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

\+ **WRIT PETITION (CIVIL) NO. 1813/2018**

Reserved on : 26th April, 2018
Date of decision: 11th May, 2018

ANSHUL AGGARWAL ..... Petitioner

Through Mr. K.K. Rai, Senior Advocate with Mr. S.K. Pandey, Mr. J.P.N. Shahi, Mr. Awanish Kumar, Mr. Chandra Shekhar A. Chakarabbi, Mr. Anshyul Rai and Ms. Vandana Goel, Advocates.

Versus

UNION OF INDIA & ORS ..... Respondents

Through Mr. Sanjeev Uniyal and Mr. Dhawal Uniyal, Advoctes for UOI.
Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.
Mr. S. Rajappa, Advocate for NIOS.
Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO. 2119/2018

SHORYA RAGHAV ..... Petitioner

Through Mr. P. Karunakaran and Mr. Mr. R. Venkatraman, Advocates.

Versus

UNION OF INDIA & ORS ..... Respondents

Through Ms. Bharathi Raju, CGSC for respondent Nos.1 and 3.
Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja

Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.
Mr. S. Rajappa, Advocate for NIOS.
Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO. 2523/2018

MS. BHINU ..... Petitioner
Through Mr. Himanshu Jain, Advocate.

Versus

UNION OF INDIA AND ORS ..... Respondents
Through Mr. Roshan Lal Goel and Ms. Anju Gupta, Advocates for UOI.
Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.
Mr. S. Rajappa, Advocate for NIOS.
Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO. 1982/2018

JASNA SHAYLA K ..... Petitioner
Through Mr. Kukund P. Unny, Advocate.

Versus

UNION OF INDIA AND ORS. ..... Respondents
Through Mr. G. Prakash, Standing Counsel for the State of Kerala.
Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.
Mr. S. Rajappa, Advocate for NIOS.

Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO.2055/2018

RITINATH SHUKLA ..... Petitioner

Through Mr. B.K. Pal, Advocate.

Versus

UNION OF INDIA & ORS ..... Respondents

Through Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.
Mr. S. Rajappa, Advocate for NIOS.
Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO.1906/2018

NEHA SUKHLA AND ORS ..... Petitioners

Through Mr. Nidhesh Gupta, Sr. Advocate with Mr. Amit Kumar, Mr. Avijit Mani Tripathi and Ms Rekha Bakshi, Advocates.

Versus

UNION OF INDIA AND ORS ..... Respondents

Through Mr. P.S. Singh, Dr. A.K. Singh and Mr. Rajpal Singh, Advocates for UOI.
Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.
Mr. S. Rajappa, Advocate for NIOS.
Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO.1916/2018

RAKSHANDA SURANA AND ORS ..... Petitioners

Through Mr. Nidhesh Gupta, Sr. Advocate with Mr. Amit Kumar, Mr. Avijit Mani Tripathi and Ms Rekha Bakshi, Advocates.

versus

UNION OF INDIA AND ORS ..... Respondents

Through Mr. P.S. Singh, Dr. A.K. Singh and Mr. Rajpal Singh, Advocates for UOI.

Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.

Mr. S. Rajappa, Advocate for NIOS.

Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO.1917/2018

MOHIT KUMAR AND ORS. ..... Petitioners

Through Mr. Nidhesh Gupta, Sr. Advocate with Mr. Amit Kumar, Mr. Avijit Mani Tripathi and Ms Rekha Bakshi, Advocates.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through Mr. P.S. Singh, Dr. A.K. Singh and Mr. Rajpal Singh, Advocates for UOI.

Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.

Mr. S. Rajappa, Advocate for NIOS.

Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO.1970/2018

SAURABH SINGH & ORS ..... Petitioners

Through Ms. Archana Pathak Dave, Ms. Ankita Chaudhary, Mr. Manish Sharma, and Mr. Prakash Kumar Jha, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through Mr. Sandeep Mahapatra, Advocate for R- and R-2.

Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.

Mr. S. Rajappa, Advocate for NIOS.

Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

WRIT PETITION (CIVIL) NO.1972/2018

JALALUDHEEN T. AND ANR. ..... Petitioners

Through Mr. Jose Abraham, Mr. Blessen Mathews, Mr. Sarah Shaji and Mr. M. P. Srivignesh, Advocates.

versus

MEDICAL COUNCIL OF INDIA AND ORS. ..... Respondents

Through Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.

Mr. Anil Dabas, Advocate for respondent No.2.

Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.

Ms. Monika Arora, CGSC with Mr. Harsh Ahuja, Mr. Kushal Kumar and Mr. Vibhu Tripathi, Advocates for UOI.

Mr. G. Prakash, Standing Counsel for the State of Kerala.
Mr. S. Rajappa, Advocate for NIOS.

WRIT PETITION (CIVIL) NO. 3513/2018

NIVEDHYA OUSEPPACHAN AND ORS. ..... Petitioners
Through Mr. Jose Abraham, Mr. Blessen Mathews, Mr. Sarah Shaji and Mr. M. P. Srivignesh, Advocates.

Versus

MEDICAL COUNCIL OF INDIA AND ORS. ..... Respondents
Through Mr. Vikas Singh, Sr. Advocate with Mr. T. Singhdev, Ms. Amandeep Kaur, Ms. Manpreet Kaur, Mr. Tarun Verma, Ms. Puja Sarkar, Ms. Michelle Biakthasangi and Mr. Abhijit Chakravarty, Advocates for MCI.
Mr. Amit Bansal and Ms. Seema Dolo, Advocates for CBSE.
Ms. Monika Arora, CGSC with Mr. Harsh Ahuja, Mr. Kushal Kumar and Mr. Vibhu Tripathi, Advocates for UOI.
Mr. S. Rajappa, Advocate for NIOS.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

This common judgment would dispose of the aforestated writ petitions, challenging amendments made to the Medical Council of India Regulations on Graduate Medical Education Regulations, 1997 (Regulations, for short) vide notification No. MCI-34(41)2017-med./169873 dated 22nd January, 2018 to the extent the following categories of students/candidates have been declared ineligible and are disqualified from

appearing in the National Eligibility cum Entrance Test (NEET, for short) for admission to Bachelor of Medicine and Bachelor of Surgery (MBBS, for short) Course;-

(i) Candidates who have completed 10+2 (Senior Secondary Certification) from recognized Open School Boards like National Institute of Open Schooling (NIOS, for short).

(ii) Candidates above the age of 25 years (with relaxation of 5 years to candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes and persons entitled to reservation under the Rights of Persons with Disabilities Act, 2016) on the date of examination.

(iii) Candidates who had completed 10+2 as private students or had taken Biology/Biotechnology as an "additional subject".

2. Amendments under challenge framed by the Medical Council of India (MCI, for short) with previous sanction of the Central Government under Section 33 of the Medical Council of India Act,1956 (the Act, for short), vide "Regulation on Graduate Medical Education (Amendment) 2017",have been reproduced and highlighted in italics and underlined alongwith clauses 4 and 4(2) of the Regulations, below:-

> "4. Admission to Medical course-Eligibility Criteria:
> No Candidate shall be allowed to be admitted to Medical Curriculum proper of first Bachelor of Medicine and Bachelor of Surgery (MBBS) Course until:
>
> (1) He/she shall complete the age of 17 years on or before 31st December of the year of admission to the MBBS Course."
>
> " *Provided further that in order to be eligible, the upper age limit for candidates appearing for National Eligibility Entrance Test and seeking admission to MBBS*

programme shall be 25 years as on the date of examination with a relaxation of 5 years for candidates belonging to SC/ST/OBC category and person entitled to reservation under the Rights of Persons with Disabilities Act, 2016."

"4(2) He/she has passed qualifying examination as under:

(a) The higher secondary examination or the Indian School Certificate Examination which is equivalent to 10+2 Higher Secondary Examination after a period of 12 years study, the last two years of study comprising of physics, Chemistry, Biology/Biotechnology and Mathematics or any other elective subjects with English at a level not less than core course for English as prescribed by the National Council of Educational Research and Training after the introduction of the 10+2+3 years educational structure as recommended by the National Committee on education;

"*Provided that two years of regular and continuous study of Physic, Chemistry, Biology/Biotechnology taken together shall be required at 10+2 level for all the candidates. Candidates who have passed 10+2 from Open Schools or as Private candidates shall not be eligible to appear for National Eligibility-cum-Entrance Test. Furthermore, study of Biology/Biotechnology as an Additional Subject at 10+2 level also shall not permissible*."

Note: Where the course content is not as prescribed for 10+2 education structure of the National Committee, the candidates will have to undergo a period of one year pre-professional training before admission to the Medical colleges;

or

(b) The Intermediate examination in science of an Indian University/Board or other recognized examining body with Physics, Chemistry and Biology/Biotechnology

which shall include a practical test in these subjects and also English as a compulsory subject;

or

(c) The pre-professional/pre-medical examination with Physics, Chemistry and Biology Biotechnology, after passing either the higher secondary school examination, or the pre-university or an equivalent examination. The pre-professional/premedical examination shall include a practical test in Physics, Chemistry & Biology Biotechnology and also English as a compulsory subject.

or

(d) The first year of the three years degree course of a recognized university, with Physics, Chemistry and Biology Biotechnology including a practical test in three subjects provided the examination is a "University Examination" and candidate has passed 10+2 with English at a level not less than a core course.

or

(e) B.Sc examination of an Indian University, provided that he/she has passed the B.Sc examination with not less than two of the following subjects Physics, Chemistry, Biology (Botany, Zoology)/ Bio-technology and further that he/she has passed the earlier qualifying examination with the following subjects- Physics, Chemistry, Biology and English.

or

(f) Any other examination which, in scope and standard is found to be equivalent to the intermediate science examination of an Indian University/Board, taking Physics, Chemistry and Biology Biotechnology including practical test in each of these subjects and English.

Note:

> The pre-medical course may be conducted either at Medical College or a Science College.
>
> Marks obtained in mathematics are not to be considered for admission to MBBS course.
>
> After the 10+2 course is introduced, the integrated courses should be abolished."

(The amended portions, which are under challenge, have been highlighted in italics and underlined).

3. As the facts in W.P. (C) Nos.1982/2018, ***Jasna Shayla K versus Union of India and Ors.*** and W.P. (C) No.1972/2018, ***Jalaludheen T. & Anr. versus Medical Council of India and Ors.***, in which the State of Kerala is also a party, are somewhat different though these writ petitions pertain to challenge to upper age limit, they are being dealt with and examined separately.

4. Regulations framed by the MCI in 1997 prescribe and fix eligibility criteria for students at the level of 10+2, who seek admission to study MBBS Course. As per clause 4, candidates should have completed at least age of 17 years on or before 31st December of the year of the admission to the MBBS Course. As per the proviso, now added and under challenge, an upper age limit of 25 years for general category and 30 years for reserved category candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes or those persons entitled to benefit under the Disabilities Act, 2016 has been prescribed. By the amendment notification, proviso to clause 4 (2) (a) has been added, and mandates that candidates who have cleared 10+2 from open schools Boards or as a private candidates, would not be eligible. This proviso is also under challenge.

