EDUCATIONAL RIGHTS OF THE MINORITIES UNDER ARTICLE 30 OF THE INDIAN CONSTITUTION

THESIS SUBMITTED BY

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CERTIFICATE

Certified that the thesis "EDUCATIONAL RIGHTS OF THE MINORITIES UNDER ARTICLE 30 OF THE INDIAN CONSTITUTION" is the record of bona fide research carried out by Mrs.ANNIE JOHN under my supervision. The thesis is worth submitting for the Degree of Doctor of Philosophy under the Faculty of Law.

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DECLARATION

I declare that the thesis entitled "EDUCATIONAL RIGHTS OF THE MINORITIES UNDER ARTICLE 30 OF THE INDIAN CONSTITUTION" is the record of bona fide research carried out by me under the supervision of Prof.(Dr.) V.D.Sebastian in the Department of Law, Cochin University of Science and Technology. I further declare that this has not previously formed the basis of the award of any degree, diploma, associateship, fellowship or other similar title of recognition.

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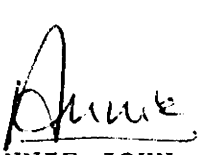

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PREFACE

In India whose people stand divided by difference of religion, language, race, culture and socio-economic factors, one of the tasks that the constitution makers was confronted with was to devise a constitutional arrangement that protects numerical minorities from discrimination and promises to preserve those characteristics which have divided them apart from the rest. The present study deals with the knotty problem of the right of the religious and linguistic minorities to establish and administer educational institutions of their choice under Article 30 of the Constitution.

Since the commencement of the Constitution in 1950, a number of conflicts have arisen between the claim of the state to regulate matters pertaining to education and educational institutions and the claim of minorities to establish and administer educational institutions according to their own choice. The object of the present study is to explore whether the judiciary has been successful in balancing the conflicting rights of the minorities and the state. The study also seeks to bring forth those judicial

principles which have governed the operation of these rights and determined the limits of their application. It also aims at evaluation of various judicial propositions for finding out whether they uphold or undermine the intention and spirit that underlies the language of these rights. The study is both narrative and critical and the materials on which it is mainly based are the cases from the Supreme Court and the High Courts decided since the commencement of the Constitution and reported till the present, the various reports of the Minorities Commission both Central and State, the opinion of eminent jurists, the Constituent Assembly Debates regarding minority problems, the various regulatory measures passed by different State legislatures on this right etc. The study covers major issues like who is a minority, the minority status and its proof, the right to establish and administer educational institutions, the problems of recognition and affiliation and state aid (whether this is a privilege or a right), admission and governing bodies of institutions, the disciplinary control over the staff of such institutions and the extent of the power of the State to regulate these rights.

A liberal, generous and sympathetic approach is reflected in the matter of the preservation of the right of minority so far as their educational institutions are concerned. Although attempts have been made in the past by many State legislations to whittle down the rights of minorities in this respect, the minorities have resisted such attempts by approaching the judiciary and the courts have consistently upheld the rights of the minority and have ensured that the ambit and scope of the minority rights is not narrowed down. The principle which can be discerned in various decisions of this court is that the catholic approach which led to the drafting of the provisions relating to minority rights should not be set at naught by narrow judicial interpretation. Article 30 was given full play by the Supreme Court in several cases in the first three decades of the Constitution by showering unlimited rights through judicial interpretations.

It is unfortunate to record that this right has assumed unlimited and irregular dimensions because of the lenient approach adopted by the judiciary towards these rights and the consequent exploitation by the so called minorities. It is rather ironic that the Supreme Court has

yet to lay down the meaning and content of the expression who is a minority and to formulate the limit to the right under Article 30 more than four decades after the Constitution came into being. It is high time for the judiciary to underline the limits of these rights. Otherwise an amendment to Article 30 is desirable to that effect.

The study is divided into nine chapters. First chapter is concerned with the historical background and events that ultimately led to the adoption by the Constituent Assembly of the rights guaranteed to the minorities. The second chapter deals with who is a minority under Article 30 of the Constitution and the study tries to bring out the meaning and content of the expression minority. Third chapter deals with the proof of establishment by a minority which is a condition precedent for the exercise of the right under Article 30 of the Constitution and what are the indicia in determining the minority status of an educational institution. In chapter four, an attempt is made to find out whether recognition and affiliation can be claimed as a matter of right and further what regulatory conditions can be attached to the

grant of recognition and affiliation and under what circumstances recognition and affiliation can be withdrawn. Chapter five deals with questions that pertain to financial aid to minority institutions. Chapter six deals with the question of the scope of the right of minorities to determine the composition of the managing bodies of their institutions. The study in chapter seven is aimed at ascertaining the scope of the right of minority institutions in matters of admission of students. In chapter eight an attempt is made to find out the extent to which minority institutions have a choice in the selection of their staff and to find out what regulations can be imposed on such choice and to ascertain the extent of the disciplinary control over the staff of such institutions. The nineth chapter records the conclusion and deals with the extent of the state's regulatory power over the rights of the minorities under Article 30 of the Constitution.

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Chapter I

HISTORICAL PERSPECTIVE

From time immemorial India is considered to be a land of minorities comprising various groups - racial religious, linguistic and cultural.[1] Hindus, Muslims, Budhists, Christians, Sikhs, Jain, Jews and Parsis have been in this land for centuries. There was communal harmony and mutual understanding and, hence, in the ancient days, India witnessed no major political problems of the existence of minorities.

The problem of minorities in India is comparatively of very recent origin. The historical background of the problem of minorities in India can be picked up since the advent of the British Rule in India.[2] In the war of 1857, all the communities in India fought

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1. See Report of Statutory Commission, 1930, Vol.II, p.22, para 36.
2. See R.Palme Dutt, India Today and Tomorrow (1955), p.225. "Prior to British rule there was no trace of the type of Hindu-Muslim conflicts associated with British rule". Jawaharlal Nehru, The Discovery of India (1946), p.263. "Nearly all our major problems today have grown up during British rule and as a direct result of British Policy".

unitedly as a common cause against the British invaders and suffered heavily and almost equally. The war of 1857 shaked the British administration in India. They resorted to "Divide and Rule" policy with the intention to break the solidarity of the people of India and their combinations. Under the myth of the 'martial races', immediately after the great revolt of 1857, the Indian Army was re-organised on tribal, sectarian and caste basis. Jawaharlal Nehru has rightly pointed out that[3]

> "The policy of balance and counterpoise was deliberately furthered in the Indian Army. Various groups were so arranged as to prevent any sentiment of national unity grouping up amongst them, and tribal and communal loyalties and slogans were encouraged."

The next step by the British rulers was the partition of Bengal in 1905 by which two communal provinces were created, ie., the Western Bengal where Hindus were greater in number and Eastern Bengal, having Muslim majority. By dividing Bengal the British rulers had cut

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3. Jawaharlal Nehru, op.cit., p.330.

the very source of Indian Nationalism.[4] The partition, though effected by the Government for administrative convenience, created a great gulf between the two major communities - Hindus and Muslims.[5]

At the beginning of the present century, the debate on constitutional safeguards for minorities centered around the issue of the method of selection of Indian representatives to the legislative institution.[6] The most effective method by which the British could succeed in dividing the Indian mass was the establishment of communal representation in legislatures. The British rulers gave adequate trials, to the theory of separate electorate on communal representation in Morley-Minto Reforms of 1909, Montague-Chelmsford Reforms of 1919, Government of India Act 1935 and the Cabinet Mission Scheme of 1946. The communal representation granted to Muslims led to similar

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4. See R.N.Aggarwal, Indian National Movement (1885 to 1947) (1971), p.65. "It was a clever move to drive a wedge between two communities and to weaken the forces of Bengali nationalism by weaning away the Muslims from the Congress.
5. See R.N.Aggarwal, National Movement and Constitutional Development (1956), p.52.
6. See Ralph Retzlaf, "The Problem of Communal Minorities in the Drafting of the Indian Constitution" in R.N.Span (ed.), Constitutionalism in Asia (1963), p.57.

demands by the Sikhs, Europeans, Anglo-Indians and Indian Christians. The communal representation in India had created a minority consciousness amongst the various religious and communal groups.[7] According to the author, the term 'minorities' in India was invented by the British rulers themselves.[8] It is said that the Indian Muslims formally entered politics and acquired a separate constitutional identity by the grant of separate electorates.[9] The brief account of some of the historical events prove that the problem of minorities which exists in acute form in India is the gift of British Rulers. In the words of Jawaharlal Nehru, "Nearly all the major problems have grown up during British rule and as a result of British policy, the princess; the minority problem ...".[10] Thus it remains a fact that the British Rulers were responsible to graft communal division in India.

THE DEVELOPMENT OF MINORITY SAFEGUARDS BEFORE INDEPENDENCE

Since the problem of minorities had assumed political colour, the Indian National Congress had held the

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7. See K.K.Wadhwa, Minority Safeguards in India (1975), p.28.
8. Id. at 29.
9. See P.Hardy, The Muslims of British India (1972), p.53.
10. Jawaharlal Nehru, op.cit., p.18.

view that the only solution to the problem of minorities which would be compatible with the ideal of nationalism, was to incorporate in the constitution a detailed list of fundamental rights, applicable to all Indian citizens irrespective of their affiliation to any particular religion. The demand for guarantee of fundamental rights had first appeared in the constitution of India Bill, 1895, framed by the Indian National Congress[11] and was thereafter expressed in several resolutions passed by the Congress, particularly between 1917 and 1919.[12] Mrs.Besant's Commonwealth of India Bill, 1925 further stressed the need for equality before the law, individual liberty, freedom of conscience, free expression of opinion, free assembly, right of free education, free profession and practice of religion.

In 1928 the All Parties Conference[13] appointed a

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11. "Free speech, imprisonment only by competent authority and free state education" formed part of the demands. Art. 16 of the Bill,Constitution of India Bill 1895, another of 1895 Bill unknown. B.Shiva Rao, The Framing of Indias Constitution--Select Documents, Vol.I.
12. For a description of these resolutions, see, Chakrabarthy and Bhattacharya, Congress in Evolution, 1940.
13. The Madras session of the Congress (1927) authorised its Working Committee to convene an all-parties conference with a view to drawing up a constitution for India acceptable to all parties. The conference was attended by the representatives of All India Muslim League, All-India Hindu Maha Sabha, the Central

(contd..)

Committee [The members were Motilal Nehru (Chairman), Ali Imam, Tej Behadur Sapru, M.S.Aney, Sardar Mangal Singh, Shuaib Qureshi, Subhas Chandra Bose and G.R.Pradhan] to suggest an amicable solution to the problem of communalism and other matters relating to constitution. All religions, communities and groups in India were given representation in the Committee. The outcome of deliberations of the committee - the Nehru Report - contained the following features relevant to the present study.[14]

1. The committee considered the country as an organic whole and not as composed of heterogeneous and independent elements as the princes, linguistic and religious minorities.

2. According to the committee India was to be a secular state with no state religion.

(f.n. 13 contd.)

Khilafat Committee, All-India Conference of Indian Christians, State's People's Conference, All-India Liberal Federation as well as Indian National Congress. The conference met in Delhi in February and March 1928 and in Bombay in May of that year.

14. The Report was published on August 10, 1928. For details, see Shiva Rao, op.cit., (1966), Vol.I, pp.59-75 and C.H.Philips, The Evolution of India and Pakistan (1965), pp.228-233.

3. It recommended safeguards for Muslims and other minorities in the form of fundamental rights.

4. It repudiated separate electorates and suggested joint electorates with reservation of seats for Muslims where they were in minority and for non-Muslims in the North-West frontier province.

The report was an act of great statesmanship. Lal Bahadur has rightly pointed out that "The Nehru Report was the practical side of the Indian agitation and was projected to serve as a fitting reply to the racial arrogance of Lord Birkenhead, the then Secretary of State".[15]

The report was acclaimed by constitutional historians as "not only an answer to the challenge that Indian nationalism was unconstructive" and the "frankest attempt yet made by Indians to face squarely the difficulties of communalism".[16] But there were communal forces among the Indian natives and officials forces (specifically the Simon Commission) of the British, working

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15. Lal Bahadur, The Muslim League (1954), p.199.
16. B.Shiva Rao, op.cit., Vol.I, p.58.

against the very spirit of the report. Muslims who had supported the Report, started opposing it and convened the All-Muslim Conference. The conference on 31st Dec. 1928 resolved for specific protections to Muslims. Their demands were crystallised into fourteen points prepared by M.A. Jinnah.[17]

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17. The following were the 14 points:-

(1) The form of the future constitution should be federal, with the residuary powers vested in the provinces.
(2) Any Bill opposed by three-fourth members of any community present shall not be proceeded with.
(3) Right of separate electorate of Muslim members remain in tact till they themselves give it up.
(4) No cabinet, either central or provincial, should be formed without there being a proposition of one-third Muslim ministers.
(5) Any territorial re-distribution that might at any time be necessary shall not in any way affect the Muslim majority in the Punjab, Bengal or the North West Frontier Province.
(6) All legislatures in the country and other elected bodies shall be constituted on the definite principle of adequate and effective representation of minorities in every province, without reducing the majority in any province to a minority or even equality.
(7) Sind should be separated from the Bombay Presidency.
(8) Reforms should be introduced in Baluchistan and North West Frontier Province, on the same lines as in other provinces.
(9) In the central legislature Muslim representatives shall not be less than one-third.
(10) Reservation of Muslims in the services.
(11) Protection of Muslim culture, language, religion and education, personal laws and Muslim charitable institutions.

(contd...)

The Conference concluded emphatically declaring that "no constitution will be acceptable to Indian Musalmans unless it conforms with the principles embodied in this resolution".[18]

For the Hindus the attitude of Muslims appeared to be anti-national and the trouble of majority-minority conflict found its full strength. The fact that the Muslim minority was in need of some special safeguards and an assured position was officially recognised by the Statutory Commission Report in 1930. The Commission after analysing the representation made by various communities came to the conclusion[19] - until the spirit of tolerance is more wide spread in India, and until there is evidence that minority are prepared to trust to the sense of justice of the majority, we feel that there is indeed, need for safeguards.

(f.n. 17 contd.)

(12) A uniform measure of autonomy shall be granted to all provinces.
(13) Liberty of worship, and observance, propaganda, association, and education, shall be guaranteed to all the communities.
(14) No change shall be made in the constitution by the Central legislature, except with the concurrence of the States consisting the Indian Federation.

18. Gwyer and Appadorai, Speeches and Documents on the Indian Constitution (1921-47) (1957), Vol.I, p.245.
19. Indian Statutory Commission Report (1930), Vol.II, p.23, para 36.

The First Round Table Conference (1930-31) which concluded on January 19, 1931, accepted certain inevitable safeguards for the protection of vested interests and guarantees for the rights of the minorities.[20] While defining the policy of His Majesty's Government observed that the Governor General must, as a last resort, be responsible for the observance of the constitutional rights of the minorities, and must be granted the necessary powers.[21] Practically, the same position was affirmed in the celebrated Gandhi-Irwin Pact of March 5, 1931.

The Karachi Resolution 1931, was another major step in the development of constitutional rights for the Indian people, and was somewhat unique for its emphasis on states positive obligations towards betterment of social and economic conditions of the people and removal of inequality and discrimination inherent in the society. The resolution of fundamental rights and duties, and economic and social programme, passed at the Karachi session and as subsequently varied by the All-India Congress Committee, at its meeting in Bombay in August 1931, envisaged certain

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20. At the concluding session of the Conference, Ramsay MacDonald (Prime Minister) asserted the role of the Governor General for the due observance of the constitutional rights of the minorities. V.P.Menon, The Transfer of Power in India (1957), p.44.
21. See, V.P.Menon, op.cit., p.45.

fundamental rights[22] to be incorporated in the constitution. But it opposed communal representation and separate electorates.

The Second Round Table Conference (1931-32) intensively discussed the problem of minorities and a Sub-committee was appointed to deal with the matter. But after many protracted negotiations and deliberations the Sub-committee confessed failure. At the conclusion of the conference, the British Prime Minister, Ramsay Mac Donald referring to the communal problem, said that it was a problem especially for Indians to settle by mutual agreement, but if that should continue to be impossible, the Government would be compelled to apply provisional scheme of its own.[23]

Since the Indian delegates were unable to come to any agreement the Prime Minister announced the "Communal Award"[24] on April 16, 1932, which recognised separate electorates, accorded weightage to certain communities, and appointed the representative system in the country into a

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22. See, The Indian National Congress Resolution 1930-34, All India Congress Committee, Allahabad, pp.119-22.
23. See V.P.Menon, op.cit., p.47.
24. For an account of the nature of the Communal Award see A.C.Banerji, Indian Constitutional Documents, Vol.III (1961), pp.237-43.

number of cross-divisions mutually separated on the lines, not only of community, race and religion, but also of economic interests and cultural differences. At the third and last session of the Round Table Conference which held in November 1932, the Secretary of State announced that the British Government had decided to give the Muslims 33% of the British Indian Seats in the Central Legislature.[25] It had also been decided to constitute Sind into a separate muslim province. As a counter balance it was later decided to create a separate province of Orissa for Hindus.[26]

The conservative movement of the communal bodies, in addition to the demand of separate electorates[27] demanded also for proportional representation in the services of all grades and departments. The Resolution of the Government of India dated July 4, 1934 specifically recognised the demand.[28] The resolution recognised not only the Muslims but also the Anglo-Indians, the domiciled Europeans and the depressed classes as minorities. Since the Anglo-Indian and the domiciled Europeans were holding

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25. Gwyer and Appadorai, op.cit., Vol.I, p.266.
26. V.P.Menon, op.cit., p.50.
27. It is said that the introduction of separate electorates encouraged the Muslim to organise themselves as a pressure group to win further concession from the Government. See P.Hardy, op.cit., p.117.
28. Report of the Joint Committee on Indian Constitutional Reform Records (1934), Vol.II, pp.315-18.

large percentage of appointments in the public service, the resolution took a policy of non-displacement of the communities from the existing position. Hence it reserved 8% of all vacancies which were approximately held by the community.[29] In regard to the depressed classes the resolution held[30] that "no useful purpose will be served by reserving for them a definite percentage of vacancies out of the number available for Hindus as a whole but ... to ensure that duly qualified candidates from the depressed classes are not deprived of fair opportunities of appointment merely because they cannot succeed in open competition. Thus by 1932 differential treatment of communities and classes had come to stay in India through separate electorate and communal representations. Since the problem of minorities had assumed political colour, the Indian National Congress was of the opinion that the only solution to the problem of minorities was to incorporate in the constitution a detailed list of fundamental rights, applicable to all Indian Citizens irrespective of their affiliation to any particular religion. But the Government of India Act 1935 provided no special safeguards and guarantees to the minorities. On the other hand it divided

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29. Gwyer and Appadorai, op.cit., p.119.
30. Id. at 117.

the population into various groups and reserved seats in the Legislatures to such groups. The problem of minorities entertained by the Act of 1935 was in the nature of distributing loaves and fishes giving representation to the communities and classes.[31]

After the elections of 1937, the Congress started a programme of Muslim mass contact. The aim it is said[32] was to convince the ordinary Muslim voter of common interest of all the poor of India and to win him for the congress policies of agrarian reform. But Jinnah characterised the Congress as a Hindu body.[33] In the talk of settlement between leaders of Congress and Muslim Leage, Jinnah insisted that the Leage should be recognised as the one and only body representing the entire Muslim community and that the congress should speak only on behalf of the Hindus. Soon after these developments, the Muslims

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31. The communal distribution of seats under the 1935 Act for the composition of the Federal Seats (Open for all communities)-86; Scheduled Castes-19; Muslims-12; Sikhs-6; Anglo-Indians-4; Europeans-8; Indian Christians-8; Women-9; Labour-10; Commerce and Industry-11 and Land-holders-7. See the Table under the First Schedule to the Government of India Act, 1935.
32. See, P.Hardy, op.cit., p.229.
33. He instanced the Bande Mataram song, the Tri-colour Flag, the Vidya Mandhir Scheme of Education and the Hindu-Urdu controversy. See, V.P.Menon, op.cit., p.56.

expounded and preached the two-nation theory which was emphatically declared by Jinnah[34] in his presidential address to the Muslim League Session at Lahore on March 23, 1940. In the Lahore Session itself the Muslim League passed a resolution for partition of the country into Hindustan and Pakistan.[35] The congress could not accept such a position because in the words of Dr.Rajendra Prasad, it would be denying its past, falsifying its history and betraying its future.[36]

Under the exigencies of the war (World War II), the British Government moved a considerable distance toward a settlement. One step was the August offer[37] which recognised that the framing of the new constitution would be primarily the responsibility of the Indians themselves and that the body framing the constitution would be

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34. See Jamil-ud-Din Ahmed (ed.), Some Recent Speeches and Writings (1943), pp.148-55.
35. The word 'Pakistan' was coined out by Chaudhri Rahmat Ali. See Percival Spear, "The Position of Muslims, Before and After Partition" in Philip Masan (ed.), India and Ceylon - Unity and Diversity (1967), p.42.
36. V.P.Menon, op.cit., p.57.
37. The declaration of the British Government issued on August 8, 1940, is commonly known as the August offer. Its main object was to ensure full co-operation of Indians in the World War II. It offered political representation for the Indians in the Governor-General's Council, proposed the establishment of a consultative committee to have a close association with the Indian public and promised the setting up of a body representative of the principal elements in India's

(contd...)

represented by the "Principal elements in India's national life", which meant the different communities of India. The congress did not accept the offer as it did not meet its immediate demand for a national government.[38] The Muslim League welcomed the assurance that no new constitution would be adopted without the consent of the minorities but simultaneously reiterated its demand for a separate state. Hence in March 1942, Sir Stafford Cripps came to India with fresh proposals.[39] The option it was claimed[40] was given with a view to protecting the intersts of Muslim minorities. But it encouraged the demand for the partition of the country and on this very ground the Indian National

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(f.n. 37 contd.)

national life in order to devise the framework of the new constitution. The smaller minority groups such as the Sikhs, the Scheduled Castes, and the backward communities regarded the offer as a charter of their rights. But the political parties rejected the offer on various reasons which, according to the Secretary of State for India, Mr.Amery, was mainly rooted in "suspicion". See Transfer of Power, Vol.I, p.256.

38. Gwyer and Appadorai, op.cit., Vol.II, p.505.
39. Gandhi described the proposal as a post-dated cheque. See V.P.Menon, op.cit., p.126. Savarkar representing the Hindu Maha Sabha commented on the proposal as "a cat in the bag". Transfer of Power, Vol.I, p.414. Under the proposals the provinces were given option either to join the proposed Indian Union or to remain outside the Union. See the 'Draft Declaration' in Transfer of Power, Vol.I, p.266.
40. Id. at 287. The immediate object of the mission was to secure full Indian co-operation in the war.

Congress rejected it.[41] The Muslim League though happy with the terms of the proposals, rejected it on the ground that there was no provision for the creation making body for building the union of Pakistan.[42]

Consequent to the failure of Cripps Mission, Gandhiji's appeal to Jinnah for unity of the nation failed. Afterwards on November 19, 1944 the standing committee of the Non-party Conference[43] decided to set up a committee "to examine the whole communal and minorities question from a constitutional and political point of view, putting itself in touch with different parties and their leaders including minorities".[44] The committee formed under the chairmanship of Sir Tej Bahadur Sapru[45] held meetings and interviews with almost all leaders and minority interests. The recommendations of the

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41. See The Resolution of the Congress Working Committee dated April 2, 1942 reproduced in Transfer of Power, Vol.I, p.746.
42. See the League Working Committee's Resolution of April 11, 1942, given in Transfer of Power, Vol.I, p.749.
43. The Conference mainly consisted of the Indian liberals. See Transfer of Power, Vol.V, p.218. Jinnah described it as an appendage of the Congress. Id. at 225.
44. Id. at 211-12.
45. There were 30 members in the Committee.

committee, popularly known as the Sapru Committee contained the following important features.[46]

1) In the constitution making body representation of Hindus (excluding the Scheduled Castes) and Muslims should be equal.

2) No decision of the constitution making body should be valid unless it was supported by three-fourths of the members present and voting.

3) The committee proposed joint electorates with reservation of seats instead of separate electorates.

4) The committee firmly rejected the idea of Pakistan.

The proposals of the Sapru Committee met with wide disapproval from almost all groups and communities and the committee failed in its efforts to advance the Unity movement. Similarly, the Simla Conference, held from June 25 to July 14, 1945 also could not draw any settlement

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46. It was published in December 1945. For the text of the Report see, B.Shiva Rao, op.cit., Vol.I, pp.151-56.

because of the claim of the Muslim League that it should be accepted as the sole representative of Muslims which was not acceptable to the Congress.

CABINET MISSION - LAST EFFORT FOR UNITY

In spite of the successive failures met with by the forces of nationalism in the battle for preserving the integrity of the country which was being engulfed by the waves of communalism, the Government decided[47] to send three of its cabinet members to India to help the Indians in the Constitution-making process. On March 15, 1946, there was a debate in the House of Commons on the Cabinet delegates visit to India. In the debate Prime Minister Attlee said: "We are mindful of the rights of the minorities and the minorities should be able to free from fear. On the other hand, we cannot allow a minority to place their vote on the advance of the majority".[48]

But the Congress strictly ruled out the division of the country before the Cabinet Mission.[49] Gandhiji also

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47. The decision was announced in the Parliament on February 19, 1946. See Transfer of Power, Vol.VI, p.931.
48. H.V.Hodson, The Great Divide, Britain - India - Pakistan (1969), pp.133-34.
49. See, Transfer of Power, Vol.VII, p.112.

subscribed to the view taken by the Congress. In order to solve the communal problem Gandhiji further stated that Jinnah should be asked to join the first Government. But Jinnah insisted on division.

B.R.Ambedkar, on behalf of the Scheduled Castes Federation claimed that "the new constitution should guarantee to the scheduled castes the elementary human rights of life, liberty and the pursuit of happiness.[50] He demanded separate electorates for scheduled castes. He maintained the contention that so long as there were joint electorates, scheduled caste voters would be so few that Hindu candidates could easily ignore their wishes. Similarly, he added, caste Hindus would never support scheduled caste candidates. According to him separate electorates were fundamental, without which the scheduled castes would never have their own representatives.[51]

The All-India Depressed Classes League held its view that the division of India into Pakistan and Hindustan would not provide a solution to the minority problem but would produce fresh problems. It demanded for specific

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50. Id. at 146.
51. Id. at 147.

provisions in the new Constitution for safeguarding the language and culture of the minorities and the rights and interests of the scheduled castes.

The Hindu Maha Sabha urged[52] that India should immediately be declared free and independent. It maintained that partition would be economically unsound and disastrous and politically unwise and suicidal. Sharing of power by the Muslims in parity with Hindus in the Central Government was not acceptable to the Sabha. It was ready to concede the fullest measure of autonomy to the provinces and the maximum protection to the minorities in respect of their language, religion and custom.

The Sikhs[53] stood for united India. To divide India, according to them, would be a very troublesome course and a risky game. They suggested for some sort of coalition Government of all communities. The Indian Christians[54] also pleaded for a unified India and demanded no separate electorate. They were in favour of guaranteed safeguards in the constitution for the protection of minorities. The Anglo-Indians did not ask for any privilege, preferential treatment or special protection,

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52. Id. at 269-71.
53. Id. at 138.
54. Id. at 213-14.

but all they wanted was equal rights with other communities.

Meanwhile, on April 10, 1946, Jinnah convened a Convention of Muslim members of various legislatures which passed the resolution demanding a sovereign and independent state of Pakistan comprising six provinces.[55] The resolution further demanded the setting up of two separate constitution-making bodies by the people of Pakistan and Hindustan.

The Cabinet Mission convened a meeting of the Congress and Muslim League for discussion[56] as regarding the unity or the division of India. But the parties could not reach a final agreement. Later the Mission made a statement[57] containing proposals and procedures to be followed in framing the new constitution was published on May 16, 1946. The Mission rejected the idea of a separate sovereign state of Pakistan. On the question of partition

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55. Bengal and Assam in the North East, Punjab, North-West Frontier Province, Sindh and Baluchistan in the North-West of India. See Indian Annual Register (1946), Vol.I, pp.194-95.
56. Second Simla Conference (5th and 6th of May 1946).
57. For the full text of the statement, see, Transfer of Power, Vol.VII, pp.582-91.

of the country it had concluded[58] that "neither a larger nor a smaller sovereign state of Pakistan would provide an acceptable solution to the communal problem". So the Mission suggested[59] for a Constituent Assembly and proposed the setting up by the Constituent Assembly, in a preliminary meeting, of an advisory committee on the rights of citizens, minorities and tribals and excluded areas. The Cabinet Mission statement categorically held that the structure of the Constituent Assembly should be "as broad based and accurate a representation of the whole population as is possible".[60] But the statement rejected the idea of election based on adult-franchise on the ground that it would lead to much delay in the formulation of the new constitution. The statement suggested utilisation of the recently elected Provincial Legislative Assemblies as the electoral bodies. Accordingly, elections were held and 296 members were elected to the Constituent Assembly. In spite of the broad division of Indian population into three communities the Constituent Assembly was represented by almost all communities and groups.[61] But the All India

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58. See para 7 of the Statement, Id. at 585.
59. See para 20 of the Statement, Id. at 590.
60. See Gwyer and Appadorai, op.cit., p.581.
61. Hindus (163), Muslims (80), Anglo-Indians (3), Indian Christians (6), Parsis (3), Sikhs (4), Scheduled Castes (31) and Backward Tribes (6). Figures as given in B.Shiva Rao, op.cit., p.298.

Muslim League protesting the overwhelming majority of the Congressmen in the Assembly rejected the Cabinet Mission Plan and decided to boycott the proceedings.[62] However, the first meeting of the Assembly was convened as scheduled on December 9, 1946. Out of the total 296 members, only 210 attended the meeting. The only significant absentees were the Muslim League members and with this exception almost all other minorities irrespective of their political affiliation joined the Assembly.[63]

Prime Minister Attlee made a statement in the House of Commons on February 20, 1947, announcing the British Government's definite intention of taking the necessary steps to effect the peaceful transfer of power into responsible Indian hands by a date not later than June 1948. In pursuance of the statement, Lord Mountbatten was sent to India as the Viceroy. Mountbatten tried to find an agreed solution on the basis of the Cabinet Mission Plan but failed in the venture. Consequently he formulated an

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62. See Gwyer and Appadorai, op.cit., p.620.
63. Number of members present in the meeting (Community-wise): Hindus (155 out of 160), Scheduled Castes (30 out of 33); all the 5 Sikh members; Indian Christians (5 out of 6); all the 6 Backward tribes; all the 3 Anglo-Indians; all the 3 Parsis and only 4 out of 80 Muslim members. See C.A.D., Vol.I, p.269.

alternative plan by consulting the Governors of Provinces and the leaders of political parties and sent it to London for approval. The plan was accepted by British Cabinet and was announced in the House of Commons on June 3, 1947. The plan came to be known as "The June 3rd Plan" or "The Mountbatten Plan". The plan finally settled the issue of partition by ascertaining the wishes of the people and accordingly votes were taken and found to be in favour of partititon. In order to give effect to the "June 3rd Plan" and the wishes of the people of India, the British Parliament introduced a Bill known as the Indian Independence Bill in the House of Commons on July 4, 1947 and it was finally enacted on July 18. The Act constituted two independent dominions of India and Pakistan with effect from August 15, 1947.

MINORITY PROBLEM AND THE CONSTITUENT ASSEMBLY

In accordance with the terms of the Cabinet Mission Statement of May 16, the elections to the Constituent Assembly were held in the summer of 1946 and the Assembly was finally convened on December 9, 1946. Almost throughout the period for which the Assembly met, the problem of safeguards for minorities remained an important and controversial issue, and continued to engage

the attention of the members till the Assembly had completed the entire draft of the Constitution in November 1949. The Assembly in its endeavour to frame a constitution acceptable to all sections of the Indian community, sustained a firm belief that only after solving the minority problem by satisfying the minority interests could a constitution be acceptable for India. This belief, found its unequivocal expression in the form of an objective resolution[64] adopted by the Assembly on January 22, 1947. The resolution though concerned with the general philosophy of the constitution contained the following declaration for the protection of minorities.[65]

"Wherein shall be guaranteed and secured to all the people in India, justice, social, economic and political, equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality;" and

"Wherein adequate safeguards shall be provided for minorities, backward and tribal areas and depressed and backward classes."

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64. The Resolution was moved by Pandit Jawaharlal Nehru, on December 13, 1946, four days after the first meeting.
65. C.A.D., Vol.I, p.59.

While moving the resolution Nehru observed:[66]

> "It is a resolution and yet, it is something much more than a resolution. It is a declaration, it is a firm resolve. It is a pledge and an undertaking and it is for all of us I hope a dedication".

Dr.Radhakrishnan while speaking on the resolution said[67] that the safeguards for the minorities should be adequate, not to satisfy either the British or our own people, but to the satisfaction of the civilised conscience of the world. Indeed, the resolution was a solemn expression of the spirit that had pervaded the whole freedom movement. The same spirit was evident in the resolution for the setting up of an Advisory Committee on the rights of citizens, minorities and tribals and excluded areas.[68] While moving the resolution setting up the Committee Govind Ballabh Pant observed:[69]

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66. Ibid.
67. B.Shiva Rao, op.cit., p.17.
68. Clause IV of paragraph 19 of the Cabinet Mission Statement dated May 16, 1946. For text, see, Gwyer and Appadorai, op.cit., p.583.
69. C.A.D., Vol.II, pp.331-32.

> "I hope every effort will be made in the advisory committee to reach decisions that will fully satisfy the minorities....We trust that in this committee every regard will be paid to the wishes of the different minorities and the decisions taken will be fully satisfactory to them".

Pant also clarified the position by saying[70] that fundamental rights are the concern of all, and no question of minority or majority can arise. According to him right of minority groups must be the most essential part of the future constitution, in view of the past where "the minorities have been incited and have been influenced in a manner which has hampered the growth of cohesion and unity".[71] In order to start a new chapter in the history of India he suggested the inclusion of rights and protection to the satisfaction of the minorities. The view, no doubt, should have remained in the minds of the Advisory Committee throughout its proceedings so that every provision on fundamental rights has a colour of minority protection. This is the most singular feature of the Indian Constitution.

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70. Id. at 329-30.
71. Id. at 331.

While constituting the Advisory Committee, which was to be the principal instrument for securing the just consideration of the minorities problems in terms of the Cabinet Mission Statement of May 16, 1946, the Congress party took care to ensure that the committee was represented by all communities and major classes. There was no representative of the Muslim League on the Committee as the League had from the very beginning boycotted the Assembly.[72]

In the first meeting of the Advisory Committee held on February 27, 1947, Vallabhai Patel was unanimously elected as Chairman and five Sub-committees were constituted to deal with the various problems to be solved by the Advisory Committee - two of them being Sub-committee on Minorities and Sub-committee on Fundamental Rights. It was in these two committees that the problem of safeguards for minorities was gradually settled.

SUB-COMMITTEE ON MINORITIES

The Minorities Sub-committee under the chairmanship of H.C.Mookerji, a Christian leader, met the

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72. B.Shiva Rao, The Framing of India's Constitution -- A Study (1968), p.747.

same day it was created, February 27, 1947. At its first sitting itself, the Minority Sub-committee adopted a questionnaire in order to ascertain the views of the individual members of the Sub-committee. The text of the questionnaire was as follows:[73]

(1) What should be the nature and scope of the safeguards for a minority in the new constitution?

(2) What should be the political safeguards of a minority (a) in the centre, (b) in the provinces?

(3) What should be the economic safeguards of a minority (a) in the centre, (b) in the provinces?

(4) What shosuld be the religious, educational and cultural safeguards for a minority?

(5) What machinery should be set up to ensure that the safeguards are effective?

(6) How is it proposed that the safeguards should be eliminated, in what time and under what circumstances?

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73. B.Shiva Rao, The Framing of India's Constitution (1966), Vol.II, p.391.

In the meantime, before receiving replies to the questionnaire, the Sub-committee received the copy of the Report of the Fundamental Rights Sub-committee and hence it was decided to discuss the Report, paragraph by paragraph, to see whether any of the provisions required to be amplified or amended for the specific purpose of protecting minority rights.[74] The discussion lasted for three days. Finally on April 19, 1947, the Minorities Sub-committee submitted an interim report to the Advisory Committee dealing "only with the question of fundamental rights from the point of view of minorities".[75] The interim report after suggesting various amendments and modifications to the draft clauses of fundamental rights prepared by the Fundamental Rights Sub-committee, recommended the incorporation of the following 'cultural and educational fundamental rights of minorities'.[76]

(1) All citizens are entitled to use their mother-tongue and the script thereof, and to adopt, study or use any other language or script of their choice.

(2) Minorities in every unit shall be adequately protected in respect of their language and culture and no

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74. Ibid.
75. Id. at 207.
76. Id. at 209.

Government may enact any laws or regulations that may act oppressively or prejudicially in this respect.

(3) No minority whether of religion, community, or language shall be deprived of its rights or discriminated against in regard to the admission into State educational institutions, nor shall any religious instructions be compulsorily imposed on them.

(4) All minorities whether of religion, community or language, shall be free in any unit to establish and administer educational institutions of their choice, and they shall be entitled to state aid in the said manner and measure as is given to similar state-aided institutions.

(5) Notwithstanding any custom, law, decree or usage, presumption or terms of dedication, no Hindu on grounds of caste, birth or denomination shall be precluded from entering in educational institutions dedicated or intended for the use of the Hindu community or any section thereof.

(6) No disqualification shall arise on account of sex in respect of Public Services or professions or admission to educational institutions save and except that this shall not prevent the establishment of separate educational institutions for boys and girls.

The Advisory Committee considered the report of the Minority Sub-committee and decided to insert the following clauses among the justiciable fundamental rights.[77]

(i) Minorities in every unit shall be protected in respect of their language, script and culture and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.

(ii) No minority whether based on religion, community, or language shall be discriminated against in regard to the admission into state educational institutions, nor shall any religious instructions be compulsorily imposed on them.

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77. Id., at 291-292.

(iii)(a) All minorities whether based on religion, community or language shall be free in any unit to establish and administer educational institutions of their choice.

(b) The State shall not while providing State aid to schools discriminate against schools under the management of minorities whether based on religion, community or language.

The Minorities Sub-committee, besides the replies to the questionnaire from the members, received a number of notes and memoranda from the representatives of minority communities and organisations. Memoranda were submitted on behalf of the Scheduled Castes, Scheduled Tribes, Sikhs, and Anglo-Indians demanding constitutional safeguards. No specific communal safeguards were asked on behalf of Indian Christians and Parsis. Also, no memorandum was presented on behalf of the Muslim League as it was still not participating in the proceedings of the Assembly.

Dr.Ambedkar who submitted memorandum on behalf of Scheduled Castes came up with more demands. These included

both political and social safeguards. The political safeguards included establishment of non-parliamentary irremovable executives both at the Centre and at the units, minimum representation according to population of the Scheduled Castes in the legislatures, municipalities and local boards. These representatives were to be elected through separate communal electorates. He demanded a minimum share of posts in all the public services, at all levels, and also under all local bodies and authorities. Jagjivan Ram also suggested generous provisions in the constitution for upliftment of Scheduled Castes. He also suggested that the guarantee of religions and cultural freedom to racial and religious minorities should be a permanent feature of the constitution whereas provisions regarding Scheduled Castes should be eliminated when their condition became satisfactory.[78]

A long list of general and specific demands was also submitted by the Adi Hindu Depressed Classes Association[79] which were similar to those suggested by Ambedkar and Jagjivan Ram.

On behalf of the Sikh community, Ujjal Singh and

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78. B.Shiva Rao, Select Documents, Vol.II, pp.330-6.
79. Id. at 381-83.

Harnam Singh prepared a memorandum[80] and submitted it to the Minorities Sub-committee which included a demand for retaining the Punjab as the "homeland and holy land of the Sikhs". The memorandum after narrating the brutal treatment accorded to the Sikh minority by the Muslim majority, suggested the following political safeguards to the community.[81]

1) Reservation in the Legislature
2) Reservation in the Cabinets
3) Reservation in the Services.

The memorandum concluded by saying[82]

> "Under the existing conditions of India, we do not see any possibility in the near future or even in the distant future when minorities will not stand in need of protection under the modern democratic constitution. If, however, majorities win the confidence of minority communities by their sympathetic and generous treatment, some of the special safeguards may automatically lapse. But others will still be needed to see that the

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80. For the text, See B.Shiva Rao, The Framing of India's Constitution (1966), Vol.II, pp.362-370.
81. Id. at 366-67.
82. Id. at 369-70.

minorities get opportunities for full grwoth, and enjoy due share in the governance of the country."

