

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 03.07.2018
Pronounced on: 29.10.2018

+ **W.P.(C) 3420/2016, C.M. APPL. 14626/2016, 19283/2018 & 23948/2018**

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES..Petitioner
Through: Sh. Parag. P. Tripathi, Sr. Advocate with Ms. Ekta
Sikri, Ms. Mishika Bajpai and Ms. K. Gayatri, Advocates.

Versus

GOVT. OF NCT AND ANR.Respondents
Through: Sh. Devesh Singh, ASC (Civil) with Ms. Sukriti
Ghai, Advocate, for GNCTD.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The Petitioner (hereafter “VIPS”) challenges the constitutional validity and *vires* of the proviso to Section 13 of the Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence) Act, 2007 (the "Act"), enacted by the Legislative Assembly of the National Capital Territory of Delhi. Also, Rule 8 (2) (a) of the Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to ensure equity and Excellence) Rules, 2007 (the "Rules") issued by the Government of NCT of Delhi, Directorate of Higher Education; (hereafter “NCT”) dealing with the provisions of admission of students to the management quota in professional unaided institutions in the NCT of Delhi, as violating its rights under Articles 14, 19 (1)(g) and 21 of the Constitution of

India. A declaration to strike down Section 6(12)(c) read with Section 10(1), as far as they apply to management seats, and the embargo to charge a fee other than what is chargeable from management seat students, is sought.

2. The facts are that the petitioner is privately owned self-financing (unaided) institution which has been established in the year 2000 by the STRENGTH India Foundation, a society registered under the Societies Act, 1860. The aim of the foundation and that of the Petitioner is to establish centres for excellence in undergraduate and/or postgraduate admissions. The Petitioner College provides 9 undergraduate and postgraduate courses [7 Undergraduate (UG) and two postgraduate (PG)]. It is affiliated to the Guru Gobind Singh Indraprastha University and various statutory bodies such as the Bar Council of India & AICTE, and as such has been consistently rated as an "A" category institution by various bodies, for which the Petitioner has to continue to expend huge amounts of expenditure of about ₹ 20 crores annually and as such the fees from the students is the only source of generating revenue that the Petitioners. The Petitioner has a yearly intake of 1780 students for the degree courses offered of out which 178 seats i.e. 10% of total seats are allocated for the management quota. The petitioner, as a private unaided institute is governed by the provisions of the Act. The Act and the rules were notified in 2007. It is averred that on 12.11.2013, the petitioner institution received an order granting provisional affiliation for conduct of 8 courses for AY 2011 to 2014. On 19.12.2014 an order was issued, continuing provisional affiliation for conduct of various courses for academic sessions 2014-2015. On 07.04.2015, an order was issued by the All India Council for Technical Education, continuing the provisional affiliation of the Petitioner for academic year 2015-16.

3. The petitioner relies on a tabular chart which shows increase in its revenue expenditure, progressively, in the past. It is also submitted that capital expenditure [including building, air conditioner, computer, office equipment's, library books,

software, furniture and fixture, projector, UPS, telephone equipment and studio equipment] has a steady trend. The table is as follows:

Item	2015	2014	2013	2012	2011
Total Revenue expenditure	18,30,34,868	16,42,63,727	10,52,68,996	59370744	34249106
	2,66,03,173	2,66,03,173	2,66,03,173	17,00,99,407	17,00,99,407

4. The Petitioner has a yearly intake of 1780 students for the degree courses offered of out which 178 seats i.e. 10% of total seats are allocated for the management quota along with general quota. In other words, each postgraduate / under-graduate course that is offered by the Petitioner offers admission through a) general quota and b) management quota. The petitioner describes the procedure for admission through the General Quota as follows:

a) The GGSIP University invites the applications in the month of Feb-March every year and candidates have to apply online for the Common Entrance Test (CET). The details of each course are provided in the admission brochure which sets forth the basic qualifications that are required for appearing in the CET for each course as also the proposed timelines.

b) The result of CET is declared as per the notification of the GGSIPU and a merit list is drawn up on the basis of rank obtained by the candidate in the CET for each programme. Thus, the yardstick of the merit is the CET Rank.

c) Three rounds of counselling are conducted by the University. In the event that there is any seat lying vacant, "spot counselling" is conducted for the vacant seats. The Petitioner is affiliated to the GGSIP University; it follows the procedure described above for admissions to general quota for the 90% seats.

5. The Act, according to the petitioner, was premised on and aimed towards removing exploitative practices from education and ensuring equity and excellence in education. Section 13 of the Act set forth that admission shall be given on the

basis of a common entrance test. However, the proviso to Section 13 sets out that admission to management quota may be given on the basis of marks obtained in the qualifying examination, which has been prescribed by the GGSIPU (designated agency) as the Class 12 examination for Undergraduate (UG) courses. That as such, *ex-facie*, nothing remains for the Petitioner or any such private college in the exercise of its right to admit students into their institutions through the management quota on complying with the procedure which has been spelt out in Rule 8 (2) (a), the scheme of which is as under:

- a) The University conducts the Common Entrance Test ("CET"). All applicants immaterial of management quota or general quota are to appear in the examination.
- b) After declaration of results of the CET, the institution concerned issues an Admission Notice inviting applicants to seek admission in the Institution under management quota. This notice has to be published in two leading dailies. One in English and one in Hindi as also on the website of the Institution concerned. Further, by this Notice, the Institution concerned must also set forth all relevant details for submission of completed application.
- c) The candidate then applies through an Application form for management quota. She has to *inter alia* enclose the Class XII mark sheet of the Qualifying Examination; for undergraduate programmes as well as to indicate the rank of CET.
- d) Upon receiving the Applications, the Institution is to prepare a merit list from the applications so received on the basis of marks obtained in the qualifying examination. This merit list is to be displayed on the website of the institution within 2 closing days for receipt of applications for management quota.
- e) Thereafter, counselling is to be conducted on the basis of the merit list within 3 days of drawing up of the merit list of management quota applicants. There cannot be more than two counselling sessions. The list of applicants who will be called for a given round of counselling is displayed on the institution's website as well as its notice board;

- f) At the end of each round of counselling, the applicants admitted to the management quota seats will be published and displayed on the website of the institution.
- g) The last date for filling up management quota seats is nine (9) calendar days after the last date for regular admissions in the University and the concerned course.
- h) The Institution concerned after filling up the management quota seats shall furnish an Affidavit setting out that the procedure prescribed under the Rules has been followed in a transparent manner and that admissions have been done without any prejudice or undue favour. This Affidavit is to be furnished to the designated agency and will be accompanied with a list of successful candidates admitted under the management quota.
- i) The admission continues to be provisional until the designated agency ratifies the admission. This decision is to be conveyed within a day of being informed by the institution of the list of successful candidates.

