REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 95 OF 2010

Society for Un-aided Private Schools of Rajasthan ... Petitioner(s)

versus

U.O.I. & Anr. ...Respondent(s)

with Writ Petition (C) Nos. 98/2010, 126/2010, 137/2010, 228/2010, 269/2010, 310/2010, 364/2010, 384/2010, 21/2011, 22/2011, 24/2011, 47/2011, 50/2011, 59/2011, 83/2011, 86/2011, 88/2011, 99/2011, 101/2011, 102/2011, 104/2011, 115/2011, 118/2011, 126/2011, 148/2011, 154/2011, 176/2011, 186/2011, 205/2011, 238/11 and 239/11.

J U D G M E N T

S. H. KAPADIA, CJI

1. We have had the benefit of carefully considering the erudite judgment delivered by our esteemed and learned Brother Radhakrishnan, J. Regretfully, we find ourselves in the unenviable position of having to disagree with the views expressed therein concerning the non-applicability of the Right of Children to Free and Compulsory Education Act, 2009 (for short "the 2009 Act") to the unaided non-minority

schools.

2. The judgment of Brother Radhakrishnan, J. fully sets out the various provisions of the 2009 Act as well as the issues which arise for determination, the core issue concerns the constitutional validity of the 2009 Act.

Introduction

3. To say that "a thing is constitutional is not to say that it is desirable" [see **Dennis v. United States**, (1950) 341 US 494].

4. A fundamental principle for the interpretation of a written Constitution has been spelt out in **R. v. Burah** [reported in (1878) 5 I.A. 178] which reads as under:

> "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the Constitution by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any Court to inquire further, or to enlarge constructively those conditions and restrictions".

5. Education is a process which engages many different actors : the one who provides education (the teacher, the owner of an educational institution, the parents), the one who

receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the State). These actors influence the right to education. The 2009 Act makes the Right of Children to Free and Compulsory Education justiciable. The 2009 Act envisages that each child must have access to a neighbourhood school. The 2009 Act has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunities to all. The Directive Principles of State Policy enumerated in our Constitution lay down that the State shall provide free and compulsory education to all children upto the age of 14 years. The said Act provides for right (entitlement) of children to free and compulsory admission, attendance and completion of elementary education in a neighbourhood school. The word "**Free**" in the long title to the 2009 Act stands for removal by the State of any financial barrier that prevents a child from completing 8 years of schooling. The word "**Compulsory**" in that title stands for compulsion on the State and the parental duty to send children to school. To protect and give effect to this right of the child to education as enshrined in Article 21

and Article 21A of the Constitution, the Parliament has enacted the 2009 Act.

6. The 2009 Act received the assent of the President on 26.8.2009. It came into force w.e.f. 1.4.2010. The provisions of this Act are intended not only to guarantee right to free and compulsory education to children, but it also envisages imparting of quality education by providing required infrastructure and compliance of specified norms and standards in the schools. The Preamble states that the 2009 Act stands enacted inter alia to provide *for* free and compulsory education to all children of the age of 6 to 14 years. The said Act has been enacted to give effect to Article 21A of the Constitution.

Scope of the 2009 Act

7. Section 3(1) of the 2009 Act provides that every child of the age of 6 to 14 years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. Section 3(2) inter alia provides that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education. An educational institution is charitable. Advancement of

education is a recognised head of charity. Section 3(2) has been enacted with the object of removing financial barrier which prevents a child from accessing education. The other purpose of enacting Section 3(2) is to prevent educational institutions charging capitation fees resulting in creation of a financial barrier which prevents a child from accessing or exercising its right to education which is now provided *for* vide Article 21A. Thus, sub-Section (2) provides that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing or completing the elementary education. Section 4 inter alia provides *for* special provision for children not admitted to or who have not completed elementary education. Section 5 deals with the situation where there is no provision for completion of elementary education, then, in such an event, a child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of Section 2, for completing his or her elementary education. Chapter III provides for duties of appropriate government, local authority and parents. Section 6 imposes an obligation on the appropriate government and local authority to establish a school within such areas or limits of

neighbourhood, as may be prescribed, where it is not so established, within 3 years from the commencement of the 2009 Act. The emphasis is on providing "neighbourhood school" **facility** to the children at the Gram Panchayat level. Chapter IV of the 2009 Act deals with responsibilities of schools and teachers. Section 12 (1)(c) read with Section 2(n) (iii) and (iv) mandates that every **recognised school** imparting elementary education, even if it is an unaided school, not receiving any kind of aid or grant to meet its expenses from the appropriate government or the local authority, is obliged to admit in Class I, to the extent of at least 25% of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. As per the proviso, if the School is imparting pre-school education, the same regime would apply. By virtue of Section 12(2) the unaided school which has not received any land, building, equipment or other facilities, either free of cost or at concessional rate, would be entitled for reimbursement of the expenditure incurred by it to the extent of per child expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as

may be prescribed. Such reimbursement shall not exceed per child expenditure incurred by a school established, owned or controlled by the appropriate government or a local authority. Section 13 envisages that no school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents to any screening procedure. Section 15 mandates that a child shall be admitted in a school at the commencement of the academic year or within the prescribed extended period. Sections 16 and 17 provide for prohibition of holding back and expulsion and of physical punishment or mental harassment to a child. Section 18 postulates that after the commencement of the 2009 Act no school, other than the excepted category, can be established or can function without obtaining a certificate of recognition from the appropriate authority. The appropriate authority shall be obliged to issue the certificate of recognition within the prescribed period specifying the conditions there for, if the school fulfills the norms and standards specified under Sections 19 and 25 read with the Schedule to the 2009 Act. In the event of contravention of the conditions of recognition, the prescribed authority can withdraw recognition after giving an opportunity of being heard to such school. The order of

withdrawal of recognition should provide a direction to transfer the children studying in the de-recognised school to be admitted to the specified neighbourhood school. Upon withdrawal of recognition, the de-recognised school cannot continue to function, failing which, is liable to pay fine as per Section 19(5). If any person establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of the recognition, shall be liable to pay fine as specified in Section 19(5). The norms and standards for establishing or for grant of recognition to a school are specified in Section 19 read with the Schedule to the 2009 Act. All schools which are established before the commencement of the 2009 Act in terms of Section 19(2) are expected to comply with specified norms and standards within 3 years from the date of such commencement. Failure to do so would entail in de-recognition of such school. Section 22 postulates that the School Management Committee constituted under Section 21, shall prepare a School Development Plan in the prescribed manner. Section 22(2) provides that the School Development Plan so prepared shall be the basis for the grants to be made by the appropriate government or local authority, as the case may

be. That plan, however, cannot have any impact on consideration of application for grant of recognition *for* establishing an unaided school. To ensure that teachers should contribute in imparting quality education in the school itself, Section 28 imposes total prohibition on them to engage in private tuition or private teaching activities. Chapter VI inter alia provides for protection of rights of children. Section 32 thus provides that any person having grievance relating to the right of child under the 2009 Act, may make a written complaint to the local authority having jurisdiction, who in turn is expected to decide it within three months after affording a reasonable opportunity of being heard to the parties concerned. In addition, in terms of Section 31, the Commissions constituted under the provisions of the Commissions for Protection of Child Rights Act, 2005 can monitor the child's right to education, so as to safeguard the right of the child upon receiving any complaint in that behalf relating to free and compulsory education.

8. By virtue of the 2009 Act, all schools established prior to the commencement of the said Act are thus obliged to fulfill the norms and standards specified inter alia in Sections 25, 26 and the Schedule of that Act. [See Section 19(2)]. The

State is also expected to first weed out those schools which are non-performing, or under-performing or non-compliance schools and upon closure of such schools, the students and the teaching and non-teaching staff thereof should be transferred to the neighbourhood school. The provision is meant not only to strengthen the latter school by adequate number of students but to consolidate and to impart quality education due to the addition of teaching staff. Needless to observe, that if there is inadequate response to the government funded school, it is but appropriate that either the divisions thereof or the school itself be closed and the students and staff of such schools be transferred to a neighbourhood school by resorting to Section 18(3) of the 2009 Act. Only after taking such decisions could the School Development Plan represent the correct position regarding the need of government aided schools in every locality across the State. Besides, it will ensure proper and meaningful utilization of public funds. In absence of such exercise, the end result would be that on account of existing non-performing or under-performing or non-compliance schools, the School Development Plan would not reckon that locality for establishment of another school. In our view, even the

State Government(s), by resorting to the provision of the 2009 Act, must take opportunity to re-organise its financial outflow at the micro level by weeding out the non-performing or under-performing or non-compliance schools receiving grant-in- aid, so as to ensure that only such government funded schools, who fulfill the norms and standards, are allowed to continue, to achieve the object of the 2009 Act of not only providing free and compulsory education to the children in the neighbourhood school but also to provide quality education. Thus, there is a power in the 2009 Act coupled with the duty of the State to ensure that only such government funded schools, who fulfill the norms and standards, are allowed to continue with the object of providing free and compulsory education to the children in the neighbourhood school.

Validity and applicability of the 2009 Act qua unaided non-minority schools

9. To begin with, we need to understand the scope of Article 21A. It provides that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. Thus, under the said Article, the obligation is on the State to

provide free and compulsory education to all children of specified age. However, under the said Article, the manner in which the said obligation will be discharged by the State has been left to the State to determine by law. Thus, the State may decide to provide free and compulsory education to all children of the specified age through its own schools or through government aided schools or through unaided private schools. The question is whether such a law transgresses any constitutional limitation? In this connection, the first and foremost principle we have to keep in mind is that what is enjoined by the directive principles (in this case Articles 41, 45 and 46) must be upheld as a "reasonable restriction" under Articles 19(2) to 19(6). As far back as 1952, in **State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga** [(1952) SCR 889], this Court has illustrated how a directive principle may guide the Court in determining crucial questions on which the validity of an important enactment may be hinged. Thus, when the courts are required to decide whether the impugned law infringes a fundamental right, the courts need to ask the question whether the impugned law infringes a fundamental right within the limits justified by the directive principles or whether it goes beyond them. For

example, the scope of the right of equality of opportunity in matters relating to employment (Article 16) to any office in the State appears more fully defined when read with the obligation of the State to promote with special care the economic and other interests of the weaker sections (Article 46). Similarly, our understanding of the right "to practice any profession or occupation" [Article 19(1)(g)] is clarified when we read along with that right the obligation of the State to see that the health of the workers and the tender age of the children are not abused (Article 39). **Thus, we need to interpret the fundamental rights in the light of the directive principles.** The above principles are very relevant in this case because the very content of Article 21A comes from reading of Articles 41, 45 and 46 and, more particularly, from Article 45 (as it then stood before the Constitution (Eighty sixth Amendment) Act, 2002). It has been urged before us that Article 45, as it then stood, imposed obligation on the State to provide for free and compulsory education for all children until they complete the age of 14 years and that the said obligation cannot be shifted or passed on to an unaided school, as defined in Section 2(n)(iv) of the 2009 Act. To answer the said contention, one needs to appreciate the

scope of Articles 21, 21A, 19(1)(g) and Articles 41, 45 and 46 of the Constitution. At the outset, it may be stated, that fundamental rights have two aspects – they act as fetter on plenary legislative powers and, secondly, they provide conditions for fuller development of our people including their individual dignity. Right to live in Article 21 covers access to education. But unaffordability defeats that access. It defeats the State's endeavour to provide free and compulsory education *for* all children of the specified age. To provide *for* free and compulsory education in Article 45 is not the same thing as to provide free and compulsory education. The word "for" in Article 45 is a preposition. The word "education" was read into Article 21 by the judgments of this Court. However, Article 21 merely declared "education" to fall within the contours of right to live. To provide for right to access education, Article 21A was enacted to give effect to Article 45 of the Constitution. Under Article 21A, right is given to the State to provide by law "free and compulsory education". Article 21A contemplates making of a law by the State. Thus, Article 21A contemplates right to education flowing from the law to be made which is the 2009 Act, which is child centric and not institution centric. Thus, as stated, Article 21A

provides that the State shall provide free and compulsory education to all children of the specified age in such manner as the State may, by law, determine. The manner in which this obligation will be discharged by the State has been left to the State to determine by law. The 2009 Act is thus enacted in terms of Article 21A. It has been enacted primarily to remove all barriers (including financial barriers) which impede access to education. One more aspect needs to be highlighted. It is not in dispute that education is a recognised head of "charity" [see **T.M.A. Pai Foundation v. State of Karnataka** (2002) 8 SCC 481]. Therefore, even according to **T.M.A. Pai Foundation**, if an educational institution goes beyond "charity" into commercialization, it would not be entitled to protection of Article 19(1)(g). This is where the paradox comes in. If education is an activity which is charitable, could the unaided non-minority educational institution contend that the intake of 25% children belonging to weaker section and disadvantaged group only in class I as provided for in Section 12(1)(c) would constitute violation of Article 19(1)(g)? Would such a provision not be saved by the principle of reasonable restriction imposed in the interest of the general public in Article 19(6) of the Constitution?

10. Coming to the principle of reasonableness, it may be stated, that though subject-wise, Article 21A deals with access to education as against right to establish and administer educational institution in Article 19(1)(g), it is now not open to anyone to contend that the law relating to right to access education within Article 21A does not have to meet the requirement of Article 14 or Article 19 for its reasonableness. [See **Khudiram Das v. State of West Bengal** reported in (1975) 2 SCR 832] After the judgment of this Court in **Maneka Gandhi v. Union of India** [(1978) 1 SCC 248], the principle of reasonableness is applicable to Article 14 of the Constitution. As held by this Court in **Glanrock Estate Private Limited v. State of Tamil Nadu** [(2010) 10 SCC 96], Article 21 (right to life) remains the core of the Constitution around which Article 14, Article 19 and others revolve. In other words, all other fundamental rights in Part III would be dependent upon right to life in Article 21 as interpreted by this Court to include right to live with dignity, right to education, etc. At the end of the day, whether one adopts the pith and substance test or the nature and character of the legislation test or the effect test, one finds that all these tests

have evolved as rules of interpretation **only as a matter of reasonableness**. They help us to correlate Article 21 with Article 14, Article 19 and, so on. Applying the above principle of reasonableness, though the right to access education falls as a subject matter under Article 21A and though to implement the said Article, Parliament has enacted the 2009 Act, one has to judge the validity of the said Act in the light of the principle of reasonableness in Article 19(6), particularly, when in **T.M.A. Pai Foundation** and in **P.A. Inamdar v. State of Maharashtra** [(2005) 6 SCC 537], it has been held that right to establish and administer an educational institution falls under Article 19(1)(g) of the Constitution. Thus, the question which arises for determination is – whether Section 12(1)(c) of the 2009 Act is a reasonable restriction on the non-minority's right to establish and administer an unaided educational institution under Article 19(6)? Article 21 says that "no person shall be **deprived** of his life...except according to the procedure established by law" whereas Article 19(1)(g) under the chapter "right to freedom" says that all citizens have the right to practice any profession or to carry on any occupation, trade or business which freedom is not absolute but which could be subjected

to social control under Article 19(6) in the interest of general public. By judicial decisions, right to education has been read into right to life in Article 21. A child who is denied right to access education is not only **deprived** of his right to live with dignity, he is also deprived of his right to freedom of speech and expression enshrined in Article 19(1)(a). The 2009 Act seeks to remove all those barriers including financial and psychological barriers which a child belonging to the weaker section and disadvantaged group has to face while seeking admission. It is true that, as held in **T.M.A. Pai Foundation** as well as **P.A. Inamdar**, the right to establish and administer an educational institution is a fundamental right, as long as the activity remains charitable under Article 19(1)(g), however, in the said two decisions the correlation between Articles 21 and 21A, on the one hand, and Article 19(1)(g), on the other, was not under consideration. Further, the content of Article 21A flows from Article 45 (as it then stood). The 2009 Act has been enacted to give effect to Article 21A. For the above reasons, since the Article 19(1)(g) right is not an absolute right as Article 30(1), the 2009 Act cannot be termed as unreasonable. To put an obligation on the unaided non-minority school to admit 25% children in class I under

Section 12(1)(c) cannot be termed as an unreasonable restriction. Such a law cannot be said to transgress any constitutional limitation. The object of the 2009 Act is to remove the barriers faced by a child who seeks admission to class I and not to restrict the freedom under Article 19(1)(g). The next question that arises for determination is – whether Section 12(1)(c) of the 2009 Act impedes the right of the non-minority to establish and administer an unaided educational institution? At the outset, it may be noted that Article 19(6) is a saving and enabling provision in the Constitution as it empowers the Parliament to make a law imposing reasonable restriction on the Article 19(1)(g) right to establish and administer an educational institution while Article 21A empowers the Parliament to enact a law as to the manner in which the State will discharge its obligation to provide *for* free and compulsory education. If the Parliament enacts the law, pursuant to Article 21A, enabling the State to access the network (including infrastructure) of schools including unaided non-minority schools would such a law be said to be unconstitutional, not saved under Article 19(6)? Answer is in the negative. Firstly, it must be noted that the expansive provisions of the 2009 Act are intended not only to guarantee

the right to free and compulsory education to children, but to set up an intrinsic regime of providing right to education to all children by providing the required infrastructure and compliance of norms and standards. Secondly, unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent/ guardian of every child [Article 51A(k)]. The Constitution directs both burdens to achieve one end: the compulsory education of children free from the barriers of cost, parental obstruction or State inaction. Thus, Articles 21A and 51A(k) balance the relative burdens on the parents and the State. Thus, the right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society. Thirdly, right to establish an educational institution has now been recognized as a fundamental right within the meaning of Article 19(1)(g). This view is enforced by the opinion of this Court in **T.M.A. Pai Foundation** and **P.A. Inamdar** that all citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26 but that right is subject to the provisions of Articles 19(6) and 26(a). The constitutional obligation of the State to provide for free and compulsory

education to the specified category of children is co-extensive with the fundamental right guaranteed under Article 19(1)(g) to establish an educational institution. Lastly, the fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation. The exercise of a fundamental right to establish and administer an educational institution can be controlled in a number of ways. Indeed, matters relating to the right to grant of recognition and/ or affiliation are covered within the realm of statutory right, which, however, will have to satisfy the test of reasonable restrictions [see Article 19(6)]. Thus, from the scheme of Article 21A and the 2009 Act, it is clear that the primary obligation is of the State to provide for free and compulsory education to children between the age of 6 to 14 years and, particularly, to children who are likely to be prevented from pursuing and completing the elementary education due to inability to afford fees or charges. Correspondingly, every citizen has a right to establish and administer educational institution under Article 19(1)(g) so long as the activity remains charitable. Such an activity undertaken by the private institutions supplements the primary obligation of the State. Thus, the State can regulate

by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6). The 2009 Act not only encompasses the aspects of right of children to free and compulsory education but to carry out the provisions of the 2009 Act, it also deals with the matters pertaining to establishment of school (s) as also grant of recognition (see section 18). Thus, after the commencement of the 2009 Act, the private management intending to establish the school has to make an application to the appropriate authority and till the certificate is granted by that authority, it cannot establish or run the school. The matters relevant for the grant of recognition are also provided for in Sections 19, 25 read with the Schedule to the Act. Thus, after the commencement of the 2009 Act, by virtue of Section 12(1)(c) read with Section 2(n)(iv), the State, while granting recognition to the private unaided non-minority school, may specify permissible percentage of the seats to be earmarked for children who may not be in a position to pay their fees or charges. In **T.M.A. Pai Foundation**, this Court vide para 53 has observed that the State while prescribing qualifications for admission in a private unaided institution may provide for condition of giving admission to small percentage of students belonging to

weaker sections of the society by giving them freeships, if not granted by the government. Applying the said law, such a condition in Section 12(1)(c) imposed while granting recognition to the private unaided non-minority school cannot be termed as unreasonable. Such a condition would come within the principle of reasonableness in Article 19(6). Indeed, by virtue of Section 12(2) read with Section 2(n)(iv), private unaided school would be entitled to be reimbursed with the expenditure incurred by it in providing free and compulsory education to children belonging to the above category to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i) or the actual amount charged from the child, whichever is less. Such a restriction is in the interest of the general public. It is also a reasonable restriction. Such measures address two aspects, viz., upholding the fundamental right of the private management to establish an unaided educational institution of their choice and, at the same time, securing the interests of the children in the locality, in particular, those who may not be able to pursue education due to inability to pay fees or charges of the private unaided schools. We also do not see any merit in the contention that Section 12(1)(c) violates

Article 14. As stated, Section 12(1)(c) inter alia provides for admission to class I, to the extent of 25% of the strength of the class, of the children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education to them till its completion. The emphasis is on "free and compulsory education". Earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14. Further, Section 12(1)(c) provides for level playing field in the matter of right to education to children who are prevented from accessing education because they do not have the means or their parents do not have the means to pay for their fees. As stated above, education is an activity in which we have several participants. There are number of stakeholders including those who want to establish and administer educational institutions as these supplement the primary obligation of the State to provide *for* free and compulsory education to the specified category of children. Hence, Section 12(1)(c) also satisfies the test of reasonableness, apart from the test of classification in Article 14.

