LAW RELATING TO ADMISSION IN MINORITY EDUCATIONAL INSTITUTIONS IN INDIA

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In

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By

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Declaration

I do hereby declare that this thesis entitled, ***"Law Relating to Admission in Minority Educational Institutions in India"*** *for the award of the Degree of Doctor of Philosophy in Law has been originally carried out by me under the guidance and supervision of* ***Dr. V.S. Sebastian,*** *Dean and Former Director, School of Legal Studies, Cochin University of Science and Technology, Kerala. I further declare that this thesis has not been submitted either in part, or in whole, for any other degree/diploma at any other University/Institution.*

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This is to certify that this thesis entitled "**Law Relating to Admission in Minority Educational Institutions in India**", submitted by **Smt. Lekshmi. G.R.**, for the award of the Degree of Doctor of Philosophy in Law is the record of bonafide research carried out by her as part-time research scholar of School of Legal Studies, Cochin University of Science and Technology under my guidance and supervision from 14.09.2007. This thesis, or any part there of has not been submitted elsewhere for any other Degree or Diploma whatsoever.

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This is to certify that this thesis entitled "**Law Relating to Admission in Minority Educational Institutions in India**", submitted by **Smt. Lekshmi. G.R.**, for the award of the Degree of Doctor of Philosophy in Law is the record of bonafide research carried out by her as part-time research scholar of School of Legal Studies, Cochin University of Science and Technology under my guidance and supervision from 14.09.2007. All the relevant corrections and modifications suggested by the audience during the Pre submission seminar and recommended by the Doctoral Committee have been incorporated by Smt. Lekshmi G.R. in this thesis.

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PREFACE

This Study pertains to the law relating to admission in minority educational institutions in India. This is an area which needs certainty. Every year, admissions to various institutions are challenged. The future of umpteen number of students are at stake. Only when clarity with regard to the nature of the rights and conditions to be fulfilled to get the rights are made, conflicts can be prevented. Awareness in this area has to be developed. Considering the peculiar nature of rights provided under Article 30 to the minorities, there is an argument that Article 30 is absolute in nature and restrictions on this right can be only in the interests of the minorities. But there is also a counter argument that minority rights are not absolute and that all rights are absolute only to the extent of their logical extreme. Thus reasonable restrictions can be placed over Article 30. The Legal framework is not comprehensive and conflicting judicial responses add to the dilemma. Legal frame work has pitfalls which creates confusions. Though there are decisions by the highest court of the land regarding admission rights, various parts of the decisions are quoted in isolation by interested parties to assert their sides. Many States try to frame legislations regulating admissions inspired by the judicial pronouncements, which are later declared as violative of minority rights and held unconstitutional. This state of affairs has prompted me to select this area as the subject for study. Study is an analysis for a better regime of law relating to admissions in minority educational institutions in India balancing the interests of various stakeholders *viz.* minority and non minority educational institutions, both professional and elementary, students, parents and the State.

At this juncture, I thank all those who were giving me various kinds of supports in the completion of this work. I firstly bow before the Almighty who has given me the strength and determination to carry out this work and without whose blessings this thesis would not have been completed.

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schedule, he could find time to discuss with me every chapter of this thesis in detail. His valuable suggestions were of immense help in developing the ideas in the right perspective. He took extra-ordinary efforts in going through the draft chapters. His perfectionism in correcting the chapters of the thesis has helped me to complete the work in a proper manner.

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I take this opportunity to express my gratitude to my loving and supportive parents Mr. N. Gopalakrishnan Nair, formerly Chief Manager, State Bank of Travancore and Smt. C. Remadevi, Special Assistant, SBT, Jagathy Branch for their blessings and support. Their sacrifice has been behind my success. I thank Almighty for having given me parents who had always taught me to stay focused and disciplined. I also thank my sister Smt. Reshmi G.R., Assistant Manager, U. S. Technologies and her family who seems happier than me in the completion of the work. I also remember my in-laws Mrs & Mr. K.S. Viswanath and their family for their support.

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ABBREVIATIONS

A.C.	-	Appeal Cases.
A.I.I.M.S.	-	All India Institute of Medical Sciences.
A.I.R .	-	All India Reporter.
A.L.D.	-	Andra Legal Decisions.
A.L.T.	-	Andra Law Times.
A.P.	-	Andra Pradesh.
A.P.C.M.S		Andra Pradesh Christian Medical Society.
A.P.H.	-	Andra Pradesh Herald.
ACHPR	-	African Charter on Human and Peoples' Rights.
AFRC	-	Admission and Fee Regulatory Committee.
Art.	-	Article.
B.C.R.	-	Bombay Cases Reporter.
B.Ed	-	Bachelor of Education.
Bom.	-	Bombay.
C.A.D.	-	Constituent Assembly Debates.
CAHMIN	-	Adoc Committee on the Protection of National Minorities.
CEDAW	-	Convention on the Elimination of All Forms of Discrimination Against Women.
CERD	-	UN Committee on the Elimination of Racial Discrimination.
CET	-	Common Entrance Test.
Co.	-	Company.
Columbia L. Rev.	-	Columbia Law Review.
CRC	-	Convention on the Rights of the Child.

CSCE	-	Commission on the Security and Co-operation in Europe.
D.B.	-	Division Bench.
D.L.T.	-	Delhi Law Times.
DISE	-	District Information System for Education.
Doc.	-	Document
DPEP	-	District Primary Education Programme.
E.H.R.R.	-	European Human Rights Report.
EAMCET	-	Engineering,Agricultural and Medical Common Entrance Test.
ECHR	-	European Convention on Human Rights.
Ed.	-	Editor.
EPW	-	Economic and Political Weekly.
Feb.	-	February.
G.L.H.	-	Gujarat Law Herald.
G.L.R.	-	Gujarat Law Reporter.
G.O.	-	Government Order.
H.Edn.	-	Higher Education.
Harv.L.Rev	-	Harward Law Review.
HRC	-	Human Rights Committee.
HRI	-	Human Rights Instrument.
HRLJ	-	Human Rights Law Journal.
I.L.R.	-	Indian Law Review.
ICCPR	-	International Covenant on Civil and Political Rights.
ICERD	-	International Convention on the Elimination of All Forms of Racial Discrimination.

ICESCR	-	International Covenant on Economic, Social and Cultural Rights.
ILO	-	International Labour Organisation.
J.I.L.I.	-	Journal of the Indian Law Institute.
J.T.	-	Judgment Today.
K.B.	-	King's Bench.
K.C.C.R.	-	Karnataka Civil and Criminal Reporter.
K.H.C.	-	Kerala High Court Cases.
K.L.T	-	Kerala Law Times.
K.S.F.E.C.M.A.	-	Kerala State Federation of Engineering Colleges Managements Association.
KAR	-	Karnataka.
Ker.	-	Kerala.
KER	-	Kerala Education Rules.
L. F. Hospital	-	Little Flower Hospital.
L.Ed.	-	Lawyers Edition.
Ltd.	-	Limited.
M.P.	-	Madya Pradesh.
MCI	-	Medical Council of India.
MDMS	-	Mid Day Meal Scheme.
MS	-	Miscellaneous.
N.O.C.	-	No Objection Certificate.
N.Y.U.L.R	-	New York University Law Review.
NBER	-	National Bureau of Economic Research.
NCMEI	-	National Commission for Minority Educational Institutions.
NCT	-	National Capital Territory.
NIEPA	-	National Institute of Educational Planning and Development.
No.	-	Number.

NPE	-	National Policy of Education.
O.M.	-	Official Memorandum.
Org.	-	Organization.
Ori.	-	Orissa.
OSCE	-	Organisation of Security and Co-operation in Europe.
Ox. J. of Law and Religion	-	Oxford Journal of Law and Religion
P & H	-	Punjab and Haryana.
p.	-	page.
P.C.I. J.	-	Permanent Court of International Justice.
para	-	Paragraph.
Pat.	-	Patna.
Pdf.	-	Portable Document Format.
pp.	-	pages.
PwD Act	-	Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act.
Q.B.	-	Queen's Bench.
Raj.	-	Rajasthan.
RTE Act	-	Right of Children to Free and Compulsory Education Act.
RTI	-	Right to Information.
S.C.	-	Supreme Court.
S.C.C.	-	Supreme Court Cases.
S.C.J.	-	Supreme Court Journal.
S.C.R .	-	Supreme Court Report.
S.C.T.	-	Service Cases Today.
S.L.R .	-	Services Law Reporter.
Ser.	-	Series.
SSA	-	Sarva Siksha Abhiyan.
Supp.	-	Supplementary.

T.N.	-	Tamil Nadu.
TL GJH	-	The Laws(Gujarat).
TL MAD	-	The Laws (Madras).
TL RAJ	-	The Laws (Rajasthan).
TTI	-	Teachers' Training Institute.
U.K.H.L	-	United Kingdom House of Lords.
U.P.	-	Uttar Pradesh.
U.S.	-	United States.
UDHR	-	Universal Declaration of Human Rights.
UN	-	United Nations.
UNDM	-	Declaration on Persons Belonging to Racial, Religious and Linguistic Minorities.
UNDP	-	United Nations Development Programme.
Vanderbilt L.Rev.	-	Vanderbilt Law Review.
Vol.	-	Volume.
WP(C)	-	Writ Petition(Civil.).
www.	-	World wide web.

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INTRODUCTION

INTRODUCTION

Where the mind is without fear and the head is held high
Where Knowledge is free
Where the world has not broken up into fragments
By narrow domestic walls
Where words come out from the depth of truth
Where tireless striving stretches its arms towards perfection
Where the clear stream of reason has not lost its way
Into dreary desert sand of dead habit
Where the mind is led forward by thee
Into ever-widening thought and action
Into that heaven of freedom, my Father, let my country awake.

- Poet Laureate Rabindranath Tagore[1]

Education is one of the most important tools for human empowerment. Wealth and other resources are limited and becomes scarce on usage. But knowledge once acquired remains with us for ever. Moreover it gets sharpened on usage. Education is the remedy for all social evils. A nation gets civilized when its citizens are educated and learned. Ancient India had been well known throughout the world for its great universities and teachers. Great universities like Nalanda and Thakshasila are monuments of our reverence for knowledge. The basic foundations for today's advancements in every field of knowledge could be traced back to India. Great achievements in the field of mathematics, medicine, astronomy, astro-physics, law etc. owes its orgin to our land. Vedas, sruthis, smrithis etc. are examples of the richness of knowledge that we had. Well known teachers like Arya Batta, Susrutha, Charaka, Chanakya etc. lived in our country. Gurukula system of learning existed and disciples used to live in the huts of their teachers. Discipline

[1] As extracted by J.B. Sudershan Reddy, in *Indian Medical Association* v. *Union of India*, (2011) 7 S.C.C. 179 at p.197.

and dedication to work were taught there. Students lived a life of struggle, doing the works entrusted to them by the teachers and looked upon their Gurus as none less than God. Gurus used to be known and respected by the prodigies they create. Learned gurus were behind the success of all powerful kings and men of worth. Every student was proud and eager to take risks of their life to give gurudakshina to their gurus to show their love and reverence.

Even though we used to be proud of our wisdom and rich traditions, it is also shadowed by the tears of pupils less privileged. The fate of Eklavya and Karna who were denied access to education for lack of being born in the privileged class haunts us. The rigids of caste system made education alien to the lower strata of the society. Vedas and Upanishads written in Sanskrit were inaccessible to castes other than Brahmins and kshatriyas. Thus within the hindu community itself there was denial of education and access to educational institutions, to non elite groups.

During the Mughal dynasty, rulers tried to accommodate men of wisdom belonging to other communities to their cabinet. But fear of assimilation into muslim culture prevented many scholars belonging to other communities to work with them. During the British period, the divide and rule policy followed by the British widened the gap between the hindus and muslims. When the country was partitioned, the distrust became evident in the debates in the Constituent Assembly wherein, the leaders of the muslim and christian community claimed minority status and wanted separate electorates for their community. But after the partition of India, the danger of giving separate political rights was realized and in return a guarantee was given to protect the cultural and educational rights of the minority community in the form of fundamental rights.

Access to education is fundamental to achieve all other human rights. We cannot make informed choices with regard to other entitlements without education. Education provokes and stimulates thought and expression, clarifies our belief and faith and strengthens the spirit of worship. This in turn helps in empowering the nation. There were no problems when the number of students accessing education were limited, as the government could cater to the educational needs of the aspirants. But later on we find that the government found it difficult to set up

educational institutions according to the growing demands. This has led to privatization of education and mushrooming of educational institutions. The private educational institutions, those run by the minorities and non minorities alike argue for their respective rights. The need to cater to the demands of different stakeholders with regard to access to education, *viz.* students, parents, educational institutions and government has led to umpteen number of litigations and is still a murky area. Balancing the conflicting interests of the above stakeholders is a difficult task. When we assure that education is not commercialized and is open to the meritorious and needy sections of the community, we can relive the dreams of our rich heritage and can make it a reality.

The questions whether an educational institution is professional or non professional, aided or unaided, minority or non minority etc. add to the complexity of the issues involved in admission. The terms 'minority' and 'minority educational institutions' are not defined in the Constitution. The requirements to be satisfied, for claiming the protection of Art.30(1) is also not provided in the Constitution. Only when conceptual clarity with regard to the terms, minority and minority educational institution is made, the entitlements which can be bestowed on eligible institutions and groups could be clear. Even among the founding fathers of the Constitution, there was no unanimity of opinion as regards educational rights to minorities. Educational rights were given as a concession to minorities to instill in them a sense of confidence and security and to bring them on par with the non minorities. The moment equality is achieved, the special protection has to be withdrawn. In conferring educational rights to minorities, it should always be remembered that the spirit behind Art.30 is the furtherance of minority interest by maintaining the minority character of the educational institution. It should be a vehicle of education for the members of the minority community, for whom the institution has been set up with a sprinkling of non minority members admitted to it.

Now the protection given under Art.30 is being misused by various groups to get out of the regulatory mechanisms envisaged by the State. As the present legal position stands, a person belonging to minority community can set up an

educational institution and obtain minority status. Further, students from outside the State are admitted into educational institutions set up within a State claiming to be minorities. Most of the minority institutions have more non-minority students enrolled in them than minority students. Though the judiciary has affirmed the inviolability of protection to the minorities, it has allowed room for regulatory measures in the interest of better administration, regulation of admission, fixation of fees etc. There has to be a balance between need for autonomy and self determination and the need for regulation and control as far as admission rights under Art.30 are concerned.

Relevance of the Study

Access to education should be possible to the meritorious and under-represented candidates disregarding their inability to pay and other considerations. State regulations in the field of admission and related areas are necessary to ensure merit based admission taking into account, the demands of the weaker sections of the community including minorities. In the changing socio-political situations in our country, governmental machinery cannot sufficiently cater to the demands for access by the student community due to lack of resources. In this scenario, the private players in the educational sector have a crucial role to play. Private institutions are obliged to act fairly in consonance with fundamental rights as well as regulations framed by the Government. While granting recognition/affiliation, State/University is obliged to impose conditions for maintaining standards and ensuring fairness in admission. The problem of regulating access becomes even more complicated in the cases of minority educational institutions. They claim admission as a facet of administration under Art.30 and want to be out of State control. Inspite of a plethora of judicial pronouncements and legislative attempts, the indicas to determine minority and minority educational institutions and the attempts to regulate admission in educational institutions run by minority still remains a knotty problem. The admissions and its regulations results in various litigations every academic year, delaying the admissions and dragging students to the Courts. The disputes regarding admissions from various High Courts reach the Supreme Court despite the existence of many Constitutional bench decisions

settling various issues. The lack of proper response to the judicial verdicts by the legislature is also an area of concern.

Objective of the Study

The major objectives of the Study includes identifying the indicas to determine who constitute minority at the national level in India and also to set the parameters to confer the status as 'minority' on educational institutions. It is also probed into, whether the existing Constitutional, legislative and judicial scheme in India is adequate to determine minority and minority educational institutions. It is also attempted to see how far the object of the Constitution for the protection of interests of minorities as far as admission is concerned is achieved through the legislative and judicial approaches. It is also looked into whether the judicial decisions regarding admissions are in tune with the expectations of the community. The public interest involved in running an educational institution is also probed into. It is also analysed, whether the judiciary can make a clear objective of minority rights regarding admission. Yet another focus of the study is to find out whether there has been an attempt in adequately defining minority and minority educational rights at international level and whether Indian law could take any cue from the international efforts at determining minority and minority educational rights. It is also an aim of the study to find out how far admission is a facet of administration of minority educational institutions in India and how to balance the interests of various stakeholders *viz*. students, parents, educational institutions and State in conferring admission rights to minority educational institutions, both professional and elementary. The legislative and judicial approaches in the State of Kerala regarding admission to educational institutions run by communities claiming minority status is attempted while examining whether the purpose of conferring rights under Art.30 is properly used by certain sections which seems to be on par with the non minority.

Research Problem

The present Study tries to analyze whether the Indian law with regard to admission in minority educational institutions, adequately balances the interests of various stakeholders *viz*. students, parents, educational institutions and the State.

Research Methodology

This is a doctrinal study based on primary and secondary sources of legal data. The primary sources are Constituent Assembly Debates, Constitution of India, Indian legislations, rules, case laws of Indian, American and international Courts, various international human right instruments and soft laws like the Hague convention and various commission reports. The secondary sources are books, journals, conference papers, web articles, newspapers and magazine reports. The theories and opinions of various legal experts are also looked into.

Chapter Scheme

The Study is divided into eight chapters. The first chapter is an attempt to find out the indicas to determine minority at international and national levels. When a group claims absolute right over admission, claiming themselves to be minorities, it is crucial to find out whether they deserve to be termed as minorities to get such rights. The Constitution of India does not define who constitute minority. Religious and Linguistic groups are the categories which can claim cultural and educational entitlements as minorities in our country. It is worth analyzing how minority is conceptualized at the international level. There is a pragmatic approach followed by international organizations as also by eminent thinkers to keep the definitional clause for minorities open ended, so as to allow only the deserving groups to claim minority protection. In India also, there has to be attempts to confer minority status only to non-dominant groups so as to put them equally with the non minorities in 'fact and law'. Conferring minority status to groups which are dominant may lead to reverse discrimination to the non minority community. Instead of looking at the numerical status of every group at the State level, other criteria like their social, political, economical and educational status has to be looked into, to see whether a group is a minority or not. It is interesting to note that in some States in India, minority groups claim sub quota within the SEBC quota along with Art.30 protection. Too much emphasis on diversity of groups affects national unity which in turn will perpetuate disintegration tendencies and should be viewed seriously. The legislature as well as

the judiciary should take care of such conflicting claims without harming national unity.

The second chapter looks into minority educational rights at international level and the evolution of minority educational rights in India. It also looks into the indicas to determine minority educational institutions in India. The claims of the minority community that, educational rights in admission are absolute in nature and hence they can claim admission rights as a facet of administration, should be looked into in the light of the debates in the Constituent Assembly. Reconciliation of Art.29 and Art.30 negates the claims of minority that, since Art.30 does not prescribe any restriction under it, it is absolute in nature. As conferment of status as minority institution bestows an educational institution with multitude of rights, identification of indicas to confer such status should be laid down. The legislative attempts to define minority educational institutions have not been effective so far. The National Commission for Minority Educational Institutions Act, 2004, confers an educational institution established or administered by a person or a group belonging to minority as a minority educational institution. The Central Educational Institutions (Reservation in Admission) Act, 2006, also defines minority educational institution as the same as defined in National Commission for Minority Educational Institutions Act, 2004. The intention of the founders of the institution, the achievement of object of furtherance of the interests of the minority community etc. should be reflected in the criteria to be laid down to confer status as minority educational institution. There should be criteria with regard to the minimum number of members of the minority community to be admitted in a particular educational institution, to confer them with minority status. If such criteria are not fulfilled, an educational institution should be allowed to function under Article 19 only and should not be given rights under Art.30 of the Constitution. It should always be remembered that the object of conferring minority status upon an educational institution is to enable it to work for the upliftment of the members of its community and not to create a fraud upon the Constitution.

In Chapter three, attempt is made to analyse the extent to which admission can be considered as a facet of administration of professional educational institutions in India. Every year admission to unaided professional educational institutions run by minority comes up for judicial scrutiny for various reasons. Minority managements claim autonomy in the matter of admission of students of their choice. They consider free ship, quotas in admission and appointment of Committees to regulate admission and fixing of fees as violative of their minority right to administration. Quotas in admission, consideration of local needs and essentially certificate are other areas of dispute raised by the minority community.

Scheme of cross subsidy, where by there shall be 50% government seats and 50% payment seats in private professional educational institutions is favoured as a better option by some educationalists, commenting that it will ensure merit based and non exploitative admission, at least to half of the available seats. But when the scheme is put into practice, there is a disadvantage that majority of the students who get better position in the rank list are affluent students who could easily outscore their counterparts from poor background with less facilities. The effect of the scheme would be that top rank holders from rich background will study at the cost of the students from lesser surroundings who will be compelled to opt for payment seats. The above scheme which found approval in *Unnikrishnan's* [2] case was overruled in *TMAPai* [3] wherein the Court laid down that private educational institutions have the right to rational selection of students and surrendering the total process of selection to the State is unreasonable. In *Islamic Academy*[4], the Supreme Court interpreted the word common entrance test suggested in *TMA Pai* and laid down that government has to compulsorily hold entrance examinations. Attempt has been made to identify the issues involved in balancing the claims of different stakeholders, such as, students, parents, educational institutions and State as far as admission rights to professional and elementary educational institutions run by minorities are concerned.

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2 *Unni Krishnan. J. P.*, v. *State of Andra Pradesh*, (1993) 1 S.C.C. 645.
3 *TMA Pai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481
4 *Islamic Academy of Education* v. *State of Karnataka*,(2003) 6 S.C.C. 697.

In order to overcome the effects of the judicial scheme in *TMAPai* [5] that unaided professional educational institutions cannot be compelled to follow any other criteria except merit, the Parliament has come up with the 93rd amendment to the Constitution which inserted clause 5 to Article 15[6] enabling the State to make special provisions in admission in aided and unaided educational institutions including professional educational institutions except minority educational institutions, for the advancement of socially and educationally backward classes and scheduled castes. In the fourth chapter the impact of reservation in professional educational institutions in the light of the 93rd amendment to the Constitution on the basic structure and other provisions of the Constitution is looked into.

Right to Education which was earlier part of fundamental rights under Article 21, got enumerated under Article 21A after the 86th amendment to the Constitution. Children of the age group of 6-14 years have a fundamental right to get free and compulsory education under this Article. Right to Free and Compulsory Education Act, 2009, has been enacted pursuant to Article 21A to enable children to realize the rights conferred under the Article. Minority educational institutions have been exempted from the purview of this Act after judicial pronouncements. The constitutionality of the different provisions of the 2009 enactment and rules framed there under and the corresponding rules framed by the State of Kerala and its impact on different stake holders as far as right to admission is concerned, is critically analyzed in the fifth Chapter.

The governmental machinery in Kerala has attempted several times to give a fresh treatment to the concept of minority and minority educational institutions so that the real purpose of determination of minority and conferment of minority rights is achieved. The criteria for determination of minority and conferment of educational rights should not be mere numerical inferiority of certain religious or linguistic groups. Dominance in the educational field when compared with the non

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5 *Supra* n. 3.

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

minority should be a relevant factor in determining whether a group should be conferred minority status so as to enable them to avail minority educational rights. Attempts by State of Kerala in regulating admission in professional educational institutions and its impact on right of admissions by minority managements and students are examined in the sixth Chapter.

In India, educational rights are available to minority community as part of fundamental rights. Moreover if sufficient empirical data is available, they can claim rights as socially and educationally backward classes also. In the seventh chapter, comparative analysis of the American position regarding admission to minorities, in institutions of higher education in United States of America is attempted. In recent debates on admission to educational institutions in the U.S., the notions of equity and access go beyond minority to diversity and affirmative action has become race exclusive.

The important issues and findings arrived at after perusal of different dimensions of the issues involved in admission in professional and elementary educational institutions is reflected in the last chapter.

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Chapter - 1

MINORITY STATUS: MEANING AT NATIONAL AND INTERNATIONAL LEVELS

Chapter - 1

MINORITY STATUS: MEANING AT NATIONAL AND INTERNATIONAL LEVELS

"When you use *the term minority or minorities in reference to people, you're telling them that they're less than somebody else".*

Gwendolyn Brooks[1]

1.1. Introduction

Determination of minority and the entitlements which are to be conferred upon them is an area of conflicting views. Conceptual clarity on who constitute minority is lacking both at national and international levels. Identifying minorities helps in determining the population groups that are entitled to protection of minority rights[2]. This in turn enables confining protection to the deserving groups [3] alone.

The focus of this Chapter is an attempt to find out the meaning and criteria adopted to identify 'minority' at the international and national levels. The essential components of a working definition of 'minority' attempted to by the UN and other international agencies are also enquired into with a view to achieve conceptual clarity to the term 'minority'.

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1 Gwendolyn Brooks is an American Poet. See *http://www.brainyquote.com/quotes/quotes/g/gwendolynb 391423.html#JOGwYuAiEEV* visited on 27.9.2008.

2 Akermark Spiliopoulov Athanasia, *Justifications of Minority Protection in International Law*, Kluwer Law International, (1996), p.27. Justification for special provisions to safeguard minority interests is provided based on three considerations. They are cultural pluralism, inherently disadvantaged position of a minority because of numbers or because of non dominance and affirmative action of the State to weaker sections.

3 Kymlicka Will, *Multi Cultural Citizenship: A Liberal Theory of Minority Rights*, Oxford University Press,(1995), p.7. See also, Chandra Satish (Dr.), *Minorities in National and International Laws*, Deep and Deep Publications, NewDelhi, (1985).

Identification of minorities at international level raises the following questions *viz*.(1) Can all the population groups in a State which are numerically of equal level without any significant majority group claim protection of minority status at the international level? (2) Whether State is the exclusive point of reference to determine a minority and (3) Whether regional minorities are to be recognized when they are part of the majority at the national level?[4] .

Norms determining minority at international level will help us to have a meaningful understanding of the conceptual requirements of minority at the national level with a special focus on their educational rights and admission to general and professional educational Institutions in India. Balancing the interests of all the stakeholders in admission to minority educational institutions, without violating the principles of equality, is attempted to in the succeeding chapters.

1.2. 'Minority' at the International Level

From tribal to the modern societies, there are smaller groups of people different from the larger groups in language, belief, customs and usages, sharing among them a common territory, and who are often subjected to differential treatment to the extent of being excluded from certain opportunities. The inferior lot of these smaller groups with distinct identities, would accept denial of equal opportunities to them as normal. Thus, the movement of peoples, religions, ideologies etc. has led to the formation of minorities around the world. In modern times, minority formation at international level can be traced to more specific causes[5]. The numerically dominant often monopolise power and induce minorities

[4] See generally, Raikka Juha (Ed.), *Do We Need Minority Rights? Conceptual Issues*, Martinus Nijhoff Publishers, Kluwer Law International,(1996). See also, Claude Inis L., *National Minorities; An International Problem*, Harvard University Press, Cambridge,(1955).

[5] Henrard Kristin, *Devising an Adequate System of Minority Protection*, Martinos Nijhof Publishers, Kluwer Law International,(2000),p.18. (1) European migration and settlement in other countries marginalizing indigenous peoples, (2) forced migration of Africans during Atlantic slave trade, (3) migration of Indian indentured labour for sugar plantations in Mauritius, Natal, the Caribbean, Guyana and Fiji, and of merchants, clerks and soldiers to support the British colonial rule in Asia and Africa, (4) post colonial migration from the South to the North in search of better opportunities, (5) changing boundaries of nation states in the wake of the post world war 1 and break up of Austro-Hungarian and Turkish empires are some of the reasons. To these may be added the post colonial emergence of States with artificial boundaries and the recent break-up of the USSR and Yugoslavia.

to assimilation and coerce them to submission. The resistance to monopoly and coercive measures by the minorities is met with threat of extermination.

The need for definition of minorities arises because when a group claims special protection, question as to whether the group comes within the ambit of protection of minorities is crucial[6]. During the seventeenth and eighteenth centuries, the term 'minority' merely focused on religious minorities. However, the rights of ethnic and linguistic minorities gradually started getting recognition at the international level and it got reflected in the domestic laws of various countries like Austria[7], Hungary[8] and in the Constitution of the Swiss Confederation of 1874[9]. The civil and political rights of national minorities came to be addressed in the nineteenth century.

1.3. Minority and its Characteristics

Minority group can be broadly defined as a subordinate group whose members have significantly less control or power over their lives than members of a dominant or majority group. Minority is not limited to mathematical minority. Minority could be a group that experiences narrowing of opportunities in terms of success, education, wealth etc. compared to their numbers in the society[10]. The characteristics of a minority group broadly include distinguishing physical or cultural traits such as skin colour or language, unequal treatment and less power over their lives, involuntary membership in the group, awareness of subordination, strong sense of solidarity etc.

1.4. Components of Minority Definition

As minority status confers upon groups certain special privileges, only the deserving categories alone should be conferred with such rights. There have been

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6 *Supra* n.2, pp. 86-96.

7 Article 19 of the Austrian Constitutional Law (1867) is a good example of recognition and protection of ethnic and linguistic minorities under the constitutional law of a country.

8 Hungary's Act XLIV of 1868.

9 The latter stipulated that the three main languages of Switzerland *i.e.* German, French and Italian had equal rights in the civil service, in legislation and before the Courts.

10 *http://academic.udayton.edu/race/minoro/.htm,* visited on 27.5.2007.

various attempts at the international level to identity the components of minority so that only the deserving groups come within the ambit of the protection[11].

1.5. League of Nations on the Components of Minority

There were several attempts by international organizations to define minorities. The efforts by the League of Nations regime is one of the earliest in this direction. The Convention of League of Nations does not contain any specific provisions on minority rights[12]. When the League of Nations was established, there were no general provisions on minority protection in its Covenant. Protection of minority groups under the auspices of the League were guarantees embodied in mandates/trust territory treaties and those imposed on the defeated states by the Peace Treaties[13]. Minority rights assured people who found themselves in different states as a result of redrawing of borders that they would have the right to continue with their own languages and religious practices. Thus minority protection under the League was primarily a device for securing international supervision of new states[14]. The League of Nations had limited success in assuring the minority guarantee clauses because of lack of effective enforcement mechanisms for such guarantees[15].

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[11] Rehman Javaid, *The Weaknesses in the International Protection of Minority Rights*, The Kluwer Law International,(2000),pp.15-20. See also, Fischer Eric, *Minorities and Minority Problems*, Vantage Press, Chicago, (1980); Gittler Joseph.B., *Understanding Minority Groups*, John Wiley & Sons, Newyork, (1956).

[12] Pentassuglia Gaetano, *Minorities in International Law: An Introductory Study*; European Centre for Minority Issues, Council of Europe,(2002), pp.27-29. See generally, *http://webcli.ncl.ac.-uk/2009 /issue1/pdf/smithla.pdf* visited on 5.4.2007.

[13] In entrustment of the League with the protection of minorities in the new Europe, a special clause was inserted in the Peace Treaties of Versailles, Neuilly, St. Germain and Trianon by which Poland, Czechoslovakia, Greece, Romania and Yugoslavia agreed to protect minorities within their new borders. The Treaty of Peace between the United States of America, the British Empire, France, Italy, Japan and Poland, concluded at Versailles in 1919, was the first of the peace treaties enshrining minority rights.

[14] The League developed an elaborate enforcement mechanism for the minority protection guarantees. A special minorities section was established to consider minority complaints before remitting them to a tripartite committee of the Council of the League. Ultimately, a Rapporteur on minority questions would examine the case, if admitted, and make a report to the Council with recommendations for remedial action.

[15] In 1929, about three hundred petitions reached Geneva. About half of these were admitted but only eight reached the Council. In only two instances did the President of the League sat with two colleagues in each case. No Council member with an interest in the case or a similar ethnic origin to either the State or minority concerned could hear the case. The Council eventually proposed action to be taken, *viz.* requesting undertakings from the States concerned to the effect that the offending behaviour would cease.

Minorities under the League of Nations were identifiable sectors of population often living near newly delineated borders. The components of 'minority' has developed through judicial pronouncements made by the Permanent Court of International Justice[16] under the League of Nations regime. In *Greco-Bulgerian Community Case* in 1930[17], the P.C.I.J. gave a rather elaborate and clear description of the concept 'community' which links objective and subjective criteria together with a purposive criterion of preserving and developing special characteristics[18]for protection of minority rights. The Court in para 30 of the instant case held that the community is a group of persons living in a given country or locality, having a race, religion, language and tradition of their own and united by its identity of race, religion and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and tradition of their race and rendering mutual assistance possible. Thus the Court held that the existence of minorities is a question of fact and not a question of law and it does not matter whether according to the local law a group is considered as a minority to give protection.

In *Access to German Minority Schools in Upper Silesia*[19], Court upheld Article 74 of the Convention between Germany and Poland concerning Upper

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16 Hereinafter referred to as P.C.I.J.

17 *Advisory opinion on the Greco Bulgarian Convention, P.C.I.J. Reports Series* B., No. 17(1930), p.19 dealing with the interpretation of the Convention between Greece and Bulgaria respecting reciprocal emigration, signed at Neuilly-Sur-Seine on November 27th, 1919 regarding the question of 'the communities'**.** The Council of the League of Nations, considered the letter addressed by the President of the Greco-Bulgarian Mixed Commission to the Secretary-General of the League on December 19th, 1929, requesting the Secretary-General, in the name of the Bulgarian and Greek Governments, that an advisory opinion be provided from the Permanent Court of International Justice, for the use of the Mixed Commission,with regard to the interpretation of those clauses of the Greco-Bulgarian Convention signed on November 27th, 1919, which relate to 'communities'. P.C.I.J. gave the opinion that 'the existence of communities is a question of fact; it is not a question of law' and that 'from the point of view of the Convention (of 1919 between Bulgaria and Greece) the question whether according to local law a community is or is not recognized as a juridical person need not be considered…'.

18 Objective factors include separate ethnic, religious or linguistic features. Subjective and purposive factors include collective will, loyalty and determination for furtherance of minority character. See generally, Henrard, Kristin, *Devising an Adequate System of Minority Protection*, Martinos Nijhof Publishers, Kluwer Law International,(2000).

19 *Advisory Opinion* P.C.I.J. (ser. A/B) No. 40 (May 15) (1931), para 10.The Court held that admissions to the German Minority schools in the case of children who passed the tests for the school years 1926-1927 and 1927-1928 remain valid and fully effective; and applications for admission submitted subsequently, even in the case of those who failed to pass the tests, fall

Silesia which lays down that the question whether a person does or does not belong to a racial, linguistic or religious minority may not be verified or disputed by the authorities.

Further principles for the protection of minorities were clearly laid down by the P.C.I.J. in the case of *The Minority Schools in Albania* [20]. In this case the

under Articles 74 and 131 of the Convention as construed by the Court and must, be dealt on the basis of the declarations of the persons responsible for the education of the children. The Court defined community as a group of persons living in a given country or locality having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

[20] *Minority Schools in Albania, Greece* v. *Albania, Advisory Opinion*, 26. P.C.I.J., Ser. A./B., No. 64, (1935). In this case the issues relate to the Albanian Declaration of October 2nd, 1921, concerning the protection of minorities and the general principles of the minorities treaties regarding the conception of "equality in law" and "equality in law and in fact" and the extent of State obligation to allow minorities to establish and maintain private schools. In January 18th, 1935, the Council of the League of Nations adopted a resolution in consideration of the Albanian Declaration made before the Council on October 2nd, 1921. Article 5 of the Declaration states that Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. They shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein. Within six months from the date of the Declaration, detailed information was to be presented to the Council of the League of Nations with regard to the legal status of the religious communities, schools, and associations of racial, religious and linguistic minorities and Albanian Government promised to take into consideration any advice it might receive from the League of Nations with regard to this question. According to Articles 206-207 of the Albanian Constitution of 1933, the instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is free and compulsory for all Albanian nationals and private schools of all categories which are in operation will be closed. Albanian Government contends that, as the abolition of private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with Article 5, first paragraph, of the Albanian Declaration. The questions raised were, whether regard being had to Declaration of October 2nd, 1921, as a whole, the Albanian Government is justified in its plea that the abolition of the private schools in Albania constitutes a general measure applicable to the majority as well as to the minority; whether it is in conformity with the letter and the spirit of the stipulations laid down in Article 5, first paragraph, of that Declaration; and if so, whether the Council of the League of Nations can, on the basis of the second paragraph of the said Article, formulate recommendations going beyond the provisions of the first paragraph. In P.C.I.J. Series A/B No.64,(1935), p.17 the Court held : "To secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary…The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a

P.C.I.J. made the following important observations which provide justification for the provision of special measures for minorities:

> The equality between members of the majority and of the minority must be an effective, genuine equality, that is the meaning of this provision[21] .

In the instant case, the attempt by the State to abolish private schools as a general measure applicable to minorities and majorities alike, was rejected by the Court and provisions for special measures for minorities were upheld stating that minorities cannot be compelled to renounce that which constitute the very essence of its being[22].

The basic principle that non-discrimination is a necessary but not sufficient condition for protection of equal rights of minorities now forms the basis of all national and international protection regimes for minorities.

1.5.1. Special Treaties on Minorities and Supervision by League of Nations

The provisions concerning minorities may be divided into those that confer or protect human or common rights[23], and those designed to preserve specific characteristics of the minority to preserve its identity[24]. The treaties placed the

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majority and a minority if the latter were deprived of their own institutions and were consequently compelled to renounce that which constitutes the very essence of its being as a minority''.

21 See *Minority Schools in Albania, supra* n.20, wherein the Court held that there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law. Equality in law precludes the discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and the minority, whose situations and requirements are different, would result in inequality in fact, treatment of this description would run counter to the first sentence of paragraph 1 of Article 5.

22 *Supra* n. 20.

23 Among the common rights were the acquisition of nationality based on habitual residence, or birth in the national territory of parents domiciled there or birth there without indication of any other nationality; the protection of life or liberty; the free exercise in public or private of any creed, religion or belief where practices are not inconsistent with public order or morals; admission to public employment, commerce, industry or the professions on a basis of equality with other citizens. Common rights are an expression which brings out the fact that human rights belong to all individual persons regardless of their group or category or place of abode.

24 Identity rights of minority nationals include an equal right to establish, manage and control, at their own expense charitable, religious or social institutions, schools or other educational institutions and to have an equitable share in public grants for such purposes. Further the minority language was to be used freely and instruction in schools was to be conducted in the

protection of minorities under League of Nations guarantee and their provisions could not be modified without the assent of majority members of League of Nations[25]. The major drawback of the rules formulated by League of Nations is that it only dealt with certain States and specific population groups, which were adhoc minorities without any discussion of a general definition[26].

1.6. The United Nations on the Components of Minority

The UN system has not been able to adequately define minority[27]. This failure partly derives from the desire to have single universally applicable

minority language in towns or districts where a considerable portion of the nationals of the country, whose mother tongue is not the official language, reside.

[25] It adopted certain principles in October 1920. The provisions for the protection of minorities were made inviolable. The right of calling attention to any infraction or danger of infraction was reserved to the members of the Council. But this does not exclude the right of minorities themselves or even of States not represented on the Council, to call the attention of the League to any infraction or danger of infraction.

[26] Dinstein Yoram (Ed.), *The Protection of Minorities and Human Rights*, Kluwer Academic Publishers,(1992), pp.1-32. Early steps to place minority rights within the broad framework of non- discrimination and to adopt indirectly the principle of minority integration, was taken by the Institute of International Law in a resolution adopted in October 1929. In effect it restates the various rights and freedoms, specifically assured to minorities in the treaties and declarations as being those to which every individual is entitled. Members of minorities are then included in this entitlement, though they are not expressly mentioned in the resolution; further the distinction between common rights and identity rights disappears.

[27] This was evident from 1947, when it created a Sub-Commission on Prevention of Discrimination and Protection of Minorities, through 1966 when Article 27 of the International Covenant on Civil and Political Rights specifically provided for the rights of persons belonging to minorities to 1992 Declaration on Minorities. See generally, *http://webcli.ncl.ac.uk/-2009/issue/pdf/smithla.pdf* visited on 5.4.2007. Human rights have been a key feature of the work of the United Nations. Minority rights, were superseded by the new notion of universal human rights intended to solve minority issues by guaranteeing equality to all peoples, thus alleviating the need for special treatment of certain groups within a State. Many vulnerable groups have found the international provisions to be inadequate and have suffered gross violations of their human rights. Minority groups find themselves in the position of having to individually claim overtly 'group or community rights' as individual rights. The initial idea was that the Commission and Sub-Commission would make a thorough study of the 'problem of minorities' in order that the United Nations could subsequently take effective measures for the protection of racial, national, religious or linguistic minorities. In 1950 one member of the Sub-Commission submitted a draft resolution (U.N. Doc. E/CN.4/Sub.2/108) under which the Secretary-General would have been asked to circulate to the Sub-Commission a draft Convention, or a draft protocol (to be attached to the International Covenants on Human Rights) aimed at the protection of ethnic, religious and linguistic groups. This proposal was subsequently withdrawn. Consequently, no universal minority clause has been adopted. Nevertheless, the concept of universal rights provided some relief to minorities. The Declaration firmly entrenched the concept of non-discrimination as a corollary to the guarantee of equal rights for all. Moreover many of the League's 'minority provisions' find general expression in the Universal Declaration. They are expressed as 'individual rights', not group rights. The fate of minorities thus became dependant on the fate of individual member of the minority itself. Equality, and thus a prohibition on discrimination of any kind, is at the foundation of the human rights policy of the United Nations. Every individual is accorded basic human rights which

comprehensive formulation applicable to all minority situations and status leaving scope for its accommodating the specifics of every particular country's situation.

1.6.1. UN Sub Commission on the Prevention of Discrimination and Protection of Minorities on the Definitional Query

In a definition of 'minority' suggested during the early debates in the UN, the Sub Commission on the Prevention of Discrimination and Protection of Minorities proposed that the term 'minority' should 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 the rest of the population. Further, such minorities must be 'loyal to the State'[28]. This view on

previously had been the prerogative of minority groups. Nevertheless, it can be argued that the Universal Declaration covered minority rights insofar as many minority issues are included expressly or impliedly. To illustrate this, consider freedom of expression (Article 19), which does not limit expression to the official language of State; freedom of religion (Article 18), which includes the freedom to manifest religious beliefs in community with others; freedom of association (Article 20), which would facilitate meetings of minority peoples; and the prohibition on discrimination on grounds of race, colour, language, religion, national or social origin, birth, or other status (Article 2), all characteristics which may define minority persons within a State. Minority rights were undoubtedly disregarded in the early days of the United Nations while the universal regime was established. Minority tensions did not seem to dissipate. Although many of the rights and freedoms have group characteristics, the provisions of the UDHR proved incapable of being used to preserve minority groups in the manner they desired, being drafted to protect individuals not groups.

[28] The Sub-Committee in its report to the Commission on Human Rights reported : "Protection of minorities is the protection of non-dominant groups, which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. The protection applied equally to individuals belonging to such groups and wishing the same protection. It follows that differential treatment of such groups or of individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole" (as cited in *St. Xavier's College* v. *State of Gujarat*, A.I.R.1974 S.C. 1395). The aforesaid report was accepted by the Permanent Court of International Justice in a case relating to *Minority School in Albania* which arose out of the fact that Albania signed a Declaration relating to the position of minorities in the State. Article 4 of the Declaration provided that all Albanian nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion. Article 5 further provided that all Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future charitable, religious and social institutions, schools and other educational establishments with the right to use their own language and to exercise their religion freely therein. Subsequently, the Albanian Constitution was amended and a provision was made for compulsory primary education for the Albanian nationals in State schools and all private schools were to be closed. The question arose before the Permanent Court of International Justice was as to whether Albanian Government was right in abolishing the private schools run by the Albanian minorities. The Court was of the view that the object of First paragraph of Art.5 of the Declaration was to ensure that nationals belonging to the racial,

'minorities' focus only on non dominant groups, which are loyal to the State and leaves out other critical features.

It leaves out situations where a group doesn't have the will to remain distinct, but the status of minority is imposed on them and the will to preserve identity, may then be the consequence of the status. Secondly, a non dominant group may still be a majority in number, in terms of the population[29]. The requirement that a minority be loyal to the State may some times be incompatible with the political inequity of an oppressive minority being the dominant group. A better approach is to recognize the relativity of the term minority and the decisive character of the related majority[30].

1.6.2. The International Covenant on Civil and Political Right on the Components of Minority

In its attempt to extent help to ethnic, non dominant groups, the UN was prompted to incorporate certain constituents of minority definition to its components. Article 27 ICCPR[31] is an instance.

In a general comment on Art.27 ICCPR, the Human Rights Committee omits defining minority[32]. It signals possibility of a broad interpretation of the term. The Committee is rather progressive in that, it does not require that members of a

religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the State. The second paragraph of Art.5 was to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements were indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being a minority.

[29] In the colonial systems, the exploitation of ethnic or religious divisions and the arbitrary drawing of boundaries could constitute tribes and other groups as involuntary minorities.

[30] *Supra* n.5 at p.47. The membership of a majority is based on the freedom to deny that one belongs to a minority, a freedom in the definition of oneself which the member of a minority cannot have. The sense of superiority, to be distinguished from the sense of difference, often characterizes a dominant group. All other groups are rated by reference to the dominant or central group. Moreover, the minority will have a sense of crippling inferiority as against the superior majority.

[31] Art.27 ICCPR reads : "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language''.

[32] HRC General Comment 23, Art.27(50th session,1994)UN DOC.HRI/GEN/1/Rev.(1)38.

minority are nationals of the State nor that they established existence or prolonged residence there.

1.6.3. Francesco Capotorti on Article 27 of ICCPR and the Concept of Minority

A formal attempt to define minorities began in 1971 when the UN Sub Commission appointed Francesco Capotorti to undertake a study on the implementation of the principles set out in Article 27 of the ICCPR with special reference to analyzing the concept of minority[33]. The requirement of nationality which is absent in Art.27 ICCPR is added by Capotorti in his definition. However no unanimity was reached at in the Sub Commission over this definition[34].

1.6.4. Definition by Deschenes[35]

Deschenes defined minority thus:

A group of citizens of a State, constituting a numerical minority and in a non- dominant position in that State, endowed with ethnic, religious, or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another, motivated if only implicitly by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.

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[33] In 1977, Francesco Capotorti put forward the following definition of minority : 'A group numerically inferior to the rest of the population of a State, in a non dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from the rest of the population, if only implicitly, a sense of solidarity, directed towards preserving the culture, tradition, religion or language''. The requirement of nationality which is absent in Art.27 of ICCPR is added by Capotorti in his study report. Following Capotorti attitude is especially negative for those population groups that are minorities in a certain region but constitute the majority nation wide.

[34] Henrard Kristin, *Devising an Adequate Framework for Minority Protection*, Martinus Nijhof Publishers, Kluwer Law International,(2000), p.33. The definition by Capotorti emphasis that the definition only pertains to the implementation of Art.27 ICCPR. Capotorti relied for the elaboration of his definition *inter alia* on the advisory opinions of the Permanent Court of International Justice (P.C.I.J.), the proposals of the UN Sub Commission, the discussions within the United Nations High Commissioner for Refugees and also the opinions of a large number of States.

[35] Jules Deschênes, CC, FRSC (June 7, 1923 – May 10, 2000) was a Canadian Quebec Superior Court judge. From 1984 to 1987 he was involved with the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. In 1985 he was appointed to head the Commission of Inquiry on War Criminals in Canada, in which he officially reprimanded those special interest groups within the Jewish Canadian community whom, he wrote, had tabled "grossly exaggerated" claims about the number of alleged war criminals supposedly hiding in Canada. He submitted his report in 1986. He was the 102nd president of the Royal Society of Canada from 1990 until 1992. From 1993 to 1997, he sat on the International Criminal Tribunal for the former Yugoslavia.

According to him the group should consist of citizens of the State[36]. Equality is emphasised in the definition of Deschenes while preservation of identity is an important aspect of Capotorti's conceptualization.

1.6.5. UN Declaration on Minorities

UN Declaration is laudable for its definitional query because of the combination of the concepts of national minorities and ethnic, religious and linguistic minorities[37]. Article 2.1. is comprehensive in nature and makes it clear that minorities include national, ethnic, religious and linguistic groups .

1.7. Recommendations of the Council of Europe[38]

The Council of Europe and Organisation for Security and Cooperation in Europe[39]made efforts at the European level to identify minorities. Recommendation 1201 of the Council of Europe contains a proposal in the form of an additional protocol to the *European Convention on Human Rights*[40]. It tries to determine national minorities. It lacks any reference to a requirement of 'non-dominance' but requires conditions of a certain degree of permanence and a numerical criterion. It

[36] The objective components of this definition includes- having ethnic, religious or linguistic characteristics differing from the rest of the population/the majority, being a numerical minority, non dominance and finally the requirement that the members of the group have the nationality of the State concerned. The subjective aspects of the definition demand that there is a sense of community and a collective will to preserve the distinctive characteristics. Divergence between the definitions of Capotorti and Deschenes pertains to the use of 'equality in fact' in Deschenes' definition as a feature of the members of a minority group. It advocates differential treatment or special measures for members of minorities, rather than to a subjective element which is generally linked to the wish to retain the separate characteristics. It would appear that both the definitions have pointed out three basics of a minority situation; numerical inferiority, non-dominant status and characteristics of identity with the difference that preservation of identity constitutes an essential aspect in Capotorti's definition while it is not so in Deschenes.

[37] See, *UN Declaration on Persons Belonging to Racial, Religious and Linguistic Minorities,1992*, Article 2.1. which reads : "Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination".

[38] See, *http://assembly.coeint/main.asp?link=/ Documents/ AdoptedText/ta93/ EREC/201.htm,* visited on 16.2.2007.

[39] Organisation for Security and Co-operation in Europe, hereinafter referred to as OSCE.

[40] Hereinafter referred to as ECHR.

acknowledges the relativity of the minority concept in the sense that a minority can also be determined at regional level and not only at the State level[41].

On 14th of March, *the Committee of Ministers of Council of Europe* directed the adhoc committee[42] to draw the outline for the convention of minorities in the form of a protocol to the *ECHR* guaranteeing individual rights in the cultural field. This committee formulated a framework convention for the protection of national minorities which was approved by the Council of Europe and entered into force on Feb.1, 1998. Explanatory note to that convention in item 12 points that there has been a conscious choice for a pragmatic approach, explaining the absence of any definition of the concept national minority[43].

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41 *Supra* n.34 at p.26. An entire section of the proposal deals with definitional issues, including the meaning of national minority, which reads as, a group of persons in a State, who a) reside on the territory of that State and are citizens thereof, b) maintain long standing, firm and lasting ties with that State, c) display distinctive ethnic, cultural, religious or linguistic characteristics, d) are sufficiently representative, although smaller in number than the rest of the population of State or of a region of that State, e) are motivated by a concern to preserve together that which constitutes their common identity including their culture, their traditions, their religion, their language. *The European Commission for Democracy Through Law*, an advisory body of the Council of Europe also suggested a definition to the word minority, as part of a proposal for a *European Convention for the Protection of Minorities*. Although this proposal focuses on ethnic, religious or linguistic minorities, 'national minorities' is nevertheless included in definitional Article 2 where it is implicitly equated to the former expression. The definition though close to Capotorti – Deschenes standard, differs to the extent that there is no mention of a requirement of non-dominance. 1. For the purpose of this Convention, the term minority shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethical, religious or linguistic features different from those of the rest of the population and are guided by the will to safeguard their culture, traditions, religion or language. 2. Any group coming within the terms of this definition shall be treated as a ethnic, religious or linguistic minority. 3. To belong to a national shall be a matter of individual choice and no disadvantage may arise from the exercise of such choice. Reference can be made to the final report of the steering committee on human rights to the council of ministers dated September 1993. The Committee's mandate of March 1993 required it to formulate a proposal specifically dealing with the protection of national minorities. The Committee had argued that in view of that mandate, it is essential to develop guidelines to enable identification of persons belonging to a national minority. In the end, the Committee considered it possible to formulate a list of criteria to identify persons belonging to national minorities which is inspired by the Capotorti - Deschenes standard .

42 Adhoc Committee for the Protection of National Minorities.

43 The official document on fifth reunion confirm the preference for a pragmatic approach in that in the proposal to extend the framework convention to ethnic, religious and linguistic minorities is rejected because this addition could be interpreted as an indirect definition to national minority. Although this argument deals with the relation between the expressions ethnic, religious or linguistic minorities and national minorities, it does underscore more general attitude regarding the definition of minority. The explanatory report to the framework convention furthermore states explicitly in item 26 that any reference to UN conventions and declarations, like Art.27 ICCPR or the 1992 *UN Declaration on Minorities,* do not extend to any definition that might be present in these documents. This statement is presumably related to the possible implications for the meaning of national minority that could be inferred from the

1.7.1. Determining National Minority at the Level of Organisation for Security and Co-operation in Europe

Organisation for Security and Co-operation in Europe[44] is an adhoc organization under UN Charter. This organization also tends to follow a pragmatic approach regarding the definition of the concept minority. There is a practical consensus in the OSCE that the concept minority concerns a non dominant group which constitutes a numerical minority within a State and also that it would refer to 'non dominant, distinct, numerical minorities within a State'[45].

Thus, by analyzing the international attempts for determining minority starting with League of Nations regime to the European level we find that there is no attempt at a clear formulation of minority but all these documents are following a pragmatic approach leaving the determining factors of minority open ended so that groups may be added or deleted from the 'minority' depending upon the context.

1.8. Objective and Essential Components of Minority

There can be objective and subjective factors for the determination of minority. Numerical position, non dominance and nationality are some of the objective components to determine minority.

(1) Relative Numerical Minority: Scope and Significance

Minority means a group numerically inferior to the rest of the population. Relative numerical position raises the following questions: Can all the population groups in a State which are numerically of equal level without any significant majority group, claim protection of minority status at the international level?

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combination of the expressions, ethnic, religious or linguistic minorities and national minorities. Finally it can be argued that the rejection of inferences as to a definition of national minority might also be inspired by the broad view of the human rights committee established in terms of ICCPR (HRC) as expressed in general comment on Art.27 ICCPR more specifically its loose attitude regarding the nationality requirement and any demand of close and durable ties.

[44] Organisation for Security and Co-operation in Europe, hereinafter referred to as OSCE. OSCE is an adhoc organization under the UN Charter (Chapter VIII) and is concerned with early warning, conflict prevention, crisis management and post conflict resolution.

[45] Jane Wright, "OSCE and Protection of Minority Rights", *Human Rights Quarterly,* vol.18, no.1, pp.190-205. (Feb 1996). See also, Henrard Kristin and Dunbar Robert, *Synergies in Minority Protection, European and International Law Perspectives*, Cambridge University Press,(2008); Hepburn A.C., *Minorities in History*, Edward Arnold (Publishers)Ltd.,London,(1978).

Whether State is the exclusive point of reference to determine minority? Whether regional minorities are to be recognized when they are part of the majority at the national level?[46]. Following Capotorti attitude of recognizing minority at the national level, is negative for those population groups that are minorities in a certain area but constitute the majority nation wide. In *Ballantyne etal v. Canada*[47] the Human Rights Committee did adopt this restrictive stand.