Thus the memorandum submitted on behalf of the Sikhs sought a clear, unabrogatable and permanent declaration in the constitution for the protection of minorities. It was clear that the Sikh community had no confidence in the majority at that time and they believed no positive change in future also.

On behalf of Parsis the memorandum was submitted by R.K.Sidhwa. He was against all types of privileges to minorities and suggested the elimination of existing safeguards also within a short span of time.[83] After giving a clear account of the role played by Parsis in the nation-building programme he said,[84]

"While we believe in the universal aphorism that no community can live its own life in the midst of an ever-expanding world, we cannot but admit that the Parsi community has led a unique

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83. Id. at 322. In this connection see the views of S.P.Mookerjee who suggested the continuation of minority protection of 20 years (Id. at 338-39).
84. Id. at 321.

existence of its own these thousand years and more and preserved its heritage .... And the Parsi community honestly believes as they have believed in the past, that its sister communities and countrymen will not like to see a fine race of men go under by the sheer weight of numbers around".

Hari Modi who spoke on behalf of the Parsis before Minorities Sub-committee did not demand any separate treatment for his community but he made it clear that "if other minorities are accorded representation anywhere, it is but fair that Parsis should receive treatment at least equal to that given to any of the smaller minorities.[85] When the minorities Sub-committee conceded the claims of other Minorities for reservation in the legislature he had also urged for statutory reservation in favour of Parsi community. But when the issue came before the Advisory Committee, he stated that he had decided to follow the traditions which the community had maintained in the past and to withdraw the claim for statutory reservation. He assumed that Parsis would remain on the list of recognised minorities and urged that if it was

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85. Id. at 323.

found that the community had not secured proper representation, its claim be considered and adequate representation provided, if the separate representation of minorities continued to be a feature of the constitution.[86] Hari Modi also pleaded that merit should be the criterion for appointment to the Public services.[87]

It was a noticeable feature that no specific communal demands were put forward on behalf of the Indian Christians. Their representatives in the Sub-committee stated that they did not like to stand in the way of nation-building. Though on principle they were against weightage given to the communities, they urged that if any weightage was given to any minority, they would also demand similar weightage.[88] Raj Kumari Amrit Kaur, a representative of Indian Christians, was opposed to reservation and weightage for any community. In her memorandum she said,[89]

> "Privileges and safeguards really weaken those that demand them. They are a definite bar to

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86. Id. at 407.
87. Id. at 323.
88. Id. at 397.
89. Id. at 310.

> unity, without which there can be no peace, as also to efficiency without which the standards of good governance are lowered".

In her dissenting opinion to the Report of Minorities Sub-committee, she continued,[90]

> ".... anything in the nature of privileges for any special class or section of society is wrong in principle and when the same is given in the ground of religion it is, in my opinion, doubly wrong, for all religions stand for the brotherhood of man and none for separatism".

On behalf of the Jain community, the Working Committee of the All India Jain Swetambar Conference submitted a memorandum which demanded adequate protection to their culture, religious orders, religious and socio-religious institutions, their trust and charitable institutions.[91] Another memorandum[92] by some representatives alleged that the Jain community should be

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90. Id. at 401.
91. For the extracts of the memorandum, see, Id. at 383-85.
92. See Id. at 373-77.

treated as a separate minority and it would be a grave injustice, if they were merely treated as a branch of Hinduism. They demanded special representation in the administrative, legislative, judicial, diplomatic, foreign and military services of the nation.

Since the Muslim League was not participating in the proceedings, of the Constituent Assembly, no memorandum on behalf of the Muslim community was presented. But at the time of the third sitting of the Committee from 21 to 27 July 1947, the question of partition had been decided and the Muslim League was also represented in the Minorities Sub-committee. On July 24, 1947, the Sub-committee had received a letter from Maulana Hizzur Rahman and Abdul Gruiyum Ansari. The letter represented the communal feelings of the Muslim community. In the letter they raised the following points for the consideration of the Sub-committee.[93]

1) To introduce the system of appointing Muslim Kazis in the judiciary to settle the questions of Muslim marriages, divorce, Khula, etc.

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93. Id. at 385-86.

2) A permanent separate portfolio to administer Wakfs should be attached to a minister of State in each province and at the centre and that minister should be a Muslim as far as possible.

3) The High Courts of the provinces and the Supreme Court of the union should each have a Muslim Judge to judge the propriety of any cultural right coming under the purview of protective laws of the State.

4) Educational aids should be given in proportion to the backward conditions of the minorities and not according to the proportion of the population.

In addition, in the Constituent Assembly some Muslim members pleaded and pressed for the continuation of a separate electorate for the Muslims.[94]

On behalf of Anglo-Indians Frank Authony submitted a detailed memorandum[95] wherein special safeguards and

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93. Id. at 385-86.
94. See C.A.D., Vol.V, pp.213 and 221.
95. For extracts of the memorandum, see, B.Shiva Rao, op.cit., Vol.II, pp.343-47.

privileges to the community in respect of language, religion, education and services were claimed. It was sought that Anglo-Indian schools should continue as a distinct entity within the educational system of the country. In order to preserve the language and culture of the community, Frank Anthony laid emphasis for a specific clause in the constitution for the grant-in-aid to the Anglo-Indian Educational institutions as it was provided[96] by the Government of India Act, 1935. In order to protect their position in the services in railways, posts and telegraphs and customs he sought for a specific clause[97] similar to section 252 of the Government of India Act, 1935.

S.H.Prater, in his reply to the questionnaire,[98] pleaded for the political safeguards to the Anglo-Indians. He sought for their increased representation in the Central and State legislatures. He recommended for the system of joint electorate as the best system for effective representation for the community in the central cabinet.

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96. Under Section 83 the Provincial Governments were required to make annual grants for the benefit of the Anglo-Indian community.
97. Section 252 provided for the continuation of service of members of the staff of the High Commissioner for India and Auditor of Indian Home Accounts who were employed before the commencement of Part III of Act.
98. B.Shiva Rao, op.cit., Vol.II, pp.347-361.

Accepting the peculiar position of the Anglo-Indians, the Advisory Committee of the Constituent Assembly appointed a special Sub-committee[99] to report on the position of Anglo-Indians. The committee after making a clear study on the problem recommended in relation to the Anglo-Indian Schools that,[100]

1) The present grants to Anglo-Indian education made by the central and provincial Governments should be continued unchanged for three years after the coming into operation of the Federal Constitution.

2) After the expiry of the first three years, the grants may be reduced by 10 per cent and by a further 10 per cent after the 6 years and again by a further 10 per cent after the 9th year. At the end of the period of 10 years, special concessions to Anglo-Indian Schools shall cease.

3) During this 10 years period, 40 percent of the vacancies in all such State aided Anglo-Indian Schools shall be made available to members of

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99. C.A.D., Vol.V, p.225. The members of the Sub-committee were G.B.Pant, K.M.Munshi, Hansa Mehta, S.H.Prater and Frank Anthony.
100. Id. at 251.

> other communities. Similarly so far as the condition of services was concerned the Sub-committee suggested[101] for the continuation of the present basis of recruitment for a period of two years after the coming into force of the new constitution. After that it was stated, at intervals of every two years, the reserved vacancies should be reduced each time by 10 percent so that after 10 years all such reservations should cease. The report of the Sub-committee was accepted by the Anglow-Indians.[102]

After considering what rights were conceded to minorities by way of fundamental rights, the Sub-committee again met on July 21, 1947 to consider the proposals which had been submitted before it. By this time, the question of partition had been decided and the Muslim League also represented in the Sub-committee. The issue which the Sub-committee formulated on the basis of the replies received to the questionnaire issued to the members covered the following:[103]

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101. C.A.D., Vol.V, p.250.
102. See the speech by Frank Anthony before the Advisory Committee, C.A.D., Vol.V, p.204.
103. B.Shiva Rao, Select Documents, Vol.II, p.392.

(i) Representation in Legislatures, Joint separate electorates and weightages;

(ii) Reservation of seats in the Cabinet;

(iii) Reservation in services;

(iv) Administrative machinery to ensure protection of minority rights.

After a prolonged discussion on these issues the Sub-committee submitted its report before the Advisory Committee on July 27, 1947. The report contained the following decisions;[104]

(i) The demands for separate electorates and weightage should be rejected and the principle of joint electorates with seats reserved for the minorities on a population basis should be accepted;

(ii) The demand for reservation of seats in the Cabinet should be rejected;

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104. B.Shiva Rao, The Framing of India's Constitution - A Study, op.cit., p.747.

(iii) The demand for reservation of posts in the public services on a population basis should be accepted.

(iv) Special officers should be appointed to look after the safeguards and interests of minorities.

When the report of the Sub-committee came up for consideration before the Advisory Committee,[105] for its consideration in July 1947, the committee endorsed almost all the conclusions reached by the Sub-committee.

By an overwhelming majority it came to the conclusion that the system of separate electorates must be abolished.[106] The Advisory Committee observed that the system of separate electorates had in the past sharpened the communal differences to a dangerous extent, and had proved to be the main stumbling block to the development of a healthy national life. So far as reservation of seats in legislatures was concerned the Advisory Committee was hesitant to provide reservation to the two microscopic minorities, Anglo-Indian and Parsis. It was decided that there should be no reservation of seats for the Anglo-Indians, but the President and the Governors should have

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105. For report of the Advisory Committee, August 8, 1947, see B.Shiva Rao, Select Documents, Vol.II, op.cit., pp.416-87.
106. C.A.D., Vol.V, p.243.

power to nominate their representatives in the central and provincial legislatures respectively if they failed to secure a adequate representation in the general election.[107] For Parsis, the Committee accepted the view expressed by Hari Modi[108] and no reservation was recommended. No final decision was taken in the case of Sikhs in view of the uncertainty of the position of the community pending the award of the Boundary Commission in Punjab. The Committee decided[109] to provide reserved seats for the Indian Christians, Muslims and Scheduled Castes in the central and provincial legislatures on the basis of population.

On the question of reservation of seats in the Cabinet the sub-committee considered two propositions ie., (a) no provision should be made for reservation of seats; (b) a convention on the lines of paragraph VII of the

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107. C.A.D., Vol.V, p.245.
108. Ibid. Hari Modi expressed the view before the Advisory Committee that he was not pressing for reservation, but the matter should be reconsidered if his community failed to secure proper representation in the legislature as a result of elections during the period prescribed.
109. Id. at 245-46.

Instruments of Instructions[110] issued to Governors under the Government of India Act, 1935, be provided in a schedule to the constitution. The first proposition was carried by 8 votes to 7 and the second by 12 votes to 5.[111] The Advisory Committee also came to the conclusion that a constitutional provision for the reservation in the Cabinet, would give rise to serious difficulties and conceded for the incorporation of a convention as suggested by the Sub-committee.[112]

On the question of reservation in services the sub-committee could not reach a satisfactory conclusion.[113] The Advisory Committee stated that any such constitutional guarantee would be a dangerous innovation and held that it would be sufficient to provide an exhortation to the Central and provincial governments to "keep in view the claims of all the minorities in making appointments to

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110. In making appointments to his Council of Ministers the Governor shall use his best endeavours to select his Ministers in the following manner that is to say, to appoint in consultation with the person who in his judgment is most likely to command a stable majority in the legislature those persons (including so far as practicable members of important minority communities), who will best be in a position collectively to command the confidence of the legislature". See Id. at 246.
111. See, B.Shiva Rao, op.cit., Vol.II, p.395.
112. C.A.D., Vol.V, p.246.
113. B.Shiva Rao, op.cit., Vol.II, p.395.

public services consistently with the efficiency of administration".[114]

As regards the administrative machinery for ensuring protection of minority rights there were four proposals before the sub-committee. The proposal by Ambedkar that there should be an independent officer appointed by the President at the centre and by the Governors in the provinces to report to the respective legislatures about the working of the safeguards provided for the minorities, was accepted by a majority of 16 to 2 votes.[115] Further, it unanimously accepted the proposal by K.N.Munshi for the setting up of a statutory commission to investigate into the conditions of socially and educationally backward classes, to study the difficulties under which they laboured and to recommend to the Union or the Unit governments, as the case may be, the steps that should be taken to eliminate their difficulties and suggest the financial grants that should be given and the conditions that should be prescribed for such grants. The Advisory Committee also accepted these proposals without any modifications.

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114. C.A.D., Vol.V, p.246.
115. B.Shiva Rao, op.cit., Vol.II, p.400.

After making the above recommendations as the safeguards to minorities the Advisory Committee observed:[116]

> We wish to make it clear, however, that our general approach to the whole problem of minorities is that the State should be so run that they should stop feeling oppressed by the mere fact that they are minorities and that, on the contrary, they should feel that they have a honourable part to play in the national life as any other section of the community".

MINORITY SAFEGUARDS UNDER THE DRAFT CONSTITUTION

The draft constitution prepared by the Drafting Committee[117] of the Assembly incorporated almost all the

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116. C.A.D., Vol.V, p.247. While submitting the report in the Constituent Assembly, Sardar V.Patel remarked: "On the whole, this report is the result of careful setting of facts on both sides". See Id. at 200.
117. The Committee was appointed by the resolution of the Constituent Assembly of August 29, 1947. B.R.Ambedkar was the Chairman and other six members were N.Gopalaswami Ayyangar, Alladi Krishnaswami Ayyar, K.M.Munshi, Saiyid Mohammed Sadulla, N.Madhava Rao and D.P.Kaitan. Sir B.C.Mitter though originally appointed member of the Committee, was unable to attend after the first meeting, as he ceased to be a member of the Assembly.

recommendations of the Advisory Committee in respect of minority rights and safeguards.

When the Drafting Committee met on Feb. 5 and 6, 1948, it formulated the various provisions into ten articles and placed them in part XIV under the title "special provisions relating to minorities". Originally the draft provided for the reservation of seats in the House of the People[118] and legislative assemblies for the Muslims, Indian Christians, Scheduled Castes and Scheduled Tribes, and in the case of Anglo-Indian it was provided[119] that the President and the Governors would have the powers to nominate Anglo-Indians to the legislatures, in case they were not adequately represented. But later when the scheme of partition was executed the matter of reservation was reconsidered and it was decided that "the system of reservation for minorities other than Scheduled Castes in legislatures be abolished"[120] and it was aslo provided that "the provision for reservation of seats and nominations

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118. Art.292 of the Draft Constitution and Art.294.
119. Arts.293 and 295.
120. C.A.D., Vol.VIII, p.311.

will last for a period of ten years from the commencement of the constitution.[121] Thus the partition of India finally determined the problems of communal electorates and reservations in the legislatures, removing to a large extent the communal consciousness of the minorities. Reservation of seats in favour of Scheduled Castes and nomination in favour of Anglo-Indians were retained, of course, owing to the peculiar position of those communities. It may be said that the political problem of minorities was more or less solved by the Assembly by carefully eliminating the evils of communal electorates and communal reservations.

Regarding the representation of minority communities in services the draft constitution reiterated that:[122]

> "... the claims of all minority communities shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services ....

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121. Id. at 290.
122. Art.296.

> And also, the recommendations of the Advisory Committee to provide special provisions for Anglo-Indians in certain services and for educational grants were recognised[123] in the draft constitution.

It was also provided for the establishment of three sets of administrative machinery for the purpose of ensuring minority safeguards. (1) Special officers to investigate all matters relating to the safeguards provided for minorities,[124] (2) a commission to report on the administration of the Scheduled areas and the welfare of the Scheduled Tribes[125] and (3) a commission to investigate the conditions of backward classes.[126]

CULTURAL AND EDUCATIONAL RIGHTS AND OTHER SAFEGUARDS UNDER THE CONSTITUTION

By not accepting the demands for separate electorates and reservation of seats on religious consideration, the Constituent Assembly thus sought to do away with any protective principle which could further damage the cause of national unity. But "to promote a

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123. Arts.297 and 298.
124. Art.299.
125. Art.300.
126. Art.301.

sense of security among the minorities, to ameliorate the conditions of the depressed and backward classes, to make them useful members of society, to wield the diverse elements into one national and political stream, the constitution contains liberal scheme of safeguards to minorities, backward classes and scheduled castes".[127]

The most important among such safeguards is the cultural and educational rights[128] where three distinct rights are conferred viz.,

(1) right to conserve their language, script or culture

(2) right to establish and administer educational institutions of their choice, and

(3) right to get state-aid to their educational institutions.

These rights are manifestly intended to confer rights on religions, linguistic and cultural minorities and

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127. M.P.Jain, Constitutional Law of India (1978), p. 85.
128. Arts. 29 and 30.

it cannot be said to grant protection on communal lines.[129] Besides these general safeguards the Anglo-Indians were given special educational facilities[130] which was to stay for ten years from the commencement of the constitution. Further there are directives[131] for the advancement of educational facilities to the depressed and backward communities.

In the political sphere the principle of joint electorate[132] with reservation to Scheduled Castes and Tribes[133] is accepted and declared in the constitution. It is also provided for the nomination[134] of Anglo-Indians to the legislatures if it appears that they are not adequately represented. These political safeguards in the form of reservation and nomination[135] though transitory in nature,

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129. Art. 29 refers to "any section of the citizens....having a distinct language, script or culture" and Art.30 says "all minorities, whether based on religion or language".
130. Art.337 which came to an end with effect from 25.1.1960.
131. See Arts.45 and 46. To make these directives a reality, clause (4) of Art.15 was added by the Constitution (First Amendment) Act, 1951 providing reservation of seats to such classes in the educational institutions.
132. Art.325.
133. Arts.330 and 332.
134. Arts.331 and 333.
135. Art.334 originally provided that the special safeguards were to cease on the expiration of 10 years from the commencement of the constitution. But by amendments the period is extended from time to time and hence they still stay in the constitution.

are still found to be very essential.

In the services, it is provided[136] that the claims of the members of the Scheduled Castes and Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration. Provision[137] is also made for the reservation of appointments at post in favour of any backward class of citizens which is not adequately represented. These two provisions if read together indicate that reservation to services cannot be made on population basis as it is made in the case of reservation in the legislatures. A transitory provision[138] was made for safeguarding the position of Anglo-Indians who had hitherto enjoyed attractive preference in appointments to the posts in the railway, customs, post and telegraph services.

The provisions[139] relating to freedom of religion and directives[140] enabling one to use his language may also

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136. Art.335.
137. Art.16(4).
138. Art.336 provided for continuation of such preferential treatment for ten more years from the commencement of the constitution, and it was to be withdrawn gradually and progressively, and thus it came to an end with effect from January 25, 1960.
139. Arts.25 to 28.
140. See Arts.120, 210, 350 and 350-A.

be considered as minority safeguards having immense importance.

Mere declaration of rights and safeguards would do no good and hence for effective implementation of minority safeguards, certain administrative machineries are also established. The special officer for Scheduled Castes and Scheduled Tribes[141] the Commission for Scheduled Areas and Scheduled Tribes,[142] Commission for backward classes,[143] Special Officer for linguistic minorities[144] are the machineries named by the constitution for the purpose.

The constitution establishes a secular democracy. The animating principle of any democracy is the equality of the people. But the idea that all people are equal is profoundly speculative. It is well said that in order to treat some persons equally we must treat them differently. We have to recognise a fair degree of discrimination in favour of minorities. An important functional aspect of the constitution is that it keeps a balance between the

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141. Art.338.
142. Art.339.
143. Art.340.
144. Art.350-B.

interest of the minority and majority, so that unity is the prime object to be achieved. The protective treatment envisaged in the constitution is only to create confidence in the minds of minorities and it is expected on a future date when the minority conscience may also come to an end by which time the national interest will be the main object of all Indians. The brief account of secularism and freedom of religion envisaged in Articles 25 to 28 of the constitution proves that the minorities in India enjoy not only the cultural and educational rights as guaranteed by Articles 29 and 30 of the constitution but also the freedom to practise and propagate their religion and their religious beliefs. These guarantees are complementary to each other. These freedoms along with the right to equality, paves way for smooth integration of minorities with the rest of the nation.

Chapter II

WHO IS A MINORITY?

Every person of course is basically different from everyone else; so everyone can, when he so chooses be in a minority. In the common parlance the term minority refers to a group of individuals smaller in number as against the numerically dominant group in population. But sociologists and theorists go further than confining their definition of 'minority' to merely numerical ratio criterion.[1] Laying down a definition of 'minority' capable of universal acceptance has always been a difficult and complex task, because of the fact that the minorities are social realities which are dynamic rather than static and which change under the influence of varying circumstances.[2] The phenomenon of culturally or racially distinct minority

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1. Some of the writers have defined the term in purely statistical sense without referring to factors, serving as the basis for distinguishing a minority from the majority. In this sense, minority is a "non-dominant group" (Henry K.Junckerstroff, World Minorities, 1961, p.29) or "a number which is less than half the whole number" (The Oxford English Dictionary, Vol.VI, 1933). See also, Grolier Encyclopaedia, Vol.XIV, p.114.
2. Definition and Classification or Minorities, Memorandum submitted by Secretary General, United Nations. Document E/CN.4/Sub.2/85 dt.27th December 1949, p.12.

groups living in the midst of an alien society is a familiar one, but what exactly is meant by 'minority' is something that scholars, politicians and those who have to take practical action in social matters have seldom found easy to describe.

The most common general description of a minority group used is of an aggregate of people who are distinct in race, religion, language or nationality from other members of the society in which they live and who think of themselves and are thought by others, as being separate and distinct. The term 'minority', in modern political terminology, is restricted to distinct "racial" or "national" minority groups of numerical strength within a state.[3] Here the word minority assumes an arithmetical connotation denoting by implication that a minority is a smaller part of a larger whole. But in the sociological sphere a minority need not always be a numerically small group of the population. For example, in the southern states of the USA, blacks form numerically larger group, but still they are treated as a minority group in relation to the numerically smaller dominant group of whites.[4] So

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3. M.N.Dalal, Wither Minorities? (1940), p.1.
4. See Encyclopaedia Britannica (1974), Vol.XII, p.261.

also before the break-up of Pakistan the people of Bangaladesh were numerically a "majority" but were dominated economically, culturally and linguistically and thus reduced to the status of a 'minority' in Pakistan.[5] Thus, neither the numerical strength nor the political strength can be the ultimate factor to distinguish a group as minority or majority. The form of a minority group and its position in a particular society depend on many variable factors such as race, religion, culture political and economic interests etc. Even a psychological submission by a group to the domination of another may be sufficient to identify the former as a minority. The most common general description of a minority group used is an aggregate of people who are distinct in race, religion, language, or nationality from other members of the society in which they live, who think of themselves and are thought of by others as being separate and distinct.[6] Owing to this separation, a minority's position in the society involves exclusion and assignment to a lower status in one or more of four areas of life, economic, political, legal and social.[7] Hence the term 'non-dominant group' is

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5. See Urmila Haksar, Minority Protection and International Bill of Human Rights (1974), p.2.
6. Encyclopaedia Britannica (1974), Vol.XII, p.260.
7. International Encyclopaedia of Social Sciences (1972), Vol.X, p.368.

sometimes substituted for minority. Both the minority and majority look upon their respective cultural heritage, social institutions, and religion as clear expression of separate individuality and want to preserve them at any cost. In so far these are in conflict as in so far as the former are likely to be swamped and overwhelmed by the latter, the political problem of minorities is created. As a consequence arises the question of protection of minorities. The question of protection arises only when one group of people dominates over another and either forces the people of the non-dominant group to give up their own peculiar features and characteristics and accept those of the dominant group or keeps the non-dominant group under conditions of segregation and backwardness.[8]

The above description of the concept of minority is insufficient because the assumption is that minority is a group of people who want to preserve their separate identity and not willing to be assimilated with the rest of the population. So far as the religious, linguistic and cultural minorities are concerned the description may be correct. But there are minorities, like the scheduled castes and scheduled tribes in India, who do not want to

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8. Urmila Haksar, op.cit., p.29.

preserve any of their characteristics as distinct from the rest of the population and even like to be assimilated with the majority, but are prevented from doing so by the opposition from the majority. This type of minority also requires protection for their assimilation with the majority.

Thus while considering 'minority' as numerically smaller group as against the majority in a defined area some place emphasis upon certain characteristics commonly possessed by the members constituting the minority and to them, these characteristics serve as objective factors of distinction. In this sense the term is used to cover "racial religious or linguistic sections of the population within a state which differ in these respects from the majority of the population".[9] The term signifies a group with an individual national and cultural character living within a state which is dominated by another nationality.[10] In the same sense was confined the term in the Report of the Third Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities set up under

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9. Casiton Encyclopaedia, Vol.IV, p.337.
10. Boehur, Max, H., Encyclopaedia of the Social Sciences (1937), Vol.X, p.518.

the Human Rights Commission which stated that the term would include "only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious, or linguistic traditions or characteristics markedly different from those of the rest of the population".[11] Thus according to these definitions, minority constitutes a collectivity which is united by certain common characteristics such as religion, language, race, culture or traditions or a combination of these factors and is numerically non-dominant in a population.

The members constituting minority group have a feeling of belonging to one common unit, a sense of akinness or community which distinguishes them from those of belonging to the majority of the inhabitants. They are "groups held together by ties of common descent, language or religious faith and feeling themselves different in these respects from the majority of the inhabitants of a given political entity".[12] A consciousness of the difference with the majority on the basis of certain common characteristics is, therefore, considered as a distinguishing mark, and as such a subjective element.

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11. Report of the Third Session of the Sub-commission, Document E/CN.4/385, January 30, 1950, Year Book on Human Rights for 1950 (1952), p.490.
12. Encyclopaedia Britannica, Vol.15, p.542.

To some group, minority is defined in terms of relationship between the dominant group and the minority. To them, it is much more important to understand, "the nature and genesis of the relationship between the dominant group and the minority than it is to know the marks by the possession of which people are identified as members of either".[13] It is suggested that the distinctive mark, apart from the numerical size, is the inferior or differential treatment which is the result of some peculiar relationship between the dominant and non-dominant groups, and that the former develops a consciousness of its inferior status.

Some sociologists refuse to accept any purely numerical definition and instead give importance only to the factors of discrimination and inferior treatment. Minority is a group of people differentiated from others in the same society by race, nationality, religion or language who both think of themselves as differential group and are thought by others as a differentiated group with negative connotation".[14]

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13. Louis Wirth, "The Problem of Minority Groups" in Talcot Parsons and others (ed.), The Theory of Society (1965), p.311.
14. Arnold M.Rose, Encyclopaedia of Social Sciences, Vol.X, p.265.

The important elements in this definition, according to him, are not the relative numbers in and out of the group but a set of attitudes those of group identification from within the group and those of prejudice from without and a set of behaviours those of self-segregation from within the group and those of discrimination and exclusion from without. Relative numbers in and out of the group are not definitionally important and, like everything that is social, minority groups must be socially defined as minority groups which entails a set of attitudes and behaviours.[15] In this sense 'minority' and 'majority' became primarily political and not merely statistical concepts.

Minority is not always regarded as a statistical concept. There exists a sharp disagreement in opinions among the formulators and each definition has its relevance only in a given context. The definitions which lay emphasis upon certain subjective factors such as 'feeling or consciousness' provide a test which is too vague and uncertain and more psychological in nature than real. Every situation may not necessarily involve the assumption that a group in order to deserve the title of 'minority'

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15. See, Arnold M.Rose and Rose Caroline, Minority Problems, 13th ed. (1965), p.4.

must be distinguishable from the majority by the presence of a 'feeling consciousness' of its being different from the majority. A group distinguishable from others by possession of certain objective characteristics, such as language, may not have a feeling or consciousness of its distinct status and may yet be counted as minority. Those who support certain objective characteristics commonly possessed by the members constituting minority as the exclusive foundations of minority status fail to recognise that objective factors alone may not always be the determining mark of a minority. Because, a group, not conscious of its distinct status or separate group identity, may soon be assimilated with the majority and thus may not be entitled to be called as minority. Those who regard the factors of discriminations, prejudice and inferior treatment as the sole determinant of minority status and dismiss as irrelevant the numerical size of the groups concerned need hardly be told that 'minority' is a relative term and must pre-suppose the existence of a numerical majority, thus, for instance, the black population of South Africa or Rhodesia though politically non-dominant and subjected to inferior treatment cannot be regarded as minority as numerically it happens to be larger in size than the numerically smaller white population. The

definition given by Human Rights Commission appears to those non-dominant groups only which apart, apart from having certain objective characteristics which are distinctively their own, wish to preserve their separate identities and are not willing to be assimilated with the rest of the population. Based on the experience of Europe where minorities like nationalities were largely minorities by will, anxious to perserve their distinctive character, and refusing to be assimilated with the rest of the population, the definition fails to include minorities which are not minorities by choice or will, but are minorities by force. The Negroes in the United States and the Scheduled Castes in India are examples in hand. They are not minorities by will, and are rather willing to assimilate with the majority but are forced to maintain their distinct status. Minority is seen, in this definition as a group apart, counterposed to the rest of the population, too much pre-occupied with itself and too much imbued with characteristics of separatism, inwardness and withdrawal, a picture too much overdrawn.[16]

By incorporating the minority rights under the Indian Constitution, the framers of the Indian Constitution

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16. See Rasheeduddin Khan in Sharma, Krishna Dev, Education of a National Minority (1978), p.XI.

were rendering a practical solution to a political problem which had remained in the forefront of India's political scene for several years before independence. In such a context, they didn't specifically identify the minority groups who would be the beneficiaries of the minority rights and further they did not lay down a definite test which would distinguish clearly a minority from the majority in each given situation and they declared under Article 30(1): "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice".

The persons of inherence of this right secured by Article 30(1) of the constitution are those who are distinguishable from others by the characteristics of either religion or language or both. "Religion" and "Language" being the criteria indicated in Article 30, a pre-condition to invoke the protection guaranteed by Article 30, the constitution itself tends to confine the task of the courts to the ascertainment whether the group claiming the protection is a group identifiable by the characteristics of religion or language and is also numerically non-dominant. The expression 'based on religion' emphasizes that unless the only basis of a

minority is religious, it is not to be covered by the words "Minorities based on religion" in Article 30(1) of the constitution. The expression means, the principal basis of a minority must be their adherence to one of the religion and not a section or part of it. As V.S.Desh Pande, J. observed in Arya Samaj Education Trust, Delhi and others v. The Director of Education, Delhi Administration.[17] "No section or class of Hindus was ever referred to as a minority. In Article 30(1), therefore, the word "minority" cannot apply to a class or a section of Hindus".[18] It can be said that for the purpose of Article 30, a 'minority' means a non-dominant collectivity distinguishable from the majority of the population by the objective factors of religion or language or a combination of both.

The constitution is silent as regards what additional factors must be taken into account to determine whether a religion or linguistic group is a 'minority' entitled to protection under Article 30(1). While Article 23 of the Draft Constitution, corresponding to the present Article 30, was being debated,[19] doubts were indeed

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17. A.I.R. 1976 Del. 207.
18. Id. at 211.
19. C.A.D., Vol.VII, pp.891-927.

expressed in the Constituent Assembly over the advisability of leaving vague justiciable rights to undefined minorities.[20] Inspite of that, the Assembly chose to avoid any further elaboration and left it to the wisdom of the courts to supply this omission.

TEST TO DETERMINE MINORITY STATUS

In order to invoke the protection of Clause (1) of Article 30 of the constitution:

(i) There must exist a minority community and that

(ii) The institution is established by one or more members of it.

The opportunity to supply the omission to decide who is a minority, came in 1958, eight years after the constitution was adopted, in Re Kerala Education Bill 1957[21], where Chief Justice S.R.Das held that a minority means a "community which is numerically less than 50

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20. See B.Shiva Rao, The Framing of India's Constitution, A Study (1972), p.275. See also, Select Documents, Vol.III, 1(i) and (ii) pp.11, 200.
21. A.I.R. 1958 S.C. 956.

percent of the total population" thus suggesting the technique of arithmetical tabulation. In the Kerala Reference case, the Supreme Court found itself faced with the difficulty of specifying the geographical unit with reference to the population of a minority could be calculated and weighed against the total population. The total population either could be that of the Indian Union, or of a State, or of any smaller geographical unit. The State of Kerala argued before the court that in order to constitute a minority the persons in question must numerically be a minority in the particular region in which the educational institution was situated. To support its argument the Kerala Government relied on the decision of Assam High Court in Ramani Kanta Bose v. Gauhati University[22] wherein the question inter alia, was whether the Bholanath College situated at Dhubri in Assam was a college established by the Bengalis. While holding that "in order to bring the case under the first part of Article 30 a minority community has to establish its character as a linguistic or religious minority", Justice Ram Labhaya observed:

> "It is also a question as to whether Bengalis could be regarded as a linguistic minority in the

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22. A.I.R. 1951 Assam 163.

area or locality with which we are concerned. The figures given by the petitioner .... show that there is a preponderance of Bengali students in the college".[23]

Although this observation does not indicate whether Labhaya J. intended to devise a 'test' by which minority status could be determined, as apart from this observation there is nothing else in the judgment to disclose such intention, the State of Kerala chose to base its argument on this observation, only to be discarded by Chief Justice S.R.Das in the Kerala Reference who while rejecting the argument said, "A little reflection will at once show that this is not a satisfactory test, whereis the line to be drawn and which is the unit which will have to be taken".[24]

The court was faced with the difficulty of demarcating the geographical boundaries of a region or area which could be treated as a unit for the purpose of determination and declaration of particular group inhabiting that region as falling within the definition of

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23. Id. at 164.
24. A.I.R. 1958 S.C. 956 at 977.

'minority'. The difficulty is manifest from Chief Justice's own words, which followed the above question:

> "Are we to take as our unit a district or a sub-division or a taluk or a town or its suburbs or a municipality or its wards?"[25]

The court then tested the formula suggested by the State of Kerala by applying it to some hypothetical situations. It stated that in many towns, persons belonging to a particular community flock together in a suburb of the town or a ward of the municipality. Thus Anglo-Indians or Christians or Muslims may flock together in one particular suburb of a town or one particular ward of a municipality and they may be in majority there, though in the context of the whole population of the State they might be numerically a minority. Illustrating the point further the Chief Justice said:

> "Behari labourers residing in the industrial areas in or near Calcutta where they may be, the majority in that locality will have no educational institutions imparting education in

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25. Ibid.

> Hindi although they are numerically a minority if we take the entire city of Calcutta or the State of West Bengal as unit. Likewise Bengalis residing in a particular ward in a town in Bihar where they form the majority will not be entitled to conserve their language, script or culture by imparting education in Bengali. There are no doubts, extreme illustrations, but they serve to bring out the fallacy inherent in the argument".[26]

The Supreme Court thus analysed these situations to show that the test for determination of 'minority' as suggested by the State was not satisfactory as, firstly, the word 'region' itself was not precisely definable and secondly, that even if a region was taken as a unit the test would break down in marginal situations. The court was, however, confronted with the problem of suggesting its own formula. It observed:

> "It is easy to say that a minority community means a community which is numerically less than 50 per cent, but then the question is not fully

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26. Ibid.

> answered, for part of the question has yet to be answered namely, 50 per cent of what? Is it 50 per cent of the entire population of India or 50 per cent of the population of the State forming a part of the Union?[27]

The court did not finally provide any definite answer to these questions and without finally deciding about the meaning of minority it observed:

> "We need not, however, on this occasion go further into the matter and express a final opinion for the Bill before us extends to the whole of state of Kerala and consequently the minority must be determined by reference to the entire population of that State. By this test, Christians, Muslims and Anglo-Indians will certainly be minorities in the State of Kerala".[28]

However, the Supreme Court ruled that when an Act of State legislature extends to the whole of the State, the

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27. Ibid.
28. Ibid.

minority must be determined by reference to the entire population of the State and any community, linguistic or religious, which is numerically less than 50 per cent of the entire State population may be regarded as a minority for purposes of the Constitution.

It follows from this, that if a question arises as to who is a minority, in connection with an Act of Union Parliament, 'minority' will have to be determined by reference to the entire population of the country.

The numerical test laid down by Their Lordships of the Supreme Court in Re Kerala Education Bill 1957[29] was followed by Justice J.M.Shelat in Shri Krishna v. Gujarat University.[30] His Lordship held,

> "The observation made in that decision[31] show that Christians, Muslims and Anglo-Indians were all held to be minorities in the State of Kerala and therefore entitled to the right under Articles 29(1) and 30(1) by reason of their being numerically smaller throughout the State and the

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29. A.I.R. 1958 S.C. 956.
30. A.I.R. 1962 Guj. 88 (F.B.).
31. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956 at pp.976-77.

> Bill in question being sought to be made applicable to the State. That being the criterion, Christians in the State of Gujarat must be held to be a minority.[32]

The test was also applied by the High Court of Kerala in Aldo Maria Pathrori v. E.C.Kesavan and others.[33] In this case the question was whether Roman Catholics living in the State of Kerala constituted a minority within the meaning of Article 30(1) of the Constitution. M.S.Menon, C.J. held that,

> "... as the Christians at the 1961 census amounted only to 21.22 per cent of the population of the State of Kerala, the Roman Catholics who formed a section of that community were a minority within the meaning of Article 30(1) of the Constitution".[34]

The test suggested in D.A.V. College, Jullunder v. State of Punjab[35] was different from the one suggested on

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32. A.I.R. 1962 Guj. 88 at 116.
33. A.I.R. 1965 Ker. 75.
34. Id. at 76.
35. A.I.R. 1971 S.C. 1737.

behalf of State of Kerala in the Kerala reference. The argument advanced was that religious or linguistic minority should be minorities in relation to the entire population of the country. Justice Jaganmohan Reddi, speaking for a unanimous Court, negatived the argument by saying,

> "In our view they are to be determined only in relation to the particular legislation which is sought to be impugned namely that if it is the state legislature, the minorities have to be determined in relation to the population of the state."[36]

The above view was further confirmed in D.A.V. College, Bhatinda v. State of Punjab.[37] Referring to the decision in the earlier case, Jaganmohan Reddy, J. said:

> "We had .... held that what constitutes a linguistic or a religious minority must be judged in relation to the state in as much as the impunged Act is a State Act and not in relation to the whole of India".[38]

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36. Id. at 1742.
37. A.I.R. 1971 S.C. 1731.
38. Id. at 1734.

Thus in these cases also the Supreme Court had to fall back upon its earlier view to merely hold that if the law is enacted by the state legislature and is intended to be applied to the whole state, minorities have to be determined with reference to the entire population of that state. Similarly in Pannalal v. Magadh University[39] Court accepted the contention that persons of Rajasthan origin with Rajasthani as their language and Mahajani as their script, residing in the state of Bihar were a minority based on language.[40]

In conferring the right under Article 30, the preliminary question is whether the claims come from a community which is a distinct minority "based on religion or language". As we have already seen, the judiciary has not confined the protection of Article 30 to the well recognised minorities existing at the commencement of the constitution but has sought to determine the status of a community as 'minority' with reference to the population of a state concerned in which the community lives, if the law

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39. A.I.R. 1976 Pat. 83.
40. See also K.O.Varkey v. State, A.I.R. 1969 Ker. 191.

in question is a state law.[41] Consequent to the above mentioned approach of the judiciary, members of the religious minority, considered as majority with reference to the population of the whole country, have sought to be recognised as religious minority in some of the states. Further, some religious denominations have sought to have themselves judicially recognised as a separate religion, independent of Hinduism, so as to be entitled to be treated as minority for the purpose of the constitutional protection secured under Article 30. But as may be seen from the decisions considered below, the courts are not uniform and firm while dealing with such claims.

In Arya Samaj Education Trust v. Director of Education, Delhi[42] the question that came up before the court for its decision was whether a religious sect or denomination can be regarded as minority "based on religion" so as to entitle the same for protection under Article 30(1). The argument raised on behalf of the Arya

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41. See In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956; A.M.Patroni v. E.C.Kesavan, A.I.R. 1965 S.C. 75; D.A.V. College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; D.A.V. College, Bhatinda v. State of Punjab, A.I.R. 1971 S.C. 1731.
42. A.I.R. 1976 Del. 207.