11. The last question which we have to answer under this head is – whether Section 12(1)(c) runs counter to the judgments of this Court in **T.M.A. Pai Foundation** and **P.A. Inamdar** or principles laid down therein? According to the petitioners, **T.M.A. Pai Foundation** defines various rights and has held vide para 50 that right to establish and administer broadly comprises the following:- (i) right to admit students (ii) right to set up a reasonable fee structure etc. (the rest are not important for discussion under this Head). That, **T.M.A. Pai Foundation** lays down the essence and structure of rights in Article 19(1)(g) insofar as they relate to educational institutions in compliance with (a) the Charity Principle (b) the Autonomy Principle (c) the Voluntariness Principle (d) Anti-nationalisation (e) Co-optation Principle. In support, reliance is placed by the petitioners on number of paras from the above two judgments. At the outset, we may reiterate that Article 21A of the Constitution provides that the State shall provide free and compulsory education to all children of the specified age in such manner as the State may, by law, determine. Thus, the primary obligation to provide free and compulsory education to all children of the specified age is on the State. However, the manner in which

this obligation will be discharged by the State has been left to the State to determine by law. The State may do so through its own schools or through aided schools or through private schools, so long as the law made in this regard does not transgress any other constitutional limitation. This is because Article 21A vests the power in the State to decide the manner in which it will provide free and compulsory education to the specified category of children. As stated, the 2009 Act has been enacted pursuant to Article 21A. In this case, we are concerned with the interplay of Article 21, Article 21A, on the one hand, and the right to establish and administer educational institution under Article 19(1)(g) read with Article 19(6). That was not the issue in **T.M.A. Pai Foundation** nor in **P.A. Inamdar**. In this case, we are concerned with the validity of Section 12(1)(c) of the 2009 Act. Hence, we are concerned with the validity of the law enacted pursuant to Article 21A placing restrictions on the right to establish and administer educational institutions (including schools) and not the validity of the Scheme evolved in **Unni Krishnan, J.P. v. State of Andhra Pradesh** [(1993) 1 SCC 645]. The above judgments in **T.M.A. Pai Foundation** and **P.A. Inamdar** were not concerned with interpretation of Article 21A and the 2009

Act. It is true that the above two judgments have held that all citizens have a right to establish and administer educational institutions under Article 19(1)(g), however, the question as to whether the provisions of the 2009 Act constituted a restriction on that right and if so whether that restriction was a reasonable restriction under Article 19(6) was not in issue. Moreover, the controversy in **T.M.A. Pai Foundation** arose in the light of the scheme framed in **Unni Krishnan's** case and the judgment in **P.A. Inamdar** was almost a sequel to the directions in **Islamic Academy of Education v. State of Karnataka** [(2003) 6 SCC 697] in which the entire focus was Institution centric and not child centric and that too in the context of higher education and professional education where the level of merit and excellence have to be given a different weightage than the one we have to give in the case of Universal Elementary Education for strengthening social fabric of democracy through provision of equal opportunities to all and for children of weaker section and disadvantaged group who seek admission **not** to higher education or professional courses but to Class I. In this connection, the relevant paras from **T.M.A. Pai Foundation** make the position clear. They are paras 37, 39, 40, 42, 45, 48, 49 and

50 (read together), 51, 53, 56, 58 - 61, 62, 67, 68, 70 etc., similarly, paras 26, 35, 104, 146 of **P.A. Inamdar**. We quote the relevant para in support of what we have stated above:

T.M.A. Pai Foundation

Para 48 read with para 50

48. Private education is one of the most dynamic and fastest-growing segments of post-secondary education at the turn of the twenty-first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of the Government to provide the necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.

50. The right to establish and administer broadly comprises the following rights:

(a) to admit students;

(b) to set up a reasonable fee structure;

(c) to constitute a governing body;

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees.

58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional

education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

60. Education is taught at different levels, from primary to professional. It is, therefore, obvious that government regulations for all levels or types of educational institutions cannot be identical; so also, the extent of control or regulation could be greater vis-a-vis aided institutions.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that State-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference

which, therefore, brings us back in a vicious circle to the original problem viz. the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations.

P.A. Inamdar

26. These matters have been directed to be placed for hearing before a Bench of seven Judges under orders of the Chief Justice of India pursuant to the order dated 15-7-2004 in P.A. Inamdar v. State of Maharashtra and order dated 29-7-2004 in Pushpagiri Medical Society v. State of Kerala. The aggrieved persons before us are again classifiable in one class, that is, unaided minority and non-minority institutions imparting professional education. The issues arising for decision before us are only three:

(i) the fixation of "quota" of admissions/students in respect of unaided professional institutions;

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

(iii) the fee structure.

104. Article 30(1) speaks of "educational

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

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

12. **P.A. Inamdar** holds that right to establish and administer educational institution falls in Article 19(1)(g). It

further holds that seat-sharing, reservation of seats, fixing of quotas, fee fixation, cross-subsidization, etc. imposed by judge-made scheme in professional/ higher education is an unreasonable restriction applying the principles of Voluntariness, Autonomy, Co-optation and Anti-nationalisation, and, lastly, it deals with inter-relationship of Articles 19(1)(g), 29(2) and 30(1) in the context of the minority and non-minority's right to establish and administer educational institutions. The point here is how does one read the above principles of Autonomy, Voluntariness, Co-optation and Anti-nationalisation of seats. On reading **T.M.A. Pai Foundation** and **P.A. Inamdar** in proper perspective, it becomes clear that the said principles have been applied in the context of professional/ higher education where merit and excellence have to be given due weightage and which tests do not apply in cases where a child seeks admission to class I and when the impugned Section 12(1)(c) seeks to remove the financial obstacle. Thus, if one reads the 2009 Act including Section 12(1)(c) in its application to unaided non-minority school(s), the same is saved as reasonable restriction under Article 19(6).

13. However, we want the Government to clarify the position on one aspect. There are boarding schools and orphanages in several parts of India. In those institutions, there are day scholars and boarders. The 2009 Act could only apply to day scholars. It cannot be extended to boarders. To put the matter beyond doubt, we recommend that appropriate guidelines be issued under Section 35 of the 2009 Act clarifying the above position.

Validity and applicability of the 2009 Act qua unaided minority schools

14. The inspiring preamble to our Constitution shows that one of the cherished objects of our Constitution is to assure to all its citizens the liberty of thought, expression, belief, faith and worship. To implement and fortify these purposes, Part III has provided certain fundamental rights including Article 26 of the Constitution which guarantees the right of every religious denomination or a section thereof, to establish and maintain institutions for religious and charitable purposes; to manage its affairs in matters of religion; to acquire property and to administer it in accordance with law. Articles 29 and 30 confer certain educational and cultural rights as fundamental rights.

15. Article 29(1) confers on any section of the citizens a right to conserve its own language, script or culture by and through educational institutions and makes it obvious that a minority could conserve its language, script or culture and, therefore, the right to establish institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that right is conferred on all minorities by Article 30(1). That right, however, is subject to the right conferred by Article 29(2).

16. Article 30(1) gives the minorities *two* rights: (a) to establish and (b) to administer educational institutions *of their choice*. The real import of Article 29(2) and Article 30(1) is that they contemplate a minority institution with a *sprinkle* of outsiders admitted into it. By admitting a non-member into it the minority institution does *not shed its character* and cease to be a minority institution.

17. The key to Article 30(1) lies in the words *"of their choice"*.

18. The right established by Article 30(1) is a fundamental right declared in terms absolute unlike the freedoms guaranteed by Article 19 which is subject to reasonable

restrictions. Article 30(1) is intended to be a real right for the *protection* of the minorities in the matter of setting up educational institutions *of their own choice*. However, regulations may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition. However, such regulation must satisfy the test of reasonableness and that such regulation should make the educational institution an effective vehicle of education for the minority community or for the persons who resort to it. Applying the above test in the case of **Rev. Sidhajbhai Sabhai v. State of Bombay** [1963] SCR 837, this Court held the rule authorizing reservation of seats and the threat of withdrawal of recognition under the impugned rule to be violative of Article 30(1).

19. The above well-settled principles have to be seen in the context of the 2009 Act enacted to implement Article 21A of the Constitution. At the very outset, the question that arises for determination is – what was the intention of the Parliament? Is the 2009 Act intended to apply to unaided minority schools? In answer to the above question, it is important to note that in the case of **P.A. Inamdar**, this Court

held that there shall be no reservations in private unaided colleges and that in that regard there shall be no difference between the minority and non-minority institutions. However, by the Constitution (Ninety-third Amendment) Act, 2005, Article 15 is amended. It is given Article 15(5). The result is that **P.A. Inamdar** has been overruled on two counts: (a) whereas this Court in **P.A. Inamdar** had stated that there shall be no reservation in private unaided colleges, the Amendment decreed that there shall be reservations; (b) whereas this Court in **P.A. Inamdar** had said that there shall be no difference between the unaided minority and non-minority institutions, the Amendment decreed that there shall be a difference. Article 15(5) is an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing for reservation *except* in the case of minority educational institutions referred to in Article 30(1). The intention of the Parliament is that the minority educational institution referred to in Article 30(1) is a separate category of institutions which needs protection of Article 30(1) and viewed in that light we are of the view that unaided minority school(s) needs special protection under Article 30(1). Article 30(1) is not conditional

as Article 19(1)(g). In a sense, it is absolute as the Constitution framers thought that it was the duty of the Government of the day to protect the minorities in the matter of preservation of culture, language and script via establishment of educational institutions for religious and charitable purposes [See: Article 26]. Reservations of 25% in such unaided minority schools result in changing the character of the schools if right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools. Thus, the 2009 Act including Section 12(1)(c) violates the right conferred on such unaided minority schools under Article 30(1). However, when we come to aided minority schools we have to keep in mind Article 29(2). As stated, Article 30(1) is subject to Article 29(2). The said Article confers right of admission upon every citizen into a State-aided educational institution. Article 29(2) refers to an individual right. It is not a class right. It applies when an individual is denied admission into an educational institution maintained or aided by the State. The 2009 Act is enacted to remove barriers such as financial barriers which restrict his/her access to education. It is enacted pursuant to Article

21A. Applying the above tests, we hold that the 2009 Act is constitutionally valid qua aided minority schools.

Conclusion (according to majority):

20. Accordingly, we hold that the Right of Children to Free and Compulsory Education Act, 2009 is constitutionally valid and shall apply to the following:

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

However, the said 2009 Act and in particular Sections 12(1)(c) and 18(3) infringes the fundamental freedom guaranteed to **unaided minority schools** under Article 30(1) and, consequently, applying the R.M.D. Chamarbaugwalla v.

Union of India [1957 SCR 930] principle of severability, the said 2009 Act shall not apply to such schools.

21. This judgment will operate from today. In other words, this will apply from the academic year 2012-13. However, admissions given by unaided minority schools prior to the pronouncement of this judgment shall not be reopened.

22. Subject to what is stated above, the writ petitions are disposed of with no order as to costs.

.....CJI
(S. H. Kapadia)

.....J.
(Swatanter Kumar)

New Delhi;
April 12, 2012

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.95 OF 2010

SOCIETY FOR UN-AIDED
P.SCHOOL OF RAJASTHAN ...Petitioner(s)

Versus

U.O.I. & ANR. ..Respondent(s)

WITH

W.P. (C) NOs.98/2010, 126/2010, 137/2010, 228/2010, 269/2010, 310/2010, 364/2010, 384/2010, 22/2011, 24/2011, 21/2011, 47/2011, 59/2011, 50/2011, 83/2011, 88/2011, 99/2011, 102/2011, 104/2011, 86/2011, 101/2011, 115/2011, 154/2011, 126/2011, 118/2011, 186/2011, 148/2011, 176/2011, 205/2011, 238/2011 and 239/2011

J U D G M E N T

K. S. Radhakrishnan, J.

We are, in these cases, concerned with the constitutional validity of the Right of Children to Free and Compulsory Education Act 2009 (35 of 2009) [in short, the Act], which

was enacted following the insertion of Article 21A by the Constitution (Eighty-sixth Amendment) Act, 2002. Article 21A provides for free and compulsory education to all children of the age 6 to 14 years and also casts an obligation on the State to provide and ensure admission, attendance and completion of elementary education in such a manner that the State may by law determine. The Act is, therefore, enacted to provide for free and compulsory education to all children of the age 6 to 14 years and is anchored in the belief that the values of equality, social justice and democracy and the creation of just and humane society can be achieved only through a provision of inclusive elementary education to all the children. Provision of free and compulsory education of satisfactory quality to the children from disadvantaged groups and weaker sections, it was pointed out, is not merely the responsibility of the schools run or supported by the appropriate government, but also of schools which are not dependant on government funds.

2. Petitioners in all these cases, it may be mentioned, have wholeheartedly welcomed the introduction of Article 21A in the Constitution and acknowledged it as a revolutionary

step providing universal elementary education for all the children. Controversy in all these cases is not with regard to the validity of Article 21A, but mainly centers around its interpretation and the validity of Sections 3, 12(1)(b) and 12(1)(c) and some other related provisions of the Act, which cast obligation on all elementary educational institutions to admit children of the age 6 to 14 years from their neighbourhood, on the principle of social inclusiveness. Petitioners also challenge certain other provisions purported to interfere with the administration, management and functioning of those institutions. I have dealt with all those issues in Parts I to V of my judgment and my conclusions are in Part VI.

3. Part I of the judgment deals with the circumstances and background for the introduction of Article 21A and its scope and object and the interpretation given by the Constitution Benches of this Court on right to education. Part II of the judgment deals with various socio-economic rights recognized by our Constitution and the impact on other fundamental rights guaranteed to others and the measures adopted by the Parliament to remove the obstacles

for realization of those rights, in cases where there is conflict. In Part III of the judgment, I have dealt with the obligations and responsibilities of the non-state actors in realization of children's rights guaranteed under Article 21A and the Act. In Part IV, I have dealt with the constitutional validity of Section 12(1)(b), 12(1)(c) of the Act and in Part V, I have dealt with the challenge against other provisions of the Act and my conclusions are in Part VI.

4. Senior lawyers – Shri Rajeev Dhavan, Shri T.R. Andhyarujina, Shri Ashok H. Desai, Shri Harish S. Salve, Shri N. Chandrasekharan, Shri K. Parasaran, Shri Chander Uday Singh, Shri Shekhar Naphade, Shri Vikas Singh, Shri Arvind P. Dattar and large number of other counsel also presented their arguments and rendered valuable assistance to the Court. Shri Goolam E. Vahanvati, learned Attorney General and Mrs. Indira Jaising, learned Additional Solicitor General appeared for the Union of India.

PART I

5. In ***Mohini Jain* v. *State of Karnataka and others*** [(1992) 3 SCC 666], this Court held that the right to

education is a fundamental right guaranteed under Article 21 of the Constitution and that dignity of individuals cannot be assured unless accompanied by right to education and that charging of capitation fee for admission to educational institutions would amount to denial of citizens' right to education and is violative of Article 14 of the Constitution. The ratio laid down in ***Mohini Jain*** was questioned in ***Unni Krishnan, J.P. and Others* v. *State of A.P. and Others*** [(1993) 1 SCC 645] contending that if the judgment in ***Mohini Jain*** was given effect to, many of the private educational institutions would have to be closed down. ***Mohini Jain*** was affirmed in ***Unni Krishnan*** to the extent of holding that the right to education flows from Article 21 of the Constitution and charging of capitation fee was illegal. The Court partly overruled ***Mohini Jain*** and held that the right to free education is available only to children until they complete the age of 14 years and after that obligation of the State to provide education would be subject to the limits of its economic capacity and development. Private unaided recognized/affiliated educational institutions running professional courses were held entitled to charge the fee higher than that charged by government institutions for

similar courses but that such a fee should not exceed the maximum limit fixed by the State. The Court also formulated a scheme and directed every authority to impose that scheme upon institutions seeking recognition/affiliation, even if they are unaided institutions. ***Unni Krishnan*** introduced the concept of "free seats" and "payment seats" and ordered that private unaided educational institutions should not add any further conditions and were held bound by the scheme. ***Unni Krishnan*** also recognized the right to education as a fundamental right guaranteed under Article 21 of the Constitution and held that the right is available to children until they complete the age of 14 years.