6. The petitioner complains that the procedure set out in the rules is inflexible and has the result of not giving any autonomy to it or private unaided colleges and institutions. It is highlighted that the basis of determining merit / preparing the merit list for admission through the management quota is the exclusive qualifying examination (Class XII) for undergraduate courses. It is on this basis that the merit list is drawn up. Every applicant has to appear in the CET; yet the merit order/rank obtained in the CET is of no consequence for admission through the management quota. It is submitted that the procedure set forth in Rule 8 (2) (a) sets forth, apart from the yardstick to adjudge merit, the timelines involved in admitting students through the management quota and the steps involved to fill up management seats from the very inception. The procedure set out in the Rules has been given a non-derogable element by prescribing that the Institution concerned admitting students through the management quota is to furnish an Affidavit which affirms that the

procedure set forth in the rules has been followed as also provide the name and details of the students who are proposed to be admitted through the management quota. It is argued that given the mandatory and non-derogable nature of the procedure including but not limited to determination of "merit" there vests no discretion and / or autonomy with the institution concerned in the process of admitting students/applicants through the management quota. It is contended that while for the general quota the yardstick for judging "merit" was rank / marks obtained in the common entrance test (CET), the yardstick for merit for management quota is exclusively marks obtained in the in the qualifying examination i.e. the Class 12 examination for undergraduate programmes. The procedure set forth in Rule 8 (2) (a) also mandatorily prescribes the yardstick by which merit is to be adjudged viz. the marks in the qualifying examination I.e. Class XII.

7. Mr. Parag Tripathi learned senior counsel argued that the procedure enacted and prescribed, is both arbitrary and / or illegal as it not only encroaches upon the right to administer the Institution provided under Article 19 (1) (g) by prescribing a procedure *per se* for the management seats, but also is contrary to Article 14 of the Constitution of India. This is primarily since (a) the marks obtained in the Qualifying examination of different boards is a variable thereby making it an unfit benchmark to adjudge merit. Particularly, for the purposes of Class 12/Qualifying exam, there are 3 main streams viz. Commerce, Science and Humanities. These streams then can be customized by each student depending on the school/board under which each student is applying. While some streams and/or their customizations are scoring, the others and/or their customizations are not. Further, it is also submitted that a number of different boards are permitted to be considered as the "Qualifying Examination", which adds to the arbitrary nature of considering merit. In light of the above, it is clear that the benchmark for consideration of merit is highly variable depending upon the nature and circumstances and therefore is

arbitrary. That apart usage of such a variable benchmark can in no event have any rational nexus to the objective of the Act which is to ensure equity in admission. Given that this arbitrary and variable yardstick is at the heart of the admission process for management quota, there exists an aura of impunity on the same. Therefore, *ex-facie* there exists a violation of Article 14 of the Constitution of India in the proviso to Section 13 (2) of the Act read with the Rules.

8. Mr. Tripathi, contended that given the fact that the Rules and the Act prescribes a mandatory procedure that is to followed by every institution, no discretion / autonomy is left with it in the process of admission. By prescribing a non-derogable and mandatory benchmark for merit, the role of an institution in admitting students has been completely nullified. Accordingly, while the Constitution guarantees a right under Article 19 (1) (g) to administer institutions, a norm purportedly emanating therefrom nullifies it. Accordingly, on this ground alone Rule 8 (2) (a) ought to be held unconstitutional.

9. Mr. Tripathi argued that there is no uniformity between the Act and the Rules. Significantly while the proviso to Section 13 does not make consideration of the Qualifying Examination as a yardstick of merit mandatory, Rule 8 (2) (a) (v) makes it so. This translates into a situation where the Rules made in pursuance of a particular statute have an over-riding effect over the statute itself. It is submitted that the right of the Petitioner under Article 19 (1)(g). Article 14 and Article 21 has in fact been judicially recognized by the Courts through its decisions in the case of *TMA Pai Foundation v. State of Karnataka* [2002] 8 SCC 481 wherein a 11 judge bench was pleased to *inter alia* hold that the right to occupation under Article 19 (1) (g) includes the right to establish and administer educational institutions. Further, by the said judgment the court also held that autonomy has to be afforded to private unaided non-minority institutions to regulate their affairs. This was reiterated/crystallized through the cases of *Islamic Academy of Education v. State*

of Karnataka [2003] 6 SCC 697 and *P.A. Inamdar & Ors. v. State of Maharashtra & Ors.* [2005] 6 SCC 537. These judgments enunciate that:

(a) private unaided non minority educational institutions have the right to administer the institutions under Article 19 (1) (g) of the Constitution of India; and
(b) the right to make different quota such as NRI quota, management quota and/or provide for procedures for admission is a right intrinsic to Article 19 (1) (g) of the Constitution of India. However, in doing so, the Institution must observe merit and not fill up seats in quotas without considering merit.

10. It was also argued that apart from the above excessive regulation in the admission of management students the Petitioner also seeks to challenge another aspect that is the control exercised by the State in fee regulation in management seats. That the Petitioner in terms of the said Act is charging similar fee from, both, the general category students as well as from the Management Quota student, as fixed by the Fee Regulatory Committee, under section 6 (12) (c) of the Act read with the section 10 of the Act, the Petitioner University cannot collect any fee over and above the fee determined by the Fee Regulatory Committee by whatever name called. For ease of reference the relevant portion of section 6 (12)(c) and section 10 are extracted below:

"Section 6 (12): The Fee Regulatory Committee shall have power to:-

(c) approve the fee structure or determine some other fee which can be charged by the institution."