Samaj Education Trust was that the word 'religion' used in Article 30(1) meant not only the religions such as Hinduism, Islam, Christianity as a whole, but also sects, or parts of such religion, and that a religions denomination would also be a religion within the meaning of Article 30(1). A division bench of the Delhi High Court negativing the claim held that Article 30(1) is confined to the well defined religions of India such as Hinduism, Islam, Sikhism, Christianity, Jainism etc. The court observed that the right under Article 30(1) being derived from the political concept of 'minority' was confined only to politico-religious minorities, namely, those minorities based on religion which kept their identity separate from the majority, the Hindus. Justice V.S.Deshpande, speaking for the court said:

> Just imagine the various classes and sections of the Hindus being regarded as minorities for the purpose of Article 30(1). There are so many classes and sections among the Hindus with varieties of religious opinions that the Hindus will be divided into numerous sections and classes. If each of them were to constitute a minority under Article 30(1), the Hindus would

not remain a majority at all but would consist of numerous religious minorities".[43]

The court further observed that because of the political origin of the sense in which the word minority was used in India, it was never applied to a part or sections of the Hindus. His Lordship said:

> "The word minority used in the expression "minorities based on religion" used in Article 30(1) connotes only those religious minorities which had claimed political rights separate from those of the Hindus prior to the constitution such as the Muslims and Sikhs. The Christians did not seem to have claimed separatist rights but they were nevertheless a distinct minority based on a religion which at no stage was regarded as a part of Hinduism. Because of the political origin of the sense in which the word 'minority' was used in India, it was never applied to a part or a section of Hindus....During the debates of the Constituent Assembly also it is only this aspect of the

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43. Id. at 215.

minority problem which was discussed. No section or class of Hindus was ever referred to as a 'minority'. In Article 30(1), therefore the word 'minority' cannot apply to a class or a section of Hindus".[44]

The above opinion of the Delhi High Court is in consonance with the intention of the framers, but it is opposed to a line of reasoning laid down by the Supreme Court and High Courts in some decisions.[45] It seems the court itself has accepted the position that a political minority such as the Sikhs could form a numerical majority in a state, and similarly, the political majority the Hindus could form a religious minority. The Delhi High Court referring to the judgment of the Supreme Court in D.A.V. College, Jullunder[46] observed:

"But the Hindus were admitted to be a minority in the Punjab before the Supreme Court in the D.A.V.College, Jullunder case with the obvious

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44. Id. at 210-211.
45. D.A.V. College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; D.A.V. College, Bhatinda v. State of Punjab, A.I.R. 1971 S.C. 1731; Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1958 Pat. 359; Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1962 Pat. 101; Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1963 Pat. 54.
46. A.I.R. 1971 S.C. 1737.

> implication that the Sikhs were a majority....Why was it necessary for the Supreme Court to inquire...as to whether the Arya Samaj was a religious minority eventhough it was undisputed that the Hindus as a whole were a religious minority.[47]

In Arya Samaj Education Trust[48], the Delhi High Court rejected the argument that Arya Samaj being a religious minority in Delhi was entitled to the right to establish educational institutions of its choice. The court found that Arya Samaj was a reformed sect of Hinduism and as such was a part of it and not a separate religion for purpose of Article 30(1). The court relied on the views expressed by Lala Lajpat Rai, perhaps the greatest Arya Samaj leader after Swamy Dayanand who asserted that Hinduism in Northern India could not be thought of without the Arya Samaj and that it was not only a source of strength to Hinduism and Hindus but was the principal effective agency.[49] The petitioner argued in the said case inter alia, based on certain observations of the Supreme

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47. A.I.R. 1976 Del. 207 at 215.
48. Id. at 207.
49. Lajpat Rai, History of the Arya Samaj, p.125.

Court in D.A.V. College, Jullunder v. State of Punjab[50], wherein one of the questions raised before the court was whether the Arya Samaj was a religious minority in Punjab for the purpose of Article 30(1). The Supreme Court had observed that Arya Samaj is reformist movement, believes in one God and the Vedas as the books of true knowledge. After quoting a passage from Encyclopedia Britannica and another from Encyclopedia of Religion and Ethics, the Supreme Court observed:

> The Arya Samaj by "rejecting the manifold absurdities found in Smiritis and in tradition and in seeking a basis in the early literature for a purer and more rational faith" can be considered to be a religious minority, at any rate as part of the Hindu religious minority in the state of Punjab".[51]

Eventhough the Supreme Court did not decide whether Arya Samaj was a distinct religious minority for the purpose of Article 30(1) or a religious denomination for the purpose of Article 26(1)(a) because it held that

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50. A.I.R. 1971 S.C. 1737.
51. Id. at 1744.

Arya Samaj was a religious minority having a distinct script of its own which entitled it to claim the protection under Article 30(1).[52] The said observation somewhat creates the impression, thus bringing an element of uncertainty, that the Supreme Court was prepared to treat Arya Samaj as a religious minority distinct from Hindus. The impression however neither finds strength in the passage is the observation seems to quote with approval, nor is supported by the connected judgment of the Supreme Court in D.A.V. College, Bhatinda v. State of Punjab.[53] For, Encyclopaedia Britannica clearly stated that Arya Samaj is a part of Hinduism.

> "Arya Samaj, a vigorously reformed sect of modern Hinduism found in 1875 by Swamy Dayananda Saraswathy at Bombay....The Arya Samaj has sought to revisualise Hindu life and to instill self confidence and national pride among Hindus".[54]

There is a comparison between Swamy Dayananda Saraswathy and Martin Luther in Encyclopaedia of Religion

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52. The court found that Arya Samajis had a distinct script of their own, namely Devanagari, and such were entitled to rights under Art.29(1) and were also a religious minority (as part of Hindu minority) in the Punjab, and as such entitled to the right under Art.30(1).
53. A.I.R. 1971 S.C. 1731.
54. Encyclopaedia Britannica, Vol.II (1968), p.558.

and Ethics which show that just as Martin Luther found protestantism as a sect of Christianity, similarly Swami Dayananda Saraswathy founded Arya Samaj as an important sect of Hinduism and that just as the former is not a separate religion different from Christianity the latter is not a separate religion from Hinduism.[55] The Supreme Court in D.A.V.College, Bhatinda[56] made a reference to its earlier decision in D.A.V.College, Jullunder v. State of Punjab[57] said that it had held that "....the Arya Samaj who are part of Hindu community in Punjab are a religious minority".[58]

It is submitted that it was not necessary for the Supreme Court to enquire into the D.A.V.College, Jullunder[59] whether Arya Samaj was a religious minority eventhough it was undisputed, and the State of Punjab, being respondent, had admitted also that the Hindus as a whole were a religious minority. The Delhi High Court in the Arya Samaj Education Trust case[60] explained away the

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55. Encyclopaedia of Religion and Ethics, Vol.II, pp.58-59.
56. A.I.R. 1971 S.C. 1731.
57. A.I.R. 1971 S.C. 1737.
58. Id. at 1734-35.
59. A.I.R. 1971 S.C. 1737.
60. A.I.R. 1976 Del. 207.

reason by observing that the petitioner had gone before the Supreme Court simply as Arya Samajis and not as Hindus. On the pleadings before it, the Supreme Court had to decide only whether the Arya Samajis constituted a religious minority, which it did. The Delhi High Court further explained that the finding that Arya Samaj "can be considered to be religious minority, at any rate as part of the Hindu religious minority" could be made by the Supreme Court only because Hindus were a minority in Punjab. The meaning of the words "at any rate as part of the Hindu religious minority", the court emphasised, have to be understood in the context of the Hindus being admittedly a minority based on religion in Punjab. It explained:

> "The fact would at any rate of ultimately, always mean that the Hindus or any part of them are a minority based on the Hindu religion in Punjab. The finding that Arya Samaj was a religious minority had to be understood to mean that it was a part of Hindu religion which itself was the religion of a minority in the Punjab".[61]

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61. Id. at 216.

In Gandhi H.U.M. Vidhyalaya v. Director of Education[62], another attempt was made by Arya Samajis to claim to be a religious minority distinct from Hinduism where it was claimed that Gandhi H.U.M. School being established with the object of imparting "knowledge of Vedic and Arya Samaj text as laid down by its founder Dayanandji" and for the uplift of Harijans and other backward classes was a minority institution and thus entitled to the protection under Article 30(1). Anand, J. of the Delhi High Court agreed with the view expressed by the Division Bench of the same court in Arya Samaj Education Trust case[63] that the Arya Samaj could not be considered a minority and that the institutions established by it could not qualify for the protection under Article 30.

In Arya Pratinidhi Sabha v. State of Bihar[64], the Patna High Court, however, appears to have taken a different view of the position of Arya Samaj. In this case the Arya Pratinidhi Sabha which was an association of persons professing the Arya Samaj faith and which had established several schools at Patna, the special features

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62. A.I.R. 1977 Del. 240.
63. A.I.R. 1976 Del. 207.
64. A.I.R. 1958 Pat. 359.

of the Schools being teaching for conservation of Vedic culture and periodic vedic prayers and vedic Havan, had challenged an order of the Director of Education constituting an adhoc committee for taking over the management of the Dayanand Kanya Vidhyalaya, one of the Schools established by the Sabha. The Patna High Court, however, appears to have taken a different view of the position of Arya Samaj. Ramaswami, C.J. observed:

> "It follows...that the School has been established and administered by a religious minority, namely the Arya Pratinidhi Sabha within the meaning of Articles 29 and 30 of the constitution and the case of the respondents to the contrary must be rejected as incorrect."[65]

The Chief Justice further observed:

> "The constitutional protection under Articles 29 and 30 is not absolute and it does not involve dispensation from obedience to general regulations made by the State for promoting the common goal of the community. But in the present

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65. Id. at 365.

case the action of the Government in imposing the adhoc committee and threatening to withdraw grants-in-aid transcends these limitations and I think it infringes the constitutional protection guaranteed under Articles 29 and 30."[66]

The court's view that Arya Pratinidhi Sabha was entitled to the protection afforded by Article 30 which enabled it to establish and administer educational institutions of its choice thus leaves no doubt that Arya Samaj was regarded minority based on religion for purposes of Article 30(1) and as such distinct from Hindus who formed majority in the State of Bihar.

The Second Arya Pratinidhi Sabha case[67] decided by the Patna High Court almost 15 years after the first case seems to follow the same line adopted in the earlier case. On the second Arya Pratinidhi Sabha case the Patna High Court though negatived the claim of Arya Samaj that it had established the institution known as Musaddi Lal Arya Kanya Uchtar Madhyamic Vidyalaya, proceeded on the assumption that Arya Samaj was a minority in the State of Bihar.

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66. Ibid.
67. Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1973 Pat. 101.

Akbar Hussain, J. speaking for the court, said:

> "It is ... clear that on the facts of this case the school... cannot be said to have been established by the Samaj and that being so naturally the protection under Article 30 of the Constitution is not available to the Arya Samaj".[68]

The above referred observation makes it clear that the Court presumed Arya Samaj as a minority for the purpose of Article 30(1).

In Dipendra Nath Sarkar v. State of Bihar[69], Patna High Court held that Brahma Samaj, a sect similar to the Arya Samaj was a religion separate from Hinduism and consequently a minority in the State of Bihar for the purpose of Article 30(1). In the Second Dipendra Nath Sarkar case[70], Brahma Samaj was even regarded as a religious minority for the purpose of Article 30(1). The Patna High Court made the following finding:

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68. Id. at 109.
69. A.I.R. 1962 Pat. 101.
70. A.I.R. 1963 Pat. 54.

"The Brahma religion is distinct and separate from Hinduism and other religions with a separate church and doctrines and tenets and rites and practices of its own. The Samaj has a place of worship. It is undisputedly a minority based on a religion, within the meaning of Article 30".[71]

The same High Court however, refused to treat Theosophy as a religion in Janaki Prasad v. State of Bihar.[72] The main issue in this case was whether the Theosophical Society was a religious minority in the State of Bihar for the purpose of Article 30(1). The court analysed the history of the foundation of the Society and its objects and found that the founders of the Society did not intend to bring about a new religion and hence Theosophical Society could not be regarded as a minority based on religion. The court found that Henry Steel Olcott, one of the two founders, the other being Madame Helina Petrovna Blavatsky had stated that "the Society was neither a religious nor a scientific body. Its object was to enquire, not to teach and its members comprised men of various creeds and beliefs".

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71. Ibid.
72. A.I.R. 1974 Pat. 187.

Alternatively, a group claiming the benefit of the right to establish an institution has to show before the Court that it is a minority "based on language". As regarding who is a linguistic minority, the constitution is silent. The only condition which is required to be satisfied by the court is that a non-dominant group to be recognised as a linguistic minority has to show that it has a separate language spoken by its members - the language need not have a distinct script also. The Punjab High Court in D.A.V.College, Jullunder case[73] observed that the Arya Samajis had a distinct script, namely Devnagari, and which was distinct from that of the Sikhs who formed the majority in the State, which entitled them to avail of the protection. The court sought to explain the meaning of 'linguistic minority' thus:

> "A linguistic minority for the purpose of Article 30(1) is one which must at least have a separate spoken language. It is necessary that language should also have a distinct script for those who speak it to be a linguistic minority".

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73. A.I.R. 1971 S.C. 1737.

The court found it unnecessary in D.A.V.College, Bhatinda v. State of Punjab[74] to go into the question whether the Arya Samaj was a separate religious denomination for the purpose of Article 26(1)[75] or a linguistic minority for the purpose of Article 30(1) because in its view "it would be sufficient for the petitioners if they could establish that they had a distinct script of their own[76] so as to be available to them the protection afforded under Article 30(1). In the said case the Arya Samaji's claim to be a linguistic minority was contested on the ground that the Punjabi was the spoken language of the Hindus and also of the Arya Samajis in the State of Punjab. The ascertainment of this fact seemed to the court to be unnecessary because it could easily find itself convinced that the Arya Samajis had a script of their own, namely, Devnagri, which was undoubtedly different from Punjabi and possession of a script was a sufficient proof for the entitlement under Article 30. Similarly in Panna Lal v. Magadh University[77], the Patna High Court readily assumed that Rajasthanis were a linguistic minority in the State of Bihar by accepting

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74. A.I.R. 1971 S.C. 1731.
75. Art.26(1)(a) says that every religious denomination or a section of it shall have the right to establish and maintain institution for religious and charitable purposes.
76. A.I.R. 1971 S.C. 1731 at 1733.
77. A.I.R. 1976 Pat. 83.

the contention of the petitioners that Rajasthani was their distinct language and Mahajani was their script, the latter being used by them in their correspondence and account books.

In Sri Jain Swetamber Terapamthi Vidyalaya v. State[78], it was held that the members representing Jain faith and belonging to the Jain Swetamber Terapanthi constituted a religious minority. It professed a faith different from the Hindu religious faith. Therefore the institution established by them was entitled to benefit of Article 30(1) of the constitution.

In State of Tamil Nadu v. Villampatti Nadar Uravinmuraikku Pattiaya Patta[79], the issue before the court was whether Hindu Nadar community of Villampatti was religious minority. The court held that the words religious denomination must take their colour from the word religion. In order to hold that a particular community constituted "religious denomination within meaning of Article 26[80], of the constitution, it must be proved that

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78. A.I.R. 1982 Cal. 101.
79. A.I.R. 1991 Mad. 233.
80. Article 26 says that, subject to public order, morality and health every religious denomination of any section shall have the following rights:-
(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion, (c) to own and acquire movable and immovable property; (d) to administer such property in accordance with law.

the said community had a system of beliefs or doctrines which the members of the community regarded as conducive to their spiritual well being. It was essential that the members of the community must have common religious tenets peculiar to themselves other than those which were common to the entire Hindu community. In that case there was absolutely no evidence on record either oral or documentary to prove that the members of the Villampatti Hindu Nadar community had a common faith, or a system of beliefs or doctrines or religious tenets peculiar to themselves other than those that were common to the Hindus in general. The court held that the said committee was not a religious denomination in order to get the benefit under Article 26 of the constitution. And hence it was held that the educational institutions managed by the Nadars of Villampatti were not denominational institutions and were not entitled to the benefits mentioned under Articles 26 or 30 of the constitution.

In S.P.Mittel v. Union of India[81], the validity of the Emergency Provisions Act, 1980, which provided for taking over the management of Auroville for a limited period was challenged; the Auroville was an international

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81. (1983) 1 S.C.C. 51.

Cultural Township which would contribute to international understanding and promotion of peace by propagating the ideals and teaching of Shri Aurobindo. The Act was challenged as violative of Article 30 of the constitution. The Supreme Court held that the benefit of Article 30(1) can be claimed by the community only on proving that it was a religious or linguistic minority and that the institution was established by it. Auroville or the society not being a religious denomination, Article 30 would not be attracted and therefore the impugned Act could not be held to be violative of Article 30.

The judicial opinion thus seems to favour application of two tests, statistical and geographical, which applied together means that a religious or linguistic group claiming the right to establish and administer educational institution of its own choice under the protection of Article 30(1) must be numerically smaller as against the total population within the boundaries of a particular state. The judicial criteria which the courts have arrived at in determining the minority status is highly controversial and disputable. Assuming that each state in the Indian Union is taken as a geographical unit for determining the minority status of a community, the

minority rights available to Punjabis in Haryana having Punjabi as their language would not be available to Punjabis in Punjab merely because of a geographical line separating them from their co-linguists in Haryana. In this situation the constitution has to be applied with double standards one for instance, for the Punjabis in Haryana, the other for the Punjabis in Punjab. In Re Kerala Education Bill the Supreme Court held that the State's argument contained inherent fallacy.

There are states where none of the religious communities formed more than fifty per cent of the total population. If minority is a relative term and its presence presupposes the existence of the majority and a minority means a group that is numerically less than fifty per cent and a majority means by logical extension a group that is numerically more than fifty per cent, the question in the above situation would be, how to determine a 'minority' in relation to a majority, if a majority is non-existent? A further paradox is that under the formula adopted by the courts some members of a minority, considered as minority in the national context would enjoy the constitutional protection whereas the members of the

same minority in another state would be deprived of the same protection.[82]

Similarly if a minority establishes educational institutions in more than one state, the formula would enable only some institution in some of the states to be able to secure the constitutional protection. It seems anomalous to allow a community to have the privilege of being minority at some places and to deny the same privilege to the same community at some other places. Another fact is that as the subject of education having been placed in the Concurrent List by the Constitution 42nd Amendment Act, 1976, whereby both state legislature as well as parliament is having power to make legislations with regard to education, in which case, a situation may arise where one particular community running an institution would have the double status of national minority and state majority which may not be the real import of Article 30 of the constitution.

A review of the decision on the question as to what is a religious minority would show that the judicial approach to the question as to what conditions must be

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82. D.K.Singh, "Cultural and Educational Rights in India", in G.S.Sharma (ed.), Educational Planning: Its Legal and Constitutional Implications in India (1967), p.136.

satisfied by a group for being entitled to be recognised as minority "based on religion" as required by Article 30(1) is neither clear nor uniform.[83] The Court's unwillingness to confine the benefit of Article 30(1) to the well defined religious minorities which existed at the time of the framing of the constitution and their readiness to extend the benefit to all numerically smaller religious groups has all but prevented them from adopting a well defined approach on claims coming before them not from established religious minorities but from religious denominations or sects seeking to be recognised as 'minority' for entitlement to the protection of Article 30.

In these circumstances, since the judicial approach to the question as to who is a minority is neither clear nor uniform, the Supreme Court has in T.M.A.Pai v. State of Karnataka[84] referred the issue that what is the meaning and content of the expression 'minority' in Article 30 of the Constitution of India, to a larger Bench to be answered authoritatively.

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83. See Anwarul Yaquin, "Religious Denomination of Religious Minorities: A Constitutional Dilemma", VI Indian Law Review, March 1980.
84. A.I.R. 1994 S.C. 13.

Chapter III

PROOF OF ESTABLISHMENT BY A MINORITY: CONDITION PRECEDENT FOR THE RIGHT UNDER ARTICLE 30 OF THE CONSTITUTION

For the application of Article 30, it is necessary that an institution is proved to have been established by a minority. The nature of proof or the quantum of evidence is however a matter for the courts discretion and satisfaction. As early as in 1951, the proof of minority status, and consequently the question of proof of establishment by a minority came up before the Assam High Court in Ramani Kanta Bose v. Gauhati University.[1] The contention of the petitioner that the college in question was established by a minority was rejected by the court on the ground that there was no statement in the petition to the effect that it was established as a minority institution. The mere statement in the affidavit that the college "intends and purposes a minority college" was found by the High Court to be insufficient to justify the claim.[2] The court observed that in the absence of sufficient proof, the institution could not be regarded as the one

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1. A.I.R. 1951 Assam 163.
2. Id. at 164.

established by a linguistic minority and without the fulfilment of the condition of establishment a right to administer the same could not be conceded.

In State of Bombay v. Bombay Educational Society,[3] the Supreme Court found even a brief statement indicating the fact of establishment to be sufficient for a presumption that the institution in question had been established by the minority concerned and accordingly it was held that the Bombay Educational Society which represented the Anglo-Indian community, whose mothertongue was English, had established the school in question. The Patna High Court in Arya Pratinidhi Sabha v. State of Bihar[4] relied on the affidavit submitted by the Sabha in support of its petition challenging an order issued by the Director of Public Instruction asking the High School run by Missionaries and other societies to reconstitute their Managing Committees in accordance with the Government resolution. The High Court did not make any enquiry about the correctiveness of the affidavit and proceeded to determine the main issue in question on the presumption that the schools in question were established by the Arya

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3. A.I.R. 1951 SC. 561.
4. A.I.R. 1958 Pat. 359.

Pratinidhi Sabha. In Mathodist Boys Higher Secondary School v. Director of Public Instruction[5] the court proceeded to decide the matters in issue on the obvious assumption that the School as contended by the petitioners, was established by the minority belonging to the Mathodist Christains in Hyderabad. Similarly in Sidhraj Bhai v. State of Bombay[6] the Supreme Court presumed the educational institution in question was established by the Christian minority.

In Dipendra Nath Sarkar v. State of Bihar[7] the court had to determine the claim of the Brahma Samaj, that the Samaj had established the institution in question and being a religious minority had the right under Article 30(1) to administer the same. The court found that both the history of the institution in question as well as the constitution adopted by it showed that it was established by and on behalf of the Brahma Samaj.

In Aldo Maria Patroni v. E.C.Kesavan[8] the Kerala High Court after going through the brief history of the institution in question submitted by the petitioner found that the school was established by a minority.

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5. I.L.J. 1963 Vol.II, Andhra 496.
6. A.I.R. 1963 S.C. 540.
7. A.I.R. 1963 Pat. 54.
8. A.I.R. 1965 Ker. 75.

In K.O.Verky v. State of Kerala[9] and also in Fr.Joseph Callians v. State of Kerala,[10] the Kerala High Court accepted the claims of the petitioners as the institutions in question were established by minorities, without any investigation into the correctness or otherwise of the claim of establishment. But in Azees Basha v. Union of India[11] the search for proof led the Supreme Court not only to trace the history of foundation of the Aligarh Muslim University but also to scrutinise at length the provisions of the Aligarh Muslim University Act, 1920 to ascertain if the university was in fact established by the Muslim minority and accordingly the Supreme Court concluded that the university was not established by the Muslims but was the creation of the Act of 1920. The court observed:

> "It is true as is clear from the 1920 Act that the nucleus was the M.A.O College which was till then a teaching institution. .... The conversion of that college into a university was however not by the Muslim minority, it took place by virtue of the 1920 Act which was passed by the Central Legislature. There was no Aligarh University

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9. A.I.R. 1969 Ker. 191.
10. A.I.R. 1962 Ker. 33.
11. (1968) 1 S.C.R. 833.

> existing till the 1920 Act was passed. It was brought into being by the 1920 Act and must therefore be held to have been established by the central legislature while passing the 1920 Act in corporated it. The fact that it was based on M.A.O College would make no difference to the question as to who established the Aligarh University. It may be noted that the 1920 Act was passed as a request of the Muslim minority. But that does not mean that the Aligarh University, when it came into being under the 1920 Act was established by the Muslim minority".[12]

In the said case the Supreme Court was faced with the issue whether Aligarh Muslim University was established by a minority or not. The petitioners impugned the validity of the Aligarh Muslim University (Amendment) Act, 1965, which amended the Aligarh Muslim University Act, 1920, on the ground that the amendment deprived the Muslim minority community of its right to manage the University established by the community. Before the impugned Act, an amending Act of 1951 had deleted the proviso to S.23(1) of

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12. Id. at 849-50.

the Act of 1920 according to which members of the "court" had to be Muslims. That amendment had not been challenged because in fact the set up of the university had continued unchanged. The effect of the two amendments was that the "court" ceased to be the Supreme Governing Body of the university and it was not necessary that it should consist exclusively of Muslims.

The case of the petitioner was that Aligarh Muslim University was a minority institution within the meaning of Article 30(1) of the Constitution, as it was established by them. The main contention of the Government was that the Aligarh Muslim University was established by the Aligarh Muslim University Act, 1920, and not by the Muslims. Therefore, the Muslim minority could not claim any fundamental right to administer the Aligarh Muslim University under Article 30(1) of the Constitution.

Thus the fine question before the court was whether the Muslim minority had established the Aligarh Muslim University. The Supreme Court looked into the long history of the establishment of Aligarh Muslim University. The court noted that in the year 1870, Sir Syed Ahmed Khan had organised a committee to devise ways and means for

educational regeneration of Muslims. In May 1872, a Society named the Mohammedan Anglo Oriental College Fund Committee was started to collect funds for the purpose. In May 1873, a School was opened. In 1876, the School was upgraded and became a High School. In 1877 Lord Lytton, the then Viceroy of India, laid the foundation stone for the establishment of a college. The Mohammadan Anglo-Oriental College was thus established.

Sir Syed Ahmed Khan died in 1898. Thereafter an idea to establish a Muslim University gathered momentum. In 1911 funds were collected and a Muslim University Association was established to take up the matter with the then Government to establish a teaching University at Aligarh. As a result of long negotiations between the Muslim University Association and the British Government not only a sum of rupees of thirty lakhs, a major part of which was contributed by Muslims, was deposited as a reserve fund to establish the university with the Government but also the existing Mohammedan Anglo-Oriental College was made the nucleus of the university and it was agreed to be handed over to the authorities to be established under the Act, along with the properties and funds attached to it. After complying with all these

formalities, the Aligarh Muslim University Act, 1920 was enacted which eventually resulted in the establishment of Aligarh Muslim University at Aligarh.

The Supreme Court held that the expression "establish and administer" used in Article 30(1) was to be read conjunctively that is to say two requirements had to be fulfilled under Article 30(1), namely (i) that the institution was established by the community and that its administration was vested in the community; (ii) that the expression "educational institutions" in Article 30(1) was wide enough to include a university; (iii) that notwithstanding the history of facts and events which led to the establishment of the university, it could not be said that the University was established by the Muslim community and that (iv) notwithstanding that under Section 23 of the Act of 1920, the "court" was constituted the supreme governing body of the university and that the "court" was to consist exclusively of Muslims, the other provisions of the Act of 1920, particularly those relating to Rector and the Visitor showed that the management of the university was not vested in the Muslim community. It was held that consequently the impunged Act did not contravene Article 30(1) of the Constitution.

It is submitted that the only manner in which a community could establish university was by invoking the exercise of the sovereign power which might either take the form of a charter or an Act of the legislature and this the Muslim community did. Several requisites are necessary to constitute a university and it was because that college possessed the other essential qualities of a university the status of a university was conferred on the said college.

As regards the meaning given by the court to the word "establish", it is submitted that the meaning is not correct. It was not disputed that "to found" is one of the meanings of the verb "to establish" and it is submitted that in the context, it is the correct meaning as is clear from the definition of the word to "found" namely, "set up or establish" (esp. with endowments).[13] The Muslim community established the university and provided it with its total endowments. Even if the definition given by the court were correct, it is submitted that the Muslim community brought the university into existence, namely, by invoking, the exercise by the sovereign authority of its legislative power. The Muslim community provided lands,

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13. Concise Oxford Dictionary.

buildings, colleges and endowments for the university, and without these the university as a body corporate would be an unreal abstraction.

The purpose in establishing the university would be defeated if its degrees were not recognised by the government. But if all requisites are complied with, nothing prevents a community from asking, and the government from agreeing that the degrees of the university would be recognised by the government. What Das, C.J. said in the Kerala opinion[14] in reference to schools established and managed by religious minorities directly applies to universities so established and managed. "There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as well make them fit for entering the public services. Educational institutions of their choice will necessarily include institutions imparting general secular education also".[15]

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14. In re Kerala Education Bill 1957, (1959) S.C.R. 995.
15. (1959) S.C.R. 995 at 1053.

The Supreme Court has on narrow, technical ground which are erroneous, held that a minority community which had striven for, and obtained the establishment of a Mulsim University and endowed it with considerable property and money, had not established that university, and that provisions of the Act of 1920 vesting the supreme government of the university exclusively in Muslims did not vest the administration in Muslims.

In W.Proost v. State of Bihar[16], the Supreme Court observed without referring to any details in the averment that the St.Xaviers College at Ranchi was established by the Jesuits of Ranchi which is a minority.

In D.A.V.College cases[17] the Supreme Court made a presumption in favour of the D.A.V.College being established in Punjab by Arya Samaj.

In State of Kerala v. Mother Provincial[18] the Supreme Court did not go into the question of proof of establishment of certain educational institutions where the whole issue was determined on the presumption that it was a minority institution. The Kerala High Court in Benedict

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16. A.I.R. 1969 S.C. 465.
17. A.I.R. 1971 S.C. 1731; A.I.R. 1971 S.C. 1737.
18. A.I.R. 1970 S.C. 2079.

Mar Gregorious v. State of Kerala[19], Mark Netto v. Government of Kerala[20] and in St.Marys Church v. State of Kerala[21] concluded, based on a brief statement on the averment, that the institutions concerned were established and were being run by the minorities. The Patna High Court in Muslim Anjman-e-Taleem,Darbhanga v. Bihar University[22] and in Mohd.Abu Saeed v. State of Bihar[23] and the Madras High Court in Director of S.E, T.N.Government v. Arogyaswami[24], in Thomas v. Deputy Inspector of School[25] and in Charles Robson v. State of Madras[26] took the same attitude that the institutions concerned were established and were being run by the minorities where a brief statement submitted as proof of the establishment went unscrutinised.

In S.K.Patro v. State of Bihar[27], the Supreme Court held that the institution in question was established by minority. The court further observed:

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19. 1976 K.L.T. 458.
20. A.I.R. 1977 Ker. 58.
21. A.I.R. 1978 Ker. 227.
22. A.I.R. 1967 Pat. 148.
23. A.I.R. 1969 Pat. 343.
24. A.I.R. 1971 Mad. 440.
25. A.I.R. 1976 Mad. 214.
26. A.I.R. 1978 Mad. 392.
27. A.I.R. 1970 S.C. 259.

> We are....unable to agree with the High Court that before any protection can be claimed under Article 30(1) in respect of the Church Missionary Society Higher Secondary School, it was required to be proved that all persons or majority of them who established the institutions were "Indian citizens" in the year 1854. There being no Indian citizenship in the year 1854 independently of the British Empire, to incorporate in the interpretation of Article 30 in respect of an institution established by a minority the condition that it must in addition be proved to have been established by person who would, if the institution had been set up after the constitution have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution.[28]

The Kerala High Court in Rajershi Memorial Basis Training School v. State of Kerala[29] found no justification

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28. Id. at 264.
29. A.I.R. 1973 Ker. 87.

in the petitioners claim that the institution in question was established by a minority as the proof supplied did not warrant such an assumption. It observed the mere fact that the School was founded by a person belonging to a particular religious persuasion was not at all conclusive. The institution must be shown to be one established and administered by or on behalf of the particular minority community.[30]

In Arya Pratinidhi Sabha v. State of Bihar[31] the court rejected the petitioner's claim that the institution in question was established by a minority. It observed:

> "In the instant case it appears that whatever may have been the position in 1957 in respect of the school which may have been established by the Arya Samaj, the managers of the school gradually decided to allow the school to receive the benefit and patronage of the notified Area Committee and later on by permitting the school to be converted into a Government subsidised school. They decided not to manage and

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30. Id. at 88.
31. A.I.R. 1973 Pat. 101.

> administer the school as a minority school and this surely is discretion which they were competent to exercise".[32]

In A.M.Patroni v. Asst. Educational Officer[33] the court held that the school in question was an institution established by Roman Catholics. The court observed:

> "For establishment it is not necessary that the school must be constructed by the community. Even if the school previously run by some other organisation is taken over or transferred to the Church and the Church recognises and manages the school to cater to and in conformity with the ideals of the Roman Catholics it can be safely concluded that the School has been established by the Roman Catholics".[34]

In Pannalal v. Magadh University[35], the Patna High Court readily assumed that Rajasthanis were a linguistic minority in the State of Bihar by accepting the contention

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32. Id. at 109.
33. A.I.R. 1974 Ker. 197.
34. Id. at 200-201.
35. A.I.R. 1976 Pat. 82.

of the petitioner that Rajasthani was their distinct language and 'mahajanki' was their script, the latter being used by them in their correspondences and account books.

In Sree Jain Swetamber Terapanthi Vidyalaya v. State[36], it was held that the members professing Jain faith and belonging to the Jain Swetamber Terapanthi sect constituted a religious minority. It professes a faith different from the Hindu religious faith. Therefore the institution established by them is entitled to benefit of Article 30(1) of the Constitution.

In Sudhindra Chandra Mallik v. State[37], it was held by the Patna High Court that for the application of Article 30 it is necessary that an institution is proved to have been "established" as well as "administered" by minority. The two terms have been used in the Article conjunctively and the burden lies on the party asserting the institution to be a minority institution to prove both the facts. It was also held that the right under Article 30 can be lost and it is also possible to surrender the same.

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36. A.I.R. 1982 Cal. 101.
37. A.I.R. 1982 Pat. 143.

An educational institution established and maintained exclusively or predominantly for teaching or promoting the religious tenets of a given religious minority, is an educational institution serving and promoting the interests of such minority and hence is a minority institution. The court in Samuel v. Dist. Educational Officer[38] held that the educational institution run by the petitioner was not a minority educational institution. The court observed that until then the petitioners never claimed that the institution in question was a minority institution. The court observed:

> "It cannot be said that merely because the members of a society which establishes an educational institution belong to a particular community, the institution established by them automatically becomes a minority institution. In each case the same test must be applied, ie., whether the institution does in any manner serve or promote the interests of the minority to which it claims to belong".

The issue whether an institution is a minority institution or not was involved in N.P.Unnimoyil Kutty v.

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38. A.I.R. 1982 A.P. 64.

Asst. Educational Officer.[39] Based on the evidence produced by the petitioner the court found that the school run by the petitioner was founded by a Muslim, it is having majority of Muslim students, application for sanction of the school stated that it was intended to be a minority school, the school follows Muslim calander and observes Fridays as holidays and Ramzan period as long vacation. It was held that the school is established for the benefit of Muslims hence is entitled to the benefits of Article 30(1). The court observed in deciding whether an institution is a minority institution or not all the attending circumstances concerning its establishment and also of its administration have to be considered. The real test is whether the institution is established and administrated for the benefit of the minority irrespective of the fact that it is started by an individual of the community or by an organisation representing the community.[40]

In State v. Guru Nanak Education Trust[41], the court observed that the question whether an institution was a minority one protected by Article 30 of the Constitution was to be decided not merely with reference to the recitals

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39. A.I.R. 1984 Ker. 124.
40. Id. at 126.
41. A.I.R. 1987 Cal. 232.

of the document founding it but reading and understanding it in the light of the facts regarding how the institution came to be established, its object, persons administering it and other details about its working and the instruction imparted in such institutions. The court held that Central Model School was a minority school and entitled to the protection guaranteed by Article 30.

The principal question which had arisen for determination in Gujarati Samaj (Regd.), Kanpur v. State[42] was whether Chatur-Bhuj Shivaji Anglo Gujarati School, Kanpur was an educational institution established and administered by a minority as contemplated by Article 30 of the Constitution. The institution in the instant case has been established by Gujarati Samaj. The relevant rule indicated that the membership of Gujarati Samaj was not restricted to the Gujarati speaking people alone. It was open to any individual, firm or company who satisfied the requirements of the rule. In these circumstances, it was not possible to conclude that the institution was in fact established by the Gujarati speaking people alone. There was also no material on record to come to the conclusion that the institution had all through been and was being

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42. A.I.R. 1988 All. 244.

administered exclusively by the Gujarati speaking people alone. Hence the court decided that the petitioner school was not a minority institution.

In Andhra Kersai Educational Society v. State[43] the issue before the court was whether Andhra Kesari Education Society was a minority institution or not. In the instant case the court held that the said Society could not claim to be a minority educational institution. The court observed:

> "When the Society was formed and was given permission to establish a college of education it was not and it never claimed to be a minority educational institution. Only after obtaining the permission, and when the question of admission of students to the institution arose did it claim the said status for the first time with a view to enable it to admit students of its own choice. The idea was to deprive the state of the right to allot students in accordance with the statutory rules governing such admissions and

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43. A.I.R. 1988 A.P. 256.

to admit the students of its own choice on its own terms under the guise and cover of a minority educational institution. Indeed court is inclined to believe that persons who have formed the said Society are merely seeking to reap unfair advantage over other similar educational institutions by claiming fraudulently the status of a minority educational institution and also to exploit the students, teachers and the staff. It is not shown how the Christian minority is being benefited by the said institution. In the circumstances, the court declined to hold the institution a minority institution".[44]

In Md. Nisar Ahmad Kaifi v. State[45], the issue involved was the proof of minority status of the petitioner's institutions. The court found that the college in question had not been shown to be established by members of minority community. It had never been managed as minority institution. Governing bodies and adhoc committees had been appointed by the university for past many years on the ground that the college was not minority

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44. Id. at 266.
45. A.I.R. 1989 Pat. 252.

institution. The petitioner failed to show any evidence of any donor that he had given donations to college with specific object of establishing minority institution. In the circumstances it was held that the college could not be declared to be a minority institution.

In State of Tamil Nadu v. Vilampatti Nadar Uravinmuraikku Pathiayapatta[46], the issue before the court was to decide if the educational institution managed by the Hindu Nadar community of Vilampatti was entitled to the benefit under Article 30 of the Constitution. The court held that the words 'religious denomination' must take their colour from the word 'religion'. In order to hold that the particular community constitutes a religious denomination within the meaning of Article 26[47] of the Constitution, it must be proved that the said community has a system of beliefs or doctrines which the members of the community regard as conducive to their spiritual well-being. It is essential that the members of that community

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46. A.I.R. 1991 Mad. 233.
47. Article 26 provides: "Subject to public order, morality and health every religious denomination or any section thereof shall have the right:-
(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in the matters of religion, (c) to own and acquire movable and immovable property and, (d) to administer such property in accordance with law".

must have common religious tenets peculiar to themselves other than those which are common to the entire Hindu community. In the instant case there is absolutely no evidence on record either oral or documentary to prove that the members of the Vilampatti Hindu Nadar community have a common faith, that is to say a system of beliefs or doctrines or religious tenets peculiar to themselves other than those that are common to the Hindus in general. So it has been held that the said community is not a religious denomination in order to get the benefit under Article 26 of the Constitution and that the educational institutions managed by the Nadars of Vilampatti were not denomination institutions entitled to benefits mentioned under Articles 26 and 30 of the Constitution.

In Firdaus Amrud Higher Secondary School, Ahmedabad v. M.M.Dave[48], the petitioners were trustees of Firdaus Amrud Education Trust and they belonged to minority community, ie., Parsi Zorastrian community. The Trust deed permitted induction of outsiders into governing body/managing committee of the educational institution run by the petitioners. The main issue before the court was to

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48. A.I.R. 1992 Guj. 179.

decide the minority status of the institution. The court held that the institution did not become non-minority one, so long as majority persons in the said committee belonged to the minority community.

It was observed by the court that when the minority community institution itself in its constitution provided for induction of an outsider in its management at its own choice so as not to deprive the community of its controlling voice in the overall management of the institution, it could not be said that such a provision in the Constitution would deprive the institution of its status as a minority community institution. Even from the guidelines prescribed by the Minority Commission for determining the minority status of the educational institution it becomes abundantly clear that a minority educational institution must be free to induct competent and reputed individuals from other communities in the managing committees or governing bodies.

The Minority Commission established by the Government of India has prescribed certain guidelines for determining the minority status.

Firstly, the Commission has stated that the benefit of Article 30(1) can be claimed by the community only on proving that it is a religious or linguistic minority and that the educational institution was established by it.

Secondly, the Commission has stated that it is not always necessary that the object for which a minority has established an educational institution must include the conservation of its language, script or culture. Therefore an institution will be a minority institution even if it imparts secular education.

Thirdly, the Commission has provided that an institution seeking recognition as a minority institution must fulfil the statutory requirements concerning the academic standards, qualification of teachers and of students seeking admission. It must have financial resources and capabilities to run on sustained basis.

Fourthly, neither the state government nor the University can prescribe medium of instruction to be followed by minority educational institution.

Fifthly, the minority educational institution must be free to induct competent and reputed individuals from the other communities in the managing committees and the governing bodies. The minority character of an institution is not impaired so long as the constitution of the managing committee cr governing body provides for an effective majority to the members of the minority community.[49]

Again, the issue of determination of minority status came up before the Allahabad High Court in the case of Badrul Hassan Quadiri v. State of U.P.[50] In the instant case, the petitioner was the Principal of an educational institution established by prominent citizens comprising of no particular community, for spread of education in general. Under the guise of disciplinary action, the managing committee of the institution removed the petitioner from service which was approved by the District Inspector of Schools. Aggrieved by this, the petitioner preferred an appeal before the Deputy Director of Education under clause (c) of Section 16-G(3) of the U.P.Intermediate Education Act, but he declined to entertain the appeal on the ground that the same was not maintainable, the

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49. Id. at 187.
50. A.I.R. 1992 All. 120.

institution being a minority institution. The court held that where the institution was established by the prominant citizens which included not only Muslims but also several Hindus and the institution was established for the spread and promotion of education in general and not merely for the benefit of any particular community, the institution cannot be said to be established as a minority institution, consequently the impugned order passed by the Deputy Director of Education in dismissing the petitioner's appeal as not maintainable on the supposition that the institution was a minority institution, could not be sustained and must be quashed.