6. The Department of Education, Ministry of Human Resources Development, Government of India after the judgment in ***Unni Krishnan*** made a proposal to amend the Constitution to make the right to education a fundamental right for children up to the age of 14 years and also a fundamental duty of citizens of India so as to achieve the goal of universal elementary education. The Department also drafted a Bill [Constitution (Eighty-third Amendment) Bill, 1997] so as to insert a new Article 21A in the Constitution

which read as follows:

> **"21A. Right to education**.
>
> 21A(1) The State shall provide free and compulsory education to all citizens of the age of six to fourteen years.
>
> Clause(2) The Right to Free and Compulsory Education referred to in clause (1) shall be enforced in such manner as the State may, by law, determine.
>
> Clause (3) The State shall not make any law, for free and compulsory education under Clause(2), in relation to the educational institutions not maintained by the State or not receiving aid out of State funds."

7. The draft Bill was presented before the Chairman, Rajya Sabha on 28.07.1997, who referred the Bill to a Committee for examination and report. The Committee called for suggestions/views from individuals, organisations, institutions etc. and ultimately submitted its report on 4.11.1997. The Committee in its Report referred to the written note received from the Department of Education and stated as follows:

> "Department in its written note stated that the Supreme Court in its judgment in **Unni Krishnan J.P.** v. **Andhra Pradesh,** has held that children of this country have a Fundamental Right to free education until they complete the age of 14 years.

This right flows from Article 21 relating to personal liberty and its content, parameters have to be determined in the light of Article 41 which provides for right to work, to education and to public assistance in certain cases and Article 45 which provides for free and compulsory education to children up to the age of 14 years. The apex Court has observed that the obligations created by these Articles of the Constitution can be discharged by the State either by establishing institutions of its own or by aiding recognising and granting affiliation to educational institutions. On clause (3) of the proposed Article 21, the report stated as follows:

> "11. Clause (3) of the proposed Article 21 provides that the State shall not make any law for free and compulsory education under clause (2), in relation to the educational institutions not maintained by the State or not receiving aid out of State funds. However, strong apprehensions were voiced about clause (3) of the proposed new Article 21A. Many of the people in the written memoranda and also educational experts in the oral evidence have expressed displeasure over keeping the private educational institutions outside the purview of the fundamental right to be given to the children. The Secretary stated that the Supreme Court in the **Unni Krishnan** judgment said that wherever the State is not providing any aid to any institution, such an institution need not provide free education. The Department took into account the Supreme Court judgment in the **Unni Krishnan** case which laid down that no private institution, can be compelled to provide free services. Therefore, they provided in the Constitutional amendment that this concept of free education need not be extended to schools or institutions which are not aided by the Government, the Secretary added. He, however, stated that there was no intention, to exclude them from the overall responsibility to provide education."

8. The Committee specifically referred to the judgment in **Unni Krishnan** in paragraph 15.14 of the Report. Reference was also made to the dissenting note of one of the members. Relevant portion of the report is extracted below:

> "**15.14**. Clause (3) of the proposed Article 21(A) prohibits the State from making any law for free and compulsory education in relation to educational institutions not maintained by the State or not receiving aid out of State funds. This issue was discussed by the Members of the Committee at length. The members were in agreement that even though the so called private institutions do not receive any financial aid, the children studying in those institutions should not be deprived of their fundamental right. As regards the interpretation as to whether the private institutions should provide free education or not, the Committee is aware of the Supreme Court judgment given in the **Unni Krishnan** case. This judgment provides the rule for application and interpretation. In view of the judgment, it is not necessary to make a clause in the Constitution. It would be appropriate to leave the interpretation to the courts instead of making a specific provision in black and white. Some members, however, felt that the private institutions which do not get any financial aid, provide quality education. Therefore, it would be inappropriate to bring such institutions under the purview of free education. Those members, accordingly, felt that clause (3) should not be deleted.
>
> **15.15**. The Committee, however, after a thorough discussion feels that this provision need not be there. The Committee recommends that clause (3) of the proposed Article 21(A) may be deleted. Smt. Hedwig Michael Rego, M.P. a Member of the Committee gave a Minute of Dissent. It is

appended to the report.

15.16. The Committee recommends that the Bill be passed subject to the recommendations made in the preceding paragraphs.

MINUTES OF DISSENT

I vehemently oppose the State wanting to introduce free and compulsory education in private, unaided schools.

Clause 21A (3) must be inserted as I do not wish the State to make laws regarding free and compulsory education in relation to educational institutions not maintained by the State or not receiving aid out of State funds.

A Committee of State Education Ministers have already considered the issue in view of the Unni Krishnan case, and found it not feasible to bring unaided private educational institutions within the purview of the Bill.

Hence, I state once again that the proposed clause "21A(3") must be inserted in the Bill.

Yours sincerely,

Sd/'

(SMT. HEDWIG MICHAEL REGO)"

(emphasis supplied)

9. Report referred to above was adopted by the Parliamentary Standing Committee on Human Resource Development and submitted the same to the Rajya Sabha on 24.11.1997 and also laid on the Table of the Lok Sabha on 24.11.1997. The Lok Sabha was however dissolved soon thereafter and elections were declared and that Bill was not

further pursued.

10. The Chairman of the Law Commission who authored ***Unni Krishnan*** judgment took up the issue *suo moto*. Following the ratio in ***Unni Krishnan,*** the Law Commission submitted its 165th Report to the Ministry of Law, Justice and Company Affairs, Union of India vide letter dated 19.11.1998. Law Commission in that letter stated as follows: "*Law Commission had taken up the aforesaid subject suo moto having regard to the Directive Principle of the Constitution of India as well as the decision of the Supreme Court of India.*"

11. Referring to the Constitution (Eighty-third Amendment) Bill, 1997, Law Commission in its report in paragraph 6.1.4 stated as under:

> "**6.1.4 (page 165.35):** The Department of Education may perhaps be right in saying that as of today the private educational institutions which are not in receipt of any grant or aid from the State, cannot be placed under an obligation to impart free education to all the students admitted into their institutions. However, applying the ratio of Unnikrishnan case, it is perfectly legitimate for the State or the affiliating Board, as the case may be, to require the institution to admit and impart free education to fifty per cent of the students as a condition for affiliation or for permitting their students to appear for the Government/Board examination. To start with, the percentage can be

prescribed as twenty. Accordingly, twenty per cent students could be selected by the concerned institution in consultation with the local authorities and the parent-teacher association. This proposal would enable the unaided institutions to join the national endeavour to provide education to the children of India and to that extent will also help reduce the financial burden upon the State." (emphasis supplied)

12. The Law Commission which had initiated the proceedings *suo moto* in the light of ***Unni Krishnan*** suggested deletion of clause (3) from Article 21A stating as follows: "So far as clause (3) is concerned, the Law Commission states that it should be totally recast on the light of the basic premise of the decision in ***Unni Kirshnan*** which has been referred to hereinabove. It would neither be advisable nor desirable that the unaided educational institutions are kept outside the proposed Article altogether while the sole primary obligation to provide education is upon the State, the educational institutions, whether aided or unaided supplement this effort."

Para 6.6.2 of the report reads as under:

"**6.6.2.** The unaided institutions should be made aware that recognition, affiliation or permission to

send their children to appear for the Government/Board examination also casts a corresponding social obligation upon them towards the society. The recognition/affiliation/permission aforesaid is meant to enable them to supplement the effort of the State and not to enable them to make money. Since they exist and function effectively because of such recognition/affiliation/permission granted by public authorities, they must and are bound to serve the public interest. For this reason, the unaided educational institutions must be made to impart free education to 50% of the students admitted to their institutions. This principle has already been applied to medical, engineering and other colleges imparting professional education and there is no reason why the schools imparting primary/elementary education should not be placed under the same obligation. Clause (3) of proposed Article 21A may accordingly be recast to give effect to the above concept and obligation."

Reference may also be made to the following paragraphs of the Report:

"**6.8**. The aforesaid bill was referred by the Chairman, Rajya Sabha to the Department-Related Parliamentary Standing Committee on Human Resources Development. A press communiqué inviting suggestions/views was issued on 18th August, 1997. The Committee considered the Bill in four sittings and heard oral evidence. It adopted the draft report at its meeting held on 4th November, 1997. The report was then presented to the Rajya Sabha on 24th November, 1997 and laid on the table of the Lok Sabha on the same day. Unfortunately, the Lok Sabha was dissolved soon thereafter and elections were called.

6.8.1. The Budget Session after the new Lok Sabha was constituted is over. There is, however,

no indication whether the Government is inclined to pursue the pending bill.

6.9. The question is debatable whether it is at all necessary to amend the Constitution when there is an explicit recognition of the right to education till the age of fourteen years by the Supreme Court in Unni Krishnan's case. As the said judgment can be overruled by a larger Bench in another case, thus making this right to education vulnerable, it would appear advisable to give this right constitutional sanctity."

13. Law Commission was giving effect to the ratio of ***Unni Krishnan*** and made suggestions to bring in Article 21A mainly on the basis of the scheme framed in ***Unni Krishnan*** providing "free seats" in private educational institutions.

14. The Law Commission report, report of the Parliamentary Standing Committee, judgment in ***Unni Krishnan*** etc. were the basis on which the Constitution (Ninety-third Amendment) Bill, 2001 was prepared and presented. Statement of objects and reasons of the Bill given below would indicate that fact:

"**2.** With a view to making right to education free and compulsory education a fundamental right, the Constitution (Eighty-third Amendment) Bill, 1997 was introduced in the Parliament to insert a new article, namely, Article 21A conferring on all children in the age group of 6 to14 years the right to free and compulsory education. The said Bill was

scrutinized by the Parliamentary Standing Committee on Human Resource Development and the subject was also dealt with in its 165th Report by the Law Commission of India.

3. After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of Parliament, the proposed amendments in Part III, Part IV and Part IVA of the Constitution are being made which are as follows:

(a) to provide for free and compulsory education to children in the age group of 6 to 14 years and for this purpose, a legislation would be introduced in parliament after the Constitution (Ninety-third Amendment) Bill, 2001 is enacted;

(b) to provide in article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of six years; and

(c) to amend article 51A of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.

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

15. The above Bill was passed and received the assent of the President on 12.12.2002 and was published in the Gazette of India on **13.12.2002** and the following provisions were inserted in the Constitution; by the Constitution (Eighty-sixth Amendment) Act, 2002.

Part III – Fundamental Rights

"**21A**. **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.

Part IV – Directive Principles of State Policy

45. Provision for early childhood care and education to children below the age of six years.– The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Part IVA – Fundamental Duties

51A. **Fundamental duties** - It shall be the duty of every citizen of India –

xxx xxx xxx

(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

16. Reference was earlier made to the Parliamentary Standing Committee Report, 165th Law Commission Report, 1998 and the opinion expressed by the Department of Education so as to understand the background of the introduction of Article 21A which is also necessary to properly understand the scope of the Act. In ***Herron* v. *Rathmines and Rathgar Improvement Commissioners*** [1892] AC 498 at p. 502, the Court held that the subject-matter with which the Legislature was dealing, and the facts existing at the time

with respect to which the Legislature was legislating are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act. In ***Mithilesh Kumari and Another* v. *Prem Behari Khare*** [(1989) 2 SCC 95], this Court observed that "*where a particular enactment or amendment is the result of recommendation of the Law Commission of India, it may be permissible to refer to the relevant report.*" (See also ***Dr. Baliram Waman Hiray* v. *Justice B. Lentin and Others*** [(1988) 4 SCC 419], ***Santa Singh* v. *State of Punjab*** [(1976) 4 SCC 190], ***Ravinder Kumar Sharma* v. *State of Assam*** [(1999) 7 SCC 435].

UNNI KRISHNAN:

17. ***Unni Krishnan*** had created mayhem and raised thorny issues on which the Law Commission had built up its edifice, *suo moto*. The Law Commission had acknowledged the fact that but for the ratio in ***Unni Kirshnan*** the unaided private educational institutions would have no obligation to impart free and compulsory education to the children admitted in their institutions. Law Commission was also of the view that the ratio in ***Unni Krishnan*** had legitimized the State or the affiliating Board to require unaided educational institutions to

provide free education, as a condition for affiliation or for permitting the students to appear for the Government/Board examination.

18. ***Unni Krishnan*** was questioned contending that it had imposed unreasonable restrictions under Article 19(6) of the Constitution on the administration of the private educational institutions and that the rights of minority communities guaranteed under Article 29 and Article 30 were eroded. ***Unni Krishnan*** scheme which insisted that private unaided educational institutions should provide for "free seats" as a condition for recognition or affiliation was also questioned contending that the same would amount to nationalisation of seats.

PAI FOUNDATION

19. ***T.M.A. Pai Foundation and others*** **v.** ***State of Karnataka and others*** [(2002) 8 SCC 481] examined the correctness of the ratio laid down in ***Unni Krishnan*** and also the validity of the scheme. The correctness of the rigid percentage of reservation laid down in ***St. Stephen's College*** **v.** ***University of Delhi*** [(1992) 1 SCC 558] in the case of

minority aided educational institutions and the meaning and contents of Articles 30 and 29(2) were also examined.

20. ***Pai Foundation*** acknowledged the right of all citizens to practice any profession, trade or business under Article 19(1)(g) and Article 26 and held those rights would be subject to the provisions that were placed under Article 19(6) and 26(a) and the rights of minority to establish and administer educational institutions under Article 30 was also upheld.

21. ***Unni Krishnan*** scheme was held unconstitutional, but it was ordered that there should be no capitation fee or profiteering and reasonable surplus to meet the cost of expansion and augmentation of facilities would not mean profiteering. Further, it was also ordered that the expression "education" in all the Articles of the Constitution would mean and include education at all levels, from primary education level up to post graduate level and the expression "educational institutions" would mean institutions that impart education as understood in the Constitution.

22. ***Pai Foundation*** has also recognised that the expression "occupation" in Article 19(1)(g) is an activity of a person undertaken as a means of livelihood or a mission in life and hence charitable in nature and that establishing and

running an educational institution is an occupation, and in that process a reasonable revenue surplus can be generated for the purpose of development of education and expansion of the institutions. The right to establish and administer educational institutions, according to ***Pai Foundation***, comprises right to admit students, set up a reasonable fee structure, constitute a governing body, appoint staff, teaching and non-teaching and to take disciplinary action. So far as private unaided educational institutions are concerned, the Court held that maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fee to be charged etc. and that the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation but those conditions must pertain broadly to academic and educational matters and welfare of students and teachers. The Court held that the right to establish an educational institution can be regulated but such regulatory measures must be in general to ensure proper academic standards, atmosphere and infrastructure and prevention of maladministration. The necessity of starting more quality private unaided educational

institutions in the interest of general public was also emphasised by the Court by ensuring autonomy and non-regulation in the school administration, admission of students and fee to be charged. ***Pai Foundation*** rejected the view that if a private school is allowed to charge fee commensurate with the fee affordable, the degrees would be purchasable as unfounded since the standards of education can be and are controllable through recognition, affiliation and common final examination. Casting burden on other students to pay for the education of others was also disapproved by ***Pai Foundation*** holding that there should be no cross-subsidy.

23. ***Pai Foundation*** has also dealt with the case of private aided professional institutions, minority and non-minority, and also other aided institutions and stated that once aid is granted to a private professional educational institution, the government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. ***Pai Foundation*** also acknowledged that there are large number of educational institutions, like schools and non-professional colleges, which cannot operate without the

support of aid from the state and the Government in such cases, would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff. In other words, autonomy in private aided institutions would be less than that of unaided institutions.

24. ***Pai Foundation*** also acknowledged the rights of the religious and linguistic minorities to establish and administer educational institutions of their choice under Article 30(1) of the Constitution and held that right is not absolute as to prevent the government from making any regulation whatsoever. The Court further held that as in the case of a majority run institution, the moment a minority institution obtains a grant or aid, Article 28 of the Constitution comes into play.

25. ***Pai Foundation*** further held that the ratio laid down in ***St. Stephen*** is not correct and held that even if it is possible to fill up all the seats with students of the minority group, the moment the institution is granted aid, the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted under Article 29(2) are not subverted.

The judgment in ***Pai Foundation*** was pronounced on 31.10.2002, 25.11.2002 and Article 21A, new Article 45 and Article 51A(k) were inserted in the Constitution on 12.12.2002, but the basis for the introduction of Article 21A and the deletion of original clause (3) from Article 21A, was due to the judgment of ***Unnikrishnan***. Parliament, it may be noted, was presumed to be aware of the judgment in ***Pai Foundation,*** and hence, no obligation was cast on unaided private educational institutions but only on the State, while inserting Article 21A.

26. The judgment in ***Pai Foundation***, after the introduction of the above mentioned articles, was interpreted by various Courts, State Governments, educational institutions in different perspectives leading to the enactment of various statutes and regulations as well, contrary to each other. A Bench of five Judges was, therefore, constituted to clarify certain doubts generated out of the judgment in ***Pai Foundation*** and its application. Rights of unaided minority and non-minority institutions and restrictions sought to be imposed by the State upon them were the main issues before the Court and not with regard to the rights and obligations of private aided institutions run by minorities and non-

minorities. The five Judges' Bench rendered its judgment on 14.8.2003 titled ***Islamic Academy of Education and another* v. *State of Karnataka and others*** [(2003) 6 SCC 697]. Unfortunately, ***Islamic Academy*** created more problems and confusion than solutions and, in order to steer clear from that predicament, a seven Judges Bench was constituted and the following specific questions were referred for its determination:

> "(1) To what extent the State can regulate the admissions made by unaided (minority or non-minority) educational institutions? Can the State enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions?
>
> (emphasis supplied)
>
> (2) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether direction made in ***Islamic Academy*** for compulsorily holding entrance test by the State or association of institutions and to choose therefrom the students entitled to admission in such institutions, can be sustained in light of the law laid down in ***Pai Foundation***?
>
> (3) Whether ***Islamic Academy*** could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions?
>
> (4) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by ***Islamic Academy***?"

27. Above mentioned questions were answered in ***P.A. Inamdar and others* v. *State of Maharashtra and others*** [(2005) 6 SCC 537] and the Court cleared all confusion and doubts, particularly insofar as unaided minority and non-minority educational institutions are concerned.