The fluctuation of the frame of reference, by following this approach can also be used to counter the argument that it is of no importance at all whether or not regional minorities are recognized when they are part of majority at the national level[48]. The argument that minorities also should be identified in a sub state

[46] *Supra* n.5 at p.23. Capotorti's definition of the numerical component of the definition of the concept minority, namely group numerically inferior to the rest of the population of a State is as follows: 'A group numerically inferior to the rest of the population of a State, in a non dominant position, whose members being nationals of the State, possess ethnic, religious or linguistic characteristics differing from the rest of the population, if only implicitly, a sense of solidarity, directed towards preserving the culture, tradition, religion or language'. Capotorti's reference to the rest of the population of the State instead of the mere mentioning of numerical minority has the advantage that it allows for the implication that in a State with different population groups of about the same scale, all these groups could rely on Art.27 ICCPR and the other minority rights provided under international law. This argument is clearly analogous to the one regarding the separate ethnic, religious and linguistic characteristics and confirms the view that the minority concept is applicable to plural societies without obvious majority population. Furthermore, the reference to the rest of the population of the State raises the interesting question whether a minority can be determined in comparison with the population of a region, a province or some other kind of internal political structure within a State. In this regard, a restrictive attitude tends to predominate since normally the State is taken as the exclusive point of reference. Indeed neither the international law nor the European documents that are relevant for minority protection allow the inference that minorities can also be defined at a sub state level.

[47] *Ballantyne, Davidson, McIntyre* v. *Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993). ICCPR Human Rights Committee, 47th Session. Views of the Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, dated, 31 March 1993(Communication Nos.359/ 1989,385/1989). See, *http://sim.law.uu.nl/ SIM/-CaseLaw/fulltextccpr. nsf/ac824e16154a 0621c1256d3d 0033...16/10/2007* visited on 5.4.2008. The Court observed that the English speaking persons in the French speaking province Quebec cannot be considered a minority because they constitute the majority nation wide. According to the Committee, Art.27 ICCPR would only apply to minorities at the national level. Simultaneously this restrictive attitude results in a least possibility to provide protection for the so called double minorities or population groups that constitute a minority within a region where the majority is the minority at the national level.

[48] T.Varady, "Minorities, Majorities, Law and Ethnicity: Reflections of the *Yugoslav* Case'', *Human Rights Quarterly*, pp.13-14, (1997). The protection of their right to identity which is the central tenet of *Article* 27 will then in any event be protected. This argument does not take into account of matters which are of crucial importance to minorities, like education and language between the citizens and the public authorities, which is not necessarily exclusively situated at the national level. Furthermore, the secondary argument that they can always move to an area

context, does not imply the denial of the importance of national standards on minority protection. In this regard, it was correctly postulated that focus on constituent state jurisdiction should not exclude consideration of the overall impact of federal laws on group relations in the State. The same principle applies between unitary states and their administrative units.

(ii) Non Dominant Position : Its Scope and Significance

The requirement of numerical minority position is connected to the fact that the need to protect minorities is the result of their weak, vulnerable and non dominant position. But in situations in which the numerical minority rules the State, the necessity of a further criterion becomes apparent. The criterion of non dominance denies the qualification 'minority' exactly to such groups that actually do not need special protection[49]. In such cases, Capotorti argues that the suppressed majority has a right to self determination.

(iii) The Nationality Requirement for Minority Protection

The Human Rights Commission of Council of Europe[50] has explicitly opted for a concept of minority which is not limited to persons having the nationality of the State concerned. This approach is evident in two of its general comments, the one dealing with Art.27, and the other on the position of aliens under the covenant. This stance is to be appreciated as nationality legislation is prone to manipulation by the State in that a State could easily exclude certain population from the status of minority and the ensuing protection, although these groups would otherwise qualify.

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where they are in a majority cannot be decisive because political limitations and related concerns often inhibit such a move.

[49] Y.Dinstein, "Freedom of Religion and Protection of Religious Minorities'' in Y.Dinstein and M.Tabory(eds.), *The Protection of Minorities and Human Rights*, Martinus Nijhof Publishers,(1992), p.145. Non dominance does not necessarily imply being subordinate or oppressed, which tends to support the view that in a plural society, the several ethnic, religious and linguistic groups could all be considered minorities. It is quite possible that none of the population groups in such a society are in a dominant position.

[50] Human Rights Commission of the Council of Europe.

1.9. The Subjective Component of the Definition of Minority

There is a close connection between the objective factor of separate ethnic, religious or linguistic feature and the subjective requirement of a collective will to preserve these distinctive characteristics[51]. There is a danger of State abuse of such subjective requirement. It is easy for the State to deny the existence of a minority[52] by saying that it fails the subjective requirements.

1.9.1. Requirement of Loyalty to Identify Minority

Requirement of loyalty was often raised in UN debates on minorities and their protection. It would be easy for a State to deny the existence of a minority by declaring that the loyalty of the population groups concerned is not proven. A State that denies the rights of minorities provokes the feelings of resentment on the side of these minorities *vis a vis* that State and it would not be just to allow the State to argue that because of lack of loyalty, the population groups cannot be considered minorities[53].

1.10. Minorities Focused Upon for Minority Protection Purposes

There are limitations in using ethnic, religious or linguistic factors for identifying minorities at the international level. Even at the European level, where the focus is on national minorities that component of definition is fully accepted and confirmed. Special attention for population groups with cultural, religious or

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[51] *Supra* n.5 at p.41. Evaluation of the subjective state of mind is difficult. Whether silence of a minority can be taken as a lack of will to preserve its minority status is to be probed. According to Capotorti, group cannot have an identity throughout history if its members have no wish to preserve it.

[52] The importance of this subjective requirement is substantiated by the argument that when the group has no desire and urge to preserve its separate identity, the provision in Art.27 would be irrelevant to its members. Silence of a minority may be the result of certain political or social circumstances or because of suppression by the State. Many States consider the subjective requirement crucial; as they fear that Art.27 would lead to the creation of new minorities or to the revival of already assimilated groups. Capotori postulates that the will emerges from the fact that a given group has kept its distinctive characteristics over a period of time. The mere continued existence of a group would be considered as sufficient proof in this regard.

[53] W.Mc Kean, *Equality and Discrimination Under International Law*, Oxford University Press,(1995), p.144. During the preparation of the framework convention for the protection of national minorities, it was decided by majority in the second reunion not to make any reference to a principle of loyalty in the Convention. Although that clause does not really deal with definition of minority, it could be used as a condition *sine qua non* to rely on the minority rights identified.

linguistic and even national specificity is necessary because these characteristics form basis for discrimination and oppression.

(i) *Racial* v. *Ethnic Minorities*

Ethnic minority encompasses all biological, cultural and historical characteristics, where as *racial* would only refer to innate physical features[54].

(ii) Religious and Linguistic Minorities

Religion and language are included in the ambit of culture. Ethnic, religious and linguistic minorities overlap[55]. Religious minority is the member of a minority which is united by a common belief. But the dividing line between religion and other practices is not evident. The different denominations within one main belief system or even divisions within these denominations etc. also prove problematic in this respect[56]. Furthermore, the expression religion and belief also include atheism.

(iii) National Minority

In most cases, a national minority is also an ethnic, religious or linguistic minority, but that certain of the latter do not qualify as national minority. On the other hand, there is an argument that the term national minority should be defined as broadly as possible so as to include all ethnic, religious or linguistic minorities[57].

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54 In the League of Nations minority protection provisions, the criteria of race, language and religion were used to identify the minorities. The UN Sub Commission decided in 1950 to systematically replace the term racial by ethnic with reference to minority groups. The reason for this change is, according to certain members of the sub commission the form racial would not be a specifically justified criterion of distinction. When discussing the relation between the adjectives racial and ethnic one should also consider the 1965 UN International Covenant on the Elimination of All Forms of Discrimination. That convention gives a definition of racial discrimination in Art.1 which implicitly uses a broad view of the concept racial, namely, one that includes ethnic. In this convention the term racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic orgin which has the purpose or effect. However, it is strongly deviant from usual meaning and not advisable.

55 L.V. Prott, "Cultural Rights as Peoples' Rights", in J. Crawford (ed.) *Rights of the Peoples*, Oxford,(1988), p.94. But the fact that one is a member of an ethnic community does not necessarily mean that one has a real and objective tie with the language that normally is linked to that community. An analogous argument can be made in connection with the religion or religions normally linked to membership of a certain ethnic group. Moreover, different ethnic minorities can be part of the religious or linguistic minority.

56 The caste system and variant practices based on religion in India is a classic example .

57 A.Bloed, "The OSCE and the issue of National Minorities'', in A.Phillip and A.Rosas (eds.), *The Universal Minority Rights*, Turku/Abo, Abo Akademy,Tryckeri (1995),p.114. The official

The majority opinion holds that national minority is considered to be a sub category of ethnic, religious or linguistic minorities. A pragmatic solution for the disagreement about the relative scope of national v. ethnic, religious or linguistic minorities could entail the simultaneous use of both the expressions. The benefit of such a combination would be that the widest possible category of persons can invoke the relevant rights as is the case in the 1992 UN Declaration on Minorities.

1.11. Preservation of Minority and Resolution of Conflict Between Majority and Minority

The attempt by minorities to preserve their identity and unity should not be seen as an attempt at self determination and should not initiate the majority's hostility towards them. Viable mechanisms for identifying groups constituting minority and sharing of power according to specific situations of countries are needed[58]. After identifying the groups which constitute minority, scheme for protection of minority rights are to be devised. Principles of equality, non discrimination[59], affirmative action, self determination[60] and intervention[61] are

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and other proposals of definition of national minority under the framework of the Council of Europe include the factor of having separate ethnic, religious or linguistic characteristics. These definitions arguably reflect that both expressions have more or less the same content as not a single reference is being made to an additional element which would make national minorities a special sub category of ethnic, religious or linguistic minorities. It needs to be acknowledged that, in the recent Framework Convention for the Protection of National Minorities special care has been taken not to take even any implicit position in this regard. See also, Kymlicka Will and Pattern Alan*, Language Rights and Political Theory*, Oxford University Press,(2003).

58 Claire Palley in her study on Constitutional Law and Minorities (part1 ch.2) has appended a table based on the analysis of pattern of sharing of power and resources in twelve European, Asian and African countries with major communal divisions .The study indicates that in those countries where legal, institutional provisions exist for non-discrimination, proportional voting systems, coalitions, equal access to government services on fair proportional quotas exists. In areas where army and police are not dominated by majority groups, there is peace and stability, and countries where these attitudes and arrangements do not obtain are torn by conflicts. This is acknowledged in Iqbal. A. Ansari, *Readings on Minorities: Perspectives and Documents,* (Vol.1), Institute of Objective Studies, New Delhi,(2005). The Minority Rights Group, London has published it in 1978 as Report No.36.

59 In non discrimination, the approach is social, treating members of a minority as having the common rights and freedoms of all human beings, equal exercise of them being secured by the rule of non discrimination. It emphasis on the integration of minorities.

60 Self Determination follows an institutional approach to minorities, in which their collective identity is secured and preserved by some form of self determination. The solution offered by Principle of Self Determination is separation. It is understood from the fact that UN General Assembly in its Declaration on the Granting of Independence to Colonial Countries and Peoples, stated that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the UN Charter. This implication is

some of the measures devised for developing an adequate system of minority protection. Along with it, various human right provisions in international instruments should work as supportive mechanisms.

1.11.1. Equality and Non –Discrimination

Equality and non discrimination are well recognized principles of international human rights law[62]. Respect for equality and non discrimination precepts do not mean identical treatment in every instance[63]. Differential treatment is possible if the aim is reasonable and objective[64] but amounts to a prohibited

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confirmed by the UN Sub Commission in asserting that minorities must be loyal to the State. It clearly limits secession.

61 An intervention is or can be seen as a trespass. If a State is to be master in its own house, other States cannot be allowed to intervene in its internal affairs, whether by suggestions, organized persuasion, economic coercion or armed force and the principle of non intervention has long recognized as a necessary brake on foreign policy but with exceptions.

62 They are prescribed in the UN Charter and the UDHR (Article 2). The ICCPR and the ICESCR, contain anti-discrimination clauses, including the ICERD,(1965); the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,(1981); the UN Convention on the Rights of the Child,(1989); ILO Convention No. 11 concerning Discrimination in Respect of Employment and Occupation,(1958); the UNESCO Convention Against Discrimination in Education,(1960). Regional human rights instruments such as ECHR (Article14) include comparable clauses. Protocol no.12 to ECHR embodies a general prohibition of discrimination, which provides a scope of protection broader than that of Article 14 of the ECHR. Article 26 ICCPR not only entitles all persons to equality before the law as well as equal protection of law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion etc. Importantly, the anti discrimination clauses enshrined in the ICCPR (especially in Article 2, paragraph 1, and Articles 3 and 26), not only prohibit discrimination by state agencies and laws, they also entail a duty on state parties to ensure that individuals are protected against discrimination by private actors. That is also clearly prescribed by the ICERD under Article 2, paragraph 1, sub paragraph d. Article 1, paragraph 4, and Article 2, paragraph 2, of the ICERD, consider special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals and guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms as not constituting an act of discrimination. These measures must be discontinued after the objectives for which they were taken have been achieved. This principle has been broadly formulated in protocol no.12 to the ECHR (third recital of the preamble) and more importantly, can be found in international texts specifically concerning minorities, in connection with basic equality and non discrimination clauses. Depending on the instrument, the adoption by states of the special measures in question is, or may be, justified, encouraged and/or even framed as a matter of duty.

63 In particular, it should be concluded that a less favorable treatment accorded to non minority individuals as compared to members of ethnic, linguistic or religious minority groups, based on the fact that the former do not belong to the latter, is *perse* discriminatory and thus contrary to international law.

64 The HRC, in its general comment no.18 on non discrimination under the ICCPR, stated in 1989 that the term discrimination as used in the covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national, or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the

discrimination when there is no reasonable and objective justification for it[65]. Thus equality and non discrimination constitute dual components of a unitary concept[66]. It requires abstention from any kind of differentiation based on arbitrary or unreasonable grounds, which is a negative aspect of equality, and differential treatment, or positive discrimination, which is intended to achieve positive equality (or equality in fact) in relation to unequal situations, in conformity with the above mentioned requirements[67].

1.11.2. Differential Treatment in the Form of Affirmative Action

Affirmative Action, also called "preferential treatment", is a technique to eliminate the effects of past discrimination and amounts to a measure of differential treatment aimed at substantive equality[68]. The ratio of affirmative action is the

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recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and obligations.

65 In fact, such requirements for a permitted distinction drew upon those already spelled out by the European Court for Human Rights in relation to Article 14 of the ECHR, in the case relating to certain aspects of the laws on the use of languages in education in Belgium and later in, *Abdul Asis Calabes* and *Balkandali* v. *United kingdom* case, Judgment dated 28/5/1985 in Application No. 9214/80, 9473/81, 9474/81. The distinction must pursue a legitimate aim; the distinction must have an objective justification; and the measures must be proportionate to the aim sought to be realized.

66 Prohibition of discrimination measures are designed to protect and promote the separate identity of minority groups. Such rules guarantee formal equality and are at the same time conducive to achieve substantive equality. They are necessary pre requisites for realizing substantive equality. The substantive equality principle assumes the existence of the first one and builds on its equality provisions for members of minorities, focus on devising appropriate means to retain and promote the separate identity of minorities. The principle of substantive equality forms the basis for measures implementing the right to identity of minorities but also confines the scope of special measures. Minority protection cannot be used to support claims of measures which would institute certain privileges for members that cannot be justified by the demands of substantive equality.

67 The equality principle can be formulated in many different ways such as prohibition of discrimination, equality before the law, equal protection of the law etc. Equality before the law is linked to the demands of formal equality, whereas equal protection of the law would be concerned with the principle of substantive equality. These two sides of the equality principle complement one another and were already recognized in the advisory opinion of the P.C.I.J. regarding the minority schools in Albania. The requirements of substantive or real equality play a complementary role regarding the restricted version of the prohibition of discrimination as the latter is not significant to achieve true equality. In this regard, substantive equality as one side of the equality principle can be more directly related to the second pillar of minority protection. It pursues the protection and promotion of the separate identity of minorities. The entire issue of affirmative action belongs there as well as the arguments regarding the need for more permanent special measures for members of minorities. These measures potentially include group rights and could also imply positive, may be even financial, obligations for the state regarding minorities.

68 Several controversies surrounding affirmative action are related to the clear group dimension of this technique, which can be related to the category of group rights and the concomitant

rectification of past discrimination[69] . These measures should be ended as soon as the goal of substantive equality is reached or else it would be converted into prohibitive discrimination.

1.12. Minority Rights at International Level

Religious, linguistic and cultural rights are some of the rights available to the minorities at international level. They are briefly discussed below.

Religious Rights

Minority protection is not the primary vehicle through which religious freedoms are addressed at the international plane[70]. When religious minorities face discrimination as a group, their case is addressed under the 'freedom of religion or belief' umbrella in international human rights and not under minority rights. Religious rights of minorities include right to protect their customs, culture etc., right to religious autonomy, and effective participation in decision making regarding religious matters. Religious minorities may also want protection of their language and culture, autonomy and effective participation in decision making[71].

Linguistic Rights

Linguistic rights of minorities may allow minorities to protect their language and script[72]. Educational rights are the most important tool through which a minority may conserve its distinct language and script.

problems. A criticism which is often voiced in connection with group rights is for example that to categorize the population among certain identity features would obstruct the integration of the population groups concerned in society instead of facilitating it. Such categorization would confirm and may even freeze the differences and would carry the risk of antagonizing the rest of the population. Such a technique can thus be criticized because it uses and therefore reinforces the categorization one tries to eliminate in order to achieve a non racial society.

69 Affirmative action does not include separate legal status for certain groups. Differential legal systems and concomitant status would, however, be acceptable as part of the broader category of special measures.

70 See *http://ojlr.oxford journals.org/contents/1/1/57.full#fn-21*, visited on 7/9/2012.

71 See generally, Ghanea Nasila, "Are Religious Minorities Really Minorities"*, Ox. J. Law and Religion,* 1(1), pp.57-79,(2012).

72 Iqbal. A. Ansari, *Readings on Minorities: Perspectives and Documents* (Vol.iii), Institute of Objective Studies, New Delhi, (2002), pp.39-59.

Cultural Rights

Culture is a collective name for the material, social, religious and artistic achievements of human groups, including traditions, customs, and behavior patterns, all of which are unified by common beliefs and values. Minorities may want their distinct culture to be protected[73].

1.13. Definition of Minority in India

Minority in common parlance refers to a group of individuals who are particularly smaller than the majority in a defined area[74] . The rights conferred on minorities are more in the nature of safeguards rather than positive privileges[75] and the special protection will be meaningless in a situation where all enjoy the same rights and liberties[76]. It is important to identify who constitute minority in India to delimit the entitlements to the deserving groups as Art.30 doesn't define minority[77].

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[73] *Id*. at p.108.

[74] Factors of distinction, subjective or objective which are to be taken as the test for distinguishing a group as minority are unsettled. Objective factors of distinction include racial, religious or linguistic sections of the population within a State which differ in these respects from the majority of the population. Minority in other sense also means, a group constituting a minority group having a feeling of belonging to one common unit, which distinguishes them from those belonging to the majority of the inhabitants. They are group 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 the given political entity. There are also those who define minority in terms of relationship between the dominant groups and minority. In certain cases, a consciousness of the difference with the majority on the basis of certain characteristics is considered as a distinguishing mark, and as such a subjective element. Thus, the definition which lays 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. No definition comes out to be comprehensive to cover all the varied situations and the courts have not ventured to formulate a general definition.

[75] See, B. Shiva Rao, *Framing of Indian Constitution: Select Documents,* (Vol. 2), Universal Law Publishing Co. Ltd,(2004), p.40 on Ambedkar's Memorandum and draft articles on the rights of states and minorities, march 24, 1947. In the statement of Fundamental Rights appended, special reference is made to the rights of minorities due to the peculiar conjuncture of circumstances in India at the moment. In reality, however they are rather obligations of majorities that they shall cultivate tolerance and equal regard for the ways of life, thought or worship of their sister communities however much they differ from them. The rights of Minorities however fully guaranteed and truly enforced cannot avoid the obligation of these groups not to use these rights to impede or blackmail the majority. Toleration and cooperation for common good are as much expected of minorities as of the majority.

[76] Note on Fundamental Rights by K .T. Shah, Dec. 23, 1946 as cited in B. Shiva Rao, *The Framing of India's Constitution: Select Documents,* Universal Law Publishing Co. Ltd, (2004), p.39.

[77] Art.30 (1) reads : "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice". Art.30 doesn't define minorities. But a reading of the Article gives an idea that religious and linguistic minorities are identified for the purpose of educational rights".

In India, minority entitlements are limited to cultural and educational rights[78]. Art. 30 which provides fundamental right to minorities to establish and administer educational institutions of their choice includes a plethora of rights[79] and has to be made available to the real minorities. Thus to delimit the educational entitlements to the deserving groups and to have proper governmental control over imparting education, it is essential to identify who constitute minority and what is a minority educational institution in the Indian context.

Identifying minorities generally, raises a plethora of questions: What are the types of minorities identified in the Indian context? What are the determining factors to confer linguistic and religious minority status to communities? Whether a sub sect within a particular religion can claim minority status? Whether linguistic minority should have a script of their own? Whether Minority status can be claimed only by the citizens of India? Whether Scheduled Caste and Scheduled Tribe communities deserve minority status? How relative numerical position should be calculated? Whether criteria of non dominance be fulfilled to get minority status? Whether minority status could be used as a fraud upon the Constitution?

After identifying minorities, indica to determine minority educational institution is to be laid down. This will help in determining the extent of state regulation that could be imposed on a minority educational institution. The question arises whether the educational institution should be established and managed by the minority to get the status of a minority educational institution or whether an institution which is established by someone not belonging to minority but the management of which is confered to minority can claim the status of a minority educational institution? Should a minority educational institution be established by a group or is it sufficient that a person belonging to minority community can establish a minority educational institution? On whom lies the onus of proof of establishment? Where shall a minority educational institution be located? Can cross border educational facilities be provided by a minority

[78] Iqbal .A. Ansari, *Readings on Minorities : Perspectives and Documents,* (Vol.iii), Institute of Objective Studies, New Delhi, (2005), pp.117-155.

[79] Right to establish and administer broadly comprises of the following rights: (a) to admit students, (b) to set up a reasonable fee structure, (c) to appoint staff and (d) to take action if there is dereliction of duty on the part of employees.

educational institution? Whether state regulation should only be for furtherance of minority interest? Whether pre constitution institutions get minority protection? Whether religious and linguistic minority could establish educational institutions for advancement of religion or language only? What are the tests to determine the status of minority educational institutions? The answers to the above questions are attempted herein.

1.13.1. Determination of Minority

The pre-constitution deliberations and constitutional provisions do not define who constitutes minority. *The Motilal Nehru Report* (1928)[80] showed a prominent desire to afford protection to minorities, but did not define the expression. The report without defining the concept said that in some provinces hindus are minority and in some provinces muslims are minority. The *Sapru Report* (1945)[81]

80 Nehru Report was the outcome of the Committee headed by Pandit Motilal Nehru, which was appointed by All Parties Conference in its meeting held in Bombay on 19th May, 1928 "to consider and determine the principles of the Constitution for India in the light of the resolution of the Madras congress, in conjunction with those passed by other political organizations''. It reflects that hindu- muslim communal conflict and distrust is the main problem in India. It says that in some provinces hindus are minority and in some provinces, muslims form minority. Some of the important elements of the report are : It contained a Bill of Rights .There shall be no State religion; men and women shall have equal rights as citizens. There should be federal form of government with residuary powers vested in the centre. It included a description of the machinery of government including a proposal for the creation of a Supreme Court and a suggestion that the provinces should be linguistically determined. It did not provide for separate electorates for any community or weightage for minorities. Both of these were liberally provided in the eventual Government of India Act, 1935. However, it did allow for the reservation of minority seats in provinces having minorities of at least ten percent, but this was to be in strict proportion to the size of the community.

81 The report proposed to provide for the establishment at the Centre and in each of the provinces (a) an independent Minority Commission which shall be composed of a representative for each of the communities (not necessarily a member of that community) represented in the Legislature. (b) Subject to the possession of such qualifications or experience as may be prescribed, the member representing each community who need not necessarily belong to the same community, shall be elected by members of the legislature belonging to that community. (c) No member of the Legislature shall be eligible for membership of the commission. (d) The term of office of members of the commission shall be the same as, and synchronize with the terms of office of members of the legislature concerned. (e) The functions of the commission shall be to keep a constant watch over the interests of minority communities in the area, without attempting to deal with stray administrative acts or individual grievances, to call for such information as the commission may consider necessary for discharging their functions, to review periodically the policy pursued in legislation and administration by the legislature and the executive in regard to the implementing of non justiciable fundamental rights assured by the constitution to minority communities and to submit a report to the prime minister. (f) The recommendations of the commission shall be considered by the cabinet and the prime minister shall as soon as possible place the report before legislature.

also proposed, *inter alia*, a Minorities Commission but did not define Minority[82]. In K.M. Munshi's letter to the Fundamental Rights Committee and Minority Sub Committee the term 'national minorities' is used[83]. The word Minority has not been defined in the Constitution[84]. Art.30(1) simply says all minorities, whether based on religion or language and doesn't lay the criteria to identify linguistic and religious minorities. Further, the unit to determine minority is not clear from a reading of Art.30. Moreover whether relative numerical position and criteria of non dominance which are determining factors of identifying minorities at international level can be used to determine the deserving groups entitled to minority protection is also not clear from Art.30. Thus it is left to the wisdom of the Courts to determine minority, so that groups which are on par with the majority and groups which are sufficiently confident need not be provided entitlements which may amount to reverse discrimination.

1.13.2. Citizens to Claim Minority Rights

Although Article 30(1) does not speak of the minority competent to claim the protection of that Article, he must be a minority person residing in India[85]. In *S.K. Patro*[86], the High Court of Bihar held that minority under Article 30 must necessarily mean those who form a distinct and identifiable group of citizen in India and did not mean a minority with regard to world population. Though minority rights were denied to the educational institutions on the ground that the

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[82] The speech delivered on February 27, 1947 by Sardar Patel, who was the Chairman of the Advisory Committee dealing with the right of minority communities, a part of which is reproduced below: "As long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not only an act of breach of faith; it would be constitutionally impermissible and liable to be struck down by the Courts".

[83] See extracts of Letter from K.M. Munshi circulated to the members of the Sub Committee on Minorities April 16, 17 as reproduced by Ansari Iqbal, *Readings on Minorities : Perspectives and Documents,* (Vol.111), Institute of Objective Studies, New Delhi, (2002).

[84] The Constitution nowhere define the term 'minority', nor does it lay down sufficient indica for determination of a group as minority. The framers made no efforts to bring it within the confines of a formulation. Even in the face of doubts being expressed over the advisability of leaving vague justiciable rights to undefined minorities, the members of the Constituent Assembly made no attempt to define the term while Article 23 of the Draft Constitution, corresponding to present Articles 29 and 30, was being debated, and, presumably left it to the wisdom of the Courts to supply the omission.

[85] The Article leave it to their choice to establish such educational institutions as will serve both the purpose, namely, the purpose of conserving their religion, language, or culture, and also the purpose of giving a thorough general education to their children. Minorities are, however, not entitled to have educational institutions exclusively for their benefit.

[86] *S. K. Patro* v. *State of Bihar,* A.I.R. 1969 (Pat.) 394.

institution was established by foreign missionaries much before the Constitution in the year 1854, on appeal this decision was slightly reversed on facts by the Supreme Court[87] and the Court held that the facts that funds were obtained from the United Kingdom for assisting in setting up and developing the school or that the management of the institution was carried on by some persons who may not have been born in India is not a ground for denying protection of Article 30(1).

1.13.3. Scheduled Caste and Scheduled Tribes as Minorities

Under international law, tribals are considered as indigenous community and not as minorities. The debates in the Constituent Assembly shows that representatives of the Scheduled Castes also claimed minority status[88] but cultural distinctness from the majority community did not usually figure in this claim[89]. It was stressed that they were a 'Political Minority'[90], that the term 'minority' in their case did not connote numerical disadvantage but rather, entitlement to special treatment on account of social and economic 'backwardness'[91]. Jaipal Singh, the most vocal tribal representative during that period, while claiming that his group

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87 *S. K. Patro* v. *State of Bihar,* (1969) 1 S.C.C. 863.

88 *Constituent Assembly Debates* (hereinafter referred to as CAD). I, p. 147. Not all representatives of the Scheduled Castes claimed minority status for the community and the concomitant 'Political safeguards'. Some argued, in keeping with dominant nationalist opinion, that reserved quotas in legislatures and public employment were undesirable. Dakshayani Velayudan, one of the members claimed that the scheduled caste needn't be considered as a minority but need immediate removal of social disabilities. See also, *Constituent Assembly Debates*, III, p. 470, *Constituent Assembly Debates*, (Vol.V), p. 264 for arguments of Scheduled Caste representatives against reserved seats in the legislatures for the group. Ambedkar and Gandhi were emblematic of the adversarial positions in the debate over whether the Scheduled Castes should be considered as a minority community. Ambedkar had intermittently demanded separate electorate for the Scheduled Castes, on grounds that they were a separate community from the Hindus. Gandhi consistently opposed proposals that the Scheduled Castes be treated separately from the Hindu community from the point of view of representation, most famously in his fast unto death against the Communal Award of 1932 that had offered Scheduled Castes separate electorates.

89 Rather, such claims emphasized that Untouchables were culturally a part of the Hindu community, or at least that they were a different type of minority from the religious minorities.

90 See CAD, (V.I), p.139 wherein P.R. Thakur stated that, Harijans are a part and parcel of the great Hindu community but should be considered as a minority not in the sense in which a community is a minority on racial or religious but a minority that is a separate political entity. See CAD,(V.1), p.284 wherein S. Nagappa reiterated that scheduled castes are a political minority.

91 See for instance, CAD, (Vol.V), p.202 for observations by Muniswamy Pillai.

was entitled to special provisions, chose not to term tribes 'minorities'[92] but viewed them as the orginal inhabitants of the country.

To say that the scheduled castes are not a minority is to misunderstand the meaning of the word minority[93]. Social discrimination constitutes the real test for determining whether a social group is or is not a minority[94]. By this yardstick, Scheduled Castes are the real minorities who need protection.

1.13.4. Relative Numerical Position

Minority means a group smaller than the rest of the population[95]. But the question arises with regard to the unit for determining minority[96]. The debate regarding relative numerical position started from *Re Kerala Education Bill*[97]. In the above case the Court suggested that the population was to be determined in accordance with the applicability of the law in question[98]. In *D.A.V. College* v. *State of Punjab* [99], the Court was reluctant in accepting that, the minority status of a person or group of persons either religious or linguistic is to be determined by taking into consideration the entire population of the country. The Court held that though there was a faint attempt to canvass the position that religious or linguistic minorities should be minorities in relation to the entire population of the country, in

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92 CAD, I p. 139. Jaipal Singh stated that the depressed classes should consider themselves as Adivasis, the original inhabitants of this country and have prescriptive rights that no one dare to deny.

93 Appendix 1 to preliminary notes at p. 103. See, B. Shiva Rao, *Framing of Indian Constitution: Select Documents,*(vol .2), Universal Publishing Co. Ltd,(2004), wherein it is observed that separation in religion is not the only test of a minority nor is a good and efficient test.

94 Editorial in *Harijan* dated 21st October 1939, "The Fiction of Majority", Gandhiji has given his opinion that the scheduled castes are the only real minority in India.

95 The employment of the term 'minority' during the Constituent Assembly Debates did not denote the numerical status of the group as much as the claim that the group suffered from some kind of disadvantage with respect to the rest that entitled it to special treatment from the state. In minority claims, the numerical status of the group was invoked most frequently to denote numerical strength, rather than numerical paucity of the group, which made it a force to reckon with, and entitled it to safeguards over other smaller groups. It appeals to the numerical status of the group which sought to establish that the group constituted a significant element of Indian society, and one therefore with a legitimate claim to preferential treatment.

96 *Ramani Kanta Bose* v. *Gauhati University*, I.L.R. (1951) 3 Assam 348: (A.I.R.1951 Assam 163) wherein it was held that persons who are alleged to be a minority must be a minority in the particular region in which the institution involved is situated.

97 A. I.R. 1958 S.C. 956. This is upheld in *A.M. Patroni* v. *E.C. Kesavan,* A.I.R. 1965 Ker. 75.

98 National Commission for Minorities Act, 1992, Section 2(c) of the Act defines minority : "Minority, for the purposes of this Act, means a community notified as such by the Central Government".

99 *D.A.V.College* v. *State of Punjab,*(1971) 2 S.C.C. 269.

the view of the Court, they are to be determined only in relation to the particular legislation which is sought to be impugned, namely, that if it is State legislation, these minorities have to be determined in relation to the population of the State[100].

But there was no discussion as regards the relative numerical position if the legislation sought to be impugned is a Central legislation. The Court in *TMAPai Foundation and Others* v. *State of Karnataka and Others*[101], held that geographical entity of State for consideration of the status of minority for Article 30. But there is also the dissenting opinion of RumaPal, J. who took a different stand with regard to numerical position which points that such an interpretation would be contrary to Article 29(1) which contains within itself an indication of the 'unit' as far as minorities are concerned, when it says that 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. Merely because persons having a distinct language, script or culture are resident within the political or geographical limits of a State within which they may be in a majority, would not take them out of the phrase "section of citizens residing in the territory of India"[102].

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[100] *Id.* at p. 274, para 9. See also, Massey James, *Minorities in a Democracy: The Indian Experience*, Manohar Publishers & Distributers, New Delhi,(1999); Yaqin . A., *Constitutional Protection of Minority Educational Institutions in India*, Deep and Deep Publications, New Delhi,(1986).

[101] (2002) 8 S.C.C. 481. Chief Justice Kirpal, speaking for the majority in *Pai Foundation* took a clue from the provisions of the States Re organization Act and held that in view of India having been divided into different linguistic States, carved out on the basis of the language of the majority of persons of that region, it is the State, and not the whole of India, that shall have to be taken as the unit for determining a linguistic minority *vis a vis* Article 30. In as much as Article 30(1) places on par religions and languages, his Lordship held that minority status, whether by reference to language or by reference to religion, shall have to be determined by treating State as a unit. The principle would remain the same whether it is a central legislation or a state legislation dealing with a linguistic or religious minority. Khare, J, Quadri, J. and Variava and Bhan JJ. in their separate concurring opinions agreed with Kirpal, C.J. According to Khare, J., one should take the population of any State as a unit, find out its demography and calculate if the persons speaking a particular language or following a particular religion are less than 50% of the population, then give them the status of linguistic or religious minority. The population of the entire country is irrelevant for the purpose of determining such status. Quadri, J. opined that the word 'minority' literally means 'a non dominant' group. Ruma Pal, J. defined the word 'minority' to mean 'numerically less'. However, she refused to take the State as a unit for the purpose of determining minority status. In her opinion, the question of minority status must be determined with reference to the territorial limits and subject matter of the law. See *Pai Foundation* as understood by *Inamdar,* (2005) 6 S.C.C. 537 at p.590, para 95.

[102] *Supra* n.101. See Ruma Pal, J.'s dissenting opinion on the same at pp.647-48. She holds that minority status must be judged in relation to the offending piece of legislation or executive order. If the source of the infringing action is the State, then the protection must be given against

Thus there is conflicting opinion among judges regarding the unit to determine minority.

1.13.5. Determining Factors of Religious Minority

Religious affiliation becomes the determining factor for constitutional safeguards because they may often be accompanied by intense degree of social separation and discrimination[103]. In India the protection of minority rights is conferred on linguistic and religious minorities[104]. As far as the concept of religion is concerned, there are still unsettled positions *viz*., can a sect claim the status of minority? Does the Article accept only major well recognized religions or whether emerging religions can also avail of the benefits? In the latter case, how can it be established that the religion is new and is not merely a sect?

In *Arya Pratinidhi Sabha* v. *State of Bihar*[105] the Court announced Arya Samaj, as a minority distinct from the Hindus. In 1962, in *Dipendra Nath Sarkar* v. *State of Bihar*[106] Brahma Samaj was conferred minority status and was accepted by the High Court. Such claims were not accepted in *Chaudari Janki Prasad*[107]and *S.P. Mittal*[108].

1.13.5.1. TMAPai on the Meaning and Content of Expression 'Religion' and 'Minority'

In this context it is worth noting the observations of the Court in *TMAPai*[109] where the meaning of expression 'religion' and 'minority' were posed before it.

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the State and the status of the individual or group claiming the protection must be determined with reference to the territorial limits of the State. If, the protection is limited to State action, it will leave the group which is otherwise a majority for the purpose of State legislation, vulnerable to Union legislation which operates on a national basis. When the entire nation is sought to be affected, surely the question of minority status must be determined with reference to the country as a whole.

[103] The belief that separate electorates go with separation in religion arises from the fact that those minorities who have been given separate electorates happen to be religious minorities. This however is not true. Muslims are given separate electorates not because they are different from hindus in point of religion. They are given separate electorates because the social relations between the hindus and muslims are marked by social discrimination.

[104] R. Bajpayee, "The Conceptual Vocabularies of Secularism and Minority Rights in India", *Journal of Political Ideologies*, 7(2), pp. 179-197, (June 2002).

[105] A.I.R. 1958 Pat. 359.

[106] A.I.R. 1962 Pat. 101.

[107] A.I.R. 1974 Pat. 187.

[108] A.I.R. 1983 S.C. 1.

[109] (2002) 8 S.C.C. 481 at p. 708.

The Court opined that the meaning of the expression 'religion' or whether the followers of a sect or denomination of a particular religion can claim protection under Art.30(1) on the basis that they constitute a minority in the State, even though the followers of that religion are majority in that State need not be answered by the particular bench and left it unanswered[110]. Moreover with regard to the question relating to the meaning and content of the expression 'minorities' under Article 30, the Court observed that since reorganization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30 have to be considered State wise[111].

One fails to understand how organization of States on linguistic basis provides a base for consideration of the States as the basic unit for arithmetical calculation for determining religious minorities[112]. Further, the condition of having less than 50% of the population in a State, distinguishable on religious or linguistic terms, does not entitle one to the rights automatically, is evident from the discussions in the Constituent Assembly Debates. Dr. Ambedkar has observed as follows[113]:

> I think another thing which has to be borne in mind in reading article 23 is that it does not impose any obligation or burden upon the State. It does not say that, when for instance, the Madras people come to Bombay, the Bombay government shall be required by law to finance any project of giving education either in Tamil language or in Andhra language or any other language…The only limitation that is imposed by Article 23 is that if there is a cultural minority which wants to preserve its language, its script and its culture, the State shall not by law impose upon it any other culture which may be either local or otherwise. Therefore this Article really is to be read in a much wider sense and does not apply only to what I call the technical minorities as we use it in our Constitution.

[110] *Ibid.*
[111] *Id*. at p.707.
[112] *Ibid.*
[113] CAD, 1948-49:923.

In *Bal Patil* v. *Union of India*[114], in response to the claim of Jains that they belong to a separate religion and are distinct from Hindus, the Court observed that the only difference between Hindus and Jains is that the Jains worship thirthankaras instead of God. The Commission instead of encouraging claims from different communities for being added to a list of notified minorities under the Act should suggest ways and means to help create social conditions where the list of notified minorities is gradually reduced and done áway with altogether.

These concluding observations were required after the eleven judge bench in *TMA Pai Foundation Case*[115], held that claims of minorities on both linguistic and religious basis would be reached by taking each State as a unit. The Court was taking this cautious approach on finding that there is tendency among different groups to differentiate themselves from major communities and thus to claim special rights as minorities. The Court understood that if this tendency is encouraged it may lead to divisive tendencies and warned against such trends.

1.13.6. Linguistic Minority and Determining Factors

It is left to the minority to establish its minority status in order to avail the benefits of Article 30. The task is difficult especially because the concept 'religion' and 'language' have not been adequately defined in the Article or the Constituent Assembly Debates[116]. Status of linguistic minority raises the following questions: Does the concept of language refer to the languages having adequately developed grammar and script or is script sufficient to claim the status or is spoken language a condition enough to acquire the status of minority? As far as language is

[114] (2005) 5 S.C.C. 690. The facts in *Bal Patil's* case is that an organization representing a section of Jain Community approached the High Court of Bombay seeking a writ in the nature of *mandamus* directing the Central Government to notify the Jains as a minority community under the National Commission for Minorities Act, 1992 (in short, Central Act of 1992). Statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the Act as such and extend any special treatment or protection to them as minority.

[115] *Supra* n. 101.

[116] Jain Ranu, "Minority Rights in Education: Reflections on Article 30 of the Indian Constitution'', *Economic and Political Weekly,* Vol.40, No.24 (Jun 11-17), pp.2430-2437, (2005). See also, Ansari. A. Iqbal, " Minority Educational Rights : Supreme Court Judgment", *Economic and Political Weekly*, (May 10), (2003).

concerned, in the case of *D.A.V. College, Jullunder* v. *State of Punjab*[117], the Court observed that a linguistic minority for the purpose of Art.30(1) is one which must at least have a separate spoken language. It is not necessary that the language should also have a distinct script for those who speak it. Thus it is the wisdom of the Courts which throws some light on determining factors to identify religious and linguistic minorities.

1.13.7. The Criteria of Non Dominance

The position that mere numerical inferiority will not entitle a group for minority protection is clear from *Bal Patil*[118]. In *Bal Patil*[119]the Court observed that statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the National Commission for Minorities Act of 1992 as such and extend any special treatment or protection to them as minority, as the provisions contained in the group of Articles 25 to 30 is a protective umbrella against the possible deprivations of fundamental right of religious freedoms of religious and linguistic minorities.

The same approach ought to have been taken in *Lisie Medical and Educational Institutions case*[120]. Instead, the Court opined that the fact that the minorities have established more educational institutions than the non minorities does not indicate that they have become advanced[121]. This is not a convincing position in the peculiar situation in Kerala, where Christian community is a dominant section politically, educationally and socially advanced than the non minority community in the State[122]. Thus criteria of non dominance ought to be taken into account to confer minority entitlements; otherwise it may lead to reverse discrimination.

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[117] A.I.R. 1971 S.C. 1737.
[118] (2005) 5 S.C.C. 690.
[119] *Ibid.* See also, John Dayal, "Defining India's Minorities", *file//C:Documents%20and %20Settings/Administrator/My%20Documents/Ph.D%work/defining-india-s-minoriites.*htm.- visited on 5.4.2011.
[120] 2007(1) K.L.T. 489.
[121] *Lisie Medical and Educational Institutions* v. *State of Kerala*, 2007(1) K.L.T. p.441, para 20.
[122] *Ibid.* See counter affidavits by the State of Kerala providing the statistical data.

1.14. Minority Status Should not be Used as a Fraud Upon the Constitution

Minority status may be misused by groups to come out of State control. An institution may come out of the control of the State by merely showing that it is established by a person belonging to minority religion or by establishing educational institutions in an area where they constitute minority. The minority status may not be allowed to be used as a fraud upon the Constitution. The superior courts were always anxious of such misuse and the observations in *St.Stephens College* v .*University of Delhi*[123], makes the cautious note that Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities and 'no ill fit or camouflaged institution should get away with the constitutional protection'[124].

To prevent fraud upon the Constitution and to delimit the entitlements to deserving groups, judiciary has responded laying down general guidelines leaving space for the law making authorities. The judiciary always maintained that by granting an educational institution protection under Article 30, the real purpose of giving minority rights is not to be defeated. *TMAPai* in its majority opinion in answer to question No.3(a)[125] decided not to pronounce upon the indicas for granting protection under Article 30. Though it was left unanswered, the Supreme Court while clarifying *TMAPai* in *P.A. Inamdar* v. *State of Maharastra*[126], relying on para 153 in *TMAPai,* emphasized the need for preserving the minority character so as to enjoy the privilege of protection under Article 30. Further the objective of establishment of the institution is not to be defeated. It is worth noting the finding in *TMAPai* that such an institution is under an obligation to admit the bulk of the students fitting into the description of the minority community. Therefore, the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group so far as that State is concerned. In other words, the predominance

[123] (1992) 1 S.C.C. 558.
[124] *St.Stephen's College* v. *University of Delhi*, (1992) 1 S.C.C. 558 at p.587, para 28.
[125] What are the indica for treating an educational institution as a minority institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?
[126] (2005) 6 S.C.C. 537.

of linguistic minority students hailing from the State in which the minority educational institutions are established should be present. The management bodies of such institutions cannot resort to the device of admitting the linguistic students of the adjoining State in which they are in a majority, under the façade of the protection given under Article 30(1)[127] .

The same principle applies to religious minority as well. If any other view is to be taken, the very objective of conferring the preferential right of admission by harmoniously constructing Articles 30(1) and 29(2) may be distorted[128]. Thus *Inamdar* relies on the law laid down in *Pai Foundation*[129] that to establish a minority institution, the institution must primarily cater to the requirements of that minority of that State else its character of minority institution is lost. However, to borrow the words of Chief Justice S.R. Das in *Kerala Education Bill*[130] a 'sprinkling' of that minority from the other State on the same footing as a sprinkling of non- minority students, would be permissible and would not deprive the Institution of its essential character of being a minority institution determined by reference to that State as a unit.

In *Askar Ali* v. *State of Kerala*[131], it was held that mere fact that a person belongs to a minority community, by itself, doesn't give an institution that he establishes, the status of a minority institution. Establishment should be with the intention to establish as a member of the minority community. It is the identity and intention of the one who establishes the institution and not the beneficiary[132]. The proof of establishment of the institution by a minority is a condition precedent for claiming the right to administer the institution. There must exist some positive index to enable the educational institution to be identified with the religious or linguistic minority[133]. Moreover in *T.V. Varghese George* v. *Kora. K. George and*

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[127] *TMAPai Foundation and Others* v. *State of Karnataka and Others*,(2002) 8 S.C.C.481 at p. 585 at para 153.
[128] *P.A. Inamdar* v. *State of Maharastra*,(2005) 6 S.C.C. 593.
[129] (2002) 8 S.C.C. 481.
[130] *Kerala Education Bill, 1957, In re*,1959 S.C.R. 995.
[131] 2005(2) K.L.T. 528.
[132] Appointment of Petitioner as Headmaster in school was under challenge as against R.45 in Chapter XIV A of Kerala Education Rules.
[133] *S.P. Mittal* v.*Union of India,* A.I.R. 1983 S.C. 1; *R.M.B.T. School* v. *State,* A.I.R. 1973 *Ker.* 87; *Managing Committee, M.A.K.A.P.T. Education College* v. *State,* A.I.R. 1989 Pat. 248; *St. John's*

Others[134], the Court held that, in order to determine the nature of an educational trust as a secular public trust or minority institution, cardinality of the founder's intention is to be ascertained. The Court held that in order to qualify as a minority institution, establishment and administration must be both "by and for'' a minority community. Intention of the founding fathers of an institution for the benefit of a minority community is a significant factor in determining the nature of an educational trust.

1.15. Criteria for Establishing a Minority Educational Institution is 'Minority' and not the 'Status of Minority'

There are judicial declarations on the rights or entitlements to the communities coming under the purview of 'Minority'. Reiterating the dictum laid down in *Sidhrajbhai* v. *State of Gujarat*[135], the High Court of Kerala in *Lisie* v. *State of Kerala*[136] held that the very background of providing rights to minority communities in the matter of running educational institutions and the said right being not subject to any restriction would be clearly suggestive of the fact that once a community is a minority, it would have the right[137].

The National Commission For Minority Educational Institutions Act, 2004 S. 2(g) defines minority educational institution as a college or institution (other than a University) established or maintained by a person or group of persons from amongst the minorities[138]. Thus if a community is declared to be a minority by the State government[139], there cannot be any further challenge to the entitlements provided to them in view of Article 30 as in the present form. The view expressed

T.T.I. (for women) v. *State of Tamil Nadu,* (1993) 3 S.C.C. 595; *Haneefa* v. *Manager, M.A.S.M. High School, Venmanad,* 1976 (2) I.L.R. (Ker.) 532; *A.P.C.M. Society* v. *Government of A.P,* A.I.R. 1986 S.C. 1490.

134 (2012)1 S.C.C. 369.

135 A.I.R. 1963 S.C. 540.

136 *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 489, para 57.

137 *Ibid.*

138 S.10(1) deals with right to establish a Minority Educational Institution. Any person who desires to establish a Minority Educational Institution may apply to the Competent authority for the grant of no objection certificate for the said purpose.

139 National Commission for Minorities Act, 1992 S.2(c) defines minority : "Minority, for the purposes of this Act, means a community notified as such by the Central Government". The Central government is the final authority and the recommendation by Commission under s.9 is only recommendatory. After *TMA Pai*, the unit is State and the Central government cannot determine a community as minority nationwide.

by the High Court of Kerala in *Lisie*[140] is in tune with the central legislation discussed above. The above view shows that non dominance is not a condition precedent to determine minority status as Art.30 stands as of now. This may not go well with recent declarations of law regarding the minimum requirements to keep minority status of an educational institution as laid down by the Constitution bench in *TMAPai*[141] and *Inamdar*[142]. However, the High Court has taken note of the fact that there is some rationality in delimiting the benefits to non dominant sections but observes that for that purpose the Constitutional provisions have to be amended suitably[143]. Thus the view of the High Court in the instant case reflects the idea that though it is wise to delimit protection under Article 30 to non-dominant sections of the minority, Article 30 as it presently stands confer protection to religious and linguistic minorities whether they are non-dominant or not.

1.16. Bringing Minority on Par With Majority

The idea of giving some special rights to the minorities is not to have a kind of privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence[144]. In the instant case Khanna J., observed that[145] the minorities are as much children of the soil as the majority and the approach has been to ensure that nothing should be done as might deprive the minorities of a sense of belonging, of a feeling of security, of a consciousness of equality and of the awareness that the conservation of their religion, culture,

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[140] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. p.491, para 61.
[141] *Supra* n. 101.
[142] *Supra* n. 128.
[143] In para 61 of *Lisie,* the Court held that there may be some rationality in extending the benefit of Art.30 to a non dominant minority, but for that Art.30 itself has to be amended. In the instant case, '…Mr. Vaidyanathan as mentioned above urged that Art.30 is meant to equalize or protect the right of minorities from being deprived by the dominant majority in a democratic set up and if viewed from that angle, S.8 provides rationale and relevant criteria for determining what is a minority professional institution. The object is to achieve egalitarian, proportionate equality in respect of admissions to professional institutions. There does not appear to be any merit in the aforementioned contention of the learned counsel. The criteria for exercising the right in the matter of establishing and administering the educational institutions is minority and not the status of such minority. For accepting the contention of Mr. Vaidyanathan, there would be indeed requirement of amendment in Art.30 of the Constitution to make their rights dependent upon dominant or affluent status of the minority. That is not so. As long as, therefore, Art.30 as it is, the contention raised by Mr. Vaidyanathan cannot be accepted, however attractive it may seem to be...' See para 61 of *Lisie*.
[144] *Ahmedabad St.Xavier's College Society* v. *State of Gujarat,* (1974) 1 S.C.C. 717at p.772 .
[145] *Id*. at p. 781.

language and script as also enshrined in the Constitution. The same generous, liberal and sympathetic approach should weigh with the courts in construing Articles 29 and 30. The safeguarding of the interest of the minorities amongst sections of population is as important as the protection of the interest amongst individuals of persons who are below the age of majority or are otherwise suffering from some kind of infirmity. It can indeed, be said as an index of the level of civilization and catholicity of a nation as to how far their minorities feel secure and are not subject to any discrimination or suppression. The Court further held that the whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality[146].

Reiterating the above idea, the Court in *TMAPai* held that Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities. At the same time there also cannot be any reverse discrimination[147].

The Court further held that the essence of Art.30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favorable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non minority institutions are permitted to do[148].

[146] *Id*. at p. 743 .
[147] *TMAPai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481 at p.579.
[148] *Ibid*.

1.17. Variety of Minority Rights in India

Cultural and Educational Rights are provided to linguistic and religious minorities under Art.29[149] and 30[150] of the Constitution of India. Moreover, under Art.333[151] Anglo Indian community is given representation in the legislative assemblies of the States. These are the only provisions in the Constitution which use the term 'minority'. The educational rights of minorities include right to administer and manage educational institutions of their choice. These rights are dealt with in the forthcoming chapters.

1.18. Conclusion

Thus we can see that the attempts at the international level and national levels in defining and identifying the groups that constitute minorities has not been able to come up with a satisfactory meaning to the term minority. Identifying minorities is crucial in delimiting the protection exclusively to the deserving categories. The international bodies and agencies which tried to define minorities have been pragmatic leaving the term open ended so that deserving categories could be admitted to the group. Even at the level of League of Nations, the P.C.I.J had held that identifying minorities is a question of fact and not a question of law. Moreover, the subjective and objective components of the term minority point out that mere numerical inferiority doesn't qualify a group to be termed as minority but the group should be non dominant and it should have a will to preserve its minority

[149] Article 29 reads : *Protection of interests of minorities* : "(1) Any section of the citizens 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. (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".

[150] Article 30 reads : *Rights of minorities to establish and administer educational institutions:* " (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.(1-A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of property is such as would not restrict or abrogate the right guaranteed under that clause (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".

[151] Article 333 of the Constitution reads : *Representation of the Anglo Indian community in the Legislative Assemblies of the States*: "Notwithstanding anything in Article 170, the Governor of a State may, if he is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate one member of that community to the Assembly".

characteristics. Even at the national level in India, this trend at the international level is to be taken into account. The Constitution doesn't define minority but simply states the religious and linguistic groups as the categories to be given minority protection. Moreover, the present position reflects that groups below 50% of the population at the State level have to be identified as minorities. There may be dominant groups which may be numerically inferior. Further the minority status should not be used as a fraud upon the Constitution. The rights given to the minorities are a privilege or an equalizing right. The moment equality is achieved special status conferred on them should be taken away. Otherwise it will lead to reverse discrimination. Thus it should be seen that the minority status is intended to uplift the group which claims the right. If it is not exercised for that purpose, further conferment of the right is not warranted.

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Chapter - 2

EDUCATIONAL RIGHTS OF MINORITIES AT INTERNATIONAL AND NATIONAL LEVELS

Chapter - 2

EDUCATIONAL RIGHTS OF MINORITIES AT INTERNATIONAL AND NATIONAL LEVELS

"Education is the key to unlock the golden door of freedom"

George Washington[1]

2.1. Introduction

Educational rights are prominent among the diverse tools for empowerment of minorities. Various entitlements of minorities can be effectively chosen only if minorities are adequately armed with educational rights. The protection of minority educational rights at the international level poses the following questions *viz*. whether educational rights for the members of the minority community should be made available to minorities at a sub regional level also or should it be confined to national minorities? Whether State should take positive actions to facilitate minorities to establish and maintain educational institutions at international level? Whether the object of an international norm need be considered while providing for educational rights of minorities? Whether minority educational rights are special rights and whether they prevail over educational rights of non minorities? Whether principles of reasonableness, equality and non discrimination *vis a vis* non minority community are to be kept in mind while demanding for minority educational rights? Whether numerical factor and the position of minority *vis a vis* non minority is to be balanced when educational rights are claimed? The international reaction to the educational rights are to be considered as guiding principles to minorities in India so far as their educational rights are concerned.