It is pointed out that Section 10 (1) states that

" Fees not to be collected excessively 10 (1) No institution shall collect any fee, by whatever name called from the candidate, for admission, over and above the fee determined by the Fee Regulatory Committee and notified by the Government"

11. In terms of the provision contained in Section 6 (1) the Act of 2007, the State Fee Regulatory Committee is to be constituted by the Government by

notification in the official gazette to determine the fee for pursuing courses in self-financing Institutions offering different courses in the NCT of Delhi. Section 7 of the said Act prescribed the factors to be considered by the State Fee Regulatory Committee to determine and fix the fee to be charged by the Institutions. Section 10 enjoins that no institution shall collect any fee, by whatsoever name called from the candidates, for admission, over and above the fee determined by the State Fee Regulatory Committee and notified by the Government. Mr. Tripathi submitted that no separate fee is being prescribed by the State Fee Regulatory Committee for (10%) Management Quota seats, the institutions have no option, but to charge the same fee for Management Quota as well. Thus, the Management also have no discretion to prescribe the fee for 10% Management Quota seats. It is argued that though the statute recognizes the distinction between merit or open seats that are regulated for the purpose of admission (through CET based merit) and are subjected to uniform fee regulation on the one hand, and management quota seats (which are a miniscule 10%) through statutory classification, the omission to prescribe a separate fee, or allow the managements of institutions to quote a different fee, is discriminatory and unreasonable. It is argued that private unaided institutions should have the choice of charging higher fee from the management quota students in recognition of their right to establish and administer educational institution guaranteed under Articles 19 (1) (g) and 21 of the Constitution of India.

12. Elaborating further, it is submitted that the provisions of the Act and rules are violative of Article 14, as it fails to classify management quota seats as separate from general quota seats, and thus impinges the right of the Petitioner to charge a higher fee from management quota as a distinct class. It is submitted that that the provisions of the Act read with the Rules, are arbitrary as has been demonstrated above owing inter-alia to (a) the unreasonable manner in which the rights and/or liberties have been diluted; (b) the restrictive and excessive interference in the realm of admission and fee regulation of students in the management quota. Mr.

Tripathi also pointed out that the Govt. of NCT, by failing to provide a separate fee for NRI quota candidates, acted arbitrarily. It is argued that such class of candidates is also statutorily recognized and forms the basis of a valid classification. Counsel urged that denying the right and autonomy to institutions to charge fee at a rate higher than those obtaining admission on the basis of merit performance in CET, in both the management quota and failure to provide a NRI quota with a higher fee, robs the essence of the right to establish and manage an educational institution of one's choice. It was urged that the ability to provide excellence through better teaching aids and modern technology and provide fair salaries to teaching staff and also generally provide facilities of international standards to the learning population, stultifies the right (to establish and administer an educational institution) and robs it of vitality. This, according to counsel, is arbitrary and unreasonable.

13. The Govt. of NCT of Delhi, which is arrayed as the respondent, submits that the Act was conceived and enacted in the light of the principles in *TMA Pai Foundation (supra)* and *Islamic Academy (supra)* judgments of the Supreme Court. The main objective of the enactment is to regulate the admission of students to professional colleges in a uniform, transparent and fair manner. According to the enactment and its various provisions, the objective is served through providing for a common entrance test (CET) as the basis for admission to such private colleges and also regulating the fee, which is determined by a fee regulatory committee. It is pointed out that Section 11 of the Act provides that “the Government shall notify the qualifying examination for admission to an institution”, and in Section 13 prescribes the manner of admission in institutions governed by the Act are to “make admission through a common entrance test to be conducted by the designated agency, in such manner, as may be prescribed”. The NCT's position is that the proviso, to which the petitioners take exception, is necessary because admission to management seats cannot be left unregulated and subjected to the

whims of individual colleges. The proviso states that management seats are to be advertised and filled up, from candidates who qualify the common entrance test, by the institution in a transparent manner based on the merit at the qualifying examination. It is submitted that if no criteria is prescribed, save that candidates, who are to qualify in the CET, there would be considerable scope of abuse, because the individual colleges would – for filling the management quota of seats, indulge in questionable and dubious practices and admit students who barely qualify in the CET, and are far lesser merited than those who obtain much higher marks. This will be deleterious to public interest and would foster ill will among the student community at large. Obviously, the consideration for admitting such students would be extraneous and not dependent upon academic merit.

14. It is also argued that while private institutions that set up colleges enjoy the right to carry on trade, or business which is constitutionally protected under Article 19 (1) (g) such activities are not immune to state regulation in the larger public interest. The college, in the impugned proviso, is enabled the autonomy to – at least for the management quota of seats- admit students provided they (a) qualify in the CET and (b) according to relative *inter se* merit in the qualifying examination (i.e. at the 10+2 level). The latter prescription is one method of ensuring transparency, and avoiding the scope of abuse of the management's position to admit students recklessly without any consideration of merit. It is pointed out that any particular institution thus had to follow CET based merit admissions for 90% of the merit quota in the college and for the rest, it has to ensure a basic level of proven proficiency i.e. qualification (or passing) of CET coupled with relative merit *among those who approach the institution for admission*. It was submitted that such a regulation cannot be termed as unreasonable because it factors in a non-arbitrary criterion, rather than leaving admission to the 10% management quota to the whims of individual institutions.

15. As regards the petitioners' complaint that though Section 7 prescribes for consideration of non-resident Indian funding to institutions, no specific provision for higher fee or for a separate quota is made, it is stated by the NCT that such classification is not necessary. It was contended on its behalf that the broad classification in terms of merit (or CET) quota and management quota having been made, it is not compulsory that the state should as of necessity provide for a NRI quota in all private unaided colleges, or a separate differential fee in that regard.

16. It was next argued that the criteria for admission to the 10% management quota, which is that the candidate should qualify in the CET and further on the basis of *inter se* merit (of the applicants to the concerned college or institution) in the qualifying examination is neither arbitrary nor unreasonable. Learned counsel relied upon the judgement of this court in *Association Of Self Financing Institutions vs Guru Govind Singh Indraprastha* [W.P.(C) 3262/2013, decided on 9th May, 2014) to say that the methodology prescribed in Section 13 was challenged, but upheld. Learned counsel relied upon the observations in the judgement and stated that when the entire procedure of filling seats through CET itself was under attack, and the court negated the contention after an elaborate discussion- holding that Section 13 and the method of filling seats by way of largest in number being through CET as opposed to management quota, was not was not unreasonable or arbitrary this court should not revisit the same issue. The question of challenging the procedure for admission to the management quota seats therefore, does not arise.