28. ***Inamdar*** specifically examined the inter-relationship between Articles 19(1)(g), 29(2) and 30(1) of the Constitution and held that the right to establish an educational institution (which evidently includes schools as well) for charity or a profit, being an occupation, is protected by Article 19(1)(g) with additional protection to minority communities under Article 30(1). ***Inamdar***, however, reiterated the fact that, once aided, the autonomy conferred by protection of Article 30(1) is diluted, as the provisions of Articles 29(2) will be attracted and certain conditions in the nature of regulations can legitimately accompany the State aid. Reasonable restrictions pointed out by ***Inamdar*** may be indicated on the following subjects: (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business; (ii) the carrying on by the State, or by a corporation owned or controlled by the State of any trade, business, industry or

service whether to the exclusion, complete or partial of citizens or otherwise.

29. Referring to the judgments in ***Kerala Education Bill*** , In Re. 1959 SCR 995 and ***St. Stephen***, the Court took the view that once an educational institution is granted aid or aspires for recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition. ***Inamdar***, as I have already indicated, was mainly concerned with the question whether the State can appropriate the quota of unaided educational institutions both minority and non-minority. Explaining ***Pai Foundation***, the Court in ***Inamdar*** held as follows:

> **"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*)

(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*)

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*)

(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* (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.

125. As per our understanding, neither in the judgment of *Pai Foundation* nor in the Constitution Bench decision in *Kerala Education Bill* which was approved by *Pai Foundation* 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*. 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." (emphasis supplied)

Pai Foundation, it was pointed out by ***Inamdar***, merely permitted the 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. Further, it was also pointed that unaided educational institutions can frame their own policy to give free-ships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the state to cater to the educational needs of weaker and poorer sections of the society not out of compulsion, but on their own volition. ***Inamdar*** reiterated that no where in ***Pai Foundation,*** either in the majority or in the minority opinion, have they 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. Further, it was pointed that the fixation of percentage of quota is to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State. State regulations, it was pointed out, 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. ***Inamdar***, disapproved the scheme evolved in ***Islamic Academy*** to the extent it

allowed States to fix quota for seat sharing between management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. ***Inamdar*** held that to admit students being one of the components of right to establish and administer an institution, the State cannot interfere therewith and upto the level of undergraduate education, the minority unaided educational institutions enjoy "total freedom". ***Inamdar*** emphasised the fact that minority unaided institutions can legitimately claim "unfettered fundamental right" to choose the students to be allowed admissions and the procedure therefore subject to its being fair, transparent and non-exploitative and the same principle applies to non-minority unaided institutions as well. **Inamdar** also found foul with the judgment in ***Islamic*** with regard to the fixation of quota and for seat sharing between the management and the State on the basis of local needs of each State in unaided private educational institutions, both minority and non-minority. ***Inamdar*** noticed that ***Pai Foundation*** also found foul with the judgment in ***Unni Krishnan*** and held that admission of students in unaided minority educational

institutions/schools where scope for merit based is practically nil cannot be regulated by the State or University except for providing the qualification and minimum condition of eligibility in the interest of academic standards.

30. ***Pai Foundation*** as well as ***Inamdar*** took the view that laws of the land including rules and regulations must apply equally to majority as well as minority institutions and minority institutions must be allowed to do what majority institutions are allowed to do. ***Pai Foundation*** examined the expression "general laws of the land" in juxtaposition with "national interest" and stated in Para 136 of the judgment that general laws of land applicable to all persons have been held to be applicable to the minority institutions also, for example, laws relating to taxation, sanitation, social welfare, economic regulations, public order and morality.

31. While examining the scope of Article 30, this fact was specifically referred to in ***Inamdar*** (at page 594) and took the view that, in the context of Article 30(1), no right can be absolute and no community can claim its interest above national interest. The expression "national interest" was used in the context of respecting "laws of the land", namely, while imposing restrictions with regard to laws relating to

taxation, sanitation, social welfare, economic legislation, public order and morality and not to make an inroad into the fundamental rights guaranteed under Article 19(1)(g) or Article 30(1) of the Constitution.

32. Comparing the judgments in ***Inamdar*** and ***Pai Foundation***, what emerges is that so far as unaided educational institutions are concerned, whether they are established and administered by minority or non-minority communities, they have no legal obligation in the matter of seat sharing and upto the level of under-graduate education they enjoy total freedom. State also cannot compel them to give up a share of the available seats to the candidates chosen by the State. Such an appropriation of seats, it was held, cannot be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution since they have unfettered fundamental right and total freedom to run those institutions subject to the law relating to taxation, sanitation, social welfare, economic legislation, public order and morality.

33. ***Pai Foundation*** was examining the correctness of the ratio in ***Unni Krishnan***, which I have already pointed

out, was the basis for the insertion of Article 21A and the deletion of clause (3) of the proposed Article 21A. ***Inamdar*** also noticed that ***Pai Foundation*** had struck down ratio of ***Unni Krishnan*** which invaded the rights of unaided educational institutions by framing a scheme. Article 21A envisaged a suitable legislation so as to achieve the object of free and compulsory education to children of the age 6 to 14 years and imposed obligation on the State, and not on unaided educational institutions.

34. Parliament, in its wisdom, brought in a new legislation Right to Education Act to provide free and compulsory education to children of the age 6 to 14 years, to discharge the constitutional obligation of the State, as envisaged under Article 21A. Provisions have also been made in the Act to cast the burden on the non-state actors as well, to achieve the goal of Universal Elementary Education. The statement of objects and reasons of the Bill reads as follows:

> "4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate

> Governments, but also of schools which are not dependent on Government funds."

35. The Bill was introduced in the Rajya Sabha which passed the Bill on 20.7.2009 and in Lok Sabha on 4.8.2009 and received the assent of the President on 26.8.2009 and was published in the Gazette of India on 27.8.2009.

36. Learned Attorney General of India submitted that the values of equality, social justice and democracy and the creation of just and humane society can be achieved only through a provision of inclusive elementary education by admitting children belonging to disadvantaged group and weaker sections of the society which is not only the responsibility of the state and institutions supported by the state but also schools which are not dependent on government funds. Learned Attorney General also submitted that the state has got an obligation and a duty to enforce the fundamental rights guaranteed to children of the age of 6 to 14 years for free and compulsory education and is to achieve that objective, the Act was enacted. Learned Attorney General submitted that Article 21A is a socio-economic right which must get priority over rights under Article 19(1)(g) and Article 30(1), because unlike other rights it does not operate

merely as a limitation on the powers of the state but it requires affirmative state action to protect and fulfil the rights guaranteed to children of the age of 6 to 14 years for free and compulsory education. Reference was also made to the judgments of this Court in ***Indian Medical Association* v. *Union of India and others*** **[**(2011) 7 SCC 179] (in short Medical Association case), ***Ahmedabad St. Xavier's College Society and Another* v. *State of Gujarat and Another*** [(1974) 1 SCC 717], ***Rev. Sidhajbhai Sabhai and Others* v. *State of Bombay and Another*** [(1963) 3 SCR 837] and ***In re. Kerala Education Bill*** (supra)**.**

37. Learned Additional Solicitor General in her written as well as oral submissions stated that Article 21A must be considered as a stand alone provision and not subjected to Article 19(1)(g) and Article 30(1) of the Constitution. Article 19(1)(g) and Article 30(1), it was submitted, dealt with the subject of right to carry on occupation of establishing and administering educational institutions, while Article 21A deals exclusively with a child's right to primary education. Article 21A, it was pointed out, has no saving clause which indicates that it is meant to be a complete, standalone clause on the subject matter of the right to education and is

intended to exclude the application of Article 19(1)(g) and Article 30(1). Learned Additional Solicitor General submitted that omission of clause (3) in the original proposed Article 21A would indicate that the intention of the Parliament was to apply the mandate of Article 21A to all the educational institutions, public or private, aided or unaided, minority or non-minority.

38. Mrs. Menaka Guruswamy and Mrs. Jayna Kothari, appearing for the intervener namely The Azim Premji Foundation, in I.A. No. 7 in W.P. (C) No. 95/2010, apart from other contentions, submitted that Article 21A calls for horizontal application of sanction on state actors so as to give effect to the fundamental rights guaranteed to the people. Learned counsels submitted that Sections 15(2), 17, 18, 23 and 24 of the Constitution expressly impose constitutional obligations on non-state actors and incorporate the notion of horizontal application of rights. Reference was also made to the judgment of this Court in ***People's Union for Democratic Rights and Others*** **v.** ***Union of India and Others*** [(1982) 3 SCC 235] and submitted that many of the fundamental rights enacted in Part III, such as Articles 17, 23 and 24, among others, would operate not only against the

State but also against other private persons. Reference was also made to the judgment of this Court ***Vishaka and Others*** **v.** ***State of Rajasthan*** [(1997) 6 SCC 241], in which this Court held that all employees, both public and private, would take positive steps not to infringe the fundamental rights guaranteed to female employees under Articles 14, 15, 21 and 19(1)(g) of the Constitution. Reference was also made to Article 15(3) and submitted that the Constitution permits the State to make special provisions regarding children. Further, it was also contended that Articles 21A and 15(3) provide the State with Constitutional instruments to realize the object of the fundamental right to free and compulsory education even through non-state actors such as private schools.

39. Shri Rajeev Dhavan, learned senior counsel appearing on behalf of some of the petitioners, submitted that Article 21A casts an obligation on the state and state alone to provide free and compulsory education to children upto the age of 6 to 14 years, which would be evident from the plain reading of Article 21A read with Article 45. Learned senior counsel submitted that the words "state shall provide" are express enough to reveal the intention of the Parliament.

Further, it was stated that the constitutional provision never intended to cast responsibility on the private educational institutions along with the State, if that be so like Article 15(5), it would have been specifically provided so in Article 21A. Article 21A or Article 45 does not even remotely indicate any idea of compelling the unaided educational institutions to admit children from the neighbourhood against their wish and in violation of the rights guaranteed under the Constitution. Learned senior counsel submitted that since no constitutional obligation is cast on the private educational institutions under Article 21A, the State cannot through a legislation transfer its constitutional obligation on the private educational institutions. Article 21A, it was contended, is not subject to any limitation or qualification so as to offload the responsibility of the State on the private educational institutions so as to abridge the fundamental rights guaranteed to them under Article 19(1)(g), Article 26(a), Article 29(1) and Article 30(1) of the Constitution.

40. Learned senior counsel submitted that Article 21A is not meant to deprive the above mentioned core rights guaranteed to the petitioners and if the impugned provisions of the Act do so, to that extent, they may be declared

unconstitutional. Learned senior counsel submitted that the "core individual rights" always have universal dimension and thus represent universal value while "socio-economic rights" envisaged the sectional interest and the core individual right, because of its universal nature, promote political equality and human dignity and hence must promote precedence over the socio-economic rights. Learned senior counsel also submitted that constitutional concept and the constitutional interpretation given by ***Pai Foundation*** and ***Inamdar*** cannot be undone by legislation. Learned counsel also submitted that the concept of social inclusiveness has to be achieved not by abridging or depriving the fundamental rights guaranteed to the citizens who have established and are administering their institutions without any aid or grant but investing their own capital. The principles stated in Part IV of the Constitution and the obligation cast on the State under Article 21A, it was contended, are to be progressively achieved and realised by the State and not by non-state actors and they are only expected to voluntarily support the efforts of the state.

41. Shri T.R. Andhyarujina, learned senior counsel appearing for some of the minority institutions submitted

that the object of Articles 25 to 30 of the Constitution is to preserve the rights of religious and linguistic minorities and to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy. Learned senior counsel submitted that the very purpose of incorporating those rights in Part-III is to afford them guarantee and protection and not to interfere with those rights except in larger public interest like health, morality, public safety, public order etc. Learned senior counsel extensively referred to various provisions of the Act, and submitted that they would make serious inroad into the rights guaranteed to the minority communities. Learned counsel further submitted that Section 12(1)(b) and 12(1)(c) in fact, completely take away the rights guaranteed to minority communities, though what was permitted by this Court was only "sprinkling of outsiders" that is members of all the communities. Counsel submitted that the mere fact that some of the institutions established and administered by the minority communities have been given grant or aid, the State cannot take away the rights guaranteed to them under Article 30(1) of the Constitution of India. Learned counsel submitted that Article 21A read with Article 30(1) also confers a right on a

child belonging to minority community for free and compulsory education in an educational institution established and administered by the minority community for their own children and such a constitutionally guaranteed right cannot be taken away or abridged by law.

PART II

Article 21A and RTE Act

42. Right to education, so far as children of the age 6 to 14 years are concerned, has been elevated to the status of fundamental right under Article 21A and a corresponding obligation has been cast on the State, but through Sections 12(1)(b) and 12(1)(c) of the Act the constitutional obligation of the State is sought to be passed on to private educational institutions on the principle of social inclusiveness. Right to Education has now been declared as a fundamental right of children of the age 6 to 14 years and other comparable rights or even superior rights like the Right to food, healthcare, nutrition, drinking water, employment, housing, medical care may also get the status of fundamental rights, which may be on the anvil. Right guaranteed to children under Article 21A is a socio-economic right and the Act was enacted to fulfil that right. Let us now examine how these rights have been

recognized and given effect to under our Constitution and in other countries.

43. Rights traditionally have been divided into civil rights, political rights and socio-economic rights; the former rights are often called the first generation rights and the latter, the second generation rights. First generation rights have also been described as negative rights because they impose a duty and restraint on the state and generally no positive duties flow from them with some exceptions. Over lapping of both the rights are not uncommon. It is puerile to think that the former rights can be realised in isolation of the latter or that one overrides the others.

44. Socio-economic rights generally serve as a vehicle for facilitating the values of equality, social justice and democracy and the state is a key player in securing that goal. The preamble of the Indian Constitution, fundamental rights in Part III and the Directive Principles of State Policy in Part IV are often called and described as "conscience of the Constitution" and they reflect our civil, political and socio-economic rights which we have to protect for a just and humane society.

45. Supreme Court through various judicial

pronouncements has made considerable headway in the realization of socio-economic rights and made them justiciable despite the fact that many of those rights still remain as Directive Principles of State Policy. Civil, political and socio-economic rights find their expression in several international conventions like U.N. Convention on Economic, Social and Cultural Rights 1966 (ICESCR), International Covenant on Civil and Political Rights 1966 (ICCPR), Universal Declaration of Human Rights 1948 (UDHR), United Nations Convention on Rights of Child 1989 (UNCRC)etc. Reference to some of the socio-economic rights incorporated in the Directive Principles of the State Policy in this connection is useful. Article 47 provides for duty of the State to improve public health. Principles enshrined in Articles 47 and 48 are not pious declarations but for guidance and governance of the State policy in view of Article 37 and it is the duty of the State to apply them in various fact situations.

46. Supreme Court has always recognized Right to health as an integral part of right to life under Article 21 of the Constitution. In ***Consumer Education & Research Centre and Others*** **v.** ***Union of India and others*** [(1995) 3 SCC

42], this Court held that the right to life meant a right to a meaningful life, which is not possible without having right to healthcare. This Court while dealing with the right to healthcare of persons working in the asbestos industry read the provisions of Articles 39, 41 and 43 into Article 21. In ***Paschim Banga Khet Majdoor Samity and Others*** **v.** ***State of West Bengal and Another*** [(1996) 4 SCC 37], this Court not only declared Right to health as a Fundamental Right but enforced that right by asking the State to pay compensation for the loss suffered and also to formulate a blue-print for primary health care with particular reference to the treatment of patients during emergency. A note of caution was however struck in ***State of Punjab and Others*** **v.** ***Ram Lubhaya Bagga and Others*** [(1998) 4 SCC 117] stating that no State or country can have unlimited resources to spend on any of its projects and the same holds good for providing medical facilities to citizens. In ***Social Jurist, A Lawyers Group*** **v.** ***Government Of NCT Of Delhi and Others*** [(140) 2007 DLT 698], a Division Bench of Delhi High Court, of which one of us, Justice Swatanter Kumar was a party, held that the wider interpretations given to Article 21 read with Article 47 of the Constitution of India are not only

meant for the State but they are equally true for all, who are placed at an advantageous situation because of the help or allotment of vital assets. ***Dharamshila Hospital & Research Centre* v. *Social Jurist & Ors.; SLP (C) No.18599 of 2007*** decided on 25.07.2011 filed against the judgment was dismissed by this Court directing that petitioners' hospitals to provide medical care to a specified percentage of poor patients since some of the private hospitals are situated on lands belonging to the State or getting other concessions from the State.

47. Right to shelter or housing is also recognized as a socio-economic right which finds its expression in Article 11 of the ICESCR but finds no place in Part-III or Part-IV of our Constitution. However, this right has been recognized by this Court in several judgments by giving a wider meaning to Article 21 of the Constitution. In ***Olga Tellis and Others* v. *Bombay Municipal Corporation and Others*** [(1985) 3 SCC 545], this Court was considering the claims of evictees from their slums and pavement dwellings on the plea of deprivation of right to livelihood and right to life. Their claim was not fully accepted by this Court holding that no one has

the right to use a public property for private purpose without requisite authorization and held that it is erroneous to contend that pavement dwellers have the right to encroach upon the pavements by constructing dwellings thereon. In ***Municipal Corporation of Delhi*** **v.** ***Gurnam Kaur*** [(1989) 1 SCC 101], this Court held that Municipal Corporation of Delhi has no legal obligation to provide pavement squatters alternative shops for rehabilitation as the squatters had no legally enforceable right. In ***Sodan Singh and Others*** **v.** ***New Delhi Municipal Committee and Others*** [(1989) 4 SCC 155], this Court negated the claim of citizens to occupy a particular place on the pavement to conduct a trade, holding the same cannot be construed as a fundamental right. Socio-economic compulsions in several cases did not persuade this Court to provide reliefs in the absence of any constitutional or statutory right. A different note was however struck in ***Ahmedabad Municipal Corporation*** **v.** ***Nawab Khan Gulab Khan and Others*** [(1997) 11 SCC 121] in the context of eviction of encroachers from the city of Ahmedabad. This Court held though Articles 38, 39 and 46 mandate the State, as its economic policy, to provide socio-economic justice, no person has a right to encroach and erect structures otherwise

on foot-paths, pavements or public streets. The Court has however opined that the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful.