[1] George Washington was the president of United States of America. See, *www.searchquotes.com/ search/ George_Washington_on_Education* visited on 20.3.2009.

2.2. International Instruments and Minority Educational Rights

There are many international documents that deal with the religious and educational rights of minorities. Article 26(2) of the Universal Declaration of Human Rights[2], Article 30 of International Convention on the Rights of the Child[3], Article 13 of the International Covenant on Civil and Political Rights[4], Article 17 of African Charter on Human and People's Rights[5], Article 14 of the Council of Europe Framework Convention for the Protection of National Minorities, Article 5(1)(c)[6] of United Nations Educational Scientific and Cultural Organisation, Convention against Discrimination in Education, Article 4(3) of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[7], Para 34 of the Document of the Copenhagen Meeting of the Conference of the Human Dimension of the Organisation of Security and Co-

[2] Hereinafter referred to as UDHR. Art.26(2) states : "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace''.

[3] Art.30 reads : "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right , in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or use his or her own language''.

[4] Hereinafter referred to as ICCPR. Art.13 ICCPR reads : "The State Parties to the present Covenant recognize the right of every one to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the UN for the maintenance of peace''.

[5] Art.17 of the African Charter reads : "1. Every individual shall have the right to education. 2. Every individual may freely take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State''.

[6] Hereinafter referred to as the UNESCO Convention. Art. 5(1)(c) of the UNESCO Convention reads : "It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools, and developing the educational policy of each State, the use or the teaching of their own language, provided however (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; (ii)That the standard of education is not lower than the general standard laid down or approved by the competent authorities and (iii) That attendance at such schools are optional''.

[7] Art.4(3) reads : "States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue''.

operation in Europe[8], Article 17 of the UNESCO Recommendations Concerning Education for International Understanding, Cooperation and Peace and Education Relating to Human Rights and Fundamental Freedoms[9] are some of the international and regional standard setting documents on minority education. The key treaty on minority rights in contemporary international law is Article 27 of the International Covenant on Civil and Political Rights[10]. But none of the case laws on Article 27 has focused on the educational process[11]. Many commentators observe that there is an intrinsic relation between cultural right and education. Hence they demand positive action including special minority education measures under Article 27 ICCPR[12]. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities mentions about the educational rights of minorities[13]. It puts forward global minimum standards for the protection of minority rights including educational rights. It is important to note that State action is required only 'wherever possible[14]'. The UNESCO Convention

[8] Para 34 reads : "The Participating States will endeavor to ensure that persons belonging to national minorities notwithstanding the need to learn the official language or the languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue, as well as, wherever possible and necessary for its use before public authorities, in conformity with applicable national legislation''.

[9] Art.17 UNESCO reads : "Member States should promote at various stages and in various types of education, study of different cultures, their reciprocal influences, their perspectives and ways of life, in order to encourage mutual appreciation of the difference between them. Such study should among other things, give due importance to the teaching of foreign languages, civilizations and cultural heritage as a means of promoting international and inter cultural understanding".

[10] Art.27 ICCPR reads : "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language''.

[11] Among the works dealing with the jurisprudence of Art.27, see Alfredsson G.and Zayas, "A Minority Rights Protection by the United Nation'', 14 *Human Rights Law Journal*, No.1-2, pp.1-9.(February 1993).

[12] See Capotorti's views in *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Sales No. E.91.XIV .2, United Nations, New York,(1991).

[13] Article 4.3 provides : "States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue. In Article 4.5 specific reference to education is made: States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole".

[14] *Ibid.*

Against Discrimination in Education makes special reference to minority education[15] with the proviso that it should not hamper national sovereignty.

2.2.1. The Hague Recommendations on the Educational Rights of National Minorities

Analysis of the Hague Recommendations and its Explanatory note gives us an understanding of the need for reasonableness in the demands for educational rights. Realising that education is an extremely important element for the preservation and the deepening of the identity of persons belonging to minority, the Organisation for Security and Co-operation in Europe asked the Foundation on Inter-Ethnic Relations, Hague, to make recommendations on an appropriate application of minority education rights in the region. The Hague Recommendations[16] after analyzing the spirit of international instruments of minority education pointed out that the right of persons belonging to national minorities to maintain their identity can be fully realized if they acquire a proper knowledge of their mother tongue during the educational process. At the same time, persons belonging to national minorities have a responsibility to integrate into the wider national society through the acquisition of a proper knowledge of the State language. Further, it pointed out that in applying international instruments which may benefit persons belonging to national minorities, States should consistently adhere to the fundamental principles of equality and non-discrimination.

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[15] Article 5(c) UNESCO Convention Against Discrimination in Education states : "Whereby the State parties agree the following: It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and depending on the educational policy of each State, the use of the teaching of their own language, provided however: (1)That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty….(3) That attendance in schools is optional ".

[16] The Foundation in consultation with experts including Asbjorn Eide, Patrick Thornberry, Allan Rosas, Tove SkutnabbKangas, produced the document known as the Hague Recommendations Regarding Education of National Minorities,1996 which along with the explanatory note gives a framework for minority educational rights.

2.2.2. Explanatory Note to the Hague Recommendations

The Explanatory Notes to the Hague Recommendations, provided that the international instruments on minority education, underline that the right to maintain the collective identity through the minority language must be balanced by the responsibility to integrate and participate in the wider national society. Such integration requires the acquisition of a sound knowledge of both that society and the State language(s). It further stresses that national minorities should ensure that their demands are reasonable[17]. They should give due consideration to such legitimate factors as their own numerical strength, their demographic density in any given region (or regions), as well as their capacity to contribute to the durability of these services and facilities over time.

The right of national minorities to establish and manage their own institutions, including educational ones, is well grounded in international law[18]. Although the State has the right to oversee this process, it must not prevent the enjoyment of this right by imposing unreasonable requirements which might render it practically impossible for national minorities to establish their own educational institutions.

2.2.3. Hague Convention on the Need for Maintaining Spirit of Integration in Tertiary Education

The objective of education is the promotion of understanding, tolerance and friendship among nations, racial and religious groups[19]. In this spirit, the explanatory note to Hague Recommendations provides that with integration in mind, the intellectual and cultural development of majorities and minorities should not take place in isolation. Hence, as far as tertiary education is concerned, special

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[17] See, Article 15 of the Framework Convention for the Protection of National Minorities; Paragraph 30 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE and Article 3 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

[18] Paragraph 32 of the Copenhagen Document imposes no obligation on the State to fund these institutions, but it does stipulate that these institutions may "seek public assistance from the State in conformity with national legislation".

[19] See Article 26 of the Universal Declaration of Human Rights.

provisions to conduct minority education in a separate manner is not conducive to the spirit of integration[20].

2.3. Judicial Trends Balancing Minority Educational Rights With General Interest of Society

At the international level, we have seen that most of the international instruments follow a pragmatic approach in defining minority keeping the definitional aspect open ended to allow only the needy to get minority protection. In allowing the educational rights also, the judicial trend balances the minority interest with the needs of the society so that the equilibrium is maintained and a harmonious societal relationship is made possible.

(a) *Access to German Minority Schools by Students who Failed the Language Test*

In *Access to German Minority Schools in Upper Silesia*[21], the Permanent Court of International Justice[22], upheld Article 74 of the Convention between Germany and Poland concerning Upper Silesia which lays down that the question whether a person does or does not belong to a racial, linguistic or religious minority may not be verified or disputed by the authorities, but by the declarations of the persons responsible for the education of the children. The Court held that admissions to the German Minority schools in the case of children who passed the tests for the school years 1926-1927 and 1927-1928 remain valid and effective; and applications for admission submitted subsequently, even in the case of those who failed to pass the tests, fall under Articles 74[23] and 131[24] of the Convention as construed by the Court and must be dealt, on the basis of declaration of parents.

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[20] The Hague Recommendations are not intended to be comprehensive. They are meant to serve as a general framework which can assist States in the process of minority education policy development.

[21] *Access to German Minority Schools in Upper Silesia, Advisory Opinion*, 1931 P.C.I.J. (ser. A/B) No. 40 (May 15).

[22] Hereinafter referred to as P.C.I.J.

[23] According to Article 74 of the Convention, "the question whether a person does or does not belong to a racial, linguistic or religious minority may not be verified or disputed by the authorities".

[24] Article 131 reads : "(1) In order to determine the language of a pupil or child, account shall only be taken of the verbal or written statement of the person legally responsible for the education of

(b) *Right of Minority Community to Establish Educational Institutions and Admit Students: Whether an Absolute Right?*

The Albanian Declaration of 2nd October 1921, concerning the protection of minorities[25]and the right of minority community to establish educational institutions was the dispute referred to P.C.I.J.[26]. The point at issue was whether the intention of *Article 5*[27] in the Albanian Declaration was to rule out discrimination as regards the maintenance and establishment of charitable institutions and schools, etc., or whether the intention was to grant to the minority an unconditional right to maintain and create their own charitable institutions and schools. The majority opinion favoured the unconditional rights[28] of the minorities irrespective of nationalization policy of the State.

(c) *Scope of Right to Admission to Educational Institutions in One's Own Language and Preference for Parent's Linguistic Choice*

The *Belgian Linguistic Case (No 2)*[29] was an issue on the right to education under the European Convention of Human Rights, Protocol 1, Article 2. It related to "certain aspects of the laws on the use of languages in education in Belgium", and was decided by the European Court of Human Rights in 1968. The applicants

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the pupil or child. This statement may not be verified or disputed by the educational authorities. (2) Similarly, the educational authorities must abstain from exercising any pressure, however slight, with a view to obtaining the withdrawal of requests for the establishment of minority educational institutions".

25 Albanian Declaration made before the Council on October 2nd, 1921, Article 5 reads : 'Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein. Within six months from the date of the present Declaration, detailed information will be presented to the Council of the League of Nations with regard to the legal status of the religious communities, churches, convents, schools, voluntary establishments, and associations of racial, religious and linguistic minorities. The Albanian Government will take into consideration any advice it might receive from the League of Nations with regard to this question'.

26 *Greece* v. *Albania.* Advisory Opinion, 26 P.C.I.J. Ser. A./B., No. 64, 1935.

27 *Supra* n. 25.

28 The argument that, if the general purpose of the minority treaties is borne in mind and also the contents of the Albanian Declaration taken as a whole, it will be found that the "equal right" provided for in the first paragraph of Article 5 cannot mean a right of which the extent is measured by that enjoyed by other Albanian nationals, and that it must imply an unconditional right, a right of which the members of the minority cannot be deprived cannot be agreed with.

29 (1968) 1 E.H.R.R. 252.

alleged that Belgian Linguistic Legislation[30] relating to education, infringed their rights under the European Convention, namely Article 8[31] in conjunction with Article 14[32], and Article 2 of the Protocol 1[33] of March 1952[34]. The applicants' claimed that the law of the Dutch speaking regions where they lived did not include adequate provisions for French-language education. Moreover, Belgian State withheld grants to institutions in those areas that did not comply with the linguistic provisions set out in the legislation for schools and denied to recognise certificates issued by these institutions. Further, the State did not allow the applicants' children to attend French classes in certain places, compelling applicants to enroll their children in local schools, violating parents' linguistic preferences. Thus the main points revolve round the issues whether the right to education in one's own language was included in the Convention[35] and the Protocol, and whether the applicants belonged to a national minority within the ambit of Article 14. The Court opined that the right to education implied the right to be educated in the national language, and did not include the provision that the parent's linguistic preferences be respected and that the Convention implies a just balance between

[30] The Acts they brought litigation against basically stated the language of education shall be Dutch in the Dutch-speaking region, French in the French-speaking region and German in the German-speaking region.

[31] Family life.

[32] Non discrimination.

[33] Right to Education.

[34] In particular the applicants sought to challenge the Acts of 27th July 1955, 29th May 1959and 30th July 1963 "relating to the use of languages in education", the Act of 14th July 1932 "on language regulations in primary and intermediate education", and the Act of 15th July1932 "on the conferring of academic degrees". Section 4 of the Act of 30th July 1963 laid down that the language of education should be Dutch in the Dutch-speaking region, French in the French speaking region and German in the German-speaking region. In Kraainem, and five other communes on the outskirts of Brussels where the normal language is Dutch, nursery and primary, but not secondary, education was allowed in French if this was the child's maternal or usual language and provided that the head of the family is resident in one of these communes.

[35] The negative formulation of Article 2 of the Protocol, 'no person shall be denied the right to education', indicates, that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidize, education of any particular type or at any particular level but merely guarantees to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time. The right to education guaranteed by the first sentence of Article 2 of the Protocol calls for regulation by the State, according to the needs and resources of the community and of individuals.

the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter[36].

Thus we can see that international law recognizes educational rights as a general human right[37] and also as a crucial part of minority rights. The international principles regarding determining minority and minority educational entitlements provides that measures favouring minority should be aimed at providing substantive equality and it should stop when equality is achieved. These basic principles should govern the treatment given to minorities in India also and the special provisions to minorities should continue till substantive equality is achieved.

2.4. Educational Rights of Minorities in India

Here, attempt is made to analyse the historical and constitutional basis for conferment of educational rights to minorities in India. In order to have a better understanding of the exact scope of rights which are envisaged by the Constitution for the protection of educational rights of minorities, the intention of the founding fathers of the Constitution is to be probed into by looking in to the debates in the Constituent Assembly. The constitutional position as regards educational rights is also examined. For the purpose of this analysis, protection of educational rights of minorities is weighed against the basic structure of our Constitution *vis a vis* the arguments as regards the absolute nature of minority educational rights.

2.5. Evolution of Educational Rights of Minorities

The evolution of educational rights of minorities can be looked into in two stages. The first stage relates to pre-partition deliberations in the Committees and Constituent Assembly and the second stage after the partition of India. On 27th of February, 1947, several Committees were formed for the purpose of drafting the

[36] See also *Kjeldsen, Busk, Madsen and Pedersen* v. *Denmark*, (1976) 1 E.H.R.R. 711; *Campbell and Cosans* v. *United Kingdom*, (1982) 4 E.H.R.R. 293; *Ali (FC)* v. *Head Teacher and Governors of Lord Grey School*, [2006] U.K.H.L.14.

[37] Art. 26 UDHR; Art.13 ICESCR; Articles 28 and 29 of CRC. See also, Charles Wagley and Marvin Harris, *Minorities in the New World : Six Case Studies*, Columbia University Press, Newyork,(1958); Thompson Virginia and Adloff, Richard., *Minority Problems in South-East Asia*, Stanford University Press, California,(1955).

Constitution of India and on the same day, the Advisory Committee appointed a Sub-Committee on Minorities with a view to submit its report with regard to the rights of the minorities[38]. There was a Committee on Fundamental Rights also and before the Fundamental Rights Sub-Committee, Shri K.M. Munshi wanted certain rights[39] for minorities being incorporated in the fundamental rights and the Fundamental Rights Committee[40] recommended that the suggestions regarding

[38] B. Shiva Rao, *The Framing of India's Constitution : A Study,* N. M. Tripathi Pvt. Ltd, Bombay (1972), p.275. See also, Desai. M., *Minority Educational Institutions and Law*, Akshar Prakashan, Mumbai, (1996); Mohammed Shafiquz Zaman, *Problems of Minorities' Education in India,* Booklinks Corporation, Hyderabad,(2001); Wadhwa Kamlesh Kumar, *Minority Safeguards in India: Constitutional Provisions and Their Implementation*, Thomson Press (India) Ltd., Haryana,(1975).

[39] One of the reasons for recommendation of the aforesaid rights was the Polish Treaty forming part of Poland's Constitution which was a reaction to an attempt in Europe and elsewhere to prevent minorities from using or studying their own language. The recommendations run as follows "1. All citizens are entitled to the use of their mother tongue and the script thereof and to adopt study or use any other language and script of his choice. 2. Citizens belonging to national minorities in a State whether based on religion or language have equal rights with other citizens in forming, controlling and administering at their own expense, charitable, religious and social institutions, schools and other educational establishment with the free use of their language and practice of their religion. 3. Religious instruction shall not be compulsory for a member of a community which does not profess such religion. 4. It shall be the duty of every unit to provide in the public educational system in towns and districts in which a considerable proportion of citizens of other than the language of the unit are residents, adequate facilities for ensuring that in the primary schools, the instruction shall be given to the children of such citizens through the medium of their own language. Nothing in this clause shall be deemed to prevent the unit from making the teaching of the national language in the variant and script of the choice of the pupil obligatory in the schools. 5. No legislation providing state aid for schools shall discriminate against schools under the management of minorities whether based on religion or language. 6. (a) Notwithstanding any custom or usage or prescription, all Hindus without any distinction of caste or denomination shall have the right of access to and worship in all public Hindu temples, countries, dharmasalas, bathing ghats, and other religious places. (b) Rules of personal purity and conduct prescribed for admission to and worship in these religious places shall in no way discriminate against or impose any disability on any person on the ground that he belongs to impure or inferior caste or menial class".

[40] The original draft of the fundamental rights submitted to the Constituent Assembly on April 16, 1947 by the Sub-Committee on Fundamental Rights did not contain any provision corresponding to Article 30(1) and did not even refer to the word minority. The letter submitted by K.M. Munshi to the Minorities Sub-Committee on the same date when, along with some other rights, the rights now forming part of Article 30(1) was proposed, made a reference to the term "national minorities". The Drafting Committee, tried to distinguish between the rights of any section of the citizen 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 and for this, the committee omitted the word 'minority' in the earlier part of the draft Article 23 corresponding to Article 29, while it retained the word in the latter part of the draft Article 23 which now forms part of the Article 30(1). Ambedkar sought to explain the reason for substitution in the Draft Constitution of the word minority by the words "any section" observing that the term minority was used therein not in the technical sense of the word 'minority' as we have been accustomed to use it for the purpose of political safeguards, such as representation in the Legislature, representation in the service and so on. The word is used not merely to indicate the minority in the technical sense of the word, but also includes groups which are nonetheless minorities in the cultural and linguistic sense. That is the reason why the word "minority" was

rights of minorities may be placed, before the Minority Sub- Committee. The aforesaid recommendations were then placed before the Minority Sub-Committee.

2.5.1. Fundamental Rights Sub Committee on Educational Rights

We can see that even among the members in the Fundamental Rights Sub Committee, there was no unanimity for any special rights for minorities. Harnam Singh's draft on Fundamental Rights[41] reflects the policy that everybody should be entitled to establish and administer educational institutions[42]. He reiterated that educational institutions for religious minority should only be for the development of their culture[43]. Even in Munshi's note and draft articles on fundamental rights, march 17, 1947 specific attention is to be given to Article 8 which deals with right to education for all. Article 8(4) reads :

omitted because it was felt that the word might be interpreted in the narrow sense of the term when the intention of the House was to use the word 'Minority' in a much wider sense so as to give cultural protection to those who were technically not minorities, but minorities nonetheless. Ambedkar's explanation that the right was available not only to minorities in the 'technical sense' but also to minorities in the 'wider sense' has an obvious reference only to that part of Draft Article 23 which now forms part of Article 29(1) and not to that which is now clause (1) of Article 30. His explanation, therefore, may be taken to be an attempt to broaden the scope of clause (1) of Article 29 only so as to include within the term 'minority' other minority groups also, as contemplated and illustrated by him, and thus to confine Article 30(1) to those minorities which he described as minorities in the technical sense, were politically recognized and the most prominent amongst them were represented in the Constituent Assembly also. The whole problem, as far as this part of Constitution is concerned, was to achieve a consensus on a constitutional arrangement, between the numerically dominant majority considered as such on the national scene and the minorities referred to above- a solution which could give the minorities a feeling of security against discrimination, and security against interference with those characteristics which had divided them apart from the majority.

41 See generally, B. Shiva Rao, *The Framing of India's Constitution: A Study,* Bombay, N.M. Tripathi Publishing Co. Pvt. Ltd, Bombay,(1972). Harnam Singh submitted his draft, before the Fundamental Rights Sub Committee on March 18,1947

42 B. Shiva Rao, *The Framing of India's Constitution: Select Documents*, (vol. II), Universal Publishing Co. Ltd.,(2004), p.82. Harnam Singh submitted his draft, before the Fundamental Rights Sub Committee on March 18,1947 In point 6 he observes : "All inhabitants shall be entitled to establish, manage and administer at their own expense, religious, charitable and social institutions, schools and other educational establishments and shall have the right to the free use of their religion in such institutions".

43 *Ibid.* In point 15 at page 82, it is provided as follows: "Religious minorities in the country shall have a right to establish autonomous institutions for the preservation and development of their culture etc." Point 18 A provides thus: "minority school shall be established on application of a national supported by the persons legally responsible for the education of at least 40 children of the minority provided that these children are nationals and they belong to the same school district and they are of age at which education is compulsory and that their parents intend to sent them to the said school".

> The opportunities of education must be open to all citizens upon equal terms in accordance with their natural capacities and their desire to take advantage of the facilities available.

2.5.2. The Minority Sub-Committee on Educational Rights of Minorities

The Minority Sub-Committee submitted its report amongst other subjects on cultural, educational and fundamental rights of minorities which were proposed to be incorporated at the appropriate places in the Constitution of India[44]and to be put in the fundamental rights chapter. On 22nd April, 1947, the report of Minority Sub-Committee was placed before the Advisory Committee[45]. The Advisory Committee then considered the recommendations of the Sub-Committee and it was resolved to insert certain clauses[46] among the justiciable fundamental rights.

2.5.3. Constituent Assembly on Educational Rights of Minorities

When clause 18[47] was moved by Sardar Vallabhai Patel before the Constituent Assembly which met on 1st May, 1947, Sub-clause (2) of clause 18[48]

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[44] The recommendations of the said Sub-Committee were : " (i) All citizens are entitled to use their mother tongue and the script thereof, and to adopt, study or use any other language and script of their choice; (ii) Minorities in every unit shall be adequately protected in respect of their language and culture, and no government may enact any laws or regulations that may act oppressively or prejudicially in this respect; (iii) 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 instruction be compulsorily imposed on them; (iv) 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 same manner and measure as is given to similar State-aided institutions; (v) 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; (vi) No disqualification shall arise on account of sex in respect of public service 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".

[45] Advisory Committee recommended that clause 16 which corresponds to Art.28 should be redrafted. "All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion subject to public order, morality or health, and to the other provisions of this chapter".

[46] See clause 18(1). "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; (2) 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 instruction be compulsorily imposed on them; (3)(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".

[47] *Ibid*.

was referred back to the Advisory Committee for reconsideration and clause 18(1)[49] and clause 18(3)[50] were accepted without any amendment.

Sub-clause (2)[51] was placed before the House on 30th August, 1947 for being adopted along with the recommendation of the Advisory Committee. When the matter was taken up, Mrs. Purnima Banerji proposed that after the word 'State' the words 'and State-aided' be inserted[52].

After Clause 18(2)[53] was adopted by the Constituent Assembly, the same was referred to the Constitution Drafting Committee of which Dr. B.R. Ambedkar was the Chairman. The Drafting Committee while drafting Clause 18 deleted the word 'minority' from Clause 18(1) and the same was replaced by the words 'any section of the citizens'. Clause 18(1)[54], (2)[55] and (3) (a) & (b) were transposed in Article 23[56] of the Draft Constitution of India.

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48 The Advisory Committee re-considered Clause 18(2) and recommended that Clause 18(2) be retained after deleting the words "nor shall any religious instruction be compulsorily imposed on them" as the said provision was already covered by Clause 16.

49 *Supra* n. 46.

50 *Ibid.*

51 *Ibid.*

52 While proposing the said amendment, Mrs. Banerji stated that the purpose of the amendment is that no minority, whether based on community or religion shall be discriminated against in regard to the admission into State-aided and State educational institutions. Many of the provinces, passed resolutions laying down that no educational institution will forbid the entry of any members of any community merely on the ground that they happened to belong to a particular community even if that institution is maintained by a donor who has specified that that institution should only cater for members of his particular community. If that institution seeks State aid, it must allow members of other communities to enter into it. The amendment proposed by Mrs. Banerji was supported by Pandit Hirday Nath Kunzra and other members. However, on intervention of Shri Vallabhbhai Patel, the following Clause 18(2) as proposed by the Advisory Committee was adopted:"18(2). No minority whether based on religion, community or language shall be discriminated against in regard to the admission into State educational institutions."

53 *Supra* n. 48.

54 Amended Article 18(1) substituting 'any section of the citizens' for 'minority'.

55 Cl.18(2) inserting the word 'state aided'.

56 Article 23 of the Draft Constitution of India runs as under: *Cultural and Educational Rights.* "23(1)Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same. (2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the State. (3) (a) All minorities whether based on religion, community or language shall have the right to establish and administer educational institutions of their choice. (b) 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, community or language".

On 8.12.1948, the aforesaid draft Article 23 was placed before the Constituent Assembly[57]. At that stage, Shri Thakur Das Bhargava moved amendment No.26 to amendment No. 687. He submitted that there are three points of difference between his proposals and the provisions of the Section which it seeks to amend[58]. After Dr. B.R. Ambedkar gave clarification as to why the words "no minority" were deleted and its place "no section of the citizen" were substituted in clause (1) of draft Article 23, amendment as proposed by Shri Thakur Das Bhargava was put to motion and the same was adopted[59]. Hence, if we analyse the

[57] When draft Article 23 was taken up for debate, Shri M. Ananthasayanam Ayyangar stated that for the words "no minority" occurring in Clause 2 of draft Article 23, the words "no citizen or minority" be substituted. He stated : "I want that all citizens should have the right to enter any public educational institution. This ought not to be confined to minorities. That is the object with which I have moved this amendment".

[58] According to him, for amendment No. 687 of the List of amendment, the following be substituted: "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". 219. He further stated : "Sir, I find there are three points of difference between this amendment and the provisions of the Section which it seeks to amend. The first is to put in the words 'no citizen' for the words 'no minority'. Secondly that not only the institutions which are maintained by the State will be included in it, but also such institutions as are receiving aid out of State funds. Thirdly, we have, instead of the words "religion, community or language", the words, "religion, race, caste, language or any of them". Now, Sir, it so happens that the words "no minority" seek to differentiate the minority from the majority, whereas you would be pleased to see that in the Chapter the words of the heading are "*cultural and educational rights*", so that the minority rights as such should not find any place under this Section. Now if we read Clause (2) it would appear as if the minority had been given certain definite rights in this clause, whereas the national interest requires that no majority also should be discriminated again in this matter. Unfortunately, there is in some matters a tendency that the minorities as such posses and are given certain special rights which are denied to the majority. It was the habit of our English masters that they wanted to create discriminations of this sort between the minority and the majority. Sometimes the minority said they were discriminated against and on the other occasions the majority felt the same thing. The amendment brings the majority and the minority on an equal status. In educational matters, I cannot understand, from the national point of view, how any discrimination can be justified in favour of a minority or a majority. Therefore, what this amendment seeks to do is that the majority and the minority are brought on the same level. There will be no discrimination between any member of the minority or majority in so far as admissions to educational institutions are concerned. So I should say that this is a charter of the liberties for the student-world of the minority and the majority communities equally. Now, Sir, the word "community" is sought to be removed from this provision because "community" has no meaning. If it is a fact that the existence of a community is determined by some common characteristic and all communities are covered by the words religion or language, then "community" as such has no basis. So the word "community" is meaningless and the words substituted are "race or caste". So this provision is so broadened that on the score of caste, race, language or religion no discrimination can be allowed. My submission is that considering the matter from all the standpoints, this amendment is one which should be accepted unanimously by this House".

[59] Thus the word 'minority' was deleted and the same was substituted by the word 'citizen' and for the words "religion, community or language", the words "religion, race, caste, language or any of them were substituted. Thus, Article 23 was split into two Articles-Article 23 containing Clause (1) and Clause (2) of Article 23 and Sub-clause (a) and (b) of Clause (3) of Article 23

reasoning given by Thakur Bhargava Das with regard to his motion on Article 23 we can see that the heading Cultural and Educational Rights given to in Article 23 denotes the entitlements under them were aimed as a Charter of educational rights which is equally available to both minority and non minority community. Thus the consideration of national interest required that non minority should not be discriminated *vis a vis* minority in educational matters was emphasised in the drafting stage itself. Thus draft Article 23 was split into two Articles-Article 23 containing clause (1) and clause (2) of Article 23 and Article 23-A containing sub-clause (a) and (b) of clause (3) of Article 23 . Subsequently, Articles 23 and 23-A became Articles 29 and 30 respectively[60].

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was numbered as Article 23-A. Subsequently Articles 23 and 23-A became Articles 29 and 30 respectively. Thus, Article 23, as amended, became part of the Constitution on 9th December, 1948.

[60] The deliberations of the Constituent Assembly show that initially Shri K.M. Munshi recommended that citizens belonging to national minority in the State whether based on religion or language have equal rights with other citizens in setting up and administering at their own expense charitable, religious and social institutions, schools and other educational establishments with the free use of their language and practice of their religion for being incorporated in the proposed Constitution of India. This was with a view that the members of the majority community who are more in number may not at any point of time take away the rights of minorities to establish and administer educational institution of their choice. It was very much clear that there was a clear intention that the rights given to minorities under Article 30(1) were to be exercised by them if the institution established is administered at their own cost and expense. It is for that reason we find that no educational institution either minority or majority has any common law right or fundamental right to receive financial assistance from the government. Non-discriminatory Clause (2) of Article 30 only provides that the State while giving grant-in-aid to the educational institutions shall not discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. The subsequent deliberations of the Constituent Assembly further shows that there was thinking in the minds of the framers of the Constitution that equality and secularism be given paramount importance while enacting Article 30(1). It is evident that amendment proposed by Shri Thakur Das Bhargava which is now Article 29(2) was a conscious decision taken with due deliberations. The Constituent Assembly was of the view that originally Clause (2) of draft Article 23 sought to distinguish the minority from majority, whereas in the Chapter the words are 'cultural and educational rights' and as such the words 'minority' ought not to have found place in that Article. The reason for omission of words in Clause (2) of draft Article 23 was that minorities were earlier given certain rights under that clause where national interest required that no member of majority also should be discriminated against in educational matters. It also shows that by the aforesaid amendment discrimination between minority and majority was done away with and the amendment has brought the minority and majority in equal footing. The debate also shows what was originally proposed either in Clause 18(2) or Article 23(2). The debate further shows that the post partition stage members of the Constituent Assembly intended to broaden the scope of Clause (2) of draft Article 23 and never wanted to confine the rights only to the minorities. The views of the members of the Constituent Assembly were that if any institution takes aid from the government for establishing and administering educational institutions it cannot discriminate while admitting students on the ground of religion, race and caste. It may be seen that by accepting the amendment proposed by Shri Thakur Das Bhargava the scope of Article 29(2) was broadened inasmuch as the interest of minority - either

2.6. Educational Rights of Minorities and the Constitution of India

Cultural and Educational Rights are provided in Articles 29[61] and 30[62] of the Constitution. The main argument with regard to Art.30 is that it is absolute in terms and is not subject to any restrictions[63]. But the rights of minorities must not be used to impede or blackmail the majority. Toleration and co-operation for common good are as much expected of minorities as of the majority. The attempt hereunder is to examine as to whether the Constitutional provisions dealing with educational rights of minorities are absolute in nature or are they subject to reasonable restrictions.

2.6.1. Purpose of Art.30-Whether for the Exclusive Benefit of Minorities?

Discussions in the Constituent Assembly Debates shows that Article 30(1) confer on the minorities a right to set up educational institutions of their choice was in return to minorities for giving up demand for separate electorate system in the country[64]. The discussions in the Assembly show that framers of the Constitution never intended that minorities can setup educational institutions for their exclusive benefit[65].

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religious or linguistic was secured and, therefore, the intention of the framers of the Constitution for enacting Clause (2) of Article 29(2) was that once a minority institution takes government aid, it becomes subject to Clause (2) of Article 29.

[61] Art.29 reads : *Protection of Interests of Minorities*: "(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. (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".

[62] *Right of Minorities to Establish and Administer Educational Institutions: "*(1) All minorities, whether based on religion or language, shall have the right to establish and, administer educational institutions of their choice. (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".

[63] See *St. Stephen's College* v. *University of Delhi,* (1992)1 S.C.C. 558, para 79 wherein the Counsel for the institution argued that minorities in the exercise of their rights under Art.30(1) are entitled to establish and administer educational institutions for the exclusive advantage of their own community candidates. See also, Saxena Priti. Dr., "Judiciary on Educational Rights of Minorities", *Indian Bar Review*, Vol.XXXII (3&4), 2005.

[64] See Bajpai, Rochana, *Recognising Minorities: A Study of Some Aspects of The Indian Constituent Assembly Debates, 1946-1949.* M.phil. thesis, Faculty of Social Studies, University of Oxford, (1997). See also, Bajpai Rochana, "Constituent Assembly Debates and Minority Rights", *Economic and Political Weekly*, (May 27),(2000).

[65] See, *Constituent Assembly Debates,* (Vol. I.), pp. 114,139,147, 284; (Vol. V.), pp. 202; 222-224; (Vol. III.), p. 470; (Vol. II.), pp. 205,223,224,261,264,285,302. See also, Imam Mohammed, *Minorities and Law*, The Indian Law Institute, New Delhi and N.M. Tripathi

In *St.Stephen's College* v. *University of Delhi*[66], the argument that the purpose of incorporation of Article 30[67] of the Constitution won't be served if the linguistic or religious minorities who establish educational institutions cannot admit their own students or are precluded from admitting members of their own communities in their own institution was held to be not good[68]. In the instant case[69], reiterating *Re, Kerala Education Bill* [70], the Court held that minorities cannot establish educational institution only for the benefit of their community. If such was the aim, Article 30(1) would have been differently worded and it would have contained the words 'for their own community'. In the absence of such words it is legally impermissible to construe the Article as conferring the right on the minorities to establish educational institutions for their own benefit.

2.6.2. The Import of the Word Caste in Art.29(2)

The fact that educational rights are not absolute in nature is further reiterated by the analysis of Art.29(2)[71]. The argument that Art.29 and 30 are special rights available to minorities as they come under the head Cultural and Educational Rights is baseless[72]. Art.29(2) confers a special right on citizens for admission into educational institutions maintained or aided by the State[73]. To limit this right only to citizens belonging to minority groups will be to provide a double protection for

Private Ltd., Mumbai,(1972); Mahmood Tahir, *Politics of Minority Educational Institutions*, ImprintOne, Haryana,(2007).

66 (1992) 1 S.C.C. 558.

67 *Supra* n. 62.

68 *Supra* n. 66.

69 (1992) 1 S.C.C. 607.

70 *Re Kerala Education Bill*,1951 S.C.R. 525.

71 *Supra* n.61. See also, Mohammed Shafiquz Zaman, *Problems of Minorities' Education in India,* Booklinks Corporation, Hyderabad,(2001); Raju M.P., *Minority Rights: Myth or Reality?- A Critical Look at 11 Judge Verdict with full text.,* Media House, Delhi, (2002).

72 It should be remembered that post partition stage, members of the Constituent Assembly intended to broaden the scope of Clause (2) of draft Article 23 and never wanted to confine the rights only to the minorities. The views of the members of the Constituent Assembly were that if any institution takes aid from the government for establishing and administering educational institutions it cannot discriminate while admitting students on the ground of religion, race and caste. It may be seen that by accepting the amendment proposed by Shri Thakur Das Bhargava the scope of Article 29(2) was broadened inasmuch as the interest of minority - either religious or linguistic was secured and, therefore, the intention of the framers of the Constitution for enacting Clause (2) of Article 29(2) was that once a minority institution takes government aid, it becomes subject to Clause (2) of Article 29.

73 *State of Bombay* v. *Bombay Educational Society,* (1955) 1 S.C.R. 568 at pp.578-80. See also *Supra* n.58.

such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. The use of the word 'caste' in Art.29(2)[74] itself indicates that Article 30(1) is subject to Article 29(2). Art.29(2) applies equally to minority and non minority communities. If Article 29(2) is meant for the benefit of minority, there was no sense in using the word 'caste' in Article 29(2)[75]. The word 'caste' is not heard of in religious minority communities and, therefore, Article 29(2) was never intended by the framers of the Constitution to confer any exclusive rights to the minorities[76].

2.6.3. Reconciling Art.29 and Art.30[77]

In a plural society, the object of law should not be to split the minority group but to find out political, social and legal means of preventing them from falling apart and destroy the society of which they are members[78]. In order to make Article 30(1) workable and meaningful, such rights must be construed in the manner in which they serve the minorities as well as the mandate contained in Article 29(2)[79]. Art.30(1) cannot be interpreted as conferring the right on the

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[74] Article 29(2) reads : "No citizen shall be denied admission into any educational institution maintained wholly by the State or receiving aid from the State funds, on grounds only of religion, race, caste, language or any of them".

[75] The Supreme Court in *St. Xaviers College* v. *State of Gujarat*, A.I.R. 1974 S.C. 1389, on an analysis of Articles 28 to 30 of the Constitution observed "….although the marginal note of Art.29 mentions protection of minority rights, the rights actually conferred by that Article are not restricted merely to the minorities. According to clause (1) of that Article, 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. In order to invoke the benefit of this clause, all that is essential is that a section of the citizens residing in India shall have the right to conserve their language, script or culture irrespective of the fact whether they are members of the majority community or minority community".

[76] *Ibid.* See also, Bakshi. P.M., "Minority Institutions and Majority Students", *Journal of the Indian Law Institute*, vol.32, No.1,(1990).

[77] Cultural and Educational Rights.

[78] Rights conferred to minority groups are distinct from and additional to, all the other rights which as an individual are entitled to enjoy under the covenant. The political thinkers have recognised the importance of minority rights as well as for ensuring such rights. According to them the rights conferred on linguistic or religious minorities are not in the nature of privilege or concession, but their entitlement flows from the doctrine of de facto equality.

[79] To hold that the receipt of State aid completely disentitles the management of minority educational institutions from admitting students of their community to any extent will be to denude the essence of Article 30 of the Constitution. Taking clue from Article 337 and spirit behind Article 30(1) it appears appropriate that minority educational institutions be given preferential rights in the matter of admission of children of their community in their own institutions while admitting students of non-minorities which, advisedly, may be upto 50% based

minorities to establish educational institutions for their own benefit[80]. The doctrine of real *de facto* equality, envisages giving a preferential treatment to members of minorities in the matter of admission in their own institutions[81] while maintaining the rule of non- discrimination envisaged by Article 29(2).

As rightly pointed out in *St.Stephens*[82], a meaningful right must be moulded and created under Art.30(1), while at the same time affirming the right of individuals under Art.29(2). There is need to strike a balance between the two competing rights. It is necessary to mediate between Art.29(2) and Article 30(1), between letter and spirit of these articles, between traditions of the past and the convenience of the present, between society's need for stability and its need for change.

2.7. Art.30 and Other Provisions of the Constitution

Although Article 30(1) strictly may not be subject to reasonable restrictions, it cannot be disputed that Article 30(1) is subject to Article 28(3) and also general laws and the laws made in the interests of national security, public order, morality etc[83]. Further looking into the precedents and the Constituent Assembly Debates and also interpreting Articles 29(2) and 30(1) contextually and textually, conclusion can be arrived at that Article 30(1) is subject to Article 29(2) of the Constitution.

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on inter se merits of such students. However, it would be subject to assessment of the actual requirement of the minorities the types of the institutions and the course of education for which admission is being sought for and other relevant factors. State must see that regulatory measures of control of such institutions should be minimum and there should not be interference in the internal or day-to-day working of the management. However, the State would be justified in enforcing the standard of education in such institutions.

80 *St.Stephen's College* v. *University of Delhi,*(1992) 1 S.C.C. 558 at p.607, para 80.

81 On application of doctrine of real *de facto* equality in such a situation not only Article 30(1) would be workable and meaningful, but it would also serve the mandate contained in Article 29(2).

82 *St.Stephen's College* v. *University of Delhi,*(1992) 1 S.C.C. 558, paras 92 and 96. See also, Violette Graff, "Aligarh's Long Quest for Minority Status, AMU(Amendment) Act,1981", *Economic and Political Weekly*,(Aug 11), (1990).

83 In that view of the matter the decision by the Court in *Rev. Sidhajbhai* v. *State of Bombay,*(1963) 3 S.C.R. 837, that under Article 30(1) fundamental right conferred on minorities is in terms absolute is not borne out of that Article.

2.7.1. National Unity and Minority Educational Rights

Minority educational rights are granted for groups defined in terms of the criteria of religion and language, whereas the concept of national identity is defined in secular and democratic terms. Overemphasis on minority educational rights is detrimental to the progress of the country[84]. Recognition of group identities affects the notion of national identity and national integrity[85] and hampers our commitment to common political ideals of secularism, democracy, equality and justice. The Supreme Court, through a Constitution Bench of eleven Judges[86], has reasserted in 2002 that "India is a land of different castes, peoples, communities, languages, religions and cultures[87] and each person, whatever his/her language, caste, religion has his/her individual identity, plays an important part in the making of the whole[88]". Though this is in tune with the constitutional concept of the composite culture of India[89], too much stress on pluralism, will lead to divisive tendencies and is against national unity.

2.7.2. Secularism and Minority Educational Rights

Minority educational rights are also opposed on the ground that they compromise the nationalist ideal of secularism. Much of the debate provisions relating to cultural and educational rights of minorities in the pre constitution stage revolved around the concept of secularism and separation between State and religion[90]. The State's stance towards religion in India does not imply exclusion of

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[84] Religion based separate electorates is seen as the direct cause of partition of our country. Demand for Minority safeguards involve the politicization of religious identities which has widened the gulf between religious communities in India. The paramount task facing the Assembly was that of containing civil strife and consolidating political unity and stability.

[85] At the level of the individual, it was felt that safeguards would encourage individual to think of themselves and to associate primarily in 'narrow' group terms in public political matters, rather than in terms of 'larger' national issues. At the level of the group, it was felt that minority safeguards would legitimize and strengthen group identities that are 'distinct from, and potentially in competition with, common citizenship identities'.

[86] *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481 at p.542.

[87] *Id*. at para 1.

[88] *Id.* at para 158.

[89] Constitution of India, Article 51A(f).

[90] It was secularism as separation that was at issue in the claim that State funding of educational institutions providing religious instruction was illegitimate from the point of view of secularism, as it would involve the state in the purveying of religious tenets. State could provide aid to minority educational institutions that imparted religious instruction, although there was no obligation upon the State to do so. Institutions maintained wholly out of State funds were

religion from political domain[91] but takes the form of State impartiality between different religions[92] and provides room for religious freedom for individuals and groups[93]. Secularism is viewed as a solution to the problem of the creation of an integrated nation-state and a common national identity out of competing allegiances of religion, caste and language[94]. The Supreme Court indeed unequivocally declared that the essence of secularism in India is the recognition

prohibited from giving religious instruction, as this was regarded as incompatible with the separation between state and religion required of a secular State. See *Supra* n.64.

91 Speeches in the Constituent Assembly in this vein argued simultaneously that a secular State did not imply secularism of this kind as well as that a secular State could not assume such a stance in country like India where religious beliefs were deep-seated. For instance, proposing an amendment that gave the President the option of taking his oath of office in the name of God, a proposal that was supported by representatives of the religious minorities and incorporated into the Constitution, K. M. Munshi stated : 'A secular State is not a Godless State. It is not a State which is pledged to eradicate or ignore religion. It is not a State which refuses to take notice of religious belief in this country…. We must take cognizance of the fact that India is a religious minded country. Even while we are talking of a secular State, our mode of thought and life is largely coloured by religious attitude to life … the State in India cannot be secular in the sense of being anti religious".

92 There were at least two values underpinning conceptions of secularism as separation between State and religion in the Constituent Assembly. First, these were regarded as a requisite of equal citizenship in a situation where citizens professed a variety of faiths. K. M. Munshi asserted: "A secular State is used in contrast with a theocratic government or a religious State. It implies that citizenship is irrespective of religious belief, that every citizen, to whatever religion he may belong, has equal civil rights, and equal opportunity to derive benefit from the State and to lead his own life and nothing more". Speaking in support of an amendment explicitly stipulating state neutrality in matters relating to religion, K. T. Shah opined: "…. With the actual profession of faith or belief, the State should have no concern. Nor should it, by any action of it, give any indication that it is partial to one or the other. All classes of citizens should have the same treatment in matters mundane from the State". A secular State here was apprehended as a liberal state, committed to equal citizenship and non-discrimination. It was argued that the State had an obligation to treat its citizens as equals, to not discriminate between them on grounds of (religious) group membership. The assumption in such utterances was that given a situation of religious pluralism and the importance of religion in people's lives, this obligation would be compromised if the state identified with or gave preference to any particular religion. Key liberal concerns, thus, were intimately bound up with the meaning and justification of secularism in the *Constituent Assembly Debates*.

93 Interestingly, religious freedom was most prominently invoked in conceptions of secular state in the speeches of proponents of Muslim Personal law in the Constituent Assembly. Many Muslim representatives argued that religious personal laws that governed areas such as marriage, divorce and maintenance were an essential aspect of religion, and as such, ought to be granted immunity from state interference. Secularism, as invoked by the proponents of muslim personal law, drew upon conceptions of secularism as de-politicization of religion. Here, secularism as separation of State and religion was construed to imply that religion in a secular order should be free from state interference

94 Secular nationalists in the Constituent Assembly were opposed to group identities on account of their divisiveness and because of their tendency to retard development. The Supreme Court reiterated the earlier stand of a number of constitution benches that secularism is one of the basic features of the constitution, thereby implying that it is even beyond the amending power of the Parliament. Besides, it laid down that special rights and protection of minorities are a necessary and essential ingredient of secularism. See also *Lisie* v. *State of Kerala,* 2003(1) K.L.T. 923.

and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole and united India[95]

Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country[96]. But at the same time it should be remembered that the purpose of providing rights to minorities is to put them on par with the majority and not to create divisive tendencies.

In *St.Stephen's College* v. *University of Delhi* [97], negating sectarian tendencies in education, it was held that even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to have a relatively homogeneous society. It may lead to religious bigotry which is the bane of mankind. In the nation building with secular character, sectarian schools or colleges, segregated faculties or universities for imparting general secular education are undesirable and they may undermine secular 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 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 of different communities in all educational institutions.

2.7.3. Equality and Minority Rights

Right to Equality is enshrined in Article 14 of the Constitution[98] and Arts.15 to 18[99] provide specific instances of Equality. Apart from that, equality concept is

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[95] See *TMA Pai Foundation* v. *State of Karnataka,*(2002) 8 S.C.C. 481, paras 331,332 and 344 as per RumaPal. J. See also, 2003(1) K. L.T. 923, wherein it is argued that Christian and Muslim Communities are far more progressive in establishing institutions of education as compared to even so-called majority communities in the State. It is also pointed out that those students of the minority communities in various fields of education may be more than the students of the majority community. It is also urged that the communities mentioned above have progressed enough. These communities are now forward and have become rich and it is now time that Government must protect and strengthen the Secular ethos and the long tradition of equitable sharing of opportunities for education among different communities prevailing in the State.

[96] *TMA Pai Foundation* v. *State of Karnataka,*(2002) 8 S.C.C. 481 at p. 578, para 138.

[97] *St.Stephen's College* v. *University of Delhi,*(1992) 1 S.C.C. 558 at p. 607, para 81.

[98] *Equality before Law and Equal Protection of the Laws.*

envisaged in other provisions of the Constitution such as clause (1) of Article 25[100] of the Constitution, Article 26[101] and Articles 28[102] to 30[103].

Giving special rights for special classes and groups is not an exception to equality but is a necessary ingredient and a mandatory requirement of equality itself. Special rights in various areas were vigorously debated even in the *Constituent Assembly Debates*[104]. The ideal of substantive equality and differential treatment, have been substantiated by the Apex Court holding that our country is often depicted as a person in the form of 'Bharat Mata – Mother India'. Like any loving mother, the welfare of the family is of paramount importance for her[105].

Thus protection for weaker sections is equated to special treatment a weaker child gets in a family. The relevance of preferential treatment[106] is highlighted and the Court emphasized that Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instill in them

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99 See Part 111 of the Constitution of India dealing with Fundamental Rights.

100 Art.25 (1) reads : "subject to public order, morality and health and to the other provisions of Part III, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion".

101 Art.26 reads : *Freedom to manage religious affairs*. "Subject to public order, morality and health, to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes; to manage its own affairs in matters of religion; to own and acquire movable and immovable property; and to administer such property in accordance with law".

102 Art.28 reads : *Freedom as to attendance at religious instruction or religious worship in certain educational institutions.* "(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds. (2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution. (3) No person attending any educational institution recognized by the State or receiving aid out of State funds 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 is a minor, his guardian, has given his consent thereto".

103 *Right to Establish and Maintain Educational Institutions*.

104 See for *eg*. provisions relating to reservation in employment. In reserved posts in government employment, the restriction of provisions for quotas in the public services to Untouchables and 'backward' tribes in the later stages of Constitution making was vigorously opposed by some Sikh and Muslim representatives. It was also asserted that the religious minorities, or sections within these communities, were backward, and that quotas were required to give effect to the principle of equality of opportunity for individuals, when such individuals belonged to groups that were discriminated against in matters of recruitment to the public services..

105 *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 586.

106 *Id.* at para 157. *"All the people of India are not alike, and that is why preferential treatment to a special section of society is not frowned upon".*

a sense of security and confidence[107]. This has been reiterated by 11-Judge Bench in the *TMA Pai*[108] case and the Court further held that the same generous, liberal and sympathetic approach should weigh with the Courts in construing Articles 29 and 30, as marked the deliberations of the Constitution makers in drafting those articles and making them part of the fundamental rights[109].

The Judgment added that it can be said to be an index of the level of civilization and catholicity of a nation as to how far their minorities feel secure and are not subject to any discrimination or suppression[110]. Thus sectarian educational institutions, would be inconsistent with the central concept of secularism and equality embedded in the Constitution[111]. The best minority educational institutions are those which shows least minority character.

2.7.4. Justice and Minority Educational Rights

Concept of justice involves fairness of treatment. Likes should be treated alike and unlike should be treated differently. The special treatment that is meted to minorities is to put them on par with the majority. The moment equality is reached the special treatment should be ended. Otherwise it may cause injustice to the bulk of the non minority sections in the society. In India the mere fact that a person or group belongs to minority *ipsofacto* entitles them to claim minority educational rights. In many States, including the State of Kerala, educational institutions belonging to non minority community claim that the so called minority in the State are much advanced that treating educational institutions set up by them in a preferential way is unjust and unfair.

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[107] *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481, para 168. It is worth remembering opinion of Justice Khanna in the *St. Xavier's* case that the provisions of the Constitution should be construed according to a liberal, generous and sympathetic approach.

[108] "*The minorities are as much children of the soil as the majority and the approach has been to ensure that nothing should be done as might deprive the minorities of a sense of belonging, a feeling of security, a consciousness of equality and the awareness that the conservation of their religion, culture, language and script as also the protection of their educational institutions is a fundamental right enshrined in the Constitution".*

[109] *Id.* at para 121.

[110] *Ibid*.

[111] (1992) 1 S.C.C. 607, para 87. See also, Bishnoi Ajay, "Minorities' Right to Establish and Administer Educational Institutions-A Critique", *http://www. Legalserviceindia. com/article/-193-minorities-rights.html*, visited on 2.4.2010.

Thus even at the Constituent Assembly stage there was no consensus to give unbridled educational rights to minorities. Rather the prevalent view was that educational rights should be equally available to all communities. A perusal of the constitutional provisions also shows that there is no absolute right to minorities under Art.30. There has to be harmonius reading of Art.30 with other provisions of the Constitution.

2.8. Minority Educational Institutions: Indicas

The conferment of the status of minority educational institution gives wide powers to an educational institution with regard to its administration. The main purpose behind conferment of such minority educational rights is to instill a sense of confidence among the minority community as well as to put them on par with the majority. The impact of conferment of minority status to an educational institution is that it results in minimal State control over a particular educational institution. Since education is a basic human right necessary for attaining all other human rights, denial of State regulation over educational institutions may result in mal administration and may be against national interest. Hence while conferring minority status to an educational institution the above issues need to be kept in mind to see that the real purpose behind claiming status as minority educational institutions is fulfilled by those educational institutions.

There should be some indica for treating an educational institution as a minority educational institution[112]. The question arises whether the educational institution should be established and managed by the minority to get the status of a minority educational institution or whether an institution which is established by someone not belonging to minority but the management of which is transferred to minority can claim the status of a minority educational institution. Should a minority educational institution be established by a group or is it sufficient that a person belonging to minority community can establish a minority educational institution? On whom lies the onus of proof regarding establishment? Where shall a

[112] See Answer to Q. 3(a) in *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 wherein Court held that matter regarding indica will be answered by a regular bench.

minority educational institution be operationally located? Can cross border educational facilities be provided by a minority educational institution?

There is nothing preventing a minority educational institution from starting an educational institution like the non minority under Art.19(1)(g). This will result in equality between minority and non minority in running an educational institution of their choice. Conferment of minority status to a group by considering their numerical strength *vis a vis* other groups is a wrong approach. Grant of minority status to a group based on mere numerical strength may result in letting the educational institutions setup by such groups out of governmental control. Only in States where minority community is in a weaker position and the number of minority educational institutions run by the minority is lesser than the non minority with regard to a particular level of education the State need to grant status of a minority educational institution[113].

2.8.1. Establish and Administer Whether to be Read Conjunctively or Disjunctively

Article 30(1) gives linguistic and religious minorities a fundamental right to establish and administer educational institutions of their choice.

In *A. M. Patroni* [114], the Court held that even if an institution previously run by some other organization is subsequently taken over by a minority community and run by it, it must be held that it was established by that minority community.

In *Azeez Basha v. Union of India*[115], a Constitution Bench of the Supreme Court has held that the expression "establish and administer" used in Article 30(1) has to be read conjunctively that is to say, two requirements have to be fulfilled under Article 30(1), namely, that the institution was established by the community and its administration was vested in the community.

[113] See S.B. Sinha's observations on local needs in *Islamic Academy* v. *State of Karnataka,* (2003) 6 S.C.C. 697, para 135. See also Infra n.126.
[114] A.I.R. 1974 Ker. 197.
[115] A.I.R. 1968 S.C. 662. See also *S.P. Mittal* v. *Union of India,* A.I.R. 1983 S.C. 1.

In the case of *St. Stephen's College* v. *University of Delhi*[116], it was held that 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 institution. The proof of establishment of the institution is thus a condition precedent for claiming the right to administer the institution. Thus the settled position in law is that a minority cannot administer an educational institution which it has not established.

With regard to the indica for conferment of minority status if the larger bench in *TMA Pai,* was unanimous with the earlier decisions of the various High Courts[117] and the Supreme Court that the mere fact of establishment and administration of an educational institution by a minority will *ipso facto* give an institution the right to be treated as a minority educational institution they would have answered that question in the affirmative. The Court felt that the question requires further consideration by a regular bench and need not be answered in the case under consideration[118].

2.8.2. Recent Legislative Trends on Conferment of Minority Status to Educational Institutions

The change in attitude shown by the higher judiciary in *TMAPai* as discussed above that there has to be reconsideration of the issue regarding conferment of minority status to an educational institution is negated by the later legislative attempts. Thus the word 'or' occurring in the definition of minority educational institution in S.2(g)[119] of the National Commission for Minority Educational Institutions Act, 2004 shows that in order to claim status of a minority educational institution, it need be proved that it was established or administered by minority.