17. Learned counsel submitted that the mere prescription of qualification in the CET by itself was not sufficient, as it would have led to mischief by private managements which would have then found themselves free to admit anyone regardless of their attainment or educational proficiency, and without having regard to the demands of the course. It was submitted that amongst the various alternatives that could be chosen, such as a combination of the weightage of marks or marks in

the CET on the one hand and the marks obtained in the qualifying examination on the other, the NCT chose one which was that the merit in the qualifying examination, as reflected in the results of that exam, would be the determining decisive factor. This tended to minimise, if not eliminate arbitrariness on the part of the college altogether. If such minimum regulation were not put in place, argued counsel, the consideration for admission to management quota seats would have been primarily other than merit. The management would have in a clandestine manner and contrary to Section 14, collected some sort of fee as a condition precedent to admit students as long as they fulfilled the minimum prescribed i.e. the CET qualification or pass marks in the CET. To avoid this state of affairs, the government deemed it appropriate to state expressly in the parent enactment itself that the admission to management quota would be on the basis of qualification in the CET and merit based upon the qualifying examination results of the candidates who apply for admission to any institution.

18. It was urged that there was nothing inherently arbitrary or discriminatory in prescribing a uniform fee for management quota and the CET quota seats. Learned counsel highlighted the mechanism provided in the statute and the various factors that are to be taken into account by the Fee Regulatory Committee under section 7. It was also highlighted that the relevant provision in the rules, Rule 8 prescribes the criteria. Learned counsel submitted that as long as the petitioner or any particular institution cannot pinpoint that the fee fixed on a uniform basis for all classes of seats is plainly and manifestly arbitrary, having regard to the proven facts, it would be beyond the courts' jurisdiction to hazard a guess on the basis of a plain statutory classification. In other words, learned counsel submitted that there was no compulsion in the statute to necessarily follow statutory classification with respect to seats while working out the fees payable for either category of candidates. As long as the colleges were able to disclose material relevant for fee fixation that kept institutions viable and ensured revenue the committee were shown to have taken

them into account reasonably while fixing the fee a uniform fee prescribed *ipso facto* does not render the provision arbitrary. It is submitted that if any given institution felt that the fee fixation, at least for the management quota was arbitrary and led to harsh economic consequences, it could approach the committee and propose a different fee based upon objective facts. In the absence of that material, learned counsel submitted that the submission regarding discrimination merely on the superficial basis that a statutory classification for the purposes of admission compels a differential fee does not follow.

Analysis and Reasoning

19. Before considering the rival contentions it would be necessary to extract the relevant provisions of the Act and Rules. They are reproduced below:

Relevant provisions of the Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence) Act, 2007

“Section 3- Definitions

(m) *Management: means any person or body by whatever name called, managing the administration of an institution;*

(n) *management seat: means a seat to be filled up by the management of an institution, in the manner as may be prescribed.*

Section 6 – Fee Regulatory Committee

(1) *The Government, by notification in the official Gazette, shall constitute a Fee Regulatory Committee, for determination of the fee for pursuing course in an institution, consisting of the following members, namely: -*

(i) *A person retired from a post not less than the Secretary of the Government - Chairperson;*

(ii) *a Chartered Accountant of repute (to be nominated by the Chairperson) - Member;*

(iii) *a representative of Medical Council of India or All India Council of Technical Education, depending on institution, as the case may be - Member,*

- (iv) *One of the Vice Chancellors of a University or his representative - Member;*
- (v) *Secretary, Department of Technical Education - Member;*
- (vi) *Secretary, Department of Health - Member;*
- (vii) *Secretary, Department of Higher Education - Member Secretary (ex-officio);*
- (viii) *Any other person as may be notified by the Government;*

(12) *The Fee Regulatory Committee shall have power to –*

- (a) *require each institution, to place before it, the proposed fee structure of such institution with all relevant documents and books of amounts for scrutiny well in advance of the commencement of the academic year, that is to say, not later than 31st December of the previous academic year;*
- (b) *verify the fee proposed by such institution, whether it is justified and it does not amount to profiteering or charging of capital ion fee;*
- (c) *approve the fee structure or determine some other fee which can be charged by the institution.*

Section 7 - Factors for determination of fee

The Fee Regulatory Committee shall determine and fix the fee or fees to be charged by an institution, on considering the following factors, namely: -

- (a) *the nature of the professional course;*
- (b) *the available infrastructure including allotment cost of land and opportunity cost of land if the land is owned by the institution at the time of its establishment;*
- (c) *the expenditure on administration and maintenance;*
- (d) *a reasonable surplus required for the growth and development of the college;*
- (e) *revenue to the institution from various sources associated with the education of students;*
- (f) *the excess funds generated from non-resident Indians, charity on the part of managements and contribution by the Government for providing freeship for Scheduled Castes or Scheduled Tribes students;*
- (g) *a reasonable surplus required for meeting any unforeseen contingencies that the institution may face and for the growth and development of the college;*
- (h) *any other factor as the Fee Regulatory Committee may deem fit or such other factors as may be prescribed.*

Section 10- Fess not to be collected excessively

(1) No institution shall collect any fee, by whatever name called from the candidate, for admission, over and above the fee determined by the Fee Regulatory Committee and notified by the Government

(2) An institution shall not collect fee of more than one year's, in advance, from a candidate in an academic year.

Section 12 - Allocation and reservation of seats

(1) In every institution, except the minority institution

(a) subject to the provisions of this Act, ten percent. of the total seats in an unaided institution shall be allocated as management seats;

(b) eighty five percent of the total seats, except the management seats, shall be allocated for Delhi students and the remaining fifteen percent seats for the outside Delhi students or such other allocation as the Government may by notification in the official Gazette, direct;

(c) supernumerary seats for non-resident Indians and any other category shall be as may be prescribed.