5. At the outset, we may record that during the pendency of the present writ petitions on the question of private candidates etc., certain queries were raised pursuant to which the MCI has issued a detailed clarification on eligibility and disqualification. As the said clarification would substantially ameliorate the grievances of the "private candidates", we would reproduce the same in entirety:-

S.No.	Particulars	Rationale/Status
1.	Candidate having qualified 10+2 examination i.e. after 12 years of study, where the last two years of study comprise of Physics, Chemistry, Biology/Biotechnology and any other elective subject with English from a Recognized Board. Candidates must have regular, co-terminus, simultaneous teaching and training in the subjects of Physics, Chemistry and Biology in Class 11th and 12th alongwith practicals in Classroom mode in a Regular School.	Meets the test of regular and continuous two years of study of Physics/Chemistry/ Biology or Biotechnology alongwith practicals taken together in Class 11th and 12th hence Eligible.
2.	Candidates who have studied Biology/Biotechnology as 6th subject in Class 11th and 12th including practicals along with the other mandatory subjects with practicals in Classroom mode in a Regular School and possess a consolidated pass mark-sheet of Class 11th and 12th of a Recognized Board stating marks of all six subjects including Biology/Biotechnology.	Meets the test of regular and continuous two years of study of Physics/Chemistry Biology or Biotechnology along with practicals taken together in Class 11th & 12th, hence Eligible.
3.	Candidates having studied Class 11th and 12th in Classroom Mode in a Regular School but have failed in a subject in class 12th for which he/she shall take the Compartment Examination from the Recognized	Meets the test of regular and continuous two years of study of Physics/Chemistry/ Biology or Biotechnology along with practicals taken together in Class 11th and

	Board to which the School is affiliated and successfully clears the Compartment Examination.	12th, hence Eligible.
4.	Candidates studying in Classroom Mode in a Regular School but fail either in Class 11th and/or Class 12th shall reappear in Class 11th and/or Class 12th from a Recognized Board to which the School is affiliated and successfully clears Class 11th and/or Class 12th Examination. In cases where the Regular School issues Class 11th and/or Board issues Class 12th mark-sheet as failed and thereafter when the candidate reappears in Class 11th and/or Class 12th Examination and the Recognized Board treats as a Private Candidate.	Meets the test of regular and continuous two years of study of Physics/chemistry/ Biology or Biotechnology alongwith practicals taken together in Class 11th and 12th, hence Eligible. However, the candidate would be require to place both the fail and pass marksheets of Class 11th and/or Class 12th before the Counselling Authorities.
5.	Candidates studying in Classroom Mode in a Regular School in Class 11th & Class 12th but re-appearing in examination for improvement of performance on account of various reasons and the Recognized Board treats him/her as a regular student.	Meets the test of regular and continuous two years of study of Physics/ chemistry/ Biology or Biotechnology alongwith practicals taken together in Class 11th and 12th, hence Eligible.
6	Candidates who have studied Class 11th with the requisite subjects/ practicals in Classroom Mode in a Regular School but subsequently after gap year study Class 12th with the requisite subjects/practicals in Classroom Mode in a Regular School.	Meets the test of regular and continuous two years of study of Physics/ chemistry/ Biology or Biotechnology alongwith practicals taken together in Class 11th and 12th, hence Eligible.
7	Candidates who have studied 10+2 with Physics, Chemistry Mathematic and after passing 10+2 have appeared with Biology/ Biotechnology as an Additional Subject of the same Board in the	Do not meet the test of regular and continuous two years of study of Physics/chemistry/Biology or Biotechnology alongwith practicals taken together in Class 11th and 12th, hence

	subsequent year and have passed it.	Ineligible.
8.	Candidates who have not attended Classroom Teaching and Training in a Regular School in Class 11th and/or Class 12th i.e. NIOS/State Open Schools & Private Candidates.	Do not meet the test of regular and continuous two years of study of Physics/ chemistry/Biology or Biotechnology alongwith practicals taken together in Class 11th and 12th, hence Ineligible. Classroom attendance is not required by NIOS/State Open Schools & Private Candidates.

6. Pursuant to the aforesaid clarification, Counsel have addressed arguments on the challenge to clarification No.8 i.e., that students, who have not attended regular school and have cleared 11th and 12th class from NIOS or State open schools Boards are not eligible. Clarification states that such students/candidates do not meet the "test" of regular and continuous two years' study of Physics/Chemistry/Biology or Biotechnology with practicals. Classroom attendance, it is stated, is not required by NIOS and private candidates. The second challenge is to the prescription of the upper age limit.

7. The aforesaid provisos are primarily challenged on the following grounds:-

(i) Disqualification and debarment of students/candidates, who have done 10+2 from recognized open school Boards, violates their fundamental right under Article 19(1)(g) of the

Constitution to study and acquire MBBS degree and practice as a doctor.

(ii) NIOS and State open Boards' certificates are treated as equivalent and at par with the certificates issued by the Central Board of Secondary Education (CBSE), State Boards and Indian Council for Secondary Education (ICSE) by the Government of India (Ministry of Human Resource Development), Association of Indian Universities, All India Institute of Medical Sciences and also for selection in Jawaharlal Institute of Postgraduate Medical Education and Research (JIPMER, for short), Puducherry.

(iii) Disqualification of NIOS and open school Board students is not protected under clause (6) of Article 19 as the restriction/bar is not based upon any objective study or empirical data that candidates/students from open school Boards are inferior and less committed.

(iv) MCI had earlier after due deliberation and consideration vide communication dated 14th September, 2012 had acknowledged and accepted equivalence and parity of NIOS and State open Boards with CBSE and State Boards, etc.

(v) Disqualification is discriminatory and violates Article 14 of the Constitution.

(vi) Prior sanction by the Union of India (Ministry of Health and Family Welfare) to the amendment and incorporation of proviso to clause 4(2)(a) of the Regulations suffers from non-application of mind and was without taking into consideration

parity and equivalence between candidates from open school Board viz. candidates from CBSE and other State Boards.

(vii) Proviso to clause 4(2)(a) of the Regulations is un-constitutional and bad in law as it would operate retrospectively. Being a delegated legislation, in absence of specific provision or implied power, it cannot be applied retrospectively.

(viii) Upper age restriction of 25 years in case of general candidates and 30 years in the case of reserved candidates violates right to education and right to acquire degree of MBBS. It artificially discriminates, without any just cause and reason, candidates above the age 25/30 years who want to acquire knowledge and practice modern or allopathic system of medicine. Proviso to Regulation 4 violates Article 19(1)(g) as it is not a reasonable restriction under clause (6) to Article 19. Upper age prescription also violates Article 14 of the Constitution. It is inequitable and is antithesis of right to equality and equal opportunity.

(ix) Proviso to clause 4 of the Regulations prescribing upper age limits has retrospective effect and being a delegated legislation, it should not be given retrospective effect.

(x) Prescription of upper age limit vide proviso to clause 4 of the Regulations is contrary to State laws of Kerala prescribing reservation for in-service nurses. Nurses would not reap benefit of reservation as they would be necessarily over-aged.

(xi) Prescription of upper age discriminates and violates right to education of compounders, nurses, ward boys, etc., who want to

upgrade their knowledge and skills to acquire degree to work as doctors.

Proviso to clause (4)(2)(a) disqualifying candidates, who have completed 10+2 (senior secondary certification) from open school Boards

8. We would examine the constitutional validity/validity of the aforesaid proviso on three different parameters. Firstly, on the ground that the proviso infringes fundamental right to practice any profession guaranteed under Article 19(1)(g) read with clause (6), Article 21 and Article 14 of the Constitution. Secondly, the prior sanction granted by the Union of India is vitiated on account of lack of application of mind. Thirdly, the proviso has been given retrospective effect in the sense that the sudden change would adversely affect students, who had taken admission in NIOS/open school Boards and were earlier eligible are now disqualified.

9. Article 19(1)(g) states that citizens have the right to practice any profession, or carry on any occupation, trade or business. The said Article and clause (6), which regulates the former, read as under:-

> "19. (1) All citizens shall have the right—
>
> (g) to practice any profession, or to carry on any occupation, trade or business.
>
> XXXXX
>
> (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, *nothing in the said sub-clause shall affect the operation*

of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(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."

The second portion of clause (6) printed in italics above was enacted and incorporated by Section 3 of the Constitution (First Amendment) Act, 1951.

10. To practice profession of medicine as a doctor, the Act i.e. Medical Council of India Act, 1956, requires that the said person/individual must have MBBS degree from a recognized college. We have no hesitation in holding that all citizens of India can claim a right under Article 19 (1) (g) to practice profession as a doctor and for this purpose have right to be considered for selection to MBBS course from a recognized medical college. Right to higher education and study MBBS course to acquire a professional degree to practice as a doctor would fall within the broad and wide parameters of the Fundamental Right guaranteed to the citizens under Article 19 (1) (g), but is subject to restrictions in terms of clause (6) to Article 19. The State under clause (6) to Article 19 can make law imposing reasonable restrictions on the right under Article 19(1)(g) including right to practice as a professional doctor in the interest of general public as per first part of clause (6) of Article 19 which postulates two requirements. The restriction should be (i) reasonable and proportionate to required interference viz. (ii) interest of general public. We have subsequently

elucidated on the aforesaid aspects. Clause (6) to Article 19 also has a second part, which has been quoted in italics, enacted and inserted by Section 3 of the Constitution (First Amendment) Act, 1951. The second part of clause (6) of Article 19 states that nothing in clause (g) would affect operation of any existing law insofar as it relates or would prevent the State from making any law in relation to; (i) professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business and; (ii) carrying on by the State or a corporation owned or controlled by the State any trade, business, industry or service to complete or in part exclusion to citizens or otherwise.

11. Sub-clause (i) of the clause (6) to Article 19, which relates to any law relating to professional or technical qualifications necessary for practicing any profession or carrying on any occupation, could be relied upon by the respondent/MCI. Reflecting upon the impact and the consequence of the amendment and enactment of sub-clause (ii), Mukherjea, J. in ***Saghir Ahmad versus State of U.P. and Others***, AIR 1954 SC 728 had observed:-

> "*23*. … The new clause in Article 19(6) has no doubt been introduced with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business; but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of the first clause of Article 19(6). The result of the amendment is that the State would not have to justify such action as reasonable at all in a court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Article 19(1)(*g*) of the Constitution."

Clause (6) of Article 19 and the effect of incorporation of clause (ii) by the first amendment were considered by the Supreme Court in ***Akadasi***

Padhan versus State of Orissa and Others, AIR 1963 SC 1047 and it was held:

> "13. In attempting to construe Article 19(6), it must be borne in mind that a literal construction may not be quite appropriate. The task of construing important Constitutional provisions like Article 19(6) cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessarily involve the adoption of a liberal and not a literal and mechanical approach to the problem. With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient more economical and more productive. The former approach was not very much influenced by these considerations, and treated it as a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.
>
> 14. The amendment made by the Legislature in Article 19(6) shows that according to the Legislature, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public.

Article 19(6)(ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly. The width of the power conferred on the State can be easily assessed if we look at the words used in the clause which cover trade, business, industry or service. It is true that the State may, according to the exigencies of the case and consistently with the requirements of any trade, business, industry or service, exclude the citizens either wholly or partially. In other words, the theory underlying the amendment in so far as it relates to the concept of State monopoly, does not appear to be based on the pragmatic approach, but on the doctrinaire approach which Socialisum accepts. That is why we feel no difficulty in rejecting Mr Pathak's argument that the creation of a State monopoly must be justified by showing that the restrictions imposed by it are reasonable and are in the interests of the general public. In our opinion, the amendment clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of the general public, so far as Article 19(1)(g) is concerned.

15. The amendment made in Article 19(6) shows that it is open to the State to make laws for creating State monopolies, either partial or complete, in respect of any trade, business, industry or service. The State may enter trade as a monopolist either for administrative reasons, or with the object of mitigating the evils flowing from competition, or with a view to regulate prices, or improve the quality of goods, or even for the purpose of making profits in order to enrich the State ex-chequer. The Constitution-makers had apparently assumed that the State monopolies or schemes of nationalisation would fall under, and be protected by, Article 19(6) as it originally stood; but when judicial decisions rendered the said assumption invalid, it was thought necessary to clarify the intention of the Constitution by making the amendment. It is because the amendment was thus made for purposes of clarification that it begins with the words “in particular”. These words indicate that restrictions

> imposed on the fundamental rights guaranteed by Article 19(1)(g) which are reasonable and which are in the interests of the general public, are saved by Article 19(6) as it originally stood; the subject-matter covered by the said provision being justiciable, and the amendment adds that the State monopolies or nationalisation, schemes which may be introduced by legislation, are an illustration of reasonable restrictions imposed in the interests of the general public and must be treated as such. That is why the question about the validity of the laws covered by the amendment is no longer left to be tried in Courts. This brings out the doctrinaire approach adopted by the amendment in respect of a State monopoly as such."

12. However, in ***Akadasi Padhan*** (supra), it was clarified that clauses (i) and (ii) to Article 19(6), in essence are in the nature of exception to the main provision, and cannot be given unduly wide and liberal construction for otherwise it would negate and gravely curtail and dilute fundamental right guaranteed under Article 19(1)(g). The "protection" under sub-clause (ii) would mean law relating to monopoly in absolute essential features, basically and essentially necessary for creating State monopoly and not other provisions which are subsidiary, incidental or helpful in operation of the monopoly. These or other provisions would not fall under clause (ii) and their validity must be judged under first part of Article 19(6). Therefore, provisions of law which are integral and essential to parts (i) and (ii) alone would be protected whereas the rest of the provisions which may be incidental, secondary or helpful would not fall under clause (i) and (ii) of Article 19(6) and must satisfy the test of the first part of Article 19(6). In ***Akadasi Padhan*** (supra), it was held:-

> **"17.** In dealing with the question about the precise denotation of the clause "a law relating to", it is necessary to bear in mind that this clause occurs in Article 19(6) which is, in a sense, an exception to the main provision of Article 19(1)(*g*). Laws protected by Article 19(6) are regarded as valid even though they impinge upon the fundamental right guaranteed under Article 19(1)(*g*). That is the effect of the scheme contained in Article 19(1) read with Clauses (2) to (6) of the said Article. That being so, it would be unreasonable to place upon the relevant clause an unduly wide and liberal construction. "A law relating to" a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19(6). In other words, the effect of the amendment made in Article 19(6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19(6) and would inevitably have to satisfy the test of the first part of Article 19(6).

Clause (i) protects only law relating to professional or technical qualification necessary for practicing any profession, carrying on any

occupation, trade or business and not legislations which are supplementary subsidiary, incidental etc.