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[116] A.I.R. 1992 S.C. 1630.

[117] *In re, Kerala Education Bill* Case, A.I.R.1958 S.C. 956.

[118] Qn. 3(a) What are the indica for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority? Ans to Qn. 3(a) This question need not be answered by this bench. It will be dealt with by a regular bench.

[119] S.2(g) reads : "Minority Educational Institution means a college or institution (other than a University) established or maintained by a person or group of persons from amongst the minorities".

There is an argument that the word 'or' occurring in the definition of minority educational institution in S.2(g) has to be read conjunctively[120]. S.2(f) of the Central Educational Institutions (Reservation in Admission) Act, 2006, defines a minority educational institution correspondingly[121]. Thus the legislative intent seems to be that either establishment or administration by a minority is sufficient to confer minority status to an educational institution. But the judicial attitude seems to be that both establishment and administration need to be proved in order to confer minority status to an educational institution.

2.8.3. Minority Group or Single Member of Minority Community to Establish a Minority Educational Institution

In *State of Kerala* v. *Mother Provincial*[122], the Supreme Court interpreted that the first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, funds the institution or the community at large contributes the funds.

However, there is divergence of opinion in this regard and Courts have decided that mere establishment by a person from a minority community does not entitle an educational institution with minority status. In *Rajershi Memorial Basic*

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[120] See *Azeez Basha* v. *Union of India,* A.I.R. 1968 S.C. 662; See also *S.P. Mittal* v. *Union of India,* A.I.R.1983 S.C. 1; *St.Stephen's College* v. *University of Delhi,* (1992) S.C.C. 558 etc. The word 'or' is normally disjunctive and the word 'and' is normally conjunctive (See, *Hyderabad Asbestos Cement Product* v. *Union of India*, (2000) 1 S.C.C. 426); but at times they are read as *vice versa* to give effect to the manifest intention of the legislature as disclosed from the context. See, *Ishwar Singh Bindra* v. *State of Uttar Pradesh* , A.I.R. 1968 S.C. 140; *MCD of Delhi* v. *Tek Chand Bhatia,* A.I.R. 1980 S.C. 360; *T.K.V.T.S.S. Medical Educational and Charitable Trust* v. *State of Tamil Nadu,* A.I.R. 2002 Madras 42; *Andhra Pradesh Christian Medical Association* v. *Government of Andhra Pradesh*, A.I.R. 1986 S.C. 1490; *N. Ammad* v. *Emjay High School,* (1998) 6 S.C.C. 674; *State of Kerala* v. *Mother Provincial,* A.I.R. 1970 S.C. 2079.

[121] S.2(f) reads : "Minority Educational Institution means an institution established and administered by the minorities under clause (1) of Article 30 of the Constitution and so declared by an Act of Parliament or by the Central Government or declared as a minority educational institution under the National Commission for Minority Educational Institutions Act, 2004. It has to be borne in mind the right guaranteed under Article 30(1) is a right not conferred on individuals but on religious denomination or section of such denomination. The definitional clause which gives even an individual right to establish minority educational institution under 2004 and 2006 Acts is contrary to this proposition.

[122] A.I.R. 1970 S.C. 2082.

Training School v. *State of Kerala*[123], the Court held that the mere fact that the school was founded by a person belonging to a particular religious persuasion is not at all conclusive on this matter. The institution must be shown to be one established by or on behalf of the particular minority community.

A perusal of S. 2(g)[124] of the National Commission for Minority Educational Institutions Act, 2004 as well as S. 2(f) of the Central Educational Institutions (Reservation in Admission) Act, 2006[125], shows that a single member of the community can also establish a minority educational institution.

2.8.4. Location of Minority Educational Institution

Another important question revolves round the location of the Minority Educational Institution[126]. In the case of *Father Mathew Munthiri Chinthyil, Vicar, St. Mary's Church Anikkampoil* v. *State of Kerala*[127], the Court held that the governmental master plan, which prescribes permissible number of schools in a locality, has to be followed while selecting a location for establishing a minority educational institution. The High Court of Kerala in the instant case, rejected a petition for establishing a new school on the same ground holding that an extreme position entitling the minority to ask, and to be given, the educational institutions, wherever it wants to establish, at any moment, is not the scope and the content of Art.30. Regulation of the right in time as well as in space must be permissible. The Court rejected the Petition but held that in weighing the needs of the locality, the authority was bound to consider the requirements of the minority communities in establishing the educational institutions of their choice. But in the later cases we

[123] A.I.R. 1973 Ker. 87.

[124] S.2(g) reads : "Minority Educational Institution means a college or institution (other than a University) established or maintained by a person or group of persons from amongst the minorities".

[125] *Supra* n.121.

[126] Qn. 6(a) Where can a minority institution be operationally located? Where a religious or linguistic minority in State A establishes an educational institution in the said State, can such educational institution grant preferential admission/reservation and other benefits to members of the religious/linguistic group from other states where they are non minorities?
A.This question need not be answered by this bench. It will be dealt with by a regular bench.
q.6(b) Whether it would be correct to say that only the members of that minority residing in State A will be treated as members of the minority *vis-à-vis* such institution?
A. This question need not be answered by this bench. It would be dealt with by a regular bench.

[127] A.I.R. 1978 Ker. 227.

can see a change in approach. In *Socio Legal Advancement Society* v. *State of Karnataka*[128] and *Mark Netto* v. *Government of Kerala*[129] the Courts stated that a minority community could not be stopped from establishing an educational institution.

2.8.5. Test to Determine Status as Minority Educational Institution

The test to determine status as minority educational institution was discussed in *Inamdar*[130]. The Court held that so long as the institution retains its minority character by achieving and continuing to achieve the objectives of (1) conservation of the minority's religion and language, and (2) the giving of a thorough good general education to children belonging to such minority, the institution would remain a minority institution.

Art.30(1) does not require that minorities based on religion should establish educational institutions for teaching religion only or that a linguistic minority should establish educational institutions for teaching its language only. The object underlying Art.30(1) is to see the desire of minorities being fulfilled that their children should be brought up efficiently and acquire eligibility for higher university education and go out into the world fully equipped with such skills as will make them fit for entering the public services, educational institutions imparting higher instructions including general secular education. So long as the institution retains its minority character by achieving and continuing to achieve the above said objectives, the institution would remain a minority institution.

2.8.6. Whether Pre Constitutional Educational Institutions can Claim Rights Under Art.30(1)?

The language employed in Art.30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions[131]. As Art.19(1)(g) applies to

[128] A.I.R. 1989 Ker. 217.
[129] A.I.R. 1979 S.C. 83.
[130] *P.A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537 at p. 591, para 97.
[131] The fallacy of this argument becomes discernible as soon as we direct our attention to Art.19(1)(g) which, clearly enough, applies alike to a business, occupation or profession already started and carried on as to those that may be started and carried on after the commencement of the Constitution. There is no reason why the benefit of Art.30(1) should be limited only to

business or occupation already started and carried on as well as those started and carried on after the commencement of the Constitution the same rationale can be applicable to institutions under Art.30(1) also.

2.8.7. Whether a Minority Educational Institution can Admit Persons Belonging to Their Community Only?

The purpose of Art.29(2) is not to deprive minority educational institutions of the aid they receive from the State[132]. To say that an institution which receives aid on account of its being a minority educational institution must not refuse to admit any member of any other community only on the grounds therein mentioned and then to say that as soon as such institution admits such an outsider it will cease to be a minority institution is tantamount to saying that minority institutions will not, as minority institutions, be entitled to any aid[133].

2.8.8. Whether Religious and Linguistic Minorities Should Establish Educational Institutions to Promote Their Religion or Language?

Art.30 does not say that minorities based on religion should establish educational institutions for teaching religion only, or that linguistic minorities should have the right to establish educational institutions for teaching their

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educational institutions established after the commencement of the Constitution. It must not be overlooked that Art.30(1) gives the minorities two rights, *viz*., (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-Constitution schools just as Art.26 covers the right to maintain pre-Constitution religious institutions.

[132] It is said that an educational institution established by a minority community which does not seek any aid from the funds of the State need not admit a single scholar belonging to a community other than that for whose benefit it was established but that as soon as such an educational institution seeks and gets aid from the State coffers Art.29(2) will preclude it from denying admission to members of the other communities on grounds only of religion, race, caste, language or any of them and consequently it will cease to be an educational institution of the choice of the minority community which established it. This argument does not appear to be warranted by the language of the Article itself. There is no such limitation in Art.30(1) and to accept this limitation will necessarily involve the addition of the words "for their own community" in the Article which is ordinarily not permissible according to well established rules of interpretation.

[133] The real import of Art.29(2) and Art.30(1) seems to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community. It is not possible to read this condition into Art.30(1) of the Constitution.

language only. What the article say and means is that the religious and the linguistic minorities should have the right to establish educational institutions of their choice[134].

2.8.9. State Regulation Over Minority Educational Institutions: Whether for Furtherance of Minority interest Only?

In the famous case *Sidhraj bhai Sabhai* v. *State*[135], the Court held that state regulation should be for furtherance of minority interests and not for public or national interest. Later in *TMAPai*[136], *Islamic Academy*[137] *and Inamdar*[138] the Court

[134] 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 will make them fit for entering the public services. Educational institutions of their choice will necessarily include institutions imparting general secular education also. In other words, the Article leaves it to their choice to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving a thorough, good general education to their children. The next thing to note is that the Article, in terms, gives all minorities, whether based on religion or language, two rights, *viz*, the right to establish and the right to administer educational institutions of their choice. The key to the understanding of the true meaning and implication of the Article under consideration are the words "of their own choice". It is said that the dominant word is "choice" and the content of that Article is as wide as the choice of the particular minority community may make it. The ambit of the rights conferred by Art.30(1) has, therefore, to be determined on a consideration of the matter from the points of view of the educational institutions themselves. The educational institutions established or administered by the minorities or to be so established or administered by them in exercise of the rights conferred by that Article may be classified into three categories, *viz*., (1) those which do not seek either aid or recognition from the State, (2) those which want aid, and (3) those which want only recognition but no aid.

[135] A.I.R.1963 S.C. 540 wherein it is held : "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. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called 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 the formal character of a minority institution destroys the power of administration is held justiciable 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 but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or 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 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 other persons who resort to such institutions."

[136] (2002) 8 S.C.C. 481.

[137] (2003) 6 S.C.C. 697.

[138] (2005) 6 S.C.C. 537.

overruled this and held that any regulation in national interest must equally be applicable to minority and non minority community alike.

2.8.10. Onus of Proof Regarding Minority Institution

The proof of the fact of the establishment of the institution is a condition precedent for claiming the right to administer the institution. The onus lies on one who asserts that an institution is a minority institution[139]. The best administration of the minority educational institutions will reveal no trace or colour of minority. A minority institution should shine in exemplary eclectic in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character[140].

2.9. Other Educational Rights of Minorities

Article 30 provides for the right to establish and administer educational institutions by the minorities. The right to establish and administer broadly comprises the following: (a) to admit students, (b) to set up a reasonable fee structure, (c) to constitute a governing body, (d) to appoint staff, (e) to take action if there is dereliction of duty on the part of any employees, (f) to get recognition and affiliation, (g) to receive financial aid from the State and (h) right to select medium of instruction.

(a) ***To Admit Students***

The right available to minority educational institutions is to admit students of their choice which may include admission into educational institutions including professional educational institutions. The scope of admission in general and professional educational institutions is dealt with in the forthcoming chapters.

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[139] It has been held by a Division Bench of the Madras High Court in *T.K.V.T.S.S. Medical Educational and Charitable Trust* v. *State of Tamil Nadu,* A.I.R. 2002 Madras 42 that "once it is established that the institution has been established by a linguistic minority, and is administered by that minority, that would be sufficient for claiming the fundamental right guaranteed under Article 30(1) of the Constitution". The same principle applies to religious minority also. See *Andhra Pradesh Christian Medical Association* v. *Government of Andhra Pradesh*, A.I.R. 1986 S.C. 1496. See also, *N. Ammad* v. *Emjay High School*, (1998) 6 S.C.C. 674; *State of Kerala* v. *Mother Provincial,* A.I.R.1970 S.C. 2079.

[140] *St.Stephens College* v. *University of Delhi,* (1992) 1 S.C.C. p.559 at p. 642, para 142, *per* Kasliwal, J . dissenting.

(b) ***To Set up a Reasonable Fee Structure***

Right to establish and administer educational institutions cannot become complete without giving sufficient discretion to the management to determine the fee to be charged from the students. Whether the fact of receiving aid from the government could allow the government to interfere with the fee structure is disputable. Moreover the right to admission is intrinsically connected with the fee structure. The scope of right to admission and determination of fee and the extent of State regulation in this area is looked into in the forthcoming chapters.

(c) ***To Constitute a Governing Body***

The right to administer made available to minorities under Art.30(1) means a right to conduct and manage the affairs of the institution established by it. This can be best exercised through a managing body in whom the founders of the institution or those who represent them have faith and confidence and who have full autonomy in that sphere. It, therefore seems to be the natural meaning of the 'right to administer' that 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, 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. In both the situations, the consequence is the same, *viz*. that the interference prevents the minority to exercise the rights under Art.30(1) freely.

(d) ***To Appoint Staff***

Selection and appointment of staff for running educational institution is an essential part of the 'right to administer' under Art.30(1). The success or failure of the objects of establishment of the institution depends upon the outlook, co-operation and efficiency of the functionaries. A minority cannot hope to administer its institution according to its own 'choice' and under that 'choice' to determine the

kind and character of the institution, unless it is able to select those who in its opinion are the right kind of persons and whom it regards as capable of carrying out the objectives for which the institution is established.

(e) ***To Take Action if There is Dereliction of Duty on the Part of any Employee***

Minority institutions employ a large number of persons to perform institutional and other administrative duties. Maintenance of discipline, order and excellence in academic standards depends to a very great extent upon a set of qualified, efficient and disciplined teaching and administrative staff. Minority educational institutions, like any other employer, have a right to select staff of their own choice, and preference and to take action against them either to enforce an orderly conduct or to enforce the terms of the contract of service. This right involves prescribing qualifications for appointment of staff, prescribing the manner of their selection, laying down the conditions of service, enforcing discipline among them, compelling performance of duties and taking action against those who violate conditions.

(f) ***To get Recognition and Affiliation***

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. Similarly, affiliation to a University by a minority institution is sought for the purpose of enabling the students to sit for an examination conducted by the University and to obtain degrees conferred by it. Although recognition or affiliation is not a fundamental right, it cannot be given on conditions which will force minorities to give up totally or partially their rights under Article 30(1).

(g) ***To Receive Financial aid From the State***

The Constitution secure two rights to minority educational institutions with respect to financial aid from the State. (1) A right, under the express provisions of Art.337, which entitled Anglo Indian educational institutions to continue to receive,

as a matter of Constitutional right, the same special financial grants to which they are entitled before 1948; (2) A right, under the express provisions of Art.30(2), which prohibits the State, while granting aid to educational institutions, from discriminating against any educational institution on the ground that it is under the management of a minority whether based on religion or language. Art.30(2) does not provide a positive right to claim aid from the State; it only provides security against differential treatment in matters of distribution of financial grants.

(h) ***Right to Select Medium of Instruction***

Minorities do not have any express right to impart education in a language of their choice. Articles 29(1) and 30(1) do not in terms recognize this right, though both of them seem to contemplate the inevitability of such a right, for an effective exercise of what they expressly confer upon minorities. Though Art.29(1) which allows minorities to conserve their distinct language or script does not specify the means of conservations, it cannot be disputable proposition that establishment of educational institutions is one of the most effective means of conservation of language and script. But no minority can claim, as a matter of right that the affiliating university should conduct teaching and examination in a language which the minority has a right to adopt.

2.10. Conclusion

Thus we have seen that international law recognizes educational rights as a general human right[141] and also as a crucial part of minority rights. The commitment to the general right is expressed in a broader range of treaty law than the specific minority right. Education for minorities is dealt with more fully in instruments of 'soft law', in resolutions of the General Assembly of the United Nations and the CSCE[142] process. There is scope for development of hard law aspects of minority education rights. The minimum or fundamental principle of international law is the protection of the existence and identity of minorities and the provision for laying down conditions for the promotion of that identity. The details

[141] Art.26 UDHR; Art.13 ICESCR; Articles 28 and 29 of CRC.
[142] Commission on Security and Co-operation in Europe.

on education may be related to that basic and open ended standard which requires constant attention on the part of States and represents a programme of action which is always unfinished. It is possible to suggest certain principles to inform the body of instruments as a whole.

1. Minorities should participate in general programmes of resourced education to the same extent as other citizens of the State. The principles of non discrimination and equal rights are prominent in this assessment

2. Minorities have special claims which also reflect the idea of equality since they are often in a vulnerable position in relation to more powerful groups in society.

3. The minority rights to existence and identity presuppose an educational component.

4. An appropriate education regime in this context ideally implies minority education in their own language and education about their culture. The open ended nature of minority rights provides ample scope for including educational rights within its ambit. But it can be seen that international trend is towards protection of educational rights of minorities without hampering the national unity.

An analysis of the Indian position reveals that even at the constituent assembly, there was no consensus to give unbridled educational rights to minorities. Rather the prevalent view was that educational rights should be equally available to all communities. A perusal of the constitutional provisions also shows that there is no absolute right to minorities under Art.30. There has to be harmonious reading of Art.30 with other provisions of the Constitution. Minority is not defined in the Constitution. What are the determining factors to determine linguistic and religious minority is not answered by the Court. Whether dominant minority can claim rights under Art.30 is also not made clear. What is a minority educational institution is also remaining ambiguous. *TMAPai*[143]is silent on the

[143] Qn. 3(a) What are the indica for treating an educational institution as a minority educational institution? Would an educational institution be regarded as a minority educational institution

indicas for deciding a minority educational institution and has left many questions unanswered[144]. Questions 6 and 7 of *TMAPai*[145] were also left unanswered by the bench. It is welcoming that *Inamdar,* clarifying *TMAPai* made it clear that the objective of establishment of a minority educational institution should be fulfilled so as to confer the status of minority educational institution to a particular institution. The trend in *BalPatil*[146] that industrialist and influential dominant community doesn't deserve protection under Art.30 is appreciable, but the approach in *Lisie*[147] that *'for this Art.30 has to be amended'* puts us back to the same old position. The judicial trend in *TMAPai* regarding indicas is negated by the legislative attempts[148]. Thus the present position remains that if a person or a group belonging to a minority community establishes or administer an educational institution it will get the status of minority educational institution. There should be some indica for treating an educational institution as a minority educational

because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?

144 Qn. 6(a) Where can a minority institution be operationally located? Where a religious or linguistic minority in State A establishes an educational institution in the said State, can such educational institution grant preferential admission/reservations and other benefits to members of the religious/linguistic group from other States where they are non minorities? Qn. 6(b) Whether it would be correct to say that only the members of the minority residing in State A will be treated as the members of minority *vis a vis* such institution? Qn. 7 Whether the member of a linguistic non minority in one State can establish a trust/society in another State and claim minority status in that State? All the above questions are left unanswered to be discussed by a regular bench.

145 *Supra* n.107.

146 (2005) 5 S.C.C. 690 "…. the only difference between Hindus and jains is that the jains worship thirthankaras instead of God. The Commission instead of encouraging claims from different communities for being added to a list of notified minorities under the Act, should suggest ways and means to help create social conditions where the list of notified minorities is gradually reduced and done away with altogether.''

147 *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K..L.T. p.441, para 61. The Court opined that the fact that the minorities have established more educational institutions than the non minorities does not indicate that they have become advanced. This is not convincing in the peculiar situation in Kerala, where Christian minority is a dominant section politically, educationally and socially advanced than the non minority community in the State.

148 S.2(g) of National Commission for Minority Educational Institutions Act, 2004 reads : "Minority Educational Institution means a college or institution (other than a University established or maintained by a person or group of persons from amongst the minorities". S. 2(f) of the Central Educational Institutions(Reservations in Admission)Act, 2006 reads : "Minority Educational Institution means an institution established and administered by the minorities under clause (1) of Article 30 of the Constitution and so declared by an Act of Parliament or by the Central Government or declared as a minority educational institution under the National Commission for Minority Educational Institutions Act, 2004". It has to be borne in mind the right guaranteed under Article 30(1)is a right not conferred on individuals but on religious denomination or section of such denomination. The definitional clause which gives even an individual right to establish minority educational institution under 2004 and 2006 Acts is contrary to this proposition.

institution because the moment such status is received the institution can come out of the ambit of State regulations in many areas. Access and quality in educational institutions is very important and State regulations are necessary to ensure access based on merit taking into consideration social obligation of reservations.

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Chapter - 3

ADMISSION AS A FACET OF ADMINISTRATION IN MINORITY PROFESSIONAL EDUCATIONAL INSTITUTIONS IN INDIA

Chapter - 3

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"Wherever social inequality exist or economic injustice is found, a democratic state enters the arena, and with the aid of law, establishes social equality and removes injustice".

Chief Justice P.B. Gajendragadkar [1]

3.1. Introduction

The right to establish and/or administer educational institutions broadly comprise of different facets such as the right to admit students, to set up a reasonable fee structure, to constitute a governing body, to take action if there is dereliction of duty on the part of employees etc[2]. The attempt hereunder is to examine how far admission is a facet of administration of aided and unaided minority professional educational institutions, and to check whether the State regulations in admissions constitute infringement of admission rights of these educational institutions. The scope of non minorities to claim admission rights as an aspect of right to administer their own educational institutions, the impact of claiming admission as a facet of administration on the stakeholders such as

[1] As quoted by Justice Shivaraj V. Patil, during Justice P.K. Goswami Memorial Law Lecture on Common man and Constitution of India, (2005) 2 S.C.C. (Jour.) 21.

[2] Answer to question No. 5(c) in *TMAPai* v. *State of Karnataka,* (2002) 8 S.C.C. 482, discussed in *Vignana Educational Foundation* v. *NTR University of Health Sciences,* 2003 (4) A.L.T. 499, para 3 wherein it has been held : "So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measures of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day to day management, like the appointment of staff, teaching and non teaching and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. The right to establish an educational institution can be regulated, but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admission would be unacceptable restrictions".

minority students and non minority students is probed into. Minority managements claim autonomy in the matter of admission of students of their choice, monitoring admissions, fixation of fee and autonomy in the matter of conducting entrance test. They consider freeship, quotas in admission and appointment of Committees to regulate admission and fixing of fees as violative of their right to administration. The scope of State regulation in these areas except that dealing with quotas in admission is probed into in this Chapter. Legality of quotas in admission, will be dealt with in the next Chapter.

3.2. Fundamental Right of the Minorities to Establish and Administer Educational Institutions

The rights of the minorities to establish and administer educational institutions of their choice are guaranteed as a fundamental right under Article 30(1)[3] of the Constitution of India. The administration of educational institutions of their choice under Article 30(1) means 'management of the affairs of the Institution'[4]. The use of the words 'of their choice' in Art.30(1) indicates that the right extends to all levels of education including professional education and hence professional educational institutions would also be covered by Art.30[5]. The management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. It is also regarded as a guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice[6]. The idea of giving some special rights to the minorities is not to have a kind of privileged or pampered section of the population but to give

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3 *Right of minorities to establish and administer educational institutions:* "(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice". See also, Singh Paramanand, "Academic and Administrative Freedom of Minority Institutions in India", *Journal of Indian Law Institute*, Vol.19, No.3, (1977).

4 *St.Stephens'College* v. *University of Delhi,* (1992) 1 S.C.C. 558, p.596, para 54.

5 Answer to question No. 3(b) in *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 587, para161. See also, Malik Sumeet, *Supreme Court Educational Institutions Cases*, Eastern Book Company, Lucknow, (2008).

6 *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 578, para 138.

to the minorities, a sense of security and feeling of confidence[7]. The rights under Article 30 are confined to religious and linguistic minorities and the same cannot be availed by any other section of citizens.

3.2.1. Fundamental Right of Citizens in General for Establishment and Administration of Educational Institutions

The right to establish and administer educational institutions by the citizens in general can be traced to Article 19(1)(g)[8] and Article 26(a)[9] of the Constitution of India. Article 19(1)(g) takes in its fold any activity carried on by a citizen of India to earn his living. Therefore, establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and the activity of imparting knowledge is carried out must necessarily be regarded as an occupation[10]. The rights under Article 19(1)(g) are so comprehensive to include all the avenues and modes through which a man may earn his livelihood[11]. Similar view was taken in *Unnikrishnan's*[12] case also. Article 26(a) of the Constitution in positive terms, gives rights to every religious denomination or section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. As education is a recognized head of charity[13] institutions for charitable purposes necessarily include educational institutions. Thus the non-minorities, which do not fall within the special categories carved out in Articles 29(1) and 30(1) of the Constitution as well as the minorities have the right to establish and maintain educational institutions under Article 19(1) (g) and Article 26(a). The rights of minorities to establish and administer educational institutions 'of their choice' under Art.30(1) is

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7 *Ahmedabad St.Xavier's College Society* v. *State of Gujarat,* 1795 (1) S.C.R. p. 224, para 77.

8 Art.19(1) reads : *Protection of certain rights regarding freedom of speech, etc.* "(1) All citizens shall have the right- (g) to practice any profession, or to carry on any occupation, trade or business".

9 Art.26 reads : *Freedom to manage religious affairs*- "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".

10 *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481, at p.535, para 25 wherein it is held that 'occupation' would be an activity of a person undertaken as a means of livelihood or as a mission in life.

11 *Sodan Singh* v. *New Delhi Municipal Committee,*(1989) 4 S.C.C. 155 at p. 687, para 28.

12 *Unni Krishnan. J.P.* v. *State of A.P.* ,(1993) 1 S.C.C. 645 at p.687, para 63.

13 *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 482 at p. 535, para 26.

not available to the non minorities under Art.19(1)(g) or Article 26(a). Thus, there is a fundamental right to minorities and non minorities to establish and administer educational institutions including professional educational institutions under these Articles.

3.3. Different Facets of Establishment and Administration of Educational Institutions

The different facets of establishment and administration of educational institutions have been discussed in a plethora of cases[14], and it has been held that the right to establish and administer educational institutions comprises the following rights: (a) to admit students, (b) to set up a reasonable fee structure, (c) to appoint staff and (d) to take action against them if there is dereliction of duty on the part of its employees[15]. The scope of State regulation on establishment and administration of educational institutions especially that run by minority community is therefore limited.

3.3.1. Permissible Regulations Under Article 30

Permissible regulations/restrictions governing different facets of Art. 30(1) of the Constitution include the following[16] *viz.* guidelines for the efficiency and excellence of standards[17], regulations ensuring the security of the services of the teachers or other employees[18], introduction of an outside authority in the matter of service conditions of employees, framing rules and regulations governing the conditions of service of teachers and employees and their pay and allowances[19], appointing high officials with authority and guidance to oversee that rules

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[14] See for example, *State of Bombay* v. *Bombay Education Society*, A.I.R. 1954 S.C. 561; *Faiz-E-Am College, Shahjahanpur* v. *University of Agra*, (1975) 2 S.C.C. 283; *Gujarat University, Ahmedabad* v. *Shri Krishna Rangnath Mudholkar*,(1963)Supp1 S.C.R. 112; *Rev.G. Devaka-dashyam* v. *Secretary to Government Education Department*, 2009-TL MAD -0-4706.

[15] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 542, para 50.

[16] *Vignana Educational Foundation* v. *NTR University of Health Sciences,* 2003 (4) A.L.T. 499, para 16.

[17] See *Sidhajbhai Sabhai* v. *State of Bombay*, A.I.R. 1963 S.C. 540; *State of Kerala* v. *Mother Provincial,* (1970) 2 S.C.C. 417; *All Saints High School* v. *Government of Andra Pradesh,* (1980) 2 S.C.C. 478.

[18] *In re, Kerala Education Bill*, A.I.R. 1958 S.C. 956. See also *All Saints High School* v. *Government of Andra Pradesh,* (1980) 2 S.C.C. 478.

[19] *State of Kerala* v. *Mother Provincial,* (1970) 2 S.C.C. 417. See also *All Saints College* v. *Government of Andra Pradesh,* (1980) 2 S.C.C. 478.

regarding conditions of service are not violated[20], prescribing courses of study or syllabi or the nature of books[21], regulation in the interest of efficiency of instruction, discipline, health, sanitation, morality, public order and the like[22].

3.3.2. Impermissible Regulations Under Article 30

Impermissible regulations governing different facets of Art.30(1) include the following[23] *viz.* refusal of affiliation without sufficient reasons[24], putting conditions that would completely destroy the autonomous administration of the educational institutions[25], introduction of an outside authority either directly or through its nominees in the governing body or the managing committee of minority institution to conduct the affairs of the institution[26], provision of an appeal or revision against an order of dismissal or removal by an aggrieved member of staff or providing for arbitral tribunal[27], vesting of management in another body are encroachments upon Art.30(1)[28].

3.3.3. Test to Determine Permissibility or Impermissibility of Regulations

The dividing line between how far the regulations would remain within the constitutional limits and when the regulations would cross the limits is difficult to be determined. A balance has to be struck between the two objectives: (i) that of ensuring the standard of excellence of the institution, and (ii) that of preserving the right of the minority to establish and administer its educational institutions. Subject

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20 *All Saints High School* v. *Government of Andra Pradesh,* (1980) 2 S.C.C. 478.
21 *Supra.* n.19.
22 *Sidhajbhai Sabai* v. *State of Bombay,* A.I.R. 1963 S.C. 540. See also, Mohammad Ghouse, "A Minority University and the Supreme Court : A Critique of *Azeez Basha* v. *Union of India*", *Journal of the Indian Law Institute*,Vol.10,(1968); Mahmood Tahir, 'Minority Matters', *The Times of India*, April 11, 2007.
23 *Vignana Educational Foundation* v. *NTR University of Health Sciences,* 2003 (4) A.L.T. 499, para 17.
24 *All Saints High School* v. *Government of Andra Pradesh,* (1980) 2 S.C.C. 478.
25 *Ibid*.
26 *Supra* n. 2.
27 See *St.Xavier's College* v. *State of Gujarat*, (1974)1 S.C.C. 717; *Lily Kurian* v. *Sr.Lewina* (1979) 2 S.C.C. 124; *All Saints High School* v. *Government of Andra Pradesh*, (1980) 2 S.C.C. 478.
28 *Supra* n.19. See also, Kamaluddin Khan, "Educational Rights of Minorities", *http://www.twocircles.net/legal_circle/educational_rights_minorities_kamalud din_khan.html*, visited on 15th March 2011.

to a reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the following four tests *viz*.

(i) the test of reasonableness and rationality,

(ii) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it[29],

(iii) it is directed towards maintaining excellence of education and efficiency of administration so as to prevent the institution from falling in standards, and

(iv) that, there is no inroad into the protection conferred by Art.30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution is not taken away.

As far as aided minority educational institutions are concerned the conditions for the proper utilization of the grant and fulfillment of the objectives of the grant without diluting the minority status of the educational institution is permissible to be imposed[30].

Thus we can infer that state regulations are permissible under Article 30(1) and right to establish and administer educational institutions cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf.

3.4. Admission in Minority Unaided Professional Educational Institutions

Minority unaided professional educational institutions are entitled to autonomy in their administration but at the same time they have to adhere to the principle of merit. The University or the Government can require a private educational institution to provide for a merit based selection, giving the

[29] *St.Stephen's College* v. *University of Delhi,* (1992) 1 S.C.C. 558, para 60 wherein it is held that regulations should be conducive to the welfare of the minority or for the betterment of those who resort to it.

[30] *See P. A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537 (paras 91, 94, 103 and 121 to 123). See also, Saxena Priti. Dr., "Judiciary on Educational Rights of Minorities", *Indian Bar Review*, (Vol.32), (3&4), 2005.

management sufficient discretion in admitting students. Conditions of affiliation or recognition which pertain to the academic and educational character of the institution and to ensure uniformity, efficiency and excellence in educational courses are valid, and they do not violate Art.30. But conditions that are laid down for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions[31].

In *TMAPai Foundation* v. *State of Karnataka*[32] in answer to Question 4 whether the admission of students to minority educational institutions, whether aided or unaided, can be regulated by the State government or by the University to which the institution is affiliated, the Supreme Court held thus:

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

3.4.1. Admission to Non-Minorities in Minority Unaided Professional Educational Institutions

The right to establish and administer educational institutions has been guaranteed to minorities to instill confidence in minority community and to provide opportunity for education to the children of their own community. This does not mean that private educational institutions set up by the minority cannot admit students who belong to other communities in their educational institutions.

In *Re*, *Kerala Education Bill*[33] the Court held :

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[31] *TMAPai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481 at p.550. See also, Molishree, "Minority Educational Institution-A Critical analysis", *http://socialjustice. nic:in/obes/ minority. htm1,* visited on 25th February 2010.

[32] *Id.* at p.708. See also,Virendra Kumar, "Minorities Right to run Educational Institutions : *TMA Pai Foundation* in Perspective", *Journal of Indian Law Institute*, (Vol.45),(2003).

[33] (1958) 1 S.C. C. 607 at para 81.

> Even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to a relatively homogeneous society. It may lead to religious bigotry which is a bane of mankind. In the nation building with secular character, sectarian schools or colleges, segregated faculties or universities for imparting general secular education are undesirable….It is essential therefore, that there should be proper mix of students of different communities in all educational institutions.

Further, the minority character of an educational institution is not lost by admitting non-minority students. Sprinkling of non-minorities can be admitted in minority institutions without losing its character. In fact, admitting a non minority student helps in propagating minority character among other sections of the people thereby increasing a feeling of security and confidence among minority members. But it must be remembered that the basic objective of giving minority rights is to see that members of the minority community benefit from such institutions. The Supreme Court *P.A.Inamdar*[34] observed as follows:

> The employment of expressions 'right to establish and administer' and 'educational institution of their choice' in Article 30(1) gives the right very wide amplitude. Therefore, a minority educational institution has a right to admit students of its own choice… admit students of non minority community. The only restriction…. spelt out in Article 30, that manner and number of such admissions should not be violative of the minority character of the institution[35].

Thus if a minority educational institution gives admission in such a manner as to be violative of its minority character the educational institution should only be allowed to function as an unaided institution under Art.19(1)(g) and not as an institution under Art.30. The interpretation of the constitutional provisions permits admission of sprinkling of non-minorities. Providing majority of seats to non-minority communities will result in loss of its character and the status as a minority institution. The government orders withdrawing minority status in such cases were upheld by various courts[36].

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[34] (2005) 6 S.C.C. 537 .
[35] *Id*. at p. 589, para 93.
[36] *John's Educational Development Society* v. *Government of A.P*., 2000(5) A.L.T. 347 .

3.5. Regulatory Measures in Admissions not Confined to Betterment of the Institution

In the preceding chapters we have seen that the framers of the Constitution did not envisage absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution. It is wrong to assume that in the establishment and administration of educational institutions by the religious and linguistic minorities, no law of the land will apply to them[37]. Regulations or conditions concerning generally the welfare of students and teachers and to provide a proper academic atmosphere could be made and such provisions do not in any way interfere with the right of administration or management under Art.30(1)[38]. Further, regulations which are made for the betterment of the institution have to be consistent with larger interests of the society[39]. The Court has observed in *St.Xavier's College*[40] that :

> The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority.

Therefore, the essence of Article 30(1) is to ensure equal treatment between the majority and minority institutions. Thus it is clear that rights of minorities are not absolute and reasonable regulations which are applicable to non minorities can be made applicable to minorities[41]. Moreover in *St.Stephen's College* v. *University of Delhi*[42], the Court held :

> The right to select students for admission is a part of administration. It is indeed an important facet of administration. This power also could be regulated but the regulation must be reasonable just like any

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37 *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 578, para 135.
38 *Id* . at paras 54 and 137.
39 *Id.* at p.578, para 136. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also-for example, laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality. See also, Noorani A. G., "Protecting Minority Rights", *Economic and Political Weekly*,(March 18), (2000).
40 (1975) 1 S.C.R. 173 at p.192. See also (1974) 1 S.C.C. 717 at p.743, para 9.
41 V.Sajith Kumar, "Criticism on *St. Stephen's College* v. *University of Delhi and Another"*, 2008 (4) K.H.C.(jour.), p. 500.
42 (1992) 1 S.C.C. 558.

> other regulation. It should be conducive to the welfare of the minority institution or for the betterment of those who resort to it...[43]

Thus regulations can be there not only for the welfare of the institution but can also be made for the betterment of those students who resort to it which may include non minority students. The purpose of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. Like any other private unaided, educational institutions administered by those religious or linguistic minorities are assured maximum autonomy in admission of students along with other factors.

This view is further substantiated by *TMAPai Foundation* v. *State of Karnataka*[44], wherein it is held :

> …No law can be framed that will discriminate against minorities ….. At the same time, there also cannot be any reverse discrimination.

TMAPai further held :

> No one type or category of institution should be disfavored or, for that matter, receive more favorable treatment than another. Laws of the land, including rules and regulations, must equally apply to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non – minority institutions are permitted to do[45].

Thus we can conclude that reasonable restrictions with regard to admissions can be not only for the betterment of the educational institutions run by minorities but can also be in national interest. The laws applicable to non- minorities with regard to regulation of their educational institutions as far as admission is concerned has to be made applicable to minorities. However, the minority institutions will have the right to admit students belonging to their community to the exclusion of the others to keep the minority character of the institution.

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[43] *Id.* at p.599, para 60.
[44] *TMAPai Foundation* v. *State of Karnataka,* 2002 (8) S.C.C. 481 at p. 578, para 138.
[45] *Id.* at para 139.

3.6. Governmental Control in Admission Whether Amounts to Nationalization of Education ?

Admission is recognized as a facet of administration of minority unaided educational institutions and therefore nationalization of admission is not permissible against such institutions. In *Mohini Jain* v. *State of Karnataka*[46], it was held that when the State governments grant recognition to the private educational institutions they create an agency to fulfill their obligations under the Constitution and the State is discharging its obligations through State owned or recognized educational institutions to allow citizens to enjoy their right to education. Thus educational institutions cannot be teaching shops and capitation fee in any form is to be prohibited. Merit shall be the sole criteria for granting admission. Regulations made by the government in national interest and for upholding merit in admission in minority educational institutions do not amount to nationalization of education. In *Unnikrishnan*[47]case, it has been observed by Jeevan Reddy; J., as follows:

> The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the governments are in no position to meet the demand…. Private educational institutions –including minority educational institutions- too have a role to play[48].

The Court overruling *Mohini Jain* further held that it has been well recognized by this Court that one who pays for the education is also entitled to stipulate the manner in which he will admit students[49]. Thus the right of the managements in administration of unaided institutions is undisputed. Though courts never found in favour of nationalization, the Scheme framed in *Unnikrishnan case*[50] in order to prevent commercialization of education had the

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46 *Mohini Jain* v. *State of Karnataka,* (1992) 3 S.C.C. 666.
47 *Unnikrishnan* v. *State of Andra Pradesh*, (1993) 1 S.C.C. 645 at p.749, para 194.
48 *Ibid.*
49 *UnniKrishnan* v. *State of Andra Pradesh*, (1993) 1 S.C.C. 645 at p.69-71.
50 The Scheme can be summarized as follows: 1. A professional college should be established and/or administered only by a society registered under the Societies Registration Act, 1860, or the corresponding Act of a State or by a public trust and no individual, firm, company or other body of individuals would be permitted to establish and administer a professional college; 2. Fifty per cent of the seats in every professional college should be filled by the nominees of the Government or university, selected on the basis of merit determined by a common entrance test which will be referred to as "free seats"; the remaining 50% seats, known as "payment seats," should be filled by those candidates who pay the fee prescribed and on the basis of *inter se* merit

effect of nationalizing education in respect of important features. It curtailed the right of a private unaided institutions to give admission and to fix fee. By framing this Scheme and by the consequent legislations[51], the private institutions became indistinguishable from the government institutions, curtailing the entire essential features of the right to administration of private unaided educational institutions[52]. The Court in such cases held that 50% of the seats in private educational institutions have to be merit based and among the remaining 50% payment seats, interse merit have to be insisted and management shall have no quota[53]. There could be separate Committees to see that a common entrance test is conducted for institutions conducting different types of courses till UGC or the regulatory agencies constitute a viable arrangement in this area[54].

The decision in *Unnikrishnan* case insofar as it framed the Scheme relating to the grant of admission and the fixing of the fee, was held to be not correct, and to that extent, the said decision and the consequent directions given to AICTE, UGC, MCI, the Central and State governments etc. were overruled in *TMA Pai* v. *State of Karnataka* [55]. Unaided minority educational institutions should have the discretion to conduct their own entrance examinations. Further, compelling them to admit 50% students in free seats is also against the right to admission which is a part of right to administration of educational institutions. The denial of management quota to the minority institutions in the payment seats also amounts to curtailment of their rights in view of the finding that right to admission is an essential facet of administration under Art.30[56]. In view of the rulings by the Constitutional Bench,

determined on the same basis as in the case of free seats; 3. There should not be no quota reserved for the management or for any family, caste or community, which may have established such a college; 4. Reservation of seats for the constitutionally permissible classes is possible in accordance with the concerned university directions; 5. Every State should constitute a committee to fix the ceiling on the fees chargeable by a professional college. This committee should fix the fees for every three years after hearing the colleges; 6. It would be appropriate for the UGC, AICTE, Indian Medical Council and other bodies to frame Regulations for the control of fees.

51 *TMAPai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481 at p. 540, para 38.

52 *Ibid.*

53 *Supra* n. 50.

54 *Ibid.*

55 *TMAPai Foundation* v. *State of Karnataka* , (2002) 8 S.C.C. 481at p. 541, para 45.

56 *Id.* at para 161.

the States don't have any claim over the admission, other than to ensure that a fair merit based procedure is followed.

3.7. Principle of Cross Subsidy Whether Violative of Admission Rights?

Only reasonable restrictions can be made under Art.30(1) and (19)(1)(g) of the Constitution of India. In *Unnikrishnan* v. *State of Andra Pradesh*[57], the Court formulated a Scheme wherein it was laid down that 50% of the seats in every professional college should be filled by the nominees of the Government or University, which will be referred to as 'free seats' and the remaining 50% shall be 'payment seats'. The Court was of the opinion that 50% 'free seats' will ensure admission to the students who are meritorious but are not able to pursue studies due to exorbitant fee demanded by unaided professional institutions including minority educational institutions. The remaining 50% will be management seats where affluent students who are lesser in merit could be admitted. This method of cross subsidizing is against minority professional educational institutions' right to admit students of their choice which is a facet of administration of educational institutions[58]. This also constitute unreasonable regulations against private educational institutions' rights under Art.19(1)(g) and the rights of minority institutions under Article 30(1)[59].

As per the scheme, the payment seat student would not only pay for his own seat, but also finance the cost of a 'free seat' classmate. Since higher education has been held as not a fundamental right, it is unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which asses the merit for the purpose of admission solely on the marks obtained, where the urban students always have an edge over the rural students[60]. This Scheme was overruled in *TMAPai*, wherein, the Court held :

> Any system of student selection would be unreasonable if it deprives the private unaided educational institutions of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing

[57] *UnniKrishnan J.P.* v. *State of A.P.*, (1993) 1 S.C.C. 645.
[58] *TMAPai* case at para 38.
[59] *Id.* at paras 35 to 45.
[60] *TMAPai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481 at p.539, para 37.

> the equivalence between different kinds of qualifications, like a common entrance test…[61]

Surrendering the total process of selection to the State was also held unreasonable[62]. Though State can prescribe the minimum qualifications for admission to educational institutions, the Private unaided minority educational institutions have every right to devise their own methods for admitting students[63]. They have to follow the minimum qualifications prescribed by the State and a rational criterion for selection. At any rate, the principle of cross subsidy cannot be thrusted on minority unaided educational institutions[64].

3.8. Right of Unaided Minority Educational Institutions to Devise Test for Selecting Students of Their Choice

In *Unnikrishnan's* case, the Supreme Court had held that unaided professional educational institutions are not entitled to conduct entrance examinations on their own. The scheme made by the Court prescribed that there should be a Common entrance test conducted by the competent authority. The Scheme prescribed that institutions which refused to follow the guidelines will be denied affiliation or recognition. However the Court in *TMA Pai* reversed the above declaration of law and accepted the contentions of the private institutions that it is unfair on the part of the Court to insist that statutory authorities should impose scheme governing admission and fees, as a condition for grant of affiliation or recognition. This, in the opinion of the Court completely destroys the institutional autonomy and the very objective of establishment of the institution[65].

Private educational institutions especially the minority run educational institutions can devise by itself a scheme of rational selection of students. The government can only prescribe minimum qualification and some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral

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61 *Id.* at p.540, para 40.
62 *Id*. at para 41.
63 *P.A.Inamdar* v. *State of Maharastra*,(2005) 6 S.C.C. 537, para 137.
64 *Id.* at para 35 .
65 *TMAPai Foundation* v. *State of Karnataka,* 2002(8) S.C.C. 481 at p. 539, para 36.

tests for selection, based on principle of fairness[66]. Surrendering the total process of selection to the State is unreasonable, as was sought to be done in *Unnikrishnan Scheme*[67]. Apart from the decision in *St.Stephen's College* v. *University of Delhi* [68], which recognized and upheld the right of a minority aided institution to have a rational admission procedure of its own, earlier Constitution Bench decisions of the Court were also supportive of the right of an institution devising a rational system for selecting and admitting students[69].

3.9. Common Entrance Test Devised by the Government or University in Unaided Minority Institutions

The right of unaided institutions to adopt merit based selection of students on a fair and discernible basis is recognized as a facet of administration. In *Minor P. Rajendran* v. *State of Madras*[70] the Constitution Bench of the Supreme Court observed as follows:

> ...So far as admission is concerned; it has to be made by those who are in control of the colleges…

The rights of such private institutions in following a rational procedure of selection got judicial scrutiny in *St.Stephen's College* case[71], wherein the Court upheld the method whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. Upholding the view taken therein, the Supreme Court in *TMAPai* held thus:

> ...The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies[72].

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66 *Id.* at p. 540, para 40.
67 *Unnikrishnan . J.P* .v. *State of Andra Pradesh*, (1993) 1 S.C.C. 645.
68 *St.Stephen's College* v. *University of Delhi,* (1992) 1 S.C.C. 558.
69 *R.Chitralekha* v. *State of Mysore,* A.I.R. 1964 S.C. 1823, at p.1830, para 8; *Kumari Chitra Ghosh* v. *Union Of India,* (1969) 2 S.C.C. 228; *Minor.P.Rajendran* v. *State of Madras*, A.I.R. 1968 S.C. 1012, at p.1017, para 17.
70 *Minor. P. Rajendran* v. *State of Madras,* A.I.R. 1968 S. C. 1012 at p.1017, para17.
71 *St.Stephen's College* v. *University of Delhi,*(1992) 1 S. C. C. 558.
72 *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S. C. C. 481 at p.548, para 65. See also *Parish Priest Catholic Church Manager* v. *State of Gujarat*, 2011-LAWS(GJH)-4-209;

The Court further held that while an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be disqualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/ modalities can be prescribed for holding the entrance test in a fair manner[73]. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institutions concerned[74]. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons[75].

Thus the Court while giving sufficient autonomy for private educational institutions especially minority run educational institutions see to it that arbitrariness and extraneous grounds are not resorted to in rejecting admission to students[76].

The conduct of entrance examinations by state agencies for admission in unaided educational institutions has been held illegal and unconstitutional by courts several times. In *Lisie* v. *State of Kerala*[77], the attempt of Kerala government to provide a common entrance test was held unsustainable. Similarly, Orissa Professional Educational Institutions Act, 2007 introduced common entrance test for unaided professional educational institutions but failed to take off on getting quashed by the Division Bench of Orissa High Court[78].

Karamsad Medical Association v. *State of Gujarat,* 2000 (2) G.L.R. 1648; *Swapnaprakash Panda* v. *State of Gujarat*, 2009(2) G.L.H. 495.

73 *Ibid*.

74 *Ibid*.

75 *Ibid.*

76 See also para 58-59 of *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481, wherein it is stated that as merit is usually determined by either the marks of the students obtained at the qualifying examination or school leaving certificate stage followed by the interview or by a common entrance test conducted by the institution, the State while framing regulations has the requisite jurisdiction to issue necessary directions in this behalf so that merit is not sacrificed.

77 2007(1) K.L.T. 409.

78 *Orissa Management Colleges Association* v. *State of Orissa,* A. I. R. 2007(Ori.)120.

3.9.1. Centralised Single Window Procedure for Admission

The question whether a centralized single window procedure for admission be prescribed by the state governments for regulating admission in unaided institutions especially minority institutions led to various litigations between the state governments and institutions in the last few decades. In *TMA Pai*[79], the Supreme Court took the view that private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students.

In *Islamic Academy*[80] the Supreme Court held that the word common entrance test suggested in *TMA Pai* clearly indicate that each institute could not conduct entrance test separately. It was clarified that managements could select students of their quota, either on the basis of a common entrance test conducted by the State or on the basis of common entrance test to be conducted by an association of all colleges of a particular type in that State[81]. However, the directions therein were further clarified in favour of educational institutions while answering the question No.2 framed in *Inamdar*[82]. The Court observed as follows:

> …There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such Institutions situated in one state or in more than one state may join together and hold a common entrance test or the State may itself or through an agency arrange for holding such a test… Such an agency conducting the Common Entrance Test must be one enjoying utmost credibility and expertise in the matter...Holding of such common entrance test followed by centralized counselling or in other words, single window system regulating admissions does not cause any dent

[79] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 548, para 65.
[80] (2003) 6 S.C.C. 697, at p. 728, para16.
[81] *Islamic Academy of Education* v. *State of Karnataka,*(2003) 6 S.C.C. 697. See also *Deepa Thomas* v. *Medical Council of India*, 2012-LAWS(S.C.)-1-54; *Monika Ranka and Others* v. *Medical Council of India*, WP(C) 34285/09; *Chaudari Navin Hemabhai and Others* v. *State of Gujarat and Others*,(2011) 3 S.C.C. 617; *Mahatma Gandhi University* v. *Gis Jose*,(2008) 7 S.C.C. 611; *Regional Officer, CBSE* v. *Sheena Peethambaran*, (2003) 7 S.C.C. 719; *Medical Council of India* v. *Manas Ranjan Behera*, (2010) 1 S.C.C. 173.
[82] Q.2.Whether unaided (minority and non minority) educational institutions are free to devise their own admission procedure or whether the direction made in *Islamic Academy* (2003) 6 S.C.C. 697 for compulsorily holding an entrance test by the State or association of institutions and to choose there from the students entitled to admission in such institutions, can be sustained in light of the law laid down in *Pai Foundation* ?

> in the right of minority unaided educational institutions to admit students of their choice….[83]

Inamdar[84] further held :

> *Pai Foundation* has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure thereof subject to its being fair, transparent and non exploitative. The same principle applies to non minority unaided institutions. ...The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit based admissions and preventing mal - administration. The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure…

From the above paragraphs, it is clear that the Court considering the larger interest and welfare of the student community, to curb malpractices, suggests that it would be permissible for the State to take over the admission procedure in the event of failure to observe the triple test of fairness, transparency and non-exploitative method in admission[85]. Otherwise, common entrance test by the State would infringe the right to admission, which is a facet of administration of educational institutions under Article 30.

3.10. Agency to Determine Failure of Triple Test

In *Inamdar's* case it has been held that while admissions in private unaided professional institutions could be done by the institutions or association of such unaided professional institutions, the State can interfere if the admission procedure fails to satisfy triple test of *fair*, *transparent* and *non exploitative* procedure[86]. The question arises regarding identification of the body which can decide whether the private unaided institutions have failed in following the triple test. In *Modern*

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[83] *P.A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537, at p. 604, para 136.
[84] *Id.* at para 137.
[85] *Ibid.* See also, *Federation of A. P. Minority Educational Institution* v. *Admission and Fee Regulatory Committee for matters relating to Fee fixation in Private Unaided Professional Colleges*, 2011-LAWS (S.C.) 8-63.
[86] *P.A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537, at p. 604, para 137.

Dental College and Research Centre v. *State of Madya Pradesh*[87], the Court held that there is a lacuna in *Inamdar* as the Court doesnot mention the body which will decide the due compliance of the triple test. It cannot be left to the unilateral decision of the State government to decide the issue as it will give unbridled, absolute and unchecked power to the State.

3.11. Appointment of Committees to Regulate Admission

In professional education, merit shall be the criteria for admission. Fair, transparent and non exploitative admission is a pre-requisite to provide access to the deserving candidates. Monitoring admission process is very important in this regard. The Supreme Court, while interpreting *TMA Pai* verdict had directed the constitution of committees to monitor admission through central or state legislation made in this regard and till then Ad-hoc committees to perform the function of regulating admission. In *Islamic Academy* [88] the Court held as follows:

> ...The Committee shall have powers to oversee the tests to be conducted by the association.…The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner. The Committee shall have power to permit an institution which has been established and which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt its own admission procedure and if the Committee feels that the needs of such an institute are genuine, to admit, students of their own community, in excess of the quota allotted to them by the State government. Before exempting any institute or varying in percentage of quota fixed by the State, the State Government must be heard before the Committee. It is clarified that different percentage of quota for students to be admitted by the management in each minority or non minority unaided professional colleges shall be separately fixed on the basis of their need by the respective State governments and in case of any dispute as regards fixation of percentage of quota, it will be open to the management to approach the Committee. It is also clarified that no institute, which has not been established and which has not followed its own admission procedure for the last, at least 25 years, shall be permitted to apply for or be granted exemption from admitting students in the manner set out hereinabove.

[87] 2009 (6) S.C.J. 418, para 27.
[88] *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. pp. 729-30, para 19.

3.11.1. P.A. Inamdar on Committees Constituted by Islamic Academy

P.A. Inamdar[89] upheld the establishment of Committees envisaged by *Islamic Academy* for professional unaided minority and non minority educational institutions. The professional unaided minority and non minority educational institutions can have their own admission procedure but is vested with a duty and an obligation to maintain requisite standards of professional excellence by giving admission based on merit and making it equally accessible to eligible students through a fair and transparent admission procedure.

Question arose in *Inamdar* whether the admission procedure could be supervised by committees constituted for this purpose in *Islamic Academy.* In *Inamdar* v. *State of Maharastra*[90]*,* in answer to question 4 relating to Committees constituted in *Islamic Academy,* the Court held that the two Committees for regulating admissions and determining fee structure constituted by the judgment in *Islamic Academy*, cannot be faulted either on the alleged infringement of Art.19(1)(g) in case of unaided professional institutions and Art.19(1)(g) read with Article 30 in case of unaided professional institutions of minorities. There is no impediment to the constitution of the Committees as a stopgap or adhoc arrangement made in exercise of the power conferred on the Supreme Court by Art.142 of the Constitution until a suitable legislation or regulation is made[91]. Such Committees cannot be equated with the *Unnikrishnan*[92] Committees which were supposed to be permanent in nature. The Committees regulating admission procedure and fee structure shall continue to exist, as a temporary measure until the Central Government or the State Governments are able to devise a suitable

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89 *P.A. Inamdar* v. *State of Maharastra,*(2005) 6 S.C.C. 537.