(2) In the seats mentioned in sub-section (1), an institution shall reserve -

(a) seventeen percent seats for the candidates belonging to the Scheduled Castes category, one percent seats for the candidates belonging to the Scheduled Tribes category and such percentage of seats, for any other category including Other Backward Classes as may be prescribed;

(b) for seats not mentioned as allocated for Delhi students in sub section (1), fifteen percent seats for candidates belonging to the Scheduled Castes category, seven and a half percent seats for the candidates belonging to the Scheduled Tribes category and such percentage of seats, for any other category as may be prescribed.

(c) subject to clause (a) and clause (b) above, three percent seats for persons with disabilities as provided in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), and, such percentage of seats for the wards of defence personnel and any other category, as may be prescribed.

Section 13- Manner of Admission

An institution shall, subject to the provisions of this Act, make admission through a common entrance test to be conducted by the designated agency, in such manner, as may be prescribed:

Provided that the management seats may be advertised and filled up, from the candidates who have qualified the common entrance test, by the institution in a transparent manner based on the merit at the qualifying examination.

SECTION 14 – Admission made in contravention of this Act

Any admission made in contravention of the provisions of this Act or rules made there under, shall be void.

Rule 8(2)(a) of the Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other measures to ensure equity and Excellence) Rules, 2007

8. Allotment of seats

(1) Allotment of seats in an un-aided professional college or institution shall be made college or institution-wise for each course.

(2) Every institution other than a minority institution, shall provide for seats in respect of management quota, wards of defense personnel, persons with disability and others in the manner as described below: -

(a) Management Quota. –

(i) The Chairman or Secretary of the highest management body of the institution shall furnish an affidavit to the designated agency; mentioning therein that they have followed the procedure laid down in the Act and these rules in a transparent manner and that they have done so without any prejudice or undue favour. Such an affidavit shall accompany the list of successful Candidates under management quota, to be lodged with the University in the manner laid down in sub-clause (yiii).

(ii) The institution shall advertise the admission notice for management quota-seats in at least two leading newspapers, one in Hindi and the other in English in addition to displaying the same on the institution's website and the institution's notice board, kept at a conspicuous place. The admission notice shall be displayed at least a fortnight before the last date for closing of admission for the concerned course in the University and shall include therein information necessary for the students seeking admission to management quota seats. The admission notice shall include therein the place from which admission forms will be available the date, time and manner for submission of completed applications and the schedule for various admission processes and counselling.

Prospective applicants shall be given a period of at least eighteen days to apply for seats under the management quota, in the aforementioned manner.

(iii) While calculating the management seats, fraction less than 0.7 shall be ignored and above that converted into one full seat.

(iv) Based on the aggregate marks obtained by qualified applicants at the qualifying Examination the institution concerned shall prepare and display the rank ordered merit list of such applicants on the institution's website and notice board kept at a conspicuous place of institution within two days of closing date for receipt of the management quota applications. The criteria for rank ordering of applicants with a tie in the qualifying examination's aggregate marks shall be the same as those laid down in the admission brochure or as laid down by the designated authority.

(v) Based on the merit list so drawn up, the institution concerned shall conduct admission counselling for allotment of branches/ courses to qualified applicants within a period of three days of drawing up of the merit list of qualified management quota applicants. Such admission counselling will, however, be subject to the condition that there shall not be more than two rounds of counselling. The list of applicants who will be called for a given round of admission counselling shall be displayed on the institution's website and notice board, kept in a conspicuous place.

(vi) Following the conduct of admission counselling, the list of applicants admitted to the management quota seats made on the basis of the merit list drawn up in the aforementioned manner and the balance of management quota seats in each course shall be published at the end of each round of counselling on the website of the institution as well as that of the designated agency. A copy of such list shall be displayed on the notice board of the designated agency as well as that of the institution, kept at a conspicuous place for the information of the candidates and others. The list of the candidates being called for the first round of counselling shall be displayed in the aforementioned manner along with the merit list, indicating therein the date, time and place at which the counselling will be held. The date, time and place of the second of counselling will be displayed along with the list of candidates admitted in the first round of counselling:

Provided that the second round of counselling shall commence only twelve hours after publication of the list of applicants admitted in the

first round of counselling and the discipline/ course -wise balance of seats.

(vii) the last date to fill up the management quota seats will be nine calendar days after the last date for regular admissions in the University and the concerned course.

(viii) all admissions made to the management quota seats shall be provisional and will need ratification by the designated agency, which will convey its decision within a day of being informed by the institution of the list of successful candidates and the basis of their selection as per procedure mentioned herein before

(ix) the affiliated institutions shall not be authorized to admit candidates against management quota seats after the cut-off date as fixed in sub-clause (vii) above.

(x) if any dispute arises with regard to the admission under the management quota seat(s), the designated agency of the Government, as the case maybe, shall have the overriding power to issue directions to the institution which shall be binding upon the institution concerned.

20. In the *Association of Self Financing Institutions case* (supra), this court had to consider the challenge to the main provision of admission CET (Section 13), which, the petitioners complained, robbed them of their right and autonomy to carry on the vocation of managing educational institutions. It was contended that this complete regulation negated the right under Article 19 (1) (g) and was not a reasonable restriction; besides it was discriminatory. The petitioner had relied on *TMA Pai Foundation* (supra), *Islamic Academy* (supra), and *PA Inamdar* (supra) in support of its argument that a modicum of autonomy was necessary if it were to be said that a right to carry on the occupation or vocation of managing an educational institution existed. This court negated the challenge, holding as follows:

“23. Crucially, this freedom to establish and administer educational institutions is unique-in that private actors' freedom to establish institutions of learning bears a direct relation with the public interest in creating such institutions. This is important, as a matter of principle, because this relationship between the public interest

and private freedom determines the nature of public controls that are permissible.