13. The aforesaid principles were referred to by the Supreme Court in ***Udai Singh Dagar and Others versus Union of India and Others***, (2007) 10 SCC 306 to observe that the test of reasonableness and general public interest laid down in ***State of Madras versus V.G. Row***, AIR 1952 SC 196 may not *ipso facto* apply in a case involving clause (6) of the Constitution. We would subsequently refer to the tests laid down in ***V.G. Row*** (supra). This ratio on the question of scope and ambit of second part and first part of clause (6) has consistently been referred and reiterated in ***Orient Paper and Industries Ltd. and Another versus State of Orissa and Others,*** 1991 Supp (1) SCC 81, ***State of Tamil Nadu and Others versus L. Abu Kavur Bai and Others,*** (1984) 1 SCC 515, ***Tinsukhia Electric Supply Co. Ltd. versus State of Assam and Others,*** (1989) 3 SCC 709, ***Utkal Contractors & Joinery (P) Ltd. and Others versus State of Orissa,*** 1987 Supp SCC 751, ***Rashbihari Panda etc. versus State of Orissa,*** (1969) 1 SCC 414 and ***Municipal Committee, Amritsar and Others versus State of Punjab and Others,*** (1969) 1 SCC 475, etc. ***Udai Singh Dagar and Others*** (supra) was a case relating to challenge to constitutional validity on applicability of the provisions of Section 30 of the Indian Veterinary Council Act, 1984 relating to right of persons to be enrolled in the Indian Veterinary Practioners' Register, as persons having diploma or certificates recognized by State of Maharashtra and some other States had been divested of their right to practice under the Central Act. Aforesaid decisions, we would observe, uphold the right of the State to enact laws insofar as they relate to professional or technical qualifications for practicing any profession or the State to create monopoly

in its own favour in respect of any trade or business. When a question relating to constitutional validity on the ground of infringement of Fundamental Right under Article 19(1)(g) covered by (i) and (ii) of clause (6) is raised, the State is not to justify that such action was reasonable at all in a court of law and to this extent no objection can be taken to infringement of the Fundamental Right. However, this does not mean that the Court cannot enquire whether the provisions of the said law are basically and essentially necessary for creating State monopoly or for the law relating to professional and technical qualifications. Therefore, other provisions made by the Act, which are subsidiary, incidental or helpful in operation of the State monopoly or any law relating to professional or technical qualification, would not fall in the second part and their validity must be judged under the first part of clause (6) of Article 19.

14. The proviso to clause 4(2)(a) of the Regulation, in our opinion, is not an absolute essential feature of a law relating to professional or technical qualification necessary for practicing any profession, for in the present case, we are concerned with eligibility or qualification required to take admission in the MBBS course to study medicine. We are not dealing with the law relating to professional or technical qualification for practicing any profession which would basically and essentially relate to the qualifications necessary to practice profession of modern medicine and give treatment. The proviso therefore must satisfy the twin requirements that the restriction imposed is reasonable and secondly it is also in the interest of general public, in terms of first part of clause (6) to Article 19.

15. It is in this context that we would have to examine whether the disqualification imposed is in the interest of general public and is a

reasonable restriction on the exercise of right guaranteed under clause (g) of Article 19(1), i.e., right and opportunity to acquire a degree which entitles you to practice as a professional doctor. To expand and elucidate on the law, we would refer to the Constitution Bench judgment of the Supreme Court in ***Modern Dental College and Research Centre and Others versus State of Madhya Pradesh and Others,*** (2016) 7 SCC 353. This would be the most appropriate case to refer and rely upon for it is recent in point of time and has extensively referred to earlier case law and had directly dealt with common entrance examination for medical courses with reference to Article 19(1)(g) and clause (6) of the Constitution though in the context of freedom of occupation of the private unaided minority and non-minority educational institutions. It was held that the right under Article 19(1)(g) is not an absolute right, but is subject to reasonable restrictions and the concept of reasonableness has to be determined having regard to the nature of the right alleged to be infringed, purpose of the restriction, extent of the restriction and other relevant factors. In this context, we would now refer to the decision in ***V.G. Row*** (supra), which on the test of reasonableness, had exposited and held:-

> "15. … It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances

> of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

16. At this stage, reference may be made to ***MRF Limited versus Inspector Kerala Government and Others***, (1998) 8 SCC 227, wherein the Supreme Court had observed that when examining the question of reasonableness of statutory provision, the following factors have to be kept in mind:-

> "(1) The directive principles of State policy.
>
> (2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.
>
> (3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.
>
> (4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).
>
> (5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

> (6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise."

17. Second aspect, which has to be kept in mind is that the reasonableness of restriction is not to be determined from the point of view of the persons on whom the restrictions are imposed, which in this case are the petitioners or other students, who have done 10+2 from open schools Boards. Neither is the question of reasonableness to be determined on abstract considerations. The question of reasonableness has to be determined in an objective manner from the stand point of interest of general public. Thus, the Court must ensure and strike a balance between freedom guaranteed under different sub-clauses of clause (1) of Article 19 and the social control permitted in terms of clauses 2 to 6, for the limitation imposed for enjoyment of the right should not be arbitrary or in this case excessive and beyond the interest of general public. The restriction must have reasonable relationship and nexus with the object, which the legislation seeks to achieve and must not be disproportionate to that object. It is in this context that in ***Modern Dental College and Research Centre and Others*** (supra), A.K. Sikri, J. referred to doctrine of proportionality, which was defined as a set of rules for determining necessary and sufficient conditions for limitation of a constitutionally protected right. Reference was made to four sub-components highlighted by Aharon Barak, Former Chief Justice of Supreme Court of Israel as to constitutionally permissible limitations, which read:-

> "60. ....

> (*i*) it is designated for a proper purpose;
> (*ii*) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;
> (*iii*) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally
> (*iv*) there needs to be a proper relation ("*proportionality stricto sensu*" or "*balancing*") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."

18. In ***Modern Dental College and Research Centre and Others*** (supra), it was observed that the requirement of proportionate limitation of constitutional rights by the sub-constitutional law, i.e., the statute is something which is derived from interpretation and notion of democracy itself. This ensures balance between constitutional rights and public interest. Thus, what is required to be examined is the question of reasonableness with reference to the tests expounded in ***MRF Limited*** (supra) with the doctrine of proportionality and whether the ineligibility and disqualification imposed on the students of open school Boards would meet the twin test, i.e., (i) of reasonable restriction and (ii) which is justified in general public interest.

19. The aforesaid principle/doctrine of proportionality was even earlier elucidated by the eleven-Judges Bench of the Supreme Court in ***Rustom Cavasjee Cooper (Banks Nationalization) versus Union of India***, (1970) 1 SCC 248, in the following words:-

> "49. ....But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief.

> If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the legislature nor by the form of the action, but by its direct operation upon the individual's rights."

20. Referring to the principle of reasonable restriction and the requirement in clause (6) to Article 19 that the restriction/limitation should be in the interest of general public, in ***Chintaman Rao versus State of Madhya Pradesh***, AIR 1951 SC 118, it was observed as under:-

> "7. Clause (6) in the concluding paragraph particularizes certain instances of the nature of the restrictions that were in the mind of the constitution-makers and which have the quality of reasonableness. They afford a guide to the interpretation of the clause and illustrate the extent and nature of the restrictions which according to the statute could be imposed on the freedom guaranteed in clause (g). The statute in substance and effect suspends altogether the right mentioned in Article 19(1)(g) during the agricultural seasons and such suspension may lead to such dislocation of the industry as to prove its ultimate ruin. The object of the statute is to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas of the Province and it could well be achieved by legislation restraining the employment of agricultural labour in the manufacture of bidis during the agricultural season. Even in point of time a restriction may well have been reasonable if it amounted to a regulation of the hours of work in the business. Such legislation though it would limit the field for recruiting persons for the manufacture of bidis and regulate the hours of the working of the industry, would not have amounted to a complete stoppage of the business of manufacture and might well have been within the ambit of clause (6). The effect of the provisions of the Act,

however, has no reasonable relation to the object in view but is so drastic in scope that it goes much in excess of that object. Not only are the provisions of the statute in excess of the requirements of the case but the language employed prohibits a manufacturer of bidis from employing any person in his business, no matter wherever that person may be residing. In other words, a manufacturer of bidis residing in this area cannot import labour from neighbouring places in the district or province or from outside the province. Such a prohibition on the face of it is of an arbitrary nature inasmuch as it has no relation whatsoever to the object which the legislation seeks to achieve and as such cannot be said to be a reasonable restriction on the exercise of the right. Further the statute seeks to prohibit all persons residing in the notified villages during the agricultural season from engaging themselves in the manufacture of bidis. It cannot be denied that there would be a number of infirm and disabled persons, a number of children, old women and petty shopkeepers residing in these villages who are incapable of being used for agricultural labour. All such persons are prohibited by law from engaging themselves in the manufacture of bidis; and are thus being deprived of earning their livelihood. It is a matter of common knowledge that there are certain classes of persons residing in every village who do not engage in agricultural operations. They and their womenfolk and children in their leisure hours supplement their income by engaging themselves in bidi business. There seems no reason for prohibiting them from carrying on this occupation. The statute as it stands, not only compels those who can be engaged in agricultural work from not taking to other avocations, but it also prohibits persons who have no connection or relation to agricultural operations from engaging in the business of bidi making and thus earning their livelihood. These provisions of the statute, in our opinion, cannot be said to amount to reasonable restrictions on the right of the applicants and that being so, the statute is not in conformity with the

> provisions of Part III of the Constitution. The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void."

Some of the aforesaid decisions were quoted in ***Cellular Operators Association of India and Ors. versus Telecom Regulatory Authority of India,*** (2016) 7 SCC 703. This decision appropriately also refers to the first amendment to the Constitution by which clauses (i) and (ii) were added to clause (6), Article 19. In the context of clause (ii) in respect of State monopoly, it has been held that the test is separate and distinct from the test of the law being reasonable and in the interest of general public.

21. In ***Dharam Dutt and Others versus Union of India and Others,*** (2004) 1 SCC 712, two-Judges Bench of the Supreme Court had observed:-

> "**35.** The scheme of Article 19 shows that a group of rights are listed as clauses (*a*) to (*g*) and are recognized as fundamental rights conferred on citizens. All the rights do not stand on a common pedestal but have varying dimensions and underlying philosophies. This is clear from the drafting of clauses (2) to (6) of Article 19. The framers of the Constitution could have made a common draft of restrictions which were permissible to be imposed on the operation of the fundamental rights listed in clause (1), but that has not been done. The common thread that runs throughout clauses (2) to (6) is that the operation of any existing law or the enactment by the State of any law which imposes reasonable restrictions to achieve certain objects, is saved; however, the quality and content of such law would be different by reference to each of sub-

clauses (*a*) to (*g*) of clause (1) of Article 19 as can be tabulated hereunder:

Article 19

Clause (1) *Nature of right*	*Clauses (2) to (6)* *Permissible restrictions* *By existing law or by law made by the State imposing reasonable restrictions in the interests of*
(*a*) Freedom of speech and expression	(*i*) the sovereignty and integrity of India (*ii*) the security of the State (*iii*) friendly relations with foreign States (*iv*) public order, decency or morality (*v*) in relation to contempt of court, defamation or incitement to an offence
(*b*) right to assemble peaceably and without arms	(*i*) the sovereignty and integrity of India (*ii*) public order
(*c*) right to form associations or unions	(*i*) the sovereignty and integrity of India (*ii*) public order or morality
(*d*) and (*e*) right to move freely and/or to reside and settle throughout the	(*i*) the general public (*ii*) the protection of the interests of Scheduled Tribes

territory of India	
(*g*) right to practise any profession, or to carry on any occupation, trade or business	The general public and *in particular* any law relating to (*i*) the professional or technical qualifications necessary for practising of any profession or carrying on of 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.

XXXXX

37. The Court, confronted with a challenge to the constitutional validity of any legislative enactment by reference to Article 19 of the Constitution, shall first ask what is the sweep of the fundamental right guaranteed by the relevant sub-clause out of sub-clauses (*a*) to (*g*) of clause (1). If the right canvassed falls within the sweep and expanse of any of the sub-clauses of clause (1), then the next question to be asked would be, whether the impugned law imposes a reasonable restriction falling within the scope of clauses (2) to (6) respectively. However, if the right sought to be canvassed does not fall within the sweep of the fundamental rights but is a mere concomitant or adjunct or expansion or incidence of that right, then the validity thereof is not to be tested by

> reference to clauses (2) to (6). The test which it would be required to satisfy for its constitutional validity is one of reasonableness, as propounded in the case of*V.G. Row* [AIR 1952 SC 196 : 1952 SCR 597 : 1952 Cri LJ 966] or if it comes into conflict with any other provision of the Constitution."