90 Qn. 4. Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by *Islamic Academy?* As far as admission procedure is concerned institutions can have their own admission procedure, as long as it satisfies the triple tests of being fair, transparent and non exploitative.

91 *Orissa Management Colleges Association* v. *State of Orissa*, A.I.R.(Ori)-0-12; *State of Orissa* v. *M/S.M.A.Tulloch and Co.*, A.I.R. 1964 S.C. 1284; *Osmania University Teachers' Association* v. *State of Andra Pradesh,* (1987) 4 S.C.C. 671; *Bharati Vidya peeth Case*, A.I.R. 2004 S.C. 1943; P*adma Sundara Rao* v. *State of Tamil Nadu*, (2000) 3 S.C.C. 533.

92 (1993) 1 S.C.C. 666.

mechanism and appoint a competent authority in consonance with the observations made in the judgment[93].

The Court further held :

> The said two Committees, for monitoring admission procedure and determining fee structure are permissible as regulatory measures aimed at protecting the interests of the student community as a whole as also minorities themselves in maintaining required standards of professional education on non exploitative terms in their educational institutions. They are reasonable restrictions in the interest of minority institutions permissible under Art.30(1) and in the interest of the general public under Art.19(6) of the Constitution[94].

Thus *Inamdar* clarified that an unaided institution can have their own admission procedure subject to the conditions that it is fair, transparent, non exploitative and based on merit[95].

3.11.2. Composition and Functions of Admission Regulatory Committees

For each State, a separate Committee need to be formed for regulating admissions. The Committee would be headed by a retired Judge of the High Court. The Judge is to be nominated by the Chief Justice of the State concerned. The other member to be nominated has to be a doctor/engineer of eminence. The Secretary of the State in charge of medical or technical education as the case may be shall also be a member and act as secretary of the committee. The Committee will be free to nominate/co-opt an independent person of repute in the field of education as well as one of the Vice-Chancellors of the University in that state, so that the total number of person in that committee does not exceed five[96]. Various State governments brought legislations providing constitution of such Committees in consonance with the judicial directions[97].

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93 *P.A.Inamdar* v. *State of Maharastra,*(2005) 6 S.C.C. 537, paras 148,151,155.
94 *Id.* at p.607, para 144.
95 Para 68(11) of *TMA Pai* was clarified that it cannot be read as law laid down, and it only mentioned the possible consensual arrangements which could be reached between the said institutions and the State.
96 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 S.C.C. 697 at p.729.
97 *Id*. at p.697.

The Committee shall have power to oversee the tests to be conducted by the association. This would include the power to call for the proposed question papers, to know the names of the paper setters and examiners and to check the method adopted to ensure question papers are not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner.

3.11.3. Post Audit Checks on Admission Procedure

In *Inamdar*[98], suggestion was made on behalf of minorities and non minorities that the same purpose for which the Committees have been setup can be achieved by post audit or checks after the institutions have adopted their own admission procedure and fee structure. However, it was held unacceptable for the reasons shown by experience of the educational authorities of various States. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of the unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb[99].

In case of any individual institution, if any of the Committees is found to have exceeded its powers by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi judicial in nature, would always be subject to judicial review[100].

Thus, we can see the judicial trend that in professional educational institutions which are unaided, merit shall not be compromised. The Committee supervising admission shall have power to permit an institution of atleast, 25 years standing, to adopt its own admission procedure to admit, students of their own community, even in excess of the quota allotted to them by the State government[101]. The right to admission which is a facet of administration of

[98] (2005) 6 S.C.C. 537.

[99] *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697, para 145 affirmed and *Unnikrishnan, J.P.* v *State of A.P.,*(1993) 1 S.C.C. 645, referred to .

[100] (2005) 6 S.C.C. 537, at p. 608, para 150.

[101] Before exempting any institute or varying in percentage of quota fixed by the State, the State government must be heard before the Committee.

educational institutions particularly minority educational institution is protected by clarifying that different percentage of quota for students to be admitted by the management in each minority or non minority unaided professional colleges shall be separately fixed on the basis of their need by the respective State governments and in case of any dispute regarding fixation of percentage of quota, it will be open to the management to approach the Committee and the decisions of the Committee will be subject to judicial review.

3.12. Governmental Control Over Fixation of Fee in Unaided Educational Institutions

Admission to educational institutions and its fee structure are closely related. Mushrooming of private professional educational institutions leads to profiteering. Unaided educational institutions claim that collection of fees is an inseparable part of administration and claim autonomy over this right. In *Mohini Jain*[102], the Court held that admissions at all levels could be made only on the basis of merit and that capitation fee in any form is to be discouraged. In *Unnikrishnan*[103], the issue was whether there could be governmental control in admission and fee structure and whether the maximum and minimum fee could be fixed by an unaided institution above the fee fixed by the government. The Court held that 50% of the seats could be payment seats and it could be used for furthering the excellence of the institution. Fee fixation is an integral part of admission rights. Since education in a sense is regarded as charitable, unaided institutions cannot charge a hefty fee which would not be required for the purpose of fulfilling the object for which the institutions are established and by the same reason they can't take recourse to profiteering[104]. As unaided institutions are to be given maximum autonomy in the matter of fixation of fee, there cannot be

(a) a rigid fee structure[105],

(b) Such fees are to be fixed by the unaided institutions[106] and

[102] (1992) 3 S.C.C. 666.
[103] (1993) 1 S.C.C. 645.
[104] *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p.579, para 57.
[105] *Id.* at p. 578, para 54.
[106] *Id.* at p. 545, paras 56 and 57.

(c) the only impediment in this behalf is that no capitation fee can be charged nor can the institutions take recourse to profiteering since education is charitable in nature. Therefore a reasonable revenue surplus for the purpose of developmental objectives and its expansion would be permissible[107]. While restricting charging of capitation fee and profiteering, the Court had merely directed that such institutions make no undue, excessive or illegal profits and thereby a reasonable profit is permitted.

(d) Only because fee is to be charged on a reasonable basis, the same should not result in a decline in the standard or amount to capitation[108].

(e) Students of weaker sections when admitted may be granted freeships and scholarships.

(f) For the purpose of finding out as to who would be the students belonging to the weaker sections of the community, local needs and other needs must be taken into consideration.

3.12.1. TMA Pai on Constitution of Machinery to Regulate Fee Structure

In *TMA Pai*[109], the Court held that a rational fee structure should be adopted by the management, which would not be equivalent to capitation fee. Appropriate machinery can be devised by the State or University to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible[110].

3.12.2. Islamic Academy on Fee Structure in Admissions

In answering the question, whether educational institutions are entitled to fix their own fee structure, in *Islamic Academy*[111], the Court held :

> "… There can be no fixing of a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be

[107] *Ibid.*
[108] *Id*. at p. 546, para 61.
[109] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481.
[110] *Id*. at p.549, para.69.
[111] *Islamic Academy* (2003) 6 S.C.C. p.697 at p.720, para 6.

> used for the betterment and growth of that educational institution. In paragraph 56 of the judgment[112] it has been categorically laid down that the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government. Each Institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc. Of course there can be no profiteering ….as per the majority judgment imparting of education is essentially charitable in nature.... The Governments/appropriate authorities should consider framing appropriate regulations, if not already framed, where under if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalized and also face the prospect of losing its recognition/affiliation ...[113].

3.12.3. Constitution and Functions of Committee on Fee Structure

Along with the constitution of Admission Supervisory Committee, the Supreme Court in *Islamic Academy* v. *State of Karnataka*[114] directed the constitution of a committee to regulate fee structure in admissions so that professional educational institution do not indulge in profiteering.

In order to give effect to the judgment in *TMAPai* case, the respective State governments/authorities were directed to appoint a committee headed by a retired High Court Judge who shall be nominated by the Chief Justice of that State. The Judge so appointed was empowered to nominate a Chartered Accountant of repute as member. A representative of Medical Council of India or All India Council for Technical Education depending upon the type of institution could also be included as member. At any rate total number of members of the Committee will not be permitted to exceed five. The above guidelines laid down by the apex court to the respective state governments later got incorporated in to statutes with minor variations.

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[112] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p.545, para 56.

[113] *Islamic Academy* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at p.720, para 7. See also *P.A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537 at p.562, para 16. *Pai Foundation* as explained in *Islamic Academy*. S. B. Sinha J., defined what is 'capitation' and 'profiteering' and also said that reasonable surplus should ordinarily vary from 6 percent to 15 percent for utilization in expansion of the system and development of education.

[114] (2003) 6 S.C.C. 697 at pp. 721-22, para 7.

As per the directions in *Islamic Academy*[115], educational institute must have to place before the Committee, well in advance of the academic year, its proposed fee structure. Along with this proposed fee structure, all relevant documents and books of accounts must also be produced before the Committee for their scrutiny. The fee structure proposed should justify the expenses incurred in the running of the Institute. The Committee shall then decide whether the fees proposed will amount to profiteering or charging of capitation fee. The Committee will be at liberty to approve the fee structure or to propose alternative fee structure applicable to the institute. The fee so fixed by the Committee shall be binding for a period of three years at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, any other amount charged, under any other head would amount to charging of capitation fee. If it is found that any institution is charging capitation fees or profiteering that institution can be appropriately penalized and also face the prospect of losing its recognition /affiliation.

The Constitution Bench has made it clear that the setting up of two sets of Committees in the States has been directed in exercise of the power conferred on that Court under Article 142 of the Constitution and such Committees shall remain in force till appropriate legislation is enacted by Parliament[116]. Various state Governments have incorporated mandate of the apex court directions, by bringing state legislations[117] in this respect.

It is suggested that so long as they remain functional, the Committees are expected to be more sensitive and to act rationally and reasonably with due regard to realities. They should refrain from generalizing fee structures and, where needed, should go into the accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

[115] *Ibid*.
[116] (2003) 6 S.C.C. 697, para 20.
[117] *Id*. at p.697.

3.12.4. *Inamdar* on Fee Determination Committee Formulated in *Islamic Academy*

The judgment in *Inamdar* makes clear that *Islamic Academy* merely implements the legal position explained in *Pai foundation* by providing a Fee Determination Committee[118]. There is duty and obligation to make admission equally accessible to eligible students based on a reasonable fee structure. The Court reiterated that while every unaided institution is free to devise its own fee structure, the same can be regulated to prevent profiteering and to ensure that no capitation fee is charged. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb. At the same time, the Court made it clear that the decision of the Committee being quasi judicial in nature, would always be subject to judicial review[119].

3.13. Professional Unaided Non Minority Educational Institutions

The right to establish and administer educational institutions is guaranteed under Article 19(1)(g) and Article 26 of the Constitution to all citizens of India and are subject to reasonable restrictions under Articles 19(6) and 26(a)[120]. A combination of unprecedented demand for access to higher education and the inability of the government to provide the necessary infrastructure have brought in private higher education agencies to the forefront. The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted giving space for unaided minority and unaided non minority institutions. Unaided non-minority institutions have the right to admit students of their choice subject to an objective and rational procedure of selection.

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[118] *P.A. Inamdar* v. *State of Maharastra,*(2005) 6 S.C.C. 537 at p.584.
[119] *Ibid*. See also *Charutar Arogya Mandal* v. *State of Gujarat*, (2010) 13 S.C.C. 420.
[120] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481, at p.591, Answer to question No. 11.

3.13.1. Government Control Over Professional Unaided Non Minority Educational Institutions

Governmental control over unaided institutions is very limited but the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation which must pertain broadly to academic and educational matters and welfare of students and teachers. The management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/University subject to adoption of a rational procedure of selection. Appropriate machinery can be devised by the State to ensure that no capitation fee is charged and there is no profiteering. A committee for monitoring admissions is made feasible by the directions in *Islamic Academy*. Conditions requiring admission of a small percentage of students belonging to weaker sections of the society can be insisted by granting them freeships or scholarships, if not granted by the government[121]. In *Pai Foundation* it has been held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore subject to its being fair transparent and non exploitative. The same principles applies to non-minority unaided institutions[122]. In *TMA Pai* after going through decisions of the constitutional benches, it has been opinioned as follows:

> ...It has been held that conditions of affiliation or recognition, which pertain to the academic and educational character of the institution and ensure uniformity, efficiency and excellence in educational courses are valid, and that they do not violate even the provisions of Article 30 of the Constitution; but conditions that are laid down for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions[123].

3.13.2. Admission Procedure in Professional Unaided Non Minority Educational Institutions

In unaided professional educational institutions, the scope of governmental control is very limited. The State can prescribe minimum qualifications and

[121] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481, at p. 543-544, para 53.
[122] (2005) 6 S.C.C. 537, p. 604, para 137.
[123] *Supra n.* 121 at p.550, para 70.

prescribe systems of computing equivalence in ascertaining merit. The right to select students guaranteed by the Constitution may create unnecessary and unavoidable expenditure and inconvenience to the students. An aspirant to admission may have to purchase forms from several institutions and may have to appear at different places on the same or different dates. Considering the same, the Supreme Court in *P.A. Inamdar* suggested that an entrance test can be held for one group of institutions imparting same or similar education. Such institutions situated in one state or in more than one state may join together and hold a common entrance test. In *P.A. Inamdar*[124], it has been clarified that State can substitute its own admission procedure in a private educational institution or group of institutions only if the admission procedure followed by them fails to fulfill the test of being fair, transparent and non exploitative. It is worth remembering the following observations of *TMA Pai* in this regard:

> ...While an educational institution cannot grant admission on its own whims and fancies and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to say, their performance in an entrance test, would be unreasonable restriction under Art.19(6) though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to give admission to the students who have otherwise qualified for the grant of admission is on the management.

Hence the governmental intervention in admission procedure can be exercised only on failure to follow the triple test[125] in admission procedure by the institution.

3.13.3. Equalising the Rights for Admission Between Minority and Non Minority Unaided Educational Institutions

In *Pai Foundation*, it was held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore, subject to it being fair, transparent

[124] (2005) 6 S.C.C. 537 at p.604-605, para 137.
[125] *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 S.C.C. 697. Fair, transparent and reasonable procedure based on merit.

and non exploitative. The same principle applies also to non-minority unaided institutions[126]. Comparison of rights has to be made by going through para 137 and 138 of the *TMA Pai*. Primarily, it appears that these paragraphs equate both types of educational institutions. However, on a careful reading, it comes to light that the minority educational institutions have a guarantee or assurance to establish and administer educational institutions of their choice. Those paragraphs merely provide that laws, rules and regulations cannot be such that they favour majority institutions over minority institutions. It is possible to read that non minority educational institutions would have the same rights as those conferred on minority educational institutions by Art.30 of the Constitution of India. Non minority educational institutions do not have the protection of Article 30. Therefore, non-minority institutions cannot stand on a similar footing as minority educational institutions. It is true that the principle behind Art.30 is to ensure that minorities are protected and are given an equal treatment yet the fundamental right under Article 30 does give them certain advantages. A legislation banning private educational institutions as part of nationalization may put an end to non minority educational institutions, but fundamental right given under Article 30(1) will still keep the rights of minorities to establish and administer educational institutions of their choice unfettered by such enactments. Further, minority educational institutions have preferential right to admit students of their own community/language. No such right exists so far as non minority educational institutions are concerned. These rights were deeply analyzed in *Islamic Academy*[127]while answering the question whether minority and non minority educational institutions stand on the same footing. In the opinion of majority in *Islamic Academy*, minority institutions stand on a better footing than non minority educational institutions. Minority educational institutions under Article 30 have a guarantee that they can establish educational institutions of their choice and State legislation cannot favour non minority institutions over minority institutions.

[126] (2005) 6 S.C.C. 537 at p.604-605, para 137. See also, Goyal K.N., "Majorities' Right to Establish and Administer Educational Institutions", *Journal of Indian Law Institute*, (Vol.38), No.3,(July-Sept) (1996).
[127] (2003) 6 S.C.C. 697 at pp. 722-23, para 9.

3.13.4. Inamdar[128] *on Islamic Academy's Findings on Admission to Unaided Professional Educational Institutions*

Inamdar further explained the scope of rights available to educational institutions declared in *TMA Pai*. Certain findings in *Islamic Academy* were also held not good by *Inamdar*. The highlights of the findings of *Islamic Academy* on admission in unaided professional educational institutions as explained in *Inamdar* are as follows:

(1) In professional institutions, as they are unaided, there will be full autonomy in their administration, but the principle of merit cannot be sacrificed, as excellence in professions is in the national interest.

(2) Without interfering with the autonomy of unaided institutions, the object of merit based admissions can be secured by insisting on it as a condition to the grant of recognition and subject to the recognition of merit, the management can be given certain discretion in admitting students.

(3) The management can have a quota for admitting students at its discretion but subject to satisfying the test of merit based admissions, which can be achieved by allowing the management to pick up students of their own choice from out of those who have passed the common entrance test conducted by a centralized mechanism. Such common entrance test can be conducted by the State or by an association of similarly placed institutions in the State.

(4) The State can provide for reservation in favour of financially or socially backward sections of the society.

(5) The prescription of percentage of seats *i.e.* allotment of different quotas such as management seats, State's quota, appropriated by the State for allotment to reserved categories, etc. has to be done by the State in accordance with the 'local needs' and the interests/needs of that community in the State, both deserving paramount consideration. The exact scope of local needs is not clarified. The plea that each minority unaided educational institution can hold its own admission test was expressly overruled…[129].

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[128] *P. A. Inamdar* v .*State of Maharastra,* (2005) 6 S.C.C.537 at p.563, 564 para 16.
[129] *Ibid*.

3.14. Art.30(1) is a 'Protective Measure' and not a 'Right'

The words of Article 30(1) are unqualified but it has been held that certain laws of the land pertaining to health, morality and standards of education will apply to minority institutions. The discussion in *TMA Pai*[130] makes it clear that Article 30(1) provides protection to the linguistic and religious minorities and principles of equality must necessarily apply to enjoyment of such rights. It is also made clear that essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. Article 30(1) is to ensure that any rule or regulation that would put the educational institution run by the minorities at a disadvantage when compared to those run by others is not framed and operated. According to Justice Sinha[131], right of minority institutions to admit their own students, in other words, is only by way of protection of the minorities' interest so that they may get the benefit of the equality clause. Affirmative action or protection though constitutionally sanctioned, cannot ignore constitutional morality which embraces in itself the doctrine of equality. Minority institutions are as much subject to regulatory measures as non minority institutions are, and both types of institutions can be asked to close down in national interest. His Lordsip further supplements that minority institutions if cross the permissible limits of regulations can be taken over with a view to maintain morality, public order, health and national interest. Moreover, in the case of gross mismanagement and violation of the conditions of essentiality certificate, the state may close down the institution[132]. Thus in his Lordships' opinion, minority educational institutions do not have a higher right in terms of Article 30(1). Article 30(1) confers 'certain additional protection' with the object of bringing the minorities on the same platform as that of non minorities, so that the minorities are protected by establishing and administering educational institutions for the benefit of their own community, whether based on religion or language[133].

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[130] *TMA Pai Foundation* v *State of Karnataka,* (2002) 8 S.C.C. 481 at p.578.
[131] *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at p.704. See paras 105, 92, 89 and 93.
[132] *Ibid*.
[133] *P. A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537, para 16.

3.15. Aided Minority Professional Educational Institutions

Minority Professional educational institutions on receiving state aid, have to comply with Art.29(2) of the Constitution. The State can impose reasonable regulations in lieu for grant of aid. But such regulations should not annihilate minority character of the educational institution.

3.15.1. Grant of Aid on the Status of an Aided Educational Institution

On receiving aid, educational institutions will have to comply with the provisions under Art.29(2). Once aid is granted to a private professional educational institution, the Government or the State agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The State would be under an obligation to protect the interest of the teaching and non-teaching staff. The State can regulate the appointment of teaching and non-teaching staff after prescribing requisite qualifications for the same. Regulation for the best interest of students and teachers can be framed and enforced[134]. Though aided institutions are not provided with the kind of autonomy available to unaided institutions, it cannot also be treated as an educational institution departmentally run by government or as a wholly owned and controlled governmental institution[135]. There is necessarily a difference in the administration of private unaided institutions and the aided institutions. In the latter case, the Government will have greater say in the administration, including admissions and fixing of fees[136].

3.15.2. Grant of Aid on the Status of an Aided Minority Educational Institution

The minority aided institutions cannot claim that admission is a facet of establishment and administration. Article 29(2) applies to minorities as well as to non-minority educational institutions. When other qualifications being equal, the religion, race, caste, or having any particular language is absolutely prohibited in educational institutions maintained by the State or state funds. At the same time, it is equally true that receipt of state aid does not impair the rights under Article

[134] *In Re, Kerala Education Bill*, 1957, A.I.R. 1958 S.C. 956.
[135] *TMA Pai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481, pp.550-551, para 72.
[136] *Id.* at para 55. See also paras 61 and 62.

30(1). The State has no power to compel minority institutions to give up their rights under Article 30(1)[137]. Any state regulation must satisfy the test of reasonableness and it must be conducive to making the institution an effective vehicle of education for the minority community and other persons who resort to it.

In *DAV College* [138], the Supreme Court explained the respective scope of Articles 29(1) and 30(1) and ordered that Article 29(1) is wider than Article 30(1). Rights guaranteed under Article 29(1) are available to any section of the citizen's including the minorities while the rights guaranteed under Article 30(1) are available only to minorities based on religion or language. The right of a religious or linguistic minority to establish and administer educational institution of their choice under Article 30(1) is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards. The rights is further subject to Article 29(2) which provides that no citizen shall be denied admission in a state aided institution based on the ground of religion, language, caste, race etc. The above view was taken in *Re Kerala* Education *Bill case*[139] also.

Under Article 29(2) discrimination based solely on the ground of a citizen's particular religion, race, caste etc. or having any particular language is absolutely prohibited in educational institutions maintained by the State or receiving aid out of State funds. It applies to minorities as well as to non minorities. Other qualifications being equal, religion, race, caste, language of a citizen shall not be a ground of preference or disability. Similarly, the words 'any of them' as used in Article 29(2) are intended to give further emphasis that none of the grounds mentioned in the Article can be made the sole basis of discrimination[140]. If an educational institution says 'yes' to one candidate but says 'no' to another candidate on ground of religion, it amounts to discrimination on the ground of

[137] *In Re, Kerala Education Bill*, 1957, A.I.R. 1958 S.C. 956. See also (1963) 3 S.C.R. 837, pp.856-57.
[138] *DAV College* v. *State of Punjab,*(1971) 2 S.C.C. 269, p. 273.
[139] *In Re, Kerala Education Bill,* 1957, 1959 S.C.R. 995, at p. 1047.
[140] *St.Stephen's College* v. *University of Delhi*, (1992) 1 S.C.C. 558, at p.608, para 84. See also, *State of Madras* v. *Champakam Dorairajan,* (1951) S.C.R. 525; *State of Bombay* v. *Bombay Educational Society,* (1955) 1 S.C.R. 568.

religion. The mandate of Article 29(2) is that there shall not be any such discrimination[141].

3.15.3. Preference to Minority Students in an Aided Minority Educational Institution Solely on the Ground of Religion

The Constitution establishes a secular democracy. The animating principle of any democracy is the equality of the people. Equality of opportunity for unequal can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reasons[142]. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible objects. Therefore, differential treatment in standards of selection are within the concept of equality[143]. It is now accepted in jurisprudence and practice that the concept of equality before law and prohibition of certain kinds of discrimination do not require identical treatment.

The individual rights under Article 29(2) will necessarily have to be balanced with competing minority interest. In view of the protective measures in Article 30(1), the minority aided educational institutions are entitled to prefer their community candidates to maintain minority character of the institutions. However, the preference has to be fixed having regard to local needs of the community in the area where institution is intended to serve. In *St.Stephens case*[144], Supreme Court fixed 50% as the outer limit and directed to make available at least 50% of the annual admission to the members of communities other than the minority community. It was an attempt to strike balance between two competing rights.

The ratio of *St.Stephen's* case was accepted by the *TMA Pai*[145] case also. However, the rigid ceiling of 50% fixed was not accepted as good law. The Court found that since Article 29 and Article 30 apply not only to institutions of higher education but also to schools, a ceiling of 50% would not be proper. It was held

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[141] *St.Stephen's College* v. *University of Delhi,* (1992) 1 S.C.C. 558 at p. 606, para 79.
[142] *State of Kerala* v. *N. M. Thomas,* (1976) 2 S.C.C. 310.
[143] *Akhil Bharatiya Soshit Karmachari Sagh(Railway)* v. *Union of India,* (1981) 1 S.C.C. 246 .
[144] *St .Stephen's College* v. *University of Delhi,*(1992) 1 S.C.C. 558, at pp.613-614, para 102.
[145] *TMAPai Foundation* v. *State of Karnataka*, 2002 (8) S.C.C. 481, p. 584, para 151. See also, answer to question no. 4 in the instant case.

more appropriate to leave it to the State to balance the interest of all by providing for such percentage of students of the minority community to be admitted, so as to adequately serve the interest of the community for which the institution was established, considering the population and the local needs of the area in which the institution is located. Thus there is preference in admissions to minorities to a certain percentage of seats even in aided institutions.

3.15.4. Effect of State Regulations on Merit in Admission and Minority Character of Aided Minority Educational Institutions

Minority aided institutions cannot claim right of admission as a facet of administration. The right of the State to have control over aided institutions is limited to proper utilization of funds and to permit the government to have some seats to the extent of its reservation policy. In *TMAPai Foundation* v. *State of Karnataka*[146], the Court held :

> Secular conditions can be imposed on minority educational institutions, if they are also imposed on other educational institutions receiving the grant.

The admission to aided institutions, whether minority or non-minority students, cannot be at the absolute sweet will and pleasure of the management of those educational institutions. The regulations to promote academic excellence and standards do not encroach upon the guaranteed rights under Article 30; therefore aided minority educational institutions can be required to observe inter se merit amongst the eligible minority applicants. In the absence of a common admission test, a rational method of assessing the comparative merit has to be evolved. For non-minority students, admission may be on the basis of the common entrance test and counseling by the state agency. It would be open for the State to insist on allocating a certain percentage of seats to weaker sections of the society[147]. The aided institutions are permitted to retain their character by admitting students belonging to their own community to a reasonable extent. Insistence on merit after providing a reasonable percentage for their own community cannot be treated as an encroachment on the minority rights.

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[146] *Id.* at para 143.
[147] *TMA Pai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481, paras 152, 153.

3.16. Powers Exercisable by Government Which Runs a College

The powers which a private owner of a college exercises can be exercised by the government as owner of an educational institution. In *R. Chitralekha* v. *State of Mysore*[148], government had issued an order devising a method for screening the applicants for admission[149]. While upholding the order so issued, it was observed:

> Once it is conceded, and it is not disputed before us, that the State Government can run medical and engineering colleges, it cannot be denied the power to admit such qualified students as have passed the reasonable tests laid down by it. This is a power which every private owner of a college will have, and the Government which runs its own colleges cannot be denied that power.

Again in *Minor. P. Rajendran* v. *State of Madras,* it was observed[150] :

> So far as admission is concerned, it has to be made by those who are in control of the colleges,- in this case the Government, because the medical colleges are government colleges affiliated to the University. In these circumstances, the Government was entitled to frame rules for admission to medical colleges controlled by it subject to the rules of the University as to eligibility and qualifications[151].

The aforesaid observations clearly underscore the right of the colleges to frame rules for admission and to admit students[152]. The only requirement for control is that the rules for admission must be subject to the rules of the University as to eligibility and qualifications.

In *Kumari Chitra Ghosh* v. *Union of India*[153]dealing with a government run medical college, it was observed :

> It is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility.

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[148] *R. Chitralekha* v. *State of Mysore,* A.I.R. 1964 (6) S.C.R. 368.
[149] *Ibid.*
[150] *Minor. P. Rajendran* v. *State of Madras*, (1968) 2 S.C.R. p.795. See also A.I.R. 1968 S.C.1012 at p.1017, para 17.
[151] *Id*. at para 17.
[152] *TMAPai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481, paras 42-44.
[153] *Kumari Chitra Ghosh* v. *Union of India*, (1969) 2 S.C.C. 228.

From the above observations, it is clear that in colleges run by the government, rules regarding eligibility and qualifications can be laid down by the government. It can lay down reasonable tests for admission and can admit students based on it like any other private owner of a college can do.

3.16.1. Effect on the Minority Character of an Aided Minority Educational Institution While Admitting an Outsider

An institution which receives aid is not entitled to deny admission to a citizen on the ground of religion, race, caste, sex or any of them. In *St.Stephens* case[154] Supreme Court fixed 50% as the outer limit and directed to make available at least 50% of the annual admission to the members of communities other than the minority community. In *Pai foundation* case, it was held more appropriate to leave it to the State to balance the interest of all by providing for such percentage of students of the minority community to be admitted, so as to adequately serve the interest of the community for which the institution was established, considering the population and the local needs of the area in which the institution is located.

Admission of non-minorities in an aided college is a reality under the Constitution. The purpose of Article 29(2) is not to deprive aid to minority educational institution. Argument that an aided minority institution by admitting an outsider ceases to be a minority institution was repelled by the Supreme Court as early in *Re Kerala Education Bill* 1957 case[155]. That will tantamount to saying that minority institutions will not, as minority institutions be entitled to aid. The real purpose of Article 29(2) and Article 30(1) clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it, the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, culture etc. of minority community may better served by propagating the same amongst non-members of the particular minority community.

[154] *St.Stephen's College* v. *University of Delhi,* (1992) 1 S.C.C. 558, p.613-614, para 102.
[155] *In Re, Kerala Education Bill*, 1957, A.I.R. 1958 S.C. 956, see also (1963) 3 S.C.R. 837, p.1051-52.

3.16.2. Effect of State Aid on Procedure and Method of Admission and Selection of Students

The admission to aided institutions, whether awarded to minority or non-minority students, cannot be at the absolute sweet will and pleasure of the management of the educational institutions. The minority aided institutions can be required to observe *interse* merit amongst the eligible minority applicants and passage of common entrance test, where there is one, with regard to admissions in professional and non-professional colleges. In the absence of a common entrance test, a rational method of assessing comparative merit has to be evolved.

In the case of non-minority students, admission may be on the basis of the common entrance test and counseling by a state agency. In the courses for which such a test and counseling are not in vogue, alternative criteria for selection by determining the merit can be evolved. The state authorities will be free to allocate a certain percentage of seats to those belonging to weaker sections of the society, from amongst the non-minority seats[156].

It is well accepted that by receiving State aid, minority character of the educational institution is not lost. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe bye rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit coupled with the reservation policy of the State *qua* non minority students. In answer to question No.5 (b), the majority in *TMA Pai* held :

> ……The merit may be determined either through a common entrance test conducted by the university or the government concerned followed by counseling or on the basis of an entrance test conducted

[156] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481, at pp. 584-85, para 152. See also *Ravindra Kumar* v. *State of Rajasthan*, TLRAJ-0-1; *State of U.P.* v. *Vineet Singh and Others*,(2000) 7 S.C.C. 262; *Dr. Parag Gupta* v. *University of Delhi and Others,*(2000) 5 S.C.C. 684; *K. Duraiswamy and Another* v.*University of TN and Others*,(2001) 2 S.C.C. 538; *Saurabh Chaudari and Others* v. *Union of India and Others,*(2004) 5 S.C.C. 538; *Dr.Pradeep Jain and Others* v. *Union of India and Others,* (1984) 3 S.C.C. 654; *Abinav Aggrawal and Another* v. *Union of India and Others*, (2001) 3 S.C.C. 425; *Magan Mehrotra and Others* v. *Union of India and Others,* (2003) 11 S.C.C. 186; *Dr. Neha Sharma and Others* v. *Rajasthan University of Health Sciences*, 2009(3)W.L.C (Raj)617; *A.I.I.M.S. Students Union* v. *A.I.I.M.S.,* (2002) 1 S.C.C .428.

> by individual institution the method to be followed can be determined by the university or the government. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the government or university to provide that consideration should be shown to the weaker sections of the society[157].

Thus in aided minority professional educational institutions, it is not mandatory that University or the government concerned should conduct common entrance test. The authority may conduct the entrance test or devise other means to ensure that admission is granted on the basis of merit. Hence the marks of qualifying examination alone or coupled with marks of common entrance test or other suitable mechanisms not compromising merit can be resorted to.

3.17. Judicial Attitudes in Admission in Various States - Conflict in Approach

Inspite of the law laid down by the Constitution Bench of the Supreme Court through catena of decisions, admission is still a matter of conflict in many states of India and it is consuming lot of judicial time. The position is similar from north to south and east to west. An attempt is being made to analyse the judicial approaches regarding admission in educational institutions in few States, to espouse the magnitude of the issues relating to admission pending unresolved. The position in State of Kerala has been done in detail in a separate chapter.

3.18. State of Karnataka

The State of Karnataka having large number of professional educational institutions, without a proper statutory mechanism for regulating admissions, has always been a breeding ground for litigations. Religious groups conferred with minority status at the national level and linguistic minorities at the State level in Karnataka are enjoying protection under Article 30[158]. The Karnataka Education Act, was passed in 1983 for maintenance and improvement in the standard of

[157] *TMA Pai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481, at p.589.
[158] Article 30(1) reads : "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice".

education in the State. Though the Act defines minority educational institution[159], indicia to determine minority educational institutions are not laid down in the Act. But it does not cover professional educational institutions[160]. The State of Karnataka had brought the Karnataka Professional Educational Institutions (Regulation of Admission and Determination of Fee)Act, 2006 with provisions for regulating admissions in minority and non minority educational institutions. Minority educational institutions under the Act means the education institutions recognized or notified as such by the state government, subject to conditions as may be prescribed[161]. However, the commencement of the Act has not taken place as it has not been notified by the government[162]. Admission to professional educational institutions are regulated by consensual agreements entered into between state and the managements[163]. The minority institutions are given more autonomy in the matter of admissions and in consensual seat sharing agreements, more seats are allotted them to retain minority character.

3.18.1. Admission to Minority students in Minority Educational Institutions

The question arose in *Shankar* v. *State of Karnataka*[164], whether minority community be denied admission in minority educational institutions established for them. As per the consensual agreement, between the management and the State, 20% of seats have to be filled through state quota and the remaining 80% by the management through open competition[165]. The petitioners belonging to Telugu minority community contended that to retain the minority character they have to admit at least few minority candidates. In this case no minority candidates were admitted for the PG Course. The High Court relying on constitutional bench

[159] S.2(21) defines Minority educational institution as a private educational institution of its choice established and administered by a minority whether based on religion or language having the right to do so under Art.30(1) of the Constitution.
[160] S.1(3).
[161] S.2(m) of the 2006 Act.
[162] S.1(2) of the 2006 Act states that it shall come into force on such date as the state government may by notification appoint.
[163] *Shankar* v. *State of Karnataka*, Laws (KAR) 2008 (7) 11.
[164] Laws (KAR) 2008 (7) 11.
[165] *Id*. At para 6. Consensual agreement entered into by the state government with the management of dental colleges in the state provides that 80% of the seats shall be filled by managements. Out of this, 80% shall be on merit and the remaining 20% shall be filled by NRI quota.

decisions[166] of the Supreme Court concluded that to retain the minority character the college should have admitted few candidates belonging to the minority. Thus the petitioners who were provisionally given admission, based on the interim orders were permitted to be regularised.

3.18.2. Increase in Government aid Will not Take Away Minority Rights

The attempt of the government to fill 100% seats in minority aided polytechnic was the matter in issue in *Babu G Education Society* v. *State of Karnataka and others*[167]. The government was providing 85 % of the expenses to a minority polytechnic college and the seats were being filled by government and management in the ratio of 80:20. The government had issued an order enhancing the grant in aid to 100% with a rider that on increasing the grant in aid from 85% to 100%, all seats of the institutions shall be filed up by the government. The High Court allowed the prayers by the minority institution by quashing the condition imposed by the State government that entire seats shall be filled by the government.

3.18.3. Filling of University Quota by Managements

In *P.A. Inamdar* v. *State of Maharashtra*[168], it was declared that greater autonomy shall be given to unaided professional institutions, in the matter of determination of admission procedure and fee. No State quota as part of reservation policy can be appropriated by the State in minority and non-minority unaided institutions[169]. The question arose whether refusal to approve admission stating that, the university quota was filled by the management without waiting for allotment is sustainable or not in *Indian Academy Degree College* v. *Bangalore University*[170]. Relying on the dictum laid down by the apex court in the above referred judgment, it was held that since university has not allotted candidates to

[166] *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481; *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 S.C.C. 537.
[167] K.C.C.R. 2014 (3) 1906. See for the same judgment in Laws (KAR) 2014 (4) 19.
[168] (2005) 6 S.C.C. 537.
[169] *Id*. at p. 602.
[170] LAWS (KAR) 2012 (12) 33.

the seats for admission within the time frame, admission conducted by the management is not liable to be challenged at a belated stage.

3.18.4. PH Reservation in Unaided Minority and Non- Minority Colleges

The minority and non-minority unaided colleges in the State of Karnataka, surrendered 20% and 30% respectively of their seats in Post Graduate Dental Courses for allocation by government agencies[171]. The entitlement of physically handicapped for reservation under 3% quota against the said seats was the matter in issue in *S.J. Rajalekshmi* v. *Secretary Medical Education, Bangalore*[172]. The government resisted the claim for reservation for physically handicapped under 3% quota, by contending that the seats secured by the State from private minority and non- minority Institutions are not government seats and therefore will not attract the provisions of Persons with Disabilities Act[173]. The High Court resolved the issue by allowing the claim for 3% seats against the total seats vested with the Government by providing accommodation in government colleges. Thus the percentage of physically handicapped will exceed 3% in government colleges.

3.19. State of Andhra Pradesh

The claim for conferring minority status resulted in various litigations in the last few decades. Religious and linguistic minorities are entitled to constitutional rights under Article 30. However, for retaining minority status to an educational Institution, certain conditions are to be followed[174]. Admission to professional colleges in the State of Andhra Pradesh[175] are governed by Andhra Pradesh Educational Institution (Regulation of Admission and Prohibition of Capitation Fee) Act, 1983 and orders issued thereunder. As per Section 3(1)[176], admission to educational institutions are subject to rules made under the Act and the admission

[171] *S. J. Rajalekshmi* v. *Secretary, Medical Education, Banglore,* LAWS (KAR) 2009(8) 21.
[172] K.C.C.R. 2009 (4) 3068: LAWS (KAR) 2009(8) 21.
[173] Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.
[174] The Government of Andhra Pradesh had laid down the principles and guide lines for conferring minority status to an educational institution as per G.O. (M.S.) No. 1 Minorities Welfare (M & R) Department dated 16/01/2004. As per clause 5, an institution managed by minorities should offer 70% of the seats being filled by the management to the candidates belonging to the respective minority community.
[175] Presently bifurcated into two states- Andhra Pradesh and Telangana
[176] S. 3(1) of the instant Act.

shall be either on the basis of marks obtained in the qualifying examination or on the basis of rank assigned in the entrance test to be conducted by such authority in such manner as may be prescribed. Under the Act, separate rules are framed for different courses for regulating the admissions and capitation fee[177]. There is no attempt to define minority so far, in the state of Andhra Pradesh, however the guidelines had been issued prescribing parameters required for conferring minority status to an educational institution[178].

3.19.1. Regulation of Admission Affecting Right of Administration

The attempt to regulate the management quota of 30 % seats, set apart for the various pharmacy courses became the matter of adjudication before the High Court of Andhra Pradesh in *Joseph Sree Harsha and Mary Indraja Educational Society* v. *State of Andhra Pradesh*[179]. The admission in unaided non-minority institutions were regulated as per (Regulation of Admission to Under Graduate and Pharm D (Doctor of Pharmacy) Professional Courses through Common Entrance Test) Rules, 2011[180] and admission in minority institutions were regulated as per Andhra Pradesh unaided Minority Professional Institutions (Regulation of Admission to Under Graduate and Pharm D (Doctor of Pharmacy) Professional Courses through Common Entrance Test) Rules, 2011[181].

There were 2 category of seats for Professional Courses/Pharmacy. The category A (70%) seats, shall be allotted by convener of EAMCET[182], a governmental authority. In the category B[183] (30%) seats, institutions were permitted to prepare the merit list of eligible applicants for each course and display the same on the website[184]. The institutions themselves have to notify the details of the courses offered in daily newspapers and also by displaying the same on the

[177] See for eg. G.O. (M.S.) 59, dated 26.5.2006 made under Sections 3 and 15 of the instant Act. It regulates admission into MBA and MCA courses in unaided minority and non minority institutions.
[178] G.O. (M.S.) No. 1 Minorities Welfare (M & R) Department dated 16/01/2004. As per clause 5, an institution managed by minorities should offer 70% of the seats being filled by the management to the candidates belonging to the respective minority community.
[179] A.L.T. 2014 (1) 16: A.I.R. (A.P.) 2013, p.168.
[180] Notified as per G.O. (M.S.) No. 74 dated 28/07/2011.
[181] Notified as per G.O. (M.S.) No. 75 dated 28/07/2011.
[182] Engineering Agricultural and Medical Common Entrance Test.
[183] Management Quota.
[184] Rule 6(ii) of G.O. (M.S.) No. 74 dated 28/07/2011and G.O. (M.S.) No. 75 dated 28/07/2011.

college website and notice board[185]. It also provides that the institutions are required to provide a facility for downloading application forms from the college website and the college authorities should maintain register containing the particulars of sale of applications[186]. In short, admission in management quota was left with private institutions with minimal governmental control. However, the above conditions were attempted to be amended in minority[187] and non-minority institutions[188] by which 30% seats left to the management was also brought to the control of the governmental agency. As per the amended rules, the entire selection process of category B seats shall be completed online through common web portal set up by the competent authority[189]. It is also relevant to note that the candidate can select any of the college or colleges and can give order of preference for admission to a college, as well as the courses offered by a college in the online application form. Candidate is also given an option to apply for more than one college by visiting respective website of the college[190]. Though rule provides that selections will be made by management themselves, the selection list has to be uploaded in the web portal and it shall be transmitted online to the competent authority for validation and approval[191].

This amendment taking away the right for admission was under challenge and the High Court of Andhra Pradesh struck down the reduction of NRI Seats from 15% to 5%. The other conditions were left untouched but further directions were issued for protecting the interest of various stake holders, as follows:

i. Apart from the making application online through the common web portal the candidates shall be given option to submit their applications in person at the college of their choice. However one select list shall be prepared and be uploaded in the web portal for verification and validation in terms of the Rule.

[185] *Ibid.*
[186] *Ibid.*
[187] G.O.(M.S.) No. 66 dated 03/09/2012.
[188] G.O. (M.S.) No.67 dated 03/09/2012.
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid* .

ii. The management of the institution shall be given an option to call upon the selected candidates to appear in person for interview to substantiate their credibility and financial capacity to the satisfaction of the management.

iii. In the event of management finding that any of the selected candidates are not suitable for admission, the management shall be at liberty to reject the candidature of such candidates and the reasons should be communicated to the competent authority.

iv. So far as the option given to the candidates to opt for any number of colleges/ course is concerned, the Andhra Pradesh State Council for Higher Education shall have a consultation with petitioners' institution and work out the modalities so as to prevent multiple blockage of seats and to ensure that selection process is completed within a time frame.

3.19.2. Cross Subsidy Deprecated

The notification[192] by State on the recommendation of Admission and Fee Regulatory Committee[193], fixing fees for various courses for the Academic years from 2010-2011 to 2012-2013 was the issue considered in *Consortium of Engineering Colleges Management Association* v. *Government of Andhra Pradesh*[194]. The government issued the fee structure for category A and B seats[195] without considering the proposals of managements. After analysing the law laid down by the Supreme Court,[196] it was found that the AFRC[197] is not permitted to recommend nor is the State entitled to notify a fee structure that incorporates a cross-subsidy of one category of students by another. The Court held that, AFRC[198] while calling for applications for recommending the fee structure, and the State Government while notifying the fee structure, shall not call for or notify differential

[192] G.O (M.S.) No.76 and 77, dated 13.8.2010.
[193] Hereinafter referred to as AFRC.
[194] A.L.T. 2012 (3) 686 : LAWS APH 2011 (10) 47.
[195] State and Management quotas respectively.
[196] *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481; *P. A. Inamdar* v. *State of Maharashtra*, (2005) 6 S.C.C. 537.
[197] *Supra* n.193.
[198] *Ibid*.

fee structure for different classes of seats as it incorporates elements of cross-subsidy.

3.19.3. Withdrawal of Minority Status on Violation of Guidelines

The government of Andhra Pradesh had laid down the principles and guidelines for conferring minority status on educational institutions[199]. As per clause 5 of the government order, an institution managed by minorities should offer 70% of the seats being filled by the management to candidates belonging to the respective minority community. The State government had withdrawn minority status to various educational institutions on finding infraction of conditions agreed. The matter was considered in *St.John's Educational Development Society* v. *Government of Andhra Pradesh*[200]. According to the government as reflected in the counter affidavit, only a small fraction of the students hailing from the respective minority communities were admitted and substantial number of students admitted to the institutions were from other communities. According to the government, certain minority institutions in the State have been resorting to various malpractices and even encouraging instant conversion of students at the time of admission defeating the rights of genuine minority students[201]. On the above factual background, the State of Andhra Pradesh cancelled the minority status to such institutions who were engaged in fraud and malpractices detailed above.

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[199] G.O. (M.S.) No. 1 Minorities Welfare (M & R) Department dated 16/01/2004.

[200] A.L.T. 2010(5) 347: LAWS (APH) 2010 (6) 50.

[201] The relevant portion of the Counter Affidavit is extracted : "In this connection it requires mention that earlier admission in all minority educational institutions were allowed based on Baptism Certificates (conversions). Under the guise of Baptism, all non-minority candidates got admission into Minority Educational Institution as minority students. In almost all minority educational Institutions, 95 to 99% of admission were made only based on Baptism Certificates. In almost all cases, non-minority students who appeared for entrance test as non-minority candidates were baptized themselves just before the interviews that were conducted by the minority education institution and got admission based as the conversion certificate. Thus admissions into all courses in all minority institution were very common till recent past, based on the spot/spontaneous conversions (Baptism Certificates). A non minority student, who baptized himself/ herself as Christian just before admission in Minority Educational Institution and if he/she seeks admission as Minority Student under the guise of Baptism, certainly it amount to infringement into the legitimate right of a true minority student who is seeking admission and could not succeed in getting admission in Minority Educational Institution due to spot conversion of nonminority students. Thus the fundamental rights to education of a true minority student are being infringed due to spot/ Spontaneous conversion of non-minority student for admission in non minority Institution".

The High Court took the view that, in institutions claiming minority status, the students must be predominantly from the concerned minority community. It is also observed that an institution which fills more than ¾ of the permitted strength with non-minority candidates cannot insist for immunity from being regulated. The Court held that course has nothing to do with religions and linguistic preaching, tenants or principle. Therefore the reason for conferment of minority status cease to exist and the writ petition challenging the orders withdrawing the minority status were dismissed.

3.20. State of Punjab

In the State of Punjab, recent litigations are mainly on the claim of persons belonging to minority communities asserting their rights to be accommodated in the quota set apart for them. The admissions are regulated through orders issued by the state and universities. In the state there is no statutory mechanism to determine minority community and minority educational institutions.

3.20.1. Minority Status for Sikhs

The claim for Sikh community seeking educational rights under Art.30 was the matter in issue before High Court of Punjab & Haryana in *Sahil Mittal* v. *State of Punjab*[202]. The notification issued by the Punjab government on April 13, 2001 permitted the SGPC[203] to give 50 per cent reservation to Sikh students in colleges run by it on grounds that Sikhs were a minority community. It was defended by the State by contending that the Sikh is a community notified[204] by as per section 2(c)[205] of the National Commission for Minorities Act, 1992 and National Commission for Minority Educational Institutions Act, 2004. The High Court was of the view that the impugned notifications[206] had not applied the relevant parameters for declaring a group of individuals to be minority. The country could

[202] S.C.T. 2008(1) 162 : S.L.R. 2008(1) 373.
[203] Sikh Gurdwara Parbandhak Committee.
[204] Notification dated 23/10/1993 of the Central government declared Sikh as a minority community for the purpose of the Act.
[205] S.2(c) reads thus : "Minority for the purpose of the Act means a community as such notified by the Central government".
[206] Notification by the State government dated 13/4/2001 permitted SGPC to give 50% percent reservation to Sikh Students, considering their institutions as Minority Educational Institution.

not be taken as a unit, as has been done. There is no material to substantiate that "Sikhs" are a non-dominant group in Punjab apprehending deprivation of their rights at the hands of "dominant" groups, who may come to power in the State in a democratic election. The notifications are clearly *ultra vires* the jurisdiction of the State government, violating right of equality and public interest. The matter is now pending consideration of the Supreme Court.

3.20.2. Eligibility for Minority by Producing Baptism Certificate

The parameters required to consider a candidate as Christian minority was considered by the Punjab and Haryana High Court in *Christian Medical College Ludhiana* v. *Joel D. Masih* [207]. A minority christian student was denied admission merely on the ground that he has not produced sponsorship certificate. The Court held that when a person is proved to be a Christian by passing Bible test and producing baptism certificate, the proof that he belongs to Christian community stands furnished and further requiring to produce sponsorship letter from sponsoring body/church would be wholly unreasonable unfair and capricious. In the face of such a condition, the merit would give way and inferior candidate would come up. The claim of petitioner to be admitted under the Christian minority quota was upheld.

3.20.3. Maintenance of Sikhi Swarup, a Condition for Minority Quota

Need for maintaining Sikhi Swarup for enabling admission in Sikh Minority Institution was considered by the full bench of Punjab High Court in *Gurleen Kaur* v. *State of Punjab*[208]. Petitioners were denied admission under Sikh minority quota and those with lesser marks were admitted. For admission under minority quota, only such candidates who had maintained their hair unshorn were only accepted as having maintained Sikhi Swarup. The doctors who were present at the time of counselling found that the male students were indulged in trimming of hair and the female students indulged in shaping of eye brows. The Court examined the entitlement of the petitioners based on various religious text and the Gurudwara Act of 1925 and found that retaining bodily hair unshorn is one of the essential

[207] LAWS (P & H) 2011(9) 79.
[208] LAW (P & H) 2009 (5) 64 : S.L.R. 2009(5) 690.

tenets of Sikh Religion. Thus the affidavit filed by the candidates were considered as false and the denial of admission under Sikh Minority quota was held justified.

3.21. State of Maharashtra

In the State of Maharastra, Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987 and orders issued thereunder, performs the function of regulation of profiteering and Capitation fee. Admissions and the quota for various stake holders for various courses are regulated through government orders. Maharashtra Educational Institutions (Regulation of Fee) Act, 2011 was notified on 21st March 2014 to specially regulate fees at School level. It defines minority educational institution[209] as the government approved institutions established and administered by minority having the right to do so under Art.30(1) of the Constitution.

3.21.1. Regulation of Admission in the Minority Quota

A question arose in *P.A. Inamdar* v. *State of Maharashtra*[210], whether in the absence of complaints or materials regarding any unfair method adopted by the minority management, denial of permission to conduct its own selection proceeding is proper or not. In the above case, a muslim minority institution was denied permission to conduct post graduate entrance test for admission of muslim minority students for MDS course for the academic year 2014-2015 by the Pravesh Niyanthran Samithi. The petitioner institution was getting permission to conduct the entrance examination till 2013-14. In this particular year, the Samithi rejected their application even without a hearing. There was no material on record to show that the petitioner has adopted any unfair, exploitative or non- transparent method. Therefore subject to similar issue pending before the Supreme Court, the interim directions were issued permitting the petitioners to conduct its own Post Graduate, Common Entrance Test at institutional level for its MDS Course.

[209] S.2(p) of the instant Act.
[210] LAWS (Bom) 2014(2) 8 : ALL MR 2014 (3) 654.

3.21.2. Admission to Weaker Sections

Question arose whether minority unaided schools are bound to extend 25% of seats for the children belonging to weaker sections and disadvantaged groups in the neighbourhood and provide free and compulsory Education in tune with S.12(1)(c)[211] of the 2009 Act[212], in *Society of St. Mary's School* v. *Pune Zilla Parishad* [213]. The petitioner, managing unaided schools claimed minority status and sought exemption from orders directing them to admit 25% of the seats for the children belonging to weaker sections and disadvantaged groups in the neighbourhood and provide free and compulsory education in tune with S.12 (1)(c). They sought exemption in the light of the Apex Court decision in the case of S*ociety for Unaided Private Schools of Rajasthan* v. *Union of India*[214]. In view of the declaration of law as regards non-applicability of Clause (c) of S.12 (1) of the said Act of 2009, on minority institutions, the High Court set aside orders compelling compliance with the requirements under S.12(1)(c)[215].

3.21.3. Fixation of Fees by Unaided Minority Institution

The right of a minority unaided institution to fix the fees was the matter in issue in *Diamond Jubilee High School* v. *State of Maharashtra*[216]. The petitioner was a minority educational institution. It was receiving state aid upto the year 2006- 07. Thereafter the management decided to convert it into an unaided school. The school provided improved infrastructure and consequent increase reflected in the tuition fees. In pursuant to complaints from a section of parents, the government passed an order directing the management to return a portion of the fees by invoking Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act 1987. The Court in an early matter in WP (L) 1876/2012 relying on the

[211] Clause 1(c) of Section 12 reads : "specified in sub clauses (iii) and (iv) of clause (n) of Section 2 shall admit in class 1, to the extent of at least twenty –five percent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide fee and compulsory elementary education till its completion".
[212] Right of Children to Free and Compulsory Education Act, 2009.
[213] B.C.R. 2014 (2) 281 : LAW (Bom) 2013(12)113.
[214] (2012) 6 S.C.C. 1.
[215] *Supra* n. 212.
[216] B.C.R. 2013 (5) 530 : LAWS (Bom) 2013(7) 15.

relevant paragraph in *TMA Pai Foundation and Others* v. *State of Karnataka*[217] had taken the view that the fees to be charged must necessarily be left to the private educational institutions, so far as they are not dependent upon any funds from the government. Following the same, the Court held that the rights under Article 19(1) g could not be interfered with by using government resolution or circulars referable to Article 162[218] of the Constitution of India. Therefore the impugned orders were quashed.

3.21.4. Eligibility for Reimbursement for 25% seats

The question arose whether, minority managements can claim reimbursement for the expenses for admitting weaker sections under 25% quota[219] under 2009 Act[220]. It was considered in *Naresh Gaugaram Goswamy* v. *Chembur English School* [221]. The Bombay High Court took the view that the children belonging to the backward community upto the creamy layer cut off are entitled to reimbursement for admission under 25% quota. It was also clarified that minority unaided schools voluntarily admitting weaker and disadvantage group are also entitled to benefit of reimbursement, since there is no provision in the 2009 Act[222] prohibiting minority unaided schools from claiming such benefits.

3.22. State of Bihar

The admissions for professional educational Institution in the State are regulated through government orders and different university regulations. Lack of transparency in admission had resulted in various litigations in the State. The Bihar School Examination Board Affiliation Bye-laws, provides that the benefits of Article 30(1) of Indian Constitution can be claimed by the community only on proving that it is a religious or linguistic minority and the institution was

[217] (2002) 8 S.C.C. 481.
[218] Art.162 reads : *Extent of executive power of State*. "Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof ".
[219] *Supra* n. 214.
[220] Right of Children to Free and Compulsory Education Act, 2009.
[221] B.C.R. 2013 (4) 194 : LAWS (Bom) 2013 (4) 32.
[222] *Supra* n. 220.

established by it. Detailed guidelines are provided in Appendix-II of the Bye-laws[223]. Liberal guidelines are laid down to extend the protections under Art.30[224].