48. Right to work does not oblige the State to provide work for livelihood which has also been not recognized as a fundamental right. Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005) guarantees at least 100 days of work in every financial year to every household whose adult members volunteer manual work on payment of minimum wages. Article 41 of the Constitution provides that State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, which right is also reflected in Article 6 of ICESCR. Article 38 of Part-IV states that the State shall strive to promote the welfare of the people and Article 43 states that it shall endeavour to secure a living wage and a decent standard of life to all workers. In ***Bandhua Mukti***

Morcha* v. *Union of India and Others [(1984) 3 SCC 161], a Public Interest Litigation, an NGO highlighted the deplorable condition of bonded labourers in a quarry in Haryana. It was pointed out that a host of protective and welfare oriented labour legislations, including Bonded Labour (Abolition) Act, 1976 and the Minimum Wages Act, 1948were not followed. This Court gave various directions to the State Government to enable it to discharge its constitutional obligation towards bonded labourers. This Court held that right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy, particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and held that it must include protection of the health and strength of workers, men and women and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.

49. The Constitutional Court of South Africa rendered several path-breaking judgments in relation to socio-economic rights. ***Soobramoney* v. *Minister of Health***

(KwaZulu-Natal) [1998 (1) SA 765 (CC)] was a case concerned with the right of emergency health services. Court held that the State owes no duty to provide the claimant, a diabetic sufferer, with kidney dialysis on a plea of socio-economic right. Petitioner was denied dialysis by a local hospital on the basis of a prioritization policy based on limited resources. The Court emphasised that the responsibility of fixing the health care budget and deciding priorities lay with political organization and medical authorities, and that the court would be slow to interfere with such decisions if they were rational and "taken in good faith".

50. In ***Government of the Republic of South Africa and Others*** v. ***Grootboom and others*** [2001 (1) SA 46 (CC)] was a case where the applicants living under appalling conditions in an informal settlement, had moved into private land from which they were forcibly evicted. Camping on a nearby sports field, they applied for an order requiring the government to provide them with basic shelter. The Constitutional Court did not recognize a directly enforceable claim to housing on the part of the litigants, but ruled that the State is obliged to implement a reasonable policy for those

who are destitute. The Court, however, limited its role to that of policing the policy making process rather than recognizing an enforceable individual right to shelter, or defining a minimum core of the right to be given absolute priority.

51. Another notable case of socio-economic right dealt with by the South African Court is ***Minister of Health and others* v. *Treatment Action Campaign and others (TAC)*** [2002 (5) SA 721 (CC)]. The issue in that case was whether the state is obliged under the right of access to health care (Sections 27(1) and (2) of 1996 Constitution) to provide the anti-retroviral drug Nevirapine to HIV-positive pregnant women and their new born infants. Referring the policy framed by the State, the Court held that the State is obliged to provide treatment to the patients included in the pilot policy. The decision was the closest to acknowledging the individual's enforceable right.

52. In ***Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*** [1996 (4) SA 744 (CC)], the Court made it clear that socio-economic rights may be negatively protected from improper invasion, breach of the obligation,

occurs directly when there is a failure to respect the right or indirectly when there is a failure to prevent the direct entrenchment of the right of another, or a failure to respect the existing protection of the right, by taking measures that diminish the protection of private parties obligation, is not to interfere with or diminish the enjoyment of the right constitutionally protected. Equally important, in enjoyment of that right, the beneficiary shall also not obstruct, destroy, or make an inroad on the right guaranteed to others like non-state actors.

53. Few of the other notable South African Constitutional Court judgments are: ***Minister of Public Works and others* v. *Kyalami Ridge Environmental Association and others*** [2001 (7) BCLR 652 (CC)] and ***President of the Republic of South Africa* v. *Modderklip Boerdery (Pty). Ltd.*** [2005 (5) SA 3 (CC)].

54. South African Constitution, unlike many other constitutions of the world, has included socio-economic rights, health services, food, water, social security and education in the Constitution to enable it to serve as an instrument of principled social transformation enabling

affirmative action and horizontal application of rights. To most of the social rights, the State's responsibility is limited to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of those rights [Sections 26(2), and 27(2)]. Few exceptions, however, give rise to directly enforceable claims, namely, right not to be evicted [Section 26(3)]; not to be refused emergency medical treatment [Section 27(3)]; the rights of prisoners to adequate nutrition and medical treatment [Section 35(2)] and rights of Children (defined as those under 18 years) to basic nutrition, shelter, basic health care and social services.

55. Social economic rights have also been recognized by the constitutional courts of various other countries as well. In ***Brown* v. *Board of Education*** [347 U.S. 483], the U.S. Constitutional Court condemned the policy of segregation of blacks in the American educational system. The Court held that the private schools for black and white children are inherently unequal and deprived children of equal rights.

56. In a **Venenzuelan** case ***Cruz del Valle Balle Bermudez* v. *Ministry of Health and Social Action*** - Case No.15.789 Decision No.916 (1999); the Court considered

whether those with HIV/AIDS had the right to receive the necessary medicines without charge and identifying a positive duty of prevention at the core of the right to health, it ordered the Ministry to conduct an effective study into the minimum needs of those with HIV/AIDS to be presented for consideration in the Government's next budget. Reference may also be made a judgment of the Canadian Constitution Court in ***Wilson* v. *Medical Services Commission of British Columbia*** [(53) D.L.R. (4th) 171].

57. I have referred to the rulings of India and other countries to impress upon the fact that even in the jurisdictions where socio-economic rights have been given the status of constitutional rights, those rights are available only against State and not against private state actors, like the private schools, private hospitals etc., unless they get aid, grant or other concession from the State. Equally important principle is that in enjoyment of those socio-economic rights, the beneficiaries should not make an inroad into the rights guaranteed to other citizens.

REMOVAL OF OBSTACLES TO ACHIEVE SOCIO-ECONOMIC RIGHTS

58. Socio-economic rights, I have already indicated, be realized only against the State and the Statute enacted to protect socio-economic rights is always subject to the rights guaranteed to other non-state actors under Articles 19(1)(g), 30(1), 15(1), 16(1) etc. Parliament has faced many obstacles in fully realizing the socio-economic rights enshrined in Part IV of the Constitution and the fundamental rights guaranteed to other citizens were often found to be the obstacles. Parliament has on several occasions imposed limitations on the enjoyment of the rights guaranteed under Part III of the Constitution, through constitutional amendments.

59. Parliament, in order to give effect to Article 39 and to remove the obstacle for realization of socio-economic rights, inserted Article 31A vide Constitution (First Amendment) Act, 1951 and later amended by the Constitution (Fourth Amendment) Act, 1955 and both the amendments were given retrospective effect from the commencement of the Constitution. The purpose of the first amendment was to eliminate all litigations challenging the validity of legislation for the abolition of proprietary and intermediary interests in land on the ground of contravention of the provisions of

Articles 14, 19 and 31. Several Tenancy and Land Reforms Acts enacted by the State also stood protected under Article 31A from the challenge of violation of Articles 14 and 19.

60. Article 31B also saves legislations coming under it from inconsistency with any of the fundamental rights included in Part III for example Article 14, Article 19(1)(g) etc. Article 31B read with Ninth Schedule protects all laws even if they are violative of fundamental rights. However, in ***I.R. Coelho (Dead) by LRs*** **v.** ***State of Tamil Nadu and Others*** [(2007) 2 SCC 1], it was held that laws included in the Ninth Schedule can be challenged, if it violates the basic structure of the Constitution which refer to Articles 14, 19, 21 etc.

61. Article 31C was inserted by the Constitution (Twenty-fifth Amendment) Act, 1971 which gave primacy to Article 39(b) and (c) over fundamental rights contained under Article 14 and 19. Article 31C itself was amended by the Constitution (Forty-second Amendment) Act, 1976 and brought in all the provisions in Part-IV, within Article 31C for protecting laws from challenge under article 14 and 19 of the Constitution.

62. I have referred to Articles 31A to 31C only to point out how the laws giving effect to the policy of the State towards securing all or any of the principles laid down in Part-IV stood saved from the challenge on the ground of violation or infraction of the fundamental rights contained in Articles 14 and 19. The object and purpose of those constitutional provisions is to remove the obstacles which stood in the way of enforcing socio-economic rights incorporated in Part-IV of the Constitution and also to secure certain rights, guaranteed under Part III of the Constitution.

63. Rights guaranteed under Article 19(1)(g) can also be restricted or curtailed in the interest of general public imposing reasonable restrictions on the exercise of rights conferred under Article 19(1)(g). Laws can be enacted so as to impose regulations in the interest of public health, to prevent black marketing of essential commodities, fixing minimum wages and various social security legislations etc., which all intended to achieve socio-economic justice. Interest of general public, it may be noted, is a comprehensive expression comprising several issues which affect public welfare, public convenience, public order, health, morality,

safety etc. all intended to achieve socio-economic justice for the people.

64. The law is however well settled that the State cannot travel beyond the contours of Clauses (2) to (6) of Article 19 of the Constitution in curbing the fundamental rights guaranteed by Clause (1), since the Article guarantees an absolute and unconditional right, subject only to reasonable restrictions. The grounds specified in clauses (2) to (6) are exhaustive and are to be strictly construed. The Court, it may be noted, is not concerned with the necessity of the impugned legislation or the wisdom of the policy underlying it, but only whether the restriction is in excess of the requirement, and whether the law has over-stepped the Constitutional limitations. Right guaranteed under Article 19(1)(g), it may be noted, can be burdened by constitutional limitations like sub-clauses (i) to (ii) to Clause (6).

65. Article 19(6)(i) enables the State to make law relating to professional or technical qualifications necessary for practicing any profession or to carry on any occupation, trade or business. Such laws can prevent unlicensed, uncertified medical practitioners from jeopardizing life and health of

people. Sub clause (ii) to Article 19(6) imposes no limits upon the power of the State to create a monopoly in its favour. State can also by law nationalize industries in the interest of general public. Clause (6)(ii) of Article 19 serves as an exception to clause (1)(g) of Article 19 which enable the State to enact several legislations in nationalizing trades and industries. Reference may be made to Chapter-4 of the Motor Vehicles Act, 1938, The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, General Insurance Business (Nationalization) Act, 1972 and so on. Sub-clause 6(ii) of Article 19 exempts the State, on the conditions of reasonableness, by laying down that carrying out any trade, business, industry or services by the State Government would not be questionable on the ground that it is an infringement on the right guaranteed under Article 19(1)(g).

66. I have referred to various provisions under sub-clauses (i) and (ii) of Article 19(6) to impress upon the fact that it is possible to amend the said Article so that socio-economic rights could be realized by carving out necessary constitutional limitations abrogating or abridging the right guaranteed under Article 19(1)(g).

67. Constitutional amendments have also been made to Articles 15 and 16 so as to achieve socio-economic justice. Articles 15 and 16 give power to the State to make positive discrimination in favour of the disadvantaged and particularly, persons belonging to Scheduled Castes and Scheduled Tribes. Socio-economic empowerment secures them dignity of person and equality of status, the object is to achieve socio-economic equality.

68. Faced with many obstacles to achieve the above objectives and the Directive Principles of the State Policy, Articles 15 and 16 of the Constitution had to be amended on several occasions so as to get over the obstacles in achieving the socio-economic justice. In ***State of Madras* v. *Shrimati Champakam Dorairajan*** [(1951) 2 SCR 525], this Court laid down the law that Article 29(2) was not controlled by Article 46 of the Directive Principles of the State Policy and that the Constitution did not intend to protect the interest of the backward classes in the matter of admission to educational institutions. In order to set right the law and to achieve social justice, Clause (4) was added to Article 15 by the Constitutional (First Amendment) Act, 1951 enabling the

State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The object of Clause (4) was to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340 of the Constitution, so as to make it constitutional for the State to reserve seats for backward classes citizens, Scheduled Castes and Scheduled Tribes in the public educational institutions, as well as to make special provisions, as may be necessary, for the advancement, e.g. to provide housing accommodation for such classes. In other words, Article 15(4) enables the State to do what would otherwise have been unconstitutional. Article 15(4) has to be read as a proviso or an exception to Article 29(2) and if any provision is defined by the provisions of Article 15(4), its validity cannot be questioned on the ground that it violates Article 29(2). Under Article 15(4), the State is entitled to reserve a minimum number of seats for members of the backward classes, notwithstanding Article 29(2) and the obstacle created under Article 29(2) has been removed by inserting Article 15(4).

69. The Parliament noticed that the provisions of Article 15(4) and the policy of reservation could not be imposed by

the State nor any quota or percentage of admission be carved out to be appropriated by the State in minority or non-minority unaided educational institution, since the law was clearly declared in ***Pai Foundation*** and ***Inamdar*** cases. It was noticed that the number of seats available in aided or State maintained institutions particularly in respect of professional educational institutions were limited in comparison to those in private unaided institutions. Article 46 states that the State shall promote, with special care, the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Access to education was also found to be an important factor and in order to ensure advancement of persons belonging to Scheduled Castes, Scheduled Tribes, socially and economically backward classes, it was proposed to introduce Clause (5) to Article 15 to promote educational advancement of socially and educationally backward classes of citizens i.e. OBCs, Scheduled Castes and Scheduled Tribes and the weaker sections of the society by securing admission in unaided educational institutions and other minority educational institutions referred to in Clause (1) of Article 30

of the Constitution.

70. The Parliament has, therefore, removed the obstacles created by the law as ruled by the Court in ***Pai Foundation*** and ***Inamdar*** so as to carry out the obligation under the Directive Principles of the State Policy laid down under Article 46. Later, the Parliament enacted the Central Educational Institutions (Reservation and Admission) Act, 2006 (for short 'the CEI Act'), but the Act never intended to give effect to the mandate of the newly introduced Clause (5) to Article 15 dealing with admissions in both aided and unaided private educational institutions.

71. Constitutional validity of Clause (5) to Article 15 and the CEI Act came up for consideration before a Constitutional Bench of this Court in ***Ashoka Kumar Thakur* v. *Union of India and Others*** [(2008) 6 SCC 1]. CEI Act was enacted by the Parliament under Article 15(5), for greater access to higher education providing for 27 per cent reservation for "Other Backward Classes" to the Central Government controlled educational institutions, but not on privately managed educational institutions. Constitutional validity of Article 15(5) was challenged stating that it had violated the

basic structure doctrine. The majority of the Judges in ***Ashok Kumar Thakur's*** case declined to pronounce on the question whether the application of Article 15(5) to private unaided institutions violated the basic structure of the Constitution, in my view, rightly because that issue did not arise for consideration in that case. Justice Dalveer Bhandari, however, examined the validity of Article 15(5) with respect to private unaided institutions and held that an imposition of reservation of that sort would violate Article 19(1)(g) and thus the basic structure doctrine. Article 19(1)(g), as such, it may be pointed out, is not a facet of the basic structure of the Constitution, and can be constitutionally limited in its operation, with due respect, Justice Bhandari has overlooked this vital fact. ***Pai Foundation*** as well as ***Inamdar*** held that Article 19(1)(g) prevents the State from creating reservation quotas or policy in private unaided professional educational institutions and, as indicated earlier, it was to get over that obstacle that Clause (5) was inserted in Article 15. In ***Ashok Kumar Thakur***, the majority held that Clause (5) to Article 15 though, moderately abridges or alters the equality principle or the principles under Article 19(1)(g), insofar as it dealt with State maintained and aided

institutions, it did not violate the basic structure of the Constitution. I have referred to Articles 15(4) and 15(5) and the judgment in ***Ashok Kumar Thakur*** to highlight the fact that the State in order to achieve socio-economic rights, can remove obstacles by limiting the fundamental rights through constitutional amendments.

72. Applicability of Article 15(5), with regard to private unaided non-minority professional institutions, came up for consideration in ***Medical Association*** case. A two judges Bench of this Court has examined the constitutional validity of Delhi Act 80 of 2007 and the notification dated 14.8.2008 issued by the Government of NCT, Delhi permitting the Army College of Medical Sciences to allocate 100% seats to the wards of army personnel. The Court also examined the question whether Article 15(5) has violated the basic structure of the Constitution. The Court proceeded on the basis that Army Medical College is a private non-minority, unaided professional institution. Facts indicate that the College was established on a land extending to approximately 25 acres, leased out by the Ministry of Defence, Government of India for a period of 30 years extendable to 99 years.

Ministry of Defence also offered various facilities like providing clinical training at Army Hospital, NCT, Delhi and also access to the general hospitality. The constitutional validity of Article 15(5) was upheld holding that Clause (5) of Article 15 did not violate the basic structure of the Constitution. While reaching that conclusion, Court also examined the ratio in ***Pai Foundation*** as well as in ***Inamdar***. Some of the findings recorded in ***Medical Association*** case, on the ratio of ***Pai Foundation*** and ***Inamdar***, in my view, cannot be sustained.

73. ***Medical Association*** case, it is seen, gives a new dimension to the expression "much of difference" which appears in paragraph 124, page 601 of ***Inamdar***. Learned Judges in ***Medical Association*** case concluded in Para 80 of that judgment that the expression "much of a difference" gives a clue that there is an "actual difference" between the rights of the minority unaided institutions under clause (1) of Article 30 and the rights of non-minority unaided institutions under sub-clause (g) of Clause (1) of Article 19. Let us refer to paragraph 124 of ***Inamdar*** to understand in which context the expression "much of difference" was used in that

judgment, which is extracted below:

> "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 the quota of seats between the Management and the State." (emphasis supplied)

Inamdar was expressing the view that so far as "appropriation of quota by the State" and "enforcement of its reservation policy" is concerned, they do not see much of difference between non-minority and minority unaided educational institutions. ***Medical Association*** case, on the other hand, in my view, has gone at a tangent and gave a new dimension and meaning to paragraph 124 of ***Inamdar***, which is evident from the following paragraph of that judgment:

> "81. xxx xxx
> xxx xxx
>
> (i) that there is not much of a difference in terms, between the two kinds of institutions under consideration, based on an overall quantitative assessment of all the rights put together, with a few differences that would still have operational significance; or

> (ii) that in all respects the two classes of educational institutions are more or less the same, with the differences being minor and not leading to any operational significance."
>
> (emphasis supplied)

Medical Association case concluded that the expression "much of a difference" could be understood only in the way they have stated in paragraph 81(i) which, with due respect, is virtually re-writing paragraph 124 of ***Inamdar,*** a seven Judges' Judgment which is impermissible. Final conclusion reached by the learned judges in paragraph 123 for inclusion of Clause (5) to Article 15 reads as follows:

> "123. Clause (5) of Article 15 is an enabling provision and inserted by the Constitution (Ninety-third Amendment) Act, 2005 by use of powers of amendment in Article 368. The Constitution (Ninety-third Amendment) Act, 2005 was in response to this Court's explanation, in P.A. Inamdar, of the ratio in T.M.A. Pai, that imposition of reservations on non-minority unaided educational institutions, covered by sub-clause (g) of clause (1) of Article 19, to be unreasonable restrictions and not covered by clause (6) of Article 19. The purpose of the amendment was to clarify or amend the Constitution in a manner that what was held to be unreasonable would now be reasonable by virtue of the constitutional status given to such measures."