22. In ***Dharam Dutt and Others*** (supra), on the question how the Court should deal with the challenge to constitutional validity of the legislation, it was observed as under:-

> "**48.** It is well settled that while dealing with a challenge to the constitutional validity of any legislation, the Court should *prima facie* lean in favour of constitutionality and should support the legislation, if it is possible to do so, on any reasonable ground and it is for the party who attacks the validity of the legislation to place all materials before the Court which would make out a case for invalidating the legislation. (See *Charanjit Lal Chowdhury* v. *Union of India* [AIR 1951 SC 41 : 1950 SCR 869] and *Ayurvedic and Unani Tibia College* [AIR 1962 SC 458 : 1962 Supp (1) SCR 156] .)
>
> **49.** In spite of there being a general presumption in favour of the constitutionality of the legislation, in a challenge laid to the validity of any legislation allegedly violating any right or freedom guaranteed by clause (1) of Article 19 of the Constitution, on a prima facie case of such violation having been made out, the onus would shift upon the respondent State to show that the legislation comes within the permissible limits of the most relevant out of clauses (2) to (6) of Article 19 of the Constitution, and that the restriction is reasonable. The Constitutional Court would expect the State to place before it sufficient material justifying the restriction and its reasonability. On the State succeeding in bringing the restriction within the scope of any of the permissible restrictions, such as, the sovereignty and integrity of India

> or public order, decency or morality etc. the onus of showing that restriction is unreasonable would shift back to the petitioner. Where the restriction on its face appears to be unreasonable, nothing more would be required to substantiate the plea of unreasonability. Thus the onus of proof in such like cases is an ongoing shifting process to be consciously observed by the Court called upon to decide the constitutional validity of a legislation by reference to Article 19 of the Constitution. The questions: (*i*) whether the right claimed is a fundamental right, (*ii*) whether the restriction is one contemplated by any of clauses (2) to (6) of Article 19, and (*iii*) whether the restriction is reasonable or unreasonable, are all questions which shall have to be decided by keeping in view the substance of the legislation and not by being beguiled by the mere appearance of the legislation."

23. The stand of the MCI to justify the proviso to clause 4 (2) (a) declaring students from open schools as disqualified is that open school students/candidates do not undergo school education through face to face mode and thus they do not undergo regular, co-terminus, simultaneous teaching and training in Physics, Chemistry and Biology with two years of study with practicals. MCI in the counter affidavit have submitted as under:-

> "97. It is respectfully reiterated that candidates who have passed 10+2 examination after 12 years of study in the requisite subjects have put in sustained effort with teaching and training along with practicals in the concerned subjects during the last 2 years and when such candidates obtain the minimum percentage of marks as required under the Statutory Regulations, it is this standard of excellence which is sought for a highly technical / scientific course in medicine. There can be no comparison between candidates who have undergone teaching and training along with practicals in the

concerned subjects for two years prior to appearing in the 10+2 examination, whereafter through their diligence & hard work achieved the minimum percentage of marks as required under the Statutory Regulations and certain other candidates who will pass the subjects without having to sustain the pressure of attending a regular school along with the other subjects to qualify the concerned subject.

98. It is humbly reiterated that the Statutory Regulation seeks to obtain candidates for admission in MBBS course of a particular caliber, who shall be judged on the basis of their competence to score a requisite percentage of marks when he/she undergoes teaching and training along with practicals in the concerned subjects while attending a regular school thus obtaining a particular percentage of marks in the concerned subjects. On the other hand, in respect of candidates who do not undergo teaching and training along with practicals in the concerned subjects for two years prior to appearing in the 10+2 examination, there being no restriction on the manner of teaching and training along with practicals in the concerned subjects, shall make the object of the Statutory Regulations redundant as there will be no parameter to judge their level of competence at that stage. The caliber of the candidates who obtain admission in MBBS course shall determine the quality of teaching and training of MBBS students and the finally the quality of doctors who shall provide health care in the Country.

99. Such candidates who do not attend a regular school and simply appear in the 10+2 examination as a private candidate of a particular Board or who after completing 10+2 examination have taken the subject of Biology as an additional subject, cannot be said to have achieved the level of excellence as required under the Statutory Regulations, even though they might have obtained the requisite percentage. These candidates will also include persons who have completed 10+2 examination from National Institute of Open Schooling or from any other

open schools. Hence, the Statutory Regulations, in this regard do not make any distinction, in as much as, candidates who have completed 10+2 examination from National Institute of Open Schooling or from any other open schools or candidates who have appeared in the 10+2 examination as a private candidate of a particular Board or who have taken the subject of Biology as an additional subject, have all not undergone regular, co-terminus I simultaneous teaching & training in the subjects of Physics, Chemistry and Biology in Higher Secondary Education (10+2) and last two years of study comprising of the above mentioned subjects including particulars.

100. It is respectfully submitted that all averments made by the petitioner as well as National Institute of Open Schooling in respect of letter dated 14.09.2012 is, entirely erroneous, misconceived & thus vehemently denied. The letter dated 14.09.2012 as issued by the then Board of Governors appointed by the Central Govt., cannot be read to be understood, as if the answering respondent at any point of time had granted equivalence to National Institute of Open Schooling with Boards providing regular, co-terminus / simultaneous teaching and training in the subjects of Physics, Chemistry and Biology towards Higher Secondary Education (10+2) with last two years of study comprising of the above mentioned subjects alongwith practicals. The said letter dated 14.09.2012 does not deal with equivalence whatsoever and only states that any candidate who as per the then prevailing provisions of Regulations on Graduate Medical Education, 1997 possesses the eligibility for admission to MBBS course shall be considered. The eligibility for admission to MBBS course as per the then provisions of Regulations on Graduate Medical Education, 1997 had already been concluded by the various judgments of the various Hon'ble High Courts including this Hon'ble High Court as well as the Hon'ble Supreme Court."

24. Before we go into the merits of the stand of MCI, i.e. distinction drawn by MCI between regular school and open school with reference to Article 19 (1)(g) read with clause (6) and Article 14 of the Constitution, we must place on record the manner and mode in which the approval or prior sanction to the impugned proviso was granted by the Ministry of Health and Family Welfare. The opening words of Section 33 of the Act while empowering the MCI to make Regulations requires that these shall be made with previous sanction of the Central Government. The relevant portion of Section 33 reads as under:-

> "33. **Power to make regulation.**- The Council, may, with the previous sanction of the Central Government, make regulations generally to carry out the purposes of this Act, and, without prejudice to the generality of this power, such regulation may provide for-
>
> XXXXX
>
> (ma) the modalities for conducting screening tests under sub-section (4A), and under the proviso to sub-section (4B) and for issuing eligibility certificate under sub-section (4B) of section 13;
>
> (mb) the designated authority other languages and the manner of conducting of uniform entrance examination to all medical educational institutions at the undergraduate level and post-graduate level;"

Clause (ma) to Section 33 was enacted and introduced vide Act 34 of 2001 and Clause (mb) to Section 33 and Section 10D were enacted and made applicable with retrospective effect from 24th May, 2016. Section 10D reads as under:-

> "10D. There shall be conducted a uniform entrance examination to all medical educational institutions at the

> undergraduate level and post-graduate level through such designated authority in Hindi, English and such other languages and in such manner as may be prescribed and the designated authority shall ensure the conduct of uniform entrance examination in the aforesaid manner:
>
> Provided that notwithstanding any judgment or order of any court, the provisions of this section shall not apply, in relation to the uniform entrance examination at the undergraduate level for the academic year 2016-17 conducted in accordance with any regulations made under this Act, in respect of the State Government seats (whether in Government Medical College or in a private Medical College) where such State has not opted for such examination."

25. In the present case, we are not directly concerned with minimum standard of medical education or the degree mandated to practice as a doctor, but with the eligibility and qualifications required by student/candidate, who wants to appear in the entrance examination. Section 10D of the Act states that a uniform entrance examination for undergraduate and post-graduate level shall be conducted by a designated authority in such manner as may be prescribed. It is not MCI but CBSE which conducts the uniform entrance examination, i.e. NEET.

26. We had called for the original files from the Ministry of Health and Family Welfare and after perusal of the same had passed the order dated 17th April, 2018, which reads as under:-

> "Original files of Department of Health and Family Welfare have been produced and examined.
>
> 2. Issue raised in the writ petitions relates to ineligibility of students, who have passed 10+2 from open schools or as private candidates or had studied

Biology/Biotechnology as an additional subject at 10+2 level.

3. Draft of the amended regulation submitted by the Medical Council of India (MCI) for sanction vide letter dated 12th December, 2017 on the question of ineligibility was commented upon in the detailed official note dated 18th December, 2017, the relevant portion of which reads as under:-

> "ii) Candidates who have passed 10+2 from Open Schools or as Private candidates shall not be eligible to appear for NEET. Furthermore, study of Biology/Biotechnology as an additional subject at 10+2 level also shall not permissible. It is submitted that in the meeting held on 26.05.2017 (**minutes at F/A**) Chaired by JS (ME), MCI was requested to check whether the NIOS and Private Candidates have any practical training. However, no justification has been given by MCI."

4. Minutes of the meeting dated 26th May, 2017 on the question of disqualification and eligibility referred to above, reads as under:-

> **"**The Chair suggested, the Council to check for NIOS and Private Candidates. Do they have practical training.**"**

5. Thereafter, the file was processed. Another note dated 20th December, 2017, states that "the proposed changes were in order except that NIOS and private candidates at class XII are not eligible to pursue MBBS. We may have no objection except that no reasoning is given by the MCI."

6. Subsequently, detailed note was prepared on 8th January, 2018. This note on the question of open schools,

private candidates and study of Biology/Biotechnology as an additional subject at 10+2 level had recorded as under:-

> "ii) Candidates who have passed 10+2 from Open Schools or as Private candidates shall not be eligible to appear for NEET. Furthermore, study of Biology/Biotechnology as an additional subject at 10+2 level also shall not permissible."

This note was approved on 22nd January, 2018 and thereafter, sanction letter dated 24th January, 2018 was issued accepting the draft regulation.

7. Subsequently, question of eligibility of private students and NIOS students came up for consideration vide note prepared on 18th January, 2018 and the note recorded on 19th January, 2018 states:-

> "This stand has raised a question regarding discrimination against NIOS although it is a valid and fully recognized qualification in our country. A copy of CBSE's recognition of NIOS qualifications is placed at flag 'B'.
>
> The matter is submitted for favour of necessary orders pl. One way could be to seek Law departments opinion on inclusion of NIOS qualifications. Another approach could be to request MCI to reconsider its stand."

8. Competent authority was asked to re-consider its stand on the NIOS matter and letter dated 1st February, 2018 has been issued by the Department of Health and Family Welfare to the Secretary, MCI. Copy of this letter was furnished to us by the counsel for the petitioners yesterday. In response thereto, MCI has written a letter dated 6th March, 2018 that the matter with regard to

including NIOS students was sub judice in the Delhi High Court.

9. We would observe that the matter being sub judice is not a valid ground to not examine and decide. Government must elucidate and state their position clearly.

10. We have recorded the aforesaid position to bring the facts on record as the Department of Health and Family Welfare has not filed their affidavit.

11. Department of Health and Family Welfare will within two days file an affidavit through their Secretary explaining the position in view of the facts emerging from original files/records produced before us.

12. NIOS had sent their response vide letter dated 5th December, 2017, which has been enclosed as Annexure R-3/22 (internal page 206 to 209) to the counter affidavit filed by the MCI in W.P. (C) No.1813/2018, Anshul Aggarwal Vs. Union of India & Ors. Copy of this letter is not available in the file of the Department of Health and Family Welfare. Affidavit by the Department of Health and Family Welfare would indicate whether this letter dated 5th December, 2017 was duly examined and considered before sanction was granted.

13. Similarly, we would require the Ministry of Human Resource to file their affidavit on their position and stand regarding private students, NIOS/SOS students as well as students, who have taken up Biology/Biotechnology as an additional subject. Affidavit would be filed within two days.

Relist on 24th April, 2018."

27. In response to the said order, Ministry of Human Resource Development have filed their affidavit, which we have quoted below.

Ministry of Health and Family Welfare have also filed their affidavit and have clarified certain aspects. We would quote the affidavit of Ministry of Health and Family Welfare subsequently.

28. The issue with regard to disqualification of students/candidates, who have cleared 10+2 from open school or as private candidates, was considered by the Ministry of Health and Family Welfare in the meeting held on 26th May, 2017. The Chair had then suggested and asked the MCI to check for NIOS and private candidates and examine whether the students undergo practical training. Clearly, reservation was expressed on the proposed amendments suggested by the MCI to disqualify students, who have cleared class 12 from open school Boards.