In Indulal Heralal Shah v. S.S.Salgaonker[51], one of the issues to be decided by the court was whether the educational institution run by the petitioners was an institution run by the minority community. A deed of declaration of Trust was executed in respect of the educational institution and the first five trustees appointed under the Deed were all Gujarati speaking persons and were to hold the office for their life time and the Trust deed itself provided that in case a vacancy occurred it had to be filled in by the remaining Trustees by

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51. A.I.R. 1983 Bom. 192.

nomination of a person of their choice. The medium of teaching was Gujarati and 80 per cent of the teachers were Gujarati speaking. In the circumstances, it was held that the institution was entitled to protection of Article 30(1).

In Deccan Model Education Society v. State[52], the court observed that once the individual institution had established prima facie that it was a minority institution within the meaning of the term occurring in Article 30 of the Constitution, the burden of proving that it was not so was on those who asserted the contrary. In the instant case, no material was placed before the court to disprove the assertion of the petitioner that it was a Christian minority institution in the state. In the circumstances the court held that the petitioner was a minority institution and therefore entitled to assert the right under Article 30(1) of the Constitution.

A generous and sympathetic approach is reflected in the Constitution so as to preserve the right of the minorities in so far as their educational institutions are concerned. In N.Parameswarakurup v. State[53], it was held

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52. A.I.R. 1983 Kant. 207.
53. A.I.R. 1986 Mad. 126.

that the plaintiff who had filed a suit for declaration that the schools managed by them were linguistic minority institution should not be deprived of their protection guaranteed under Article 30(1) merely because the plaintiffs who established the institution were not minority at the time when the institutions were established but later became minority in view of the fact that at the time of establishment the institutions were in the Kanyakumari district in the erstwhile state of Travancore Cochin, which district was transferred to the State of Tamil Nadu by the Central Act 37 of 1956 reducing the linguistic class to minority by the State Act 29 of 1974. In view of the above fact it was held that the plaintiffs were entitled to protection under Article 30(1).

In S.P.Mittal v. Union of India[54], the validity of the Auroville (Emergency Provision) Act, 1980 which provided for taking over the management of Auroville for a limited period was challenged. The Auroville was an international cultural township which would contribute to international understanding and promotion of peace by propagating the ideals and teachings of Sri Aurobindo. The Act was challenged as violative of Article 30 of the

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54. (1983) 1 S.C.C. 51.

Constitution. The Supreme Court held that the benefit of Article 30(1) could be claimed by the community only on proving that it was a religious or linguistic minority and that the institution was established by it. Auroville or the Society not being a religious denomination, Article 30 would not be attracted and therefore the impugned Act could not be held to be violative of Article 30.

The proposition that the Government, the University or the court can go behind the veil of minority's institution to see that it is a genuinely educational institution of the minorities was established in A.P.Christains Medical Educational Society v. Government of A.P.[55]. The appellant Society purported to establish and run a medical college as minority institution falsely showing that the Central Government had already accorded permission. There was nothing in the Memorandum or Articles of Association or in the actions of the Society to indicate that the institution was intended to be a minority educational institution. Neither the State Government granted permission to the establishment of the medical college, nor the University granted affiliation to the institution. Despite the strong protests and warnings of

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55. (1986) 2 S.C.C. 667.

the University , the Society even admitted or pretended to admit students to the medical college in the first year M.B.B.S. course in total disregard of the provisions of the A.P. Education Act, the Osmania University Act, and the Regulations of the Osmania University. On refusal of the Government to grant permission to start a medical college the Society filed the present case on the ground that it was violative of Article 30 of the Constitution. Dismissing the case the court held:[56]

> "The object of Article 30(1) is not to allow bogies to be raised by pretenders but to give the minorities 'a sense of security, a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minority but also to enable all minorities religious or linguistic to establish and administer educational institutions of their choice. What is imperative is that there must exist some real positive endure to enable the institution to be identified as an educational institution of the minorities. The government, the university and ultimately the court have the

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56. Bench consisting of O.Chinnappa Reddy, G.L.Oza and K.N.Singh, JJ.

> undoubted right to pierce 'the minority veil' and to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well founded or not".[57]

It further observed:

> "....in the present case the claim of the Society was ill founded. The mere use of words in the Memorandum of Association of the Society that it intended to establish the institution as a Christian minority educational institution would not found a claim on Article 30(1). The Society and the so-called institution were started as business ventures with a view to make money from gullible individuals anxious to obtain admission to professional colleges. In view of this conclusion it was not necessary to express any opinion on the question whether the policy decision of the Government of India and the Medical Council of India not to permit starting of new medical colleges amounted to denial of minorities rights under Article 30(1).[58]

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57. (1986) 2 S.C.C. 667 at 676.
58. Id. at 675.

The minority under Article 30(1) must necessarily mean those who form a distinct and identifiable group of citizens of India. Whether it is "old stuff" or "new product", the object of the institute should be genuine. There should be nexus between the means employed and the ends desired. There must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities and it is essential, to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection. Thus in St.Stephens College v. University of Delhi[59], while holding that the said college was a minority institution the court observed:

> "The words "establish and administer" used in Article 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institutions. The proof of establishment is thus a condition precedent for claiming the right to administer the institution".[60]

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59. A.I.R. 1992 S.C. 1630.
60. Id. at 1645.

In determining who is a minority the courts neither been consistent in their approach nor have they been able to lay down general proposition applicable uniformly to similar fact-situations. Since the judicial approach to the question as to who is a 'minority' and what conditions must be satisfied by a group for being entitled to be recognised as minority as required by Article 30(1) is neither clear nor uniform, the Supreme Court has in T.M.A.Pai v. State of Karnataka[61] referred the said issue to a larger Bench, which is pending.

Conclusion

The courts have in some cases presumed that the institution in question had been established by a minority.[62] They have accepted without scrutiny the version of the claimant of the protection of Article 30 and have made no attempt to weigh the sufficiency or otherwise

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61. A.I.R. 1994 S.C. 13.
62. Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1958 Pat. 359; Methodist Boys Higher Secondary School v. Director of Public Instruction, I.L.J. 1963 Vol.II Andhra 496; Sidhraj Bhai v. State of Bombay, (1963) 3 S.C.R. 837; A.M.Patroni v. E.C.Kesavan, A.I.R. 1965 Ker. 75; G.D.F.College v. University of Agra, A.I.R. 1975 S.C. 1821; K.O.Varkey v. State of Kerala, A.I.R. 1969 S.C. 465; W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465; State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079.

of the proof supplied. Though such cases are those in which the opposite party had raised no objection as to the fact of establishment, and attitude of the courts seems to have been determined by the attitude of the opposite party which allowed whatever proof was submitted to go unchallenged, this approach is not only a disregard of Article 30(1) visualises but also not quite consonant with the court's own view that the words "establish" and "administer" are to be read conjunctively and the exercise of the right to administer is dependent upon the proof of establishment.[63]

The proof of establishment being a condition precedent for the application and exercise of the rights under Article 30 it is suggested that the courts have to insist upon the proof of establishment in all such cases where a claim to administer an institution is advanced, irrespective of the attitude of the opposite party. There must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. The name of educational institution[64], the

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63. Azeez Basha v. Union of India, A.I.R. 1968 S.C. 662; St.Stephens College v. University of Delhi, A.I.R. 1992 S.C. 1630 at 1645.
64. Ramani Kanta v. Gauhati University, A.I.R. 1951 Ass.163; Rajershi Memorial Basic Training School v. State of Kerala, A.I.R. 1973 Ker. 87; Pannalal v. Magadh University, A.I.R. 1976 Pat. 82; Azeez Basha v. Union of India, (1968) 1 S.C.R. 833.

history of the establishment of the institution[65], the persons involved in the establishment[66], the sources of funds, the subjection of an institution to legal provisions and expression of intention[67], the strength of the minority staff in the educational institution, the strength of the minority students in the institution[68], should, singularly or in combination with each other, serve factors proving or disproving the claim of establishment. An individual member of a minority can establish an institution for or on behalf of a minority and an individual assumes the status of a representative of a minority by the fact of the

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65. A.M.Patroni v. Asst. Educational Officer, A.I.R. 1974 Ker. 197; N.P.Unnimoyin Kutty v. Asst. Educational Officer, A.I.R. 1984 Ker. 124; State v. Guru Nanak Education Trust, A.I.R. 1987 Cal. 232.
66. Rajershi Memorial Basic Training School v. State of Kerala, A.I.R. 1973 Ker. 87; Pannalal v. Magadh University, A.I.R. 1976 Pat. 82; Azeez Basha v. Union of India, (1968) 1 S.C.R. 833; Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1973 Pat. 101.
67. St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; D.A.V.College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; S.K.Patro v. State of Bihar, A.I.R. 1970 S.C. 259; State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 259.
68. N.P.Unnimoyil Kutty v. Asst. Educational Officer, A.I.R. 1984 Ker. 124.

membership to it. The participation of other members of the minority in the process of establishment is not essential for inferring a positive intention and the participation of outsider in the process of establishment is an irrelevant consideration for inferring a negative intention.

The absence of any fixed formulae and the consequent use of wide discretion have led the courts to arrive at conclusions which are not always rational.[69]

It is desirable that the government has to lay down a definite formula[70] in identifying the educational institutions as established by religious or linguistic minorities. Those educational institutions which claim to be minority educational institutions have to approach the government for a minority certificate which shall be issued by the government on application of the above said formula.

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69. Azzez Basha v. Union of India, (1968) 1 S.C.R. 833.
70. In arriving at the formula the government has to consider the name of the institution, the persons involved in the establishment, the members of the governing body, the sources of funds, the subjection of the institution to legal provisions and the expression of intention of the strength of the minority staff in the educational institution, the strength of minority students in the institution etc.

Chapter IV

RIGHT TO RECOGNITION AND AFFILIATION

Recognition is a facility which the State grants to an educational institution for enabling the students in such institution to sit for an examination conducted by the State in the subjects prescribed and to obtain certificates or degrees. The students of an unrecognised educational institution are not eligible to obtain such recognised certificates or degrees and hence they are denied higher education as well as employment opportunities. Hence minorities have an interest in recognition of their educational institutions without which they cannot fulfil the real objects of their choice. When a minority institution seeks recognition from the State, it expresses its choice to participate in the system of general education and expresses its intention to adopt for itself the courses of instruction prescribed for other institutions.

Affiliation to a university by a minority institution is sought for the purpose of enabling the

students of the institution to sit for an examination conducted by the University and to obtain degrees conferred by it. But the institutions seeking recognition or affiliation have to satisfy conditions set by the affiliating authorities for according recognition or affiliation.

RECOGNITION AND AFFILIATION, WHETHER A RIGHT OR PRIVILEGE?

It is evident from the language of Article 30(1) that the right to recognition or affiliation is not expressly granted. The judicial approach is that although recognition or affiliation is not a fundamental right, recognition or affiliation cannot be given on conditions which will force minorities to give up totally or partially their rights under Article 30(1). The two views hardly seem to be well reconciled with each other.

In the Kerala Education Bill,[1] which indeed was the trend setter, Das, C.J., speaking for the court, observed:

> "There is no doubt, no such thing as fundamental right to recognition by the State but to deny

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1. A.I.R. 1958 S.C. 956.

recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their right under Article 30(1)."[2]

He further observed:

"Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised".[3]

In St.Xavier's College v. State of Gujarat,[4] Ray, C.J. speaking on behalf of himself and Palekar J. said:

"The consistent view of this court has been that there is no fundamental right of minority institution to affiliation .... Any law which provides for affiliation on terms which will involve abridgment of the right of linguistic and

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2. Supra, Note 1, p.985.
3. Ibid.
4. A.I.R. 1974 S.C. 1389.

religious minorities to administer and establish educational institutions of their choice will offend Article 30(1)".[5]

Further emphasising the importance of affiliation Ray, C.J. said:

"The educational institutions set up by minorities will be robbed of their utility if boys and girls cannot be trained in such institutions for university degrees. Minorities will virtually lose their right to equip their children for ordinary careers if affiliation be on terms which make them surrender and lose their rights ....The establishment of a minority institution is not only ineffective but also unreal unless such institution is affiliated to a university for the purpose of conferment of degrees on students".[6]

Recognition and affiliation are means to exercise effectively the rights under Article 30(1) but the abovesaid observations do not disclose the reason why a

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5. Id. at 1359.
6. Ibid.

right to recognition or affiliation is not impliedly read in that article. In the St.Xavier's College case, where the whole decisional law on the scope of Article 30(1) including the question of recognition and affiliation was reviewed by a Bench of nine Judges viz., Ray, C.J., Palekar, Alagiriswami, Khanna, Mathew, Reddi, Chandrachud, Bhagawati and Beg, JJ., at least four Judges rejected any idea of recognition and affiliation being a mere privilege. Reddi J., speaking on behalf of himself and Alagiriswami observed:

> "The right under Article 30 cannot be exercised in vacuo. Nor would it be right to refer to affiliation or recognition as privilege granted by the State. In a democratic system of Government with emphasis on education and enlightenment of its citizens, there must be elements which give protection to them. The meaningful exercise of the right under Article 30(1) would and must necessarily involve recognition of the secular education imparted by the minority institutions without which the right might be a mere husk".[7]

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7. Id. at 1406-7.

The U.S. Supreme Court observed in Forst and Frost Trucking Co. v. Railroad Comm.[8]

> "It is not necessary to challenge the proposition that, as a general rule, the State having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose; but the power of the State in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favour, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the constitution of the United States may thus be manipulated out of existence".

Relying on the abovesaid case,[9] Mathew, J. observed:

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8. (1925) 271 US 583 at p.593.
9. Ibid.

> "This decision clearly declares that, though the State may have privileges within its control which it may withhold, it cannot use a grant of those privileges to secure a valid consent to acts which, if imposed upon the grantee in invitum, would be beyond its constitutional power".[10]

It can be concluded from what has been considered above that a right to recognition and affiliation is implicit in Article 30(1) in certain situations at least. Das, C.J's view in the Kerala opinion and its reiteration in the St. Xavier's College case by all the nine Judges constituting the bench make it a firmly established principle that no conditions can be imposed for grant or refusal of recognition or affiliation which will compel minorities to surrender or which will tantamount to surrender of their right to establish and administer educational institutions of their choice. In the latter case, even Beg, J. and Dwivedi, J., who dissented from the majority on the vital principle of 'Judicial policy' to be adopted on such matters as recognition and affiliation, found themselves ultimately persuaded to subscribe to the

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10. Id. at 1439.

majority view that the recognising or affiliatting authority could not subject the grant of recognition or affiliation to conditions which would entail a loss of right under Article 30(1) a forbidden result.

Short of surrender of the right, these opinions, thus, leave open a wide area for regulatory measures to have their play. The question, therefore, that immediately becomes pertinent is: What is the extent of permissible state control in matters of recognition and affiliation? Dealing with the question of recognition of minority institutions, Das, C.J. for the court in the Kerala Education Bill[11] observed:

> ".... denial of recognition except on such terms as virtually amount to surrender of the right to administer the institution, must, in substance and effect infringe Article 30(1)".[12]

But he admitted that the minorities cannot ask for recognition for "an educational institution run by them in unhealthy surroundings, without any competent teachers possessing any semblance of qualification and which does

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11. A.I.R. 1958 S.C. 956.
12. Supra note 1, at 985.

not maintain even a fair standard of teaching".[13] He observed that "reasonable regulations" could be imposed by the State as a condition for recognition or affiliation.[14]

The Supreme Court determined in Sidhrajbhai v. State of Bombay,[15] the question whether threats of withdrawal of recognition already given to an institution could be used to compel a minority educational institution to admit nominees of Government into it. The petitioners were Christian religious minority who maintained a training college for training teachers to be absorbed in the primary schools conducted by the Society. In 1955 the Government of Bombay issued an order saying that in non-governmental training colleges, 80 per cent seats would be reserved for teachers nominated by the Government. When the said Training College expressed its inability to comply with the order, the Educational Inspector directed the college not to admit private candidates without obtaining specific permission, failing which severe disciplinary action, such as withdrawal of recognition, would be taken.

Shah, J., speaking for the Court,[16] noted that the effect of the order was that right of the minority college

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13. Id. at 983.
14. Ibid.
15. (1963) S.C.R. 837.
16. The Bench consisted of Sinha, C.J., Imam, Subba Rao, Wanchoo, Shah and Ayyangar, JJ.

to admit students of its choice was severely restricted and the enforcement of restriction was sought to be secured by holding out a threat to withdraw recognition. He observed that serious inroads were made upon the right vested in the society to administer the training college.

Relying on certain observations of Das, C.J. in Kerala opinion,[17] the State advanced argument in the present case that the State could validly impose restrictive measures in national interest or in public interest provided such measures were not annihilative of the character of minority educational institution. Shah, J., rejecting the plea, sought to explain that the court in the Kerala opinion did not lay down any test upon which reasonableness or otherwise of a regulation could be tested. Referring to the Kerala opinion he said:

> "It was .... held that notwithstanding the absolute terms in which the fundamental feedom under Article 30(1) was guaranteed, it was open to the State by legislation or by executive direction to impose reasonable regulation".[18]

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17. Referring to Clauses 14 and 15 of the Kerala Education Bill which authorised the State to take over management of private institutions in certain cases. Das, C.J. had observed: "We....find it impossible to support clauses 14 and 15....as mere regulations. The provisions of those clauses may be totally destructive of the rights under Article 30(1).
18. Supra, note 1, at 983-84.

The court did not, however, lay down any test of reasonableness of the regulation. The court did not decide the public or national interest was the sole measure or test of reasonableness; it also did not decide that a regulation would be deemed unreasonable only if it was totally destructive of the right of the minority to administer educational institution.[19] Shaj, J. then laid down the object with which a regulation could be imposed.

The right is intended to be effective and is not to be whittled down by so-called regulative measures not conceived in the interest of minority educational institution, but of the public or the nation as a whole.[20]

Then he suggested his own formula.

> Regulations which may lawfully be imposed either by legislative or executive action as a condition ... of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must

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19. Id. at 855-56.
20. Id. at 856.

> satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or the persons who resort to it.[21]

He rejected any idea of regulations being made in the public interest rather than in the interest of minority institutions and assigned his own reasons.

If every order while maintaining the formal character of minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be a "testing illusion", a promise of unreality.[22]

But he admitted that: "Regulations made in the true interest of efficiency of institutions, discipline, health, sanitation, morality, public order and the like may

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21. Id. at 856-57.
22. Id. at 856.

undoubtedly be imposed. Such regulations are not restrictions .... they secure the proper functioning of the institution, in matters educational".[23]

If, as Shah, J. seems to allow, a regulation is framed, in the "true interest of public order", such a regulation can hardly be said to be a regulation strictly in the interest of the institution itself. Such a regulation is nothing else than a regulation in 'public interest' - a test expressly rejected by Shah J. himself in the Sidhrajbhai case, and which has never found favour thereafter. Moreover, regulatory conditions for recognition, affiliation or aid may be held permissible and yet they may not have been designed to make the minority institution as an excellent vehicle for education but for the sole purpose of maintaining 'uniformity' in standards - which is nothing else than a regulation in the public interest.

In D.A.V.College, Bhatinda v. State of Punjab,[24] the issue before the court was the validity of Section 4(2)

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23. Id. at 850.
24. A.I.R. 1971 S.C. 1731.

and Section 5 of the Punjabi University Act of 1961 and a notification of the Punjab University. As per these sections the petitioner had ceased to be affiliated to the Punjab University established under an Act of 1947 and was compelled to become affiliated to the Punjabi University established under an Act of 1961. The notification of the Punjabi University declared that "Punjabi will be the sole medium of instruction and examination for the Pre-university even for science group with effect from Academic Session of 1970-71". As this declaration was applicable to affiliated colleges also, the petitioner was forced to adopt Punjabi which was not their own language. Jaganmohan Reddi, J. speaking for the Court[25] observed that the right of the minorities to establish and administer educational institutions of their choice would include the right to have a choice of the medium of instruction also, and declared:

> "But if the University compulsorily affiliates such colleges and prescribes the medium of instruction and examination to be in a language which is not their mother tongue or requires examination to be taken in a script which is not

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25. Sikri, C.j., Mitter, Hegde, Grover and Reddi, JJ. constituted the Bench.

their own, then it interferes with their fundamental rights".[26]

Thus the court viewed the compulsory affiliation as bad, and went to the extent of saying that either the State must harmonise its power of prescribing the medium of instruction with the rights of minorities by "either providing also for instruction in the media of minorities,[27] or if there are other Universities which allow such colleges to be affiliated where the medium of instruction is that which is adopted by the minority institutions to allow them the choice to be affiliated to them.[28]

In Socio-literati Advancement Society, Bangalore v. State of Karnataka,[29] the petitioner society, a linguistic minority submitted an application to the Additional Director of Education on 25.6.1978 for according recognition to its Teachers Training Institute. It undertook to adhere to the standards prescribed by the Department of Education and to abide by all the rules

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26. Id. at 1735.
27. Ibid.
28. Ibid.
29. A.I.R. 1979 Kant. 217.

prescribed for teachers' training schools. On the verbal assurance of Additional Director of Education that the necessary recognition would be given, the Society started the classes from 1.7.1978. On 25.7.1978, the Department issued a notification stating that no recognition was accorded to the Institute. The Society stated that a representation had been made on 24.7.1978 reiterating its request for recognition which it had earlier made. By a letter of 24.7.1978 the Additional Director intimated that there were more number of Training Institutes in the State than required and the policy of the Government was not to permit any more training Institutes. The Society took the plea that even on 31.8.1978 recognition was accorded to one Venkatesha Education Society to start a teacher training Institute. It contended that the refusal of recognition was on irrelevant and non-existent grounds. On behalf of the State it was contended that the State had the power to decide whether there was a need to establish a particular institution and that recognition was refused in order to prevent unhealthy competition among the various Teacher Training Institutes.

The Karnataka High Court held as unconstitutional Rule 7 of the uniform Grant-in-Aid Code which laid down the

procedure for starting and recognition of teachers training Institutions. Relying on the Sidhrajbhai and St.Xavier's College cases, Chandrakantaraj Urs J. observed that since recognition was accorded to another Training Institute in the very same year in which the petitioner-society applied for recognition, that not only amounted to unequal treatment but also showed that no such policy as contended by the State in fact existed. The court declared Rule 7 as a mere formality where such institutions are concerned and the Rule had to be read down to yield place to constitutional guarantee. It held:

> "...it is clear that the code which is but a mere administrative instruction cannot be so read .... that the right of the petitioner-society ... would get whittled down to mean nothing. As already noticed in the decided cases of the Supreme Court even reasonable restrictions cannot be imposed on a minority institution except to the extent of maintaining general educational standards, health and hygiene of the students, much less deny them the right to start the school or the institution itself".[30]

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30. Id. at 223.

In Mark Netto v. Government of Kerala,[31] the Manager of the School belonging to the Roman Catholic Diocese of Trivandrum applied for permission to admit girl students in their High School in which only boys were admitted. Permission was refused on the ground that there was in existence in the locality a Girls High School and as such there was no necessity for admitting girls into the boys school, which was also prohibited by a Rule. The Supreme Court there held that "although there was already in existence a facility for the education of the girls in the locality (Muslim Girls High School), as the Christian community in the locality wanted their girls also to receive their education in the school of their community, permission could not be refused under Chapter VI, Rule 12(iii) and is held to be inapplicable to a minority educational institution".[32]

The reasoning laid down in Mark Netto case[33] was not adopted by the Kerala High Court in Vicar, St.Mary's Church v. State of Kerala,[34] where the infringment of the right arose in similar circumstances. In this case the

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31. A.I.R. 1979 S.C. 83.
32. Id. at 86.
33. Id.
34. A.I.R. 1978 Ker. 227.

petitioner applied for recognition and aid for a school started by the catholics in the locality which is religious minority. The District Development Committee had included the school in its priority list of schools in the Sub-division of the District. But still no sanction was accorded to the school. In reply to the application for grant of recognition, he was directed to apply to the authorities concerned as and when notification was published for opening new schools. No notification was published in 1967, 1970 and 1971. But the petitioner claimed that sanction was granted for opening new schools in those years. The petitioner therefore approached the Kerala High Court for compelling the State Government to accord recognition to the St. Mary's Lower Primary School and to give aid given to similar aided schools. The Government filed a counter affidavit on 16.6.1972 negativing the claim of the petitioner. On 6.9.1974 a Full Bench of the Kerala High Court recorded the assurance of the Government that if an application was made, it would be considered, and issued an order accordingly. The petitioner applied on 20.9.1974. On 4.10.1974 the Government stated before the Court that a report of the Assistant Educational Officer was published on 21.8.1973

containing the list of places where Government Lower Primary Schools were to be opened for the year 1973-74. This report contained the sanction of a Lower Primary School at Anikhampoil. The Government contended that with the establishment of the Government Lower Primary School, the educational needs of the locality was satisfied and accordingly there was no need for another school for the locality.

Nambiyar, C.J., speaking for the court rejected the petition, and declared Rule 2 as within the constitution. This Rule had laid down the procedure for determining the areas where new schools could be opened or existing schools upgraded, and authorised the Director to prepare once in two years, a report indicating the locality where new schools were to be opened. The Director was to take into account (a) the existing schools in and around the locality in which new schools were to be opened; (b) the accommodation available in the existing schools in that locality; (c) the distance, each of the existing school to the area where new schools were to be opened; (d) educational needs of the locality with reference to the habitation and backwardness of the area. Nambiar C.J. observed:

> "....an extreme position entitling the minority to ask, and to be given the educational institutions, wherever it wants to establish, at any moment when the cry is raised, is not the scope and content of Article 30 .... We cannot ... regard Rule 2 as passing beyond pale of permissible regulations and trenched on the offending sphere of restrictions on the fundamental rights. We are of the opinion that the Rule is well within the border land of regulation of the right sanctioned by judicial decision".[35]

The reasoning upheld in the abovesaid case did not take into account the needs of the minority from the point of view of minority itself. It is submitted that Nambiyar C.J.'s decision seems to be passed on a wrong assumption of the principle laid down by the Supreme Court in a stream of cases and his observations did not appreciate the spirit that runs through the language of Article 30(1). The Supreme Court through its various pronouncements has insistently held that national interest or public interest

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35. Id. at 230.

shall not be the grounds for imposing restrictions upon the right under Article 30(1).[36] If national or public interest cannot limit the right, it is difficult to appreciate how the educational needs of a section of the population in a locality as determined by a government official can limit the choice of the other section - the minority. It is submitted that the decision is wrong. The government shall have decided the case on the genuineness of the claim of the minority and not on the basis of the educational needs of the locality.

In St.Xavier's College v. State of Gujarat,[37] Sections 40 and 41 of the Gujarat University Act of 1949, as amended by an Act of 1973, were challenged as violative of Article 30. As per Section 40 of the Act, teaching and training would be imparted by teachers of the University. It also provided that as soon as the court of the University determined that the teaching and training would be conducted by the University, the provisions of Section 41 of the Act would come into force. Section 41 contained four sub-sections. The first sub-section provided that all

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36. See State of Bombay v. Bombay Education Society, A.I.R. 1954 S.C. 561; Sidhraj Bhai v. State of Bombay, (1963) 3 S.C.R. 837; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389.
37. Supra, note 4.

colleges within the University area which were or were to be admitted to the privileges of the University under Section 5 of the Act would be constituent colleges of the University. The second sub-section stated that all institutions within the University area should be the constituent institutions of the University. The third sub-section stated that no educational institution situated within the University area would be competent save with the consent of the University and with the sanction of the State Government, to be associated in anyway with or seek admission to any privilege of any other University established by law. The fourth sub-section stated that the relations of the constituent colleges and constituent, recognised, or approved institutions within the University would be governed by the University statutes. The implications of these two Sections were that a power existed which when used, would have made minority institutions as constituent institutions of the Gujarat University. Once an affiliated college became a constituent college within the meaning of Section 41 of the Act pursuant to a declaration under Section 40, it became integrated to the University. As under Section 40, teaching was to be conducted by the University, it implied that the University was a teaching University.

Consequently, a constituent college could not retain its former individual character, and in case of minority institutions, they could not retain their character as minority institutions.

The Court[38] held that Sections 40 and 41 which sought to convert affiliated colleges into constituent colleges violated Article 30(1) and those Sections could not have any compulsory application to colleges established and administered by minorities. Ray, C.J. viewed these provisions as having the effect of making minority institutions as constituent institutions, and thus compelling them to lose their minority character.[39] Justice Khanna observed:

> "A provision which makes it imperative that teaching in under-graduate courses be conducted only by the University and can be imparted only by the teachers of the University plainly violates the rights of minorities ... such provision must consequently be held qua minority institutions to result in contravention of Article 30".[40]

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38. Eight out of nine Judges who constituted the Bench to decide the case. Ray, C.J., Jaganmohan Reddi, Palekar, Khanna, Mathew, Beg, Chandrachud and Alagiriswami, JJ.
39. Id. at 1398.
40. Id. at 1428.

For declaring Sections 40 and 41 as violative of Article 30(1) Mathew, J. reasoned:

> "On a plain wording of Section 40, it is clear that the governing body of the religious minority will be deprived of the most vital function which appertains to its right to administer the college, namely the teaching, the training and instruction in the courses of studies, in respect of which University is competent to hold examination".[41]

In striking down Sections 40 and 41, Reddi, J. concurred with Ray, C.J. and Beg, J. assigned his own reasons. He observed:

> "St.Xavier's College is apparently situated within the University area, it is prevented from seeking affiliation to any other University....This would ...have the effect of compelling it to abandon its fundamental rights guaranteed by Article 30(1)...as price for

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41. Id. at 1445.

affiliation....Section 41(1), however operates even more directly upon the petitioning college....This provision would have the compelling effect of making it automatically a constituent unit of the University, and must, therefore be held to be inoperative against the petitioning college...."[42]

Reddy, J. further observed:

"In spite of the consistent and catagorical decisions which have held invalid certain provisions of the University Acts of some of the States as interfering with the fundamental rights of management of institutions inherent in the right to establish educational institutions of their choice under Article 30(1) the State of Gujarat has incorporated similar analogous provisions to those declared invalid by this Court....A kind of instability in the body politic will be created by action of a State which will be construed as a deliberate attempt to transgress the rights of the minorities where

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42. Id. at 1449.

similar earlier attempts were successfully challenged and the offending provisions held invalid".[43]

Ray, C.J. observed:

"With regard to affiliation a minority institution must follow the statutory measures regulating educational standards and efficiency, the prescribed courses of study, courses of instruction and the principles regarding the qualification of teachers, educational qualifications for entry of students into educational institutions".[44]

And again emphasised:

"...measures which will regulate the courses of study, the qualifications and appointment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all comprised in matters germane to affiliation of minority institutions. These regulatory measures

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43. Id. at 1406.
44. Id. at 1396.

> for affiliation are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institution under Article 30."[45]

Reddy, J. emphasised that the State was entitled to impose regulatory measures for furthering the excellence of standards in education.[46] Khanna, J. referring to earlier Supreme Court decisions made the following observations:

> "To deny the power of making regulations to the authority concerned would result in robbing the concept of affiliation or recognition of its real essence. No institution can claim affiliation or recognition until it conforms to a certain standard....It is, therefore, permissible for the authority concerned to prescribe regulations which must be complied with before an institution can seek or retain affiliation and recognition".[47]

Answering the question, whether there is any limitation on the prescription of regulations, Khanna suggested the

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45. Ibid.
46. Id. at 1401.
47. Id. at 1423.

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> "Balance has therefore, to be kept between the standard of excellence of the institution and that of preserving the right of the minorities to establish and administer their educational institutions. Relations which embrace and reconcile the two objectives can be considered to be reasonable".[48]

Khanna, J. said that there are two legitimate interests which may justify a regulation:

> "First is the interest in ensuring that the benefit or facility given or granted, namely, recognition or affiliation is maintained for the purposes intended, in order to protect the effectiveness of the benefit or the facility itself. Second, social interest must be protected against those whose capacity for inflicting harm is increased by possession of the benefit or facility".[49]

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48. Ibid.
49. Id. at 1441.

He noted that recognition or affiliation was a facility granted on the basis of the excellence of an educational institution. The purpose was to enable the students to sit for a recognised examination and obtain degrees etc. He emphatically held that regulatory measures must be related to this purpose - the purpose for which recognition or affiliation was granted. He suggested the formula:

> "In every case, when the reasonableness of a regulation comes up for consideration before the court, the question to be asked and answered is whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation, namely, the excellence of the institution as a vehicle for general secular education to the minority community and to other persons who resort to it".[50]

He further added:

> "The question whether a regulation is in the interest of the public has no relevance, if it

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50. Id. at 1443.

> does not advance the excellence of the institution...."[51]

Mathew, J. observed:

> "If a legislature can impose any regulation which it thinks necessary to protect what in its view is in the interest of the State or Society, the right under Article 30(1) will cease to be a fundamental right".[52]

Even Beg, J. who expressed his strong reservations on the majority view held the view:

> "The price of affiliation (or recognition) cannot be a total abandonment of the right to establish and administer a minority institution".[53]

In Deccan Model Education Society v. State[54] the court observed that while right to recognition may not be a fundamental right, nevertheless a minority institution is

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51. Ibid.
52. Id. at 1442.
53. Id. at 1448.
54. A.I.R. 1983 Kant. 207.

entitled to be treated equally as any other applicant for recognition of its institution and it was held that the order of rejection of an application seeking permission to establish institution must stand the test of judicial scrutiny. It was further observed that the department is bound to give recognition if the conditions are satisfied notwithstanding that there are other institutions in that area.

In Benson Erock Semual v. State[55], the validity of Bombay Primary Education Rules 1949, Rule 106(2) and Schedule F (as amended by Gujarat Amendment Rules 1978), Clauses 1(2), 5, 13, 15, 24, 27 and 30 were challenged. The court held that the said provisions could not be applicable to the minority institutions since they were violative of Article 30 of the Constitution and in so far as the undertaking to be furnished under Rule 106(2) obliged the minority institution managements to abide by the aforesaid provisions of Schedule F as conditions of recognition, they would be clearly violative of Article 30 of the Constitution and they would not be to that extent applicable to the cases of minority institutions. The other provisions in new Schedule 'F' which inter alia

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55. A.I.R. 1984 Guj. 49.

prescribe for the scales of pay, leave, retirement benefits and conduct and disciplinary proceedings were in the nature of regulatory measures and they could not be said to be derogatory to the right of the management and the undertaking to abide by these provisions would not, therefore, attract the prohibitory mandate of Article 30 and could not be said to be ultra vires of the Constitution.[56]

In Rayalaseema Navodaya Minorities Christian Educational Society v. State[57], it was held that a training institution sought to be established by minority in Andhra Pradesh would be subject to regulatory provisions in Chapter V of the A.P. Education Act. The court observed that the right of minority under Article 30(1) of the Constitution was that it was not subject to regulations but that such regulations should not abridge or annihilate the right of minority community. Regulations regarding conduct of institution did advance excellence of educational standards and they did promote the interest of the institution.[58]

In Rahamania Primary Teachers Training College v.

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56. Id. at 60.
57. A.I.R. 1992 A.P. 54.
58. Id. at 62.

State of Bihar[59], it was held that the State Government was having power to determine whether an educational institution established by minority was truly a Teachers Training College or not. Once this fact was established in the affirmative, the bar to obtain from the Government prior permission to establish was lifted.[60]

In Managing Board of the Milli Talimi Mission, Bihar, Ranchi and Brothers v. State of Bihar and others[61], the issue involved was refusal to grant affiliation to the Milli Talimi Mission, a teachers training college, which was a minority institution. The State had refused to grant affiliation to it on purely illusory grounds which did not exist and failed to consider the recommendation of the Education Commissioner which was made after full inspection for grant of affiliation and thus the affiliation was refused without giving any sufficient reason. The Supreme Court by a majority, Fazal Ali and Varadarajan, JJ. (Mukherji, J. concurring) held that although the State or the University could lay down reasonable conditions to maintain the excellence of standard of education and could insist on certain courses of study to be followed by

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59. A.I.R. 1992 Pat. 1.
60. Id. at 7.
61. (1984) 4 S.C.C. 500.

institutions before they could be considered for affiliation, refusal of affiliation on terms and conditions or situations which practically denied the progress and autonomy of the institution was impermissible as being violative of Article 30 apart from being wholly arbitrary and unreasonable. It further observed that:

> "If there are cogent reason and sufficient material before the State or the University to show that the appellants' institution has not fulfilled the conditions which may be imposed hereafter, it is opened to it to withdraw the affiliation provided the conditions imposed are reasonable and justifiable".[62]

In All Bihar Christian Schools Association v. State of Bihar,[63] Sections 3 and 18(3) of the Bihar Non-Government Secondary Schools (taking over of management and control) Act 1981 were challenged. Clauses (a) to (k) of Section 18(3) lay down terms and conditions for granting recognition to a minority school. Clause (a) of Section 18(3) required a minority secondary school to frame written byelaws for constitution of managing committee entrusted

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62. Id. at 514.
63. (1988) 1 S.C.C. 206.

with the function of running and administering its schools. Clause (b) of Section 18(3) required the managing committee to make appointment of a teacher with the concurrence of the School Service Board. Clause (c) of Section 18(3) required the managing committee to frame rules of employment consistent with the principles of natural justice and the prevailing law. Clause (d) of Section 18(3) expressly provided that while considering the question of granting approval to the disciplinary action taken by the management of a minority institution the School Service Board should scrutinise whether disciplinary proceedings had been taken in accordance with the rules and no more.

Clause (e) of Section 18(3) prohibited appointment of a mentally and physically incapacitated person as teacher or non-teaching staff.

Clause (f) of Section 18(3) provided that public funds of the State should not be used for the employment of a person in service who might have crossed 58 years of age.

Clause (g) of Section 18(3) provided that fees should be charged from the students as prescribed by the

State Government and if the management decided to charge higher fee it must seek the approval of the State Government.

Clause (h) of Section 18(3) provided for the inspection of minority secondary school by authorised inspecting officer.

Clause (i) of Section 18(3) laid down principles and methods relating to admission and transfer of students, discipline, punishment and maintenance of record and accounts.

Clause (j) of Section 18(3) confered power on the State Government to issue instructions consistent with the provisions of Articles 29 and 30 for efficient management and for improving the standard of teaching and a minority school was required to comply with those instructions.

Clause (k) of Section 18(3) confered a right on the management of the minority school to challenge any arbitrary exercise of power by an authority of the State in withdrawing recognition or withholding or stopping the disbursement of aid to the institution.

It was held that these provisions were regulatory in nature which sought to secure excellence in education and efficiency in management of schools and did not confer any unguided blanket or veto power on any outside agency or authority to veto thedecision of the management of the school. Instead, the minority's right to manage its school in accordance with rules framed by it was fully preserved. The legislature had taken care to confer a limited power on the School Service Board for granting approval to appointment and dismissal of a teacher which were necessary in the interest of the educational need and discipline of the minority school itself. The terms and conditions applicable to a recognised minority school did not compel the management of a minority school to surrender its right of administration; instead the management was free to administer its school in accordance with the rules framed by it.[64]

In State of Tamil Nadu v. St.Joseph Teachers' Training Institute,[65] the respondent, a minority educational institution, was established for imparting education in teachers Training Course, without obtaining recognition from the Education Department of the State

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64. Id. at 234-35.
65. (1991) 3 S.C.C. 87.

Government. The respondent filed writ petition before the Madras High Court claiming relief for the issuance of mandamus directing the Government to recognise the institute and to permit the students to write the public examination. The Full Bench rightly held that the students of unrecognised educational institutions could not be permitted to appear at the public examination, but issued directions permitting the students to appear at the examination with a condition that the declaration of their result would be subject to the ultimate settlement of the question of recognition. On appeal by the state of Tamil Nadu, the Supreme Court held that the directions given by the High court permitting the students to write the examination were unauthorised and wholly unjustified.

The Court held:[66]

> "Under Article 30 of the Constitution minorities based on religion or language have fundamental freedom to establish educational institutions of their choice, but the State has right to prescribe regulatory provisions for ensuring educational excellence. Minority institutions which do not seek recognition are free to

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66. Consisting of K.N.Singh and K.Ramaswamy, JJ.