74. Referring to ***Pai Foundation*** case, the Court also stated, having allowed the private sector into the field of

education including higher education, it would be unreasonable, pursuant to clause (6) of Article 19, for the State to fix the fees and also impose reservations on private unaided educational institutions. Nevertheless, the Court opined that taking into consideration the width of the original powers under Clause (6) of Article 19, one would necessarily have to find the State would at least have the power to make amendments to resurrect some of those powers that it had possessed to control the access to higher education and achieve the goals of egalitarianism and social justice.

75. Article 15(5), it may be noted, gives no protection to weaker sections of the society, except members belonging to Scheduled Castes/Scheduled Tribes and members of Other Backward Community.

76. Constitutional amendments carried out to Article 16 in securing social justice may also be examined in this context. Clause (1) of Article 16 guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(4) is a special provision confined to the matters of employment in the services under the State which states that nothing in

Article 16(1) shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. Article 46 obliges the State to take steps for promoting the economic interests of the weaker sections and, in particular, of the Scheduled Castes and Scheduled Tribes. The expression 'weaker sections' in Article 46 is wider than 'backward class'. The backward citizens in Article 16(4) do not comprise of all the weaker sections of the people but only those which are socially, educationally and economically backward, and which are not adequately represented in the services under the State. Further, the expression 'weaker sections' can also take within its compass individuals who constitute weaker sections or weaker parts of the society.

77. In ***Indra Sawhney* v. *Union of India and Others*** [(1992) Supp. 3 SCC 212], this Court held that, as the law stood then, there could be no reservation in promotion. It was held that reservation of appointments or posts under Article 16(4) is confined to initial appointments only. To set right the law and to advance social justice by giving

promotions to Scheduled Castes and Scheduled Tribes Clause (4A) was added to Article 16 by the Constitution (Seventy-seventh Amendment) Act, 1995. Consequently, the hurdle or obstacle which stood in the way was removed by the Constitutional amendment.

78. The scope of the above provision came up for consideration in ***Jagdish Lal and Others* v. *State of Haryana and Others*** [(1997) 6 SCC 538], where this Court held that the principle of seniority according to length of continuous service on a post or service will apply and that alone will have to be looked into for the purpose of seniority even though they got promotion ignoring the claim of seniors. It was said that reserved candidates who got promotion ignoring the claim of services in general category will be seniors and the same cannot affect the promotion of general candidates from the respective dates of promotion and general candidates remain junior in higher echelons to the reserved candidates. The above position was, however, overruled in ***Ajit Singh and Others* v. *State of Punjab and Others*** [(1999) 7 SCC 209], wherein it was decided that the reserved category candidates cannot count seniority in the

promoted category from the date of continuous officiation *vis-à-vis* the general candidates who were senior to them in the lower category and who were later promoted. ***Ajit Singh*** case was declaring the law as it stood. Consequently, the Parliament, in order to give continuous appreciation in promotion, inserted the words "with consequential seniority" in Clause (4A) to Article 16 by Constitution (Eighty-fifth Amendment) Act, 2001 (which was made effective from 17.6.1995). In the light of Article 16(4A), the claims of Scheduled Castes and Scheduled Tribes for promotion shall be taken into consideration in making appointment or giving promotion.

79. Constitution (Eighty-first Amendment) Act, 2000, which came into effect on 9.6.2000, inserted Clause (4B) to Article 16, which envisaged that the unfilled reserved vacancies in a year to be carried forward to subsequent years and that these vacancies are to be treated as distinct and separate from the current vacancies during any year, which means that 50% rule is to be applied only to normal vacancies and not to the posts of backlog of reserved vacancies. Inadequacy and representation of backward

classes, Scheduled Castes and Scheduled Tribes are the circumstances which enabled the State Government to enact Articles 16(4), 16(4A) and 16(4B).

80. The constitutional validity of Article 16(4A) substituted by the Constitution (Eighty-fifth Amendment) Act, 2001 came up for consideration before this Court in ***M. Nagaraj & Ors.*** **v.** ***Union of India*** [(2006) 8 SCC 212]. The validity of the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001 were also examined and held valid. This Court held that they do not infringe either the width of the Constitution amending power or alter the identity of the Constitution or its basic structure. This Court held that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

81. I have referred extensively to the constitutional

amendments effected to Articles 31A to 31C, Articles 15, 16 and 19 to show that whenever the Parliament wanted to remove obstacles so as to make affirmative action to achieve socio-economic justice constitutionally valid, the same has been done by carrying out necessary amendments in the Constitution, not through legislations, lest they may make an inroad into the fundamental rights guaranteed to the citizens. Rights guaranteed to the unaided non-minority and minority educational institutions under Article 19(1)(g) and Article 30(1) as explained in ***Pai Foundation*** and reiterated in ***Inamdar*** have now been limited, restricted and curtailed so as to impose positive obligation on them under Section 12(1)(c) of the Act and under Article 21A of the Constitution, which is permissible only through constitutional amendment.

82. Constitutional principles laid down by ***Pai Foundation*** and ***Inamdar*** on Articles 19(1)(g), 29(2) and 30(1) so far as unaided private educational institutions are concerned, whether minority or non-minority, cannot be overlooked and Article 21A, Sections 12(1)(a), (b) and 12(1)(c) have to be tested in the light of those constitutional principles laid down by ***Pai Foundation*** and ***Inamdar*** because ***Unnikrishnan*** was the basis for the introduction of the

proposed Article 21A and the deletion of clause (3) from that Article. Interpretation given by the courts on any provision of the Constitution gets inbuilt in the provisions interpreted, that is, Articles 19(1)(g), 29(2) and 30.

83. We have to give due respect to the eleven Judges judgment in **Pai *Foundation*** and the seven Judges judgment in ***Inamdar***, the principles laid down in those judgments still hold good and are not whittled down by Article 21A, nor any constitutional amendment was effected to Article 19(1)(g) or Article 30(1). Article 21A, it may be noted was inserted in the Constitution on 12.12.2002 and the judgment in ***Pai Foundation*** was delivered by this Court on 31.10.2002 and 25.11.2002. Parliament is presumed to be aware of the law declared by the Constitutional Court, especially on the rights of the unaided non-minority and minority educational institutions, and in its wisdom thought if fit not to cast any burden on them under Article 21A, but only on the State. Criticism of the judgments of the Constitutional Courts has to be welcomed, if it is healthy. Critics, it is seen often miss a point which is vital, that is, Constitutional Courts only interpret constitutional provisions and declare what the law is, and not what law ought to be, which is the function of the

legislature. Factually and legally, it is not correct to comment that many of the amendments are necessitated to overcome the judgments of the Constitutional Courts. Amendments are necessitated not to get over the judgments of the Constitutional Courts, but to make law constitutional. In other words, a law which is otherwise unconstitutional is rendered constitutional. An unconstitutional statute is not a law at all, whatever form or however solemnly it is enacted. When legislation is declared unconstitutional by a Constitutional Court, the legislation in question is not vetoed or annulled but declared never to have been the law. People, acting solemnly in their sovereign capacity bestow the supreme dominion on the Constitution and, declare that it shall not be changed except through constitutionally permissible mode. When courts declare legislative acts inconsistent with constitutional provisions, the court is giving effect to the will of the people not due to any judicial supremacy, a principle which squarely applies to the case on hand.

84. In ***S.P. Gupta* v. *President of India and Others*** [1981 SCC Supp. (1) 87] [para 195], Justice Fazal Ali pointed

out as follows:

> " The position so far as our country is concerned is similar to that of America and if any error of interpretation of a constitutional provision is committed by the Supreme Court or any interpretation which is considered to be wrong by the Government can be rectified only by a constitutional amendment which is a very complicated, complex, delicate and difficult procedure requiring not merely a simple majority but two-third majority of the Members present and voting. Apart from the aforesaid majority, in most cases the amendment has to be ratified by a majority of the States. In these circumstances, therefore, this Court which lays down the law of the land under Article 141 must be extremely careful and circumspect in interpreting statutes, more so constitutional provisions, so to obviate the necessity of a constitutional amendment every time which, as we have already mentioned, is an extremely onerous task."

Reference may also be made to the judgment in ***Bengal Immunity Company Limited*** v. ***State of Bihar and Others*** [AIR 1955 SC 661].

85. In ***People's Union for Civil Liberties (PUCL) and Anr.* v. *Union of India (UOI) and Anr.*** [2003 (4) SCC 399] in para 112 this Court has held "*It is a settled principle of constitutional jurisprudence that the only way to render a judicial decision ineffective is to enact a valid law by way of amendment.....*"

86. In ***Smit* v. *Allwright*** [321 U.S. 649 (1944)], the Court held "*In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice and this practice has continued to this day.*"

87. Constitutional interpretation given by this Court as to what the law is, led to bringing in several amendments either to set right the law or abridge the constitutional rights guaranteed in Part III of the Constitution, some of which I have already referred to in the earlier part of this judgment.

88. Principles laid down by ***Pai Foundation*** and in ***Inamdar*** while interpreting Articles 19(1)(g), 29(2) and 30(1) in respect of unaided non-minority and minority educational institutions like schools upto the level of under-graduation are all weighty and binding constitutional principles which cannot be undone by statutory provisions like Section 12(1)(c), since those principles get in-built in Article 19(1)(g), Article 29(2) and Article 30(1) of the Constitution. Further Parliament, while enacting Article 21A, never thought if fit to

undo those principles and thought it fit to cast the burden on the State.

PART III

OBLIGATIONS/RESPONSIBILITIES OF NON-STATE ACTORS IN REALIAZATION OF CHILDREN'S RIGHTS:

89. We may, however, also examine whether the private unaided educational institutions have any obligations/responsibilities in realization of children's rights. Articles 21A, 45, 51A(k), Section 12 of the Act and various International Conventions deal with the obligations and responsibilities of state and non-state actors for realization of children's rights. Social inclusiveness is stated to be the motto of the Act which was enacted to accomplish the State's obligation to provide free and compulsory education to children of the age 6 to 14 years, in that process, compulsorily co-opting, private educational institutions as well. A shift in State's functions, to non-state actors in the field of health care, education, social services etc. has been keenly felt due to liberalization of economy and privatization of state functions.

90. The Universal Declaration of Human Rights, 1948

(UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), UN Convention on the Rights of the Child (UNCRC), 1989 throw considerable light on the duties and responsibilities of State as well as non-state actors for the progressive realization of children rights. Article 6(1) of ICCPR states: "Every human being has the inherent right to life … No one shall be arbitrarily deprived of this right", meaning thereby that the arbitrary deprivation of a person's life will be a violation of international human rights norm whether it is by the State or non-state actors. UDHR, ICCPR, ICESCR, UNCRC and other related international covenants guarantee children civil, political, economical, social and cultural rights. Article 4 of the UNCRC requires the State to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention.

91. Article 2.1 of the ICESCR, has also approved the above obligation of the State, which reads as follows:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its

> available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Non-state actor's obligation is also reflected in preamble of ICCPR and ICESCR which is as follows:

> "The individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."

Preamble of UDHR also reads as follows:

> "… every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education, to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance…"

Non-state actor's "duty to the community" and to the "individuals in particular" are accordingly highlighted.

Article 30 of UDHR highlights the necessity to protect and safeguard the right of others which reads as follows :-

> "Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

92. In this connection reference may be made to Article 28(1)(a) of UNCRC which reads as follows: "*States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: make primary education compulsory and available free to all*";

Article 29 is also relevant for our purpose which reads as follow:-

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall

> be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

93. Provisions referred to above and other provisions of International Conventions indicate that the rights have been guaranteed to the children and those rights carry corresponding State obligations to respect, protect and fulfill the realization of children's rights. The obligation to protect implies the horizontal right which casts an obligation on the State to see that it is not violated by non-state actors. For non-state actors to respect children's rights cast a negative duty of non-violation to protect children's rights and a positive duty on them to prevent the violation of children's rights by others, and also to fulfill children's rights and take measures for progressive improvement. In other words, in the spheres of non-state activity there shall be no violation of children's rights.

94. Article 24 of the Indian Constitution states that no child below the age of 14 years shall be employed to work in

any factory or be engaged in any hazardous employment. The Factories Act, 1948 prohibits the employment of children below the age of 14 years in any factory. Mines Act, 1952 prohibits the employment of children below 14 years. Child Labour (Prohibition and Regulation) Act, 1986 prohibits employment of children in certain employments. Children Act, 1960 provides for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children. Juvenile Justice (Care and Protection of Children) Act, 1986 (the Amendment Act 33 of 2006) provide for the care, protection, development and rehabilitation of neglected and delinquent juveniles. There are also other legislations enacted for the care and protection of children like Immoral Trafficking Prevention Act, 1956, Prohibition of Child Marriage Act, 2006 and so on. Legislations referred to above cast an obligation on non-state actors to respect and protect children's rights and not to impair or destroy the rights guaranteed to children, but no positive obligation to make available those rights.

95. Primary responsibility for children's rights, therefore, lies with the State and the State has to respect, protect and

fulfill children's rights and has also got a duty to regulate the private institutions that care for children, to protect children from violence or abuse, to protect children from economic exploitation, hazardous work and to ensure human treatment of children. Non-state actors exercising the state functions like establishing and running private educational institutions are also expected to respect and protect the rights of the child, but they are, not expected to surrender their rights constitutionally guaranteed.

96. Article 21A requires non-state actors to achieve the socio-economic rights of children in the sense that they shall not destroy or impair those rights and also owe a duty of care. The State, however, cannot free itself from obligations under Article 21A by offloading or outsourcing its obligation to private State actors like unaided private educational institutions or to coerce them to act on the State's dictate. Private educational institutions have to empower the children, through developing their skills, learning and other capacities, human dignity, self-esteem and self-confidence and to respect their constitutional rights.

97. I have in the earlier part of the judgment referred to

Article 28(1) and Article 29 of UNCRC which cast an obligation on the State to progressively achieve the rights of children and also to make primary education compulsory and available free to all but all the same make it clear that no part of Articles 28 and 29 be construed to interfere with the liberty of non-state actors. They are expected to observe the principles set forth in Para 1 of Article 29 and also to conform to such minimum standards as laid down by the state.

98. South African Constitution Bench in ***Governing Body of the Juma Musjid Primary School*** **v.** ***Minister for Education*** [[2011] ZACC 13] dealt with the interplay between private rights and the State's obligation to provide right to education. In that case, the Court held that the primary positive obligation to provide the right to education resides on the Government and the purpose of Section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. That was a case involving balancing of proprietary rights of a trust seeking to evict a public school in order to establish an independent school. One of the pleas raised by the evictees was that the evictor trust also had an obligation

towards the right to education of the learners which it could not ignore. The Constitutional Court held that the only obligation of a private party as regards socio-economic rights, like right to education, is a negative obligation i.e. not to unreasonably interfere with the realization of the right and that there is no positive obligation cast on them to protect the right by surrendering their rights.

99. ***Pai Foundation*** and ***Inamdar*** also cast a negative obligation on the private educational institutions in the sense that there shall be no profiteering, no demand of excessive fee, no capitation fee, no maladministration, no cross subsidy etc. Further, this Court, while interdicting the State in appropriating seats in private educational institutions, restrained them from interfering with the autonomy of those institutions and adopted a balancing approach laying down the principle of voluntariness, co-operation, concession, and so on.

100. ***Pai Foundation*** and ***Inamdar*** have categorically held that any action of 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, would amount to nationalization of seats. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions, it was held, are acts constituting serious encroachment on the right and autonomy of private unaided professional educational institutions and such appropriation of seats cannot be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution, so far as the unaided minority institutions are concerned.

PART IV

101. Article 21A has used the expression "State shall provide" not "provide for" hence the constitutional obligation to provide education is on the State and not on non-state actors, the expression is clear and unambiguous and to interpret that expression to mean that constitutional obligation or responsibility is on private unaided educational institutions also, in my view, doing violence to the language

of that expression. The obligation of the State to provide free and compulsory education is without any limitation. Parliament in its wisdom has not used the expression "provide for". If the preposition "for" has been used then the duty of the State would be only to provide education to those who require it but to provide for education or rather to see that it is provided. In this connection it is useful to refer to the judgment of the Supreme Court of Ireland in ***Crowley* v. *Ireland*** [(1980) IR 102], where the expression "provide for" came up for interpretation. It was held that the use of the preposition "for" keeps the State at one remove from the actual provision of education indicating that once the State has made an arrangement for the provision of education – provided the buildings, pay teachers and set the curriculum - it is absolved of the responsibility when the education is not actually delivered. The absence of the preposition "for" in Article 21A makes the duty on the State imperative. State has, therefore, to "provide" and "not provide for" through unaided private educational institutions.

102. Article 21A has used the expression "such manner" which means the manner in which the State has to discharge its constitutional obligation and not offloading those

obligations on unaided educational institutions. If the Constitution wanted that obligation to be shared by private unaided educational institutions the same would have been made explicit in Article 21A. Further, unamended Article 45 has used the expression "state shall endeavour.....for" and when Article 21A was inserted, the expression used therein was that the "State shall provide" and not "provide for" the duty, which was directory earlier made mandatory so far as State is concerned. Article 21 read with 21A, therefore, cast an obligation on the State and State alone.

103. The State has necessarily to meet all expenses of education of children of the age 6 to 14 years, which is a constitutional obligation under Article 21A of the Constitution. Children have also got a constitutional right to get free and compulsory education, which right can be enforced against the State, since the obligation is on the State. Children who opt to join an unaided private educational institution cannot claim that right as against the unaided private educational institution, since they have no constitutional obligation to provide free and compulsory education under Article 21A of the Constitution. Needless to say that if children are voluntarily admitted in a private

unaided educational institution, children can claim their right against the State, so also the institution. Article 51A(k) of the Constitution states that it shall be the duty of every citizen of India, who is a parent or guardian, to provide opportunities for education to his child. Parents have no constitutional obligation under Article 21A of the Constitution to provide free and compulsory education to their children, but only a constitutional duty, then one fails to see how that obligation can be offloaded to unaided private educational institutions against their wish, by law, when they have neither a duty under the Directive Principles of State policy nor a constitutional obligation under Article 21A, to those 25% children, especially when their parents have no constitutional obligation.