3.22.1. Role of Universities for Fairness and Transparency in Admission

Need to follow a fair and reasonable procedure in admission by a minority institution was the matter in issue in *Sayed Sadik Akhter* v. *L.N. Mithila University*[225]. The subject matter was in relation to the admission for Bachelor of Education in a minority Teachers Training College. On getting information that fair and transparent method was not followed in admission, the University constituted a committee to enquire into the allegations. It was found that 7 candidates were admitted by interpolating the records of the college against the names of such students who had passed the entrance examination conducted by the college. Though the students were provisionally permitted to write examination, the results were not declared. The writ petition was filed for directions to declare the results of the examination along with a relief to quash the enquiry report of the committee constituted by the University. The minority institution had contended that the University need only to look whether the students have secured 45% marks at the time of admission and the University has no role in examining the procedure of admission adopted by the college. Relying the decision in *Sindhu Education Society* v. *Chief Secretary, Government of NCT of Delhi and Others*[226], the High

[223] *www.biharboard.bih.nic.in* visited on 2.1.2014. Appendix-II reads : 1. *Determination of Minority Character of an Educational Institution* – "The benefits of Article 30(1) of Indian Constitution can be claimed by the community only on proving that it is a religious or linguistic minority and the institution was established by it. The question of proof in a Court of Law is regulated by the provisions of the Indian Evidence Act. This Act requires that when there is written document, other evidence is to be excluded but if there is no written document, other evidence is admissible. 2**.** Object of Establishment of Minority Educational Institutions -It is not always necessary that the objects for which a minority may establish an educational institution must include the conservation of its language, script or culture". Article 30(1) only emphasizes that the body establishing and administering an educational institution belongs to a minority, based on religion or language. It says nothing about the character of education to be imparted by them. Hence an institution will be a minority institution, even if it imparts secular education. Once it is proved to be a minority institution, the character of education to be imparted and of administration will be at the choice of those who can administer it. In these matters, the choice cannot be of any one also.

[224] *Ibid* .

[225] LAWS (PAT) 2012 (12) 18.

[226] (2010) 8 S.C.C. 49, wherein the Court held that minority institution may have its own procedure and method of admission as well as selection of students. But it has to be a fair and transparent method. The State has the power to frame regulation which are reasonable and do impinge upon the basic character of minority institution. The Court in the decision, has taken the view that the

Court came to the conclusion that the admission of those students were manipulated at the instance of the college authorities and accordingly refused to grant any relief.

3.22.2. Medical Council Regulations on Minority Management

The question arose whether Regulation 9[227] of the Medical Council of India Regulations, insisting non-governmental institution to fill 50% of the total seats through the competent authority notified by the state government and the remaining 50% by the management of the institution on the basis of inter se academic merit is sustainable or not, in *Kaithar Medical College* v. *State of Bihar*[228]. The challenge was against the attempt of the unaided minority management to conduct admission to PG Medical Courses through the PG medical entrance test conducted by Private Medical Colleges Association, Bihar. As per Regulation 9, in non-governmental institutions, 50% of the total seats shall be filled by the competent authority notified by the State government and the remaining 50% by the management of the institution on the basis of *inter se* academic merit. The Court noticed that as far as

width of the right and the limitation thereof of even unaided Institution, whether run by a majority or minority must conform to the maintenance of excellence and with a view to achieve the said goal indisputedly, the regulations can be made by the State. Division Bench observed that when autonomy has been given to minority institution in the matter of administration under Article 29 of the Constitution of India, such power is also coupled with a duty to act fairly in as much as if Article 29 and 30 are part of the Fundamental Right, so is the Article 14 which itself envisages fairness and transparency in the action of the authority.

[227] Regulation 9 of the Medical Council of India Regulations, 2000 reads : *Selection of Post Graduate Students* – "1. Students for Postgraduate medical courses shall be selected strictly on the basis of their academic merit. (a) Students for Post Graduate medical courses shall be selected strictly on the basis of their Inter-se Academic Merit. (b) 50% of the seats in Post Graduate Diploma Courses shall be reserved for Medical Officers in the Government service, who have served for at least three years in remote and difficult areas "As decided by the competent State authorities from time to time". 2. For determining the academic merit, the university/institution may adopt any one of the following procedures both for degree and diploma courses : (i.) On the basis of merit as determined by the competitive test, conducted by the State Government or by the competent authority appointed by the State Government or by the university/group of universities in the same State; or (ii.) On the basis of merit as determined by a centralized competitive test held at the national level; or (iii.) On the basis of the individual cumulative performance at the first, second and the MBBS examination, if such students have been passed from the same university; or combination of (i) and (iii): Provided that wherever entrance test for Postgraduate admission is held by a State Government or a university or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical courses shall be fifty per cent for candidates belonging to general category and 40 per cent for the candidate belonging to Scheduled Castes, Scheduled Tribes and Other Backward classes: Provided further that in non-Governmental institutions fifty percent of the total seats shall be filled by the competent authority and the remaining fifty per cent by the management of the institution on the basis of merit''.

[228] LAWS (PAT) 2011 (7) 102.

Regulations are in force, the management is bound to follow the same. Though the constitutional validity of the above proviso Regulation 9 of the Regulation is the subject matter of challenge before the Apex Court, no order of stay was granted against the operation of the aforesaid proviso to regulation 9. Therefore High Court of Patna held against minority managements by setting aside the attempt of the Management to conduct their own admission procedure.

3.23. Conclusion

Thus we can see that admission is a facet of administration in professional educational institutions both of minorities and non-minorities. Inspite of Constitutional bench decisions on the subject, absence of proper statutory mechanism in defining the entitlement of stake holders, consumes lot of judicial time in each State in India.

Thus for settling the issue, it is highly necessary that specific parameters are laid down to define minority for the purpose of Article 30 to the Constitution of India. It is also highly necessary that the guidelines are laid down to ensure that minority status may not be used as a camouflage for commercial purpose. Those who claim immunity under Article 30 should serve the needs of community for whom the institution has been established.

As regards admission in aided institutions, operation of Article 29(2), creates a right in favour of citizens of the State making it obligatory on State to impose more regulatory measures, even by insisting on a common entrance test conducted by the State agency. In minority aided institutions, a fixed percentage of seats can be offered to general candidates by the state government after setting apart a quota for the community concerned. Reasonable regulations in admission to these institutions are permissible ensuring merit and sufficient representation to the weaker sections of the society. The validity of 93rd Constitution amendment[229] and its impact on various stakeholders in admission is dealt in the next chapter.

In view of the law declared by the Supreme Court, for regulating admissions in unaided institutions, in each State, a separate Committee needs to be formed

[229] 93rd Amendment inserts Art.15(5) to the Constitution.

headed by a retired Judge of the High Court. The Judge is to be nominated by the Chief Justice of the State concerned. The other member to be nominated has to be a doctor/engineer of eminence. The Secretary of the State in charge of medical or technical education as the case may be, shall also be a member and can act as Secretary of the committee. The Committee will be free to nominate/co-opt an independent person of repute in the field of education as well as one of the Vice-Chancellors of the University in that State, so that the total number of person in that committee does not exceed five[230]. Various State governments brought legislations providing constitution of such Committees in pursuant to the judicial directions.

Along with the constitution of admission supervisory committee, the Supreme Court in *Islamic Academy* v. *State of Karnataka*[231] has directed the constitution of a committee to regulate fee structure in admissions so that professional educational institution do not indulge in profiteering. The respective State governments/authorities were directed to appoint a committee headed by a retired High Court Judge who shall be nominated by the Chief Justice of that State. The Judge so appointed was empowered to nominate a Chartered Accountant of repute as a member. A representative of MCI or AICTE depending upon the type of institution has to be included as members. At any rate total number of members of the Committee will not be permitted to exceed five. Admission and fee regulatory committees are intended to act as adhoc mechanism till State regulations are framed.

Private professional educational institutions are allowed to conduct their own admission process as far as it satisfies the triple test of *fair, transparent and non exploitative procedure*. But the problem arises when one or two institutions in the consortium fail to satisfy the triple test. The questions whether the test is invalid as far as other members in the consortium are concerned is yet be answered. Similarly, if a college fails in the triple test for once, is it that it cannot hold a test on its own forever. Court has held that failure in the triple test is the only ground in which State could take over the test. In the next year if the same institution passes

[230] *Islamic Academy of Education* v. *State of Karnataka*,(2003) 6 S.C.C. 697 at p.729.
[231] *Id*. at pp. 721-22, para 7.

the triple test, if the institution is not permitted to conduct test on its own, inordinate hardship may be caused to the students because students may get trapped in endless litigation between the colleges and committees governing admission. More clarity is yet to be evolved on the triple test requirements and the extent of State intervention.

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Chapter -4

MINORITY PROFESSIONAL EDUCATIONAL INSTITUTIONS AND RESERVATIONS IN ADMISSION

Chapter - 4

MINORITY PROFESSIONAL EDUCATIONAL INSTITUTIONS AND RESERVATIONS IN ADMISSION

"History says don't hope
On this side of the grave,
But then, once in a life time
The longed-for tidal wave
Of justice can rise up,
And hope and history rhyme"

Seamus Heaney[1]

4.1. Introduction

Educational institutions run by the unaided sector constitute majority of the professional educational institutions in India. In the previous chapter we have seen that in professional educational institutions, in the unaided sector, admissions shall be made on the basis of merit and Committees can be constituted till a central or state mechanism is put in place to see that the tests conducted by a consortium or a single institution is done following the triple tests of fair, transparent and reasonable procedure. Subject to these conditions, they can claim unfettered freedom to choose students for admission[2].

Now the question arises whether the private educational institutions including minority educational institutions imparting education, are acting as instrumentality of the State and whether they have to fulfill the social obligation of providing reservation to the weaker sections of the society while making admissions. If the

[1] This quote is by Seamus Heaney. See, Seamus Heaney, *The Cure at Troy: A Version of Sophocles' Philoctetes*, Faber and Faber, London,(1991).
[2] See *P. A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537, para 137.

answer is in the affirmative, then the nature and extent of the government quota for these institutions is to be determined. Moreover, the following issues arise. If a small percentage of the weaker sections of the society are to be admitted, whether the determination of that small percentage is to be done by the management? For determining weaker sections whether social and educational backwardness of the area or regions and the necessities of the State are to be taken care of? The present Chapter is limited to the examination of reservation for certain groups in admission in the unaided and aided non minority professional educational sector, necessitated by the 93rd amendment to the Constitution of India and the constitutionality of Article 15(5) *vis a vis* fundamental right to admission in minority and non minority professional educational institutions.

4.2. Circumstances Leading to the 93rd Amendment

Inability of the State to provide enough opportunity to the needy for professional education led to mushrooming of private educational institutions in India. Unaided educational institutions claimed unfettered right to regulate admission and it got recognized in the decisions rendered by the apex court. This made the government a mere spectator in the educational scenario. The 93rd amendment was brought in as an attempt to bring social justice in admissions. Though the object of the amendment is laudable, whether it helps in providing justice to all the stakeholders in admission is yet to be seen.

4.2.1. The Unnikrishnan Case

Reservation for students in unaided professional educational institutions was first suggested in *Unnikrishnan*[3] case. In this case, a Scheme was laid down which shall be applicable to unaided professional educational institutions. It was laid down that there shall be no quota reserved for the management or for any family, caste or community which might have established such college. It shall be open to a professional college to provide for reservation of seats for constitutionally permissible groups with the approval of the affiliating University. Such reservations shall be made and notified to the competent authority, at least one

[3] *Unnikrishnan* v. *State of Andra Pradesh,* (1993) 1 S.C.C. 645.

month prior to the issuance of notification for applications for admission to such category of colleges. In such a case, the competent authority shall allot students keeping in view the reservations provided by the college. The rule of merit shall be followed even in such reserved categories[4]. Thus in the *Unnikrishnan* Scheme, the University cannot compel reservation and it shall be at the discretion of the institution to provide for reservation with the approval of the affiliating university.

4.2.2. TMAPai on Quota Policy

The fact that quota policy[5] affects operational autonomy and financial independence of unaided professional educational institutions was approved in *TMAPai Foundation* v. *State of Karnataka*[6], wherein the Court held that the private unaided educational institutions impart education and that cannot be the reason to take away their choice, in matters of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfils the condition for grant of such affiliation and recognition. Otherwise the institutional autonomy and the very objective of establishment of the institution will be destroyed[7].

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4 *Id.* at p. 684.

5 *Unni Krishnan* v. *State of Andra Pradesh,* (1993) 1 S.C.C. 645, pp. 69-71. The Scheme can be summarized : 1. A professional college should be established and/or administered only by a society registered under the Societies Registration Act, 1860, or the corresponding Act of a State or by a public trust and no individual, firm, company or other body of individuals would be permitted to establish and administer a professional college. 2. Fifty per cent of the seats in every professional college should be filled by the nominees of the Government or university, selected on the basis of merit, determined by a common entrance test which will be referred to as "free seats", the remaining 50% seats, known as "payment seats", should be filled by those candidates who pay the fee prescribed and on the basis of inter se merit determined on the same basis as in the case of free seats. 3. There should not be any quota reserved for the management or for any family, caste or community, which may have established such a college. 4. Reservation of seats for the constitutionally permissible classes is possible in accordance with the concerned university directions. 5. Every State should constitute a committee to fix the ceiling on the fees chargeable by a professional college. This committee should fix the fees for every three years after hearing the colleges. 6. It would be appropriate for the UGC, AICTE, Indian Medical Council and other bodies to frame Regulations for the control of fees. In its anxiety to check the commercialization of education, a scheme of free and payment seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality.

6 *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p.708. See answer to question no. 4.

7 *Id.* at p.539, para 36.

Thus the *Unnikrishnan* Scheme of free seats and payment seats is held to be against the right to autonomy in administration. The Court further held that any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test[8].

4.2.3. TMA Pai on Reservation to Weaker Sections

Reservations in admission to poorer and backward sections of the society can be made in unaided minority and non minority professional educational institutions. The Court in its discussion on private non minority educational institutions held that with regard to the core components of the rights under Articles 19 and 26(a), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government[9]. Thus *TMA Pai* lays down that compliance with conditions that a small percentage of weaker section of students can be admitted to private educational institutions is a reasonable restriction. But this condition cannot be forced upon private educational institutions and can be the result of a consensual arrangement between the State and the management[10]. The private educational institutions must have the right to choose and select students who can be admitted to their courses of studies[11] is

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8 *Id.* at p. 540, para 40.

9 *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 54, para 53. See also, para 59. Merit is usually determined for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

10 *P.A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537.

11 It is for this reason that in *St.Stephen's College* Case, (1992) 1 S.C .C. 558, the Court upheld the scheme whereby a cutoff percentage was fixed for admission, after which the students were interviewed and thereafter selected.

strengthened by the observations of the Court in *TMA Pai*[12] that any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, their performance in an entrance test would be an unreasonable restriction under Art.19(6).

Thus reservation for poorer and backward sections can be made in minority unaided professional educational institutions on consensual agreement entered into by it with the government. The prescription of percentage for this purpose has to be done by the Government according to local needs and different percentages can be fixed for minority and non minority unaided professional colleges[13]. Thus *TMA Pai* affirms that admission in unaided professional educational institutions shall be based on merit. Weaker sections can be given reservation in admission only as a result of consensual arrangement.

4.2.4. Islamic Academy on Extent of Reservation for Weaker Sections in Unaided Professional Educational Institutions

TMA Pai[14] as noted above, has held that weaker sections can be admitted in private professional institutions on consensual agreement and it comes within the ambit of reasonable restrictions on the right to run educational institutions. Now the

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12 *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481.

13 *Id.* at p.549, para 68.

14 *Supra* n.12 at paras 53 and 68. Kirpal. C.J. has further held : "53. With regard to the core components of the rights under Articles 19 and 26(a), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government….". "68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university/institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided professional colleges. The same principles may be applied to other non-professional but unaided educational institutions *viz.* graduation and post-graduation non-professional colleges or institutes.

issue arises whether the determination of percentage of weaker sections to be given admission is to be made by the management or the government. In *Islamic Academy*[15] the managements argued that in the case of professional educational institutions the discretion to determine admission to a small percentage of persons drawn from the weaker sections of the society should be left with the management[16], which would include the weaker sections of the minority community for which the institution has been established[17].

Islamic Academy has held that a common entrance test should be conducted by the government and further relying on *TMA Pai*[18] said that certain percentage of seats can be reserved for admission by management out of those students who have passed the common entrance test held by itself or by the State agency and the rest of the seats may be filled up on the basis of counseling by the State agency. The Court further held that the quota of seats to be filled up by the State Government for the poor or weaker sections of society may be fixed on the basis of the entrance test held by the concerned State Government or the University. Economic disability of a meritorious student should come to the forefront for determining the criteria as regards to poor or weaker sections of the society[19].

Thus, the consensual arrangement as envisaged in the illustration provided in the second part of para 68 of *TMA Pai* is relied on by *Islamic Academy* in providing that there shall be a common entrance test held and State quota for weaker sections should be provided in admission in unaided professional educational institutions on the basis of the Common Entrance Test.

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15 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 S.C.C. 697.

16 Admission to a small percentage of weaker sections which the unaided institutions are required to follow by way of implication rules out enforcement of any reservation policy of the State as the same would run counter to the decision of the Court as held in A*hmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 S.C.C. 717.

17 Submission on behalf of the petitioners in *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 S.C.C. 697, at p.735, para 36.

18 Paras 59 and 68 of *TMA Pai* as observed in *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697, pp.776-777.

19 *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 S.C.C. 697, at p.781, para 186.

4.2.5. The Requirement of Accommodating Local Needs in Admission to Weaker Sections

It has already been stated that in unaided professional educational institutions, the management must have sufficient discretion in admitting students subject to the criterion of merit. The prescription of percentage of poorer and backward sections of the society can be done by the Government according to the local needs and different percentages can be fixed for minority and non minority unaided professional educational institutions[20] as part of a consensual agreement. Otherwise, as admission is a facet of administration, the only obligation of the unaided especially minority professional educational institutions, is to fulfill the merit criteria. In fixing the percentage for unaided minority professional colleges, the State must keep in mind, apart from local needs, the interest/needs of that community in the State which should get more priority[21] and *interse* merit has to be followed therein also.

4.2.6. S. B.Sinha. J. on Local Needs

The majority judgment in *Islamic Academy* reaffirmed para 68 of *TMA Pai* that after admissions are provided based on merit, different percentages can be determined for poorer and weaker sections. The majority judgment stresses on the importance of taking into consideration the needs of the locality but doesn't define local needs. In his separate judgment Sinha, J. has attempted to give clarity to 'local needs'[22]. According to him, State government alone would be in a position to determine local needs. Factors such as the percentage of the relevant minority in the State, the number of minority professional colleges belonging to that particular linguistic/religious minority in the State, percentage of poorer and backward sections in the State, total number of professional colleges therein, would be

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[20] *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 549, para 68.

[21] *Islamic Academy of Education* v. *State of Karnataka* , (2003) 6 S.C.C.697 at p.727, paras 14 and 15.

[22] *Id.* at p.770, para 134, wherein Mr. Venugopal refers to the Medical Council of India Regulations, 1999 for the purpose of showing the requirements necessary to be considered by the State government for the grant of the essentiality certificate.

relevant factors. Moreover local needs would vary from State to State[23]. It may be difficult to give a restrictive meaning to the expression 'local needs' i.e. keeping the same confined to the area where the educational institution is sought to be established in as much as the right of minority extends to the entire State and thus, the local needs may also have direct nexus having regard to the needs of the State[24].

4.2.7. Community Needs Vis a vis Local Needs

Local needs cannot be given a restrictive meaning. In terms of *TMA Pai*[25], local need would be a relevant factor for the purpose of determining the percentage of students who would be admitted to a non minority quota. Local needs, if it is a compelling State interest, will have a primacy over the needs of the Community. The difference between minority and non minority unaided professional educational institutions is that, maintaining minority character could be given priority when balancing between local needs and community needs in a minority educational institution, while local needs has to be given more priority in non minority educational institutions.

4.2.8. Inamdar on the Impermissibility of Reservation Policy in Unaided Professional Educational Institutions

The judgment in *Islamic Academy* wrongly relies on *TMA Pai* and creates an impression that in unaided educational institutions there has to be a compulsory holding of common entrance test and there shall be seat sharing between the State and the management. The Court in *Inamdar* clarified that there is nothing in *TMA Pai* case, or in *Kerala Education Bill*[26] which permits reservation as it would amount to nationalization of seats which has been disapproved in *TMA Pai*. The States have no power to insist on seat sharing in unaided private professional

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[23] Even development of a backward area may be a local need. The State may, in pursuit of its policy for the development of people consider it expedient to encourage entrepreneurs for establishing educational institutions in remote and backward areas for the benefit of the local people. Local needs, therefore, cannot be defined only with reference to the State as a unit. See generally, S.P.Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 2n Oxford University Press,(2002).

[24] *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at p.770, para 135 as per Justice Sinha.

[25] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p.549, para 68.

[26] 1959 S.C.R. 995.

educational institutions by fixing a quota of seats between the management and the State. Such appropriation of seats cannot also be held to be a regulatory measure in the interest of the minority within the meaning of Art.30(1) or a reasonable restriction within the meaning of Art.19(6) of the Constitution. Unaided institutions not deriving any aid from the State funds can have their own admissions, if *fair, transparent, non exploitative procedure* based on merit is followed[27]. *Inamdar* holds that a reading of the majority judgment in *Pai Foundation* in its entirety supports the conclusion that while the first part of *para* 68 thereof is law laid down by the majority, the second part is only by way of illustration, amounting to just a suggestion or observation, as to how the State may devise a possible mechanism so as to take care of the poor and backward sections of the society. The second part of *para* 68 cannot be read as law laid down by the Bench. It is only an observation or an illustrative situation which may be reached by consent or agreement or persuasion. The observations in *Pai Foundation* in para 68(ii) and other paragraphs, mentioning fixation of percentage or quota, are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State. As *Pai Foundation* has very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure, State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of students by charging of exorbitant money or capitation fees[28].

4.2.9. Imposition of Reservation in Self Financing Institutions Vis a vis Directive Principles of State Policy

Providing reservation is a State function. The duty of the States to prescribe a certain percentage of seats for those belonging to the backward category candidates is said to have arisen from the argument that the States have a duty to enforce the

[27] See *P.A. Inamdar* v. *State of Maharastra*, (2005) 6 S.C.C. 537, paras 132, 124 to 126.

[28] *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481, paras 110, 128 and 129; *Kerala Education Bill*,1957, *Inre*, S.C.R. 1959, p. 995 : A.I.R. 1958 S.C. 956, clarified and followed; *Islamic Academy of Education* v. *State of Karnataka,*(2003) 6 S.C.C. 697, partly overruled.

directive principles of State policy in terms of Articles 38[29], 41[30], 45[31] and 47[32] of the Constitution of India[33]. Although reasonable restrictions can be imposed on exercise of right under Art.19(1)(g) or Art.30 in terms of the constitutional scheme, the State cannot impose its own duties and obligations upon a citizen[34]. Further, enabling provisions under the directive principles can't be used for conferring preferential rights.

Thus a perusal of the relevant judicial decisions discussed above makes it clear that in private unaided educational institutions there cannot be any State quota in admission and enforcement of reservation policy is not allowed. Local needs or any other conditions except merit need be followed by unaided professional educational institutions. The legislative changes made after the above mentioned decisions and the consequent judicial pronouncements are discussed below.

4.2.10. Impact of Art.15 (5) on Admission in Unaided Professional Educational Institutions

In order to overcome the effects of the judicial scheme that unaided professional educational institutions cannot be compelled to follow any other criteria except merit, the Parliament has come up with the Constitution 93rd

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[29] Art. 38 reads : *State to secure a social order for the promotion of welfare of the people*-[(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. (2) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations].

[30] Art.41 reads : *Right to work, to education and to public assistance in certain cases* – "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want".

[31] Art.45 reads : *Provision for free and compulsory education for children* – "The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years".

[32] Art.47 reads : *Duty of the State to raise the level of nutrition and the standard of living and to improve public health* – "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health".

[33] See para 126 of *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at p. 766. The directive principles of state policy contained in Part 1V of the Constitution of India are not justifiable.

[34] *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at p.767, para 129.

amendment Act which inserted clause 5 to Art.15[35] enabling the State to make special provisions in admission in aided and unaided educational institutions including professional educational institutions except minority educational institutions, for the advancement of socially and educationally backward classes and scheduled castes.

4.3. Mutual Exclusiveness of Article 15(4) and 15(5)

Art.15(4)[36] allows the State to make special provisions for the advancement of socially and educationally backward classes and for the scheduled castes and scheduled tribes. The Article further provides that Art.29(2) which prohibits denial of admission to citizens in educational institutions receiving aid from the State shall not affect making special provisions under Art.15(4). Art.15(5) was framed as an extension of Art.15(4) to confer upon the State the power to make special provisions in relation to admission to Socially and Educationally Backward Classes and scheduled castes and scheduled tribes in non minority educational institutions which are aided and unaided[37] .

Art.15(4) was inserted into the Constitution to get over the impact of *Champakam Dorai Rajan*[38] wherein the Government order providing reservation in aided institutions was struck down. Art.15(4) enabled the government to bring in legislations for the purpose of making reservation for scheduled castes/scheduled tribes as well as for socially and educationally backward clases within the constitutional scheme. Similarly, Art.15(5) was inserted into the Constitution with a view to get over the direction in *TMA Pai* as well as *Inamdar* to the effect that unaided educational institutions have unfettered right in admission. The

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

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

[37] See for divergence of opinion in *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 S.C.C. 1 at p.626 wherein Pasayat.J, held that Article 15(4) and 15(5) operate in different fields and Art.15(5) doesn't render Art.15(4) inoperative.

[38] (1951) S.C.R. 525.

appropriation or reservation in unaided institutions was held impermissible under the Constitution in those cases.

When Art.15(4) permitted special provisions in admissions for SC/ST and SEBCs in educational institutions including aided minority institutions, Art.15(5) enables special provisions for reservations in educational institutions excluding minority educational institutions. Hence there are elements of inconsistency as far as Art.15(4) and Art.15(5) are concerned. The Supreme Court in *Ashoka Kumar Thakur* v. *Union of India*[39] did not admit the inconsistency between the two enabling provisions and held that they are mutually exclusive. The Court took the view that Art.15(4) and 15(5) operate in different areas. 'Nothing in this Article' [mentioned at the beginning of Art.15(5)] could only mean that nothing in Art. 15(1) alone be given importance. Therefore, Art.15(5) does not exclude Art.15(4) of the Constitution.

The rationale of the justification is doubtful. The Court opined that if the intention of the Parliament was to exclude Art.15(4), they would have deleted Art. 15(4) of the Constitution. The above observation doesn't hold good in view of the fact that Art.15(4) is not limited to admission in educational institutions but has a wider application.

Further, if the proposition that Article 15(4) and 15(5) are mutually exclusive as laid down in *Ashoka Kumar Thakur*[40] is to be accepted, the former should limit to admissions in aided institutions and the latter in unaided institutions. However, the impugned legislation *i.e.* the Central Educational Institutions (Reservations in Admissions) Act, 2006 provides provision for reservation in aided institutions, pursuant to Article 15(5)[41] and not in pursuant to Article 15(4). The same Act of 2006 specifically excludes minority institutions from its operation by way of

[39] (2008) 6 S.C.C. 1. See also, 186th Parliamentary Standing Committee Report on Central Educational Institutions (Reservations in Admissions) Bill, 2006.

[40] *Id.* at p. 146.

[41] See generally, *pib.nic.in/website/erelease.aspx?rel.d=23895* visited on 22.9.2010. The HRD minister speaking in RajyaSabha on 18.12.06 on the debate on the bill on the 2006 Act, observed that the bill has been brought under Art.15(5) of the Constitution of India.

S.4(c).[42] If this Act was enacted pursuant to Article 15(4), no such exclusion of minority institutions would have been permissible, as that is an exception available only in Article 15(5).

4.3.1. Inconsistency Between Articles 15(4) and 15(5)

The validity of Article 15(5) has to be tested on various factors including its conflict with Article 15(4) of the Constitution. The two provisions are inconsistent with each other on various aspects. Article 15(4) found place in the early fifties[43] and is a source of legislative power for making special provisions including reservations for scheduled castes and scheduled tribes as well as for socially and educationally backward classes of citizens in aided educational institutions including those of minorities. The object of Article 15(4) is evident from a catena of decisions which include *State of Madras* v. *Champakam Dorai Rajan*[44] and the decisions of the apex court from *Balaji*[45] to *Nagaraj*[46]. The various legislations enacted that brought in reservation by many States[47], have also sourced their legislative competence from Article 15(4). The fact that Article 29(2) which deals with non-discrimination in admission is referred to in Article 15(4) itself makes clear the nature and purpose behind Article 15(4). But Article 15(5) which enables reservation of seats for SCs and STs as well as SEBCs in aided educational institutions expressly excludes such reservation in minority educational institutions under Article 30(1) of the Constitution.

Article 15(4) operates with a condition that, nothing in Article 15 or in Article 29(2) shall prevent the State from making such special provisions for SCs

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[42] (2008) 6 S.C.C. 1. at p.147. See arguments by Adv. K.K. VenuGopal. S.4(c) of the 2006 Act reads : "Act not to apply in certain cases.-…(c) a Minority educational institution as defined in this Act…".

[43] Added by the Constitution 1st amendment Act, 1951.

[44] (1951) S.C.R. 525.

[45] *M.R. Balaji* v. *State of Mysore*, A.I.R. 1963 S.C. 649.

[46] *M. Nagaraj* v. *Union of India*, (2006) 8 S.C.C. 212. See also *P. Rajendran* v. *State of Madras,* (1968) 2 S.C.R. 786; *A.Periakaruppan* v. *State of Tamil Nadu,* (1971) 1 S.C.C. 38*; State of A.P.* v .*U.S.Balram,* (1972) 1 S.C.C. 660.

[47] Uttar Pradesh Public Service (Reservation for Scheduled Castes, Scheduled Tribes, and Other Backward Classes) Act, 1994; Jammu and Kashmir Reservation Act, 2004; Tamil Nadu Backward Classes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in Services Under the State) Act,1993; The Karnataka Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in Services Under the State) Act, 1994.

and STs as well as SEBCs and Article 15(5) operates with a condition that nothing in Article 15 or in Article 19(1)(g) shall prevent the State from making such special provisions for SCs and STs as well as SEBCs. There can be a contention that qualifying words in Article 15(4) do not have any purposeful meaning for the reason that both Article 15(1) as well as Article 29(2) prohibits discrimination only on grounds of religion or caste, since special provision for reservation for SCs and STs as well as SEBCs can never be only on the grounds of religion or caste[48]. Even if the reservation is based on caste, the qualifying words in Art.15(4) gives ample provisions for reservation. There is direct conflict between the two provisions, since Article 15(4) provides reservation for SCs and STs as well as SEBCs in aided minority educational institutions, while Article 15(5) excludes reservation in aided minority educational institutions[49]. The inconsistency between the provisions seems irreconcilable whenever a law providing for reservation in aided minority educational institution comes for judicial scrutiny. If such a law is made applicable to aided institutions, it would be consistent with Article 15(4)[50] but violative of Article 15(5) of the Constitution, as the duty of providing special provisions by way of reservations is not applicable to minority institutions, including aided minority educational institutions. In State of Kerala, the orders issued in consequent to the direct payment agreement between the minority managements and government in the year 1972 at Clause 18[51] stipulates 20% reservation in

[48] *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 S.C.C. 1 at p. 499, para 161. National Commission for the Backward Classes and the State Commission for Backward Classes have prepared a list based on elaborate guidelines and these guidelines have been framed after studying the criteria/indicators framed by the Mandal Commission and the Commissions setup in the past by different State Governments for the identification of SEBCs. Creamy Layer is to be excluded from SEBCs. The identification of SEBCs will not be complete and without the exclusion of 'creamy layer', such identification may not be valid under Article 15(1) of the Constitution. See *Indra Sawhney* v. *Union of India*, (1992) supp 3 S.C.C. 217. Moreover the creamy layer principle is not applicable to the Scheduled Castes and Scheduled Tribes. See, *E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 S.C.C. 394.

[49] Article 15(5) expressly covers 'aided or unaided' educational institutions as much as Article 15(4) also covers such institutions.

[50] See para 161, answer to question 5(b) of *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481.

[51] Clause 18 of the Agreement for Direct Payment entered into between the Government and the Educational Agencies of Private Colleges stipulates that all future admission of students to the private affiliated colleges shall be on the following basis, *viz* ; a) Twenty percent of the total number of seats in each college under the Educational Agency shall be reserved for students belonging to the Scheduled Castes and Scheduled Tribes. Those seats which cannot be filled on this basis shall be filled on the basis of merit from among backward minority communities, in case the college is run by a backward minority community and from among OBCs, in all other

admission to SC/ST students[52]. The fate of the reservation being enjoyed by the backward communities in Kerala will depend on the final interpretation as regards inconsistency between Art.15(5) and Art.15(4). The Supreme Court while upholding Art.15(5) of the Constitution in *Pramati Educational and Cultural Trust* v. *Union of India*[53] didn't seriously discuss or enunciate on the inconsistency between Art.1 (4) and Art.15(5).

4.3.2. Doctrine of Implied Repeal

There are elements of direct inconsistency between Art.15(4) and 15(5), as one provision provides for such reservation in aided minority educational institutions while the other excludes such reservations in the same. Argument that Article 15(4) and Article 15(5) are both enabling provisions and both can survive together is difficult to stand judicial scrutiny for long. The Court would have to read Article 15(4) and uphold the legislation making provision for reservation in aided minority educational institutions. At the same time, it will find it difficult to reject the equally balancing contention that such a reservation in aided minority educational institution would violate Article 15(5) and would have to be struck down. However, while holding that minority aided and unaided educational institutions are not bound to provide reservation to weaker sections, the Supreme Court in *Pramati Educational and Cultural Trust* v. *Union of India*[54] went short of examining the inter-relationship between Art.15(4) and Art.15(5). The Court merely held that the object of Art.15(5) is to provide equal opportunity to the backward classes of citizens to study in educational institutions and since equality of opportunity is also the object of Art.15(1) and (2), Art.15 (5) is not a clause or

cases. b) Ten*/Twenty** percent of the seats shall be reserved for the candidates belonging to the Community to which the college belongs. These seats will be filled strictly on the basis of merit from among the students of the said community. c) Fifty/Forty percent of the seats will be filled by open selection on the basis of merit.
d) The remaining seats will be filled by the Educational Agency by candidates of their choice.
* This will apply to Forward Community Colleges.
** This will apply to Backward Community.

[52] See, *www.assumptioncollege.in,* accessed on 23/12/2013, gives the rules regarding admission to various stakeholders in a aided minority institution.

[53] (2014) 8 S.C.C. 1; 2014(2) K.L.T. 547 (S.C.).

[54] 2014(2) K.L.T.547 (S.C.).

proviso overriding Art.15 of the Constitution of India but an enabling provision to make equality of opportunity[55].

4.3.3. Impact of the Expression 'Special Provision' in Art.15(5)

The phrase 'special provision, by law' in Art.15(5)[56] needs to be understood properly[57]. It suggests that there must be a genuine requirement necessitating the introduction of a statutory provision. The method by which that need is to be assessed is not laid down. It needs a detailed investigation and collection of material and its examination in a rational and scientific manner[58]. It is therefore apparent that there must be data and material which would have to be adduced and proved, when such a legislation is challenged in a Court of law.

'Special provision' cannot ignore the advancement of the rest of the society and has to be tested on the touch stone of reasonableness[59]. It may be argued that the provisions contained in Art.15(5) are "not withstanding anything contained" in Art.15 itself and Art.19(1)(g). Even if it is argued that special laws that may thus be made would not be subject to Arts.15 and 19(1)(g), but the same would certainly be subject to the provisions contained in Arts. 14, 21, 26 and 30 of the Constitution[60]. If the special laws in the matter of admission would thus be subject to Art.14, it shall have to be seen whether the special provisions are reasonable[61] and proportionate[62].

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55 *Id*. at para 16.

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

57 See the contentions of Mr. Fali S. Nariman, Senior Advocate, for the Petitioners in *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 S.C.C. 1 at p. 131, para 1.

58 See *M.R. Balaji* v. *State of Mysore*, A.I.R. 1963 S.C. 649. See also (1963) S.C.R. at p. 461.

59 *Id*. S.C.R. at pp.467-69.

60 *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409, para 87.

61 *State of Madras* v. *V.G.Row,* A.I.R. 1956 S.C. 196. The special provisions would be subject to reasonableness. The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable in all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time,

4.4. Equality in Administration of Unaided Educational Institutions

Articles 14,15,16,17 and 18 are a family of Articles which recognize the equalizing principles of equality. In *Indra Sawhney* v. *Union of India*[63], it was held that special provisions contemplated in Article 15(4) and 16(4) are nothing but an emphatic reiteration of the principles of equality enshrined in Article 14 and emphasized in Article 15(1) and 16(1). Equality before law is not just treating citizens equally; it is about ensuring that unequals are not treated equally and also about ensuring that equals are not treated unequally. It has been held that Article 16(1) is a facet of Article 14 and just as Article 14 permits reasonable classification so does Article 16(1). It has also been held that a classification may involve reservation of seats or vacancies as the case may be. It has also been held that the doctrine of equality is an evolving concept and the goal is equality of status and opportunity and that Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of the several Articles in Part 1V i.e. *justice*, *social*, *economic* and *political*, which is the sum total of the aspirations

should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part.

62 (2004) 2 S.C.C. 130 See also *Nagaraj* v. *Union of India,* (2006) 8 S.C.C. 212. By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Art.19(1) of the Constitution of India, the Court will consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. In cases where such legislation is made and the restrictions are reasonable; yet, if the statute concerned permitted administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing the restriction or whether the administrator has not properly balanced the fundamental right and the need for restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restrictions etc. In such cases, the administrative action has to be tested on the principle of proportionality, just as it is done in the case of main legislation. Therefore, axioms like secularism, democracy, reasonableness, social justice etc., are overarching principles which provide a linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values.

63 (1992) Suppl. 3 S.C.C. 217.

incorporated in Part 1V. Justice Jeevan Reddy who spoke for the majority in the *Indra Sawhney*[64] held :

Article 14 enjoins upon the State not to deny to any person 'equality before law' or the 'equal protection of the laws' within the territory of India. Most Constitutions speak of either 'equality before the law' or 'equal protection of the laws', but very few of both. Section 1 of the X1Vth amendment to the US constitution uses only the latter expression while the Australian Constitution (1920), the Irish Constitution (1937) and the West German Constitution (1949) use the expression 'equal protection of the law'. Article 7 of the Universal Declaration of Human Rights, 1948, of course, declares that 'all are equal before the law and are entitled without any discrimination to equal protection of the law' The content and sweep of these two concepts is not the same though there may be much in common. The concept of the expression 'equality before the law' is illustrated not only by Articles 15 to 18 but also by Articles in Part 1V, in particular, Articles, 38,39,39-A,41 and 46. Among others, the concept of equality before the law contemplates minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people including in particular the scheduled castes and scheduled tribes and to protect them from social injustice and all forms of exploitation. Indeed in a society where equality of status and opportunity do not obtain and where there are glaring inequalities in incomes, there is no room for equality- either equality before law or equality in any other respect[65].

Article 15(5) to the extent it excludes minority educational institutions from providing reservation in admission comes in conflict with the principles of equality and is inconsistent with the interpretation given to minority and non minority institutions under Article 19(1)(g) and Article 30 in *TMA Pai*[66]and *Inamdar*[67]. The

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64 *Ibid*.
65 *Id*. at para 282.
66 *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481, para 138.
67 *P.A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537, paras 124-126, 132.

judgments of the Supreme Court in the above cases, place the rights of minority and non minority established educational institutions on the same footing, the Article 30 of the Constitution being intended only to prevent the non minorities from depriving the minorities of an equal right in that regard. The essence of equality[68] is violated in regard to discharging the common burden of providing reservation of seats for SEBCs, SC and STs in unaided private educational institutions established by minorities, when such classification has no nexus with the advancement of the interests of SEBCs and SC/ST[69]. The complete exclusion from the liability to provide reservation in running of educational institutions especially unaided institution puts minority in a better position, giving undue advantage over non-minorities. The majority judgment in *Ashoka Kumar Thakur*[70] has not attempted to decide the challenge with regard to discrimination between minority and non-minority unaided institutions but evaded the issue by holding that, the affected institutions should have approached the Court and vindicated their rights.

Subsequently this issue was raised in *Pramati*[71], wherein the contention that clause (5) of Art.15 excludes both unaided minority institutions and aided minority

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[68] *Minerva Mills Ltd* v. *Union of India,* (1980) 3 S.C.C. 625 at paras 43,44,45,56,57,58,59,60; *Bhim Singhji* v. *Union of India,* (1981) 1 S.C.C. 166 at paras 20-21; *I.R. Coelho* v. *State of Tamil Nadu,* (2007) 2 S.C.C. 1 at paras 95,140,141,145; *Secretary, State of Karnataka* v. *Umadev*i,(2006) 4 S.C.C. 1.

[69] For the test of reasonableness see, *Ram Krishna Dalmia* v. *S.R. Tendulkar,* 1959 S.C.R. 279; *A.I.I.M.S. Students' Union* v. *A.I.I.M.S.,* (2002) 1 S.C.C. 478.

[70] (2008) 6 S.C.C. 1. at p. 487, para 128.

[71] *Pramati Educational and Cultural Trust* v. *Union of India,* 2014 (2) K.L.T. 547(S.C.) at p.565 paras 25 and 26. "Para 25…On the question whether the right of minority institutions under Art.30(1) of the Constitution would be affected by admission of students who do not belong to the minority community which has established the institutions, Kirpal C.J. writing the majority judgment in *T.M.A Pai Foundation* , considered the previous judgments of this Court and then held in Paragraph 149 at page 582 and 583 of the S.C.C."149. Although the right to administer includes within it a right to grant admission to students of their choice under Article 30(1), when such a minority institution is granted the facility of receiving grant-in-aid, Article 29(2) would apply, and necessarily, therefore, one of the right of administration of the minorities would be eroded to some extent. Article 30(2) is an injunction against the State not to discriminate against the minority educational institution and prevent it from receiving aid on the ground that the institution is under the management of a minority. While, therefore, a minority educational institution receiving grant-in-aid would not be completely outside the discipline of Article 29(2) of the Constitution by no stretch of imagination can the rights guaranteed under Article 30(1) be annihilated. It is this context that some interplay between Article 29(2) and Article 30(1) is required. As observed quite aptly in *St.Stephen's* case "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 in Article 30(1)". The word 'only' used in Article 29(2) is of

institutions alike and is thus violative of Art.14 is answered in favour of minority institutions. The Court took the view that the minority character of the minority educational institutions referred to in clause (1) of Art.30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes and it is for this reason that minority institutions, aided or unaided are kept outside the enabling power of the State under clause (5) of Art.15. Thus validity of Art.15(5) as held in *Ashoka Kumar Thakur*[72] is followed in *Pramati*[73]. The reasoning given by the Court in *Pramati*[74] is that admission to SC/ST and SEBC

considerable significance and has been used for some avowed purpose. Denying admission to non-minorities for the purpose of accommodating minority students to a reasonable extent will not be only on grounds of religion etc. but is primarily meant to preserve the minority character of the institution and to effectuate the guarantee under Article 30(1). The best possible way is to hold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors, and it may not be advisable to fix any specific percentage. The situation would vary according to the type of institution and the nature of education that is being imparted in the institution. Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in colleges or in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is possible to fill up all the seats with the students of the minority group, the moment the institution is granted aid, the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted under Article 29(2) are not subverted. It is for this reason that a variable percentage of admission of minority students depending on the type of institution and education is desirable, and indeed, necessary to promote the constitutional guarantee enshrined in both Article 29(2) and Article 30"… "Para 26…Such admissions of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes who may belong to communities other than the minority community which has established the institution, may affect the right of the minority educational institutions referred to in clause (1) of Art.30 of the Constitution. In other words, the minority character of the minority educational institutions referred to in clause (1) of Art.30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes and it is for this reason that minority institutions, aided or unaided, are kept outside the enabling power of the State under clause (5) of Art.15 with a view to protect the minority institutions from a law made by the majority…"

[72] *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 S.C.C. 1. at para 668 it has been held that the Constitution (93rd) Amendment Act, 2005, is valid and does not violate the 'basic structure' of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. Question whether the Constitution (93rdAmendment)Act, 2005 would be constitutionally valid or not so far as 'private unaided' educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J .in his opinion, has, however, considered the issue and has held that the Constitution(93rd)Amendment Act, 2005 is not constitutionally valid so far as private unaided educational institutions are concerned.

[73] *Supra* n.71.

[74] *Ibid.*

will annihilate the minority character of the institution and for maintaining Art.29 (2) admissions to non-minorities could be based on merit. At the same time, non minority educational institutions have to provide reservation to the reserved category. The contention of the non-minorities that excellence will be compromised by admission from amongst the backward classes and SC/ST is held to be contrary to the Preamble of the Constitution which promises to secure to all citizens' fraternity assuring the dignity of the individual and unity and integrity of the nation[75]. However, compromising the excellence by admitting reserved candidates in minority institutions will annihilate the minority character. No rational reasoning is laid down by the Supreme Court in *Pramati*[76] on how minority character is affected merely on admitting few students from weaker sections other than compromising the excellence.

4.5. Non Severability of Exclusion Clause

For sustaining Article 15(5), on being tested on the principles of equality and secularism forming part of the basic structure of the Constitution, a larger bench of Supreme Court will have to hold in favour of severing the exclusion clause ultimately. Since the intention of Parliament was not to include minority established institutions from carrying the burden imposed by Article 15(5), such exclusion of minority established institutions is prima facie not severable. This intention is evident from the rejection of amendment, moved to include the minority educational institutions in Article 15(5)[77]. But in *Pramati Educational and Cultural Trust* v. *Union of India*[78] the Court held that minority educational institutions are a class by themselves and their rights are protected under Art.30 of the Constitution, and therefore, the exclusion of minority educational institutions from Art.15(5) is not violative of Art.14 of the Constitution. The absence of

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[75] 2014(2) K.L.T. 547(S.C.) : (2014) 8 S.C.C. 1.

[76] *Id.* at para 28.

[77] The test of severability is the intention of the legislature. See *R.M.D. Chamarbaugwalla* v. *Union of India*, 1957 S.C.R. 930; *Kihoto Hollohan* v. *Zachilhu,* (1992) Supp 2 S.C.C. 651; *Jia Lal* v. *Delhi Administration,*(1963) 2 S.C.R. 864 at paras 3,11,12,15,16,18,20,21,22,23; *Poindexter* v. *Greenhow,* 114 U.S. 270 at pp.304-305; *Spraigue* v. *Thomspon,* 118 U.S. 90 (1886) at pp.94-95; *Connolly* v. *Union Sewer Pipe,*184 U.S. 540(1902) at p.565; *Davis* v. *Wallace*, 257 U.S. 478 at pp.484-485; *Sloan* v. *Lemon,* 413 U.S. 825(1973) at p.834.

[78] 2014 (2) K.L.T.547 (S.C.) para 26.

rational reasoning by the Supreme Court in *Pramati*[79] on how admission to SC/ST and SEBC will annihilate the minority character of the institution other than compromising the excellence, remains as an open question, which will certainly be a matter of consideration by a larger bench of the Supreme Court in future.

4.6. Discriminating Aided Minority and Non Minority Educational Institutions

If the intention of the legislature is to achieve the constitutional goals of equality of opportunity in admission for socially and economically backward classes, aided minority and aided non-minority would have been bestowed with an equal obligation to fulfill it. It has been held by *TMA Pai*[80] that when State, whilst giving aid, asks the minority educational institutions to comply with a constitutional mandate, it can hardly be said that the State is discriminating against that institute and the State is bound to ensure that all educational institutes, irrespective of minority or non-minority, comply with the constitutional mandate. Thus mandating non minority aided educational institutions to provide for reservation in admission and exempting minority aided educational institutions, do not go in consonance with principles of equality under Art.14. While answering the question whether the minority institutions' right to admission of students and to lay down procedure and method of admission, if any, would be affected in any way by the receipt of State aid, the Supreme Court in *TMA Pai* in answer to question No. 5(b)[81] held :

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

[79] 2014 (2) K.L.T. 547(S.C.). For the same judgment, see (2014) 8 S.C.C. 1.
[80] *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 506, para 426.
[81] *Id.* at p.589.

> case of such institutions, it will be permissible for the Government or the University to provide that consideration should be shown to the weaker sections of the society''.

In view of this enunciation, the impugned portions of the amendment in so far as it excludes aided minority institutions from the purview of extending special provisions would be difficult to stand long since the content of the Articles in question remains the same and there cannot be any attempt to remove the basis that led to the pronouncement. It was in fact a recognition of the fact that equality of status and opportunity is a part of the basic feature of the Constitution. Hence what is significant is on the aspect of reservation there cannot be any discrimination between minority and non minority institutions.

The Supreme Court recently in *Pramati*[82], referring to para 149 of *TMA Pai*[83], held that as long as the minority educational institution permits admission of citizens belonging to the non minority class to a reasonable extent based on merit, it will not be an infraction of Art.29(2). This interpretation merely based para 149 of *TMAPai*[84] in *Pramati*[85] is highly inappropriate. The answer given by the 11 member Constitutional bench on the issue of receipt of aid by a minority institution at para 161, Question No. 5(b)[86] was totally ignored and not adverted to anywhere in the judgment. Since aid is given by the government, merit based admissions and reservation policy of the State, could be insisted upon aided minority educational institutions as per *TMA Pai*[87]. Hence the reliance of *para* 149 of *TMA Pai* in *Pramati* ignoring the answer given by the bench to the specific issue at Question No. 5(b) for holding that only meritorious students from non minority community need be admitted for the requirement of Art.29(2) is not a correct proposition in tune with principles evolved through precedents and Constitutional provisions.

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82 *Supr*a n.71.
83 *Supra* n. 80.
84 *Ibid.*
85 *Supra* n.79.
86 *Supra* n. 83.
87 *Ibid.*

4.7. The Denial of Reservation to SC/ST

The necessary result of Article 15(5) is the denial of reservation for SC's and STs. From the inception of the Constitution, all aided educational institutions, minority or non minority were providing reservation for SCs and STs. Presently, reservation would be expressly prohibited by Article 15(5) in aided minority institutions. Such an interpretation would be violative of the equality clause and the basic structure of the Constitution. Article 15(5) ensures that no reservation can be made under Article 15(4) in regard to minority aided educational institutions, thus depriving SC/STs of the existing reservations in aided minority educational institutions[88]. The decision in *Pramati Educational and Cultural Trust* v. *Union of India*[89], wherein the Court held that admissions of socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes who may belong to communities other than the minority community which has established the institution, may affect the minority character of the institution, requires reconsideration.

4.8. Discriminating Unaided Non Minority and Minority Educational Institutions

Setting up educational institutions and imparting education can be an occupation under Art.19(1) (g) and reasonable restrictions under Art.19(6) can be made applicable to them. Art.15(5) allows special provisions in unaided non minority educational institutions to provide reservation in admission to certain classes. The judgment of *TMA Pai* [90] lays down that the protection of Art.19(1) (g) as well as the protection of Article 26 is available to private educational institutions. On a misreading of *para* 68 of *Pai* case, a bench of five learned judges of the Court in *Islamic Academy*[91] case had held that as a pro term measure till laws are made, there should be some State quotas even in private unaided institutions and it falls within the reasonable restrictions under Articles 19, 26 and 30. This was

[88] *P. A. Inamdar* v. *State of Maharastra,*(2005) 6 S.C.C. 537 at p.601, paras 124.125,127 and 139. See also para 143 of *TMA Pai,* which says that any secular condition will not dilute the minority status of an educational institution.
[89] 2014(2) K. L.T. 547 (S.C.) para 26.
[90] *TMAPai* v. *State of Karnataka*, (2002) 8 S.C.C. 481.
[91] (2003) 6 S.C.C. 697. See discussions on Question nos.3 and 4.

negated by the Court in *Inamdar*[92] that there can be no question of reservations in private unaided institutions. The private educational institutions cannot be compelled to make reservations for the weaker sections. As character and identity of an educational institution is central in case of private educational institutions, compelling reservations in such an institution constitutes an unreasonable encroachment on the rights guaranteed to the private educational institutions. Further putting the burden of providing reservation only on unaided non minority and excluding minority unaided educational institutions from the obligation of reservation is violative of Art.14. In the majority opinion in *Ashoka Kumar Thakur*[93], the Court observed that since none of the affected parties have approached the Court, the question whether there is violation of Art 14 is not to be probed into[94].

Subsequently, applicability of Article 15(5), with regard to private unaided non-minority professional institutions, came up for consideration in *Medical Association case*[95]. A two judges' Bench of the Supreme Court has examined the constitutional validity of Delhi Act 80 of 2007[96] and the notification dated 14.8.2008 issued by the Government of NCT, Delhi permitting the Army College of Medical Sciences to allocate 100% seats to the wards of army personnel. The Court also examined the question whether Art.15(5) has violated the basic structure of the Constitution considering the Army Medical College as a private non-minority, unaided professional institution[97]. The constitutional validity of Article 15(5) was upheld holding that Art.15(5) did not violate the basic structure of the Constitution. While reaching that conclusion, Court also examined the ratio in *Pai*

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92 (2005) 6 S.C.C. 537 at p.601, para 125.

93 (2008) 6 S.C.C. 1 at p. 487, para 128.

94 *Ibid*. See also the minority Judgment by Pasayat; J.where in the same stand is taken.

95 *Indian Medical Association* v. *Union of India and Others*, (2011) 7 S.C.C. 179. See also, Amartya Sen, *The Argumentative Indian- Writings on Indian History, Culture and Identity*, Picador, (2006); Sen, Amartya, *The Idea of Justice*, Allen Lane, (2009); Sukhadeo Thorat, Aryama and Prasant Negi (eds.), *Reservation and Private Sector : Quest for Equal Opportunity and Growth*, Rawat Publications,(2005).

96 Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fees and Other measures to Ensure Equity and Excellence) Act, 2007.

97 Facts indicate that the College was established on a land extending to approximately 25 acres, leased out by the Ministry of Defense, Government of India for a period of 30 years extendable to 99 years.

Foundation as well as in *Inamdar*. *Medical Association case*, has given a new dimension to the expression "much of difference in minority and non-minority educational institutions" which appears in *Inamdar*[98]. Learned Judges in *Medical Association case* concluded in para 80 of that judgment that the expression "much of a difference" in *Inamdar* gives a clue that there is an "actual difference" between the rights of the minority unaided institutions under clause (1) of Article 30 and the rights of non-minority unaided institutions under sub-clause (g) of Clause (1) of Article 19. The Court at para 81[99] concluded that there could be "few differences that would still have operational significance" between minority and non-minority Institutions. This observation is virtually amounting to overruling the dictum in paragraph 124 of *Inamdar*, a seven Judges' Judgment by two judges', which is impermissible in law. Based on all these erroneous appreciation, the Constitutionality of Clause (5) to Article 15 was upheld [100]:

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

Further referring to *Pai Foundation case*, the Court also stated that having allowed the private sector into the field of education including higher education, it would have been unreasonable for the State to fix the fees and also impose

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[98] *P.A. Inamdar* v. *State of Maharastra* (2005) 6 S.C.C. 537 at p. 601, para 124. Para 124 runs thus: "So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of a difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat sharing in unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks *i.e.* on any criteria except merit".