24. This relationship is clear from the various rulings of the Supreme Court. The ubiquitous emphasis of the Supreme Court in its various decisions on maintaining "excellence of education" (ref, TMA Pai Foundation), or more generally, ensuring good quality education is crucially important. Private actors' freedom to establish educational institutions is not an absolute right in itself, but rather, tempered by the principle that such institutions must provide good quality education, which is in the public interest. Thus, "under the guise of exclusive right to management", even minority institutions, subject to greater protection under Article 30 of the Constitution, "cannot be permitted to fall below the standards of excellence expected of educational institutions." (ref. In re Kerala Education Bill). Similarly, in TMA Pai Foundation, the Court noted that "it is in the interest of the general public that more good quality schools are established"; in Islamic Foundation, in explaining the decision in TMA Pai Foundation, the Court noted "the principle of merit cannot be sacrificed, as excellence in profession is in national interest"; in PA Inamdar, again while discussing TMA Pai Foundation, the Court noted that "regulatory measures for ensuring educational standards and maintaining excellence thereof are no anathema to the protection conferred by Article 30(1)"; in Mohan Bir Singh Chawla v. Punjab University, Chandigarh and Anr., AIR 1997 SC 788, the Court noted that "in the larger interest of the nation, it is dangerous to depreciate merit and excellence in any field." Indeed, this dictum is well-accepted in the jurisprudence of the Supreme Court. Crucially, the important point that the link between private freedom and public interest determines the nature of permissible controls was made explicit by the Court in PA Inamdar, noting that "[excellence in education and maintenance of high standards at this level are a must. To fulfill these objectives, the State can and rather must, in national interest, step in" (emphasis supplied), and in Islamic Foundation in the following terms:

"So far as institutions imparting professional education, are concerned, having regard to the public interest, they are bound to maintain excellence in standard of education. To that extent, there cannot be any compromise and the State would be entitled to impose restrictions ... The width of the rights and limitations thereof of unaided institutions whether run by a majority or a minority must conform to the

maintenance of excellence. With a view to achieve the said goal indisputably the regulations can be made by the State.”

25. *The above discussion removes any doubt from the proposition that the State may exercise its authority to maintain the standard of excellence in professional institutions. The freedom of occupation under Article 19(1)(g) cannot exclude such regulation, which goes to the very core of the public purpose that educational institutions serve. If such institutions, in their functioning, and specifically in this case, in their manner of admission of students, adopt a procedure that deviates from the standards of excellence, the State may determine by its own assessment whether such a lacuna arises, and if so, take the necessary steps to fill it. Any exercise to determine the regulatory power of the State under Article 19(1)(g) must ensure that sufficient authority is recognized to conduct this activity fully. Any interpretation that the educational institutions have-and the State thereby does not have-the authority take any action (choosing the manner of admission of students, the curriculum etc.), which has a bearing on the standard of excellence in an institution, would thus be unmerited.”*

26. *The right to administration of a private unaided educational institution assumes the right to admit students, to set up a reasonable fee structure, to constitute a governing body, to appoint staff and take disciplinary action. There is no quarrel with this proposition. Equally, the right to admit students-which is in issue presently-is not and cannot escape any regulation. This is because the merit of students entering educational institutions-and accordingly, the admissions procedure in place-is intrinsically linked to the maintenance of academic standards in that institution. Just as the quality of instruction within the classroom is an important aspect that has a bearing upon the standard of excellence expected of an institution, the merit of students admitted to that institution is equally important. This point was stated in no uncertain terms by the Supreme Court in TMA Pai Foundation:*

“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.”

27. Thus, ensuring that admissions policies judge merit of prospective students reliably is an aspect that is crucial to the maintenance of excellence in academic institutions. This is not to say that the right to admit students does not form part of the freedom under Article 19(1)(g). The autonomy granted to educational institutions in the admission of students-i.e. the private right to administer-must be seen in the context of the public purpose, i.e. to ensure that admissions policies judge merit of the students fairly.

28. Here, it is important to state that any instance of State regulation-whether permissible or impermissible-involves a fettering of the autonomy of private unaided institutions. This by itself does not mean that the freedom under Article 19(1)(g) is violated. The freedom under Article 19(1)(g) does not imply that the State cannot regulate educational institutions in the public interest. Nor does it imply that the autonomy recognized under Article 19(1)(g) leaves only trivial matters to be regulated by the State. Rather, State regulation that conforms to a clear public interest (as determined by the State itself, rather than a blind assessment conducted by the Courts) can-as explained above-restrict the private freedom embodied in Article 19(1)(g). In other words, as the Supreme Court noted in *The Ahmedabad St. Xavier's College Society and Anr. v. State of Gujarat and Anr.*, (1974) 1 SCC 717, at paragraph 40, "the distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration." Having a right does not entitle one to claim that it cannot be regulated.”

21. The narrow issue which the petitioner argues, is with respect to the proviso to Section 13, which dictates that in respect of the management quota (10% seats) the private colleges and institutions have to follow qualification in CET as the eligibility condition, and strictly abide by *inter se* merit based upon the marks in the qualifying (10+2) examination of the candidates. According to the petitioners, this criterion is irrational, because the basis of admission is the qualifying examination,

which is not considered *essentially to be the premise of admission, because the state wishes all candidates to appear in the CET*. The managements, besides have no choice in regard to admitting students who are otherwise qualified, because they would have passed in the qualifying (10+2) examination and also passed in the CET.

22. The judgment of the Chief Justice of India in *TMA Pai (supra)*, (which was agreed to by a majority of judges, some of whom also supplemented through concurring opinions) is forthright on the issue:

"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."

Equally, in *Islamic Academy (supra)* the Supreme Court echoed the same principle saying that:

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

P.A. Inamdar (supra), a seven judge Bench decision, that revisited the entire range of issues, and considered *TMA Pai (supra)* as well as *Islamic Academy (supra)* stated as follows:

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

this level possessed by individuals collectively constitutes national wealth.

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

133. Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on same or different dates and there may be a clash of dates. If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, the number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting Common Entrance Test (CET, for short) must be one enjoying utmost credibility and expertise in the matter. This would better ensure the fulfillment of twin objects of transparency and merit. CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralized counseling or, in other words, single window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of list of successful

candidates prepared at the CET without altering the order of merit inter se of the students so chosen.

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

The admission procedure so adopted by private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure.

The second question is answered accordingly.