29. MCI had written letter dated 3rd November, 2017 to the Secretary NIOS, on the question of eligibility of NIOS candidates for appearing in NEET examination and had referred to the Minutes of the meeting of the Executive Committee of its Council held on 26th September, 2017. Letter dated 3rd November had also referred to the legal opinion given by learned Additional Solicitor General of India that any candidate, who had not undergone classroom training in subjects of Physics, Chemistry, Biology and English, simultaneous and co-terminus including practical examination should not be granted eligibility certificate for seeking admission in primary medicine courses in a foreign medical institute and, therefore, also not eligible to appear in screening test for obtaining registration to practice medicine in the country. The Executive Committee had noted the opinion of the Chairman, Academic Committee that learners from NIOS were not at par with those from the regular mode and hence, were ineligible for NEET

on equitable basis. This decision of the Executive Committee was approved by the Oversight Committee on 25th October, 2017.

30. NIOS vide communication dated 5th December, 2017 had given a detailed reply stating that their certificates were equivalent and at par with the certificates issued by the CBSE or ISCE and, therefore, it would not be correct for MCI to reverse their earlier decision and to withdraw their earlier letter dated 14th September, 2012. NIOS was established by the Ministry of Human Resource Development with prime objective to offer academic programmes at pre degree level including Senior Secondary level. NIOS was a recognized Board at national level. NIOS was offering courses through affiliated schools recognised by CBSE, ISCE and other State Boards. These schools act as study centres and had laboratories, libraries etc. in Science subjects. The learners i.e. students were required to study theory and perform practicals. Practical examinations were also conducted. NIOS was also conducting programmes at study centres under face to face mode.

31. MCI thereafter wrote letter dated 12th December, 2017 enclosing therewith copy of the draft amendments to the Regulations to the Ministry of Health and Family Welfare. This letter had also referred to the proposal dated 28th April, 2017 of the Central Government, Ministry of Health and Family Welfare on the question of relaxation of the clause for lowering minimum marks and to explore possibility of allowing NIOS and private candidates in NEET examination and medical courses. The letter dated 12th December, 2017 had not enclosed or referred to the reply of NIOS dated 5th December, 2017 or their letter dated 14th September, 2012 to NIOS. We have referred to this letter of MCI dated 14th September, 2012 subsequently.

32. On the basis of the correspondence/letter dated 12th December, 2017 received from MCI, a detailed office note dated 18th December, 2017 was prepared in the Ministry of Health and Family Welfare on the question of sanction to the draft amendments to the Regulations. With reference to open school candidates, it was observed:-

> "ii) Candidates who have passed 10+2 from Open Schools or as Private candidates shall not be eligible to appear for NEET. Furthermore, study of Biology/Biotechnology as an additional subject at 10+2 level also shall not permissible. It is submitted that in the meeting held on 26.05.2017 (minutes at F/A) Chaired by JS (ME), MCI was requested to check whether the NIOS and Private Candidates have any practical training. However, no justification has been given by MCI."

Thereafter, another note dated 20th December, 2017 records that *"the proposed changes were in order except that NIOS and private candidates at class XII are not eligible to pursue MBBS. We may have no objection except that no reasoning is given by the MCI."* This note had also directed that comments from Directorate General of Health Services should be obtained before taking up the matter with MCI. Additional Director General in his opinion on the proposed amendments to the Regulations did not specifically refer to and examine the issue of disqualification of open school Boards. There was complete silence and no comments or opinion were offered by the Additional Directorate General of Health Services on the said aspect. In view of the aforesaid position, office note dated 7th January, 2018 records that the Minister's approval was quickly required on the *"undisputed points"*.

33. Thereupon, another detailed note dated 8th January, 2018 was prepared for approval of draft amendments to the Regulations by the Minister. Paragraph (ii) of the said note reads as under:-

> "ii) Candidates who have passed 10+2 from Open Schools or as Private candidates shall not be eligible to appear for NEET. Furthermore, study of Biology/Biotechnology as an additional subject at 10+2 level also shall not permissible."

This note did not take into account the background and the objections, which had been sounded and recorded in the Minutes of the meeting dated 26th May, 2017 and notes dated 18th and 20th December, 2017 and also the fact that approval was sought on "undisputed points" and the issue or proposal regarding disqualification of open school Board candidates was under consideration (it would be right to state "was disputed"). This detailed noting dated 8th January, 2018 records that the most notable feature was the prescription of upper age limit of 25 years, relaxable by five years for reserved categories. Reference was not made to divergent and variant view on the aspect of open school students/candidates. The note was approved by the Minister on 16th January, 2018.

34. Ministry of Health and Family Welfare in their affidavit accept and admit that they were not forwarded and did not have the benefit of the letter dated 5th December, 2017, written by the NIOS to MCI. Thereafter, a meeting between the two Ministers i.e. Minister of Health and Family Welfare and Minister of Human Resource Development was held on 17th January, 2018, wherein the issue of eligibility of NIOS students in NEET was discussed and consequent to the said meeting, letter dated 1st February, 2018 was addressed by the Ministry of Health and Family Welfare to the

MCI. This letter is of significance as it would reflect that the said Ministry harboured doubts and were unaware of the parity and equivalence accorded by the Government of India to class 12 certificates issued by NIOS. The letter reads as under:-

> "Subject: Eligibility of NIOS students for appearing in NEET (UG) — reg. Madam,
>
> I am directed to refer to MCI's letter dated 03.11.2017 wherein it was informed that the candidates who have not undergone classroom training including practical examination in class 11th and 12th will not be eligible for appearing in NEET (UG) and for grant of Eligibility Certificate.
>
> 2. In this context, it is informed that the matter has been discussed with CBSE and M/o HRD and it was informed that the NIOS is a recognized qualification in the country. CBSE vide letter dated 30.10.1991 (copy enclosed) has granted recognition to NIOS and is consider equivalent to other recognized Boards. It is also learnt from CBSE that around 1500-2000 students from NIOS qualify NEET every year. Excluding NIOS qualification from NEET will be unreasonable and unjustified.
>
> 3. Therefore, the Council is requested to reconsider its decision for excluding the NIOS students from appearing in NEET (UG) and convey the same to this Ministry accordingly."

This letter to the MCI specifically refers to the letter dated 3rd November, 2017 of the MCI, which has been referred to above.

35. Apparently and contrary to the developments pursuant to the meeting of the two Ministers on 17th January, 2018, approval granted by the Ministry of Health and Family Welfare on 16th January, 2018 to the draft amendments to the Regulations, which included disqualification of open school

candidates, was notified and informed to the MCI vide letter dated 22nd January, 2018. This letter refers to letter dated 19th January, 2018, written by the MCI, requesting for approval under Section 33 of the Act. Thereupon, the amended Regulations were notified in the Official Gazette published on 23rd January, 2018.

36. Ministry of Health and Family Welfare in their affidavit have stated that the MCI in response to the letter dated 1st February, 2018 had stated/informed vide letter dated 6th March, 2018 that the matter was sub-judice in the High Court. Ministry of Health and Family Welfare therefore in their affidavit are ambivalent and not categoric. They have referred to facts for consideration of the Court and have not proceeded to take a firm and decisive stand in the matter in the light of the letter dated 1st February, 2018 read with response of the MCI dated 6th March, 2018. The Ministry of Health and Family Welfare, who had earlier granted prior sanction on re-thought and deeper consideration, it is obvious, have reservation on the proviso to clause 4(2)(a) of the Regulations.

37. We have specifically referred to the prior sanction or approval granted by the Ministry of Health and Family Welfare, for we find that the said approval or sanction would faulter and does not meet the mandate of law, as relevant and seminal aspect and issue, eligibility of students of Open School Board were never considered and examined. In fact, the letter dated 22nd January, 2018 should not have been issued after the question of eligibility of recognized open schools Boards students had arisen and was under debate and consideration pursuant to the meeting between the two Ministers on 17th January, 2018.

38. At this stage, we would like to note that both CBSE and Ministry of Human Resource Development, Union of India have supported the petitioners and are clearly opposed to the proviso disqualifying candidates, who have completed 10+2 from open schools. We begin by first referring to the affidavit of the CBSE on the said aspect, as in the counter affidavit, they have stated on oath in support of the writ petitioners as under:-

> "5. That as regards the ineligibility of private candidates to sit for NEET is concerned, it is submitted that education is a part of the concurrent list of the Constitution of India and accordingly there are 02 types of Educational Boards across the country. The details are as follows:
>
> a. National Boards: National Boards are CBSE, ICSE & NIOS. The CBSE and ICSE offers the education through Face to Face mode only. Further, NIOS is offering school education through Open and Distance Education Mode.
>
> b. State Boards – There are following types of educations boards existing in the Country:
>
> i School Education Bard(s)
>
> ii Open Schools like NIOS and
>
> iii Other Boards like Sanskrit Board and Madrasa Board etc
>
> 6. The National Institute of Open Schooling was established by Govt. of India in compliance of the recommendations made by National Policy on Education, 1986. Earlier, NIOS was known as NOS i.e National Open School and later on its name was changed from National Open School to National Institute of Open Schooling. NIOS is a Pace Setting National Board, which is guiding the states for providing education through Open and Distance Education Mode to the youths

> who are from the disadvantageous category/position. It is also informed that National Open School was a part of CBSE till 1988 and after the recommendations of NPE, 1986 unit of CBSE of open school was given an independent status in the form of National Open School. Both CBSE and NIOS are autonomous organizations of Ministry of Human Resources Development , Govt. of India.
>
> 7. As per the policy, the certificates issued by all the Boards for class X & class XII are treated at par for all purposes. A student who has done class X from CBSE may seek admission in National Institute of Open Schooling in class XII and the reverse is also possible. Likewise, any student who has passed class X from any State Board may seek admission in class XII in any of the 03 National Boards. Further, students can move from one State Board to another State Board also. All the Boards are allowed to issue the certificates to the students who have passed either class X or XII from their Boards. Students of any Board may also seek the admission in under graduate courses across the country. All the Boards are following the National Curriculum Framework, 2005 brought out by National Council for Education Research and Training (NCERT) and accordingly allowed to frame their own syllabus."

39. Ministry of Human Resource Development in their affidavit filed in Writ Petition (C) No. 2119/2018, ***Shorya Raghav versus Union of India and Others***, are equally assertive on the equivalence of the 10+2 certification by approved open school Board and have stated as under:-

> "3. That it is submitted that, National Institute of Open Schooling (NIOS) originally formed by the Ministry of Human Resource Development (Department of Education), Government of India vide Resolution dated 21-11-1989 and it has been notified as such in the Gazette of India dated December 23, 1989, copy of the Resolution

is attached as Annexure R-1. That as per the above Notification, NIOS was called as "The National Open School Society". However, thereafter, vide a Resolution dated 14-09-1990, Government of India ordered vesting of authority in the National Open School Society (NOS) for holding certain examinations through distance and open learning system at the school stage and for certification thereof. Accordingly, NIOS became a separate Board in the eyes of law. Presently NIOS's nomenclature has been changed to NIOS and it is an autonomous body under the MHRD having Regional Centres all over India.

4. That it is submitted that the answering respondent, Ministry of Human Resource Development has set up two National Boards, i.e., Central Board of Secondary Education (CBSE) and National Institute of Open Schooling (NIOS). MHRD has authorized the NIOS to conduct examination through distance and open learning system at school stage and issue certificate thereof. MHRD have conveyed to all the State/UT Governments that the students passing from NIOS are eligible for admission to higher studies and also for employment under the Central/State Governments.

5. That it is submitted that the Respondent No. 2 Medical Council of India (MCI), while amending their "Regulations on Graduate Medical Education, 1997" vide Notification No. MCI-34 (41)/2017-Med./169873 dated 22.01.2018, have made the candidates, who have passed 10+2 from open Schools or as Private candidate, ineligible to appear for National Eligibility-cum-Entrance-Test from this year. As a result, the learners passing out from NIOS and 20 State Open School Boards has become ineligible for MBBS/BDS Entrance Examination. The decision of the MCI is against the earlier decision of the Board of the Governors of MCI, taken in its meeting held on 13th August, 2012, as conveyed vide their letter No.MCI-34(1)/(UG)(Gen.)/2012-Med./129570 dated 14.09.2012,

> making the students appearing in 10+2 examination conducted by NIOS as eligible for admission to MBBS course.
>
> 6. That it is submitted that the Hon'ble Minister for MHRD, wrote a letter to the Hon'ble Minister of Health & Family Welfare seeking intervention in the matter to reconsider the matter so as to enable the students from NIOS and other State Open Schools eligible to appear in NEET examination from 2018 (Anexure-R-2).
>
> 7. That it is submitted that, in regard to candidates taking Biology/Bio-Technology as additional subjects in class 11th and 12th will not be eligible to appear in the NEET Examinations, this Ministry has no comments to offer as it is the domain of Respondent No. 1 Ministry of Health & Family Welfare, Govt of India and Respondent No. 2."