[99] *Indian Medical Association* v. *Union of India and Others*, (2011) 7 S.C.C. 179.

[100] *Id.* at para 126 .

reservations on private unaided educational institutions but the State retains the power to make amendments to resurrect some of those powers to control the access to higher education and achieve the goals of egalitarianism and social justice[101]. Thus permissibility of reservation in unaided non-minority institutions got judicial approval in the above case. The constitutionality of Art.15(5) again came for consideration before the apex court in *Pramati*[102] when the validity of RTE Act[103] was challenged. It was a virtual reiteration of finding in *Medical Association case*[104]. The Court held :[105]

> "…Parliament has stepped in and in exercise of its amending power under Art.368 of the Constitution inserted clause (5) in Art.15 to enable the State to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the SC/ST for their advancement and to a very limited extent affected the voluntary element of this right under Art.19(1)(g).We therefore do not find any merit in the submission of learned counsel for the petitioners that the identity of the right of unaided private educational institutions under Art.19(1)(g) of the Constitution has been destroyed by Art.15(5)".

Further, the Court considered the constitutionality of excluding minority educational institutions from the purview of reservation in *Pramati*[106] and observed that minority character of minority educational institutions under Art.30, whether aided or unaided will be affected by admission of socially and educationally backward classes and SC/ST students and their exclusion from Art.15(5) has been proper and not violative of Art.14 to the Constitution.

The above finding does not hold good in aided institutions in view of the specific answer given by the *TMA Pai* in answer to question No. 5(b)[107] permitting the state policy of reservation in aided minority institutions. Aided minority and

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[101] *Id.* at para 180 .
[102] *Supra* n.89.
[103] Right to Free and Compulsory Education Act, 2009.
[104] *Supra* n. 99.
[105] 2014(2) K.L.T.547(S.C.) at para 22.
[106] *Id*. at para 26.
[107] (2002) 8 S.C.C. 481 at para 161.

aided non minority should have a common obligation of providing reservation to the backward classes.

The judgment in *TMA Pai*[108]and *Inamdar*[109] place the rights of minority and non-minority established educational institutions on the same footing, the essence of Art.30 of the Constitution being intended only to prevent the non-minorities from depriving the minorities of an equal right in that regard. The principle of equality[110] is violated in regard to discharging the common burden of providing reservation of seats in admission for SEBCs, SC and STs in unaided private educational institutions established by minorities, when such classification has no nexus with the advancement of the interests of SEBCs and SC/ST[111]. If reservations in admission is to be imposed on the unaided sector, both minority and non minority unaided institutions should equally share the obligation but excluding minority unaided institutions as against unaided non minority from providing reservation in admission can be said as violative of equality clause under Art.14.

4.9. Impact of Art.15(5) on Secularism

The twin principles of equality and secularism are held to be part of the basic structure of the Constitution. In *TMA Pai*[112] Kirpal, C.J. for the majority held that secularism and equality being two basic features of the Constitution, Article 30(1) ensures protection to linguistic and religious minorities, there by preserving the secularism of the country. This aspect is affirmed by Rumapal, J. at para 330 wherein it is held :

> The rights guaranteed under the several parts of Part 111 of the Constitution overlaps and provide different facets of the objects sought to be achieved by the Constitution. These objectives have been

[108] *TMA Pai Foundation* v. *State of Karnataka,*(2002) 8 S.C.C. 481, para.138.
[109] *P.A. Inamdar* v. *State of Maharastra,*(2005) 6 S.C.C. 537.
[110] *Minerva Mills Ltd* v. *Union of India,*(1980) 3 S.C.C. 625 at paras 43,44,45,56,57,58,59,60; *Bhim Singhji* v. *Union of India,* (1981) 1 S.C.C. 166 at paras 20-21; *I.R. Coelho* v. *State of Tamil Nadu,*(2007)2 S.C.C.1 at paras 95,140,141,145; *Secretary; State of Karnataka* v. *Umadev*i,(2006) 4 S.C.C. 1.
[111] For the test of reasonableness see *Ram Krishna Dalmia* v. *S.R.Tendulkar,* 1959 S.C.R. 279; *A.I.I.M.S. Students' Union* v. *A.I.I.M.S.,* (2002) 1 S.C.C. 478. See also, Seamus Heaney, *The Cure at Troy: A Version of Sophocles' Philoctetes* , Faber and Faber, London,(1991).
[112] (2002) 8 S.C.C. 481 at para 138.

> held to contain the basic structure of the Constitution, which cannot be amended in exercise of the powers under Article 368 of the Constitution. Amongst these objectives are those of equality and secularism. The principle of equality mandates that as far as secular issues are concerned, there shall not be discrimination without reasonable classification. Article 15(5) breaches the basic features of secularism[113]by excluding religious and linguistic minority institutions whether aided or unaided from having to provide reservations. To the extent that Article 15(5) seeks to elevate the minorities based on religion to a higher pedestal, the very secular foundation on which the Constitution is built is abrogated[114].

Clause (5) of Art.15 of the Constitution seems to be violative of secularism insofar as it excludes religious minority institutions referred to in Art.30(1) of the Constitution from the purview of clause (5) of Art.15 of the Constitution. In *Dr. M. Ismail Faruqui & Ors.* v. *Union of India & Others* [115], the apex court has held that the Preamble of the Constitution read in particular with Articles 15 to 28 emphasis this aspect and indicates that the concept of secularism embodied in the constitutional scheme is a creed adopted by the Indian People. In *Pramati Educational and Cultural Trust* v.*Union of India*[116], the Court held that exempting minority educational institutions from the purview of reservation is not violative of the concept of secularism since the essence of secularism in India is recognition and preservation of different types of people, with diverse languages and different beliefs and Arts.29 and 30 seek to preserve such differences and at the same time unite the people of India to form one strong nation and by excluding minority educational institutions from providing reservation, the secular character is not destroyed but maintained. However, it can be said that, it divides the society based on minority and non-minority and will lead to trust deficit affecting the peaceful co-existence of people.

[113] *S.R. Bommai* v. *Union of India,* (1994) 3 S.C.C. 1 at p.168, para 183.
[114] See, *Ahmedabad St.Xavier's College Society* v. *State of Gujarat,* (1974) 1 S.C.C. 717 at paras 9 and 77; *Secretary, Malankara Syrian Catholic College* v. *T. Jose,* (2007) 1 S.C.C. 386, para 19(ii).
[115] (1994) 6 S.C.C. 360.
[116] 2014 (2) K.L.T. 547(S.C.), para 27.

4.10. Impact of Art.15(5) on Art.19(1)(g)

Justice Chandrachood, in *Indira Nehru Gandhi* v. *Raj Narain*[117]identified four unamendable features as forming part of the basic structure *i.e.* Sovereign democratic republic, equality of status and opportunity of an individual, socialism and freedom of conscience and religion and government of laws and not of men. Thus, equality and equal opportunity before law forms the basic features of the Constitution.

The main criticism against Art.15(5) has mainly been on the ground that it infringes Art.19 of the Constitution. In *Ashoka Kumar Thakur* v. *Union of India*[118] the Court observed that Article 15(5) does not take away the 'basic structure' of the Constitution as far as state maintained institutions are concerned. The Court observed that if any constitutional amendment is made, which moderately abridges or alters the equality principle or the principles under Art.19(1)(g), it cannot be said that it violates the basic structure of the Constitution[119]. However, the observation above were concerning aided institutions as evident in para 122[120] of the judgment. Hence the question whether imposing reservations on unaided minority is violative of basic structure and Art.14 was left open in *Ashoka Kumar Thakur*[121]. The rights under Art.19(1)g was subject of detailed examination in *TMA Pai* and *Inamdar* and

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[117] (1975) Supp. S.C.C. 1.

[118] (2008) 6 S.C.C. 1 at p. 471, paras 108-122. In *Ashoka Kumar Thakur,* the main challenge is against Act 5 of 2007. Act 5 of 2007 has been enacted to provide reservation of seats for Scheduled Castes, Scheduled Tribes and SEBCs of citizens in Central Educational Institutions. The Central Educational Institution has been defined under Section 2(d) of the Act. They are institutions incorporated by or under the Central Act or set up by an Act of Parliament or deemed universities maintained by or receiving aid from the Central Government or educational institutions set up by the Central Government under the Societies Registration Act, 1860. Act 5 of 2005 is not intended to provide reservation in private unaided educational institutions. Hence constitutional validity of 93rd amendment Act in so far as it relates to unaided private educational institutions is not pronounced in the judgment.

[119] *Id*. at p. 484, para 120.

[120] *Id*. at para 122. It is held that the 93rd amendment to the Constitution does not violate the basic structure of the Constitution so far as it relates to aided educational institutions. Question whether reservation could be made for SCs, STs or SEBCs in private unaided educational institutions on the basis of the Constitution (93rd Amendment) or whether reservation could be given in such institutions; or whether any such legislation would be violative of Article 19(1)(g) or Article 14 of the Constitution or whether the Constitution (93rd) Amendment which enables the State legislatures or Parliament to make such legislation are all questions to be decided in a properly constituted *lis* between the affected parties and others who support such legislations.

[121] As evident from para 122 of the judgment in *Ashoka Kumar Thakur* v.*Union of India*, (2008) 6 S.C.C. 1.

held that unaided minority and non-minority institutions enjoys all rights to conduct admission in a merit based procedure. However, in *Pramati*[122] the Court upheld the reservation to weaker sections holding the view that providing free and compulsory education to the children are consistent with the right under Art.19 (1) of the Constitution, since it is meant to achieve the constitutional goal of equality of opportunity in elementary education to children of weaker sections.

4.11. Impact/Right Test and Art.19

The impact/right test[123] can be applied to determine whether basic structure has been violated. Total deprivation of fundamental rights, even in a limited area, can amount to abrogation of fundamental rights just as a partial deprivation in every area can[124]. As a result of the amendment, unaided non minority institutions suffer many problems[125]. Academic standards may get declined and the reputation of unaided institutions is severely compromised. Thus Justice *Bandari* rightly holds that Article 19(1)(g) has been more than abridged. The identity of the institution is altered when unreasonable restrictions make a fundamental right fruitless. The 93rd Amendment's imposition of reservation on unaided institutions has abrogated Article 19(1)(g), a basic feature of the Constitution, in violation of our Constitution's basic structure[126].

As per the decision in *Pramati*[127], identity of the rights of private unaided institutions under Art.19(1)(g) is not taken away by the insertion of Art.15(5). The Court has to see whether by the width of the power of the State vested by the constitutional amendment, the essence of the right has been taken away. The Court in para 22 of *Pramati*[128] held that Parliament has stepped in and in exercise of its amending power under Art.368 of the Constitution inserted clause (5) to Art.15 to enable the State to make a law making special provisions for admission of socially

[122] 2014 (2) K.L.T. 547(S.C.) at para 44.
[123] *I.R. Coelho* v. *State of T.N.,*(2007) 2 S.C.C.1, Conclusion (ii) at p.111.
[124] *Minerva Mills Ltd* v. *Union of India,* (1980) 3 S.C.C. 625 at p. 655, para 59 as observed by Chandrachud, J.
[125] *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 S.C.C.1 at p.678, para 534.
[126] *Id*. at para 539.
[127] *Pramati Educational and Cultural Trust* v. *Union of India,* 2014(2) K.L.T. 547(S.C.)
[128] *Ibid.*

and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement and to a very limited extent affected the voluntary element of the right under Art.19(1)(g) of the Constitution.

Further in para 24[129] Court held that width of the power vested on the State under clause (5) of Art.15 of the Constitution by the constitutional amendment is limited to making a special provision relating to admission to private educational institutions, whether aided or unaided. It is difficult to justify 93rd amendment holding that there is a limited infringement of rights which is negligible. There is total deprivation of rights as far as unaided non minority educational institutions are concerned. Hence there is likelihood of validity of 93rd amendment being reconsidered by a larger bench of the Supreme Court.

4.12. Impact on Quality of Students

The Supreme Court in *TMAPai* to *Inamdar*[130] has made it clear that private educational institutions have the right to fix the fee in order to manage its affairs and for enhancing the infrastructure. The fee to be fixed by the Committee constituted for the purpose by the State shall have to take into consideration, the infrastructure facilities, quality of education and outcome of the institution etc. while fixing the fees. The reservation policy enacted through 93rd amendment will bring unfavourable situation as far as the members of the non minority community are concerned. Meritorious students from upper strata will bring good results in the examinations. The institution which admits meritorious students and students from upper strata will get more reputation and students will flock to such institutions. This will enable such institutions to collect more fees. On the other hand, institutions run by non minority will have to admit students from backward strata of the society and less meritorious candidates with low economic background. This will create a situation wherein the persons belonging to non-minority community may obtain conversion certificates for effectively managing an educational institution, which in turn will be a fraud on the Constitution.

[129] *Id.* at para 24.
[130] *Supra* n.9 and 10.

4.13. Obligation of National Interest

The right of admission in minority educational institutions is circumscribed by national interest and any regulation framed in national interest must necessarily apply to all educational institutions, whether run by the majority or the minority[131].

Art.15(5) purports that the provision for reservation is for the advancement of the socially and educationally backward classes of citizens and for the scheduled castes and scheduled tribes. If this provision is truly for the furtherance of national interest, then it is imperative that the nation must be treated as a unit when confronted with issues of the upliftment of the socially and educationally backward sections of society. The artificial distinction drawn between minority institutions and non minority institutions as far as their obligations to the weaker sections are concerned would serve to harm and dilute the secular fabric of the country. In this context it is worth noting the observations of *TMA Pai*[132] that no one type or category of institution should be disfavored or receive more favorable treatment than another. Laws of the land including rules and regulations must apply equally to the majority institutions as well as to the minority institutions.

Even apart from the binding decision in *TMA Pai*, it is an accepted position of law that minority educational institutions are subject to reasonable restrictions in national and public interest.

4.14. Fallacy of Imposing Reservation in Educational Institutions run by Scheduled Caste

Art.15(5) provides that aided and unaided educational institutions run by non minority has to provide reservation in admission for SEBCs and SC/ST candidates. If a successful member of the scheduled caste establishes a college entirely out of his own funds for the education of scheduled caste students, compelling him to make reservation for the other backward classes would result in arbitrariness.

[131] *TMA Pai* v. *State of Karnataka,*(2002) 8 S.C.C. 481 at p.563, para 107.
[132] *Supra* n. 9 at para 138.

4.15. Conclusion

The 93rd amendment is part of a continuing stream of amendments by Parliament to overturn Supreme Court decisions and sit in appeal over them[133] . When the Court in *TMA Pai, Islamic Academy and Inamdar* has held that unaided educational institutions doesn't have the obligation of providing reservation, Art. 15(5) was introduced by the Parliament, making it the obligation of private educational institutions other than minority educational institutions to provide reservation in admissions thus defeating the earlier judicial pronouncements in this area regarding right to admission, which is a facet of establishment and administration of educational institutions. For the time being, the amendment got judicial approval in *Indian Medical Association* and *Pramati.* However, its maintainability can again be a subject of judicial review as far as unaided non-minority institutions alone are compelled to shoulder the burden of providing reservation to weaker sections, to the exclusion of minority unaided educational institutions.

The exclusion of unaided minority educational institutions by Article 15(5) is legitimate and proper. Minority institutions under Articles 29 and 30 are a separate class by themselves. Institutional autonomy is accorded to all minority institutions under Art.30[134]. The constitutional limitations for minority institutions are distinct[135] and minority institutions have to cater to their own students[136]. Hence the

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[133] The Constitution (77th Amendment)Act, 1995 overruled the decision in *Indra Sawhney*, by adding Article 16(4-A), the Constitution (81st Amendment) Act, 2000 overruled the decision in *Indra Sawhney* by adding Article 16(4-B), the Constitution (82nd Amendment) Act, 2000 overruled *Vinod kumar* v. *Union of India*,(1996) 6 S.C.C. 580, by amending Article 335, the Constitution (85th Amendment) Act, 2001 overruled the decisions of *Union of India* v. *Virpal Singh Chauhan*,(1995) 6 S.C.C. 684 and *Ajit Singh* v. *State of Punjab*,(1996) 2 S.C.C. 715 and the Constitution (ninety third Amendment)Act, 2005 overruled *TMA Pai* and *Inamdar* by adding Art.15(5) to the Constitution.

[134] *Sidhrajbhai Sabhai* v. *State of Gujarat,* (1963) 3 S.C.R. 837; *TMA Pai Foundation* v. *State of Karnataka,*(2002) 8 S.C.C. 481, paras 36,40,42-44,55, 61,62,65, 68,119,127,139 and 144(in respect of unaided institutions and para 72; *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at para 9; *Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537 at para 118.

[135] See *Sidharaj Sabhai* v. *State of Gujarat,* (1963) 3 S.C.R. 837at pp. 852,856-857(applying the dual betterment test of reasonable regulations which are for the benefit of the institution); *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at paras 105,107,118,119 and 122; *Inamdar* v. *State of Maharastra*, (2005) 6 S.C.C. 537 at para 122.

unaided minority institutions cannot be subjected to further quotas. In *Ashoka Kumar Thakur* v. *Union of India*[137], the Court held that saving for minority educational institutions in Article 15(5) is really *ex abundanti cautela* as minority educational institutions were constitutionally protected and at all times considered different from other private educational institutions. At the same time it should be remembered that unaided non minority professional educational institutions under Art.19 can be subjected to restrictions mentioned under Art.19(6) only. Art.15(5) abrogates Art.19 to the extent it infringes the rights of unaided non minority educational institutions. It is disturbing that in *Pramati Educational and Cultural Trust* v. *Union of India*[138], the Supreme Court upheld the constitutionality of Art.15(5) as not infringing the rights of non minority educational institutions. Infringement of equality in imposing the State's burden of providing reservation on unaided non minority and exempting unaided minority will certainly be a subject to be considered by the larger bench of the Supreme Court.

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[136] Earlier, the minority quota was permissible to 50% as per *St.Stephens College* v. *University of Delhi*,(1992) 1 S.C.C. 558 at para 102. *TMA Pai* permits the State governments to enlarge or contract the 50% rule.
[137] (2008) 6 S.C.C.1 at p. 470, para 91.
[138] 2014(2) K.L.T.547(S.C.)

Chapter - 5

ADMISSION RIGHTS AND ITS REGULATION IN ELEMENTARY EDUCATIONAL INSTITUTIONS

Chapter - 5

ADMISSION RIGHTS AND ITS REGULATION IN ELEMENTARY EDUCATIONAL INSTITUTIONS

"Education is not preparation for life; education is life itself".

John Dewey[1]

5.1. Introduction

Right to basic elementary education is a fundamental right recognized by various international instruments[2]. It encompasses not only a right to access educational facilities, but also the obligation of the State to eliminate discrimination at all levels of education[3], to set minimum standards and to improve its quality[4]. The prominent organizations around the world striving for promotion of right to education includes UNESCO[5], UNICEF[6], World Bank and ILO[7]. The

[1] John Dewey is an American Philosopher. See, *http://www.brainyquote.com/quotes/quotes/j/johndewey154060.html#esI8527oyGZK00VP.99.*

[2] The right to education is clearly acknowledged in the United Nations' Universal Declaration of Human Rights (UDHR), adopted in 1948, Article 26. See also, Article 3 of the Convention Concerning Discrimination in Respect of Employment and Occupation (1958), Convention Against Discrimination in Education (1960), Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966), Article 10 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)(1981), Article 28 and 29 of the United Nations Convention on the Rights of the Child (1989) etc.

[3] Article 27 of the International Covenant on Civil and Political Rights, Article 30 of the Convention on the Rights of the Child, Article 5 of the UNESCO Convention Against Discrimination in Education, Paragraph 34 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Commission on Security and Co-operation in Europe, Article 4 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 14 of the Framework Convention for the Protection of National Minorities etc.

[4] Ms. Katerina Tomasevski, former United Nations Special Rapporteur on the right to education, developed the concept of '4 As' according to which education can be a meaningful right. It should be made available, accessible, acceptable and adaptable. See also, V.R. Krishna Iyer, *The Dialectics and Dynamics of Human Rights in India – Yesterday, Today and Tomorrow* – Tagore Law Lectures, Eastern Law House, Calcutta (1999), p. 54.

[5] United Nations Educational, Scientific and Cultural Organization- led the Global Education for All- movement, aiming to meet the learning needs of all children, youth and adults by 2015. The four internationally agreed education goals of UNESCO are 1) Expand early childhood care and

attempt hereunder is to examine how far the system of admission to elementary education in India corresponds to the *right based model*, and to find out whether the legislative scheme enabling universal elementary education in India is in consonance with the right to establish and administer educational institutions by aided minority as well as unaided minority and non minority educational institutions and other provisions of the Constitution. The compatibility of the national legislation on Free and Compulsory Education and rules there under with the judicial trend in this direction is also analyzed. The Kerala rules regarding free and compulsory education provisions having slight variance with regard to certain provisions from the central Act and rules and its legality is also explored in this Chapter.

5.2. Right Based Model of Education

The admission rights to institutions of elementary education in India is in tune with the *right based model*. An analysis of the *right based model* of education will give clarity to the stakeholders regarding their respective rights and duties in admission to educational institutions. An understanding of this model will help us in meaningful discussions on the implications of such a model as against the different constitutional and statutory provisions dealing with admission to elementary educational institutions in India.

In a *Right based Model of Education*, children have a right to get free and compulsory elementary education. There is a corresponding obligation on the part of the State as well as the parents to provide free and compulsory elementary education[8] to children. Duty to respect, facilitate and fulfill human right obligations requires State to make schools available, accessible, acceptable and adaptable to the stakeholders[9]. Duty to respect education also requires not introducing measures interfering with access to education and the duty to protect, requires the State to

education, 2) provide free and compulsory primary education for all, 3) promote learning and life skills for young people and adults and 4) increase adult literacy by 50 per cent.

6 United Nations International Children's Emergency Fund.

7 International Labour Organization.

8 Parents who abstain from providing education to the children shall be made liable to punishment.

9 State has an obligation towards the parents that education of the choice demanded by the parents are provided to the children.

ensure that the State/individuals do not deprive children of their right to education. The obligation to protect, casts an obligation on the State to see that right to education is not violated by non-state actors. For non-state actors, to respect children's rights, cast a negative duty of non-violation of children's rights and a positive duty to prevent the violation of their rights by others[10]. Duty to facilitate and fulfill, creates a duty on the State and requires an enabling framework of law that removes barriers to education. The components of the duties to make education available, obliges the State to ensure that public schools are accessible by ensuring that they are free of cost and free from discriminatory practices. Right to acceptability in education obliges the State to ensure that curriculum is acceptable to parents and children, and that schools are child friendly. Adaptability requires the State, to make the content of education flexible[11]. Admission, selection procedure and grouping should be made transparent and the law should address inequalities based on class, caste, religion, language etc.

5.3. Free and Compulsory Education in the Pre Constitution Era

Provision for free and compulsory education to children irrespective of their socio economic status has evolved in India gradually[12]. In the pre Constitution period, education was not considered as a function of the State and social

[10] Article 29 UNCRC reads : "1. States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment. 2. No part of the present Article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present Article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

[11] Duty bearers at each level should be identified and students should be admitted in the shortest time possible. Principles of non discrimination and equality, best interests of the child and child participation which are non negotiable rights guaranteed by CRC should be incorporated.

[12] India is a State party to the International Covenant on Educational Social and Cultural Rights, the Convention on Elimination of Racial Discrimination, the Convention on Elimination of Discrimination Against Women, and the Convention on the Rights of the Child.

inclusiveness was absent in the early periods as well as in the Muslim and British periods. Clause 43 of the Charter Act of 1813 made education a State responsibility[13]. The Hunter Commission (1882-1883) was the first to recommend universal education in India. The demand for a law on free and compulsory education was made during the freedom struggle[14] but lack of resources by the State stood in the way of providing universal elementary education[15]. In the *Constituent Assembly Debates* also education remained a non justiciable directive instead of being an entitlement[16]. By 1947, primary education had been made compulsory in 152 urban areas and 4995 rural areas.

5.4. Free and Compulsory Education at Elementary Level

There has been a continuous effort to strengthen the base of elementary education in India by improving the quality of education imparted through several programs[17], Schemes[18], Policies[19] and Commissions[20]. Legislation to provide free

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[13] Dr. P.L. Mehta and Rakhi Poonga, *Free and Compulsory Education: Genesis and Execution of Constitutional Philosophy*, Deep and Deep Publications, New Delhi (1997), pp.42-47.

[14] Bills for compulsory education were made in the Imperial Legislative Assembly and the provinces were ready to adopt a law on compulsory education. Gokhale while debating the bill said thus: "….elementary education is both compulsory and free, and in a few, though the principle of compulsion is not strictly enforced or has not been introduced, it is either wholly or for the most part gratuitous; in India alone it is neither compulsory nor free. Thus in Great Britain and Norway, Sweden, the US, Canada, Australia and Japan it is compulsory and free….In Spain, Portugal, Greece, Bulgaria, Serbia and Romania, it is free, and in theory, compulsory, though compulsion is not strictly enforced''. [See, Lok Sabha Debates, 28-11-2001, Vol.20, p.476] as cited in *Society for Unaided Private Schools, Rajasthan* v. *Union of India and Another,* 2012 J. T. 4-137.

[15] The Patel Bill, 1917, was the first compulsory education legislation. It proposed to make education compulsory from ages 6 to 11. The Government of India Act, 1935 provided that 'education should be made free and compulsory for both boys and girls'. Free and Compulsory education got a boost when the *Zakir Hussain Commission* recommended that the State should provide it. The 1944 *Sargent Report* strongly recommended free and compulsory education for children aged six to fourteen.

[16] The State has been making endeavours to provide free and compulsory education since 1813. When the original framers gathered at the Constituent Assembly, their desire to provide free and compulsory education was well established. The real question in the debate was whether the original framers would make free and compulsory education justiciable or not. They oscillated between the options, first placing it in the fundamental rights and later moving it to the directive principles under Article 45 of the Constitution. See also, Selected Educational Statistics, 2004-2005 (published by the Statistics Division, Department of Higher Education, Ministry of Human Resource Development, Government of India.

[17] *Sarva Shiksha Abhiyan* (SSA)**,** was started in 2001, to provide education to children between 6–14 years by 2010. The programme focuses specially on girls and children with challenged social or financial backgrounds and aims to provide infrastructure and relevant source material in the form of free text books to children in remote areas. • *District Primary Education Programme*

and compulsory education in India has been passed by fourteen states and four union territories[21]. Union Territories of Chandigarh, Delhi, Pondicherry and Andaman Nicobar Islands were also covered by legislations providing compulsory elementary education. But they have remained unenforced due to socio economic compulsions that keep the children away from schools. Therefore with an intent to provide an effective mechanism for free and compulsory education, the parliament has enacted The Right of Children to Free and Compulsory Education Act, 2009[22].

(DPEP) was initiated in 1994, with an aim to provide access to all children to primary education through formal primary schools or its equivalent alternatives. The Ministry of Human Resource Development delegated the task of developing a school based computerized information system, to National Institute of Educational Planning and Administration (NIEPA), New Delhi. • *District Information System for Education* (DISE) is the first database software created by NIEPA in 1995. This software was again redesigned as per recommendation from SSA, to provide computerized data and statistical analysis of the various data.

[18] *Mid-Day Meal Scheme* (MDMS) was launched in 1995 to enhance enrolment, retention, and participation of children in primary schools, simultaneously improving their nutritional status.

[19] *The National Policy on Education* gives the highest priority to the programme of universalisation of elementary education and recommends that it shall be ensured that free and compulsory education is provided to all children up to the age of fourteen years. The Programme of Action 1992 outlines relevant strategies to be acted upon. There have so far been mainly two comprehensive statements of the National Policy on Education, *viz*. those of 1968 and 1986. The *National Policy of Education,* (1986) and *Program of Action,* (1992) lay down the objectives and features of Indian Education Policy such as promotion of equality, common educational structure, education for women's equality, adult education etc. *National Policy on Education* emphasis education of the Scheduled Castes, Scheduled Tribes and Minorities.

[20] *Kothari Commission* (1964-68) reviewed the status of education in India and made several recommendations. In order to eliminate inequality in educational opportunities, it recommended that a common school system be introduced. Some of the excerpts from the report are as follows: '5.01….But in any given society and at given time, the decisions regarding the type, quantity and quality of educational facilities depend partly upon the resources available and partly upon the social and political philosophy of the people. Poor and traditional societies are unable to develop even a programme of universal primary education. But rich and industrialized societies provide universal secondary education and expanding and broad based programmes of higher and adult education. Feudal and aristocratic societies emphasise education for a few. But democratic and socialistic societies emphasize mass education and equalization of educational opportunities. The principal problem to be faced in the development of human resources, therefore is precisely this: How can available resources be best deployed to secure the most beneficial form of educational development? How much education, of what type or level of quality, should society strive to provide and for whom?' '5.03 Increasing the educational level of citizens.-In the next two decades the highest priority must be given to programmes aimed at raising the educational level of the average citizen. Such programmes are essential on grounds of social justice, for making democracy viable and for improving the productivity of the average worker in agriculture and industry. The most crucial of these programmes is to provide, as directed by Article 45 of the Constitution, free and compulsory education of good quality to all children up to the age of 14 years. In view of the immense human and physical resources needed, however the implementation of this programme will have to be phased over a period of time'.

[21] Assam, Andhra Pradesh, Bihar, Gujarat, Haryana, Jammu Kashmir, Karnataka, MadyaPradesh, Maharastra, Punjab, Rajasthan, Tamil Nadu, Kerala and West Bengal.

[22] Hereinafter refered to as the 2009 Act.

5.5. Elementary Education as a Constitutional Right

The fundamental right to education originally evolved from Art.21 of the Constitution. This right is not an absolute right and its contents and parameters have to be determined in the light of Articles 21A, 41 and 45. Hence every child citizen of this country has a right to free education until he completes the age of fourteen years. Thereafter, his right to education is subject to the limits of economic capacity and development of the State[23]. The obligation created by Articles 41[24], 45[25] and 46[26] of the Constitution can be discharged by the State either by establishing institutions of its own or by aiding, recognizing and/or granting affiliation to private educational institutions.

5.5.1. The UnniKrishnan Judgment and its Impact

The judicial decision from which the right to education emanated as a fundamental right was from the one rendered by the Supreme Court in *Mohini Jain* v. *State of Karnataka*[27], wherein the Supreme Court held that the right to education flows directly from the right to life. The rationality of this judgment was further examined by a five judge bench in *J.P.Unnikrishnan* v. *State of Andhra Pradesh*[28] where the enforceability and the extent of the right to education was clarified in the following words:

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[23] *Unnikrishnan* v.*State of Andra Pradesh,* (1993) 1 S.C.C. 645.

[24] Art.41 reads : *Right to work, to education and to public assistance in certain cases*- "The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want".

[25] At the time of the Constituent Assembly Debates, there was opposition to universal adult franchise since most people were illiterate. Article 45 was introduced as a compromise: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years". It was the only directive principle of state policy that had a specified time frame for implementation. Art.45 is viewed as a compulsion on the State rather than on parents.

[26] Art.46 reads : *Promotion of Educational and Economic Interests of Scheduled Castes, Scheduled Tribes and Other Weaker Sections*- "The State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation".

[27] (1992) 3 S.C.C. 666.

[28] (1993) 1 S.C.C. 645.

> The right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development.

Mohini Jain was affirmed in *Unnikrishnan* to the extent of holding that the right to education emanates from Article 21 of the Constitution and charging of capitation fee was illegal. The Court partly overruled *Mohini Jain* and held that the right to free education is available only to children until they complete the age of 14 years and after that the obligation of the State to provide education would be subject to its economic capacity and development. Private unaided recognized/affiliated educational institutions running professional courses were held entitled to charge the fee higher than that charged by government institutions for similar courses but it was held that such a fee should not exceed the maximum limit fixed by the State. The Court also formulated a scheme and directed every authority to impose that scheme upon institutions seeking recognition/affiliation, even if they are unaided institutions. *Unnikrishnan* introduced the concept of "free seats" and "payment seats" and held that private unaided educational institutions were bound by the scheme. *Unnikrishnan* also recognized the right to education as a fundamental right guaranteed under Article 21 of the Constitution and held that the right is available to children until they complete the age of 14 years. The same has also been upheld by the Supreme Court in *Bandhua Mukti Morcha, etc.* v. *Union of India*[29], wherein it was held :

> ...A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop a spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, dalits and tribes and minorities is mandatory. The basic education and employment oriented vocational education should be imparted so as to empower the children within these segments of the society to retrieve them from poverty and thus, develop basic abilities… to live a meaningful life...Compulsory education, therefore to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions.

[29] (1997) 10 S.C.C. 549 at p.557, para 11.

The Court further held[30]:

> "In *Maharashtra State Board of Secondary and Higher Education* v. *K.S. Gandhi*, right to education at the secondary stage was held to be a fundamental right. In *J.P.Unnikrishnan* v. *State of Andhra Pradesh*, a Constitution Bench had held education up to the age of 14 years to be a fundamental right…. It would be therefore incumbent upon the State to provide facilities and opportunity as enjoined under Article 39 (e) and (f) of the Constitution and to prevent exploitation of their childhood due to indigence and vagary".

5.5.2. Draft Bill on Right to Education

The Department of Education, Ministry of Human Resources Development, Government of India after the judgment in *Unnikrishnan* made a proposal to amend the Constitution to make the right to education a fundamental right for children up to the age of 14 years and also a fundamental duty of citizens of India so as to achieve the goal of universal elementary education. A Bill to amend the Constitution [(Eighty-third Amendment) Bill,1997] was drafted so as to insert a new Article 21A containing three clauses[31] and the clause (3) therein specifically provided that unaided educational institutions need not provide for free and compulsory education.

5.5.3. Committee of Rajya Sabha on Draft Bill

The draft Bill was presented before the Chairman, Rajya Sabha, who referred the Bill to a Department-Related Parliamentary Standing Committee on Human Resources Development for examination which submitted its draft report on 4.11.1997. The Committee in its Report referred to the written note received from the Department of Education that the concept of free education need not be extended to schools or institutions which are not aided by the Government. The Committee specifically referred to the judgment in *Unnikrishnan* in paragraph

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[30] *Ibid.*

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

15.14 of the Report[32]. The members felt that though the so called private institutions do not receive any financial aid, the children studying in those institutions should not be deprived of their fundamental right. As regards the interpretation as to whether the private institutions should provide free education or not, the Committee observed that it would be appropriate to leave the interpretation of the Supreme Court judgment in the *Unnikrishnan* case, to the courts instead of making a specific provision. Some members, thought that it would be inappropriate to bring private institutions under the purview of free education and felt that clause (3) should not be deleted. After much discussions, the Committee recommended that clause (3) of the proposed Article 21A may be deleted.

5.5.4. 165th Report of the Law Commission

The Report of the Committee of Rajya Sabha regarding draft Article 21A was adopted by the Parliamentary Standing Committee on Human Resource Development. It was laid on the Table of the Lok Sabha on 24.11.1997. The Lok Sabha could not pursue the Bill further as it was dissolved soon thereafter and elections were declared.

The Chairman of the Law Commission, who authored *Unnikrishnan* judgment, took up the issue *suo moto*[33]. Referring to the Constitution (Eighty-third Amendment) Bill, 1997, Law Commission in its 165th Report stated that the Department of Education may be right in saying that, the private educational institutions which are not in receipt of any grant or aid from the State, cannot be placed under an obligation to impart free education to all the students admitted into their institutions. However, applying the ratio of *Unnikrishnan case*, it is perfectly legitimate for the State or the affiliating Board, to require the institution to admit and impart free education to fifty per cent of the students as a condition for affiliation or for permitting their students to appear for the Government/Board examination. Hence, as an initial attempt, twenty percent students could be selected

[32] See para 15.14 of the Report of the Committee of Rajya Sabha on the proposed 83rd Amendment Bill to the Constitution dated 4.11.1997.

[33] Justice B.P. Jeevan Reddy who delivered the *Unnikrishnan* Judgment was the chairman of Law Commission. Following the ratio in *Unnikrishnan,* the Law Commission submitted its 165th Report to the Ministry of Law, Justice and Company Affairs, Union of India *vide* letter dated 19.11.1998.

by the concerned institution in consultation with the local authorities and the parent-teacher association, for providing free education. This proposal would enable the unaided institutions to join the national efforts to provide education to the children of India and to that extent will also help reduce the financial burden upon the State[34].

The Law Commission which had initiated the proceedings *suo moto* in the light of *Unnikrishnan* suggested deletion of clause (3) from Article 21A[35]. It also made recommendations that the unaided institutions should be made aware that recognition, affiliation or permission to send their children to appear for the Government/Board examination also casts corresponding social obligation upon them. The recognition/affiliation/permission aforesaid is meant to enable them to supplement the effort of the State and hence they are bound to serve the public interest. For this reason, the unaided educational institutions must be made to impart free education to 50% of the students admitted to their institutions. As this principle has already been applied to medical, engineering and other colleges imparting professional education, schools imparting primary/elementary education could be placed under the same obligation. Clause (3) of proposed Article 21A may accordingly be recast to give effect to the above concept and obligation.

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

5.5.5. Constitution (Ninety-third Amendment) Bill, 2001

The 93rd amendment bill was prepared and presented[36]based on the Law Commission report[37], report of the Parliamentary Standing Committee, judgment

[34] See 165th Law Commission Report, 1998, page 165.35, paragraph 6.1.4 .
[35] See 165th Law Commission Report, 1998, paras 6.6.2, 6.8, 6.8.1and 6.9.
[36] The proposed amendments in Part III, Part IV and Part IVA of the Constitution were as follows: (a) to provide for free and compulsory education to children in the age group of 6 to 14 years and for this purpose, a legislation be introduced in parliament after the Constitution (Ninety-third Amendment) Bill, 2001 is enacted; (b) to provide in Article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of six years; and (c) to amend Article 51A of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.

in *Unnikrishnan* etc. The above Bill was passed and received the assent of the President on 12.12.2002 and was published in the Gazette of India on 13.12.2002[38]. It is necessary to know the background of Art.21A to understand the scope of the Act on Free and Compulsory Education.

5.6. Scope of Art.21A

Article 21A was inserted to ensure that fundamental right to elementary education is made available to the age group of 6-14. But the question arises, whether Art.21A is a stand alone provision which prevails over other rights in the Constitution and whether there is an obligation on the private players to ensure compliance of Art.21A without corresponding amendments in other fundamental rights.

5.6.1. Whether Socio Economic Right Under Art.21A is Superior Right?

The Preamble of the Indian Constitution, Fundamental Rights in Part III and the Directive Principles of State Policy in Part IV reflects our civil, political and socio-economic rights which have to be protected for a welfare society. Article 21A which envisages State to provide free and compulsory education to children of the age of 6 to 14 years in the manner prescribed by law, is a socio economic right as it enables the citizens to realize equality and social inclusiveness through education. In the enjoyment of socio-economic rights, the beneficiaries should not encroach into the rights guaranteed to other citizens. When socio-economic rights

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[37] In *Herron* v. *Rathmines and Rathgar Improvement Commissioners,* [1892] A.C. 498 at p. 502, the Court held that the subject-matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act. In *Mithilesh Kumari and Another* v. *Prem Behari Khare,* (1989) 2 S.C.C. 95, this Court observed that "where a particular enactment or amendment is the result of recommendation of the Law Commission of India, it may be permissible to refer to the relevant report". See also, Dr. *Baliram Waman Hiray* v. *Justice B. Lentin and Others,* (1988) 4 S.C.C. 419; *Santa Singh* v. *State of Punjab*, (1976) 4 S.C.C. 190; *Ravinder Kumar Sharma* v. *State of Assam,* (1999) 7 S.C.C. 435.

[38] Art.21A reads : *Right to Education*.- "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine". Art.45 reads : *Provision for early childhood care and education to children below the age of six years*.- "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years". Art.51A reads : *Fundamental Duties* – "It shall be the duty of every citizen of India (k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years".

have been given the status of constitutional rights, those rights are available only against State and not against private state actors, like the private schools, private hospitals etc., unless they get aid, grant or other concession from the State[39]. There is an argument that, as Article 21A is a socio-economic right, it requires affirmative state action to protect and fulfill the rights guaranteed to children of the age of 6 to 14 years for free and compulsory education[40]. But Article 21A cannot be considered as a stand alone provision not subjected to Article 19(1)(g) and Article 30(1) of the Constitution[41].

5.6.2. Core Individual Rights Prevail Over Socio Economic Rights

Article 21A is not meant to deprive core rights guaranteed under Art.19 and Art.30 of the Constitution. The "core individual rights" always have universal dimension and thus represent universal value while "socio-economic rights" envisage the sectional interest. Hence, core individual rights must get precedence over the socio-economic rights. Further, the concept of social inclusiveness has to be achieved not by abridging or depriving the fundamental rights guaranteed to the citizens who have established and are administering their institutions without any aid or grant, but investing their own capital. The principles stated in Part IV of the Constitution and the obligation cast on the State under Article 21A, are to be progressively achieved by the State and not by non-state actors and they are only expected to voluntarily support the efforts of the State.

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[39] *Consumer Education & Research Centre and Others* v. *Union of India and Others*, (1995) 3 S.C.C. 42; *Paschim Banga Khet Majdoor Samity and Others* v. *State of West Bengal and Another,*(1996) 4 S.C.C. 37; *State of Punjab and Others* v. *Ram Lubhaya Bagga and Others*,(1998) 4 S.C.C. 117; *Social Jurist, A Lawyers Group* v. *Government of NCT of Delhi and Others*, 2007 D.L.T. 698; *Olga Tellis and Others* v. *Bombay Municipal Corporation and Others,* (1985) 3 S.C.C. 545; *Municipal Corporation of Delhi* v. *Gurnam Kaur*,(1989) 1 S.C.C. 101; *Sodan Singh and Others* v. *New Delhi Municipal Committee and Others*,(1989) 4 S.C.C. 155; *Bandhua Mukti Morcha* v. *Union of India and Others*,(1984) 3 S.C.C. 161.

[40] See, *Indian Medical Association* v. *Union of India and Others*, (2011) 7 S.C.C. 179 (in short *Medical Association* case); *Ahmedabad St. Xavier's College Society and Another* v. *State of Gujarat and Another,*(1974) 1 S.C.C. 717; *Rev. Sidhajbhai Sabhai and Others* v. *State of Bombay and Another*,(1963) 3 S.C.R. 837 and *In Re. Kerala Education Bill*, A.I.R. 1958 S.C. 956.

[41] Article 19(1)(g) and Article 30(1), dealt with the subject of right to carry on occupation of establishing and administering educational institutions, while Article 21A deals exclusively with a child's right to primary education. Article 21A, has no saving clause which indicates that it is meant to be a complete, standalone clause on the subject matter of the right to education and is intended to exclude the application of Article 19(1) (g) and Article 30(1).

5.6.3. Obligation of Unaided Institutions Vis a vis Parents Under Art.21A

The State has the obligation to meet all expenses of education of children of the age 6 to 14 years, under Article 21A of the Constitution. Children have also got a constitutional right to get free and compulsory education, which can be enforced against the State. Children who opt to get admission in an unaided private educational institution cannot claim that right as against the unaided private educational institution, since they have no constitutional obligation to provide free and compulsory education under Article 21A of the Constitution. If children are voluntarily admitted in a private unaided educational institution, they cannot claim their right against the State, or the institution. In *Avinash Mehrotra* v. *Union of India & Others*[42], the Court held that Article 21A imposes a duty on the State, while Article 51A(k) places burden on the parents to provide free and compulsory education to the children of the age 6 to 14 years. There exists a positive obligation on the State and a negative obligation on the non- state actors, like private educational institutions, not to unreasonably interfere with the realization of the children's rights and the State cannot offload their obligation on the private unaided educational institutions.

5.6.4. Whether 21A Calls for Horizontal Application of Sanction on Non-State Actors?

Articles 15(2), 17, 18, 23 and 24 of the Constitution expressly impose constitutional obligations on non-state actors and incorporate the notion of horizontal application of rights[43]. Further under Article 15(3), the Constitution permits the State to make special provisions regarding children. Thus Articles 21A and 15(3) provide the State with constitutional instruments to realize the object of the fundamental right to free and compulsory education even through non-state actors such as private schools. Non-state actors exercising the state functions like establishing and running private educational institutions are also expected to respect and protect the rights of the child, but they are, not expected to surrender

[42] (2009) 6 S.C.C. 398.

[43] *Peoples' Union for Democratic Rights and Others* v. *Union of India and Others*,(1982) 3 S.C.C .235; *Vishaka and Others* v. *State of Rajasthan*,(1997) 6 S.C.C. 241.

their rights guaranteed by the Constitution[44]. *Pai Foundation* and *Inamdar*[45] have laid down that any action of the State to regulate or control admissions in the unaided professional educational institutions, so as to compel them to give up a share of the available seats to the candidates chosen by the State, would amount to nationalization of seats. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions, are acts constituting serious encroachment on the right and autonomy of private unaided professional educational institutions and such appropriation of seats cannot be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution, so far as the unaided minority institutions are concerned.

5.6.5. The Import of the Word 'State Shall Provide '

Article 21A has used the expression "State shall provide" and not "provide for", hence the constitutional obligation to provide education is on the State and not on non-state actors. If the preposition "for" has been used, then the duty of the State would be only to provide education to those who require it. The use of the preposition "for" would indicate that once the State has made an arrangement for the provision of education, provided the buildings, pay teachers and set the curriculum, it is absolved of the responsibility when the education is not actually delivered. The absence of the preposition "for" in Article 21A makes the duty on

[44] Article 24 of the Indian Constitution states that no child below the age of 14 years shall be employed to work in any factory or be engaged in any hazardous employment. The Factories Act, 1948 prohibits the employment of children below the age of 14 years in any factory. Mines Act, 1952 prohibits the employment of children below 14 years. Child Labour (Prohibition and Regulation) Act, 1986 prohibits employment of children in certain employments. Children Act, 1960 provides for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children. Juvenile Justice (Care and Protection of Children) Act, 1986 (the Amendment Act 33 of 2006) provide for the care, protection, development and rehabilitation of child in conflict with the law and child in need of care and protection. There are also other legislations enacted for the care and protection of children like Immoral Trafficking Prevention Act, 1956, Prohibition of Child Marriage Act, 2006 and so on. Legislations referred to above, cast an obligation on non-state actors to respect and protect children's rights and not to impair or destroy the rights guaranteed to children, but no positive obligation to make available those rights.

[45] *TMA Pai Foundation* v. *State of Karnataka,*(2002) 8 S.C.C. 481 and *P. A. Inamdar* v. *State of Maharastra,*(2005) 6 S.C.C. 537, para 132.

the State imperative. State has, therefore, to "provide" and not "provide for" through unaided private educational institutions.

5.6.6. Import of the Word 'Such Manner'

Article 21A has used the expression "such manner" which means the manner in which the State has to discharge its constitutional obligation and not offloading those obligations on unaided educational institutions. Making of legislation under Article 21A has to be in a constitutionally permissible manner. If legislation made under Art.21A restricts Art.19 or 30 it has to be under the manner provided under the respective Articles. Rights guaranteed under Article 19(1)(g) can be restricted or curtailed in the interest of general public[46] imposing reasonable restrictions on the exercise of rights conferred under Article 19(1)(g). But State cannot travel beyond the contours of Clauses (2) to (6) of Article 19 of the Constitution in curbing the fundamental rights guaranteed by Clause (1). The grounds specified in clauses (2) to (6) are exhaustive and are to be strictly construed[47]. Moreover, judiciary has laid down the conditions under which Art.30 can be regulated. The Court is required to look into whether the law has over-stepped the Constitutional limitations. Thus as Art.21A as it presently stands doesn't compel private educational institutions to provide free and compulsory education. Moreover, the judgment in *Pai Foundation* was finally pronounced on 25.11.2002 and Article 21A, new Article 45 and Article 51A(k) were inserted in the Constitution on 12.12.2002. *Pai Foundation* has laid down that private unaided educational institutions including schools have maximum autonomy in admissions[48]. Parliament was presumed to be aware of the judgment in *Pai Foundation,* and hence, no obligation was cast on unaided private educational institutions but only on the State, while inserting Article 21A.

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[46] Interest of general public, is a comprehensive expression comprising several issues which affect public welfare, public convenience, public order, health, morality, safety etc. all intended to achieve socio-economic justice for the people.

[47] The majority opinion in *Society for Unaided Schools in Rajasthan,* (2012) J.T. 4-137, holds that Articles 41, 45 and 46 must be upheld as a "reasonable restriction" under Articles 19(2) to 19(6).

[48] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 546, para 61.

5.7. Admission to Institutions of Elementary Education Under Right to Free and Compulsory Education Act

The ratio in *Unnikrishnan* created obligation on unaided private educational institutions to impart free and compulsory education to the children admitted in their institutions. Law Commission in its 165th Report was also of the view that the ratio in *Unnikrishnan* had legitimized the State or the affiliating Board to require unaided educational institutions to provide free education, as a condition for affiliation or for permitting the students to appear for the Government/Board examination. In *TMA Pai*, *Unnikrishnan scheme* was held unconstitutional and violative of Art.19(1)(g) and Article 30 of the Constitution. Further rigid percentage of reservation laid down in *St.Stephen's College* v. *University of Delhi*[49], was also held incorrect. When Art.21A was framed, the judgment in *TMA Pai* was already in existence. Thus it should be understood that Art.21A as it presently stands does not create an obligation on non state actors to provide for free and compulsory education. Relying on Article 21A, the legislature proposed to enact the Right of Children to Free and Compulsory Education Bill, 2008[50]. The Right to Free and Compulsory Education Act came into force in 2009[51]. Consequently the 2009 Act which is based on Art.21A ought not to have made it obligatory on unaided educational institutions to provide for free and compulsory education[52]. Further Art.15(5) provides that there shall not be any reservation in aided and unaided minority educational institutions. The Supreme Court in *Society for unaided Schools, Rajasthan* v. *Union of India and Others* [53], held that S.12 of the 2009 Act is unconstitutional to the extent of providing reservation in unaided

[49] (1992) 1 S.C.C. 558.

[50] It seeks to provide the following: (a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards; (b) 'Compulsory education' casts an obligation on the appropriate government to provide and ensure admission, attendance and completion of elementary education; (c) Free education means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education, (d) The duties and responsibilities of the appropriate governments, local authorities, parents, schools and teachers in providing free and compulsory education; (e) A system for protection of the right of children and a decentralized grievance redressal mechanism.

[51] Published in *Gazette of India* Ext.No.39, Part 11 Section 1 dated 27.8.09.

[52] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 539.

[53] (2012) J.T.4-137. See for the same judgment, in (2012) 6 S.C.C. 1.

minority educational institutions, but upheld the validity of the provision as far as unaided and aided non-minority and aided minority educational institutions are concerned. Though S.12 of the Act covers both aided and unaided minority and non minority schools, the judicial attitude towards the provision is different. The aided schools, both minority and non minority should provide reservation to the students[54] in return for receiving aid from the State. However the unaided non-minority educational institutions will have to appropriate quota on reading S.2(n) along with S.12[55] of the 2009 Act while unaided minority educational institutions will get the benefit of Art.15(5). This provision was further diluted in *Pramati Educational and Cultural Trus*t v. *Union of India*[56] by holding that 2009 Act insofar as it applies to minority schools, aided or unaided, covered under Art.30(1) is *ultra vires* the Constitution.

Social inclusiveness in the field of elementary education is laudable but the means adopted to achieve that object if divides the society in to minority and non-

[54] See Art.29(2) of the Constitution of India.

[55] S.2(n) and S.12 are as follows: S.2(n)-"School" means any recognised school imparting elementary education and includes-school established, owned or controlled by the appropriate Government or a local authority; an aided school receiving aid or grants to meet whole or part of the expenses from the appropriate Government or the local authority; a school belonging to specified category; and an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority; S.12: *Extent of school's responsibility for free and compulsory education.*- (1) For the purposes of this Act, a school.- specified in sub-clause (i) of clause (n) of S.2 shall provide free and compulsory elementary education to all children admitted therein; specified in sub-clause (ii) of clause (n) of S.2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent; specified in sub-clauses (iii) and (iv) of clause (n) of S.2 shall admit in class l, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion: Provided further that where a school specified in clause (n) of S.2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education. (2) The school specified in sub-clause (iv) of clause (n) of S.2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, of the actual amount charged from the child, whichever is less, in such manner as may be prescribed: Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of S.2: Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation. (3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be.

[56] 2014(2) K.L.T. 547(S.C.) para 47.

minority, limiting or curtailing the fundamental rights only to a section of the society, may not bring the desired results but is likely to create negative consequences in the society. The object and purpose of the Act could have been achieved more effectively by limiting or curtailing the fundamental rights guaranteed to both minority and non-minority educational institutions under Article 19(1)(g) and Article 30(1).

5.7.1. Free And Compulsory Admission in Neighbourhood School Violates Art.30, Art.19(1)(g) and Art.15(5).

Every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school[57] coming under the category of the schools mentioned in S.2(n) till completion of elementary education. 'School' under the Act means any recognized school imparting elementary education[58] and includes school established, owned or controlled by the appropriate government or a local authority[59], an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate government or local authority[60], school belonging to specified category[61] and an unaided school not receiving any kind of aid or grants to meet its expenses from appropriate government or local authority[62]. Hence all the schools providing elementary education in the neighbourhood[63] comes under the ambit of the Act[64] which includes aided minority and non minority schools[65] and unaided minority and non minority schools[66]. The provision imposing mandatory obligation to admit students and to provide education goes

[57] In the Central rules on Free and Compulsory Education, neighbourhood is not defined. Hence neighbourhood school under Central Act covers all schools coming under S.2(n). R.6 of the Central rules defines *Areas or limits of neighbourhood*. R.2(o) of Kerala Rules defines *neighbourhood*. Neighbourhood means area near or within a walkable distance of an elementary school referred to in sub clauses (i) and (ii) of cl (n) of S. 2 of the Act and shall include areas of such schools in adjacent local bodies. The Kerala Right of Children to Free and Compulsory Education Rules, 2011, R.6. defines *Areas or limits of neighbourhood.*

[58] S. 2(n).

[59] S. 2(n)(i).

[60] S. 2(n)(ii).

[61] S. 2(n)(iii).

[62] S. 2(n)(iv).

[63] In the Central Act and rules neighbourhood is not defined. Hence neighbourhood school under Central Act covers all schools coming under S. 2(n).

[64] S. 3(1).

[65] See, S. 2(n)(ii).

[66] See, S. 2(n)(iv).

against the right to admission crystallized on private unaided institutions, both minority and non minority, as per the constitutional scheme interpreted by the Supreme Court of India. Private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, *interalia*, of selection of students and fixation of fees[67]. S.12 was held unconstitutional as far as unaided minority educational institutions are concerned in *Society for Unaided Schools, Rajasthan* v. *Union of India*[68], but in *Pramati Educational and Cultural Trust* v. *Union of India*[69], the Court went a step further, holding that S.12 is not applicable even to aided minority educational institutions. However, the validity of the provisions as far as non minority educational institutions are concerned were upheld.