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

23. It is therefore, apparent that the common refrain, or thread of reasoning in all the three rulings is that for admission to institutions of higher learning, merit and merit alone, is the paramount consideration. The NCT in the present case, has devised a method whereby 90% of the seats are to be filled *entirely* on the basis of CET; the balance (management quota) is to be filled by considering only CET qualified students and determining the *inter se* merit on the basis of their results in the qualifying examination. The petitioners complain that by imposing these two restrictions, their options to admit students of their choice, based on their

independent assessment of merit, is taken away. A substantial argument made on their behalf is that in the first place, qualifying examination results are not deemed to be sufficient barometer for merit determination, which is the *rationale* for mandating a CET; therefore, now to revert to that norm is arbitrary. There is perhaps a grain of truth in this grievance.

24. The CET was brought in to combat the possible abuse of private managements in a criteria less situation, where they could have said that the basis of admission of students were marks in the qualifying examination and some subjectively evolved, college or institution centric norm. By the impugned provision, the eligibility for admission is two fold- qualifying in CET (which acts as a filter, to ensure a basic level of proficiency and knowledge of the applicant, evaluated on a common uniform test- the underlying implicit condition being that she has qualified in the qualifying -i.e 10+2 board or equivalent examination, which is the premise for CET participation) and marks in the qualifying examination. This cannot be compared with admission entirely based on qualifying examination results in a regulation free environment, when individual managements *selectively chose to admit students, without any oversight as to whether even applications of merited students were entertained*. The eligibility (CET) ensures a basic knowledge content and puts all aspirants on an even keel. Therefore, even a student who might have scored very high marks in the qualifying board exams might fare badly and not pass in the CET; the converse might also happen. After ensuring that the basic knowledge content is tested through CET, if the qualifying marks are the determinant for admission to private colleges and institutions, - as the impugned provision does- merit is ensured. In other words, it is not the CET merit, (which is the basis of admission to 90% of the seats) but that CET results determine eligibility; the qualifying examination performance determines *inter se* merit.

25. In the opinion of the court, the system devised by the impugned provision cannot be termed arbitrary, because the admission procedure for the 10% management quota is substantially different. This is another form of merit. There may be many objective methods of ensuring a uniform basis for admission, such as a combination of CET results and qualifying exam results and relative weightage to each; variations of these, with weightage to some activities such as sports, extra-curricular events (theatre, debates, music and other events) or performance in an interview, etc. That such alternative methods can be devised, but are not, by the state, when it regulates admission, is not a ground for the court to declare the its choice or method, is unreasonable or arbitrary. The provision as it exists is distinct from entirely CET merit-based admissions; it at the same time, ensures that merit is uniformly followed in admission to the 10% quota. Consequently, the proviso to Section 13 is upheld.

26. As far as the next two questions go, this court is of the opinion that they involve consideration of two facets of the same issue: the extent to which the state can and ought to regulate fees in unaided non-minority educational institutions. The petitioners' argument is that once a classification is recognized by the statute, *vis-a-vis* admission, that classification ought to be given effect, through differential fees, *vis-à-vis* management (10%) seats.

27. It would be instructive to recollect the decision of the Supreme Court, in the decision, reported as *Modern Dental College & Research Centre v. State of M.P.*, (2010) 14 SCC 186 where this issue was considered and the conclusions recorded as follows:

“26. We may at this stage notice two subsequent developments. The first is that this Court in P.A. Inamdar [(2005) 6 SCC 537] reiterated the direction in Islamic Academy of Education [(2003) 6 SCC 697] for constitution of Fee Fixation Committees to deal with fee structure. This Court held as follows: (SCC pp. 605-08, paras 139, 141, 144-49 & 151)

“139. To set up a reasonable fee structure is also a component of ‘the right to establish and administer an institution’ within the

*meaning of Article 30(1) of the Constitution, as per the law declared in **Pai Foundation** [(2002) 8 SCC 481] . Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (paras 56 to 58 and 161 [answer to Question 5(c)] of **Pai Foundation** [(2002) 8 SCC 481] are relevant in this regard).*

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

*144. The two Committees for monitoring admission procedure and determining fee structure in the judgment of **Islamic Academy** [(2003) 6 SCC 697] are in our view, permissible as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under Article 30(1) or the right of minorities and non-minorities under Article 19(1)(g). They are reasonable restrictions in the interest of minority institutions permissible under Article 30(1) and in the interest of general public under Article 19(6) of the Constitution.*

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

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.

147. In our considered view, on the basis of judgment in Pai Foundation [(2002) 8 SCC 481] and various previous judgments of this Court which have been taken into consideration in that case, the scheme evolved of setting up the two Committees for regulating admissions and determining fee structure by the judgment in Islamic Academy [(2003) 6 SCC 697] cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories and Article 19(1)(g) read with Article 30 in case of unaided professional institutions of minorities.

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

149. However, we would like to sound a note of caution to such Committees. The learned counsel appearing for the petitioners have severely criticised the functioning of some of the Committees so constituted. It was pointed out by citing concrete examples that some of the Committees have indulged in assuming such powers and performing such functions as were never given or intended to be given to them by Islamic Academy [(2003) 6 SCC 697] . Certain decisions of some of the Committees were subjected to serious criticism by pointing out that the fee structure approved by them was abysmally low which has rendered the functioning of the institutions almost impossible or made the institutions run into losses. In some of the institutions, the teachers have left their jobs and migrated to other institutions as it was not possible for the management to retain talented and highly qualified teachers against the salary permitted by the Committees. Retired High Court Judges heading the Committees

are assisted by experts in accounts and management. They also have the benefit of hearing the contending parties. We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regard for realities. They should refrain from generalising fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

151. On Question 4, our conclusion, therefore, is that the judgment in Islamic Academy [(2003) 6 SCC 697] , insofar as it evolves the scheme of the two Committees, one each for admission and fee structure, does not go beyond the law laid down in Pai Foundation [(2002) 8 SCC 481] and earlier decisions of this Court, which have been approved in that case. The challenge to setting up of the two Committees in accordance with the decision in Islamic Academy [(2003) 6 SCC 697] therefore, fails. However, the observation by way of clarification, contained in the latter part of para 19 of Islamic Academy [(2003) 6 SCC 697] which speaks of quota and fixation of percentage by the State Government is rendered redundant and must go in view of what has been already held by us in the earlier part of this judgment while dealing with Question 1.”