104. In ***Avinash Mehrotra* v. *Union of India & Others*** [{2009} 6 SCC 398], this Court held that Article 21A imposes a duty on the State, while Article 51A(k) places burden on the parents to provide free and compulsory education to the children of the age 6 to 14 years. There exists a positive obligation on the State and a negative obligation on the non-state actors, like private educational institutions, not to unreasonably interfere with the realization of the children's

rights and the state cannot offload their obligation on the private unaided educational institutions.

105. I am, therefore, of the considered view that Article 21A, as such, does not cast any obligation on the private unaided educational institutions to provide free and compulsory education to children of the age 6 to 14 years. Article 21A casts constitutional obligation on the State to provide free and compulsory education to children of the age 6 to 14 years.

CONSTITUTIONALLY IMPERMISSIBLE PROCEDURE ADOPTED TO ACHIEVE SOCIAL INCLUSIVENESS UNDER THE ACT.

106. I may endorse the view that the purpose and object of the Act is laudable, that is, social inclusiveness in the field of elementary education but the means adopted to achieve that objective is faulty and constitutionally impermissible. Possibly, the object and purpose of the Act could be achieved by limiting or curtailing the fundamental rights guaranteed to the unaided non-minority and minority educational institutions under Article 19(1)(g) and Article 30(1) or imposing a positive obligation on them under Article 21A, but this has not been done in the instant case. I have extensively

dealt with the question - how the socio economic rights could be achieved by making suitable constitutional amendments in Part II of this judgment.

107. Sections 12(1)(b) and 12(1)(c) are vehicles through which the concept of social inclusiveness is sought to be introduced into the private schools both aided and unaided including minority institutions, so as to achieve the object of free and compulsory education of the satisfactory quality to the disadvantaged groups and weaker sections of the society. The purpose, it is pointed out, is to move towards composite classrooms with children from diverse backgrounds, rather than homogenous and exclusive schools and it was felt that heterogeneity in classrooms leads to greater creativity. In order to understand the scope of the above mentioned provisions and the object sought to be achieved, it is necessary to refer to those and other related provisions:-

> Section 12:- Extent of School's responsibility for free and compulsory education –
>
> (1) For the purposes of this Act, a school, -
>
> (a) specified in sub-clause(i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein ;

(b) specified in sub-clause(ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.;

(c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

(2) The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified n sub-clause (i) of clause(n) of section 2:

Provided further where such school is already under obligation to provide free education to a specified number of children on account of it

having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be.

Reference may be also be made to definition clauses.

2(d) "child belonging to disadvantaged group" means a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification;

2(e) "child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower that the minimum limit specified by the appropriate Government, by notification;

2(n) "school" means any recognized school imparting elementary education and includes –

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority.

(iii) a school belonging to specified category; and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

(A) <u>Unaided Educational Institutions, minority and non-minority:</u>

108. First, I may deal with the challenge against Section 12(1)(c), which casts an obligation on the unaided private educational institutions both non-minority and minority to admit to class 1 at least 25% of the strength of those children falling under Sections 2(d) and 2(e), and also in the pre-school, if there is one. State also has undertaken re-imbursement of the fees of those children to the extent of per-child expenditure incurred by the State.

109. Right of a citizen to establish and run an educational institution investing his own capital is recognized as a fundamental right under Article 19(1)(g) and the right of the State to impose reasonable restrictions under Article 19(6) is also conceded. Citizens of this country have no constitutional obligation to start an educational institution and the question is after having started private schools, do they owe a constitutional obligation for seat sharing with the State on a fee structure determined by the State. ***Pai Foundation*** and ***Inamdar*** took the view that the State

cannot regulate or control admission in unaided educational institutions so as to compel them to give up a share of available seats which according to the court would amount to nationalization of seats and such an appropriation of seats would constitute serious encroachment on the right and autonomy of the unaided educational institutions. Both ***Pai Foundation*** and ***Inamdar*** are unanimous in their view that such appropriation of seats cannot be held to be a regulatory measure in the interest of rights of the unaided minority educational institutions guaranteed under Article 30(1) of the Constitution or a reasonable restriction within the meaning of Article 19(6) in the case of unaided non-minority educational institution. ***Inamdar*** has also held that to admit students being an unfettered fundamental right, the State cannot make fetters upto the level of under graduate education. Unaided educational institutions enjoy total freedom and they can legitimately claim 'unfettered fundamental rights' to choose students subject to its being fair, transparent and non-exploitative.

110. Section 12(1)(c) read with Section 2(n)(iv) of the Act never envisages any distinction between unaided minority

schools and non-minority schools. Constitution Benches of this Court have categorically held that so far as appropriation of quota by the State and enforcement of reservation policy is concerned, there is not much difference between unaided minority and non-minority educational institutions (Refer Paras 124, 125 of ***Inamdar***). Further, it was also held that both unaided minority and non-minority educational institutions enjoy "total freedom" and can claim "unfettered fundamental rights" in the matter of appropriation of quota by the State and enforcement of reservation policy. This Court also held that imposition of quota or enforcing reservation policy are acts constituting serious encroachment on the right and autonomy of such institutions both minority (religious and linguistic) and non- minority and cannot be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Therefore, no distinction or difference can be drawn between unaided minority schools and unaided non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c) of the Act.

111. I am of the view, going by the ratio laid down by ***Pai Foundation*** and ***Inamdar***, to compel the unaided non minority and minority private educational institutions, to admit 25% of the students on the fee structure determined by the State, is nothing but an invasion as well as appropriation of the rights guaranteed to them under Article 19(1)(g) and Article 30(1) of the Constitution. Legislature cannot under the guise of interest of general public "arbitrarily cast burden or responsibility on private citizens running a private school, totally unaided". Section 12(1)(c) was enacted not only to offload or outsource the constitutional obligation of the State to the private unaided educational institutions, but also to burden them with duties which they do not constitutionally owe to children included in Section 2(d) or (e) of the Act or to their parents.

112. ***Pai Foundation***, in paragraph 57 of the judgment has stated that in as much as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Further, it was also pointed

out that in the establishment of an educational institution, the object should not be to make profit, inasmuch as education is essentially charitable in nature. However, there can be a reasonable revenue surplus, which may be generated by the educational institutions for the purpose of development of education and their expansion. Consequently, the mere fact that education in one sense, is regarded as charitable, the Government cannot appropriate 25% of the seats of the unaided private educational institutions on the ground that providing education is charity. ***Pai Foundation*** and ***Inamdar*** after holding that occupation of education can be regarded as charitable held that the appropriation of seats in an unaided private educational institution would amount to nationalization of seats and an inroad into their autonomy. The object and purpose of Section 12(1)(c), it may be noted, is not to reduce commercialization. ***Pai Foundation*** and ***Inamdar*** have clearly denounced commercialization of education.

113. Right to establish and administer and run a private unaided educational institution is the very openness of personal freedom and opportunity which is constitutionally

protected, which right cannot be robbed or coerced against his will at the threat of non-recognition or non-affiliation. Right to establish a private unaided educational institution and to make reasonable profit is recognized by Article 19(1)(g) so as to achieve economic security and stability even if it is for charity. Rights protected under Article 19(1)(g) are fundamental in nature, inherent and are sacred and valuable rights of citizens which can be abridged only to the extent that is necessary to ensure public peace, health, morality etc. and to the extent of the constitutional limitation provided in that Article. Reimbursement of fees at the Government rate is not an answer when the unaided private educational institutions have no constitutional obligation and their Constitutional rights are invaded.

114. Private unaided educational institutions are established with lot of capital investment, maybe with loan and borrowings. To maintain high standard of education, well qualified and experienced teachers have to be appointed, at times with hefty salary. Well equipped library, laboratory etc have also to be set up. In other words considerable money by way of capital investment and overhead expenses would go

into for establishing and maintaining a good quality unaided educational institution. Section 12(1)(c), in my view, would amount to appropriation of one's labour and makes an inroad into the autonomy of the institution. Unaided educational institutions, over a period of time, might have established their own reputation and goodwill, a quantifiable asset. Nobody can be allowed to rob that without their permission, not even the State. Section 12(1)(c) is not a restriction which falls under Article 19(6) but cast a burden on private unaided educational institutions to admit and teach children at the state dictate, on a fee structure determined by the State which, in my view, would abridge and destroy the freedom guaranteed to them under Article 19(1)(g) of the Constitution.

115. Parliament can enact a social legislation to give effect to the Directive Principles of the State Policy, but so far as the present case is concerned, neither the Directive Principles of the State Policy nor Article 21A cast any duty or obligation on the unaided private educational institutions to provide free and compulsory education to children of the age of 6 to 14. Section 12(1)(c) has, therefore, no foundation either on the Directive Principles of the State Policy or Article 21A of the

Constitution, so as to rope in unaided educational institutions. Directive Principles of the State Policy as well as Article 21A cast the constitutional obligation on the State and State alone. State, cannot offload or outsource that Constitutional obligation to the private unaided educational institutions and the same can be done only by a constitutional provision and not by an ordinary legislation.

116. Articles 41, 45 and 46 of Part IV of the Constitution cast the duty and constitutional obligations on the State under Article 21A, apart from other constitutional principles laid down by ***Pai Foundation*** as well as ***Inamdar.*** Section 12(1)(c) has neither the constitutional support of Article 21A, nor the support of Articles 41, 45 or 46, since those provisions cast duty only on the State and State alone. The policies laid down under Articles 41, 45 and 46 can always be achieved by carrying out necessary amendment to the fundamental rights. However, so far as the present case is concerned, Article 21A has been enacted to cast a constitutional obligation on the state and a duty upon the State under Articles 41, 45 and 46. I have pointed out that it is to get over such situations and for the removal of such

obstacles several constitutional amendments were necessitated which I have extensively dealt with in Part II of my judgment.

117. Section 12(1)(c) seeks to achieve what cannot be achieved directly especially after the interpretation placed by ***Pai Foundation*** and ***Inamdar*** on Article 19(1)(g) and Article 30(1) of the Constitution. ***Inamdar*** has clearly held that right to set up, and administer a private unaided educational institution is an unfettered right, but 12(1)(c) impose fetters on that right which is constitutionally impermissible going by the principles laid down by ***Pai Foundation*** and ***Inamdar***. Section 12(1)(c), in my view, can be given effect to, only on the basis of principles of voluntariness and consensus laid down in ***Pai Foudnation*** and ***Inamdar*** or else, it may violate the rights guaranteed to unaided minority and non-minority institutions.

118. Constitution of India has expressly conferred the power of judicial review on Courts and the Legislature cannot disobey the constitutional mandate or the constitutional principle laid down by Courts under the guise of social inclusiveness. Smaller inroad like Section 12(1)(c) may lead

to larger inroad, ultimately resulting in total prohibition of the rights guaranteed under Articles 19(1)(g), 29(2) and 30(1) as interpreted by the ***Pai Foundation*** and ***Inamdar***. Court, in such situations, owe a duty to lift the veil of the form and appearance to discover the true character and nature of the legislation and if it has the effect of bypassing or ignoring the constitutional principles laid down by the Constitutional Courts and violate fundamental rights, the same has to be nullified.

119**.** ***Pai Foundation*** and ***Inamdar*** have not laid down any new constitutional principle, but only declared what the law is. Constitutional principles laid by courts get assimilated in Articles 19(1)(g), 29(2) and 30(1) and can be undone not by legislation, but only by constitutional amendments. The object to be achieved by the legislation may be laudable, but if it is secured by a method which offends fundamental rights and constitutional principles, the law must be struck down as unconstitutional. The constitutional provision like Article 19(1)(g) is a check on the exercise of legislative power and it is the duty of the constitutional court to protect the constitutional rights of the

citizens against any encroachment, as it is often said, "smaller inroad may lead to larger inroad and ultimately resulting into nationalization or even total prohibition." Section 12(1)(c), if upheld would resurrect ***Unni Krishnan*** scheme which was nullified by ***Pai Foundation*** and ***Inamdar.***

120. I am, therefore, of the view that so far as unaided educational institutions both minority and non-minority are concerned the obligation cast under Section 12(1)(c) is only directory and the said provision is accordingly read down holding that it is open to the private unaided educational institutions, both minority and non-minority, at their volition to admit children who belong to the weaker sections and disadvantaged group in the neighbourhood in their educational institutions as well as in pre-schools.

(B) <u>Aided Educational Institutions, minority and non-minority:</u>

121. Section 12(1)(b) deals with the schools receiving aid or grants to meet whole or part of its expenses from the appropriate government or local authority. Those schools are

bound to provide free and compulsory elementary education to such proportion of children subject to a minimum of 25% depending upon its annual recurring aid or grants so received. ***Pai Foundation*** has clearly drawn a distinction between aided private educational institutions and unaided private educational institutions both minority and non-minority. So far as private aided educational institutions, both minority and non-minority are concerned, it has been clearly held in ***Pai Foundation*** that once aid is provided to those institutions by the Government or any state agency, as a condition of grant or aid, they can put fetters on the freedom in the matter of administration and management of the institution. Aided institutions cannot obtain the extent of autonomy in relation to the management and administration as would be available to a private unaided institution. ***Pai Foundation*** after referring to ***St. Stephen*** judgment and Articles 29 and 30 held that even if it is possible to fill up all the seats with minority group the moment the institution is granted aid the institution will have to admit students from non-minority group to a reasonable extent without annihilating the character of the institution. In ***St. Stephen*** case which I have already dealt with in the earlier paragraphs

of the judgment, the Court held that the State may regulate intake in a minority aided educational institution with due regard to the need of the community of that area where the institution is intending to serve. However, it was held in no case such intake shall exceed 50% of the annual admission. Minority aided educational institutions, it was held, shall make available at least 50% of the annual admission to the members of the communities other than minority community. The Court also held by admitting a member of a non minority into a minority institution, it does not shed its character and cease to be a minority institution and such "sprinkling of outsiders" would enable the distinct language, script and culture of a minority to be propagated amongst non members of a particular community and would indeed better serve the object of serving the language, religion and culture of that minority. I may also add that Section 12(1)(b) equally safeguards the rights of the members of religious and linguistic minority communities. Section 2(e) deals with the 'child belonging to weaker section' of the minority communities, religious or linguistic, who would also get the benefit of Section 12(1)(b) and, therefore, the contention that Section 12(1)(b), as such, would stand against the interest of

the religious and linguistic minority communities is unfounded.

122. Applying the principle laid down in ***Pai Foundation, Inamdar, St. Stephen*** and ***in Re. Kerala Education Bill,*** I am of the view that clause 12(1)(b) directing the aided educational institutions minority and non-minority to provide admission to the children of the age group of 6 to14 years would not affect the autonomy or the rights guaranteed under Article 19(1)(g) or Article 30(1) of the Constitution of India. I, therefore, reject the challenge against the validity of Section 12(1)(b) and hold that the provision is constitutionally valid.

PART V

123. Private unaided educational institutions, apart from challenging Section 12(1)(c), have also raised various objections with regard to other provisions of the Act. Learned senior counsels appearing for them submitted that Sections 3, 6, 7, 8 and 9 read with Sections 4, 5 and 10 impose duties and obligations upon the appropriate government and local authority and those sections completely answer and fulfill the mandate contained in Article 21A as against the State.

Section 3 recognizes the right of the child to free and compulsory education in a neighbourhood school. Unaided educational institutions have only a negative duty of not interfering with the right of the child and not to unreasonably interfere with the realization of those rights and there is no obligation to surrender their rights guaranteed under Article 19(1)(g) and Article 30(1), recognized in ***Pai Foundation*** and ***Inamdar***. Children can, therefore, enforce their constitutional and statutory rights against the educational institutions run by the State, local authority qua aided educational institution and not against unaided minority and non-minority educational institutions. It is so declared.

124. Petitioners have not raised any objection with regard to prohibition imposed under Section 13 against collecting the capitation fee which they are bound to follow even on the declaration of law, by ***Pai Foundation*** and ***Inamdar.*** Petitioners submitted that a fair and transparent screening procedure is being followed by all the schools. So far as Section 14 is concerned, petitioners have submitted that schools always give opportunity to the child/parent to produce some authentic proof to ascertain the age of the

child. Petitioners, referring to Section 15, submitted that the child has to adhere to the academic procedure laid down by the institutions and there will be no denial of admission to the children subject to the availability of seats. With regard to Section 16, it was contended that the prohibition against holding back any student in any class or expelling any student regardless of how grave the provocation may be, imposes unreasonable and arbitrary restriction which would completely destroy the unique educational system followed by some of the unaided educational institutions.

125. Shri Chander Uday Singh, senior counsel appearing in Writ Petition (Civil) No. 83 of 2011, submitted that they are following the International Baccalaureate system of education; the syllabus, curriculum, method of instructions are totally different from other schools. There are no day scholars, and all the students have to stay in the Boarding and the school fees is also high. Most of the students studying in the school are not from the neighbourhood but from all over the country and abroad. School has its own rules and regulations. Prohibition of holding back and expulsion of students in an unaided private educational

institution depends upon the academic and disciplinary procedure laid down by the school and its parent body. Counsel, referring to Section 17 of the Act, submitted that the prohibition of physical punishment and mental harassment is a welcome provision which the schools follow.

126. Learned senior counsel also submitted that some of their schools are not affiliated or recognized by any State Education Board or the Board constituted by the Central Government or the Indian Council of Secondary Education etc. and those schools generally follow the rules laid down by the recognizing body and are, therefore, unable to fulfill the norms and standards specified in the schedule referred to in Section 19.

127. Counsel appearing for the unaided institutions contended that the curriculum and evaluation procedure laid down by the body affiliating or recognizing the institutions are being followed by them and the provisions stipulated in Section 29(2) are generally being adhered to by their schools. With regard to Section 23 of the Act, counsels submitted that some of the unaided private educational institutions employ the teachers from outside the country as it encourages cross-

fertilization of ideas and educational systems and practices and the qualifications provided by the institutions may not be as prescribed under Section 23 of the Act and the qualifications provided therein may not be sufficient for appointment as teachers in the schools affiliated to International Baccalaureate system. Learned counsel appearing for the unaided private educational institutions also referred to Rules 9, 11 to 15 and 23 and explained how it affects their autonomy and status of their institutions.