> function according to their own choice, but if such an institution seeks recognition from the State, it has to comply with the prescribed conditions for granting recognition, and in that event the minority institution has to follow prescribed syllabus for examination courses of study and other allied matters. These conditions are necessary to be followed to ensure efficiency and educational standard in minority institutions. A minority educational institution has no right to insist upon the State to allow students to appear at the public examinations without recognition or without complying with the conditions prescribed for such recognition.[67]

In St.Stephen's College v. University of Delhi,[68] the Delhi University issued circular to all affiliated colleges prescribing the last date for the receipt of application for admission and also it provided phased programme of admission to be followed by the affiliated colleges. It was contended that St. Stephen's College after being affiliated to the Delhi University has lost its minority character. The Court held that the State or any

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67. Id. at 90-91.
68. A.I.R. 1992 S.C. 1630.

instrumentality of the State could not deprive the character of the institution, founded by a minority community by compulsory affiliation since Article 30(1) was a special right to minorities to establish educational institutions of their choice. The minority institution had a distinct identity and the right to administer with continuance of such identity could not be denied by coercive action. Any such coercive action would be void being contrary to the constitutional guarantee. Reasonable regulations, however, were permissible but regulations should be of regulatory nature and not of abridgement of the right guaranteed under Article 30(1).[69] It was however held that the provisions of the Delhi University Act did not preclude a college from maintaining its minority character. That in matters of admission of students to degree courses the candidates had to apply to the college of their choice and not to the University and it was for the Principal of the college concerned to take decision and make final admission. It was therefore, wrong to state that there was no admission to the college but only to the University.[70]

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69. Id. at 1648.
70. Id. at 1649.

In Unnikrishnan, J.P. v. State of A.P.,[71] Section 3(A)[72] of the A.P. Educational Institutions (Regulations of Admission and Prohibition of Capitation Fee) Act, 1983, was

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71. (1993) 1 S.C.C. 645.

72. Section 3A of A.P.Educactional Institutions (Regulation of Admission) and Prohibition of Capitation Fee) Act, 1983 says:- "Notwithstanding anything contained in Section 3 but subject to such rules as may be made in this behalf and the Andhra Pradesh Educational Institutions (Regulation of Admission) Order, 1974, it shall be lawful for the management of any unaided private Engineering College, Medical College, Dental College and such other class of unaided educational institutions as may be notified by the Government in this behalf to admit students into such colleges or educational institutions, to the extent of one-half of the total number of seats from among those who have qualified in the common entrance test or in the qualifying examination, as the case may be, referred to in sub-section (1) of Section 3 irrespective of the ranking assigned to them in such test or examination and nothing contained in Section 5 shall apply to such admission". By virtue of this section it is open to the private educational institutions to charge as much amount as they can for admission which will be a matter of bargain between the institution and students seeking admission and the admission can be made without reference to inter se merit of paying candidates which is violative of Art.14 of the Constitution. Invalidating the said Section as violative of Art.14, the Court observed:

"...the educational activity of the private educational institutions is supplemented to the main effort by the State and that what applies to the main activity applies equally to the supplemental activity as well. If Art.14 of the Constitution applies--as it does, without a doubt--to the State institutions and compels them to admit students on the basis of merit and merit alone, the applicability of Art.14 cannot be excluded from the supplemental effort/activity". at 763.

challenged as violative of Article 14 of the Constitution. Invalidating the said Section, the Court observed:

> "The right to establish an educational institution does not carry with it the right to recognition or the right to affiliation. Affiliation or recognition is life blood of private educational institution. It is obligatory upon the authority granting recognition or affiliation to insist upon such conditions as are appropriate to ensure not only education of requisite standard but also fairness and equal treatment in the matter of admission to the students".[73]

The Court further observed:

> "It would be unrealistic and unwise to discourage private institution in providing educational facilities, particularly for higher education .... It could be concluded that private colleges are the felt necessary of time. That does not mean one should tolerate the "so-called colleges"

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73. Id. at 766.

> run in thatched huts with hardly any equipment, with no or improvised laboratories, scarce facility to learn in an unhealthy atmosphere, far from conducive to education. Those who venture are financial adventurers without morals or scruples. Their only aim is to make money, driving a hard bargain exploiting eagerness to acquire a professional degree which would be a passport for employment in country rampant with employment. They could be even called pirates in the high seas of education".[74]

Right of a minority to establish an educational institution does not include a right to be affiliated to a University. The right does not automatically flow out of Article 30, though, without affiliation, the right to establish and administer an eductional institution of one's choice may become illusory. In Nette Educational Trust v. State,[75] the issue involved was the refusal by the Government to accord affiliation or permission to start a new medical college which was challenged as violative of Article 30(1) by the petitioner. The Court held that every restriction placed could be said to be destructive of right

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74. Id. at 700-701.
75. A.I.R. 1993 Kant. 167.

under Article 30. "Restriction as to number of colleges in the States, limit of intake of students by any institution, to see output of qualified persons/graduates may not exceed a reasonable number, (are) ultimately conducive to advancement of minorities also. Such restrictions closely proximate and (are) relevant to the question of public order and maintenance of morale of younger generation. Since the Government have not turned down the request of the petitioner to start medical college on the ground that it is a minority institution, the question of answering that the order under challenge is against Article 30(1) of the Constitution does not arise".[76]

Thus the above analysis shows that although right to recognition or affiliation is not expressly recognised by Article 30(1), the Courts are conscious that in the absence of such a right the options otherwise open to minority institutions may not be such as to enable them to effectively exercise their rights under Article 30(1). This assumption has led the courts to strike down all attempts to make recognition or affiliation on terms tantamounting to surrender of the rights under Article 30. In certain situations at least, without recognition or

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76. Id. at 183.

affiliation there can be no meaningful exercise of the right to establish and administer under Article 30, and that recognition or affiliation can be given only on conditions that do not render the Article illusory. What the State cannot achieve directly, cannot also achieve by employing indirect methods which means that such regulatory conditions cannot be imposed as adversely affect the minority character of the institution or are made on considerations which are not conducive to the making of the institution as an efficient and excellent vehicle of education.

Conclusion

Without recognition or affiliation, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised.[77] The meaningful exercise of the rights under Article 30(1) would and must necessarily involve recognition of the secular education imparted by the minority institutions without which the right might be a mere husk.[78] Article 30(1) itself visualises certain

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77. A.I.R. 1958 S.C. 956 at 985.
78. In St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389 at 1359. Reddi, J. speaking on behalf of himself and Alagiriswami, J. observed: "The right under Art.30 cannot be exercised in vacuo.

situations in which recognition and affiliation is so linked with the exercise of the right under Article 30(1) that it becomes a part of the general right in that Article.[79] Minorities will virtually lose their right to equip their children for ordinary carrier if affiliation be on terms which make them surrender and lose their rights. The establishment of a minority institution is not only ineffective, but also unreal unless such institution is affiliated to a university for the purpose of conferment of degrees on students.[80] In according recognition or affiliation consideration of (a) the existing school in and around the locality in which new schools were to be opened; (b) the accommodation available in the existing schools in the locality; (c) the distance from each existing school to the area where new school were to be opened; (d) educational needs of the locality with reference to the habitation and backwardness of the area is irrelevant and outside the scope and content of Article 30 of the constitution.[81]

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79. See, H.M.Seervai, Constitutional Law of India (1975), p.628.
80. St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389 at 1359.
81. It is submitted that in Vicar, St.Mary's Church v. State of Kerala, A.I.R. 1978 Ker. 228, Nambiar, C.J. observed on a wrong assumption of the principle laid down by the Supreme Court in a stream of cases and his observations did not appreciate the spirit that runs through the language of Art.30(1). The Supreme Court through its various pronouncements has insistently held that national interest or public interest shall not be the grounds for imposing restrictions upon the right under Art.30(1).

With regard to affiliation a minority institution must follow the statutory measures regulating edcuational standards and efficiency, the prescribed courses of study, courses of instruction, the principles regarding the qualification of teachers and the educational qualifications for entry of students into educational institutions.[82] These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational standards of the institution. The recognition or affiliation shall not be on terms tantamounting to surrender of the rights under Article 30 of the constitution. What the state cannot achieve directly, cannot also achieve by employing indirect methods which means that such regulatory conditions cannot be imposed as adversely affect the minority character of the institution or are made on considerations which are not conducive to the making of the institution as an efficient and excellent vehicle of education.

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82. See State of Bombay v. Bombay Education Society, A.I.R. 1954 S.C. 561; Sidhraj Bhai v. State of Bombay, (1963) 3 S.C.R. 837; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389.

Chapter V

RIGHT TO STATE AID

The Constitution of India itself has classified the educational institution into two in the matter of right to get grant-in-aid from the State. They are: (i) those educational institutions which are by the Constitution itself expressly made eligible for receiving grants, and (ii) those educational institutions which are not entitled to any grant by virtue of any express provision of the Constitution. Educational institution established prior to 1948 by Anglo-Indians came within the first category. Article 337[1] of the Constitution conferred a positive right

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1. Article 337 of the Constitution of India: "Special provision with respect to educational grants for the benefit of Anglo-Indian community- During the first three financial years after commencement of the Constitution, the same grants, if any shall be made by the Union and by each State for the benefit of the Anglo-Indian community in respect of education as were made in the financial year ending on the thirtyfirst day of March 1948. During every succeeding period of three years the grants may be less by ten per cent than those for the immediately preceding period of three years.
   Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community shall cease.
   Provided further that no educational institution shall be entitled to receive any grant under this Article unless forty per cent of the admissions therein are made available to members of communities other than the Anglo-Indian community.

on them, to get grant for a period of ten years from the commencement of the Constitution.

What Article 337 did was to protect such financial grants which the Anglo-Indian institutions were getting before independence. Such grants were initially protected for a period of three years. Thereafter during each succeeding year, the same could be reduced by 10 per cent than those for the immediately preceding period of three years. The Anglo-Indian educational institutions, as a condition precedent to get grants were under an obligation, according to the second proviso to Article 337, to make available 40 per cent of the annual admissions to other communities. Likewise, Article 29(2)[2] of the Constitution provide inter alia, that no citizen shall be denied admission into any educational institution receiving aid out of state funds on grounds only of religion, race, caste, language or any of them. One special feature of such grant was that it was not open to the state to put any other pre-conditions for receiving such grants. This was

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2. Article 29(2) of the Constitution of India:- "No citizen shall be denied admission into educational institution maintained by the State or receiving aid out of State funds on grounds of religion, race, caste, language or any of them.

recognised by the Supreme Court in State of Bombay v. Bombay Educational Society.[3] State of Bombay, by a circular, directed that no primary or secondary schools shall admit to a class where English was used as a medium of instruction any student other than a student belonging to a section of Indian and citizens of non-Asiafic descent. The Barnes High School, which was a recognised Anglo-Indian school and had been imparting education through the medium of English since its inception in 1925 took the plea that one of the consequences of the order was that the school was prevented from admitting students whose mother-tongue was not English. S.R.Das, J., held for the Court that the constitution had imposed upon Anglo-Indian institutions as a condition of receiving special grants, the duty that at least 40 per cent of the annual admissions therein must be made available to the member of other communities. His Lordship observed that if the order was applied to the Barnes Schools it amounted to preventing the school from performing its constitutional obligations and thus exposed it to the risk of losing the special grant. The Supreme Court held that the order amounted to imposition of conditions other than what Article 337 itself had imposed upon Anglo-Indian institutions. This was not permissible under the Constitution.[4]

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3. A.I.R. 1954 S.C. 561.
4. Id. at 569.

In the case of in Re Kerala Education Bill 1957[5], Article 337 again came for consideration before their Lordships of the Supreme Court. The Counsel appearing for Anglo-Indian schools contended that the State of Kerala sought to expressly apply to the Anglo-Indian educational institutions, clauses 8(3) and 9 to 13 besides other clauses, attracted by clause 3(5)[6] of the Kerala Education Bill curtailing their constitutional right to manage their own institutions as a price for the grant to which they were constitutionally entitled under Article 337. It was further argued that except to the extent that they were required under Article 337, to reserve 40 per cent admissions for other communities and that Article 29(2) required them not to descriminate against any citizen in the matter of admission on grounds only of religion, race, caste, language or any of them, they were not under any other obligation for receiving special grants under Article

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5. A.I.R. 1958 S.C. 956.
6. Clauses 3(5) required aided schools to furnish every year a list of properties for nonfulfilment of this condition several consequences were to follow such as withdrawal of grants. Clause 8(3) required aided institutions to make overall fees and other dues to the Government. Clause 9 made it obligatory on the Government to pay salary to teachers and nonteaching staff, and gave certain powers with regard to the latter. Clause 10 required Government to prescribe qualifications of teachers. Clause 11 prescribed the procedure for selection of teachers by the Public Service Commission for aided schools. Clause 12 provided for conditions of service of teachers in such schools.

337. The Supreme Court, speaking through S.R.Das, C.J., held that the above clauses of the Bill sought to impose onerous conditions which violated both Article 337 and Article 30(1). Thus the Supreme Court in State of Bombay v. Bombay Educational Society[7] as well as in Re Kerala Education Bill 1957[8] case clearly held that the imposition on the Anglo-Indian educational institutions of any condition other than those which the Articles 337 and 29(2) contemplated while protecting the financial grant to which they were entitled before 1948, would violate the provisions of the Constitution.

THE NON-DISCRIMINATION CLAUSE

Article 30(2)[9] imposes an obligation upon the state not to discriminate against a minority institution in matters of financial aid which the state may choose to make available to educational institutions. The said clause is moulded in negative terms. It is not a positive right to claim aid from the state. It only provides security

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7. Supra, note 3, p.561.
8. Supra note 5 , p.956.
9. Article 30(2):- "The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language.

against differential treatment in matters of distribution of financial grants. Clause (2) is an additional protection to minority educational institutions and is in no way derogatory to what otherwise is the scope of clause (1) of Article 30. In Sidhraj Bhai v. State of Gujarat[10], J.C.Shah, J., observed:

> "Clause (2) is only a phase of the non-discrimination clause of the constitution and does not derogate from the provisions made in clause (1). The clause is moulded in terms negative, the stage is thereby enjoined not to discriminate in granting aid to educational institutions on the ground that the management of the institution is in the hands of a minority religious or linguistic, but the form is not susceptible of the inference that the state is competent otherwise to discriminate so as to impose restrictions upon the substance of the right to establish and administer educational institutions by minorities, religious or linguistic".[11]

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10. A.I.R. 1963 S.C. 540.
11. Id. at 545.

The state is competent to sanction or not to sanction any grant to educational institution, but while sanctioning grant the state is under a constitutional obligation, (i) not to discriminate against an educational institution on the ground that it is under the management of a minority, whether based on religion or language, and (ii) the state also cannot while sanctioning grant impose restrictions upon the substance of the right guaranteed by clause (1) of Article 30 of the Constitution.

The application of the non-discrimination clause incorporated under Article 30(2) is confined only to one situation where the grant is denied to a minority institution or is sanctioned on an unequal basis. But it is not applicable to the circumstances of the type which arose in Jose Callion v. Director of Public Instruction.[12] The petitioner in this case was a Roman Catholic and was running a school in a particular locality. He challenged an order of the Kerala Government, according sanction to another man to run a similar school in the same locality as being in violation of Article 30(2). The grievance of the petitioner was that as a consequence of the sanction granted to the other person and the opening of a similar

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12. A.I.R. 1955 Ker. 331.

school in the locality, he was unable to get for his school enough pupils to earn a grant from the government. The Kerala High Court rejecting the plea held:

> "We are completely at a loss to see how the establishment of another school in the same locality interferes with the petitioner's right to run his school and if the result thereof is that the petitioner cannot get enough pupils to earn grant, surely it cannot be said that the state is discriminating against him on the ground of his community".[13]

It has been recognised by Their Loardhips of the Supreme Court in Re Kerala Education Bill 1957[14], Sidhraj Bhai v. State of Gujarat[15], St.Xaviers College v. State of Gujarat[16] and All Saints High School v. Government of Andhra Pradesh[17] that in modern times the educational institution to be properly and efficiently run require considerable expenses which cannot be met fully by fees

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13. Id. at 332.
14. A.I.R. 1958 S.C. 956.
15. A.I.R. 1963 S.C. 540.
16. A.I.R. 1974 S.C. 1389.
17. A.I.R. 1980 S.C. 1042.

collected from the scholars and private endowments which are not adequate and therefore no educational institution can be maintained in a state of efficiency and usefulness without substantial aid from the state. Though theoretically it is true that the Court may not insist upon sanction of any educational institutions which the state may not have the resources at its disposal to assist, the fact remains that, in the present educational set up, the state does and must, as a matter of policy, make available financial assistance to privately run educational institutions. The constitution itself under Articles 28(3)[18], 29(2) and 30(2) visualises educational institutions receiving aid out of state funds.

The state can impose reasonable regulation while granting aid to educational institutions. In Re Kerala Education Bill 1957[19], one of the questions before the Supreme Court was whether the State could constitutionally

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18. Article 28(3):- "No person attending any educational institution recognised by the State or receiving aid out of State fund, shall be required to take part in any religious instruction that may be imparted in such institution or in any premises attached thereto unless such person, or, if such person is a minor his guardian has given his consent thereto.
19. Supra, note 5.

impose restrictions contained in clauses 5, 6, 7, 8, 9, 10, 11, 12, 14, 15 and 20 of Kerala Education Bill 1957 while granting aid to educational institutions. Clause 5 required aided schools to submit annual statements of accounts. By clause 6, the assets of the aided institutions were frozen and could not be dealt with except with prior permission of the Government. Under clause 7 the Managers were to be appointed by the Authorised officer of the State. The managers were under complete control of the officer and were under an obligation to submit accounts etc., in the manner they were told. Under clause 8 all fees, etc., were required to be made over to the Government. Under clause 9 the Government took over the responsibility of the payment of salaries to teaching and non-teaching staff. Under clause 10 the academic qualification of a teacher could be prescribed. Under clause 11 the aided educational institutions could appoint teachers out of the panel settled by the Public Service Commission. According to clause 12, the aided institutions could not take disciplinary action against the staff except with the previous sanction of the authorised officer. Clauses 14 and 15 authorised the Government to take over the management in certain cases. Clause 20 prevented aided schools from charging any fee for tuition in the primary classes.

It was contended by the counsels representing the minority institutions that not only Articles 28(3), 29(2) and 30(2) contemplate the granting of aid to educational institutions but Articles 41 and 46 make it the duty of the state to aid educational institutions and to promote educational institutions of minorities and other weaker sections of society. It was further argued on behalf of minority institutions that the impugned clauses of Kerala Education Bill, 1957 compelled the minority institutions to surrender the fundamental rights guaranteed by clause (1) of Article 30 of the Constitution in consideration of the aid doled out by the state. S.R.Das, C.J., speaking for the majority[20] of the Court did not accept the extreme contention of the minority educational institutions that while granting aid the state could not impose any conditions. At the same time he rejected the extreme contention of the State that any conditions could be imposed for state grants, for minority institution were free to forego grants and exercise their rights under Article 30(1) unrestrictedly. Dealing with this controversy, the court admitted that a Government may not at all make any grants either out of its own free will or

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20. S.R.Das, C.J., for himself and N.H.Bhagawathi, B.P.Sinha, S.J.Imam, S.K.Das and J.L.Kapur, JJ., but T.L.Venkatarama Aiyar, J. dissented.

because of compulsion of financial circumstances, but insisted that once the Government decides to make grant, it cannot attach such conditions to those grants as would destroy the right under Article 30(1). The court felt that as the right to administer under Article 30(1) could not include the right to maladminister, a minority could not ask for aid for an educational institution in unhealthy surroundings without competent teachers and which did not maintain fair standards of teaching. Speaking through S.R.Das, C.J., the court maintained:

> "It stands to reason then that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the state to insist that in order to grant aid the state may prescribe reasonable regulations to ensure the excellence of the institution to be aided".[21]

With equal emphasis however the court pointed out:

> "No educational institution can in actual practice be carried on without aid from the state

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21. A.I.R. 1957 S.C. 956 at 983.

> and if they will not get it unless they surrender their rights by compulsion of financial necessities they will be compelled to give up their rights under Article 30(1)".[22]

The court noted:

> "The conditions imposed by the ... Bill on aided institutions established and administered by minority communities ... will lead to the closing down of all these aided schools unless they are agreeable to surrender the fundamental right of management".[23]

It also emphasised:

> "The legislative powers conferred on legislature of the states by Articles 245 and 246 are subject to the other provisions of the Constitution and certainly to the provisions of Part III which confers fundamental rights, which are, therefore, binding on the state legislature. The state

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22. Id. at 983.
23. Ibid.

> legislature cannot, it is clear, disregard or override those provisions merely by employing indirect methods of achieving exactly the same result. Even the legislature cannot do indirectly what it certainly cannot do directly".[24]

But in sharp contrast with what the above observations convey, the court quite surprisingly, accepted clauses 7, 10, 11(1), 12(1), (2), (3) and (5) as "reasonable regulations or conditions for the grant of aid".[25]

Under clause 7 of the Kerala Education Bill the managers were to be appointed by the Authorised officer of the State. The managers were under complete control of the officer, and were under an obligation to submit accounts etc. in the manner they were told. Under clause 10, the academic qualifications of a teacher could be prescribed. Under clause 11, the aided educational institutions could appoint teachers out of the panel settled by the Public Service Commission. According to clause 12, the aided institutions could not take disciplinary action against the staff except with the previous sanction of the Authorised officer.

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24. Ibid.
25. Ibid.

Sidhraj Bhai v. State of Gujarat[26] arose in circumstances quite different from that of the Kerala opinion. The petitioners were the members of the Gujarat and Kathiawar Presbyterian Joint Board. This Board managed 42 primary schools and a training college for teachers known as the Mary Brown Memorial Training College in Kaira district, Gujarat. The college received Rs.8,000/- annually from the Education Department of the Government of Bombay. In May 1955 the Government issued an order that with effect from the academic year 1955-56, 80 per cent seats should be reserved by the management of the non-Government training colleges for the students nominated by the Government. The principal of the training college expressed his inability to comply with the order. Thereupon, the education inspector informed the management of the college that no grant would be paid to the college unless 80 per cent seats were reserved for the students nominated by the Government. Thus the Government imposed a regulation on a minority institution in the interest of training teachers for District and Municipal Board Schools which object could in no way be said to serve the minority institution itself. The petitioners contended that no regulatory measures were permissible unless they were in

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26. Supra, note 15.

the interest of the institution itself. The state's contention was that it was competent to impose regulation in the national or public interest, the only condition being that such a regulation did not destroy the character of the institution as a minority institution. The state further contended that it was not bound to make a grant; and in case it chose to make a grant it was entitled to impose conditions and in the event of the institution failing to carry out the condition it was entitled to withhold the grant. Rejecting the arguments of the state, Shah, J. spoke on behalf of the Supreme Court:

> "The right established by Article 30(1) is a fundamental right declared in terms absolute unlike the fundamental freedoms guaranteed by Article 19, it is not subject to reasonable restrictions....The right is intended to be effective and is not to be whittled down by so called regulatory measures conceived in the interest not of the minority educational institutions, but of the public or the nation as a whole".[27]

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27. Id. at 956.

He further observed:

> "If every order which while maintaining the formal character of the minority institution destroys the power of administration is held justifiable because in the public or national interest...the right guaranteed by Article 30(1) will be but a "teasing illusion", a promise of unreality".[28]

Shah, J. suggested the test for permissible regulation thus:

> "Regulation which may lawfully be imposed either by a legislative or executive action as a condition for receiving grant...must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such a regulation must satisfy a dual test the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution as

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28. Ibid.

effective vehicle of education for the minority community".[29]

In All Saints High School v. Government of A.P.[30], T.S.Kailasam, J. observed:

"It is open to the state to prescribe relevant condition and insist on their being fulfilled before any institution becomes entitled to aid. No institution which fails to conform to the requirements thus validity prescribed would be entitled to any aid".[31]

Some of the provisions analogous to clauses 11, 12(1), (2), (3) and (5)[32] upheld by the Supreme Court in the Kerala opinion have been held invalid by the Supreme Court in later cases. In State of Kerala v. Mother

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29. Id. at 956-57.
30. A.I.R. 1980 S.C. 1042.
31. Id. at 1075.
32. Under clause 11 of the Kerala Education Bill, the aided institutions were under obligation to appoint teachers out of a panel settled by the Public Service Commission. Under clause 12, the aided institutions could not take disciplinary action against staff except with previous sanction of the authorised officer.

Provincial[33], sub-sections (1), (2) and (9)[34] of section 53 of the Kerala University Act, 1969 were held as violative of the right under Article 30(1). These were in fact similar in terms and effect as clause (11) of the Kerala Education Bill 1957.[35] In D.A.V.College v. State of Punjab[36], clause 17 of the Gurunanak University Act[37] which incorporated a provision similar to sub-clauses (1), (2) and (3) of clause 12 was declared as invalid.

In Lily Kurian v. Sr.Lewina[38], referring to the case laid down in Sidhraj Bhai case, Sen, J. speaking for the Supreme Court observed:

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33. A.I.R. 1970 S.C. 2079.
34. Sub-sections (1) and (2) of Section 53 of the Kerala University Act confers on the Syndicate of the University the power to veto even the action of the governing body or the managing council in the selection of the Principal. Sub-section (9) gives a right of appeal to the Syndicate to any person aggrieved by the action of governing body or the management council thus making the Syndicate the final and absolute authority in these matters.
35. Supra note 32.
36. A.I.R. 1971 S.C. 1737.
37. Clause 17 of the Statute provided that the staff initially appointed shall be approved by the Vice-Chancellor. All subsequent changes shall be reported to the University for the approval of the Vice-Chancellor.
38. A.I.R. 1979 S.C. 52.

> "Article 30(1) is not a charter of maladministration; regulation so that the right to administer may be better exercised, for the benefit of the institution is permissible, but the moment one goes beyond that and imposes, what is in truth, not a mere regulation but an impairment of the right to administer, the Article comes into play and the interference cannot be justified by pleading the interests of the general public, the interests justifying interference can only be the interests of the minority concerned".[39]

The conclusion which can be drawn from the above referred cases is that the court accepted the position that the right under Article 30(1) is a right not to obtain aid on conditions which are not destructive of it.

In All Bihar Christian Schools Association v. State of Bihar[40], clause (h) of section 18(3) of Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act 1981 was challenged inter alia, on the ground

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39. Id. at 61.
40. (1988) S.C.C. 206.

that the provision for the inspection of minority school by the authorised inspecting officer was violative of Article 30 of the Constitution. The court held that the object was to ensure that the money from the public funds given to a minority school as grant-in-aid, was utilised for the purpose for which it was given and that did not trespass on the minority right under Article 30(1).

It is a matter of paramount importance that grants-in-aid should not be reduced or stopped unless there are valid reasons for it. In Monfe de Guirim Educational Society v. Union of India[41], Rule 94 of the Goa, Damen and Diu Grant-in-Aid Code for Secondary Schools and Colleges and Other Educational Institutions Except the Primary Schools (1963), authorised the Director to reduce the grants after due warning given to the management if it was found that the provisions of the rules laid down in the Code were not duly observed and the school had deteriorated in general efficiency. The court held that before grant-in-aid was stopped both conditions must exist - failure to maintain Rules under the Code and deterioration of general efficiency. In the instant case it was not alleged that general efficiency of the school had deteriorated and hence

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41. A.I.R. 1980 Goa 1.

Rule 91 did not apply and it was held that stopping of grant was unconstitutional.

Conclusion

Although the right to State aid is not expressly recognised by Article 30(1), the demands and necessities of modern educational institutions to be properly and effectively run require considerable, expense which cannot be met fully by fees collected from the students and private endowments which are inadequate and therefore, no educational institution can be maintained efficiently without substantial aid from the state funds. Even though the Constitution itself under Articles 28(3), 29(2) and 30(2)[42] visualises educational institutions receiving aid out of state funds, minority institutions are not given any right fundamental or otherwise to receive any grant from the state, other than the right not to be discriminated against in matters of financial grants. The right under Article 30(1) implied within itself a right to obtain aid on conditions which are not destructive of the right. No educational institution can in actual practice be carried on without aid from the state and if they will not get it unless they surrender their right, they will, by compulsion

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42. See, supra notes 2 and 9.

of financial necessities, be compelled to give up their rights under Article 30(1).[43] But the legislature cannot do indirectly what it certainly cannot do directly.[44] But it stands to reason than that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid, the State may prescribe regulations to ensure the excellence of the institution to be aided[45]; but it is submitted that such conditions as were upheld by the Supreme Court in the Kerala opinion are no more regarded as mere regulations but are treated as restrictions by the later courts.[46]

The state can lay down certain conditions for the minority institutions seeking aid. Obviously there cannot be any fixed standards for judging the validity of a pre-condition for aid, and every case must be decided on its own merit; subject to the condition that it must be a reasonable regulation and must be regulative of the educational character of the institution.

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43. In Re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956 at 983.
44. Id. at 983.
45. Id. at 983.
46. State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079, D.A.V.College v. State of Punjab, A.I.R. 1971 S.C. 1737; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; Benedict Mar Gregorious v. State of Kerala, 1976 K.L.T. 458 (468); Sidhraj Bhai v. State of Gujarat, (1963) 3 S.C.R. 837.

Chapter VI

GOVERNING BODIES IN MINORITY INSTITUTIONS

The right to constitute the governing body of an educational institution or to change its membership is an integral part of the right to administer an educational institution. The right to conduct and manage the affairs of the institution established by it and the choice to select a managing body must be unfettered so that the founders or their representatives can shape and mould the institution as they deem appropriate and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. Interference with this 'choice' may either take place when such persons as do not belong to the minority are sought to be inducted into the managing body or it may take place when the managing body is sought to be replaced by another body not of the choice of the minority.

INTERFERENCE WITH THE CHOICE TO SELECT THE GOVERNING BODY

In S.K.Patro v. State of Bihar[1], the question involved was of the validity of an order passed by the

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1. A.I.R. 1970 S.C. 259.

Education Department of the State of Bihar setting aside the election of the President and Secretary of the Church Missionary Society School and directing the School to constitute a Managing Committee in accordance with the order. On being challenged, J.C.Shah, J. held that the order passed by the Education authority requiring the Secretary of the Church Missionary Society School to take steps to constitute the Managing Committee in accordance with the order was invalid.[2]

In State of Kerala v. Mother Provincial[3], the constitutional validity of Sections 48 and 49 of the Kerala University Act, 1969 was in question, in appeal, before Their Lordships of the Supreme Court. The Kerala University Act, 1969, contemplated two different types of private institutions: (1) those not under corporate management, and (2) those under corporate management. By 'Corporate Management' was meant a person or body of persons who or which managed more than one private college. Sections 48 and 49 of the Act required the Corporate Managements to constitute a managing council, and required the other institutions not under corporate management to constitute a governing body. The governing body was to

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2. Id. at 264.
3. A.I.R. 1970 S.C. 2089.

consist of eleven members who are to be as follows: (1) Principal, (2) the Manager of the College, (3) one person nominated by the University in accordance with the provisions contained in the University Statutes; (4) one person nominated by the government, (5) one person elected in accordance with such procedure as might be prescribed by the Statute of the University from among themselves by the permanent teachers of the private college, (6) not more than six persons nominated by the institution concerned. The composition of the managing council was to be on the same pattern except that it was to be comparatively a larger body. It was further provided that the powers and functions of the governing body or the Managing Council, the removal of the members thereof and the procedure to be followed would be prescribed by the statutes. The decisions in these bodies were to be taken on the basis of the majority opinion of the members.

The Supreme Court found that after the election of these two bodies the founders of the community could obviously have no hand in the administration of the institutions. The Court found these provisions so much objectionable, it outrightly rejected the arguments of the State that even in the presence of these provisions, the

Managing Council and the governing body had the controlling voice in the management. Hidayathullah, C.J., speaking for the Court[4] observed:

> "The constitution contemplates the administration to be in the hands of the particular community. However desirable it might be to associate nominated members of the kind mentioned in Sections 48 and 49 with other members of the governing body or the managing council nominees, it is obvious that their voice must play a considerable part in management. Situations might be conceived when they may have a prepondering voice. In any event, the administration goes to a district corporate body which is in no way answerable to the...management. The founders have no say in the selection of members nominated or selected except those to be nominated by them. It is, therefore, clear that by the force of...Sections 48 and 49, the minority community loses the right to administer the institution it has founded".[5]

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4. The other Judges were Shah, Hegde, Grover, Ray and Dha, JJ.
5. Id. at 2084.

A provision in Guru Nanak University Statutes which was similar to the said Sections 48 and 49 of the Kerala University Act, came for consideration before the Supreme Court in D.A.V.College, Jullander v. State of Punjab.[6] Clause 2(1)(a) of Chapter V of the Statutes framed under the Guru Nanak University Amritsar Act, 1969, imposed a condition upon private colleges applying to the University for affiliation to satisfy that the college would have a regularly constituted governing body consisting of not more than 20 persons approved by the Senate and including, among others, two representatives of the University and the Principal of the College ex-officio. The clause thus contained a condition precedent for grant or affiliation which was more restrictive than merely requiring the inclusion of two outsiders in the governing body. The Court, accordingly struck down the provisions as offending Article 30(1).

The State of Gujarat incorporated a similar provision in the Gujarat University Act, 1949, while amending the same in 1973, even though the Supreme Court was firm and consistent in its approach on provisions compelling minority institutions to include outsiders in

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6. A.I.R. 1971 S.C. 1737.

their management bodies. Section 33A(1)(a) of the Act stated that every college should be under the management of a governing body which should include amongst its members a representative of the University nominated by the Vice-Chancellor and representatives of the teachers, non-teaching staff and students of the college. The St.Xaviers College, Ahamedabad, a minority institution, challenged this provision in St.Xaviers College v. State of Gujarat[7] on the ground that the governing body of an institution was a part of administration and as such could not be interfered with. The majority view in the St.Xaviers College, represented Ray, C.J., Palekar, Jaganmohan Reddi, Alagiriswami, Khanna, Mathew and Chandrachud, JJ., upheld the line of reasoning of the Supreme Court in earlier cases and declared Section 33A(1)(a) of the Gujarat University Act as an unwarranted restriction upon the right of minority to govern its institution through a managing body of its own choice. Ray, C.J.[8] held that the choice in the personnel of management was a part of administration and that it could not be interfered with by a provision like Section 33 A(1)(a). While admitting that the Gujarat University was competent to see that there was no

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7. A.I.R. 1974 S.C. 1389.
8. Speaking himself and Palekar, J.

maladministration in the institutions affiliated to it and was entitled to exercise control on administration in order to find out whether minority institutions were engaged in activities which were not conducive to the interest of the minority, Ray, C.J. stressed greatly upon the permissible limits of a regulating measure.

Permissible regulating measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the educational institutions and without displacing the management.[9] He further observed:

> "If the administration has to be improved it should be done through the agency of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of and for the minority...institutions concerned will affect the autonomy in administration".[10]

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9. Id. at 1399.
10. Ibid.

Reddi, J. viewed the provisions of the Gujarat University Act to be a deliberate attempt on the part of the State of Gujarat to interfere with the right of minority where similar earlier attempts were successfully challenged and the offending provisions held invalid.[11]

Khanna, J. held that a law which interfered with the minority's choice of a governing body or managing council would be violative of the right guaranteed by Article 30(1).[12]

Mathew, J. observed:

> "It is in the governing body...that the religious minority which established the College has vested the right to administer the institution and that body has alone the right to administer the same. The requirement that the college should have a governing body including persons other than those who constitute the governing body...has the effect of divesting that body of its exclusive right to manage the educational institution".[13]

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11. Id. at 1406.
12. Id. at 1426.
13. Id. at 1444.

He further observed that "under the guise of preventing maladministration, the right of governing body of the college...to administer the institution cannot be taken away. The effect of the provision is that the religious minority virtually looses its right to administer the institution it has founded".[14]

In Arya Pratinidhi Sabha v. State of Bihar[15], Article 182 of the Education Code of the State of Bihar was challenged by the petitioner who was running a minority educational institution. Article 182 authorised the Board of Secondary Education to make orders for imposing an adhoc committee consisting of government nominees only in a situation where the managing committee of a school was not functioning in a way conducive to the proper maintenance of discipline among the teachers and pupils and was not carrying out the directions of the Board. The Patna High Court held that Article 182 was violative of Article 30 of the Constitution. The main objection that the Court made was that the adhoc committee consisted of government officials and that complete power of control and management had been vested in the adhoc committee and the petitioners

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14. Ibid.
15. A.I.R. 1958 Pat. 359.

who were trustees of the institution had been divested of the control and management.

Clauses 14 and 15 of the Kerala Education Bill, 1957 came to be scrutinised by the Supreme Court In re Kerala Education Bill[16] through a Presidential reference.[17] Under sub-clause (8) the Government was allowed even to acquire the school, taken over under clause 14 on compensation and in the public interest. Under clause 15 the Government was empowered to acquire any category of schools, if it was satisfied that for standardising general education in the State or for improving the level of literacy in any area or for more effectively managing the aided institutions in any area or for bringing education of any category under the direct control of the Government, it was necessary so to do. The Supreme Court did not find it possible to accept that these clauses were mere regulations. It held that these clauses are totally destructive of the rights of minorities under Article 30(1) and observed that, if enacted into law, the provisions in these clauses would be violative of Article 30(1).[18]

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16. A.I.R. 1958 S.C. 956.
17. Under Art.143 of the Constitution the President is empowered to refer any matters of public importance to the Supreme Court for the purpose of obtaining its opinion.
18. Id. at 984.

The question involved in Muslim Anjuman-e-Taleem v. Bihar University[19], was the constitutional validity of Bihar Act - XVI of 1965 which authorised the Bihar University to lay down the constitution of the governing bodies of educational institutions admitted as colleges and to suspend or dissolve the governing bodies and to appoint adhoc committees also. The University framed Statutes under this provision. On behalf of the Milad College, Leheria Sarai, which was established by the local Mulsim minority, it was argued that the Muslim, having established the college for imparting modern education to Muslim students in a manner that would conserve their distinct language, culture and religion, had a right to administer the same and any interference with their right would be a violation of Article 30. The Patna High Court, relying on Sidhraj Bhai v. State of Gujarat[20], held that the right conferred by Article 30(1) was a real right and that in the guise of regulatory measures the character of the institution as a minority institution should not be taken away.

In M.M.Alikhan v. Magadh University[21], the Patna

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19. A.I.R. 1967 Pat. 148.
20. A.I.R. 1963 S.C. 540.
21. A.I.R. 1974 Pat. 341.

High Court intervened and held invalid the act of Magadh University seeking to replace the management of Mirza Ghalib College, Gaya by appointing an adhoc committee of 7 persons to manage the affairs of the College until a governing body was constituted in accordance with the Statutes of the University. The same High Court quashed an order of the same University in Hari Mandirji v. Magadh University[22], in almost identical circumstances in which it had to intervene in the above said case. The Magadh University constituted an adhoc committee for the management of Shree Guru Govind Singh College, Patna, which was a minority college. The Court held that the appointment of the adhoc committee by the University was an interference with the right of Sikh minority to administer and manage the college in accordance with its own choice.

The Kerala High Court in Benedict Mar Gregorios v. State of Kerala[23], was called upon to determine the constitutional validity of Sections 52 and 53 of Kerala University Act, 1974, which were challenged as serious inroads into the right of minority institution to be governed by their own governing bodies. Section 5 defined a 'Unitary management' as an educational agency which

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22. A.I.R. 1977 Pat. 12.
23. 1976 K.L.T. 458.

managed a private college, and a 'corporate management' as an educational agency which managed more than one private college. Section 52 enjoined on a unitary management to constitute a governing body consisting of members specified in the section. The members so specified were: (a) Principal, (b) Manager of the College, (c) a person nominated by the University, (d) a person nominated by the Government, (e) a person elected by the permanent teachers of the College from among themselves, (f) the Chairman of the College Union, (g) a person elected by the non-teaching staff from among themselves, (h) not more than six persons nominated by the Unitary Management. Sub-section (2) provided that the Manager of the Private College would be the Chairman of the governing body. Sub-section (3) provided that it would be the duty of the governing body to advise the unitary management in all matters relating to administration. Sub-section (4) enacted the decision of the governing body would be on the basis of simple majority. Section 53 contained an almost similar provision for a Managing Council for all private colleges under a corporate management.

A full bench of the Kerala High Court found that the attack on sections 52 and 53 was, prima facie, well

founded. But the court passed the two provisions as that the bodies contemplated under the two provisions were purely advisory. Nambiar, J. speaking for the Court observed:

> "By confining the power of the governing body under Section 52 and of the managing council under Section 53 to purely advisory functions and with no provision to make the advice binding on the minority institution, we see no ground to hold that these sections violate Article 30(1)".[24]

The learned Judge further observed:

> "We would confine the provisions of the sections accordingly, and were they to have a wider effect or purpose than purely advisory, we would hold that they trench on Article 30(1) of the Constitution".[25]

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24. Id. at 470.
25. Ibid.