28. Having regard to the principles laid down in T.M.A. Pai Foundation [(2002) 8 SCC 481] , Islamic Academy Education [(2003) 6 SCC 697] and Inamdar [(2005) 6 SCC 537] whereby the previous scheme in Unni Krishnan [(1993) 1 SCC 645] was held to be unconstitutional, insofar as private unaided professional educational institutions are concerned, the question of two fee structures — one for the “State quota” students and one for the “management quota” students does not arise. These decisions contemplate the determination of fee structure for each college with reference to the various parameters like location, nature of the professional course, investment in infrastructure including land and building, infrastructure and facilities available by way of buildings, labs, equipments, salaries to faculty and staff, the cost of administration and maintenance and reasonable surplus for growth and development of the institution mentioned therein. There can therefore be only one fee structure for all students of a private

unaided professional educational institution. This of course does not come in the way of different fee structures being applied in regard to government institutions and aided institutions, nor does it come in the way of weaker sections of students admitted to unaided private professional educational institutions being extended scholarships, grants, fee concessions, etc. on a voluntary basis, either by the institutions themselves or by the Government.”

28. The above decisions teaches us that there is no ingrained rule, inflexible in application, that if there are two methods of admission to private colleges, there *must be a differential fee structure*. Now, under the Delhi Act, Section 7 spells out the factors for determination of fee: they are nature of the course; available infrastructure (*“including allotment cost of land and opportunity cost of land if the land is owned by the institution at the time of its establishment”*); expenditure on admission and maintenance, provision for reasonable surplus to fund future growth and development; college’s revenue from all sources; excess funds generated *“from non-resident Indians, charity on the part of managements and contribution by the Government for providing freeship for Scheduled Castes or Scheduled Tribes students”* and *“a reasonable surplus required for meeting any unforeseen contingencies that the institution may face and for the growth and development of the college”* other factors deemed fit by the Fee Regulatory Committee. Section 10 enjoins that a college or institution cannot collect any amount for admission, in excess of what is determined by the Committee; it cannot also collect more than a year’s fee in advance from any candidate.

29. These provisions – i.e. factors (outlined in Section 7) and the prohibitions under Section 10 constitute the statutory framework assimilating the mandate of the decisions in *Islamic Academy (supra)* and *Inamdar (supra)*. The court notices that the Delhi Legislature enacted the Act *after* those two decisions. The factors spelt out, in Section 7 are adequate to address the funding concerns of any given educational institution; they also provision for reasonable surplus, both for revenue

and growth. They also enjoin the committees to consider the infrastructure and revenue costs of the institutions. There is considerable latitude to the Regulatory Committee even to prescribe other criteria or criterion; equally there is flexibility to the committees to factor in differential fee structures- be it institution wise, or class of institutions, or even having regard to the peculiarities in the concerned institutions. However, that flexibility is not compulsive; it is only potential, i.e. that it can be exercised depending on the facts of the facts and the nature of materials shown by the institutions. Inherent in this exercise is that a degree of scrutiny and assessment of the documentary materials, expenditure proof and examination of accounts is needed.

30. It would be useful here to recollect that the court, in judicial review, possesses limited power to appreciate a policy- and the manner of its implementation through legislation. (Ref. *Census Commissioner v. R. Krishnamurthy* (2015) 2 SCC 796; *Union of India v. M. Selvakumar* (2017) 3 SCC 504 and *Villianur Iyarkkai Padukappu Maiyam v. Union of India* (2009) 7 SCC 56. Speaking of this, and quoting a previous ruling *NTR University of Health Sciences v. G. Babu Rajendra Prasad* [*NTR University of Health Sciences v. G. Babu Rajendra Prasad*, (2003) 5 SCC 350 (in *Selvakumar*) the Supreme Court held that:

“By reason thereof the State would be entitled to either adopt a policy decision or make laws providing for reservations. How and in what manner the reservations should be made is a matter of policy decision of the State. Such a policy decision normally would not be open to challenge subject to its passing the test of reasonableness as also the requirements of the Presidential Order made in terms of Article 371-D of the Constitution of India.”

31. Again, in *Sri. Sitaram Sugar Co. v. Union of India* (1990) 3 SCC 223 : AIR 1990 SC 1277, it was held as follows:

“The correctness of the reasons which prompted the Government in decision making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.”

32. The allegations of arbitrariness, on the ground of Article 14, and of irrational classification, being the basis of challenge under Article 14, *vis-a-vis* non-mandatory prescription of differential fee, in the statute, therefore cannot be sustained. This court also recollects that in *Ajoy Kumar Banerjee v. Union of India* (1984) 3 SCC 127 AIR 1984 SC 1130 it was observed - relevant to the present context - that —

“in the matter of economic legislation or reform, a provision would not be struck down on the vice of under inclusion, inter alia, for the reasons that the legislature could not be required to impose upon administrative agencies task which could not be carried out or which must be carried out on a large scale at a single stroke. It was further reiterated that piecemeal approach to a general problem permitted by under-inclusive classifications, is sometimes justified when it is considered that legislatures deal with such problems usually on an experimental basis. It is impossible to tell how successful a particular approach might be, what dislocation might occur, and what situation might develop and what new evil might be generated in the attempt. Administrative expedients must be forged and tested.”

33. The view that this court has expressed previously persuades it to also reject the complaint that a separate treatment ought to have been given to NRI students, by way of admissions and separate fees. As far as fees go, the court notices that Section 7 does factor in funding from NRI sources. As to whether in such event,

NRI students ought to pay higher fee or the same as other management quota seats, is a matter left to the discretion of the law-makers. They chose to be silent on the issue; *per se* that is not an irrational or arbitrary approach. Often, silence ought to mean no more, that the law-makers had the opportunity to go into the particular aspect, but deliberately did not; it is not for courts – like knights in shining armour to rush in and then “fill in the gaps” in the statute when confronted with such silences.

34. In view of the foregoing discussion, the challenge to the various provisions of the Act has to fail. The writ petition is therefore dismissed; there shall however be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

OCTOBER 29, 2018