40. It would be appropriate, at this stage, to also refer to the affidavit filed on behalf of NIOS. The said institute was formed by the Ministry of Human Resource Development, Department of Education, vide resolution dated 21st November, 1989 and was notified in the Gazette of India dated 23rd December, 1989. The primary aim and object for creating the said institute was proper development of distance and open learning system at the school level in the country and to develop, prescribe and offer wide spectrum of study courses for the purpose of general and continuing education. This Board was established to take over administration and management of the open schools, which was hitherto operationalized and managed by the CBSE. NIOS was to work as a society. Thereafter, vide resolution dated 14th September, 1990, Ministry of Human Resource Development had decided that NIOS shall conduct pre-degree level 10 and 12 class examination whether "academic, technical or vocational", subject to

approval of the society's Executive Board or as would be called upon to conduct by the Government of India, Ministry of Human Resource Development, and would act as a certifying authority for such courses and programs and to do such acts ancillary to such objects as may be necessary.

41. NIOS has placed on record copy of their curricula in different subjects, which include Physics, Chemistry and Biology. They have also placed on record "Guidelines for Centre Superintendents for Practical Examinations" which are applicable to practicals conducted for subjects like, Physics, Chemistry and Biology. It is mandatory that each student should have been enrolled for a period of two years and each student must undergo the entire course spread over this period of two years, which includes a minimum of thirty face to face programs (Personal Contact Programs) per session per subject for theory and five additional sessions for subjects having practicals. These sessions are held on weekends and holidays at the nominated study centres. The study centres selected have proper infrastructure and laboratories for Science subjects and are the affiliated schools of CBSE or State Education Boards. Marks are separately assigned for theory and practicals. Theory exams are conducted and evaluated by a panel of evaluators/examiners having experience in the Board of Education. Practical exams, which carry 20% weightage are conducted at the study centre. 50% of the practical was/is formative assessment and 50% was/is summative assessment.

42. Association of Indian Universities vide their letter No. EV 11/(354)/91 dated 25th July 1991 have stated that they had in the meeting granted equivalence to courses conducted by NIOS with those of

examination of recognized Boards for the purpose of admission to higher studies in Indian Universities.

43. The issue whether students, who clear class 12 from the recognized open school Boards were eligible and should be treated at par with candidates who have undergone regular schooling, it is apparent, had arisen earlier in 2012. MCI vide their letter dated 23rd February, 2012 to the NIOS had sought clarification on procedure adopted for conducting practical tests in Physics, Chemistry and Biology and whether NIOS students passing 10+2 had to undergo practical lessons and practical tests. NIOS had then responded vide communication dated 28th February, 2012 stating that the courses offered by them were undertaken through study centres, that were schools affiliated to a recognized National and State Board. Such schools had laboratories in the desired subjects like, Physics, Chemistry and Biology. It was mandatory for the students undertaking the said courses to perform practicals at the study centres. Attendance in these classes was compulsory for every learner. Practical exams were also conducted as held by any formal board. NIOS was following National Curriculum Framework, 2005 for evaluating the learners. NIOS had an et cetera curriculum, as their exams were conducted for both 11th and 12th class courses. In formal Boards, exams were conducted for class 12th course only. It may be relevant to state here that a student/candidate cannot appear in 10+2 examination unless he has been enrolled for two years with the NIOS/open Boards. These aspects were again clarified by NIOS to MCI vide their communication dated 30th July, 2012. This letter by NIOS had affirmed that large number of candidates of NIOS were appearing in various competitive examinations, including admission in MBBS at national and

State level and they were qualifying. Large number of such students were already studying in various medical colleges.

44. MCI vide communication/letter No.MCI-34 (1) (UG)(Gen.)/2012-Med/129570 dated 14th September, 2012, after making reference to earlier correspondence in the form of six letters starting from 4th January, 2012 till 27th August, 2012, had positively stated that the matter regarding their acceptance to NIOS certificate for evaluating eligibility of students seeking admission to MBBS course had been considered by the Board of Governors on 13th August, 2012 and it was resolved that since the Regulations i.e. Graduate Medical Education Regulations, 1997 *"do not specify as to the qualification granted by particular Board will be recognized, therefore,.....eligibility criteria for admission to MBBS course are fulfilled by the students appearing in 10+2 examination conducted by the National Institute of Open Schooling they may be considered for admission to MBBS course."* Aforesaid letter/communication affirms and accepts that students/candidates who had completed 10+2 from open school Boards were eligible.

45. The contention of the MCI that their earlier letter dated 14th September, 2012 was vague and ambiguous or was written under misapprehension is far-fetched and should be rejected. The letter dated 14th September, 2012 accepting the students of NIOS as eligible for NEET examination was issued after thorough examination and after detailed correspondence including the letters written by NIOS on the question of face-to-face learning, practicals and classes being held in the subjects, Physics, Chemistry and Biology. It was a conscious decision. The principle that estoppel does not apply to law, would not be of avail in so far as MCI

had correctly and fairly interpreted the Regulation as they existed prior to enactment of the proviso under challenge.

46. We would now examine importance of right to education and opportunity to acquire knowledge and higher education. We are conscious and aware that under Article 21A, the State has to provide for free and compulsory education to all children between 6 to 14 years of age in a manner determined by law. It could be argued that in some cases, it has been held that right to professional degree may not be covered by Article 21. Reference could be made to paragraph 102 in ***National Legal Services Authority versus Union of India and Others***, (2014) 5 SCC 438, which refers to ***Unni Krishnan J.P. and Others versus State of Andhra Pradesh and Others***, (1993) 1 SCC 645. In this case, we are directly concerned with Article 19(1)(g) and Article 14 of the Constitution and there are number of decisions in which right and opportunity to higher education is treated as falling within the scope and ambit of Article 19(1)(g).

47. It is sometimes urged that the decision in ***Unni Krishnan, J.P.*** (supra) holds that there is no fundamental right to higher education. ***Unni Krishnan, J.P.*** (supra) on the question whether right to establish educational institutions was over-ruled in ***TMA Pai Foundation versus State of Karnataka***, (2007) 8 SCC 481. ***Unni Krishnan, J.P.*** (supra) had referred to ***Bandhua Mukti Morcha versus Union of India and Others***, (1984) 3 SCC 161 wherein it was held that the right to life guaranteed by Article 21 does "take in" "education facilities". This legal proposition was accepted in ***Unni Krishnan, J.P.*** (supra) observing that right to education was implicit in and flowed from the right to life guaranteed by Article 21. Right to education, it was affirmed, was of transcendental importance in life and was so

recognized all over the world observing that education was perhaps the most important function bestowed on the Government and the very foundation of good citizenship. It was doubtful if any child would succeed in life if he was denied opportunity to education. The right to education finds reference in three Articles of Part IV, viz., Article 41, Article 45 and Article 46 which shows the importance attached to the said rights. Referring to ***Mohini Jain (Miss) versus State of Karnataka and Others***, (1992) 3 SCC 666, it was observed that the right to education, though implicit in the right to life, was somewhat different from the latter in the sense that the said right was not determined by perspective of threat. It means that the State cannot deprive a citizen of his right to education except in accordance with the procedure prescribed by law. Education means knowledge and knowledge itself is power and, therefore, a part of right to life, but this does not mean that every citizen of this country can command to the State to provide him education of his choice. Differentiation was made between the right to free education for all children until they complete the age of 14 years as stated in Article 45, now a fundamental right in Article 21A, and right to education of citizens after they complete the age of 14 years referable to Article 41 of Part IV of the Constitution which states that the citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. In this context, it was observed that the limits of economic capacity were ordinarily speaking matters within the subjective satisfaction of the State. We would note that the aforesaid decision refers to Article 21 of the Constitution and the right to life. In the context of the present case, however, we are dealing with the issue of right of open school Board students to appear in NEET examination who, on

qualification, can study medicine and acquire MBBS degree. In ***University of Delhi and Another versus Anand Vardhan Chandel***, (2000) 10 SCC 648, referring to the decision of the Division Bench of the Delhi High Court reported as ***Anand Vardhan Chandel versus University of Delhi and Another***, ILR (1978) 2 Delhi 297 holding that the right to education was a fundamental right under clause (a), (b) and (c) of Article 19(1) and Article 21, it was held that there could be no dispute that the right to education was a fundamental right to the extent it had been spelt out by the Constitution Bench in ***Unni Krishnan, J.P.*** (supra). Reference can also be made to the observations of the Supreme Court in ***AIIMS Students' Union versus AIIMS and Others***, (2002) 1 SCC 428 and ***Secretary, Mahatma Gandhi Mission and Another versus Bhartiya Kamgar Sena and Others***, (2017) 4 SCC 449 dealing with admissions to post graduate courses and college education respectively. Pertinently, in the present case, impact of Article 19(1)(g) can be clearly appreciated and understood for we are concerned with the right of the students/candidates who want to practice the profession of modern system of medicine. These candidates are not seeking or praying for right to education in the sense that the State must, notwithstanding its resources, provide for and establish medical college, but for opportunity to the students/ candidates from open school Boards. Albeit their contention is that they have been denied their right to participate and opportunity to compete with others in the selection process to get admission to MBBS course by imposing an unreasonable restriction, which is also not in general public interest.

48. On the question of reasonableness, we would also like to quote and reproduce Article 41 of the Constitution which reads as under:

> "41. Right to work, to education and to public assistance in certain cases.- The 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, and in other cases of undeserved want."

49. Appropriately, reference can also be made to Article 15(4) and (5) of the Constitution which though couched in negative terms prescribe that the States shall not be prevented from making any special provision for advancement of socially and educationally backward classes of citizens and Scheduled Castes and Scheduled Tribes including relating to admission to educational institutions including private educational institutions. These clauses may not be directly applicable, but they reflect constitutional vision and need to ensure that persons from socially and economically backward classes must be afforded fair and equal opportunity to acquire professional degrees, an aspect which was highlighted by different judges in ***Ashoka Kumar Thakur versus Union of India***, (2008) 6 SCC 1 (see paragraph 445 in the judgment of K.G. Balakrishnan, J., paragraphs 285 to 286, 324 and 355 in the judgment of Pasayat, J. and paragraphs 457, 482, 483 and 634 in the dissenting opinion of Bhandari, J.).

50. We also find unequivocal merit in the contention raised by the petitioners that the disqualification of open school candidates/students would violate and infringe Fundamental Right under Article 19 (1) (g) of the Constitution in view of the test and parameter of reasonableness prescribed vide judicial decisions noted above. We would accept that the MCI is an expert body, which has been given primacy under the Act and the question

of eligibility or calibre of students to be admitted to the MBBS course can be made subject matter of the Regulations vide Section 10D and clause (ma) and (mb) of Section 33 of the Act. Even before enactment of Section 10D, the Supreme Court in ***State of Kerala versus Kumari T.P. Roshana and Another***, (1979) 1 SCC 572 had observed that the MCI as a high powered Council would have power to prescribe the minimum standards of medical education as this was implicit in power to supervise qualification or eligibility standard for admission. We would also accept that in academic matters, the Courts accord and give respect and opinion to the statutory experts in education and would hesitate and distance themselves from adverse comments as such bodies are the best judges of standards, which have to be laid down and maintained. But there should be uniformity. However, in the facts of the present case, there is divergence between the academic experts themselves. The divergence is in the form of affidavit filed by the CBSE and the Ministry of Human Resource Development. Affidavit of NIOS, an expert body, obviously is also to the contrary. Thus, reliance placed by the MCI on the several decisions on the scope of judicial review on academic and educational policy matters or matters concerning admission, prescribing criteria or calibre of students eligible to appear in NEET examination in the facts of the present case, we would observe is not final and would not prevent the Court from examining and deciding this *lis*.

51. It is not anyone's case that the Court cannot interfere when constitutional validity of eligibility condition in the matter of educational qualification is challenged. The power to interfere is conferred by the Constitution and cannot be abrogated and excluded vide first part of clause (6) to Article 19. (Scope and power of judicial review under part two of

clause (6) of Article 19 is somewhat different but in this case we do not deal with the second part). Existence of such power of judicial review is not debatable. Exercise of power, i.e. when and in which situations the power is to be exercised, is the matter of debate and ratio of legal decisions. This was aptly summarized and stated in ***V.G. Row*** (supra) in the following words:-

> "13. Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation a to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts undercover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights", as to which this Court has been assigned the role of a sentinel of the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set-up are out to seek clashes with the legislatures in the country."

52. In ***State of T.N. versus P. Krishnamurthy,*** (2006) 4 SCC 517, it was observed:-

> **"15.** It is well recognised that a subordinate legislation can be challenged under any of the following grounds:
>
> (*a*) Lack of legislative competence to make the subordinate legislation.

(*b*) Violation of fundamental rights guaranteed under the Constitution of India.

(*c*) Violation of any provision of the Constitution of India.

(*d*) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(*e*) Repugnancy to the laws of the land, that is, any enactment.

(*f*) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules)."