128. I have extensively dealt with the contentions raised by the unaided private educational institutions and I am of the view that not only Section 12(1)(c), but rest of the provisions in the Act are only directory so far as those institutions are concerned, but they are bound by the declaration of law by ***Pai Foundation*** and ***Inamdar***, like there shall be no profiteering, no maladministration, no demand for capitation fee and so on and they have to follow the general laws of the land like taxation, public safety, sanitation, morality, social welfare etc.

129. I may indicate that so far as the rest of the schools are concerned, including aided minority and non-minority

educational institutions, they have necessarily to follow the various provisions in the Act since I have upheld the validity of Section 12(1)(b) of the Act. Certain objections have also been raised by them with regard to some of the provisions of the Act, especially by the aided minority community. Contention was raised that Sections 21 and 22 of the Act, read with Rule 3, cast an obligation on those schools to constitute a School Management Committee consisting of elected representatives of the local authority which amounts to taking away the rights guaranteed to the aided minority schools, under Article 30(1) of the Constitution. Learned Additional Solicitor General has made available a copy of a Bill, proposing amendment to Section 21, adding a provision stating that the School Management Committee constituted under sub-section (1) of Section 21 in respect of a school established and administered by minority whether based on religion or language, shall perform advisory functions only. The apprehension that the committee constituted under Section 21(1) would replace the minority educational institution is, therefore, unfounded. [Ref. F.No.1-22009-E.E-4 of Government of India (Annexure A-3)].

130. Petitioners have also raised objections against the restrictions imposed in following any screening procedure before admitting children to their schools under Sections 13 or 14 of the Act, which according to the petitioners, takes away the autonomy of the institutions. Several representations were received by the Ministry of Human Resources and Development, Government of India seeking clarification on that aspect and the Ministry issued a notification dated 23.11.2009 under Section 35(1) of the Act laying guidelines to be followed by both unaided and aided educational institutions. It was pointed out that the object of the provisions of Section 13(1) read with Section 2(d) is to ensure that schools adopt an admission procedure which is non-discriminatory, rational and transparent and the schools do not subject children and their parents to admission tests and interviews so as to deny admission. I find no infirmity in Section 13, which has nexus with the object sought to be achieved, that is access to education.

131. Contention was also raised by them against Section 14(2) which provides that no child shall be denied admission in a school for lack of age proof which, according to them, will

cause difficulty to the management to ascertain the age of the child. Section 14 stipulates that the age of a child shall be determined on the basis of the birth certificate issued in accordance with the provisions of the Birth, Death and Marriages Registration Act, 1986, or the other related documents. The object and purpose of Section 14 is that the school shall not deny access to education due to lack of age proof. I find no legal infirmity in that provision, considering the overall purpose and object of the Act. Section 15 states that a child shall not be denied admission even if the child is seeking admission subsequent to the extended period. A child who evinces an interest in pursuing education shall never be discouraged, so that the purpose envisaged under the Act could be achieved. I find no legal infirmity in that provision.

132. Challenge was also made to Section 16 of the Act stating that it will lead to indiscipline and also deteriorate the quality of the education, which I find difficult to agree with looking to the object and purpose of the Act. Holding back in a class or expulsion may lead to large number of drop outs from the school, which will defeat the very purpose and object

of the Act, which is to strengthen the social fabric of democracy and to create a just and humane society. Provision has been incorporated in the Act to provide for special tuition for the children who are found to be deficient in their studies, the idea is that failing a child is an unjust mortification of the child personality, too young to face the failure in life in his or her early stages of education. Duty is cast on everyone to support the child and the child's failure is often not due the child's fault, but several other factors. No legal infirmity is found in that provision, hence the challenge against Section 16 is rejected.

133. Petitioners have not raised any objection with regard to Section 17, in my view, rightly. Sections 18 and 19 insist that no school shall be established without obtaining certificate of recognition under the Act and that the norms and standards specified in the schedule be fulfilled, if not already fulfilled, within a stipulated time. There is nothing objectionable in those provisions warranting our interference. Section 23, in my view, would not take away the freedom of aided minority educational institutions for the reasons already stated by us. No infirmity is also found with regard

to Sections 24 to 28 of the Act since the object and purpose of those provisions are to provide education of satisfactory quality so that the ultimate object of the Act would be achieved.

134. Learned counsel also submitted that some of the aided minority and non-minority educational institutions are following the curriculum as laid down by independent recognized Boards such as CBSE, ICSE etc. and they are competent bodies for laying down such procedures and in case those schools are compelled to follow the curriculum and evaluation procedure laid down in Section 29, the schools would be put to considerable inconvenience and difficulties and may affect the quality of education.

135. I am of the view that requiring the minority and non-minority institutions to follow the National Curriculum Framework or a Curriculum Framework made by the State, would not abrogate the right under Article 19(1)(g) or Article 30(1) of the Constitution. Requirement that the curriculum adopted by a minority institution should comply with certain basic norms is in consonance with the values enshrined in the Constitution and cannot be considered to be violative of

the rights guaranteed to them under Article 30(1). Further, the curriculum framework contemplated by Section 29(1) does not subvert the freedom of an institution to choose the nature of education that it imparts, as well as the affiliation with the CBSE or other educational boards. Over and above, what has been prescribed by those affiliating or recognizing bodies is that these schools have also to follow the curriculum framework contemplated by Section 29(1) so as to achieve the object and purpose of the Act. I, therefore, find no infirmity in the curriculum or evaluation procedure laid down in Section 29 of the Act.

136. Section 30 of the Act which provides that no child shall be required to pass any Board examination till the completion of elementary education and that on completion of elementary education, the child shall be awarded a certificate. Education is free and compulsory for the children of the age 6 to 14 years and the object and purpose is to see that children should complete elementary education. If they are subjected to any Board Examination and to any screening procedure, then the desired object would not be achieved. The object and purpose of Section 30 is to see that a child

shall not be held back in any class so that the child would complete his elementary education. The Legislature noticed that there are a large number of children from the disadvantaged groups and weaker sections who drop out of the schools before completing the elementary education, if promotion to higher class is subject to screening. Past experience shows that many of such children have dropped out of the schools and are being exploited physically and mentally. Universal Elementary Education eluded those children due to various reasons and it is in order to curb all those maladies that the Act has provided for free and compulsory education. I, therefore, find no merit in the challenge against those provisions which are enacted to achieve the goal of universal elementary education for strengthening the social fabric of the society.

137. Counsel appearing for some of the aided minority institutions raised a doubt as to whether the Act has got any impact on the Freedom of Religion and Conscience guaranteed under Article 25 insofar as it applies to institutions run by a religious denomination. It was clarified by the Union of India that the Act would apply to institutions

run by religious denominations in case the institution predominantly offers primary education either exclusively or in addition to religious instruction. It was pointed out that where the institution predominantly provides religious instructions like Madrasas, Vedic Pathshalas etc. and do not provide formal secular education, they are exempted from the applicability of the Act. The Act, therefore, does not interfere with the protection guaranteed under Articles 25 and 26 of the Constitution and the provisions in the Act in no way prevent the giving of religious education to students who wish to take religious education in addition to primary education. Article 25 makes it clear that the State reserves the right to regulate or restrict any economic, financial, political or other secular activities which are associated with religious practice and also states that the State can legislate for social welfare and reform, even though by doing so it would interfere with the religious practices. Madrasas and Vedic Pathshalas, as I have already indicated, predominantly provide religious instruction and do not provide formal secular education and, hence, they are exempted from the applicability of the Act. The Central Government has now issued Guidelines dated 23.11.2010 under Section 35(1) of the Act clarifying the above

position. The operative part of the guidelines reads as under:

> "3. Institutions, including Madrasas and Vedic Pathshalas, especially serving religious and linguistic minorities are protected under Articles 29 and 30 of the Constitution. The RTE Act does not come in the way of continuance of such institutions, or the rights of children in such institutions."

Madrasas, Vedic Pathshalas and similar institutions serving religious and linguistic minorities as such are, therefore, protected under Articles 29 and 30 of the Constitution from the rigour of the Act.

138. The Act has now brought in the concept of public-private partnership for achieving the goal of Universal Elementary Education. It also stresses upon the importance of preparing and strengthening the schools to address all kinds of diversities arising from inequalities of gender, caste, language, culture, religious or other disabilities. The concept of neighbourhood schools has also been incorporated for the first time through a legislation and the right of access of the children to elementary education of satisfactory and equitable quality has also been ensured. The duties and responsibilities of the appropriate government, local

authorities, parents, schools and teachers in providing free and compulsory education, a system for protection of the right of children and a decentralized grievance mechanism has been provided by the Legislature. Obligation has also been cast on the State and the local authority to establish neighbourhood schools within a period of three years from the commencement of the Act and the Central Government and the State Governments have concurrent responsibilities for providing funds for carrying out all the provisions of the Act and the duties and responsibilities cast on the local authorities as well. A provision has also been made in the Act for pre-school education for children above the age of three years. The purpose is to prepare them for elementary education and to provide early childhood care and education for all children until they complete the age of six years and the appropriate government has to take necessary steps for providing free pre-school education for such children. Further, the Act also cast a duty on every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, for an elementary education in the neighbourhood school, which is in conformity with Article 51A(k) of the Constitution.

139. The State has played a dominant role in providing educational services through the Government schools, largely managed by State Governments and local bodies, as well as through privately managed but publicly funded schools called government-aided schools. These aided schools are operated by charitable trusts, voluntary organizations, and religious bodies but receive substantial funding from the government. According to the Indian Human Development Survey (IHDS), 2005 about 67% of students attend government schools, about 5% attend government-aided schools, and 24% attend private schools. Convents and Madrasas account for about 1-2%. The survey conducted by IHDS indicates that in 2005 about 21% of rural and 51% of urban children were enrolled in private schools. Part of this increase in private school enrolment has come about through a decline in enrolment in government-aided schools. In 1994, nearly 22% of rural children were enrolled in government-aided schools. By 2005, this declined to a bare 7% in rural areas and 5% in urban areas. At an all India level, 72% of children are enrolled in government schools, and about 28% are in private schools. The survey further indicates that the children

between 6-14 years old, about 40% participated in private sector education either through enrolment in private school (20%), through private tuition (13%), or both (7%). The growing preference for private schooling and the reliance on private tutoring, has to be seen in the context of differences in admission of children in government and private schools. The quality of education in government schools, due to various reasons, has gone down considerably. The Act is also envisaged on the belief that the schools run by the appropriate government, local authorities, aided and unaided, minority and non-minority, would provide satisfactory quality education to the children, especially children from disadvantaged and weaker sections.

140. Private aided educational institutions, though run on aid and grant provided by the State, generally the payment to such schools is not performance oriented. The State Governments provide 100% salary to the teachers on its roll on monthly basis and some State Governments would provide 90%. Generally, the State Governments do not provide capital cost either for construction or for repair and whenever these schools are aided, the school fee is regulated

and is generally equal to the fee prevailing in the government schools. The recruitment of teaches by these schools is also subject to the Government regulation like inclusion of a representative of the Government in the selection committee, or the appointment being subject to the approval of the Government.

141. Currently, all taxes in India are subject to the education cess, which is 3% of the total tax payable. With effect from assessment year 2009-10, Secondary and Higher Secondary Education Cess of 1% is applicable on the subtotal of taxable income. The proceeds of the cess are directed to a separate non lapsable fund called Prarambhik Shiksha Kosh (PSK), setup by Government of India, to exclusively cater to the elementary education in India. This fund is under the control of the Ministry of Human Resource and Development (MoHRD) and is typically utilized for its flagship programmes – Sarva Sikksha Abhiyaan (SSA) and the Mid-day Meal Scheme (MDMS).

142. The statistics would indicate that out of the 12,50,775 schools imparting elementary education in the country in 2007-08, 80.2% were all types of government

schools, 5.8 % private aided schools and 13.1% private unaided schools. Almost 87.2% of the schools are located in the rural areas. In the rural areas the proportion of private unaided schools is only 9.3% and that of aided schools is 4.7%. However, in the urban areas, the percentage of private unaided and aided schools are as high as 38.6% and 13.4% respectively.

143. Out of the total students enrolled in primary classes in 2007-08 about 75.4, 6.7 and 17.8% are enrolled in government, aided and unaided schools. The total number of teachers working in these schools in 2007-08 was 56,34,589 of which 69.3, 10.4 and 20.7% are teaching in government, aided and private schools, the average number of teachers per school being 3.9, 8.3 and 6.7% respectively. The statistics would indicate that the Government schools have the highest percentage of teachers who are professionally trained at 43.4%, followed by aided school (27.8%) and unaided private schools (only 2.3%). However, the learning achievements are higher in private schools compared to Government schools. Going through the objects and reasons of the Act, the private unaided educational institutions are

roped in not due to lack of sufficient number of schools run by the appropriate Government, local authorities or aided educational institutions, but basically on the principle of social inclusiveness so as to provide satisfactory quality education. Some of the unaided educational institutions provide superior quality education, a fact conceded and it is a constitutional obligation of the appropriate Government, local authority and aided schools not only to provide free and compulsory education, but also quality education.

144. Positive steps should be taken by the State Governments and the Central Government to supervise and monitor how the schools which are functioning and providing quality education to the children function. Responsibility is much more on the State, especially when the Statute is against holding back or detaining any child from standard I to VIII.

145. Mr. Murray N. Rothbard, an eminent educationist and Professor in Economics, in his Book "Education: Free and Compulsory" [1999, Ludurg von Mises Institute, Auburn, Aliana] cautioned that progressive education may destroy the independent thought in the child and a child has little

chance to develop his systematic reasoning powers in the study of definite courses. The Book was written after evaluating the experiences of various countries, which have followed free and compulsory education for children for several years. Prohibition of holding back in a class may, according to the author, result that bright pupils are robbed of incentive or opportunity to study and the dull ones are encouraged to believe that success, in the form of grades, promotion etc., will come to them automatically. The author also questioned that since the State began to control education, its evident tendency has been more and more to act in such a manner so as to promote repression and hindrance of education, rather than the true development of the individual. Its tendency has been for compulsion, for enforced equality at the lowest level, for the watering down of the subject and even the abandonment of all formal teaching, for the inculcation of obedience to the State and to the "group," rather than the development of self-independence, for the deprecation of intellectual subjects.

146. I am of the view that the opinions expressed by the academicians like Rothbard command respect and cannot be

brushed aside as such because, much more than anything, the State has got a constitutional responsibility to see that our children are given quality education. Provisions of the statute shall not remain a dead letter, remember we are dealing with the lives of our children, a national asset, and the future of the entire country depends upon their upbringing. Our children in the future have to compete with their counter-parts elsewhere in the world at each and every level, both in curricular and extra-curricular fields. Quality education and overall development of the child is of prime importance upon which the entire future of our children and the country rests.

147. The legislation, in its present form, has got many drawbacks. During the course of discussion, the necessity of constituting a proper Regulatory Body was also raised so that it can effectively supervise and monitor the functioning of these schools and also examine whether the children are being provided with not only free and compulsory education, but quality education. The Regulatory authority can also plug the loopholes, take proper and steps for effective implementation of the Act and can also redress the

grievances of the children.

148. Learned Attorney General for India has favoured the setting up of an Adjudicatory/Regulatory Authority to determine the question whether compliance with Section 12(1)(b) and Section 12(1)(c) will have an adverse impact on the financial viability of the school, and if so, to suggest remedies and to deal with issues like expulsion etc. Learned Attorney General indicated the necessity of a statutory amendment if the Regulatory/Adjudicatory body has to be set up under the Act. Proper adjudication mechanism may also pave the way for a successful and effective public-private partnership for setting up educational institutions of best quality so that our children will get quality education. I am sure that the Government will give serious attention to the above aspect of the matter which are of prime importance since we are dealing with the future of the children of this country.

PART VI

CONCLUSIONS

1. Article 21A casts an obligation on the State to provide

free and compulsory education to children of the age of 6 to 14 years and not on unaided non-minority and minority educational institutions.

2. Rights of children to free and compulsory education guaranteed under Article 21A and RTE Act can be enforced against the schools defined under Section 2(n) of the Act, except unaided minority and non-minority schools not receiving any kind of aid or grants to meet their expenses from the appropriate governments or local authorities.

3. Section 12(1)(c) is read down so far as unaided non-minority and minority educational institutions are concerned, holding that it can be given effect to only on the principles of voluntariness, autonomy and consensus and not on compulsion or threat of non-recognition or non-affiliation.

4. No distinction or difference can be drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c) of the Act. Such an

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.

5. The Appropriate Government and local authority have to establish neighbourhood schools as provided in Section 6 read with Sections 8 and 9, within the time limit prescribed in the Statute.

6. Duty imposed on parents or guardians under Section 10 is directory in nature and it is open to them to admit their children in the schools of their choice, not invariably in the neighbourhood schools, subject to availability of seats and meeting their own expenses.

7. Sections 4, 10, 14, 15 and 16 are held to be directory in their content and application. The concerned authorities shall exercise such powers in consonance with the directions/guidelines laid down by the Central Government in that behalf.

8. The provisions of Section 21 of the Act, as provided, would not be applicable to the schools covered under

sub-Section (iv) of clause (n) of Section 2. They shall also not be applicable to minority institutions, whether aided or unaided.

9. In exercise of the powers conferred upon the appropriate Government under Section 38 of the RTE Act, the Government shall frame rules for carrying out the purposes of this Act and in particular, the matters stated under sub-Section (2) of Section 38 of the RTE Act.

10. The directions, guidelines and rules shall be framed by the Central Government, appropriate Government and/or such other competent authority under the provisions of the RTE Act, as expeditiously as possible and, in any case, not later than six months from the date of pronouncement of this judgment.

11. All the State Governments which have not constituted the State Advisory Council in terms of Section 34 of the RTE Act shall so constitute the Council within three months from today. The Council so constituted shall undertake its requisite functions in accordance with the provisions of Section 34 of the Act and advise the

Government in terms of clauses (6), (7) and (8) of this order immediately thereafter.

12. Central Government and State Governments may set up a proper Regulatory Authority for supervision and effective functioning of the Act and its implementation.

13. Madrasas, Vedic Pathshalas etc. which predominantly provide religious instructions and do not provide for secular education stand outside the purview of the Act.

149. The Writ Petitions are disposed of as above. This Judgment would have prospective operation and would apply from the next academic year 2012-13 onwards. However, admissions already granted would not be disturbed. We record our deep appreciation for the valuable assistance rendered by the counsel appearing for the both sides.

.....J.
(K. S. RADHAKRISHNAN)

New Delhi;
April 12, 2012