DEVIATION FROM THE CONSISTENT JUDICIAL APPROACH

This consistency in judicial approach, so well demonstrated in the cases reviewed above, seems to have suffered erosion in Gandhi Faiz-e-am College v. Agra University[26], decided by the Supreme Court about a year after the St.Xaviers College.[27] But even before the said case, in 1971, the Punjab & Haryana High Court had proceded one wrong assumption in Punjab University v. Khalsa College[28] wherein Rule 10 of the Regulations governing service and conduct of teachers in non-government affiliated colleges framed by the Punjab University was challenged as violative of Article 30. Rule 10 provided that besides the principal who was to be an ex-officio member of the governing body of a non-government college, two representatives of teachers elected in the manner stated therein should be included in the management. The college being established by the Sikh minority argued that the enforcement of the rule might result in introducing a non-Sikh into the managing body thus violating Article 30.

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26. A.I.R. 1975 S.C. 1821.
27. Supra note 7.
28. A.I.R. 1971 Punj & Har. 479.

The Court declaring the contention untenable observed:

> "It cannot be said that there is any certainty that a non-Sikh teacher can be elected to the Governing Body. Even if he can be elected to a Governing Body of 20 persons, the presence of two representatives will not in any manner alter the real and true composition of that Governing Body. The object of Service Rule 10 is merely to give representation to teachers in that Body. Moreover, it is open to the Governing Body not to appoint any person as a teacher who is a non-Sikh and if they appointed any person as the teaching staff, who is a non-Sikh, they cannot make a grievance that a non-Sikh has been elected to the Governing Body".[29]

It further observed:

> "If an educational institution established by a minority considers it necessary or in its interest to employ teachers not belonging to that minority and such teachers enjoy the confidence

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29. Id. at 481-82.

> of their colleagues and are popular enough to be elected to the Governing Body, we fail to see how it can constitute interference with the minority's right guaranteed under Article 30 of the Constitution".[30]

Gandhi Faiz-e-am College v. Agra University[31] is a case which deviates from the consistent line of reasoning evolved by the Supreme Court on the question of autonomy in the matter of selection of management bodies. In this case, the petitioner college, a Muslim minority institution, affiliated to the Agra University, applied for permission to start teaching in certain subjects. As a condition of recognition of the proposed subjects, the University insisted that the College should follow statute 14-A. It provided that an affiliated college must include in its governing body the Principal and the senior most member of the Staff of the college to be appointed by rotation every academic year. The University directed the College to constitute a governing body as contemplated in the Statute. The college agreed to reconstitute its management body and requested the University to grant recognition to the new subjects. When the University took

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30. Id. at 482.
31. Supra note 26.

no steps accepting the request the college challenged the vires of the statute 14-A and the legality of the directive. The Allahabad High Court[32] rejected the contention and the College went in appeal before Supreme Court against the High Court decision. A 2:1 majority of the Supreme Court found the provision as salutory and not restrictive of the right under Article 30(1) as, in its view, the inclusion of only 2 persons, the Principal and the seniormost teacher did not restrict the substance of the right. Krishna Iyer, J., speaking on his behalf and on behalf of A.C.Gupta, J. justified the provision as a reasonable regulation and not an unconstitutional condition. He observed: "Regulation which restricts is bad; but regulation which facilitates is good".[33] Krishna Iyer, J. was faced with the difficulty of drawing the delicate line distinguishing a permissible regulation from an impermissible restriction. He suggested the test:

> "No rigid formula is possible but a flexible test is feasible. Where the object and effect is to improve the tone and temper of the administration without forcing on it a stranger hower superb his virtues be, where the directive is not to

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32. A.I.R. 1968 All. 188.
33. Supra note 26 at 1826.

> restructure the governing body but to better its performance by a marginal catalytic induction, where no external authority's fiat or approval or outside nominee is made compulsory to validate the management body but inclusion of an internal key functionary appointed by the autonomous management alone is asked for, the provision is salutory and saved, being not a diktat eroding the freedom".[34]

He held that though a rough distinction between creation of a managing body and general regulation of its activities to prevent maladministration could be drawn, the distinction was bound to be blurred in marginal situations. He observed:

> "A dichotomy is sometimes drawn in this branch of juridical discussion. More plainly the difference drawn is between creating a management body by the minority community and regulation of the manner of its functioning to obviate mal-administration. The former is ordinarily beyond the pale of legislative prescription while the

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34. Ibid.

> latter is permissible as preservative. Broadly, this is sound, but as a rigid logical formula, it breaks down".[35]

He further observed:

> "These fine but real lines cannot be obfuscated by excessive emphasis on the character of the organ as against its method of working. Men matter in extreme situation".[36]

Emphasising the importance of the position of the principal in an educational institution he said:

> "A regulation which requires his inclusion in the Governing Council imposes no external element....His membership on the Board is a blessing in many ways and not a curse in any conceivable way".[37]

The learned Judge distinguished the various earlier decisions of the Supreme Court in Mother

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35. Ibid.
36. Id. at 1827.
37. Ibid.

Provincial[38], W.Proost[39], S.K.Patro[40], D.A.V.College[41] and St.Xaviers College[42] cases from the present case. He observed:

> "In all these cases administrative autonomy is imperilled, transgressing, purely regulatory limits. In our case autonomy virtually left intact and refurbishing, not restructuring, is prescribed. The core of the right is not gauged out at all and the regulation is at once reasonable and calculated to promote excellence of the institution - a text book instance of constitutional conditions".[43]

To Krishna Iyer, J., what seemed to be the distinguishing factor between the case he was dealing with and the cases decided earlier was that in the earlier cases the regulations were in the nature of restrictions whereas in the instant case the regulation was intended to improve "the tone and temper of administration".

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38. Supra note 3.
39. A.I.R. 1969 S.C. 465.
40. Supra note 1.
41. Supra note 6.
42. Supra note 7.
43. A.I.R. 1975 S.C. at 1829.

The mere presence of non-minority members can change the whole colour of the managing body. The presence of outsiders in the management body has helped the courts in certain cases[44], to form a presumption that the institution in question were not intended to be minority institution. It can be said that Gandhi Faiz-e-am College case[45] was not decided on logically justifiable assumptions.

In Smt.Nanda Ghosh Pastidar and others v. Guru Nanak Education Trust and others[46], the Court quashed the order dated May 7, 1983 of the President of the West Bengal Board of Secondary Education appointing an administrator to take charge of the management of the school which belonged to the Guru Nanak Education Trust. Their Lordships held:

> "The Board cannot, however, under any circumstances interfere with the management of the school by superseding the Managing Committee and appointing administrator to take charge of the school and administer the same".[47]

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44. Ramani Kantha v. Gauhati University, A.I.R. 1951 Assam 163; Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1973 Pat. 101; Pannalal v. Magadh University, A.I.R. 1976 Pat. 82.
45. A.I.R. 1975 S.C. 1821.
46. A.I.R. 1984 Cal. 40.
47. Id. at 43.

An analysis of the decisions reviewed above brings out the fact that the Courts were firm and consistent in its approach that the right to establish and administer educational institutions including the right to select the governing body and that this right cannot be restricted or interfered with. The rule laid down in Gandhi Faiz-e-am College is that imposition of outsiders on managing body of a minority institution is an interference with the right of minority to administer its institution according to its choice. There is an exception to this rule that induction of such a nominal number of insiders (such as Principal or a teacher) as would not be able to dominate the Managing Body's voice in the decision making is permissible.

In Nanda Ghosh v. Guru Nanak Education Trust[48], the Court held that the education Board could not under any circumstances, interfere with the management of a minority school by superceding the managing committee and appointing an Administrator to take charge of the school and administer the same. The Court also noticed that in the impugned order of supersession, there was no allegation as to the mismanagement of the school.[49]

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48. A.I.R. 1984 Cal. 40.
49. Id. at 43.

In Sushil Kumar v. State of Assam[50], Rule 6 of Assam Aided Higher Secondary, High and Middle School Management Rules, 1976, empowered the inspector of schools to dissolve and reconstitute the Managing Committee at any time, subject to two conditions: (a) the circumstances must so demand; and (b) this must be subject to the approval of the Director of Public Instruction.

In the instant case the School in question belonged to Bengali Community which was a linguistic minority in the State of Assam. Under Rule 6, the Inspector of Schools dissolved the managing committee of the school and reconstituted new committee without observing principles of natural justice. The Court held that there is absolutely nothing on record to show the circumstances which had led the Inspector of Schools to pass the impugned order dissolving the committee formed and constituting new committee. Moreover, principles of natural justice had not been followed. So a reasonable opportunity of being heard was not given. Any attempt to transcend permissible limit in the garb of supervision would not admit the tolerance of Article 30.[51]

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50. A.I.R. 1984 Gau. 69.
51. Id. at 74.

In Anjuman Ahle Hadees, Darbhanga v. State[52], the constitutional validity of Section 7(2)(n) of Bihar State, Madarsa Education Board was challenged. The pattern for constitution of managing committee as laid down in Section 7(2)(n) comprised of 9 members. Of those 9, the donor representative would be only 2. The management could naturally pass out of the hands of the organisation which had sponsored and set up the Madarsa and it might become a tool of Madarsa Board. The minority community would, therefore, be deprived of its right and privilege of managing its institution, namely, the Madarsa. The provision of Section 7(2)(n) thus clearly violated Article 30(1) of the Constitution.

In Managing Committee, Baptist Church, M.E.School v. State[53], District Inspector of Schools in exercise of his power under Rule 3(1) of the Orissa Education (Management of the Private Schools) Rules 1980, constituted a managing committee for the petitioner school which was a minority school. The rules framed under the Orissa Education Act excluded from its application institutions established and administered by minority committees. The

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52. A.I.R. 1985 Pat. 315.
53. A.I.R. 1988 Ori. 250.

Court held that the rules could not be invoked to appoint a Managing Committee for the petitioners school. It is too well settled in law that even though regulatory measures can be made applicable to the institutions protected under Article 30(1), yet interference with the management in the shape of either taking over of the management or reconstitution of it in effects destroys the very guarantee under Article 30(1) and would be ultra vires of it.

The validity of sub-clause (a) of paragraph 17, sub-clause (1)(i) as also sub-clause (a) of paragraph 17(1)(ii) of Statute No.28 framed under Indore University Act which prescribed that 'Kulapati' or his nominee shall be the Chairman of the selection committee in the case of teaching posts and in the case of Principal, were challenged in Islamia Karimia Society, Indore v. Devi Akilya Vishwa Vidyalaya[54]. The petitioner was linguistic and religious minority. The petitioner challenged the said provision as violative of Article 30 of the Constitution. The Court held that the provision contained in para 17(1)(i) of Statute No.28 in regard to the constitution of the selection committee in the case of teaching posts except in so far as they provided in sub-clause (a) that

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54. A.I.R. 1988 M.P. 200.

the Kulapati or his nominee should be Chairman of such committee, were aimed at ensuring educational standards and maintaining excellence thereof and could not be said to be violation of Article 30(1). The same was the position with regard to clause (ii) also of the said paragraph 17(1) which dealt with the constitution of selection committee in the case of Principal. Except sub-clause (a) which provided for the Kulapati or his nominee being the Chairman, the other sub-clause did not offend Article 30(1) of the Constitution in as much as they too apparently had been enacted for ensuring educational standards and maintaining excellence thereof.[55]

Educational authorities have no right to encroach upon fundamental rights of founders of nominees of minority educational institutions by constituting or reconstituting managing committees for such institutions. In Berhampur Diocesan Catholic School Managing Committee v. State[56], the institution in question was a minority institution and the authorities had from time to time recognised the said school to have been established by the minority. In 1986, the Inspector of school interfered with the constitution of the Managing Committee. The petitioner challenged the

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55. Id. at 205.
56. A.I.R. 1993 Ori. 93.

interference as violative of Article 30(1) of the Constitution. The Court held that the State had no authority to interfere with constitution of the management committee, since it did not fall within the regulatory power of the State to be exercised in the interest of excellence of education. To permit the indulgence would destroy the enshrined rights guaranteed under the Constitution.[57]

In Bihar Christian Schools Association and another v. State of Bihar[58], the constitutional validity of Section 3 and 18(3) of Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 was challenged on the ground that the provisions were violative of Article 30(1) of the Constitution. The Court consisting of Ranganadh Misra and K.N.Singh, JJ. held that Section 3 which provided for taking over of management and control of non-government secondary schools did not in any manner encroach upon the fundamental right of a minority institution as sub-section (1)[59] did not effect a minority

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57. Id. at 99.
58. (1988) 1 S.C.C. 206.
59. Sub-section (1) of Section 3 of Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981:- "All non-government secondary schools other than the minority secondary schools based on religion or language declared as such by the State Government and centrally sponsored, autonomous and

(contd...)

secondary school at all. Sub-section (2) merely enabled the State to take over the control and management of a minority institution only when an unconditional offer was made to it by the management of the minority institution and sub-section (3) related to the taking over of management and control of unrecognised schools other than minority school.[60]

Clause (a) of Section 18(3) required a minority secondary school to frame written bye-laws for constitution of managing committee entrusted with the function of running and administering its school. It was held that this clause was in the interest of the minority institution itself, as no outsider was imposed as a member of the managing committee and it would ensure efficient administration, there was no interference with the minority's right to administer its school.

(f.n.59 contd.)

proprietary secondary schools recognised by the State Governments, recognised permanently, provisionally or partially by the Board of Secondary Education under the Bihar Secondary Board Education Act, 1976 (Bihar Act 25 of 1976) and the Bihar Secondary Education Board (Second Amendment) Ordinance, 1980 (Bihar Ordinance 82 of 1980) shall, notwithstanding, anything contained in the said Act, or the said ordinance, be deemed to have been taken over by the State government with effect from October 2, 1980.

60. (1988) 1 S.C.C. 225.

In Bihar State Madarsa Education Board v. Madarsa Hanifa Arabic College[61], Sections 7(2)(n) of State Madarsa Education Board Act, 1982 was challenged as violative of Article 30(1) of the Constitution by the respondents which were educational institutions established by the Muslim minority community. Section 7(2)(n) empowered the Board to dissolve the management of an aided and recognised Madarasa. The Court[62] held that Section 7(2)(n) of the Act was clearly violative of Article 30(1) in so far as it provided for dissolution of a managing committee of a Madarasa. The Court further observed that though the minority institution could not be allowed to fall below the standard of excellence on the pretext of their exclusive right of management, but at the same time their constitutional right to administer their institutions could not be completely taken away by superseding or dissolving managing committee. Under the guise of regulating the educational standards to secure efficiency in institution, the State was not entitled to frame rules or regulations compelling the management to surrender its rights of administration.[63]

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61. (1990) 1 S.C.C. 428.
62. Consisting of K.N.Singh and N.M.Kasliwal, JJ.
63. Id. at 432.

CONCLUSION

The requirement that the college should have a governing body including persons other than those who constitute governing body has the effect of divesting that body of its exclusive right to manage the educational institution. The choice in the personnel of management is a part of administration. If the administration has to be improved through permissible regulatory measures it should be done through the agency of the existing management body and not by displacing it. A law which interferes with the minorities choice of a governing body would be violative of the right under Article 30(1).[64] There is a clear distinction between creating a governing body by the minority community and the regulation of the manner of its functioning to prevent maladministration. The former is beyond the pale of legislative prescription while the latter is permissible as preservative. Regulations are permissible to prevent maladministration but can only relate to the manner of administration after the body which is to administer has come into being. The imposition of

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64. State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2089; S.K.Patro v. State of Bihar, A.I.R. 1970 S.C. 259; D.A.V.College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389.

outsiders on the governing body against the will of the minority is more likely to create a state of confrontation that to create conditions for improvement of the tone and temper of the college management. The mere presence of non-minority members can change the whole colour of the managing body. This presence of outsiders in the management bodies had helped the courts[65] to form a presumption that the institutions in question were not intended to be minority institutions. The induction of such a nominal number of insiders (such as the Principal or a teacher) as would not be able to dominate the managing bodies voice in the decision-making is not permissible because it is more likely to be of a curse than a blessing.[66]

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65. Ramani Kantha v. Gauhati University, A.I.R. 1951 Ass. 163; Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1973 Pat. 101; Pannalal v. Magadh University, A.I.R. 1976 Pat. 82.
66. The decision laid down in Gandhi Faiz-e-am College v. Agra University, A.I.R. 1975 S.C. 1821, is a case in contrast and is distinguishable from all others decided by the Supreme Court on the question of autonomy in the matter of selection of management bodies.

Chapter VII

ADMISSION IN MINORITY INSTITUTIONS

The very object of incorporation of Article 30(1) into the Constitution was to enable minority to educate their children in the institutions established by them. The whole concept of protection under Article 30(1) revolves around this object, consequent to which the courts have admitted a very broad interpretation to the word "choice" occurring in Article 30(1). This choice includes a score of 'rights' and such rights include among others, a right, in certain situations, to get recognition and affiliation[1]; a right in same situation at least, financial aid from State[2]; a right to select medium of instruction[3];

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1. D.A.V.College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737, St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389.

2. St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389, Benedict Mar Gregorios v. State of Kerala, 1974 K.L.T. 458 (468).

3. State of Bombay v. Bombay Education Society, A.I.R. 1954 S.C. 561.

a right to select management bodies[4]; a right to select staff[5] and a right to take disciplinary action.[6]

A right to autonomy in management includes a right to admit students and a right to determine the kind and character of the institution. None of these rights is expressly made available to minority under Article 30(1) and yet all of them are recognised as essential for an effective and meaningful exercise of what is purported to

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4. State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2089; D.A.V.College, Bhatinda v. State of Punjab, A.I.R. 1971 S.C. 1731; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389, Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1958 Pat. 359; Mohd. Abu Saeed v. State of Bihar, 1969 B.L.J.R. 343; M.M.Alikhan v. Magadh University, A.I.R. 1974 Pat. 341; Hari Mandirji v. Magadh University, A.I.R. 1977 Pat. 12; Muslims Anjuman-e-Taleem v. Bihar University, A.I.R. 1963 Pat. 148.
5. W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465; State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079; D.A.V.College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; A.M.Patroni v. Kesavan, A.I.R. 1963 Ker. 73; Patroni v. Asst. Educational Officer, A.I.R. 1974 Ker. 197; Rev.Brother A.Thomas v. Deputy Inspector of Schools, A.I.R. 1976 Mad. 214; Benedict Mar Gregorios v. State of Kerala, 1976 K.L.T. 458.
6. St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; Lilly Kurian v. Sr.Lawaina, A.I.R. 1979 S.C. 52; St.Joseph's Training College v. University Appellate Tribunal, 1980 K.L.T. 67; Monte de Guirim Educational Society v. Union of India, A.I.R. 1980 Goa 1.

be made available to them. All these rights are complementary to the principal right, the right of the minorities to educate their children in their own institutions established under Article 30(1) and none of them taken singly or in combination with others, has any significance in the absence of the principal right. Article 30(1) clearly seems to leave a choice with minority to confine admissions in their institutions to their own members. This inference is the most natural outcome of what is stated under Article 30(1) and is the obvious consequence of the recognition by the courts of a number of rights, listed above, as falling within the scope of that Article.

THE RIGHT TO DETERMINE THE KIND AND CHARACTER OF THE INSTITUTION

The courts in a series of cases[7] have asserted and reiterated that Article 30(1) of the Constitution of India cannot be read to imply a condition that an institution

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7. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956; Dipendra Nath v. State of Bihar, A.I.R. 1962 Pat. 10; Sidhraj Bhai v. State of Gujarat, (1963) 3 S.C.R. 837; W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465, State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079; M.M.Alikhan v. Magadh University, A.I.R. 1974 Pat. 341.

must keep its doors open to the members of the minority alone in order to have the status of minority institution. By admitting a non-member into a minority institution, it does not shed its character and cease to be a minority institution. Article 30(1) implies no limitation whatever, for minority institutions to restrict their 'choice' of admission to the members alone.

If under Article 30(1) the minorities can admit the students on its choice it has to face with the prohibition incorporated in clause 2 of Article 29[8] which seeks to prevent educational institutions receiving aid out of state funds from denying admission to any citizen on grounds of religion, race, caste or language. The impression which Articles 30(1) and 29(2) taken together gives is that the latter intends to restrict the former. That is, a minority may continue admission to the members of its own community provided it shall not deny admission to any citizen on grounds of religion, race, caste or language. But these two propositions are contradictory which the members of the Constituent Assembly might not

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8. Article 29(2):- "No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

have intended. This apparent conflict can be explained by offering two possible reasons:

1. The Assembly deliberately intended to take away indirectly what it intended to concede to minorities directly by placing Article 29(2) as an exception to Article 30(1).

2. The Assembly in its estimation, did not find Article 29(2) as being in conflict with Article 30(1) and as such an exception to Article 30(1).

The first possibility must be ruled out, as the Assembly could not be expected to decide an absurd result. Alternatively, it is only the second possibility which can be relied upon to infer the framer's intention that they did not mean Article 29(2) to serve as exception of Article 30(1).

The Supreme Court in In re Kerala Education Bill 1957[9], held that Article 30(1) was subject to Article 29(2). The Court failed to realise that this view was a negation of all that the court had done to enforce the

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9. A.I.R. 1958 S.C. 956.

spirit that underline what is called the 'cherished rights' of minorities. The Court also did not pay attention to the fact that this view conflicted with its own statements which immediately preceded, namely that 'a minority community can effectively ensure its language, script or culture by and through educational institutions, and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Article 30(1).[10] To say that a minority can effectively conserve its language and culture etc. by and through educational institutions established under the right available to it under Article 30(1) and then to say Article 30(1) is subject to Article 29(2) implying that a minority cannot confine the benefits of its institution to minority members, is to say nothing less than Article 30(1) and Article 29(2) mutually exclude each other - a result, the framers could hardly have intended.

THE ORIGIN AND DEVELOPMENT OF ARTICLE 29(2)

The recommendation of the Minorities Sub Committee

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10. Ibid.

made on April 9, 1947 for being incorporated as fundamental rights in the Constitution contained a provision in clause (iii) which read:

> "No minority, whether of religion, community or language, shall be deprived of its rights or discriminated against in regard to the admission into State Educational Institutions".

The Advisory Committee approved this recommendation, and incorporated it as sub-clause 2 of clause 18 in its interim report. When on May 1, 1947 Patel moved clause 18(2) for its acceptance by the Assembly, Munshi suggested to refer the clause back to the Advisory Committee for clarifying its scope in respect of State aided institutions about which no mention had been made in the clause. When on August 30, 1947 the Assembly took up for consideration the re-drafted sub-clause 2 of clause 18, Poornima Banerji moved an amendment seeking to prohibit State aided institutions also from making discrimination against minorities. Clause 18 as adopted by the Assembly, came to be incorporated in the Draft Constitution as Article 23, with some drafting changes. Till this stage, it is very evident that the intention of the Assembly was

to protect 'minorities' from being discriminated in matters of admission. It was only when the draft Article 23 came up before the Assembly on December 7, and 8, 1947 that a dramatic change took place in this position. Pandit Thakurdas Bhargawa suddenly came forward with an amendment to redraft Article 23(2) to read: "No citizen shall be denied admission into any educational institution maintained wholly by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. Explaining the amendment, he pointed out that the amendment was intended to (1) extend the right of admission to educational institutions to all citizens whether they belonged to majority or minority and (2) to provide that not only State maintained institutions but also those receiving aid out of State funds would be prohibited from practising discrimination in the matter of admission".[11] The Assembly accepted the amendments. What reason impelled the Assembly to accept Bhargawa's amendment substituting the word 'minority' by the word 'citizen' are not known as the Assembly chose to assign none. Bhargawa explained: "This amendment seeks to include such other institutions as are aided by State funds. There are a very large number of such institutions, and in future by this

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11. C.A.D., Vol.VII, p.895.

amendment the right of the minority have been broadened and the rights of the majority have been secured.[12] What he wanted was to make available to the students of majority community also a right which the Assembly was to concede to the minorities, thus seeking to broaden the scope of Article 29(2) without touching at the same time the special right made available to minorities under Article 30(1) to educate their children in their own institutions.

In State of Bombay v. Bombay Education Society[13], the main issue before the Court was whether the impugned order infringed any constitutional right of the minority institution, to admit non-Anglo-Indian students and students of Asiatic descent to classes where English was being used as the medium of instruction. The Court held that where a minority had the fundamental right to conserve its language, script and culture under Article 29(1)[14] and had the right to establish and administer educational institutions of its choice under Article 30, then there must be implicit in such fundamental right, the right to impart instruction in its own institutions to the children of its own community in its own language, and pointed out:

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12. Id. at 898.
13. A.I.R. 1954 S.C. 561.
14. Article 29(1):- "Any Section of the citizens residing in the Territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

"To hold otherwise will be to deprive Article 29(1) and Article 30(1) of the greater part, of their contents".[15]

Thus the Court admitted that a minority had a right to determine the kind of instruction to be given to its children in its institutions. This right could not obviously be exercised by the minority unless it had a right to admit its own children in its own institution. If a minority has, as the court said, a fundamental right to educate its own children in the language of its own choice, it is implicit that it is having the right to admit its students in its institutions for that purpose. The latter right is a necessary concomitant to the former right.

In Mark Netto v. Government of Kerala[16], Rule 12(iii) of Chapter VI of Kerala Education Rules (1959) prohibited admission of girls in secondary schools for boys if there were a girl's school in the same area. The petitioner school admitted only boys till the academic year 1971-72. It applied for permission to admit girls in the school which was refused. The order was issued on the

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15. Id. at 569.
16. A.I.R. 1979 S.C. 83.

ground that the school was being run purely as a boy's school for the last 25 years, that there existed a facility for the education of the girls of the locality in the nearby girls school within a radius of one mile. The petitioner urged that admission of girls in schools was part of the administration of the institution. Untwalia, J., speaking for the Supreme Court said:[17]

> "The self imposed restriction by the management in vogue for a number of years restricting the admissions for boys only, per se, is wholly insufficient to cast a legal ban on them not to admit girls".[18]

The decision emphasises that even though facilities for education of minority students are available, and are viewed as equally efficient, the choice of minority to admit its own students in its own institutions cannot be restricted on that basis. Mark Netto case confirms what the courts have, in an unbroken line of decisions stated and reiterated, namely, that restriction on minority

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17. Chandrachud, C.J., Sarkaria, Chinnappa Reddy and Sen, JJ. were the other judges included in the Bench.
18. Id. at 86.

institutions cannot be justified on any other ground than on the ground that the same goes to the benefit of the minority institution itself.[19]

RESERVATION OF SEATS

If seats are reserved in a minority educational institution for candidates belonging to Scheduled Castes, Schedule Tribes or backward classes under the authority of Article 15(4)[20], the reservation would restrict the choice of the minority institution in matters of admission and further it would restrict the choice of the minority students to secure admission in such institutions.

Sidhraj Bhai v. State of Bombay[21] was the first case which involved reservation of seats in minority institutions. The petitioners in this case who professed Christian faith were members of a Society, which maintained educational institutions primarily for the benefit of the Christian community. The Society maintained 42 primary

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19. Sidhraj Bhai v. State of Gujarat, (1963) S.C.R. 837; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; G.F.College v. Agra University, A.I.R. 1975 S.C. 1821.
20. Article 15(4):- "Nothing in this Article or in Clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes.
21. (1963) 3 S.C.R. 837.

schools and a Training college for teachers. The Government of Bombay issued an order saying that 80 per cent of the seats in the Training Colleges for teachers in non-government training colleges would be reserved for teachers nominated by the Government. By another order, the Educational Inspector directed the Principal of the Training College not to admit, without specific permission, private students in excess of 20 per cent of the total strength in each class. The Principal expressed his inability to comply with the order, consequent to which the department threatened to take disciplinary action such as withdrawal of recognition and also informed the college that for non-compliance of the orders the college would be paid no educational grant for the specific year as per certain Rules framed by the State of Bombay for Primary Training Colleges thereupon the said rules were challenged by the petitioners as violative of Article 30 of the Constitution. In the said case[22] the Supreme Court viewed these provisions as violative of Article 30(1) and Shah, J. speaking for the Court held:

> "Serious inroads are made by the Rules...issued by the Government of Bombay upon the right vested

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22. Ibid.

> in the Society to administer the training college".[23]

And the Court further observed:

> "It is manifest that the right of the Private Training Colleges to admit students of their own choice is severely restricted".[24]

Accordingly the Court held that the Rules, in so far as they related to reservation of seat in Private Colleges, infringed the fundamental right granted under Article 30(1).

In K.O.Varkey v. State of Kerala[25], the main issue involved was reservation of seats in minority run training schools. The petitioner maintained two training schools for training of teachers to be appointed in various schools run by the petitioners. He contended that Rule 6, 7 and

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23. Id. at 848.
24. Ibid.
25. A.I.R. 1969 Ker. 191.

8[26], in Chapter XXV of the Kerala Education Rules, 1959 were violative of Article 30(1) as they placed restriction upon the right of the institution to admit students of their choice. The result of these rules was that only 20 per cent of the seats were left for selection by the private schools, and admissions against 80 per cent of the seats were taken out of their hands. Mathew, J. speaking for the Kerala High Court, declared the rules as imposing unreasonable restrictions upon the fundamental right guaranteed by Article 30(1) and restrained the respondents from enforcing the rules against the minority institutions.

In Director v. Arogiasami[27], not only seats were sought to be reserved in a minority institution but also the Government sought to regulate the admission procedure. The Christhuraj Basi Training School was established by a Christian minority. The Government issued an order

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26. Rule 6 reserved 20 per cent of the total seats in aided training schools for selection by the managers of the respective training schools. Rule 7 reserved 60 per cent of the seats in such institutions for selection by a selection committee consisting of a member of Public Service Commission as Chairman and an official nominee of the Education Department. Rule 8 authorised the Director of Education to depute 20 per cent of the seats of the untrained teachers employed in Government and aided teachers training schools.
27. A.I.R. 1971 Mad. 440.

directing that a list of candidates selected for admission by the aided training schools should be scrutinised by a Scrutiny Committee and that no candidate should be admitted before the list was approved. The Committee was to consist of the Chief Educational Officer concerned and a non-official appointed by the Government. The order also laid down that the selection of candidates for admission should be done by the school authorities by interviewing every candidate. The marks secured at the interview were to be added to the marks secured by the candidates at the S.S.L.C. Public Examination. The order also directed that selecting authorities must reserve seat for the scheduled castes and scheduled tribes and for the backward communities, ie. 16 per cent for the former and 25 per cent for the latter in accordance with the rules in force. This system was to be enforced by the Scrutiny Committee, and any institution failing to follow the scheme was made by the order liable to be exposed to serious action including imposition of cut in financial grants.

The Madras High Court viewed this restriction as a serious inroad on the freedom of minority institutions to make admissions according to their choice. Speaking for the Court, Veeraswamy, C.J., observed:

"It is true that the impugned order is conceived in public interest to ensure proper safeguards in the matter of admission to...training schools. That is good by itself". But at the same time what is important to note is that such a regulation should be conceived and made from the stand point of and for the benefit of the minority institution in the matter of its establishment and administration. General standards to be achieved, by the regulations may be good from the public point of view, but enforcement of such general standards on a minority institution may destroy or defeat or severely curtail the protection given to it by Article 30(1). The regulations can only be made in the interests of the institution and they cannot be made in the interest of the outsiders".[28]

State of Kerala v. Manager, Corporate Management Schools[29], involved the same rules, Rule 6, 7 and 8 of Chapter XXV of the Kerala Education Rules[30], as were

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28. Id. at 442.
29. 1970 K.L.T. 106.
30. Supra, note 9.

challenged in K.O.Varkey v. State of Kerala.[31] The Kerala High Court found that when it is remembered that the object of Article 30(1) is the conservation or advancements of the religious culture of minority communities, it is easily understandable that to restrict the community's choice of candidates for training in their schools to 20 per cent of the school strength would certainly prejudice that interest of the community, and would therefore violate the freedom assured to them under Article 30(1). The Court pointed out that 80 per cent of the candidates should be chosen by outside authorities would seriously affect the character of the institution.

In K.A.Hamid v. Mohd. Haji Saboo Polytechnic[32] it was held that restriction prescribing that a certain percentage of students belonging to Scheduled Tribes had to be admitted even by non-government polytechnics in the State were not reasonable restriction and hence violative of Article 30(1) of the Constitution.

The Allahabad High Court has deviated from the line of reasoning so far followed by the courts in Sheetansy Srivastava v. Principal, A.A. Institute.[33] It

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31. Supra, note 25.
32. A.I.R. 1985 Bom. 394.
33. A.I.R. 1989 All. 117.

was held that government aided minority institutions were not competent to preclude students of other communities by reserving seats for students of their own community in purported exercise of power under Article 30(1) to educate their own children notwithstanding Article 29(2). The Court held that both articles had to be interpreted in a manner that one does not destroy the right of other while maintaining their basic characteristic of absolute interest in them. Therefore, the right of admission which vests in an institution by the virtue of power of administration enjoyed by it under Article 30(1) cannot be in violation of Article 29(2). Hence a minority institution cannot therefore insist in reserving seats for students of own community.

In S.D.College Educational Society v. Punjab University[34], the petitioner society is a religious and linguistic minority in Punjab. The respondent issued instructions regulating admission of students in the college which was objected by the petitioner as violative of their right under Article 30 of the Constitution. The Court observed:

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34. A.I.R. 1988 P&H 164.

"From the provisions of Articles 29 and 30 of the Constitution, it is clear that right to admit students in educational institution is one of the fundamental rights conferred upon such institution run by a religious and linguistic minority which cannot be interfered with by any instructions, rules and regulations of the University or the State or by a legislature. If such an institution denies admission, there would be no question of discrimination and infringement of Article 14 of the Constitution. Such institution is not required to follow any such instructions, rules or regulations putting fetters on the right of admission of students and further non-observence of such instructions, rules and regulation would not be a ground to disaffiliate or dissentitle the minority institution to any grant or aid".[35]

In Managing Committee, M.A.K.A.P.T. Education College v. State[36], the School Examination Board insisted that students of recognised institution could only appear at examination. The petitioner established the college

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35. Id. at 170.
36. A.I.R. 1989 Pat. 248.

without the prior permission of the State Government and in contravention of State Act of 1982. The students were not allowed to appear for the examination and the Court held that the claim of the petitioner as minority will not stand until the sponsorers established that the institution in question had been established by minority community and it must establish that the institution was a minority institution in spirit and was not just a commercial venture.

In Director, Little Flower Hospital v. State[37], the admission procedure issued by the Kerala Nurses and Midwives Council was challenged by a school of Nursing run by a Christian minority. It prescribed (1) condition of eligibility for admission by way of age, (2) reserved 10 per cent of seats for scheduled castes and scheduled tribes and (3) limited the percentage of seats to be filled up by the management to 40 per cent (20% free choice and 20% on merit from community). The upper age limit fixed for purposes of admission kept out nuns from Nursing Schools and prevented them from pursuing their religious vows. The court held that this infringed the right guaranteed under Article 30 and likewise deprivation of 60 per cent of the

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37. A.I.R. 1992 Ker. 215.

total number of seats from the management also a negation of the right under Article 30.

In Md. Joywal Abedin v. State of West Bengal[38], a memo issued by Board of Secondary Education to approve pattern of special constitution, which was contrary to the special constitution enjoyed by the institution before and after establishment of the Board, was challenged. The Court held that such a memo was violative of the right under Article 30 of the Constitution.

In All Bihar Christian Secondary School Association v. State of Bihar[39], clause (i) of Section 18(3) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act 1981 was challenged as violative of Article 30(1) of the Constitution. It laid down principles and methods relating to admission and transfer of students, discipline, punishment and maintenance of record and accounts. The Court held that these were essential to maintain the efficiency in the administration of the institution and did not interfere with the right of administration.

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38. A.I.R. 1990 Cal. 193.
39. (1988) 1 S.C.C. 206.

The principle that the minority institutions shall make available at least 50 per cent of the annual admission to members of the communities other than the minority community is laid down in St.Stephen's College v. University of Delhi.[40] St.Stephen's College is a constituent college affiliated to Delhi University which is having its own admission programme providing for giving preference in favour of Christian students claiming that it is entitled to have its own admission programme since it is a religious minority institution. The issues involved in the case are: (1) whether St.Stephen's College is a minority run institution?, (2) Whether the college as a minority institution is bound by the University circulars dated June 5, 1980 and June 9, 1980 directing that the college shall admit the students on the basis of merit of the percentage of marks secured by the students in the qualifying examination? (3) Whether the college is entitled to accord preference to or reserve seats for students of their own community and whether such preference or reservation would be invalid under Article 29(2) of the Constitution?

The Court held[41] that St.Stephen's College was

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40. A.I.R. 1992 S.C. 1630.
41. The majority view is taken by M.H.Kania, K.Jagannath Shetty, M.Fatima Beevi and Yogeswar Dayal, JJ. and the minority view of M.M.Kaliwal, J.

established and administered by a minority community. As regarding the second issue the Court observed:

> "The admission solely determined by the marks obtained by the students, cannot be the best available objective guide to future academic performance. The college admission programme of St.Stephen's College on the other hand, based on the test of promise and accomplishment of the candidates seems to be better than the blind method of selection based on the marks secured in the qualifying examination. There is nothing on the record to suggest that the interview of the students conducted by the college suffer from arbitrariness or there is any vice or lack of scientific basis in the interview or in the selection. The interview confers no wide discretion to the selection committee to pick and chose any candidate of their choice. They have to select the best among those who are called for interview and the discretion is narrowly limited to select one out of every four or five.[42] The St.Stephen's College is therefore not bound by

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42. Id. at 1655 and 1656.

the circulars dated June 5, 1980 and June 9, 1980 of the Delhi University. The College need not follow the programme for admission laid down by the University nor need admit students solely on the basis of merit determined by the percentage of marks secured by the students in the qualifying examination".[43]

The Court further observed:

"Though Article 39(1) is couched in absolute terms in marked contrast with other fundamental rights in Part III of the Constitution, it has to be read subject to the power of the State to regulate education, educational standards and allied matters.[44] The right to administer does not include the right to maladminister. The State being the controlling authority has right and duty to regulate all academic matters. Regulations, however, shall not have the effect of depriving the right and duty to regulate all academic matters. Regulations, however, shall not have the effect of depriving the right of

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43. Id. at 1650.
44. Id. at 1652.

> minorities to educate their children in their own institution. That is a privilege which is implied in the right conferred by Article 30(1).[45] The right to select students is a part of administration. It is indeed an important facet of administration. This power also could be regulated but the regulation must be reasonable just like any other regulation. It should be conducive to the welfare of the minority institutions or for the betterment of those who resort to it".[46]

If students are to be selected for admission on the uniform basis of marks secured in the qualifying examination, it would deny the right of St.Stephen's College to admit students belonging to Christian community. It has been the experience of the college that unless some concession is provided to Christian students they will have no chance of getting into the college. If they are thrown into the competition with the generality of the students belonging to other communities, they cannot even be brought within the zone of consideration to interview. Even after giving concession to a certain extent, only a tiny number

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45. Id. at 1658.
46. Id. at 1653.

of minority applicants would gain admission.

As regards the third issue of according preference to their own community students in minority institutions the Court observed:

> "The collective minority right is required to be made functional and is not to be reduced to useless lumber. A meaningful right must be shaped, moulded and created under Article 30(1), while at the same time affirming the right of individuals under Article 29(2). There is need to strike a balance between the two competing rights. It is necessary to mediate between Article 29(2) and Article 30(1) between letter and spirit of these Articles, between tradition of the past and convenience of the present between society's need for stability and its need for change".[47]

The Constitution establishes secular democracy. The animating principle in any democracy is the equality of the people. But the idea that all people are equal is

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47. Id. at 1662.

profoundly speculative. In order to treat some persons equally we must treat them differently. A fair degree of discrimination in favour of minorities has to be recognised. But it is impossible to have an affirmative action for religious minorities in religious neutral way. In order to get beyond religion we cannot ignore religion. We must first take account of religion. The same principle which is applied to socially and educationally backward classes, that is the principle of protective discrimination would be applicable in the matter of minority institution".[48] Laws carving out rights of minorities in Article 30(1), however, must not be arbitrary, invidious or unjustified; they must have a reasonable relation between the aim and the means employed. The individual rights will necessarily have to be balanced with competing minority interests. In the light of all these principles and factors, and in view of the importance which the constitution attaches to protective measures to minorities under Article 30(1), the minority aided institutions are entitled to prefer their community candidates to maintain the minority character of the institutions subject of course in confirmity with the university standard. The State may regulate intake in this category with due regard

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48. Ibid.

to the need of the community in the area which the institution is intended to serve. But in no case such intake shall exceed the 50 per cent of the annual admission. The minority institution shall make available at least 50 per cent of the annual admission to members of communities other than the minority community. The admission of other community candidates shall be done purely on the basis of merit.[49]

The access to academic institutions maintained or aided by the State funds is the special concern of Article 29(2). It recognises the right of an individual not to be discriminated under the aegis of religion, race, caste, language or any of them. The fact that Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities under Article 30(1).