53. On the question of reasonableness of the restriction, we had specifically asked and called upon the counsel for MCI to state to whether there exists any empirical data or whether any study was made with regard to the performance of open school Board candidates who had qualified and were selected for MBBS course in earlier years. On instructions, it was stated that no such empirical data or study was made and is available. This crucial and critical aspect was not examined and considered before debarment proviso was proposed vide draft Regulations, crippling and crumbling the wishes and desire for equal opportunity of such candidates.

54. The petitioners, on the other hand, have pointed out that students/candidates who have done open schooling had appeared in NEET examination held in 2017 and have relied upon the following data:

PERFORMANCE OF OPEN SCHOOL IN NEET – (UG), 2017

S. No.	Board Name	Registered	Appeared	Qualified

1	National Institute of Open Schooling	2958	2710	864
2	Haryana Open School, Bhiwani	175	161	59
3	Rajasthan State Open School, Jaipur	58	55	31
4	MP State Open School, Bhopal	156	146	19
5	Andhra Pradesh Open School Society	129	116	59
6	Bihar Board of Open Schooling Examination	822	780	351
7	Chhattisgarh State Open School	162	146	29
	Total	**4460**	**4114**	**1412**

55. MCI states that the data only reflects and states number of students/candidates who had qualified and would not indicate number of students/candidates from open schools Boards who actually secured seats and were admitted to recognized medical college. The argument raised by the respondent MCI would only reflect that MCI has not conducted and made objective and thorough study on the performance of the open school Board candidates. They have proceeded on prejudice and assumption or a priori ex hypothesis predicated on the belief the students/candidates who do not attend regular schools, because of financial hardship and social reasons, are inferior and less deserving and turn downs. Such presumptions must be

resoundingly rejected as contrary to the constitutional ethos and would clearly violate both Article 14 and right to opportunity to acquire professional degree. Such perception would falter when we apply test of reasonableness, which is not wholly a subjective test. Reasonableness is to be tested on the golden thread of advancement of the nation and society as a whole, social and economic justice, distributive equality and fair opportunity. Contention of the MCI, if accepted, would be contrary to Article 41, Directive Principles of the State Policy and also Articles 15(4) and (5) of the Constitution. Everyone has a right to choose employment and take up a trade or profession of one's liking. This right is subject to reasonable regulation in the interest of general public under first part of clause (6) of Article 19 and the State can under the second part of clause (6) to Article 19 prescribe professional or technical qualification for pracising any profession. We are concerned with the first part, as we are concerned with right to opportunity and not directly with the right to practise a profession. Regulation to be reasonable must provide level playing field and should not restrain those who have struggled and fought social prejudice and financial hardship to complete 10+2 schooling, from right and opportunity to acquire a professional degree. After all, all students including those from open schools Boards are treated at par and equivalent to candidates with regular schooling. Once equivalence is accepted and affirmed, they should be given opportunity to compete with others. Only on meeting the eligibility marks and excellence on merits, they become eligible for selection. Selection and actual admission being based on merit, i.e. the marks obtained, no privilege or advantage is bestowed and given to a student from open school Boards. NEET is a centralized and a single window examination,

conducted in a transparent manner. This is a true and sure test of competence, caliber and aptitude. Professional degree would be awarded to students who meet the exacting standards and qualify the MBBS course. Impugned prohibition in the form of disqualification of students/candidates of open school Board would not meet the constitutional standard of reasonableness and test of interest of general public. The restriction in the nature of prohibiting students belonging to open school Board is therefore disproportionate and unreasonable to the purported "evil" sought to be remedied, i.e. to filter out students who are not interested and do not have the calibre and intellect to undergo and clear the MBBS course.

56. Higher level of knowledge is liberating, enabling and empowering to those who suffer from prejudice and are financially challenged. Efforts have to be made and law must permit inclusion and not exclusion of such persons from portals of knowledge. Indian Constitution recognises affirmative action as an extension of the principle of equality. It would be unfair and unjust, if we on vague and unsubstantitated pretence of unfitness close the door of knowledge on candidates, who have done class 12 from open school Boards. The restrictions envisaged would not only be unreasonable, but would perpetuate inequality and hamper promotion of egalitarian social order and justice.

57. In the aforesaid discussion, we have primarily discussed and elucidated on infringement of Fundamental Right under Article 19 (1) (g) read with clause (6). The aforesaid analysis, on the question of reasonableness, would be relevant to the issue of discrimination under Article 14 of the Constitution which formalises and ordains significant and salutary guarantee of equality before the law and equal protection of the

laws, including opportunity to education and matters relating to appointment and employment as held in ***E.P. Royappa versus State of Tamil Nadu & Anr.,*** (1974) 4 SCC 3. Right to equality from a positivistic point of view is antithetic to arbitrariness, which ensures that the State action must be fair and guided by considerations to ensure equality in treatment. All similarly situated should be treated alike and unequal treatment should not be guided by extraneous and irrelevant considerations, for otherwise the law would violate and deny equal treatment. In the context in question, we would hold that it is permissible to fix qualifications and eligibility norms for higher education but the eligibility norm and criteria must not fall foul of the principle of equality in opportunity. Prescriptions and qualification must be in the interest of general public, and to further the cause of education in MBBS courses. This discretion is not be exercised to curtail and deny opportunity to those who are not privileged, due to financial constraints and social reasons, and are not in a position to attend regular schooling, yet have the desire, merit and ability to study and want to become doctors. On the one hand government policy exposits a concerted attempt and effort to ensure that those denied opportunity to attend regular schooling are enabled to pursue and study higher education; the proviso, now enacted, seeks to undermine and negate the said objective and purpose. To us, it is apparent that the desire of the Union of India to recognize open school Boards and treat them equivalent and at par with school Boards, would suffer a contradiction and blow by the proviso enacted. We can while examining the validity of the proviso take into account connected laws including the executive policy and examine their combined concord, and erase and strike down laws which destroy equal opportunity to higher

education violating Article 14. We have earlier commented on the question of object and purpose behind the bar and disqualification of students/candidates, who have cleared 10+2 from open school Boards, and on analysis observed that the restriction enacted as based upon conjures and beliefs indicative of preconceived assumption and bias resulting in discrimination. This disqualification is not based upon any sound principle or basis, relevant to object and purpose. The proviso would result in hostile discrimination and hence, cannot be sustained on the ground that it does not have any rationale relation with the object sought to be achieved by the statute, which is that most meritorious and best students as per the test score are selected. The test of reasonableness and rationale is decided on the principle what is conducive and relevant to the functioning of the present day society. The petitioners and others similarly situated do not seek any preference and selection at the cost of merit and excellence, even when they compete as unequals with those who had the benefit of schooling, coaching, etc. What they seek and have prayed for, is right to compete on equal terms with their counterparts from regular schools. Proviso to clause 4(2)(a) runs counter to the objective that excellence and merit from every quarter must be given an opportunity. The bar and prohibition promotes inequality in opportunity, if not promoting inequality itself.

58. We would reject the contention of the MCI that students/candidates from open school Boards were ineligible under the existing Regulations before the amendment made effective from 22nd January, 2018. The submission is incorrect and fallacious. MCI, in support of the contention, had referred to decision of this Court in ***Raghukul Tilak versus Union of India***, (2006) 92 DRJ 356, which judgment was affirmed by a Division

Bench vide judgment authored by one of us (Sanjiv Khanna, J.). Division Bench judgment is reported as ***Raghukul Tilak versus Union of India & Anr.***, AIR 2007 Delhi 237. In these decisions, the question raised and considered was different as Raghukul Tilak had not studied Biology for two years as a subject in classes 11 and 12. He had taken Biology as an optional subject after clearing 10 + 2 examination vide supplementary classes. The said judgment clearly records that the issue raised in the case was of eligibility as per the extant rules and constitutional validity of the provision was not challenged. The question raised was relating to applicability and interpretation of the applicable Rule in the factual matrix of the said case.

59. Single Judge (S. Ravindra Bhat, J.) in ***Raghukul Tilak versus Union of India***, (2006) 92 DRJ 356 had elegized on the methods in vogue which had left much to be desired and had lamented that a meritorious student who had secured a high rank in coveted All India quota was being denied a seat. It was specifically observed that Raghukul Tilak had not appeared in any practical examination and if practical examination had been incorporated to a large measure, concerns of MCI about proficiency and aptitude of the candidate ultimately selected and the ability in the practicals would have been addressed. Single Judge had hoped that suitable remedial action would be taken soon and this would be matter of some conciliation and solace to Raghukul Tilak who could then derive some cold comfort that the system had changed at his behest. MCI instead of taking note of the words, has gone back from the position accepted and in existence for the last five years in terms of their letter dated 14th September, 2012.

60. Our attention was drawn to judgment of the Madras High Court in ***Sneha Manimurugan versus Medical Council of India,*** W.P. No.

30328/2015 of the single Judge dated 18.02.2016 and of the Division Bench in W.A. No.321/2016 dated 12.04.2016 respectively. In the said case, the candidate did not fulfill the criteria of two years of study in Biology as she had completed her certificate course from Singapore Cambridge without Biology in December, 2013 and had done Biology alone as a single subject from NIOS in April, 2014 and then had passed Physics, Chemistry, Biology and English from NIOS in October, 2014. She did not have two years of regular and continuous study in Biology.

61. Clause 4(2)(a) requires that the student/candidate should have studied in the last two years subjects of Physics, Chemistry, Biology and Mathematics with English at a level not less than a core course prescribed by National Counsel for Educational Research and Training as per educational structure recommended by the National Committee on education. We are not diluting, interfering or amending the said requirement and eligibility condition. Indeed, MCI itself in their letter dated 14th September, 2012 accepts that students from NIOS Board could meet the said minimum requirement and condition, if the student had studied the relevant subjects for two years at 10+2 level. It is the proviso now incorporated vide Notification dated 22nd January, 2018 which disqualifies and declares such candidates as ineligible and disqualified. Emphasis on regular and continuous study for two years, we would hold, does not exclude study by methods and manner recognized by law as appropriate and proper method of imparting education. Pertinently, sub-clause (f) to clause 4(2) of the Regulations states that any other examination which in scope and standard is found to be equivalent to intermediate science examination of an Indian

university/Board with Physics, Chemistry and Biology including practical test in each and English are to be considered as eligible.

62. Another additional factor may be noticed in favour of the petitioners. Open school Board candidates are considered eligible for selection for MBBS course in All India Institute of Medical Sciences and JIPMER, Puducherry. These prestigious institutions have not disqualified open school Board candidates. MCI has not disputed or denied this position and eligibility. Such candidates are also eligible and can appear in Joint Engineering Examination and can become engineers by studying in prestigious institutions like Indian Institute of Technology etc.

63. There is yet another aspect highlighted by the petitioners, relying upon decision of the Supreme Court in ***Suresh Pal and Others versus State of Haryana and Others***, (1987) 2 SCC 445, to the following effect:-

> "3. We are of the view that since at the time when the petitioners joined the course, it was recognised by the Government of Haryana and it was on the basis of this recognition that the petitioners joined the course, it would be unjust to tell the petitioners now that though at the time of their joining the course it was recognized, yet they cannot be given the benefit of such recognition and the certificates obtained by them would be futile, because during the pendency of the course it was derecognized by the State Government on January 9, 1985. We would, therefore, allow the appeal and direct the State Government to recognize the certificates obtained by the petitioners and others similarly situate as a result of completing the certificate course in Shri Hanuman Vayayam Prasarak Mandal, Amravati for the purpose of appointment as Physical Training Instructor in government schools in Haryana. Of course, if any person has joined the certificate course after January 9, 1985 he

> would not be entitled to the benefit of this order and any certificate obtained by him from the said Institute would be of no avail. There will be no order as to costs of the appeal."

64. In ***Rohit Naresh Agarwal versus Union of India and Others***, (2013) 204 DLT 401 (DB), a Division Bench of this Court had dealt with challenge to clause 4.4(3) of the Screening Test Regulations issued and notified on 16th April, 2010 by the MCI. One of the reasons to strike down the impugned stipulation that migration from one university or medical college to another was impermissible, was that the amendment had impacted and resulted in retrospective effect inasmuch as it had adversely affected students who, on the basis of eligibility certificates, had proceeded overseas and had obtained medical qualification or were in process of doing so. The Court observed that unless there were compelling and good reasons in public interest, legislation with retrospective effect could be declared as unreasonable or arbitrary and violating Article 14 of the Constitution. Further, in case of delegated legislation, power to make retrospective legislation must exist and should be expressly stated or inferred by necessary implication. Such power in the context of the Act cannot be inferred to have been granted to MCI and MCI had not indicated any compelling reason why the Regulation should be given retrospective effect. Similar observations are to be found in ***Narendra Sakharam Jadhav versus State of Maharashtra***, 2000 (3) Mh.L.J. 806.