The line of reasoning so far followed by the courts seems to stand deviated in the present case as per the following observation of the Court:

> "The choice of institution provided in Article 30(1) does not mean that the minorities could

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49. Id. at 1663.

establish educational institution for the benefit of their own community people. It is legally impermissible to construe Article 30(1) as conferring the right on minorities to establish educational institution only for their own benefit. Even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to have relatively a homogenous society. It may lead to religious bigotry which is the bane of mankind. In the nation building with the secular character, sectarian schools or colleges, segregated faculties or universities for imparting general secular education are undesirable and they may undermine democracy. They would be inconsistent with the central concept of secularism and equality embedded in the constitution. Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life. The students and the teachers are the critical ingredients. It is there they develop respect for and tolerance of the cultures and beliefs of others. It is essential therefore, that there should be proper mix of

students in different communities in educational institution".[50]

In T.M.A.Pai Foundation v. State of Karnataka[51], the Supreme Court[52] was to pass orders with respect to the fees structure in private professional colleges and for other appropriate orders. The Court reiterated that as far as admission to the 50 per cent seats was concerned they should be filled by the allottees of the Government as per the order dated August 19, 1993 in Unnikrishnan J.P. v. State of A.P.[53]. The Court observed during the course of hearing of this writ petition that certain questions had cropped up, which had to be answered authoritatively by a larger Bench. The questions were:

"(1) What is the meaning and content of the expression 'Minorities' in Article 30 of the Constitution of India?

(2) What is the meaning of the expression 'minority educational institution' and what is the indicia to determine whether an educational institution is a minority educational institution?

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50. Id. at 1658 and 1659.
51. A.I.R. 1994 S.C. 13.
52. Consisting of Justice S.Ratnavel Pandian, S.C.Agrawal, S.Mohan, B.P.Jeevan Reddy and S.P.Bharueha, JJ.
53. A.I.R. 1993 S.C. 2178.

(3) Whether the decision of this Court in St.Stephen's College case[54] is right in saying that Article 30 clothes a minority educational institution with the power to admit students by adopting its own method of selection and that the State or the affiliating university has no power to regulate admission of students to such minority educational institutions even while permitting the minority educational institution to admit students belonging to the relevant minority to the extent of 50 per cent of its intake capacity?".

The Court answered:

> "With regard to the third question, we think, we must briefly indicate the reasons for reference to the larger bench. In St.Stephen's College v. University of Delhi, it is held that it is not permissible for the State or the affiliating University to provide that admissions to minority educational institutions should also be on the basis of merit as determined in a joint-common-entrance test and that the minority educational institution too must draw its student from the

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54. A.I.R. 1992 S.C. 1630.

common pool on the basis of merit. We entertain serious reservation with respect to the said holding. So long as the minority educational institutions is permitted to draw students belonging to that minority to the extent of fifty per cent seats even by going down the merit list, we see no reason why the State or affiliating University cannot stipulate that the general students as well as minority students must all be drawn only from the common merit pool and that even the minority community students must also be admitted on the basis of inter se merit determined on the basis of common or joint entrance test. Article 30, in our opinion, does not clothe a minority educational institution with a power to adopt its own method of selection of students. It is not a part of the minority character of the institution. The said requirement is but a piece of regulation which the state or affiliating University can prescribe in the interest of fairness and maintenance of standards".

Conclusion

The language of Article 29(2) taken as it is on the face of it, is quite plain and unambiguous. But it does become an ambiguous proposition when correlated to what is declared in Article 30(1). The reasons assigned by the Assembly for the substitution of the word 'minority' by the word 'citizen' which contain the 'intention' of the framers expressed at the time when Articles 30(1) and 29(2) were being accepted finally. Article 30(1) and Article 29(2) have to be read harmoniously, by giving the latter a restricted scope. The institutions contemplated in Article 29(2) are State-maintained and State-aided institutions and that the latter expression referred to institutions other than those contemplated in Article 30(1), ie., those not established and administered by religious and linguistic minorities. Such a construction would be in perfect accord with the intention of the framers as expressed by Pandit Thakurdas Bhargawa, the mover of the amendment substituting the word 'minority' by the word 'citizen' in Article 29(2), and endorsed by the Assembly.[55] The Constituent Assembly Debates amply demonstrate that Article 29(2) was intended to 'broaden' the rights of minorities.[56]

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55. C.A.D., Vol.V, p.370.
56. C.A.D., Vol.VII, p.898.

The right to select student is a part of administration. This power also could be regulated but the regulation must be reasonable just like any other regulation. It should be conducive to the welfare of the minority institutions or for the betterment of those who resort to it.[57] But in St.Stephens the court observed that it is legally impermissible to construe Article 30(1) as conferring the right on minorities to establish educational institution only for their own benefit[58] which is contrary to its own finding in the said cases as well as against the Sidhraj Bhai test.[59] Any provision for reservation in minority institution is necessarily in the interest of others and not in the interest of the minority institution.

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57. St.Stephen's College v. University of Delhi, A.I.R. 1992 S.C. 1630 at 1653.
58. Id. at 1658.
59. The test laid down in Sidhraj Bhai case was as follows:- Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education. This test has not been departed from since its enunciation in 1963 and the later courts have quoted the test with approval as in State of Kerala v. Mother Provincial A.I.R. 1970 S.C. 2097; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; G.F.College v. Agra University, A.I.R. 1975 S.C. 1821; Mark Netto v. Government of Kerala, A.I.R. 1979 S.C. 52; Lilly Kurian v. Sr.Lewina, A.I.R. 1979 S.C. 83; All Saints High School v. Government of A.P., A.I.R. 1980 S.C. 1042.

If the admission to minority educational institutions is to be on the basis of merit as determined in a joint-common-entrance test and that the minority educational institution must draw its students from the common pool on the basis of merit, the very purpose of the right under Article 30 is defeated because if the minority students are thrown into the competition with the generality of the students belonging to the other communities, only a tiny number of minority applicants would gain admission.

To strike the balance between the right of the minorities to admit their own students and the claim of the State to maintain standard of education, it is suggested that the entire seats in the minority educational institutions are to be reserved for the students of the same community and admission should be on the basis of merit as determined in a joint-common-entrance test or the qualifying examination as the case may be. If any seats are remaining after being filled up by the students belonging to the particular minority community they must be filled up from the common pool on the basis of merit.

By admitting a non-member into a minority institution, it does not shed its character and cease to be a minority institution. Article 30(1) implies no limitation whatever for minority institutions to restrict their 'choice' of admission to the members alone.[60]

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60. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956; Dipendra Nath v. State of Bihar, A.I.R. 1962 Pat. 101; Sidhraj Bhai v. State of Gujarat, (1963) 3 S.C.R. 837, W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465; State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079; M.M.Alikhan v. Magadh University, A.I.R. 1974 Pat. 341.

Chapter VIII

APPOINTMENT OF STAFF AND DISCIPLINARY CONTROL OVER THEM

The judiciary is consistent and categorical in its approach in holding that the right to administer under Article 30(1) includes the right to appoint the staff for running the educational institutions. The tone and temper of an educational institution revolve around its staff, on whom depends the continuity of its traditions, the maintenance of discipline and efficiency of its teaching. If the staff plays such a pivotal role in the life of an institution, their selection and appointment must invariably be the most important aspect of the right to administer an educational institution. The Courts are very much aware of this fact and they are very firm in holding that the 'choice' of minority to select staff cannot be interfered with.

Appointment of Teachers

As early as in 1958, S.R.Das, C.J. had expressed a different view, in Re Kerala Education Bill[1], on Clause 11 of Kerala Education Bill 1957. Clause 11 of the Kerala Education Bill, 1957 empowered the State Public Service

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1. A.I.R. 1958 S.C. 956.

Commission to select candidates for appointment as teachers in aided institutions. Clause 11 also laid down the procedure to be followed by the Commission in this regard. Strong objections were made, to this clause, and, in particular, Clause 2 was objected to, as it sought to thrust upon educational institutions of religious minorities, teachers of scheduled castes who could not have knowledge of the tenets of their religion and could be otherwise weak educationally.

Referring to Clause 11 along with Clause 12[2], Das, C.J. observed:

> "These are, no doubt, serious inroads on the right of administration and appear perilously near violating that right. But considering that those provisions are applicable to all educational institutions, and that the impugned parts of Clauses 9, 11 and 12 are designed to give protection and security to the ill paid teachers who are engaged in rendering service to the nation and protect the backward classes, we are prepared, as at present advised, to treat

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2. Clause 12 dealt with the conditions of service of teachers.

these clauses 9, 11(2) and 12(4) as permissible regulations which the State may impose on the minorities as a condition for granting aid to their educational institutions".[3]

The above observation has never been regarded as laying down the law correctly in subsequent cases by the Supreme Court. The words of Khanna, J. in St.Xavier's College[4] case explain well the judicial approach on Das, C.J.'s opinion:

"...in subsequent cases this court held similar provisions to be violative of Article 30(1) in the case of minority institutions. The opinion expressed by this Court in Re Kerala Education Bill was of an advisory character and though great weight should be attached to it because of its persuasive value, the said opinion cannot override the opinion subsequently expressed by this Court in contested cases. It is the law declared by this Court in the subsequent contested cases which would have a binding effect. The words "at present advised" as well

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3. Id. at 983.
4. A.I.R. 1974 S.C. 1389.

> as the preceding sentence indicate that the view expressed by this court ... in this respect was hesitant and tentative and not a final view in the matter".[5]

In a series of decisions, the Supreme Court was very determined to protect the minorities right in matters of selection and appointment. The path followed by the Supreme Court in Re Kerala Education Bill was first deviated from by the court in W.Proost v. State of Bihar,[6] where in Section 48A of the Bihar Universities Act, 1960, as amended in 1961, was challenged. The section had provided that the affiliated colleges could make appointments of the teachers only on the recommendation of the University Service Commission and on the approval of the Syndicate of the University. It further stated that no college would be competent to appoint a teacher who was not recommended by the Commission. During the pendency of the petition, the Governor of Bihar promulgated an ordinance which amended the Bihar Universities Act and added Section 48-B. The new provision gave exemption from the operation of Section 48-A to all such institutions as were established by religious and linguistic minorities. It

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5. Id. at 1429.
6. A.I.R. 1969 S.C. 465.

provided that they could make appointments subject to the approval of the commission and the Syndicate of the University. The petitioners claimed exemption from the operation of Section 48-A and sought protection of Section 48-B. The Supreme Court held that the college was entitled to the exemption under Section 48-B of the Act.

Now there arises the question whether the Court was allowing Section 48-B as a permissible regulation under Article 30(1) which meant that the appointments made by the minority institutions were not to be valid unless they were approved by an external authority, curtailing the free hand in such matters. The petitioners had claimed for an exemption under Section 48-B from the operation of Section 48-A and went to the extent of saying that they would withdraw the petition if exemption from the operation of Section 48-A was granted. Thus the immediate and limited question before the court was whether they were entitled to exemption under Section 48-B to which the Supreme Court provided the answer in the affirmative. The decision therefore cannot be regarded as an authority for the proposition that the requirement of approval of appointment from an external authority does not infringe Article 30(1).

In D.A.V.College, Jullunder v. State of Punjab,[7] clause 17 of Section 19 of the Guru Nanak University Amritsar Act, 1969, was challenged which provided that the staff initially appointed in the college affiliated to the Guru Nanak University should be approved by the Vice-Chancellor and all subsequent changes should be reported to him for approval. The court held that the petitioners were minority institutions and declared clause 17 as an interference with the right to administer their institutions according to its choice.

How the Supreme Court viewed the interference with the minority's choice in matters of selection and appointment of staff is well reflected in St.Xavier's College v. State of Gujarat.[8] In this case, certain provisions of the Gujarat University Act, 1973 were challenged as violative of Article 30(1) of the constitution. Sections 40 and 41 together provided that if the Gujarat University so decided and the State Government issued the necessary notification, all instructions, teaching and training in undergraduate courses would, in the constituent colleges, be imparted by the teachers of

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7. A.I.R. 1971 S.C. 1737.
8. A.I.R. 1974 S.C. 1389.

the University. The result was that once these provisions became operative the minority colleges would not be entitled to impart education through their own teachers, which indirectly affected their choice to appoint and have teachers of their own liking. Section 33-A(1)(b) provided for a Selection Committee[9] for recruitment of the principal and members of the teaching staff of the college which was a more direct interference with the choice of the minority institutions to appoint their own staff. Supreme Court held that Section 40,41 and 33-A(1)(b) as inapplicable to minority institutions. Khanna J. observed:

> "A law which interferes with a minorities choice of qualified teachers (or its disciplinary control over teachers and other members of the staff of the institution) is void as being violative of Article 30(1). It is, of course, permissible for the State and its educational authorities to prescribe the qualifications of teachers, but once the teachers possessing the requisite qualifications are selected by the

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9. The Committee was to include (1) in the case of recruitment of the Principal, a representative of the University nominated by the Vice-Chancellor and (2) in the case of other members of the teaching staff, a representative of the University and the Head of the Department concerned with the subject to be taught by such members.

> minorities... the State would have no right to veto the selection of those teachers. The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage and the minorities can plainly be not denied such right of selection and the appointment without infringing Article 30(1).[10]

Referring to the provision which required the inclusion of the representatives in the selection committee for recruiting the Principal and other teachers, Mathew J. observed:

> "It is upon the Principal and teachers of a college that the tone and temper of an educational institution depend, on them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the Principal and to have the teaching conducted by teachers appointed by the management after an over all assessment of their outlook and philosophy is perhaps the most important facet of the right to administer".[11]

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10. Id. at 1427.
11. Id. at 1445.

He further observed:

> "So long as the persons chosen have the qualification prescribed by the University, the choice must be left to the management. This is part of the fundamental right of the minorities to administer the educational institution established by them".[12]

In Rev.Br.A.Thomas v. Deputy Inspector of Schools[13] the Madras High Court found it to be an unreasonable interference to tell the minority institution that it could not employ a more highly qualified teacher in the interests of the better standards of education. The constitutional validity of an order issued by the Deputy Inspector of Schools directing the school run by the petitioner not to appoint secondary grade teachers in higher grade vacancies, was challenged in this case as violative of Article 30(1). The Court admitted that the Government was competent to prescribe the minimum qualification. But beyond that, exercise of any control over the power of appointment of a minority institution would amount to restriction not permitted by Article 30(1).

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12. Ibid.
13. A.I.R. 1976 Mad. 214.

Section 57(9) of the Kerala University Act, 1974, was given a restricted meaning by the Kerala High Court in Benedict Mar Gregorios v. State of Kerala.[14] Section 57(9) provided that every appointment of a teacher would be reported to the University for approval. A full bench of the court observed:

> "... we would pass Section 57(9) of the Act subject to the limitation that the University is bound to grant approval once a teacher appointed is found to possess the requisite qualifications prescribed for appointments and that any arbitrary or unwarranted refusal or approval to an appointment would violate the provisions of Article 30(1)".[15]

Section 18(3) of the Bihar non-government Secondary Schools (Taking over management and control) Act 1981 was challenged in All Bihar Christian Schools Association v. State of Bihar[16] as violative of Article 30(1) of the constitution. Clause (b) of Section 18(3) of the Act required the managing committee to make appointment

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14. 1976 K.L.T. 458.
15. Id. at 469.
16. (1988) 1 S.C.C. 206.

of a teacher with the concurrence of the School Service Board. The court observed that the expression concurrence means approval. Such approval need not be prior approval. Object and purpose underlying Clause (b) is to ensure that the teachers appointed in a minority school should possess requisite qualifications and they are appointed in accordance with the procedure prescribed and the appointments are made for the sanctioned strength. The selection and appointment of teachers is left to the management of the minority school and there is ano interference with the managerial rights of the institution. In granting approval the School Service Board has limited power. The appointment of qualified teachers in a minority school is a sine qua non for achieving educational standard and better administration of the institution. It was held that Clause (b) is regulatory in nature to ensure educational excellence in the minority school and hence not violative of Article 30(1).[17]

Clause (c) of Section 18(3) has also required the managing committee to frame rules of employment consistent with principles of natural justice and the prevailing law. The court observed that these provisions are directed to

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17. Id. at 227.

avoid uncertainty and arbitrary exercise of power to bring uniformity in administration and there would be security of employment to teachers; instead the management itself is empowered to frame rules. It was held that there was, therefore, no element of interference with the managements right to administer a minority school.[18]

Clause (d) of Section 18(3) provided that while considering the question of granting approval to the disciplinary action taken by the management of a minority institution, the School Service Board should scrutinise whether disciplinary proceedings has been taken in accordance with the rules and no more. The Court held that this was regulatory in nature and no unguided, uncanalised and blanket power had been conferred on the School Service Board.[19]

In Virendranath Gupta v. Delhi Administration[20], a linguistic minority educational institution prescribed additional essential qualification of knowledge of Malayalam for the post of Vice-Principal in addition to the

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18. Ibid.
19. Id. at p.228 and 229.
20. (1990) 2 S.C.C. 307.

qualifications in the relevant rules. That language made a compulsory subject for students upto V Standard in the institution, this was challenged on the ground of mala fides. The court held that linguistic minority institution had not only the right to establish and administer educational institution of its choice but also it had the right to conserve and promote its language, script and culture. In exercising this right it might prescribe additional qualifications for teachers employed in its institution.

A review of the cases considered above leads to the conclusion that, in the matter of appointment of teaching staff, the courts have endeavoured to protect the right of minority institutions free from arbitrary control of the authorities. At the same time, controls which do not restrict the freedom but which are merely regulatory in the interests of the institutions themselves have been upheld as valid.

Appointment of Principal/Headmasters

In an educational institution, the head plays an important role. Realisation of the purpose of the institution largely depends on his qualities. So the

appointment of the head of a minority educational institution has attracted the special consideration of the courts in the light of the constitutionally guaranteed rights.

In State of Kerala v. Mother Provincial[21], the validity of sub-sections (1), (2) and (3) of Section 53 of the Kerala University Act, 1969 was challenged which sought to regulate the appointment of Principal in Private Colleges. It provided that the post of the Principal would be a selection post and that appointment to such post would be made by the managing body from among the teachers of the college, an outsider being appointed only if there was no suitable person in the college. It further provided that the appointment would be made having regard to seniority and merit, and would be made subject to approval of the Syndicate. These provisions further said that the appointment to the lowest grade of teachers in each department of the college would be made by the managing body by direct recruitment on the basis of merit, and all such appointments would be reported to the University for approval. Appointments to the posts in intermediate

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21. A.I.R. 1970 S.C. 2079.

grades, namely, grades between the lowest and the Principal, were to be made by the managing body by promotion from among the teachers of the college on the basis of seniority-cum-merit, appointment of an outsider being made only if there was no person possessing the qualifications, prescribed for the post. Sub-section (9) of Section 53 gave a right to the disappointed teacher to make an appeal to the Syndicate of the University.

The Supreme Court held that sub-section (1), (2), (4)[22] and (9) as violative of Article 30(1) on the ground that these provisions had the effect of conferring on the Syndicate the power to veto the action of the minority institution in the selection of the Principal. In striking down the above provisions of Section 53 of the Kerala University Act 1969 the Supreme Court observed:

> "Administration means management of the affairs of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit and

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22. Under sub-section (4) of Section 53 of Kerala University Act, 1969, the right of such institution to select teachers was made subject to the control of an outside authority, the Syndicate.

> in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right".[23]

In A.M.Patroni v. Asst. Education Officer[24], the question involved was the constitutional validity of Rules 44 and 45 of Kerala Education Rules. Rule 44 provided that ordinarily a headmaster must be appointed by promotion of the seniormost teacher and Rule 45 was an exception to that in the case of upper primary schools. In order that exception could apply, the teacher who was sought to be appointed as the headmaster must be a graduate with at least 5 years' teaching experience and must have put in service equal to one-third of the service put in by the seniormost teacher. The Court observed that even if an institution was protected under Article 30(1) the State could make laws regulating the appointment of teachers in the interest of the institution. It however insisted that,

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23. Id. at 2082.
24. A.I.R. 1974 Ker. 197.

the regulation must be limited to the qualification that a teacher must possess and to the experience which he should have....Rules 44 and 45 do not relate to these two requirements.[25] The court accordingly held that the said provision interfered with the freedom of the minority community to appoint a headmaster and hence invalid.

In A.M.Patroni v. E.C.Kesavan[26], the management of a minority institution appointed a junior member of the staff who was a member of the same minority community, as the headmaster of the school in preference to another teacher who was senior to him in the service of the school. Rule 44 of the Kerala Education Rules, 1959, provided that the appointment of headmasters by the managers of aided school should ordinarily be according to seniority, and that a teacher aggrieved by the appointment would have the right of appeal to the Education Department of the state. The Director of Public Instruction, Trivandrum allowed an appeal by the senior teacher under Rule 44 and directed the school to appoint the senior teacher as the headmaster.

A full bench of the Kerala High Court held that Rule 44 of the Kerala Education Rules 1959 as violative of

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25. Id. at 201.
26. A.I.R. 1965 Ker. 75.

Article 30(1) as it sought to restrict the choice of the minority to appoint a key functionary as the headmaster.

The Court observed:

> "The post of the headmaster is of pivotal importance in the life of a school. The right to choose the headmaster is perhaps the most important facet of the right to administer a school; and we must hold that the imposition of any trammel thereon - except to the extent of prescribing the requisite qualifications and experience - cannot but be considered as a violation of the right guaranteed by Article 30(1) ... To hold otherwise will be to make the right a teasing illusion, a promise of unreality".[27]

In Manager, Corporate Education Agency v. State of Kerala[28] the issue before the court was regarding the applicability of Rule 44 of the Kerala Education Rules framed under the Kerala Education Act, 1958. This prescribed that appointment of Headmasters should

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27. Id. at 77.
28. A.I.R. 1990 Ker. 256.

ordinarily be according to seniority. The minority educational agencies in question who were the petitioners had established and were administering various educational institutions in State, was required by the State to follow Rule 44 strictly. The court held that the right to appoint the Headmaster of a school was one of the prime importance in the administration of the institution. The right of the minority to administer the educational institution of its choice requires the presence of a person in whom they would repose confidence, who would carry out their directions, and to whom they could look forward to maintain the traditions, discipline and efficiency of teaching. When once the pivotal position of the Headmaster was recognised, it must be said that the right to appoint a person of its choice as Headmaster was of paramount importance to the minority, any interference with which would denude the right of administration of its content, reducing it to mere husk, without the grain. Such an inroad could not be saved as a regulation which the State might impose for furthering the standards of education. At the same time, any choice of Headmaster, even by the minority, had to satisfy the requirements of qualifications and experience as also the essential qualities, necessary for making a good Headmaster. Power was vested in the educational

authorities on these limited grounds to refuse approval to any appointment of Headmaster made by the minority educational agency.

The decisions considered above reveal that the courts have struck a just balance between the right of the minority to choose its candidate to be head of an institution and the requirement of possession of the prescribed qualification of the chosen candidate.

Disciplinary Control Over Staff

In any system of employment assurance of reasonable conditions of service and security of job are very important and it ensures to a great extent efficiency of service. Security of tenure, good service conditions and a fair procedure in the matter of disciplinary actions will attract competent and qualified staff and must ultimately improve the excellence and efficiency of educational institutions. The tone and temper of an educational institution depend upon its staff and on them would depend its reputation, the maintenance of discipline and its efficiency in teaching. It thus apparently seems that minority institutions have under Article 30(1) a right to select staff of their own choice and to take action

against them either to enforce an orderly conduct or to enforce the terms of contract. This right involves laying down conditions of service, enforcing discipline among them, compelling performance of duties and taking action against those found recalcitrant.

But discipline is not to be equated with dictatorial methods in the treatment of teachers. The institutional code of discipline must conform to acceptable norms of fairness and cannot be arbitrary or fanciful. In the name of discipline and in the purported exercise of the fundamental right of administration and management, no educational institution can be given the right to hire and fire the teachers without any reason. Unless they have a constant assurance of justice, security and fair play it will be impossible for them to give of their best which alone can enable the institution to attain educational excellence.[29] But the courts have reiterated that standards of education are not part of the right to establish and administer educational institution and as such can be regulated. The courts have recognised that regulations can be imposed in all such matters that go to

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29. Chandrachud, C.J. observed in All Saints High School v. Govt. of A.P., A.I.R. 1980 S.C. at 1051.

ensure excellence of institution and have left enough room for regulatory authorities to prevent deterioration in standards.

The Supreme Court was called upon under Article 143 of the Constitution[30] to express its opinion on the constitutional pripriety of Clause 12(4) of the Kerala Education Bill in In Re Kerala Education Bill[31]. Clause 12(4) which provided that "no teacher in aided schools be dismissed, removed, reduced in rank or suspended by the manager without the previous sanction of the authorised officer". S.R.Das, C.J. speaking for the court observed:

> "These are (Regulations) no doubt, serious inroads on the right of administration and appear perilously near violating that right. But considering that those provisions are applicable to all educational institutions and that the impugned parts of clauses 9, 11 and 12 are designed to give protection and security to the ill paid teachers who are engaged in rendering

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30. Article 143:- "If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain opinion of the Supreme Court upon it, he may refer the question to that court for consideration and the court may, after such hearing as it thinks fit, report to the President its opinion thereon.
31. A.I.R. 1958 S.C. 956.

> service to the nation and protect the backward classes, we are prepared, as at present advised to treat these clauses 9, 11(2) and 12(4) as permissible regulations which the state may impose on the minorities as a condition for granting aid to their educational institutions".[32]

Power of dismissal, removal, reduction in rank or suspension is an index of the right of management and that is taken away by Clause 12(4).[33]

Kerala is not the only state where problems of disciplinary action have been felt. In Rev.Father Proost v. State of Bihar[34], Section 48 of the Bihar University Act 1960 was challenged which laid down that in cases of minority educational institutions, dismissal, removal, termination of service or reduction in rank of teachers had to be made with the approval of the University Service Commission and the Syndicate of the University. However, during the pendency of the petition, the Governor of Bihar promulgated an ordinance which amended the Bihar

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32. Id. at 982.
33. Id. at 983.
34. A.I.R. 1969 S.C. 469.

Universities Act and Section 48-B was incorporated into the Act by an executive action which declared that the provisions would not be applicable to minority institutions. The Supreme Court gave a declaration that it was a minority institution but nonetheless added that the right under Article 30(1) was an absolute right.

In State of Kerala v. Mother Provincial[35] Section 56 of the Kerala University Act, 1969 which regulated conditions of service of the teachers of private colleges was challenged. Section 56(2) laid down that no teacher of a private college could be dismissed, removed or reduced in rank by the governing body or managing council without the previous sanction of the Vice-Chancellor or placed under suspension by either of the body for a continuous period exceeding 15 days without such previous sanction. Section 56(4) provided that a teacher against whom disciplinary action was taken should have a right of appeal to the Syndicate of the University, and the Syndicate should have power to order reinstatement of the teachers in case of wrongful removal or dismissal and to order such other remedial measures as it deemed fit, and the minority educational institution was bound to comply with the order.

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35. A.I.R. 1970 S.C. 2079.

The Supreme Court held that these provisions clearly took away the disciplinary power from the governing body and the managing council and conferred it on the University, and thereby enabled political parties to interfere in the management of the minority institutions, and robbed the founders of the institutions of the right which the constitution guaranteed to them.

Several provisions of the Gujarat University Act relating to termination of services of the staff were challenged in St.Xavier's College v. State of Gujarat.[36] Section 51-A(1)(a) of the Act provided that no member of teaching or non-teaching staff of an affiliated college should be dismissed or removed or reduced in rank except after an enquiry in which he had been informed of the charges against him and given a reasonable opportunity of being heard and until he had been given a reasonable opportunity of making representation on any such penalty. Clause (b) of this section provided that no such penalty should be inflicted unless it is approved by the Vice-Chancellor or any other officer appointed by him. Section 51-A(2)(a)(b) made similar provisions in respect of termination of service not amounting to dismissal or

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36. A.I.R. 1974 S.C. 1389.

removal. The Supreme Court by a 7:2 majority found the provisions requiring the management to afford opportunity of hearing and representation as being merely "regulatory" but took serious note of the provision which conferred upon the Vice-Chancellor a power of approval of disciplinary action. Ray, C.J., Palekar, Reddi and Alagiriswami, JJ. held the power as bad for the reason that it was "undefined, arbitrary and unguided" and that power was intended to be a check on the administration. Khanna, J. held that the power of approval was in the nature of a veto over disciplinary control by the educational institutions and was a blanket power; and further observed:

> "No guidelines are laid down and, it is not provided that the approval is to be withheld only in case dismissal, removal, reduction in rank or termination in service is mala fide or by way of victimisation or other similar cause".[37]

Mathew, J. allowed the provision which required the management to follow a procedure before an action could be taken against a teacher but held as unconstitutional the provision which required approval of the action by an

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37. Id. at 1427.

outside agency. He observed:

> "The relationship between the management and a teacher is that of an employer and employee and passes one's understanding why the management cannot terminate the services of a teacher on the basis of the contract of employment".[38]

In Benedict Mar Gregorios v. State of Kerala[39], a full bench of the Kerala High Court upheld a provision in Section 57(9) of the Kerala University Act of 1974 which required approval of appointments by the University and a provision in Section 57(10) which provided for a right of appeal to the Appellate Tribunal by any person aggrieved by any appointment.

In Lilly Kurian v. Sr.Levina[40], the appellant was dismissed from service by the minority educational institution for misconduct. The appellant filed an appeal before the Vice-Chancellor of Kerala University under Ordinance 33(4), Chapter LVII of the Ordinance framed by

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38. Id. at 1446.
39. 1976 K.L.T. 458.
40. A.I.R. 1979 S.C. 52.

the Syndicate under Section 19 of the Kerala University Act, 1957 against the order of dismissal. Thereafter the managing board placed the appellant under suspension pending inquiry for an alleged act of insubordination. The Vice-Chancellor by an order held that the orders for dismissal and suspension were against the principles of natural justice and accordingly directed the management to allow her to act as principal. The question before the court was whether a right of appeal before the Vice-Chancellor given to the teacher of private colleges under Ordinance 33, in the matter of suspension and dismissal, was violative of Article 30(1). Sen, J. speaking on behalf of the Bench[41] held:

> "The conferral of a right of appeal to an outside authority like the Vice-Chancellor under Ordinance 33(4) takes away the disciplinary power of a minority educational authority. The Vice-Chancellor has the power to veto its disciplinary control. There is a clear interference with the disciplinary power of the minority institution. The State may regulate the exercise of the right of administration but it has no power to impose

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41. A Bench of five Judges, Chandrachud, C.J., Sarkaria, Untwalia, Koshal and Sen, JJ.

any restriction which is destructive of the right itself. The conferral of such wide powers on the Vice-Chancellor amounts, in reality, to a fetter on the right of administration under Article 30(1)".[42]

The question before the Court in Monte de Guirim Educational Society v. Union of India[43] was whether the proviso to Rule 74(2) of the Goa, Daman and Diu Grant-in-Aid Code was violative of Article 30(1). Rule 74(2) provided that the services of a permanent employee could be terminated by the management without assigning any reason on giving compensation. It further provided that an employee whose services were intended to be terminated must be given 12 months' salary if he had been in service of the institution for 10 years or more and 6 months salary must be given to the employee of less than 10 years service. The proviso said that no employee should be removed under this rule without the prior approval of the Deputy Director of Education. The court held that the conferral of the power contained in the proviso was in the nature of a veto and took away the disciplinary power of the minority

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42. A.I.R. 1979 S.C. at 61.
43. A.I.R. 1980 Goa 1.

institution. The court found that the power conferred on the Deputy Director was not only an encroachment on the minority institutions right to enforce discipline in its administrative affairs but was also an uncanalised and unguided power as no restrictions were placed on its exercise.

The Supreme Court was called upon to strike the balance between the claims of minority institutions to have autonomy in the matter of disciplinary control over their staff and the claim of the state to regulate such matters in the interest of security of tenure and the general welfare of the staff employed in such institutions in All Saints High School v. Govt. of Andhra Pradesh[44]. Sections 3 to 7[45] of the Andhra Pradesh Recognised Private

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44. A.I.R. 1980 S.C. 1042.
45. Section 3(1) of the Act required private educational institutions in Andhra Pradesh to obtain prior approval, from the competent authority, to any action intended to be taken against a teacher in the form of dismissal, removal, reduction in rank or any other kind of termination of services. Section 3(2) left it to the discretion of the competent authority to approve the proposal for action if it was satisfied that there were "adequate and reasonable grounds" for the proposal. Section 4(a) made available to the teacher against whom such action was taken a right to prefer appeal before the competent authority appointed by the government for the purpose. Section 5 could be read together with Section 4(a) as it provided for transfer of an appeal pending before an authority to the appellate authority.

(contd...)

Educational Institutions Control Act, 1975 were the subject-matter of dispute before a bench of three Judges, Chandrachud, C.J., Murtaza Fazal Ali, J. and Kailasam, J.

By a majority 2:1 the Supreme Court declared Section 3(1) and (2) as constitutionally inapplicable to minority institutions. Drawing support from Mother Provincial,[46] D.A.V.College[47] and Lilly Kurian[48] cases where similar provisions were held inapplicable, Chandrachud CJ. held:

> "Section 3(1) and (2) as conferring an untrammelled discretion to interfere with the internal management of minority institutions".[49]

Fazal Ali J. while declaring Sections 3(1) and (2) as inapplicable to minority institutions assigned the following reasons:

(f.n. 45 contd.)

Section 6 required the institutions to have prior approval in case of retrenchment of any teacher rendered necessary consequent on any government scheme relating to education or courses. Section 7 made it obligatory for the institutions to make payment of salary and other allowances on an appointed day.

46. A.I.R. 1970 S.C. 2079.
47. A.I.R. 1971 S.C. 1731.
48. A.I.R. 1979 S.C. 52.
49. A.I.R. 1980 S.C. at 1051.

First, if the State wanted to regulate the conditions of service of teachers, it should have taken care to make proper rules giving sufficient powers to the management specifying the manner in which it has to act. Second, the induction of an outside authority over the head of the institution and making its decision final and binding on the institution was a blatant interference with the administrative autonomy of the institution. Third, while giving approval, the competent authority was not required to ascertain the views of the governing body so as to know their view point and the reasons why action had been taken against a particular teacher. Fourth, the competent authority was not given any guidelines for exercise of his discretion and the power in respect of approval of action could be exercised on purely subjective satisfaction. Fifth, while under Section 4(a) right was given to the aggrieved teacher to prefer an appeal before the competent authority, no such right was acceded to the minority institution. Sixth, Section 3 specified no time limit within which competent authority was to give its approval, which was bound to create a stalemate. This could impair seriously the smooth running of the institution as the authority could sit over the matter for a long time.

Dissenting from the majority view on the question of approval of disciplinary action, Kailasam J. held that:

> "Section 3(1) and (2) were constitutionally valid as the learned Judge found sufficient guidelines for a proper exercise of the power, in the statements of objects and reasons and the preamble of the Act.

On the question of right of appeal under Section 4, which provided that any teacher who was dismissed, removed or reduced in rank, or whose pay or allowances or any of whose conditions of service were altered or interpreted to his disadvantage could prefer an appeal before the prescribed authority, all the three Judges agreed in declaring Section 4 as inapplicable to minority institutions.

The question of suspension again divided the Supreme Court and Chandrachud CJ and Kailasam J. declared Sections 3(3)(a) and 3(3)(b) as constitutionally valid saying that the provision was merely regulatory in nature. Section 3(3)(a) provided that no teacher should be placed

under suspension except when an enquiry into the gross misconduct of such teacher was contemplated. Section 3(3)(b) fixed the period of suspension to two months and provided that if the inquiry was not completed within that period the teacher would be deemed to have been restored as a teacher. Further, the competent authority was empowered to extend the period for a further period of two months if the inquiry could not be completed within the initial period of two months for reasons directly attributable to the teacher. Chandrachud CJ., noted that no educational institution can function effectively and efficiently unless the teachers observe at least the commonly accepted norms of good behaviour.

Fazal Ali J., however, declared the provision as inapplicable to minority institutions.

On the question of retrenchment also Chandrachud CJ. and Kailasam J. disagreed with Fazal Ali J. and held that Section 6 of the Act did not offend Article 30(1). The court observed that Section 6 only aimed at affording the teachers a minimal guarantee of security of tenure by eschewing the passing of malafide orders in the garb of retrenchment.[50]

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50. Id. at 1052.

Regarding Section 7, which sought to ensure regular payment of salary to the staff employed in minority institutions, all the Judges unanimously agreed that such a provision was an innocent regulatory measure which did not in anyway affect administrative autonomy.

In Indulal Hiralal Shah v. S.S.Salgaonkar[51] the constitutional validity of provisions of Rule 77.3(3)(vii) of Maharashtra Secondary Schools Code was challenged as violative of Article 30(1) of the constitution. The said rule enabled either party ie., the aggrieved teacher or the management to prefer an appeal to the Deputy Director and Sub-rule (viii) enabled the Deputy Director to decide the appeal both on facts and law and to substitute its own decision for that taken by the management of the minority institution. In view of the dictum laid down in Lilly Kurian v. Sr.Lewina[52] and St.Xavier's College v. State of Gujarat[53] it was held that the blanket powers conferred under these provisions are violative of Article 30(1) in as much as it encroaches upon a minority institution's right to administer its affairs.

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51. A.I.R. 1983 Bom. 192.
52. A.I.R. 1979 S.C. 52.
53. A.I.R. 1974 S.C. 1389.

It is submitted that the Teachers in the minority institution should have protection from the highhandedness of their employer. They shall not be discriminated against and Article 14 which guarantees every person 'equal protection of law' applied to these teachers. It should be understood that regulation of the condition of the service of teachers, fixing minimum wage for them, taking disciplinary action against them, and like matters pertaining to them do not go to interfere with the minority character of the institution, rather non-regulation of the terms of their condition would be discriminatory against them and would amount to denial of the constitutional right of non-discrimination. In Frank Anthony Public School Employees Association v. Union of India[54] Section 12 of the Delhi School Education Act which excluded the teachers and other employees of unaided minority schools from the beneficial provisions of Sections 8 to 11 which deal with 'terms and conditions of service of employees of recognised private schools' was challenged. As a result of this exclusion, (1) the administrator may not make rules regulating the conditions of service of employees of unaided minority schools (2) the prior approval of the

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54. (1986) 4 S.C.C. 707.

Director need not be obtained for the dismissal, removal, reduction in rank or termination of service otherwise than by dismissal or removal of an employee of an unaided minority school (3) against such dismissal, removal or reduction in rank, there is to be no appeal (4) neither prior nor subsequent approval of the Director need be obtained to suspend any of the employees of unaided minority school. (5) The scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other benefits which may be given to employees are subject to no regulation except that they should be contained in a written contract of service and need not conform to the scales of pay and allowances etc. of the employees of the corresponding status in schools run by the appropriate authority as in the case of other recognised private schools.

The Frank Anthony Public School, New Delhi, is a recognised private unaided minority school. The pay scales and other terms and conditions of service of the Teachers and other employees of the school compared unfavourably with those of teachers and employees of Govt. Schools. Since by virtue of Section 12, the beneficial provisions of Sections 8 to 11 of the Act were inapplicable to this

school, the Employees Association of the school challenged Section 12 of the Act as unconstitutional as being violative of Articles 14, 21 and 23. The court consisting of Chinnappa Reddy and G.L.Oza JJ., held that requirement of Section 10 that scales of pay and allowances etc. of employees of recognised private school shall not be less than employees of schools run by the appropriate authority is aimed at safeguarding the excellence of the institution. Hence applicability of Section 10 of the Act to minority institutions does not infringe Article 30(1). The court held that Section 12 which makes Section 10 inapplicable to minority institution is clearly discriminatory and violative of Article 14 of the constitution. The court observed:

> "The maintenance of educational standard and excellence of educational institutions would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualification of teachers, their salaries, allowance and other conditions of service which ensure security, contentment and decent living

standards to teachers and which will consequently enable them to render better service to the institution and the pupils cannot be said to be violative of Article 30(1). The management of a minority educational institution cannot be permitted under the guise of Article 30(1) to oppress or exploit its employees any more than any other private employee. Oppression or exploitation of the teaching staff of an educational institution is bound to lead, inevitably to discontent and deterioration of the standard of instruction imparted in the institution affecting adversely the object of making the institution an effective vehicle of education for the minority community or other person who resort to it. The management of a minority institution cannot complain of invasion of the fundamental right to administer the institution when it denies the members of its staff the opportunity to achieve the very object of Article 30(1) which is to make the institution an effective vehicle of education".[55]

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55. Id. at 731.