65. Counsel for MCI has drawn our attention to decision of the Supreme Court in ***Kailash Chand Sharma versus State of Rajasthan and Others***, (2002) 6 SCC 562, wherein the decision in the case of ***Suresh Pal*** (supra) was distinguished and clarified. We would observe that this reason is not

the primary ground to allow the writs and quash the proviso to Clause 4 (2) (a) of the Regulations, albeit is a supporting and a secondary factor.

66. We would also like to record that some of the counsels for the petitioners had relied upon Section 19A of the Act to contend that the amendments made should have been circulated and approved by the State Governments. In our opinion, Section 19A of the Act would not be applicable for the said provision does not apply to qualifications prescribed for NEET examination which is conducted in terms of power conferred under Section 10D of the Act, read with clauses (ma) and (mb) to Section 33 of the Act.

Challenge to age limit / over age

67. This brings us to the second issue and question of over age or upper age limit. The proviso to clause (4) of the Regulations, as noticed above, now postulates that general candidates above the age of 25 years and reserved category candidates above the age of 30 years would not be eligible to appear in NEET Examination, 2018 and onwards. At the outset, we would reject the contention of the petitioners that the aforesaid amendments would fall foul on the ground that they are retrospective. The said assertion cannot be accepted for the simple reason that whenever upper or any age criteria is prescribed, it will be effective from a particular date. If the contention of the petitioners on the aspect of age or cut-off date is to be accepted, then by legislation, subordinate or otherwise, upper or any age criteria cannot be fixed or altered. With regard to cut-off dates, it is normally left to the domain of the executive authority and courts do not interfere, unless the cut-off date appears to be ex-facie arbitrary and causes blatant

discrimination [see ***Government of Andhra Pradesh & Ors. versus N. Subbarayudu & Ors.,*** (2008) 14 SCC 702].

68. In the counter affidavit filed by the respondent/MCI on the question of fixation of upper age limit, it has been explained that approximately 11 Lakh students compete each year for about 61000 seats for MBBS courses in various government and private medical colleges across the country. Prior to the amendment, no upper age limit was fixed for appearing in the NEET examination and it was noticed that large number of candidates kept on appearing year after year in the hope of getting a seat or secure an upgrade to a reputed medical college. This had resulted in an unhealthy competition amongst the candidates and the rule position was to the disadvantage of those who were young and meritorious, who would face tough and rather unfair competition from those who had earlier appeared and were not successful or wanted to secure admission to a better college. Candidates who would repeat were at an advantage, on account of preparation, etc. The respondent/MCI, on the over age aspect, have explained as under:-

> "68. It is relevant to submit here that the conditions relating to the maximum age limit assumes great significance since the underlying objective behind having a Uniform Entrance Examination for admissions to MBBS course is to ensure that every candidate gets equal, fair and reasonable opportunity to compete with the other candidates. The idea of having a Uniform Entrance Examination is to have a level playing field as also to curb unhealthy competition and at the same time ensuring that only bona fide meritorious candidates are selected through a transparent process of selection.

69. It is respectfully submitted that there are approximately 61,020 seats available in MBBS course in various Government and Private Medical College across the Country. It is submitted that on an average approximately 11 Lakh students compete every year seeking admission in the above-mentioned number of seats for MBBS course. Prior to the amendment to the Regulations on Graduate Medical Education, 1997, no upper age limit was fixed for appearing in the Uniform Entrance Examination was there as a result of which it was noticed that large number of candidates kept appearing in the Uniform Entrance Examination year after year just in the hope of getting a seat in a reputed medical college. This has resulted in a very unhealthy competition amongst the candidates since the numbers of candidates appearing in the Uniform Entrance Examination has tremendously increased every year for almost the same number of seats.

70. It is submitted that it is discernible that when the number of candidates competing are far in excess of the number of seats available then it becomes very difficult to assess and determine the real merit. In other words, it is unfair to make a young candidate appearing in the NEET examination for the first time to compete with a much older candidate who had more time to prepare and had already given several attempts. It is respectfully submitted that it is in the interest of the candidates that there is cap fixed on the upper age so that certain candidates who have already given several attempts do not steal a march over the other candidates.

71. It is respectfully submitted that fixing of upper age limit is very crucial as it would ensure that the candidates do not become victims of unhealthy competition, resulting in a situation where it becomes impossible for the young candidates to secure admission in the medical college.

72. It is submitted that by way of the amended Graduate Medical Regulation, 1997 the answering respondent has prescribed 17 years as the minimum age limit to be eligible for admission in the medical college. By fixing 25 years as the maximum age limit for appearing in the NEET examination every candidate belonging to General Category on an average gets 7-8 years for preparation to appear in the NEET examination. Similarly a candidate belonging to SC/ST/OBC category on an average gets 13 years till he attains the age of 30 years for preparation to appear in the NEET examination. In view thereof, no candidate is deprived of a fair and reasonable opportunity to compete with other candidates in the Uniform Entrance Examination.

73. It is relevant to submit that merit is determined on the basis of the calibre of the candidate to score certain number of marks in the entrance examination and secure a position in the merit list. The study of medicine requires meritorious and intelligent candidates having the requisite knowledge and such candidates should be within a particular age group. It is submitted that appearing in the Uniform Entrance Examination endlessly will neither benefit the candidate nor the medical colleges as well as the Country since it will only increase the burden on the candidates to compete with more and more candidates every year.

74. It is further submitted that the introduction of maximum age limit to appear in the NEET examination, is also required to be viewed from the perspective of the candidates. It is a well-known fact that the number of candidates aspiring to become doctors is far more than any other profession in the Country. It is submitted that the total number of seats available in the medical college are far less than the number of candidates seeking admission in MBBS course. It is respectfully submitted that it is quite apparent that every candidate appearing in the NEET examination cannot get admission to MBBS course as there is a great dearth of seats. In view thereof,

> no fruitful purpose would be served by permitting a candidate to appear in the NEET examination year after year without there being any cap on the age limit.
>
> 75. It is respectfully submitted that there have been many instances where the candidates despite appearing several times in the entrance test has failed to get admission in the medical colleges. It is submitted that if there is no upper age limit fixed then the candidates aspiring to become doctors will continue to appear in the examination just in hope of getting selected even though they have been unsuccessful in the entrance examination on several occasion. This would result in unnecessary wastage of the valuable time, energy and hard work put in by the candidate and such candidate who failed to qualify even after repeated opportunities will also be left with no other alternative option to pursue any other profession in life.
>
> 76. It is submitted that by way of the amended Graduate Medical Regulation, 1997 the answering respondent has prescribed 17 years as the minimum age limit to be eligible for admission in the medical college since the candidates at that age possess a developing mind and can cope up with highly technical/ scientific subject of MBBS since the candidates at that age possess a developing mind due to high grasping power but beyond a certain age a person's mind becomes fully developed and the same inhibits him from grasping technical / scientific course in medicine."

The aforesaid reasoning and grounds given appeal to us. Factually, the assertions of the MCI are not under challenge. By fixing upper age limit of 25 years in case of general candidates, a candidate belonging to the general category on an average would get 7 to 8 years for preparation and appearing in NEET examination. A reserved category candidate, till he attains the age of 30 years, will get an average of 12 to 13 years to prepare

and appear in the NEET examination. No candidate therefore is denied an adequate and fair opportunity to get selected.

69. Aforesaid need to put the upper age limit was necessary as there are approximately 61000 seats for MBBS course in government and private medical colleges in the country. There has to be a level playing field for selection amongst lakhs of candidates who appear every year (in 2017, about 11 Lakh candidates had appeared). It is obvious that a candidate who is 17 or 18 years of age will find it difficult to compete with a candidate who is above 26/31 years of age and has been studying for last 7 to 10 years or even more only to get admission to an MBBS course.

70. Contention of the petitioners that no upper time limit has been prescribed for completion of the MBBS course after admission to acquire a degree, would not in our opinion make the proviso prescribing the upper age limit for selection as arbitrary and unconstitutional. These are two separate aspects. Failure to prescribe an upper time period to complete MBBS course may be an anomaly, which it can be argued requires a correction (on which we give no direction). It will not be a ground to strike down the impugned proviso which is justified and necessary, as invalid and unconstitutional.

71. We are conscious that several countries do not impose and have not fixed upper age limit for MBBS course, but the situation in these countries is different for there are not that many candidates competing for selection to a few and limited seats. The present situation in India cannot be compared with the situation prevailing abroad or the professional course in law which entitles a candidate to practice as an advocate. There are large number of colleges offering LL.B. degree and, therefore, the position is too far

different. There is need to avoid unhealthy and unfair advantage and competition which is to the disadvantage of the candidates belonging to younger age group. There is also need to ensure that candidates from young age group get admission to medical colleges so that they bloom and groom themselves into experts and specialists who can render medical services over a long period of time. We do not think the challenge on the upper age limit has any merit and is therefore rejected.

72. As eidolons, we would accept that every person should be given an opportunity to compete for selection for neither age nor subjects studied in school matter, when the person has competence and calibre clear the entrance examination and successfully complete the MBBS course. Multi disciplinary approach in medicine and other fields is now accepted as necessary and beneficial. There are several countries that do not subscribe any restriction on age limit or the course/subjects studied during schooling without sacrificing quality and calibre. Midlife change in profession should be accepted and should not treated as a disqualification. However, in the present context and background in India, given the limited number of seats and large number of aspirants, it is difficult to hold that the upper age limit is not a reasonable restriction, which has been imposed in the interest of general public. Hopefully, in near future, this situation would change, and age and "subject" constraint and restriction would not be required and necessary.

73. W.P.(C) No.2055/2018 has been preferred by Ritinath Shukla who is a compounder/ward boy aged 45 years. Petitioner submits that they should be given preference and they want to upgrade their skills as a compounder / ward boy to that of a qualified doctor. We can empathise with the desire of

Ritinath Shukla to appear in the NEET examination to qualify to selection to a medical college, but do not think this can be a ground to allow the writ petition and grant relief. We have already examined the question of upper age limit above.

74. The case of nurses from Kerala in W.P.(C) Nos.1982/2018, Jasna Shayla K and 1972/2018, Jalaludheen T. & Anr. is somewhat different for by State legislation, nurses are entitled to reservation in medical colleges in the State of Kerala. However, we do not think we can grant any relief to the said petitioners in view of the decision of the Supreme Court in ***State of Uttar Pradesh and Others versus Dinesh Singh Chauhan***, (2016) 9 SCC 749 which decision refers to Entry 66 of the Union List and Entry 25 of the Concurrent List. The law and ratio expounded is that law under Entry 25 of the Concurrent List is subject to the Central law referable to Entry 66 in the Union List which in this case would be the Regulation. The legal issue and ratio, in ***Dinesh Singh Chauhan*** (supra) was referred to a larger Bench in W.P.(C) No.196/2018, ***Tamil Nadu Medical Officers' Association & Ors. versus Union of India & Ors.*** vide order dated 13th April, 2018. The prayer for interim relief was not granted as it was felt appropriate that the prayer for interim relief would be considered by the larger Bench. The larger Bench of five Judges of the Supreme Court in their order dated 24th April, 2018 in ***Tamil Nadu Medical Officers' Association & Ors. versus Union of India & Ors.*** have not acceded to and accepted the prayer for interim relief which was refused observing that at this stage, ***Dinesh Singh Chauhan*** (supra) holds the field and primacy has to be accorded to the legislation framed under Entry 66 of List I. We, therefore, regret and express our inability to accept the prayers made in the aforesaid writ petitions.

Conclusions

75. In view of the aforesaid discussion, our findings and conclusions are as under:-

(a) Proviso to clause 4(2)(a) of the Regulations disqualifying recognized open school Board candidates is struck down and declared unconstitutional. Students/candidates, who have done class 12 from NIOS or recognized open school State Boards, would not be treated as per se disqualified for selection and appearance in NEET examination. Their NEET results, when otherwise eligible, would be declared with other candidates.

(b) Proviso to clause 4 prescribing upper age limit of 25 years in case of general category candidates and 30 years in case of reserved category candidates is legal and valid. To this extent, the writ petitions challenging *vires* of proviso to clause 4 of the Regulations are dismissed.

(c) In respect of private students, MCI has already issued clarification, which appears to have satisfied grievance of the private candidates. In the light of the said clarification, no arguments have been addressed before us and, therefore, we have not decided or adjudicated on the said issue/aspect.

(d) Writ Petition (C) No. 1982/2018, ***Jasna Shayla K versus Union of India and Ors.*** and Writ Petition (C) No.1972/2018, ***Jalaludheen T. & Anr. versus Medical Council of India and Ors.*** are dismissed in

view of the judgment of the Supreme Court in ***Dinesh Singh Chauhan*** (supra).

The afore-stated writ petitions are disposed of in the aforesaid terms. There would be no order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(CHANDER SHEKHAR)
JUDGE

MAY 11, 2018
NA/VKR/PK