The Court further held that Section 8(2) which required the prior approval of the Director for the dismissal, removal reduction in rank or other termination of service of an employee of a recognised private school offends Article 30(1) and hence could not be applied to unaided minority schools. Section 8(3) gives a right of appeal against order of dismissal, removal or reduction in rank to a Tribunal constituted under Section 11, that is, a Tribunal consisting of a person who has held office as a District Judge or any equivalent judicial office. The court held that the limited right of appeal, the character of the authority constituted to hear the appeal and the manner in which the appellate power was required to be exercised made the provision for an appeal perfectly reasonable.[56]

Section 8(4) is regarding prior approval of the Director for the purpose of suspension of an employee and

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56. The line of reasoning arrived in St.Xavier's College case (A.I.R. 1974 S.C. 1389) and in Mother Provincial case, (A.I.R. 1970 S.C. 2079) are distinguishable because in the former one the objection to the reference to an Arbitration Tribunal was to the wide power given to the Tribunal to entertain any manner of dispute and the provision for the appointment of umpire by the Vice-Chancellor and in the latter case, the provision for an appeal to the Syndicate was considered objectionable as it conferred the right on the University. Those defects have been cured in these provisions involved in the present case.

Section 8(5) authorises the Director to accord his approval to suspension of an employee if he is satisfied that there are adequate and reasonable grounds for such suspension. The court observed:

> "The provision appears to be eminently reasonable and sound and the answer to the question in regard to this provision is directly covered by the decision in All Saints High School[57] where Chandrachud, C.J. and Kailasam, J. upheld Section 3(3)(a) of the Act impugned therein".[58]

In the result Section 12 was held discriminatory and void except to the extent that it makes Section 8(2) inapplicable to unaided minority institutions.

The consistent endeavour of the court to strike a balance between the constitutional obligation to protect what is secured to the minorities under Article 30(1) and the social necessity to protect the members of the staff against arbitrariness and victimisation is conspicuous in Y.Theclamma v. Union of India.[59] The issue involved in this case was whether Section 8(4) of Delhi School

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57. A.I.R. 1980 S.C. 1012.
58. (1986) 4 S.C.C. 734.
59. A.I.R. 1987 S.C. 1210.

Education Act, 1973, which deals with the management's power to suspend its employee subject to the prior approval of the Director of Education, infringes Article 30(1) of the Constitution. The Court consisting of A.P.Sen and K.N.Singh, JJ. held:

> "It cannot be doubted that although disciplinary control over the teachers of a minority educational institution is with the managements, regulations can be made for ensuring proper conditions of service for the teachers and also for ensuring a fair procedure in the matter of disciplinary action. As the court laid down in Frank Anthony Public School's case[60], the provision contained in sub-section (4) of Section 8 of the Act is designed to afford some measure of protection to the teachers of such institutions without interfering with the management's right to take disciplinary action. Although the court in that case had no occasion to deal with the different ramifications arising out of sub-section (1) of Section 8 of the Act, it struck a note of caution that in a case where

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60. (1986) 4 S.C.C. 707.

> the management charged the employee with gross misconduct, the Director is bound to accord his approval to the suspension. It would be seen that the endeavour of the court in all the cases has been to strike a balance between the constitutional obligation to protect what is secured to the minorities under Article 30(1) with the social necessity to protect the members of the staff against arbitrariness and victimisation".[61]

It was argued in the instant case that the decision in Frank Anthony Public School's case holding that sub-section (4) of Section 8 of the Act was applicable to such institutions was in conflict with the decision of the constitutional bench in Lilly Kurian's case and therefore required reconsideration. Based on this argument the court observed:

> "It would be seen that the decision of the Court in Frank Anthony Public School's case[62] with regard to the applicability of sub-section (4) of

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61. A.I.R. 1987 S.C. at 1216.
62. Supra, n.60.

Section 8 of the Act to the unaided minority educational institutions is based on the view taken by the majority in All Saints High School case[63] which in its turn, was based on several decisions right from In re The Kerala Education Bill[64] down to St.Xavier's[65], including that in Lilly Kurian.[66] It is therefore difficult to sustain the argument that the decision in Frank Anthony Public School's case holding that sub-section (4) of Section 8 of the Act was applicable to such institutions was in conflict with the decision of the constitutional bench in Lilly Kurian's case and therefore required reconsideration. The contention of the learned counsel for the respondent is that sub-section (4) of Section 8 of the Act requiring the prior approval of the Director was a flagrant encroachment upon the right of the minorities under Article 30(1) of the Constitution to administer educational institutions established by them is answered in all the earlier decisions of this court right from In re The Kerala

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63. Supra, n.57.
64. Supra, n.31.
65. A.I.R. 1974 S.C. 1389.
66. A.I.R. 1979 S.C. 52.

Education Bill, down to that in All Saints High School case which have been referred to by the court in Frank Anthony Public School's case. These decisions unequivocally lay down that while the right of the minorities, religious or linguistic, to establish and administer educational institutions of their choice cannot be interfered with, restrictions by way of regulations for the purpose of ensuring educational standards and maintaining excellence thereof can be validly be prescribed".[67]

An important question which had arisen in Christian Medical College Hospital Employees Union and another v. Christian Medical College Vellore Association and others[68], was whether Sections 9-A, 10, 11-A, 12 and 33 of the Industrial Disputes Act, 1947 were applicable to educational institutions established and administered by minorities which were protected by Clause (1) of Article 30 of the Constitution of India. In the present case, three employees were dismissed from service by the management. On an industrial dispute being raised by the Christian

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67. A.I.R. 1987 S.C. 1210 at 1216.
68. A.I.R. 1988 S.C. 36.

Medical College Hospital Employees Union in respect of the said dismissal, the Government of Madras referred it to the Labour Court for adjudication. The respondents filed writ petitions to quash the said references and for a declaration that the provisions of the Industrial Disputes Act were unconstitutional and ultra vires and were inapplicable in entirety to the minority educational institution protected by Article 30(1) of the Constitution. The Madras High Court held that it was an educational institution established and administered by a minority and Sections 9-A, 10, 11-A, and 33 of the Act would not be applicable to them by virtue of Article 30(1) of the Constitution. Accordingly the High Court quashed the said references. Aggrieved by the judgment of the Madras High Court, the petitioner filed appeal by special leave. Reversing the judgment of the High Court, E.S.Venkataramiah, J. for himself and on behalf of K.N.Singh, J. observed:

> "The Industrial Disputes Act which is a general law for prevention and settlement of industrial disputes cannot be said to interfere with the right of the minorities to establish and

administer educational institutions. The smooth running of an educational institution depends upon the employment of the workmen who are not subjected to victimisations or any other kind of maltreatment. The conditions of services of workmen including minority educational institution have to be protected in the interest of the entire society and any unfair labour practice such as 'hiring and firing', termination or retrenchment of the service of a workman on irrational grounds will have to be checked. The I.D. Act makes provisions in respect of these matters. The Act being a general law for prevention and settlement of industrial disputes cannot be construed as a law which directly interferes with the right of administration of a minority educational institution guaranteed under Article 30(1) of the Constitution. The law is not enacted with the object of interfering with any such right".[69]

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69. Id. at 45; It clearly falls within the observation of Mathew, J. in St.Xavier's College case, A.I.R. 1974 S.C. 1389, that "regular tax measures, economic regulations, social welfare legislation, wage and hour legislation and similar measures may of course have some effect upon the right under Article 30(1). But where the burden is the same as that borne by others engaged in different forms of activity, the similar impact on the right seems clearly insufficient to constitute an abridgement".

The Court further observed that an application of the provisions of the I.D. Act would not result in abridgement in the right of the management of minority educational institutions to administer such institutions because of the following reasons:-

(i) It was only when a reference was made by the Government the Industrial Tribunal or the Labour Court got jurisdiction to decide a case. It could not therefore be said that each and every dispute raised by a workman would automatically end up in a reference to the Industrial Tribunal or the Labour Court.

(ii) Secondly, the circumstances in which the Industrial Tribunal or Labour Court might set aside the decision arrived at by the management in the course of a domestic enquiry held by the management into an act of misconduct of a workman were evolved by a series of judicial decisions. It could not therefore be said that the Industrial Tribunal or the Labour Court would function arbitrarily and interfere with the very decision of the management as regards dismissal or discharge of a workman arrived at in a disciplinary enquiry.

(iii) The decision of the Industrial Tribunal or the Labour Court was open to judicial review by the High Court and by the Supreme Court on appeal.

(iv) Section 11-A of the I.D. Act which conferred the power on the Industrial Tribunal or the Labour Court to substitute a lesser punishment in lieu of the order of discharge or dismissal passed by the management could not be considered as conferring an arbitrary power on the Industrial Tribunal or the Labour Court. The power under Section 11-A of the Act had to be exercised judicially and the Industrial Tribunal or the Labour Court was expected to interfere with the decision of a management under Section 11-A of the I.D. Act only when it was satisfied that the punishment imposed by the management was highly disproportionate to the degree of guilt of the workman concerned.

(v) The Industrial Tribunal or the Labour Court had to give reasons for its decisions and such decision was again subject to judicial review by the High Court and the Supreme Court".[70]

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70. A.I.R. 1988 S.C. at 46 to 48. The Court tried to distinguish the said case from the St.Xavier's College case wherein Section 51-A of the Gujarat University Act, 1949 conferred a blanket power on the Vice-Chancellor or other officer

(contd..)

The Court further explained as to how the I.D. Act was passed to give effect to the rights of the workers specified in international standards[71] and constitutional provisions.[72] These when judicially interpreted and applied could not be held as violating the right guaranteed in Article 30(1) of the Constitution.

(f.n. 70 contd.)
authorised by him to approve or not any recommendation made by the management regarding the dismissal, removal, reduction in rank or termination of service of a workman without furnishing any guidelines regarding the exercise of that power which was in the nature of a veto power. Secondly, Section 52-A of the Gujarat University Act which required the dispute between the governing body and any of its employee connected with the conditions of service of such member to be referred to a Tribunal of Arbitration consisting of one nominated by the governing body and one nominated by the said member and an umpire approved by the Vice-Chancellor was held to be violative of Article 30(1) as it was likely to involve the management in a series of arbitration proceedings and that the power vested in the Vice-Chancellor to nominate an umpire would make virtually the Vice-Chancellor the person who would have the ultimate voice in the decision of the Tribunal of Arbitration. There was also no check on the question whether the dispute was one considered by the Tribunal of Arbitration. The court observed in the instant case that there was no room for such contingency to arise because the government decided whether the case was a fit one to the Industrial Tribunal because the circumstances in which the Tribunal might set aside the decision arrived at by the management were evolved by a series of judicial decisions and the Tribunal had to give reasons for its decision which was subject to judicial review by the High Court and the Supreme Court.

71. The International Covenant on Economic, Social and Cultural Rights, 1966.
72. Articles 41 and 42 of the Constitution.

Thus the Supreme Court correctly disallowed an exaggerated claim based on minority rights. Development of a 'minority labour law' is not necessary to realise the right protected by Article 30(1) of the Constitution.

Conclusion

The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage the institution. The right to choose the staff and to have the teaching conducted by the teachers appointed by the management after an overall assessment of their outlook and philosophy is the most important facet of the right to administer. It is permissible for the State to prescribe the qualification of teachers, but once the teachers possessing the requisite qualification are selected by the minorities the State would have no right to veto the selection of those teachers.[73]

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73. W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465; D.A.V.College, Jullunder V. State of Punjab, A.I.R. 1971 S.C. 1737; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; Rev.Bro.A.Thomas v. Deputy Inspector of School, A.I.R. 1976 Mad. 214; Benedict Mar Gregorios v. State of Kerala, 1976 K.L.T. 458.

All the more, the right to appoint the Principal/ the Headmaster of an educational institution is one of the prime importance in the administration of the institution. Therefore, the management requires a person as Principal/ Headmaster in whom they would repose confidence, who would carry out their directions, and to whom they could look forward to maintain the traditions, discipline and efficiency of teaching.[74] At the same time any choice of Principal/Headmaster even by the minority has to satisfy the requirements of qualification and experience. Thus, there should be a balance between the right of minorities to choose the Principal and other staff of their own choice and the claim of the State to regulate such appointments so as to maintain academic standards and the suggested formula is that the State can prescribe professional qualifications and experience and the minority institutions should be left with the freedom to choose personnel.

A right to select staff of their own choice implies the maintenance of discipline and its efficiency in

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74. State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079; A.M.Patroni v. Assistant Educational Officer, A.I.R. 1974 Ker. 197; A.M.Patroni v. E.C.Kesavan, A.I.R. 1965 Ker. 75; Manager, Corporate Education Agency v. State of Kerala, A.I.R. 1990 Ker. 256.

teaching which involves laying down conditions of service and enforcing discipline among them. But discipline is not to be equated with dictatorial methods in the treatment of teachers. The institutional code of discipline must conform to acceptable norms of fairness, cannot be arbitrary or fanciful. Unless they have a constant assurance of justice, security and fair play it will be impossible for them to give of their best which alone can enable the institution to attain educational excellence.[75] But the right to exercise disciplinary control over the staff belongs to the institution and cannot be vested in any external authority. But it is required that the concerned institution has to hold an enquiry before an action is taken against a staff member, otherwise the institution has to follow a fair procedure while taking disciplinary action, ie., observe the principles of natural justice. In order to strike a balance between the valuable rights that belong to the staff member and the right of the minorities to exercise disciplinary control over the staff employed in their institution, it is suggested that the conferment of a power of appeal or approval is not by itself unconstitutional, and such conferment is

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75. All Saints High School v. Govt. of A.P., A.I.R. 1980 S.C. at 1051.

impermissible which allows a power of appeal to, or approval by, an outside authority without any limitation or guidelines. Well guided power conferred upon an external agency has to be welcomed so that Article 30(1) does not become a tool of oppression in the hands of management. It is desirable that the Government or the University shall frame rules and regulations governing the conditions of service of teachers in order to secure their tenure of service and to appoint a higher authority armed with sufficient guidance to see that the said rules are not violated or the members of the staff are not arbitrarily treated or innocently victimised.[76] But while setting up such authority care must be taken to see that the said authority is not given blanket powers.[77]

The decisions of the Courts have by and large laid the correct base for the future development of the law on the above lines.

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76. All Saints High School v. State of A.P., A.I.R. 1980 S.C. 1012; Frank Anthony Public School Employees Association v. Union of India, (1986) 4 S.C.C. 707; Theclamma v. Union of India, A.I.R. 1987 S.C. 1210; Christian Medical College Hospital Employees Union and another v. Christian Medical College Vellore Association and others, A.I.R. 1988 S.C. 36.
77. State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; Benedict Mar Gregorios v. State of Kerala, 1976 K.L.T. 458; Lilly Kurian v. Sr.Levina, A.I.R. 1979 S.C. 52; Monte De Guirim Educational Society v. Union of India, A.I.R. 1980 Goa 1.

Chapter IX

CONCLUSION

Article 30 confers a special right on minorities to establish educational institutions of their own choice. This is an expression of the liberal and tolerent culture of our nation which is reflected in the Constitution. The idea is to foster unity in diversity, a unique characteristic of the Indian way of life. While promoting unity and integrity of the nation, the minorities are given facilities for realising their legitimate aspirations. To achieve this minority educational institutions are allowed to preserve general secular education along with the educational pursuits needed to conserve their culture or language. In this way it can be ensured that there is proper integration between national goals and minority aspirations. We have seen how the courts have striven to settle the accommodational balance envisaged by the Constitution. These may be reviewed now.

The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population, but to give to the

minorities a sense of security and a feeling of confidence. The great leaders of India since time immemorial had preached the doctrine of tolerance and catholicity of outlook. Those noble ideas were enshrined in the Constitution. Special rights for minorities were designed not to create inequality. The real effect was to bring about equality by ensuring the preservation of minority institutions and by guaranteeing to the minorities autonomy in the matter of administration of those institutions. The differential treatment for the minorities by giving them special rights is intended to bring about equilibrium so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true genuine equality, an equality not merely in theory but also in fact.

The majority in a system of adult franchise hardly needs any protection. It can look after itself and protect its interest. Any measure wanted by the majority can, without much difficulty, be brought on the statute book because the majority can get that done by giving such a mandate to the elected representatives. It is only the minorities who need protection, and Article 30, besides some other Article is intended to afford and guarantee that protection.

Article 30 confers a right on all minorities whether they are based on religion or language, to establish and administer educational institution of their choice. This choice includes a number of rights which help to make the object of establishment and administration a meaningful proposition. Those rights are to get recognition and affiliation in certain situations, to receive financial aid from State in certain situations, to select medium of instruction, to select management bodies, to admit students, to select staff, to take disciplinary action and to determine the kind and character of the institution. Though none of these rights is expressly made available to minorities, yet all of them are recognised by the Courts as essential for a meaningful exercise of the principal right, the right to establish and administer educational institutions. Although attempts have been made in the past to whittle down the rights of the minorities in this respect, the vigilant sections of the minority have resisted such attempt. The Courts have consistently upheld the rights of the minorities embodied in that Article and have ensured that the ambit and scope of the minority rights is not narrowed down.

Object of Establishment

A review of the judicial decisions[1] suggests that "any section of citizens" referred to in Article 29(1) and religious and linguistic minorities referred to in Article 30(1) are not identical groups of persons. Similarly, the rights to conserve language script or culture guaranteed in Article 29(1) and the right to establish and administer educational institution secured under Article 30(1) are not identical rights.[2] It can be logically followed from the review of the judicial decisions that a religious or linguistic minority may establish an educational institution with the sole object of giving a general 'secular' education wholly unconnected with any thing like conservation of language, script or culture. The language employed in Article 29(1) and 30(1) makes these Articles different from each other as to their object and that the language of one Article cannot be read as limiting the scope of the other. A reading of the two Articles show that the right to conservation of language, script or

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1. In Re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956; W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465; Dipendranath Sarkar v. State of Bihar, A.I.R. 1963 Pat. 54; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389.
2. See Mohammed Ghouse in Annual Survey of Indian Law, Vol.X, Indian Law Institute, New Delhi (1974).

culture is available to any section of citizens which term includes a 'minority'. As has already been noted in Chapter 1 of this work, the Drafting Committee of the Constituent Assembly had itself sought to make a distinction between the right of any section of the citizens to conserve its language, script or culture and the right of the minorities based on religion or language to establish and administer educational institutions of their choice. With this distinction in view, the Drafting Committee had omitted the use of the word 'minority' in the earlier part of the Draft Article 23 corresponding to the present Article 29, while it had retained the word 'minority' in the latter part of the Draft Article which later became the present Article 30. The reason for their substitution was well explained by Ambedkar, the Chairman of the Drafting Committee, who stated that the change was made to include within the term any section of such linguistic and cultural groups, for protecting their language, script or culture, who were not minorities in the technical sense, but were minorities nonetheless.[3] What Ambedkar sought to explain was that the intention of the Drafting Committee was to broaden the scope of Article 29(1) as to the persons of inherence so as to bring within

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3. C.A.D., Vol.VIII, pp.922-23.

the protection of Article 29(1) certain cultural and linguistic groups who were otherwise not politically and historically recognised minorities and thus to confine the rights made available under Article 30(1) to those minorities which he described as the minorities in the technical sense, many of whom were represented as political minorities in the Constituent Assembly also. If the right of establishment and administration of educational institutions under Article 30(1) is regarded as being limited to conservation of language, script or culture, Article 30(1) would obviously become redundant as the right to conservation of language, script or culture under Article 29(1) is itself wide enough to include within its scope a right to establish educational institutions for carrying this object into effect.

Doubts have been expressed whether the constitution envisaged such a result which the Courts have achieved by giving such a broad construction to Clause (1) of Article 30 that even institutions of general education, unrelated to preservation of language, culture or script, enjoy protection and stand in much more privileged position than is enjoyable by similar majority institutions?[4]

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4. See M.P.Jain, Indian Constitutional Law (1978), p.543.

Anomalies are pointed out[5] in having two types collegiate institution one established by linguistic or religious minorities and the other by the majority. Anomalies are explained by saying that although both the sets of institutions are, for instance, affiliated to a University, teach the curriculum prescribed, enrol students of all communities, and in many cases overwhelming majority of the students belongs to a community other than that of the members of the sponsoring community, hold examinations according to the rules and regulations prescribed by the University, and assist in the development of higher general education, on one type of institutions, the jurisdiction of the University to supervise and regulate education by laying down rules and regulations which are undoubtedly healthy, rational may be regarded as inapplicable.[6] At present, it is further pointed out, "the same curriculum is taught by both the groups of Colleges which are affiliated to the same University, rules and regulations concerning the qualifications for the appointment of teachers, for the security of the appointment of proper governing bodies and other allied matters are uniformly applied to both the

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5. See, P.B.Gajendragadkar, The Indian Parliament and the Fundamental Rights, p.55.
6. Id. at 56.

groups of colleges. This position which is undoubtedly healthy and normal, would be in jeopardy if colleges started by linguistic and religious minorities are entitled to claim immunity from the supervisory and regulatory jurisdiction of the University to which they are entitled.[7] Plea is made for reconsideration of the broad construction of Article 30(1) and for confinement of its scope to conservation of language, script and culture.[8]

It is submitted that on a plain reading of Articles 29(1) and 30(1) the intention of the framers appears quite evident that the object of establishment of educational institutions under Article 30(1) and the means of conservation of language, script or culture are not one and the same. As is already sought to be explained[9], the Constituent Assembly itself made a distinction between the different groups entitled to the protection under the respective Articles. Its intention expressed in the language of two Articles, is sufficiently clear to justify the inference that the scope of one Article cannot limit the scope of the other. Secondly, the Courts have not

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7. Id. at 56-57.
8. Ibid. See also P.W.Rege, "Religious Freedom and Educational Planning" in G.S.Sharma (ed.), Educational Planning (1967), p.133.
9. Supra, note 3.

failed to mention, they have rather taken pains to emphasise again and again, that standards of education are not part of management[10] and can be well regulated. The Courts have recognised and emphasised that regulations can be imposed in all such matters that go to ensure excellence of the education[11], and have left enough room for regulatory authorities to prevent deterioration in academic standards.

Extent of the State's Regulatory Power

Though Article 30(1) is couched in absolute terms in marked contrast with other fundamental rights in Part III of the Constitution, it has to be read subject to the power of the State to regulate education, educational standards and allied matters. In re Kerala Education Bill 1957[12], Das, C.J. observed that "the key to the understanding of the true meaning and implication of Article 30 are the words of 'their choice' and that the choice and the content of that Article is as wide as the choice of the particular minority community may make it",[13] The later courts have drawn their support and substance for

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10. See State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079. Supra, Chapter VIII, n.21.
11. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 1956. Supra, Chapter V, note 19.
12. A.I.R. 1958 S.C. 956.
13. Id. at 979.

drawing a distinction between matters which are protected and matters which the State can lawfully regulate from the note of caution which Das, C.J. had observed in the said case that "the right to administer is not a right to maladminister".[14]

The Supreme Court in Sidhraj Bhai[15] observed that the right under Article 30(1) was declared in terms absolute, was intended to be a real right, and was not to be whittled down by regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed under Article 30(1) will be but a 'teasing illusion', a promise of unreality. Shah, J. representing the Court, sought to generalise his views by laying down a test for determining the validity or otherwise of a regulatory measure.

Such regulation must satisfy a dual test - a test of reasonableness and the test that it is regulative of the

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14. Id. at 982.
15. Sidhraj Bhai v. State of Bombay, A.I.R. 1963 S.C. 540. Supra. Chapter V, notes 19 and 20.

educational character of the institution and is conducive to making the institution an effective vehicle of education.[16] Shah, J. found himself readily persuaded to reject the argument advanced on behalf of the State that reasonableness or otherwise of a regulation must be tested on the basis whether or not the same is totally destructive or annihilative of the substance of the right under Article 30(1), a test propounded by Das, C.J. in the Kerala opinion[17], Shah, J. specified the possible subject of regulation.

Definition of Minority under the Constitution

While Article 23 of the Draft Constitution, corresponding to the present Article 30, was being debated[18] doubts were indeed expressed in the Constituent Assembly over the advisability of having vague justiciable rights to undefined minorities. The Assembly chose to avoid any further elaboration and left it to the wisdom of the judiciary. The opportunity to supply the omission came in 1959, ie., In re Kerala Education Bill 1957[19], where the Supreme Court through Chief Justice S.R.Das, while

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16. Id. at 547.
17. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956.
18. C.A.D., Vol.VII, pp.891-927.
19. A.I.R. 1958 S.C. 956.

suggesting the technique of arithmetical tabulation held that a minority means a community which is numerically less than 50 per cent of the total population. The Court held that when an act of a State Legislature extends to the whole of the State, the minority must be determined by reference to the entire population of the State and any community which is numerically less than 50 per cent of the entire State population may be regarded as a minority for the purpose of the Constitution. The judicial opinion[20] of application of two tests - statistical and geographical to determine the minority status of any group is questionable.

(i) The formula is inapplicable where the population in a State is so fragmented on a linguistic or religious basis that all the groups in the State to comprise persons who are less than 50 per cent of the entire population. Ascertainment of minority is linked with the existence of a numerically dominant group within the State - the majority

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20. In re Kerala Education Bill, A.I.R. 1958 S.C. 956; A.M.Patroni v. Kesavan, A.I.R. 1965 Ker. 75; D.A.V.College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; D.A.V.College, Bhatinda v. State of Punjab, A.I.R. 1971 S.C. 1731; Pannalal v. Magadh University, A.I.R. 1976 Pat. 83; K.O.Varkey v. State of Kerala, A.I.R. 1969 Ker. 191; Supra. Chapter II, notes 21, 32, 35, 37, 39 and 40.

- the formula would loose its workability if no group emerges out to constitute more than 50 per cent of the State population, because a minority need not have to claim protection against a group which itself is a non-dominant group.

(ii) As per the formula adopted by the Courts, some members of a minority, considered as minority in the national context, would enjoy the constitutional protection whereas the members of the same minority in another State would be deprived of the same protection.[21] The Sikhs in Punjab, the Christians in Nagaland or the Muslims in Jammu and Kashmir where their numerical strength is more than 50 per cent would therefore have to forego the rights secured to the Sikhs or Christians or Muslims elsewhere in the country. If a minority establishes educational institutions in more than one State, the formula would enable only some institutions in some of the States to be able to secure the constitutional protection.

(iii) As the subject of education, having been placed in the Concurrent List by the Constitution 42nd Amendment Act,

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21. D.R.Singh, "Cultural and Educational Rights in India", in G.S.Sharma (ed.), op.cit., p.136.

1976, if a Union Law applied to the State of Jammu and Kashmir or Nagaland or Punjab where the numerical strength of Muslims, Christians and Sikhs respectively is more than 50 per cent of the total State population, these communities, in terms of the country's total population would be designated as minority but would still be majority where the law in dispute is a State law whereby these communities would have the double status of being national minorities and State majorities which may not be the real import of Article 30 of the Constitution.

Some religious denominations have sought to have themselves judicially recognised as a separate religion, independent from Hinduism, so as to be entitled to be treated as minority for the purpose of constitutional protection secured under Article 30.[22] The Courts' unwillingness to confine the benefit of Article 30(1) to the well defined religious minorities which existed at the

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22. Arya Samaj Education Trust v. Director of Education, Delhi, A.I.R. 1976 Del. 207; D.A.V.College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; D.A.V.College, Bhatinda v. State of Punjab, A.I.R. 1971 S.C. 1731; Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1958 Pat. 359; Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1962 Pat. 101; Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1963 Pat. 54. Supra. Chapter II, notes 42 and 45.

time of the framing of the Constitution and their readiness to extend the benefit to all numerically small religious groups has all but prevented them from adopting a well defined approach on claims coming before them not from established religious minorities but from religious denominations or sects seeking to be recognised as minority for entitlement to the protection of Article 30.

Proof of Minority Status

An analysis of judicial decisions[23] shows that the Courts have in some cases presumed that the institution in question had been established by a minority. It is not in consonance with the Courts own view[24] that the words establish and administer are to be read conjunctively and the exercise of the right is dependent upon the proof of

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23. State of Bombay v. Bombay Educational Society, A.I.R. 1954 S.C. 561; Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1958 Pat. 359; Methodist Boys Higher Secondary School v. Director of Public Instructions, I.L.J. 1963 Vol.II Andhra 496; Sidhraj Bhai v. State of Bombay, (1963) 3 S.C.R. 837; Aldo Maria Patroni v. E.C.Kesavan, A.I.R. 1965 Ker. 75; G.D.F. College v. University of Agra, A.I.R. 1975 S.C. 1821; K.O.Varkey v. State of Kerala, A.I.R. 1969 Ker. 191; W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465; D.A.V.College, Jullunder v.State of Punjab, A.I.R. 1971 S.C. 1737; D.A.V.College, Bhatinda v. State of Punjab, A.I.R. 1971 S.C. 1731; State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079. Supra. chapter III.
24. Azeez Basha v. Union of India, (1968) 1 S.C.R. 833; S.K.Patro v. State of Bihar, A.I.R. 1970 S.C. 259. Supra. Chapter III.

establishment. It is submitted that the proof of establishment being a condition precedent for the application and exercise of the rights under Article 30, the Court would be well advised to insist upon the proof of establishment in all such cases where a claim to administer an institution is established.

In other category of cases, where the opposite parties have especially challenged the claims of establishment, the Courts in their anxiety to insist upon the proof of establishment and to weigh the merit of the claims in the light of the proof supplied, have neither been consistent in their approach nor have they been able to lay down general propositions applicable uniformly to similar fact situations.[25]

An analysis of judicial decisions[26] shows that the name of the institution, the persons involved in the

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25. Ramani Kanta v. Gauhati University, A.I.R. 1951 Ass. 163; Dipendra Nath v. State of Bihar, A.I.R. 1963 Pat. 54; Azzez Basha v. Union of India, (1968) 1 S.C.R. 833; S.K.Patro v. State of Bihar, A.I.R. 1970 S.C. 259; Rajeshwari Memorial Basic Training School v. State of Kerala, A.I.R. 1973 Ker. 87; Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1973 Pat. 101; A.M.Patroni v. Asst. Educational Officer, A.I.R. 1974 Ker. 197; A.M.Patroni v. E.C.Kesavan, A.I.R. 1965 Ker. 75; Pannalal v. Magadh University, A.I.R. 1976 Pat. 82. Supra. Chapter III.
26. Ibid, supra, Chapter III.

establishment, the sources of funds, the subjection of an institution to legal provisions, the expression of intention, the strength of the students and staff belonging to that particular minority group have singly or in combination with each other, served as factors proving or disproving the claim of establishment.

Recognition and Affiliation

An analysis of the jidicial decisions[27] shows that although right to recognition and affiliation is not expressly recognised by Article 30(1), without recognition or affiliation there can be no meaningful exercise of the right to establish and administer under Article 30, and that recognition and affiliation can be given only on conditions that do not render that Article illusory.[28] The

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27. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956; Sidhraj Bhai v. State of Bombay, (1963) S.C.R. 837; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; D.A.V.College, Bhatinda v. State of Punjab, A.I.R. 1971 S.C. 1737. Supra. Chapter IV.
28. Shah, J. observed in Sidhraj Bhai v. State of Bombay, (1963) S.C.R. 837 at 850: "Regulations made in the true interest of the efficiency of institutions, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions...; they secure the proper functioning of the institution in matters educational". Supra. Chapter IV.

Courts have emphasised that the State cannot, by employing indirect methods, impose conditions that would adversely affect the minority character of the institution or are made on considerations which are not conducive to the making of the institution as an efficient and excellent vehicle of education.[29]

State Aid

A Government may not at all make any grants either as a matter of policy or because of compulsion of financial circumstances; but once the Government decides to make grants, it cannot attach such conditions to those grants as would destroy the right under Article 30(1). The Court observed it stands to reason that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid, the State may prescribe reasonable regulations to ensure the excellence of the institution to be aided.[30] Regulations

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29. Supra. Chapter IV.
30. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 959 at 983. With equal emphasis, however, the Court pointed out: "No educational institution can in actual practice be carried on without aid from the State and if they will not get it unless they surrender their rights they will; by compulsion of financial necessities, be compelled to give up their rights under Article 30(1). Supra. Chapter V.

which may lawfully be imposed either by legislative or executive action as a condition for receiving grant must be directed to making the institution while retaining its character as a minority institution effective as an educational institution.[31]

Governing Body

The right to 'administer' can best be exercised through a managing body in whom the founders of the institution have faith and confidence. The choice to select a managing body must be unfettered so that the founders can shape and mould the institution as they deem appropriate and in accordance with their ideas of how the interest of the community in general and the institution in particular be best served. Interference with this choice may either take place when such persons as do not belong to the minority are sought to be inducted into the managing body, thus disturbing its composition as determined by the minority or it may take place when the managing body is sought to be replaced by another body not of the choice of the minority.[32]

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31. Id. at 856-57.
32. Arya Pratinidhi Sabha v. State of Bihar, A.I.R. 1958 Pat. 359; Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1963 Pat. 54; State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079; S.K.Patro v. State of Bihar, A.I.R. 1970 S.C. 259; D.A.V.College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389. Supra. Chapter VI.

If the administration has to be improved it should be done through the agency of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interest of and for the benefit of the minority institutions concerned will affect the autonomy in the administration.[33]

Admissions

The very object of incorporation of Article 30(1) was to enable the minorities to educate their children in the institutions established by them. Around this object revolves, indeed, the whole concept of protection under Article 30(1) to which the Constitution so plainly choose to commit itself and to give effect to which the Courts have admitted a very broad interpretation to the word "choice"[34] occurring in Article 30(1). This Article seems

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33. St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389 at 1399. Ray, C.J. speaking on behalf of himself and Palekar, J. stressed greatly upon the permissible limits of a regulatory measure. Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the educational institutions and without displacing the management.
34. This choice includes as they have felt, a score of rights, which helped to make the object of establishment and administration a meaningful proposition.

to have a choice with minorities to confine admission in their institution to their own members. The reason is obvious that if the students belonging to the minority are thrown into a general competition with the other students, they would, most likely, be outnumbered by the latter, and would have but slender chances of admission. By admitting a non-member into it, a minority institution does not shed its character and cease to be a minority institution.[35] Any provision for reservation in a minority institution is necessarily in the interest of the public and not in the interest of the minority institution itself, and no such provision can meet the Sidhraj Bhai[36] test and hence it is violative of Article 30(1) of the Constitution.

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35. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956; Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1962 Pat. 101; Sidhraj Bhai v. State of Gujarat, (1963) 3 S.C.R. 837; W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465; State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079; M.M.Alikhan v. Magadh University, A.I.R. 1974 Pat. 341; St.Xavier's College v. State of Gujarat , A.I.R. 1974 S.C. 1389. Supra. chapter VII.
36. The test laid down in Sidhraj Bhai case was as follows:- "Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education.

Appointment and Disciplinary Action

The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage the institution. A right to select staff of their own choice implies the maintenance of discipline and its efficiency in teaching. It is permissible for the State to prescribe the qualifications of teachers, but once the teachers possessing the requisite qualifications are selected by the minorities the State would have no right to veto the selection of those teachers.[37]

It is upon the principal and teachers of the College that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the Principal and to have

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37. W.Proost v. State of Bihar, A.I.R. 1969 S.C. 465; D.A.V.College, Jullunder v. State of Punjab, A.I.R. 1971 S.C. 1737; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; Rev.Bro.A.Thomas v. Deputy Inspector of Schools, A.I.R. 1976 Mad. 214; Benedict Mar Grigorios v. State of Kerala, 1976 K.L.T. 458. Supra. Chapter VIII.

the teaching conducted by the teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important fact of the right to administer.[38] But assurance of reasonable conditions of service and security of job are important in any system of employment and ensure to a very great extent efficiency of service. It is too obvious to be noted that if the service conditions are good and a fair procedure is followed in the matter of disciplinary action, this must necessarily result in security of tenure, attract competent and qualified staff and must ultimately improve the excellence and efficiency of the educational institution. To prevent abuse of power by the management of minority institutions it is necessary that the State must have some kind of regulatory power so as to safeguard the interests of those employed in such institutions and to ultimately maintain a minimum level in academic standards. An analysis of the judicial decisions[39] shows that the right to exercise

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38. St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389 at p.1445.
39. In re Kerala Education Bill 1957, A.I.R. 1958 S.C. 956; State of Kerala v. Mother Provincial, A.I.R. 1970 S.C. 2079; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; Lilly Kurian v. Sister Levina, A.I.R. 1979 S.C. 52; All Saints High School v. Govt. of A.P., A.I.R. 1980 S.C. 1042. Supra. Chapter VIII.

disciplinary control over the staff belongs to the institution and cannot be vested in any external authority. But it is open to the Government or the University to frame rules and regulations governing the conditions of service of teachers in order to secure their tenure of service and to appoint a high authority armed with sufficient guidance to see that the said rules are not violated or the members of the staff are arbitrarily treated or innocently victimised.[40] The Courts have endeavoured to strike a reasonable balance in this regard.

SUGGESTIONS

Since the question as to who is a religious minority or what conditions must be satisfied by a group for being entitled to be recognised as minority is neither

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40. All Saints High School v. Govt. of A.P., A.I.R. 1980 S.C. 1042 at 1067; Fazal Ali, J. observed: "In such a case the purpose is not to interfere with the internal administration or autonomy of the institution but it is merely to improve the excellence and efficiency of education but while setting up such authority care must be taken to see that the said authority is not given blanket powers". The said view was reaffirmed in Frank Anthony Public School Employees Association v. Union of India, (1986) 4 S.C.C. 707; Theclamma v. Union of India, A.I.R. 1987 S.C. 1210; Christian Medical College Hospital Employees Union and others v. Christian Medical College Vellore Association and others, A.I.R. 1988 S.C. 36. Supra. Chapter VIII.

clear nor uniform, it is high time for the judiciary to answer the said questions in unequivocal terms. Otherwise, an amendment to Article 30 is required defining the term minority in the light of the intention of the framers of the Constitution of India. Since the subject of education having been placed in the Concurrent List by the Constitution 42nd Amendment Act, 1976, if the Parliament makes a legislation on 'education', all the linguistic groups in India will be minorities, whereby the entire popultion can claim minority status, consequent to which the incorporation of Article 30 itself becomes meaningless which may not be the real import of Article 30, and may not have been the intention of those who include these provisions in the Constitution.

It is suggested that where a minority is a minority in the historical or national context and its claim is based on religion it must be defined and ascertained in terms of the population of the whole country irrespective of its being a numerical majority in any particular State and the minority status of linguistic group has to be ascertained in terms of the population of any particular State irrespective of its being a numerical minority in terms of the population of the whole country.

A religious denomination also can be treated as a religion within the meaning of Article 30(1) provided it is having a separate organisation with doctrines and tenets and rites and practices of its own.

It is desirable that the State has to constitute an authority preferably the Minorities Commission, with proper guidelines to issue a minority certificate to all the groups which claim to be entitled to the right under Article 30(1) of the Constitution. While issuing such certificates the concerned authority is advised to look into certain factors such as the name of the institutions, the persons involved in the establishment, the source of funds, subjection of an institution to legal provisions, the expression of intention, the strength of the students and staff belonging to that particular community in determining whether such an institution is intended to be for the welfare of the particular minority.

Eventhough the Courts have reiterated through many judicial pronouncements[41] that standards of education are

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41. Hidayatullah, C.J. observed in State of Kerala v. Mother Provincial, A.I.R. 1970 s.C. 2079 at 2082; St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389. Supra. Chapters IV, VI and VIII.

not part of the right to establish and administer and as such can be regulated, it will be necessary for the judiciary to have a watchful eye on the extent of the regulatory power of the State on the right of minorities to establish and administer educational institutions, in accordance with the principles already enunciated and applied.

As regarding admissions in minority educational institutions, it is suggested that the entire seats should be reserved to the students belonged to the particular minority community, and the admission should be on the basis of merit as determined in a joint common entrance test or the qualifying examination as the case may be. If any seats are remaining after being filled up by the students belonging to the particular minority community, they must be filled up from the common pool on the basis of merit.[42]

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42. The formula laid down in St.Stephen's College v. University of Delhi (A.I.R. 1992 S.C. 1630) is contrary to the test laid down by Sidhraj Bhai case regarding the permissible limits of regulation which lays down that the regulation should be reasonable and for the benefit of the particular minority community. But any provision for reservation in minority institution is necessarily in the interest of others and not in the interest of the minority institution and hence not permissible as per Sidhraj Bhai test.

As regarding the appointment of the staff, it is permissible for the State to prescribe the qualification of teachers. It is desirable (suggested) that the University or the Government shall frame rules and regulations governing the conditions of service of teachers in order to secure their tenure service and to appoint a higher authority armed with sufficient guidance to see that the said rules are not violated or the members of the staff are not arbitrarily treated or innocently victimised. But while setting up such authority care must be taken to see that the said authority is not given blanket power.

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