Section 3 of the Act, recognizes the right of the child to free and compulsory education in a neighbourhood school. Unaided educational institutions have only a negative duty of not interfering with the right of the child and not to unreasonably interfere with the realization of those rights and there is no obligation to surrender their rights guaranteed under Article 19(1)(g) and Article 30(1), recognized in *Pai Foundation*[70] and *Inamdar*[71]. The provisions under S.3 had completely taken away the institutional autonomy and the very objective of establishment of the aided and unaided minority schools under Art.30(1). Even S.B.Sinha J. who has dissented with the majority judges on rights of minorities by giving more emphasis to equalizing principles, in *Islamic Academy*[72] upheld the right of admission conferred on the minority educational institutions by observing thus:

> ….At the kindergarten, primary, secondary levels, minorities may have 100% quota….

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67 *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p. 539.
68 (2012) J.T. 3-137.
69 2014(2) K.L.T. 547 (S.C.), para 44 wherein it is held that as non minority educational institutions are reimbursed their expenditure spend in educating the children under the concerned provision, they are consistent with the rights under Art.19(1)(g) and are meant to achieve the goals of constitutional equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in the society.
70 *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p.539.
71 (2005) 6 S.C.C. 537, paras 124-126.
72 *Islamic Academy of Education* v. *State of Karnataka,*(2003) 6 S.C.C. 697 at p. 784, para 199.

The provisions under Section 3 (2)[73]exempting children from paying fees is also against the right of admission by private educational institutions including minority educational institutions. In *TMAPai*[74] it is held :

> In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit….There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that State run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the orginal problem *viz*, the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be 'purchasable' is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examination.

Further, as per the enabling provision under 93rd amendment, minority unaided as well as aided minority institutions are excluded from the purview of providing reservation in admission in educational institutions[75]. A reading of S.

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[73] S.3(2) reads : "For the purpose of sub sec (1), no child shall be liable to pay any kind of fee or charges which may prevent him or her from pursuing and completing elementary education. Provided child suffering from disability as defined in cl (1) of s.2 of Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act,1996 shall have the right to pursue free and compulsory education in accordance with Chapter v of the said Act".

[74] *TMA Pai Foundation* v. *State of Karnataka,*(2002) 8 S.C.C. 481 at p. 546, para 61.

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

2(n) along with S.12 shows that reservation to weaker and disadvantaged sections[76] are to be provided by the schools under S.2(n), which includes minority and non-minority schools. This is violative of Art.15(5) in so far as requiring aided and unaided minority educational institutions to provide for reservation. In *Society for Unaided Schools, Rajasthan* v. *Union of India and Others*[77], unaided minority schools are exempted from providing free and compulsory education. However in view of Art.15(4) and Article 29(2), reservation in aided minority institutions was held proper. In *Pramati Educational Trust* v. *Union of India*[78], the Supreme Court held that even aided minority institutions are outside the purview of the Act, but failed to examine the interrelationship between Art.15(5) and 15(4).

There seems to be no illegality in asking to a school receiving aid from the State in making provisions for weaker sections of the society. As per the Act, even unaided schools could be asked to provide free and compulsory elementary education as expenses are reimbursed by the appropriate government[79]. But imposing the burden solely on non minority educational institutions by the above judicial decisions relying on Art.30 and Art.15(5) is violative of right to establish and administer educational institutions by non-minority[80] under Art.19. Moreover, it is violative of Art.14 of the Constitution as similar treatment has to be accorded to aided educational institutions, both minority and non minority[81]. As the duty to provide reservation is vested on the State, private educational institutions ought not have been made responsible for providing the same. In such a situation, imposing the duty solely on unaided and aided non minority schools is also violative of Art.14 of the Constitution.

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the Constitution Ninety third Amendment) Act, 2005 (*w.e.f.* 20-1-2006). See also S.12(1)(a), (b), (c) of the Central Act.

[76] S.2 (d) '*child belonging to disadvantaged group*' means a child belonging to the Scheduled caste, the Scheduled tribe, the socially and educationally backward classes or such other group having disadvantage owing to social, cultural, economic, geographical, linguistic, gender or such other factor, as may be specified by the appropriate government, by notification; S.2(e) '*child belonging to weaker section*' means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification.

[77] (2012) J.T. 3-137.

[78] 2014 (2) K.L.T. 547.

[79] S.7 of the 2009 Act.

[80] *TMA Pai Foundation* v. *State of Karnataka* , (2002) 8 S.C.C. 481 at p. 539.

[81] See Art.14 and Art. 29(2) of the Constitution of India.

5.7.2. Reservation for Weaker Sections

The Right to Education Act, visualizes reservation for weaker sections and disadvantaged groups. The reservation to disadvantaged group has to be determined based on caste. The weaker sections are determined on the basis of their family income. Article 15(5) specially excludes minority institutions from providing reservation to SC, ST as well as SEBCs. In *Pramati Educational and Cultural Trust* v. *Union of India* [82], the Court held that minority educational institutions are a class by themselves and exclusion of minority institutions in Art.15(5) is not violative of Art.14. The Court failed to clearly examine S.2(d)[83] and S.2(e)[84] of the Act which provides for reservation for groups other than SC/ST or SEBCs.

5.7.3. Free and Compulsory Admission in Neighbourhood School- Kerala Position

In the rules framed by the State of Kerala[85] the unconstitutionality which has arisen as regards S. 3[86] of the Central Act and rules there under has been attempted to be narrowed down by bringing Rule 2(o)[87] defining neighbourhood to include only government schools and aided schools[88].

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[82] 2014 (2) K. L.T. 547(S.C.), para 26.

[83] S. 2(d) reads : "child belonging to disadvantaged group means a child belonging to SC, ST, SEBC or such other group having disadvantage owing to social, cultural, economic, geographic, linguistic, gender or such other factor as may be specified by the appropriate government by notification".

[84] S. 2(e) reads : "child belonging to weaker section means a child belonging to such parent or guardian who annual income is lower than the minimum limit specified by the appropriate Government, by notification".

[85] In exercise of powers conferred under section 38 of the Central Act.

[86] S.3 of the Central Act, 2009 requires schools of specified category and unaided schools not receiving any grant from the government to provide free and compulsory education.

[87] R.2(o) of The Kerala Right of Children to Free and Compulsory Education Rules, 2011 reads thus-: 'Neighbourhood' means the area near or within a walkable distance of an elementary school referred to in sub clauses (i) and (ii) of clause (n) of Section 2 of the Act and shall include areas of such schools in adjacent local bodies.

[88] But R.8 of the Kerala Right of Children to Free and Compulsory Education Rules, 2011 provides that it shall be the responsibility of the Government and local authority to see that children attending a school referred to in sub clauses (iii) and (iv) of clause (n) of S. 2 shall be entitled to free education. Thus though R. 2(o) excludes unaided schools including minority schools and schools of specified category, they are to provide free and compulsory education under R. 8.

The Rule 8 framed by the State of Kerala is slightly in conflict with Rule 2(o)[89]of the Central Act. After restricting the scope of neighbourhood schools, Rule 8 speaks of free education, text books, writing material etc. to the students who are admitted to the schools defined under S. 2(n) (iii) and (iv)[90]. Explanation to the Rule 8 makes clear the responsibility on the unaided Schools, both minority and non-minority, to provide free entitlements to children admitted as per S. 12(1) (c). Thus Schools under specified category, unaided schools, both minority and non minority are also brought within the scheme of free education under above provisions. Harmonizing of the above two rules is subject to judicial interpretation.

5.7.4. Admission of Children in Class Appropriate to Age Vis a vis Art.30, Art. 19(1)(g) and 15(5)

The Act contains provisions for direct admission to a child who has not been admitted to school in a class appropriate to his age. If a child is ten years old and has not ever been to school, he cannot not be admitted to class 1, but should be admitted to a class appropriate to his age. He should be given special training to make him on par with others of his age. The special provisions compelling admission of children who are not admitted to or who have not completed elementary education under s.4[91] is unconstitutional in view of the right to admission, which is a facet of establishment and administration by private educational institutions including minority educational institutions. S. 4[92] providing direct admission to children who have not been admitted or who have not completed elementary education in a class appropriate to his age and giving special training[93] in the manner prescribed, to make them on par with others is not in

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89 *Supra* n. 87.

90 S.2(n)(iii) reads : "School belonging to a specified category". S.2(n) (iv) reads : "an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate government or the local authority".

91 Right of Children to Free and Compulsory Education Act, 2009. S. 4. *Special provisions for children not admitted to, or who have not completed, elementary education*- Where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he or she shall be admitted in a class appropriate to his or her age. Provided that where a child is directly admitted in a class appropriate to his or her age, then, he or she shall, in order to be at par with others, have a right to receive special training, in such manner, and within such time-limits, as may be prescribed.

92 *Ibid.*

93 Right of Children to Free and Compulsory Education Rules, 2010. R.5. *Special Training*-(1) The School Management Committee of a school owned and managed by the appropriate

consonance with the right to admission guaranteed to the private educational institutions under Article 19(1) g, Article 26 and Article 30 of the Constitution of India[94]. Further this is violative of constitutional guarantees under Art.15(5) insofar as unaided minority educational institutions are concerned. After the decision in *Pramati*[95], though minority educational institutions are free of their obligations, the provision seems to be violative of Art.14, when the obligation is solely vested on non minority aided and unaided educational institutions.

The proviso further provides that a child admitted to elementary education as per S. 4 shall be entitled to free education till completion of elementary education even after fourteen years[96]. Though the Act covers duty for providing education for the children of the age group of six to fourteen, the proviso which further enhances the duty to provide education to children admitted under S.4[97] even after fourteen years is an additional burden to the concerned schools. This is also violative of Art.30 as conditions that would completely destroy the autonomy of administration of the educational institutions[98]under Art.30(1) and it is an unreasonable restriction under Art.19(1)g.

5.7.5. Powers of Local Authority and Right to Administration

The 2009 Act provides that appropriate Government has to ensure that child belonging to weaker sections and the children belonging to disadvantaged groups[99]

Government or local authority shall identify children requiring special training and organize such training in the following manner, *viz.*: (a) the special training shall be based on specially designed, age appropriate learning material, approved by the academic authority specified in sub section (1) of S. 29; (b) the said training shall be provided in classes held on the premises of the school, or in classes organized in safe residential facilities; (c) the said training shall be provided by teachers working in the school, or by teachers specially appointed for the purpose; (d) the duration of the said training shall be for a minimum period of three months which may be extended, based on periodical assessment of learning progress, for a maximum period not exceeding two years. (2)The child shall, upon induction into the age appropriate class, after special training, continue to receive special attention by the teacher to enable him to successfully integrate with the rest of the class academically and emotionally.

94 S. 4.

95 2014(2) K.L.T. 547(S.C.)

96 *Supra* n.91.

97 *Ibid.*

98 *All Saints High School* v. *Government of Andra Pradesh,* (1980) 2 S.C.C. 478.

99 S. 2 (d) - Child belonging to disadvantaged group means a child belonging to SC, ST, SEBC or such other group having disadvantage owing to social, cultural, economic, geographic, linguistic, gender or such other factor as may be specified by the appropriate government by notification.

are not discriminated against[100] and prevented from pursuing and completing elementary education on any grounds[101]. Rule 9[102]of the Central rules empowering the appropriate government to oversee that the child attending a school referred to in sub clauses (iii) and (iv) of clause (n) of S. 2[103] in accordance with S.12 shall be provided with free education is an interference with right to administration vested with unaided schools in view of Art.30, Art. 26 and 19(1)(g)[104]. After the decision in *Pramati*[105], the responsibility is vested only on non minority educational institutions which can be said as violative of Art.14 of the Constitution.

[100] See R.11of the Central rules, 2010. See also Kerala Right of Children to Free and Compulsory Education Rules, 2011. R.10. *Admission of children belonging to weaker section and disadvantaged group*- (1)The Head teacher of a school referred to in sub clauses (iii) and (iv) of clause (n) of S. 2, shall ensure that children from the neighbourhood who are admitted against the seats available as provided in clause (c) of sub section (1) of S. 12 shall not be segregated from the other children in the classrooms nor shall their classes be held at places and timings different from the classes held for the other children. (2) The Head teacher of a school referred to in sub clauses (iii) and (iv) of clause (n) of S. 2, shall also ensure that children admitted as required under clause (c) of sub section (1) of S. 12 shall not be discriminated from the rest of the children in any manner pertaining to entitlements and facilities such as text books, uniforms, laboratory, library and Information and Communication Technology facilities, extra curricular activities and sports.

[101] S. 9(c).

[102] Right of Children to Free and Compulsory Education Rules, 2010. R.9. *Responsibilities of the appropriate Government and Local authority*. (1) A child attending a school of the appropriate Government or local authority, referred to in sub clause (i) of clause (n) of S. 2, a child attending a school referred to in sub clause (ii) of clause (n) of S. 2 in accordance with clause (b) of subsection (1) of s. 12, and a child attending a school referred to in sub clauses (iii) and (iv) of clause (n) of S. 2 in accordance with clause (c) of sub section (1) of S. 12 shall be entitled to free education as provided for in sub section (2) of S. 3 of the Act, and in particular to free text books, writing materials and uniforms: Provided that a child with disability shall be entitled also for free special learning and support material. Explanation-For the purposes of sub rule (1), it may be stated that in respect of the child admitted in accordance with clause (b) of sub section (1) of S.12 and a child admitted in accordance with clause (c) of sub section (1) of S.12, the responsibility of providing the free entitlement shall be of the school referred to in sub clause(n) of S. 2 and of sub clauses (iii) and (iv) of clause (n) of S. 2, respectively. (2) For the purpose of determining and for establishing neighbourhood schools, the appropriate Government or the local authority shall undertake mapping, and identify all children, including children in remote areas, children with disability, children belonging to disadvantaged group, children belonging to weaker section and children referred to in S. 4, within a period of one year from the appointed date, and every year thereafter. (3)The appropriate Government or the local authority shall ensure that no child is subjected to class, religious or gender abuse in the school. (4) For the purposes of Clause (c) of S. 8 and clause (c) of S. 9, the appropriate government and the local authority shall ensure that a child belonging to a weaker section and a child belonging to disadvantaged group is not segregated or discriminated against in the class room, during midday meals, in the playgrounds, in the use of common drinking water and toilet facilities, and in cleaning the toilets or classrooms.

[103] *Supra* n. 90.

[104] Right of Children to Free and Compulsory Education Rules, 2010, R.9(1).

[105] 2014(2) K.L.T. 547(S.C.)

5.7.6. Parental Duty in a Right Based Model and Right to Admission in Unrecognized Minority Schools

S. 10[106] makes it the duty of every parent or guardian to admit his child or ward to an elementary education in the neighbourhood school. This provision ensures, the realization of the parental duty to provide elementary education under Art.51A(k)[107]. It should be remembered that *right – based model* does not have any room for punishing parents and children for absenteeism and it is in the *policing model* of education that the onus of the State is shifted on to the parent/guardian and the unwilling parent is penalized. Further, this provision affects minority educational institutions which don't want recognition[108]. Penalty provision in Right to Education Act will force them to close down for want of students as the parents on pain of penalty will sent their wards only to aided or recognized schools. It in fact abridges and indeed takes away right under Art.30(1).

5.7.7. Free Pre School Education

The Act ensures that children get an adequate opportunity to undergo free pre school education[109]. This is important as it provides that children who are put to pre school education have more chance to continue elementary education[110]. Section 11[111] only states that appropriate government shall make arrangement for free pre

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[106] S. 10. *Duty of parents and guardians* – It shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in a neighbourhood school.

[107] It shall be the duty of every citizen of India who is a parent to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

[108] The Constitution deals with the schools established by minority communities in a way different from the way it deals with other schools. Educational institutions started by all minority communities including the Anglo Indians are protected by Art.29 and 30. Minority schools may be of three categories: those which do not seek aid or recognition from the State, those which need aid and those which need recognition and not aid. As regards the first category, penalty provision in Right to Education Act will force them to close down for want of scholars as the parents on pain of penalty will sent their wards to aided or recognized schools. It abridges and indeed takes away right under Art.30(1).

[109] S. 11-*Appropriate Government to provide for pre school, education* –With a view to prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate Government may make necessary arrangement for providing free pre school education for such children.

[110] S. 2 (f)- Elementary education means education from 1st class to 8th class.

[111] *Supra* n.109.

school education. But the Act and the rules are silent on how this can be achieved. If unaided educational institutions also are required to share this burden it will be violative of Art.19 being an unreasonable restriction under that Article. Now Art.15(5) allows reservation in unaided non minority institutions. After the decision in *Pramati Educational and Cultural Trust* v. *Union of India*[112], the liability vests solely on non minority educational institutions which can be said as violative of Art.14 of the Constitution.

5.7.8. Compulsory Admission Violates Art.19(1) g and 15(5)

Section 12 deals with the extent of school's responsibility for free and compulsory education[113]. Schools specified in Sections 2(n)(iii)[114]and (iv)[115] shall admit in class 1 to the extent of at least 25% of the strength of that class, children belonging to weaker sections [116] and disadvantaged groups in the neighbourhood[117] and provide free and compulsory education till its completion[118]. Reservation in admission was not liable to be enforced in private unaided educational institutions as it is the duty of the State. After 93rd amendment Clause (5) was inserted in Article 15 allowing reservation in admission in educational institutions except minority educational institutions[119]. In *Pramati Educational and Cultural Trust* v. *Union of India*[120] the Court held that the objects and reasons of the bill which became the 2009 Act explicitly stated that the 2009 Act is pursuant to Art.21A of the Constitution but did not make any reference to clause (5) of Art.15 of the

[112] 2014(2) K.L.T. 547(S.C.).
[113] Schools established, owned or controlled by the appropriate government or local authority specified in 2(n) (i) shall provide free and compulsory elementary education to all children admitted therein. Similarly aided schools shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of 25%.
[114] S.2(n)(iii)- School belonging to a specified category.
[115] S.2(n)(iv)- an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate government or the local authority.
[116] Right of Children to Free and Compulsory Education Rules,2010, R. 11: *Admission of children belonging to weaker section and disadvantaged group.*
[117] Right of Children to Free and Compulsory Education Rules, 2010-R.6: *Area or limits of neighbourhood.*
[118] S. 12(1)(c).
[119] The constitutionality of 93rd amendment was under challenge which requires non minority aided and unaided educational institutions, including professional educational institutions to provide reservation in admission to SEBCs and SC, STs.
[120] 2014(2) K.L.T. 547(S.C.), paras 44-47.

Constitution. It was submitted that the validity of the provisions of the 2009 Act will, therefore, have to be tested only by reference to Art.21A of the Constitution and not by reference to clause (5) of Art.15 of the Constitution. According to both Mr. Rohatgi and Mr. Nariman, who appeared for the petitioners in the instant case, S.12(1) (c) of the 2009 Act insofar as it provides that a private unaided school shall admit in Class I to the extent of at least 25% of the total strength of the class, children belonging to weaker sections and disadvantaged group in the neighbourhood and provide free and compulsory education till its completion is violative of the right of private unaided schools under Art.19(1)(g) of the Constitution as interpreted by this Court in *TMA Pai Foundation*[121]and *P.A Inamdar*[122]. Regarding minority institutions, it was submitted[123] that private educational institutions cannot have any grievance since they are performing functions of the State. Regarding minority institutions, he contended that they have equal status under Constitution. Further in terms of the judgment in *Society for Unaided Private Schools of Rajasthan* v. *Union of India & Another*[124], the 2009 Act has been amended and the law will be applicable only in aided minority schools.

S. 12(1)(c)[125] is not is consonance with the principles behind Art.15(5)[126] and it infringes minority educational institutions prerogative to admit students of their choice. Requiring them to admit students belonging to disadvantaged and weaker sections into their educational institutions[127] is an invasion into their rights under Art.30 and it was so held in *Pramati*[128]. Similarly, the compulsory admission is

[121] (2002) 8 S.C.C. 481, para 138.
[122] (2005) 6 S.C.C. 537, paras 124-126, 132.
[123] By Adv. Vishwanathan, Additional Solicitor General.
[124] (2012) J.T. 3-137.
[125] Specified in sub clauses (iii) and (iv) of clause (n) of S. 2 shall admit in class 1, to the extent of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion.
[126] Art.15(5) reads : "Nothing in this Article or in sub clause (g) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such provisions relate to their admission to educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30".
[127] Right of Children to Free and Compulsory Education Rules, 2010, R.11- *Admission of children belonging to weaker section and disadvantaged group.*
[128] 2014(2) K.L.T. 547(S.C.), para 44.

violative of the right of private unaided schools under Art.19(1)(g) of the Constitution as interpreted by the Supreme Court in *TMA Pai Foundation*[129] and *P.A. Inamdar*[130]. Inspite of rejection of these contentions in *Pramati*, the matter is likely to be a subject of judicial review by a larger bench as far as burden of providing reservation in admission is shouldered solely by non-minority educational institutions.

5.7.9. Compulsory Seat Sharing on Fee Determined by Government

Section 12(1)(c)[131], casts an obligation on the unaided private educational institutions both non-minority and minority to admit to class 1, at least 25% of the strength of those children falling under Ss. 2(d) and 2(e), and also in the pre-school, if there is one. State also has undertaken re-imbursement of the fees of those children to the extent of per- child expenditure incurred by the State. Compulsorily providing for seat sharing with the State on a fee structure determined by the State is an unreasonable restriction under Art.19(1)(g). *Pai Foundation*[132] and *Inamdar*[133] took the view that the State cannot regulate or control admission in unaided educational institutions so as to compel them to give up a share of available seats which would amount to nationalization of seats and such an appropriation of seats would constitute serious encroachment on the right and autonomy of the unaided educational institutions[134]. *Inamdar* has also held that to admit students being an unfettered fundamental right, the State cannot make fetters up to the level of under graduate education[135]**.** In *Pramati Educational and Cultural Trust* v. *Union of India*[136] the Court has held that the 2009 Act in so far as it applies to minority schools aided or unaided is *ultra vires* the Constitution.

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[129] *Supra* n. 121.
[130] *Supra* n. 122.
[131] Clause 12(1)(c) reads : "Specified in sub-clauses (iii) and (iv) of clause (n) of S. 2 shall admit in class I, to the extent of at least twenty –five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory education till its completion".
[132] *Supra* n.67.
[133] *P.A. Inamdar* v. *State of Maharastra*,(2005) 6 S.C.C. 537.
[134] *Id.* at p.539. Answer to question 1.
[135] *Id.*at paras 105 to 107,133 and 134.
[136] 2014(2) K.L.T. 547(S.C.), para 47 .

5.7.10. Appropriation of Quota and Enforcement of Reservation Policy

S.12(1)(c)[137] read with S.2(n)(iv)[138] of the Act never envisages any distinction between unaided minority schools and non-minority schools. Constitution Benches of the Supreme Court have categorically held that so far as appropriation of quota by the State and enforcement of reservation policy is concerned, there is not much difference between unaided minority and non-minority educational institutions[139]. Further, it was also held that both unaided minority and non-minority educational institutions enjoy "total freedom" and can claim "unfettered fundamental rights" in the matter of appropriation of quota by the State and enforcement of reservation policy. The Court also held that imposition of quota or enforcing reservation policy are acts constituting serious encroachment on the right and autonomy of such institutions both minority (religious and linguistic) and non- minority and cannot be held to be regulatory measures in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Therefore, no distinction or difference can be drawn between unaided minority schools and unaided non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c)[140] of the Act.

Pai Foundation[141] has stated that in as much as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. However, there can be a reasonable revenue surplus, which may be generated by the educational institutions for the purpose of development of education and their expansion. Consequently, the mere fact that education in one sense is regarded as charitable does not provide the Government, with authority to appropriate 25% of the seats of the unaided private educational institutions. *Pai Foundation* and *Inamdar* after holding that occupation of

[137] *Supra* n.131.
[138] *Supra* n.115.
[139] *P.A. Inamdar* v. *State of Maharastra,*(2005) 6 S.C.C. 537, paras 124,125.
[140] *Supra* n.131.
[141] *TMAPai Foundation* v. State of Karnataka,(2002) 8 S.C.C. 481, para 57.

education can be regarded as charitable, held that the appropriation of seats in an unaided private educational institution would amount to nationalization of seats and an inroad into their autonomy. The unaided schools specified in sub clause (iv) of clause (n) of S. 2 providing free and compulsory elementary education is entitled to be reimbursed[142]. The Central Government in rules framed takes the burden for the implementation of Act by giving grant in aid by due procedure prescribed in Rule 7[143]. The government has framed provisions in the rules to ensure that expenditure incurred by the unaided schools are reimbursed and Rules 12[144] of the Central Rules and Rule 11[145] of the Kerala rules prescribes somehow similar

[142] S. 12(2)-The school specified in sub clause (iv) of clause (n) of S. 2 providing free and compulsory elementary education as specified in clause (c) of sub section (1) shall be reimbursed expenditure so incurred by it to the extent of per –child expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed.

[143] Right of Children to Free and Compulsory Education Rules, 2010. R.7 *Financial Responsibility of the Central Government* -(1)The Central Government shall prepare annual estimates of capital and recurring expenditure for carrying out the provisions of the Act, for a period of five years, within one month of the appointed date, which may be reviewed for every three years. (2) In order to implement the provisions of the Act, the Central Government shall, within a period of six months of the appointed date, ensure that its programmes for elementary are in conformity with the provisions of the Act. (3) The Central Government shall, within a period of six months from the date, hold consultation with the State Governments and determine the percentage of expenditure which it shall provide to the State Governments as grants-in-aid of revenues for implementation of the Act. (4) Within one month of the appointed date, the Central Government shall cause a reference to be made to the Finance Commission, and cause similar references to be made every time the estimates are revised: Provided that in case there is no Finance Commission in existence at the time of a particular reference, the Central Government may setup an alternative mechanism for the purpose of providing resources to the State Governments.

[144] Right of Children To Free and Compulsory Education Rules, 2010. R.12. *Reimbursement of per child expenditure by the appropriate Government*.-(1)The total annual recurring expenditure incurred by the appropriate Government, from its own funds, and funds provided by the Central Government and by any other authority, on elementary education in respect of all schools referred to in sub clause (i) of clause (n) of S. 2, divided by the total number of children enrolled in all such schools, shall be the per child-expenditure incurred by the appropriate Government. Explanation-For the purpose of determining the per-child-expenditure, the expenditure incurred by the appropriate Government or local authority on schools referred to in sub –clause (ii) of clause (n) of S. 2 and the children enrolled in such schools shall not be included. (2) Every school referred to in clauses (iii) and (iv) of clause (n) of S. 2 shall maintain a separate bank account in respect of the amount received by it as reimbursement under sub section (2) of S. 12.

[145] Kerala Right of Children to Free and Compulsory Education Rules, 2011, R.11 - *Reimbursement of per child expenditure by the Government* - (1) The ratio between total annual recurring expenditure incurred by the Government , from the Consolidated Fund and fund provided by the Central Government or any other authority, on elementary education in respect of all Government and local authority schools referred to in sub clause (i) of clause (n) of S. (2) and total number of children enrolled in all such schools, shall be the per child expenditure incurred by the Government. Explanation-(i) For the purpose of determining the per child expenditure, the expenditure incurred by the Government or local authority on schools referred to in sub clause (ii) of clause (n) of S. 2 and the children enrolled in such schools shall not be included. (2) (a) The Government shall constitute a committee comprising of Secretary (Finance), Secretary (General Education), Secretary (Local Self Government), Director of Public

method for reimbursement of expenses. Reimbursement of expenses cannot be made a reason to surrender the right to admission which is an important facet of administration.

Reimbursement of fees at the Government rate is not an answer when the unaided private educational institutions have no constitutional obligation and their Constitutional rights are invaded. Unaided educational institutions, over a period of time, might have established their own reputation and goodwill, a quantifiable asset. Nobody can be allowed to rob that without their permission, not even the State.

S.12(1)(c), can be given effect to, only on the basis of principles of voluntariness and consensus laid down in *Pai Foundation* and *Inamdar* [146]or else, it may violate the rights guaranteed to unaided non-minority institutions.

Now Art.15(5) enables State to enforce its policy of reservation in unaided non minority educational institutions but unaided minority educational institutions can get the protection of Art.15(5) and Art 30. This has been upheld in *Society for Unaided Schools, Rajasthan*[147]. Further, in *Pramati*[148]aided minority is also absolved of this duty. Thus non minority educational institutions, both aided and unaided alone are responsible for providing free and compulsory education which can be said as violative of equality clause under Art.14.

Instruction and Director (Sarva Siksha Abhiyan) to assess the per child expenditure for the next academic year. (3) The Committee shall meet three months after the appointed date and thereafter every year during the month of September. (4) The reimbursement of expenditure incurred by a school under specified category and an unaided school on the children under clause (c) of sub section (1) of S.12 shall be made directly through electronic transfer to a separate bank account maintained by the school in two installments during the academic year. The first installment of 50% shall be reimbursed during the month of September and balance during the month of January. The second installment shall be made after verification of the retention and attendance of such children subject to a minimum of 80% and the pupil cumulative record. (5) Every school referred to in sub clauses(iii) and (iv) of clause (n) of S. 2 shall maintain a separate bank account in respect of the amount received by it as reimbursement under sub section (2) of S. 12. (6) Every school shall provide such information as may be called for by the Government or the local authority under this rule.

[146] *P.A. Inamdar* v. *State of Maharastra*,(2005) 6 S.C.C. 537 at p.602, para 128.

[147] (2012) J.T. 3-137.

[148] 2014(2) K.L.T. 547(S.C.).

5.7.11. Freeship violates Rights of Unaided Minority Schools

Reiterating *Rev. Sidhajbhai Sabhai* v. *State of Bombay*[149], wherein the Court held the rule authorizing reservation of seats and the threat of withdrawal of recognition under the impugned rule to be violative of Article 30(1), the Court in *Society for Unaided Private Schools, Rajasthan* v. *Union of India and Others*[150]held :

> The right established by Article 30(1) is a fundamental right declared in terms absolute unlike the freedoms guaranteed by Article 19 which is subject to reasonable restrictions. Article 30(1) is intended to be a real right for the protection of the minorities in the matter of setting up educational institutions of their own choice. However, regulations may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition. However, such regulation must satisfy the test of reasonableness and that such regulation should make the educational institution an effective vehicle of education for the minority community or for the persons who resort to it. …[151]

Reservation of 25% seats in such unaided minority schools will result in changing the character of the schools as the right to establish and administer such schools flows from the right to conserve the language, script or culture. Thus, the 2009 Act including Section 12(1)(c) violates the right conferred on such unaided minority schools under Article 30(1). The finding that freeship or appropriation of quota is not possible in unaided minority schools holds good but there is no justifiable judicial reasoning in the *Pramati Educational and Cultural Trust* v. *Union of India*[152] for making it applicable to unaided non-minority schools. Providing reservation in admission is a governmental obligation. Minority unaided educational institutions have been exempted from providing reservation. The Court took the view that that the provisions of the 2009 Act providing free and compulsory education to children between the ages of six and fourteen are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society and hence

[149] (1963) S.C.R. 837.
[150] (2012) 6 S.C.C. 1.
[151] *Id*. at para 58 .
[152] 2014(2) K.L.T. 547(S.C.), para 44.

doesn't violate Art.19(1)(g). However after the decision in *Pramati*[153], aided and unaided minority educational institutions are absolved of this liability.

5.7.12. Aided Educational Institutions, Minority and Non Minority Under S.12 (1) (b)

S.12(1) (b) of the 2009 Act is concerning the schools receiving aid or grants to meet whole or part of its expenses from the appropriate government or local authority[154]. Those schools are bound to provide free and compulsory elementary education to such proportion of children subject to a minimum of 25% depending upon its annual recurring aid or grants so received. *Pai Foundation*[155] has clearly drawn a distinction between aided private educational institutions and unaided private educational institutions both minority and non minority. So far as private aided educational institutions, both minority and non-minority are concerned, it has been clearly held in *Pai Foundation*[156] that once aid is provided to those institutions by the Government or any state agency, as a condition of grant or aid, they can put fetters on the freedom in the matter of administration and management of the institution[157]**.** *Pai Foundation*[158] after referring to *St. Stephen*[159] judgment and Articles 29 and 30 held that even if it is possible to fill up all the seats with minority group, the moment the institution is granted aid the institution will have to admit students from non-minority groups to a reasonable extent without annihilating the character of the institution. The Court also held that by admitting a member of a non minority into a minority institution, it does not shed its character and cease to be a minority institution and such "sprinkling of outsiders" would enable the distinct language, script and culture of a minority community to be propagated amongst non members of a particular community and would indeed better serve the object of serving the language, religion and culture of that

[153] *Ibid.*
[154] S.12(1)(b) –"a school specified in S.2(n)(ii) shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of 25%".
[155] 2002(8) S.C.C. 481.
[156] *Ibid*.
[157] *TMA Pai Foundation* v. *State of Karnataka,*(2002) 8 S.C.C. 481 at p.584, paras 144, 152.
[158] *Ibid*.
[159] (1992) 1 S.C.C. 558.

minority[160]. Thus clause 12(1)(b) directing the aided educational institutions, minority and non-minority to provide admission to the children of the age group of 6 to14 years would not affect the autonomy or the rights guaranteed under Article 19(1)(g) or Article 30(1) of the Constitution of India.

Reservation in aided minority institutions were challenged being violative of Art.15(5) but in *Society for Unaided Private Schools, Rajasthan*[161], the Court upheld S.12 requiring aided minority schools to provide reservation in aided minority educational institutions in view of Article 21A. However subsequent judgment in *Pramati Educational and Cultural Trust* v. *Union of India*[162]both aided and unaided minority schools are exempted from the purview of providing reservation.

5.7.13. Applicability of TMA Pai and Inamdar

In *Society for Unaided Private Schools, Rajasthan* v. *Union of India and Another*[163], it has been held in the majority judgment that the petitioners in *TMA Pai* and *Inamdar* were professional educational institutions and the law regarding the extent of state regulation in the field of professional education was the issue in those cases and that will not be applicable in testing the validity of S. 12 (1) (c). The Court held :

> On reading *TMA Pai Foundation* and *P.A. Inamdar* in proper perspective, it becomes clear that the said principles have been applied in the context of professional/higher education where merit and excellence have to be given due weightage and which tests do not apply in cases where a child seeks admission to class I and when the impugned S. 12(1)(c) seeks to remove the financial obstacle. Thus, if one reads the 2009 Act including S. 12(1)(c) in its application to unaided non-minority school(s), the same is saved as reasonable restriction under Article 19(6).

It is hyper technical to distinguish *TMAPai* as well as *Inamdar,* on the ground that the dictum therein will be applicable only to professional educational

[160] *Id.* at para 102. See also *In Re, Kerala Education Bill*, 1959 S.C.R. 995 at pp.1051-52.
[161] (2012) 6 S.C.C. 1.
[162] 2014 (2) K.L.T. 547(S.C.).
[163] *Ibid.*

institutions. Though professional educational institutions were the parties therein, most of the declarations of rights therein were related to educational institutions in general. All the questions which were framed, considered and answered by *TMAPai*, were related to the rights of educational institutions by minorities and non-minorities[164]. Nowhere in the judgment, the Supreme Court had restricted the scope of the declaration of law to professional educational institutions. It was not mere decision on inter party dispute but declaration of law by the constitutional bench on the questions framed by them.

5.7.14. Prohibition of Screening in Admission in Conflict With Art.30 and 19(1)(g)

Section 13 of the Act provides that no capitation fee[165] be charged and no screening procedure[166]be adopted in admitting students to the Schools. It imposes punishment on those subjecting children to screening procedure. Screening[167]of students is totally prohibited. This section[168]is against the right of private educational institutions to admit students of their choice. The private educational institutions can have an admission procedure which is *fair, transparent and non exploitative*. Further, private minority educational institutions imparting general education can give admission to the extent of 100% to members of their own community. In *TMA Pai Foundation*[169] it was held that any system of student selection would be unreasonable if it deprives the private unaided institutions of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed. Further in *Kriti sisodia* v. *Directorate of*

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[164] *TMA Pai Foundation* v. *State of Karnataka*,(2002) 8 S.C.C. 481, paras 161,48-66.

[165] S. 13(1) *No Capitation fee and screening procedure for admission* – "(1) No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or parents or guardian to any screening procedure". S.13(2) "Any school or person, if in contravention of the provisions of sub section(1)-(a) receives capitation fee, shall be punishable with fine which may extend to ten times the capitation fee charged".

[166] S.13(2)(b) – "subjects a child to screening procedure, shall be punishable with fine which may extend to twenty five thousand rupees for the first contravention and fifty thousand rupees for each subsequent contraventions".

[167] S. 2(o)- *Screening Procedure* means the method of selection for admission of a child, in preference over another, other than a random method.

[168] *Supra* n.165.

[169] (2002) 8 S.C.C. 481at p.540, para 40.

Education[170]the Court held that minority educational institutions can have their own admission procedures subject to national interest.

Thus reasonable regulations can be there for maintaining excellence but preventing a fair screening procedure at the elementary level is not a reasonable regulation to enhance excellence of the institution.

5.7.15. Prohibition of Denial of Admission, Holding Back and Expulsion- Violative of Art.30, Art.26 and 19(1)(g)

S.15 prohibits denial of admission to students[171]. Students who seek admission are to be provided admission at the commencement of the academic year or within the extended period as may be prescribed[172]. This provision also transgresses with the right of admission to the minority educational institutions which is a facet of administration as also against the right of non minority unaided institutions under Articles 26 and 19(1)g. There is prohibition against holding back and expulsion under S.16[173]. The Act also requires that there shall be no physical or mental harassment[174] to children and actions may be taken against such persons who indulge in such activities[175]. This takes away the right of administration by private managements especially of the minority managements right to administer educational institutions. If no student is to be expelled or held back merit may be a casualty and private educational institutions whose very existence depends on the reputation it has in providing quality education will be severely affected.

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[170] W.P. 895 of 2007(Del.) H.C.

[171] S. 15- *No denial of admission*- "A child shall be admitted in a school at the commencement of the academic year or within such extended period as may be prescribed: Provided that no child shall be denied admission if such admission is sought subsequent to the extended period: Provided further that any child admitted after the extended period shall complete his studies in such manner as may be prescribed by the appropriate government".

[172] Kerala Right of Children to Free and Compulsory Education Rules, 2011.R. 13-*Extended period for admission* -"(1)Extended period of admission shall not exceed three months from the date of commencement of the academic year of a school. (2) Where a child is admitted in a school after the extended period he shall be provided with such special training for such period, as may be determined by the Head teacher of the school".

[173] S. 16 – *Prohibition of holding back and expulsion* – "No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education".

[174] S. 17 – *Prohibition of physical punishment and mental harassment to child* – "(1) No child shall be subjected to physical punishment or mental harassment".

[175] S. 17(2)-" Whoever contravenes the provisions of sub section (1) shall be liable to disciplinary action under the service rules applicable to such person".

5.7.16. Conditions for Recognition

S.18[176] provides that schools other than those established, owned or controlled by the appropriate government[177] or local authority shall, have to obtain a certificate of recognition from concerned authority and the proviso to S.18[178] stipulates that no recognition shall be granted to a school unless it fulfills norms and standards specified under S.19[179]. There is no doubt that refusal for recognition and affiliation without sufficient reasons[180] is an impermissible regulation under Art.30(1) and Art.19(1)g, but the extent of infringements as far the norms and standards are concerned have to be tested in court of law.

In *Society for Unaided Private Schools Rajasthan* v. *Union of India and Others*[181], the Court referring to *TMAPai* held :

> In *TMA Pai Foundation*, this Court *vide* para 53 has observed that the State while prescribing qualifications for admission in a private unaided institution may provide for condition of giving admission to small percentage of students belonging to weaker sections of the society by giving them freeships, if not granted by the government. Applying the said law, such a condition in S.12(1)(c) imposed while granting recognition to the private unaided non-minority school cannot be termed as unreasonable. Such a condition would come within the principle of reasonableness in Article 19(6).

This proposition does not hold good as conditions of recognition and affiliation which can have the effect of completely taking away the rights vested

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[176] S.18- *No school to be established without obtaining certificate of recognition* – "(1) No school, other than a school established, owned or controlled by the appropriate Government or the local authority, shall, after the commencement of this Act, be established or function, without obtaining a certificate of recognition from such authority, by making an application in such form and manner, as may be prescribed".

[177] This is in tune with para 67 *TMA Pai* dealing with minority and non minority aided educational institutions wherein it is held : "To aid is not to destroy. The State is undoubtedly free to stop aid or recognition to a school if it is mismanaged. It can even as an interim measure, arrange in the interests of the students to run that school pending its making other arrangements to provide other educational facilities. But it cant compulsorily take over school…infringe rights to establish and maintain under Art.19(1)(g) or Art.30(1)".

[178] Provided that no such recognition shall be granted to a school unless it fulfills norms and standards specified under Section 19.

[179] S.19 – *Norms and standards for school* – "(1) No school shall be established, or recognized under S.18, unless it fulfills the norms and standards specified in the Schedule". See the Schedule given at the end of the Act regarding norms and standards to be followed by the schools under the Act.

[180] *All Saints High School* v. *Government of Andra Pradesh,*(1980) 2 S.C.C. 478.

[181] (2012) 6 S.C.C. 1.

under Arts.19(1) (g) and 30 through unreasonable restrictions. The court could not have justified imposition compulsory reservation and freeships in unaided schools in view of the observations in para 53 of *TMA Pai*. *TMA Pai* was further explained in *Inamdar* making it clear that fixation of percentage of quota are to be read and understood only as a consensual arrangement[182].

5.7.17. Schools Following International Baccalaureate System of Education

There are schools following the International Baccalaureate system of education; their syllabus, curriculum, method of instructions are totally different from other schools. There are no day scholars, and all the students have to stay in the Boarding and the school fees is also high. Most of the students studying in the school are not from the neighbourhood but from all over the country and abroad. They are not affiliated or recognized by any State Education Board or the Board constituted by the Central Government or the Indian Council of Secondary Education etc. and those schools generally follow the rules laid down by the recognizing body and are, therefore, unable to fulfill the norms and standards specified in Sections.18 and 19 as also the schedule referred to in S. 19.

In *Society for Unaided Private Schools, Rajasthan* v. *Union of India and Others*[183], it has been held that there are boarding schools and orphanages in several parts of India. In those institutions, there are day scholars and boarders. The 2009 Act could only apply to day scholars. It cannot be extended to boarders and it was recommended that appropriate guidelines be issued under S.35[184] of the 2009 Act clarifying the above position.

5.7.18. Effect on High Performing Low Cost Schools

Where a school established before the commencement of this Act, does not fulfill the norms specified in the schedule, it shall have to take steps to fulfill such norms within a period of 3 years[185]otherwise its recognition could be withdrawn[186]

[182] (2005) 6 S.C.C. 537, at p.602, para128.
[183] *Ibid.*
[184] S.35-*Power to issue directions*.
[185] S .19(2) – "Where a school established before the commencement of this Act does not fulfill the norms and standards specified in the Schedule, it shall take steps to fulfill such norms and

and the school ceases to function[187]. Any person who establishes or runs school without recognition or continues to run a school after withdrawal of recognition shall be liable to fine[188]. It does not come within the reasonable restrictions under Article 19(1)g, Article 26 as well as Article 30. The Right to Education Act mandates private schools to conform to a set of new regulations within 3 years, or face closure. These regulations include certified teachers, official curricula and set teaching times. Many fear that they will lead to the closure of many high performing, low cost private schools[189]. In *P.A. Inamdar*[190] it was held :

> Dealing with unaided minority educational institutions, *Pai Foundation*… However, a distinction is to be drawn between minority educational institutions of the level of schools and undergraduate colleges on the one side and institutions of higher education, in particular, those imparting professional education, on the other side. In the former, the scope of merit based selection is practically nil and hence may not call for regulation...

5.7.19. Composition of School Management Committee

The composition of School Management Committee is violative of right to administration of educational institutions. S. 21[191]requires constitution of School Management Committee[192] and stipulates the composition of its members and their

standards at its own expenses, within a period of three years from the date of such commencement".

[186] S.19(3) – "Where a school fails to fulfill the norms and standards within the period specified under sub section (2), the authority prescribed under sub section (1) of S. 18 shall withdraw recognition granted to such school in the manner specified under sub section (3) thereof".

[187] S.19(4)- "With effect from the date of withdrawal of recognition under sub section (3), no school shall continue to function".

[188] Any person who continues to run school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which the contravention continues.

[189] S.19(3).

[190] *P.A. Inamdar* v. *State of Maharastra,*(2005) 6 S.C.C. 537 at p.594, para 105.

[191] S. 21 *School Management Committee*-"(1) A school, other than a school specified in sub clause (iv) of clause (n) of S. 2, shall constitute a School Management Committee consisting of the elected representatives of the local authority, parents or guardians of children admitted in such school and teachers: Provided that at least three fourth of members of such Committee shall be parents or guardians: Provided further that proportionate representation shall be given to the parents or guardians of children belonging to disadvantaged group and weaker section: Provided also that fifty percent of members of such Committee shall be women".

[192] Right of Children to Free and Compulsory Education Rules, 2010.R.3. *Composition and functions of the School Management Committee*.

functions[193]. Schools under S. 2(n)(iv)[194] are excluded from its ambit. Thus unaided minority and non minority schools are rightly excluded from the need to constitute a School Management Committee as it is against their right to administration. However, the aided minority schools have to comply with the requirements of Section 21[195]. Introduction of an outside authority either directly or through its nominees in the governing body or the managing committee of minority institution is an impermissible regulation under Article 30(1). It has the right to establish and administer educational institutions of their choice under Art.30 and only reasonable regulations can be imposed upon them[196].

The minority right to administer educational institutions of their choice by aided minority is infringed by the regulations envisaged by the provision[197] and interferes with it[198].

In *State of Kerala* v. *Very Rev. Mother Provincial*[199],the Supreme Court has held that administration means 'management of the affairs' of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best

[193] The Right of Children to Free and Compulsory Education Rules, 2010. R.4. *Preparation of School Development plan.*

[194] S. 2(n)(iv)- "an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority".

[195] S. 21 *School Management Committee*-"(1) A school, other than a school specified in sub clause (iv) of clause (n) of S. 2, shall constitute a School Management Committee consisting of the elected representatives of the local authority, parents or guardians of children admitted in such school and teachers".

[196] Second class of minority institutions consist of two categories, a) those which by the Constitution itself expressly made eligible for receiving grants and b) those which are not entitled to any grant by virtue of any express provision of the Constitution but nevertheless seek to get aid and therefore, to continue their institutions they will have to seek aid and will naturally have to surrender their constitutional right of administering the educational institutions of their choice. Arts. 28(3), 29(2) and 30(2) postulate educational institutions receiving aid from the State. Stringent terms as condition precedent to grant of aid virtually deprive rights. Granting of aid is a normal function of government which must be discharged in a reasonable way and without infringing the rights of minorities.

[197] S. 21.

[198] S. 21(2)- "The School Management Committee shall perform the following functions, *viz,* monitor the working of the school; prepare and recommend school development plan; monitor the utilization of the grants received from the appropriate Government or local authority or any other source; and perform such other functions as may be prescribed".

[199] (1970) 2 S.C.C. 417.

served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right.

In *Ahmedabad St .Xaviers' College Society* v. *State of Gujarat*[200] , Khanna, J. held thus:

> ….The 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 for the minority community or other persons who resort to it.

There is a move proposing amendment to Section 21, adding a provision stating that the School Management Committee constituted under sub-section (1) of S. 21 in respect of a school established and administered by minority whether based on religion or language, shall perform advisory functions only. The apprehension that the committee constituted under S. 21(1) would replace the minority educational institution is, therefore, unfounded[201].

5.7.20. Curriculum, Evaluation Procedure and Exemption From Board Exams

Chapter V of the Act dealing with curriculum and evaluation procedure for elementary education is also not in consonance with minority rights under Art.30[202]. The provision that medium of instruction shall be in child's mother tongue[203] is also violative of minority right to establish and administer educational institutions of their choice. S.30(1)[204] exempts children to pass any board exam till completion of elementary education. This is violative of the right to administration

[200] (1974) 1 S.C.C. 717 Khanna, J. in a concurrent judgment at p.770, para 74.

[201] Learned Additional Solicitor General in *Society for Unaided Private Schools, Rajasthan* v. *Union of India and Others,* (2012) J.T. 4-137, made available a copy of a Bill, proposing amendment to Section 21, adding a provision stating that the School Management Committee constituted under sub-section (1) of Section 21 in respect of a school established and administered by minority whether based on religion or language, shall perform advisory functions only. The apprehension that the committee constituted under S. 21(1) would replace the minority educational institution is, therefore, unfounded. [Ref. F.No.1-22009-E.E-4 of Government of India (Annexure A-3)]

[202] S. 29(1) The curriculum and the evaluation procedure for elementary education shall be laid down by an academic authority to be specified by the appropriate Government by notification.

[203] S. 29(2)(f).

[204] S.30(1)- "No child shall be required to pass any Board examination till completion of elementary education".

of aided and unaided minority educational institutions as well as unaided non minority educational institutions.

5.8. Conclusion

Admission is a facet of administration of minority and non minority educational institutions and therefore only reasonable regulations can be made with regard to the right to admission. In private educational institutions at school level, run by minority and non minority, there is much discretion for the management under Arts.30, 26 and 19(1)(g). The Right to Free and Compulsory Education Act, 2009, enacted by the Central Government contains provisions violative of right to admission in institutions run by both minority and non minority, unaided and aided. The Act makes serious inroads into Constitutional guarantees and come in conflict with the judgments of the Supreme Court regarding rights of minority and non minority to run schools. The majority judgment in *Society for Unaided Private Schools .Rajasthan* v. *Union of India and Others*[205] which upheld the validity of the Central legislation holding unaided private schools responsible for free ships and subjecting their recognition to Ss. 18 and 19 make inroads into Arts.19 and 30 of the Constitution. The judgment in *Pramati*[206] held that S.12[207] is unconstitutional so far as it applies to aided and unaided minority schools, thus discriminating minority and non- minority from achieving the national goal of elementary education to all its citizens is really disturbing. The following suggestions are made to make the Act in consonance with constitutional policy of the State.

Article 21A casts an obligation on the State to provide free and compulsory education to children of the age of 6 to 14 years and not on unaided non-minority and minority educational institutions. The Supreme Court ought to have held that the rights of children to free and compulsory education guaranteed under Article 21A and RTE Act can be enforced against the schools defined under S. 2(n) of the Act, except unaided minority and non-minority schools.

[205] (2012) J.T. 4-137.
[206] 2014(2) K.L.T. 547 (S.C.).
[207] S.12-Extent of school's responsibility for free and compulsory education.

S.12(1)(c) should have been read down so far as unaided non-minority and minority educational institutions are concerned, only subject to the principles of voluntariness, autonomy and consensus and not on compulsion or threat of non-recognition or non-affiliation.

No distinction or difference can be drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under S.12(1)(c) of the Act. Such an appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.

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

Sections 4[208], 10[209], 14[210], 15[211] and 16[212] are to be directory in their content and application.

The provisions in S.21 regarding the composition of School Management Committee, would not be made applicable to the schools covered under sub-section (iv) of clause (n) of S. 2. They shall also not be applicable to minority institutions, whether aided or unaided.

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[208] S. 4 deals with special Provisions for children not admitted to, or who have not completed, elementary education.
[209] S. 10 deals with duty of parents and guardians.
[210] S. 14 deals with proof of age for admission.
[211] S. 15 deals with denial of admission.
[212] S. 16 deals with prohibition of holding back and expulsion.

Chapter - 6

ADMISSION IN MINORITY PROFESSIONAL EDUCATIONAL INSTITUTIONS IN KERALA

Chapter - 6

ADMISSION IN MINORITY PROFESSIONAL EDUCATIONAL INSTITUTIONS IN KERALA

"Until we get equality in education, we won't have an equal society".

Sonia Sotomaqor[1]

6.1. Introduction

The State of Kerala is much forward in providing education at elementary as well as technical and professional levels unlike most other States. The State has from its inception, understood the need to have governmental control over all levels of education so that merit as well as requirements of socially and economically backward classes are taken care of. The governmental machinery has at various stages tried to have universal education at elementary level very much early to the enactment of Central Act of 2009, providing for free and compulsory education[2]. More over, many regulations and Acts were enacted for regulating admission and conduct of courses at the professional levels in tune with the various judicial pronouncements of the higher judiciary so as to bring merit based admission which is transparent, non exploitative and following a fair procedure[3]. The attempts by the State to provide elementary education by framing State rules in consonance with the Central enactment on free and compulsory education is perused in the Chapter discussed above. Attempts by the State of Kerala in regulating admission in professional educational institutions and its impact on right of admissions by minority managements and students are examined in this Chapter.

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1 Judge, Supreme Court of America.

2 See *In re, Kerala Education Bill,* A.I.R.1958 S.C. 956.

3 See, Kerala Unaided Professional Colleges (Admission of Students and Fixation of Fee) Regulations, 2002; Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non –Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006.

6.2. Minority Professional Educational Sector in the State of Kerala

The professional educational scenario in the State of Kerala is seen dominated by the minority managements. Even in 2006, there were eight Self Financing Medical Colleges in the State out of which five belonged to Christian management, one belonged to Muslim management and two belonged to Hindu management. Out of the total 49 Self Financing Engineering Colleges, 18 belonged to Christian management, thirteen belonged to Muslim management, one belonged to a secular organization and seventeen belonged to Hindu management. Out of 51 nursing colleges, 28 colleges belonged to Christian management[4]. There is considerable increase in the number of colleges managed by minority institutions in recent times[5]. The table produced along with counter affidavit of the State evidenced that minority students secured more admission based merit than their percentage of population for various professional courses in the year 2006-2007[6]. The sanctioned strength for admission to various private unaided professional colleges under minority and non minority managements for the year 2006-2007[7] had shown than non-minority was having only around 35% seats in Engineering and 10 % for MBBS courses. Minority community was having excess percentage of seats than percentage of population for all professional courses. The total number of students admitted from non minority communities for professional courses is much less than the other communities considering the percentage of population. The minority communities are obtaining admissions in the governmental institutions at a rate more than their percentage of population and they are having their institutions, which will cater the additional needs of their own community. The non minorities rely on the minority educational institutions for their educational requirements. Most of the governmental initiatives to regulate

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4 Statistics from *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K. L.T. 409 at p. 418, para 6.

5 Copy of the agreement between the government and Collective Association of Engineering Colleges issued as per Letter. No.44454/ G3/2011/ H.Edn. Higher Education (G) Department Trivandrum, dated 23.1.2012 received from the State Public Information Officer, under Right to Information Act in response to an application dated 5.11.2010 and 09.12.2011 by the research scholar speaks about existence of 75 Engineering Colleges.

6 Counter affidavit filed by the State of Kerala in WP(c) 18307/2006.

7 *Ibid.*

admission in professional education sector gets struck down on the ground that it is against the right to establish and administer educational institutions by minorities.

The governmental machinery in Kerala has attempted several times to give a fresh treatment to the concept of minority and minority educational institutions so that the real purpose of determination of minority and conferment of minority rights is achieved. The criteria for determination of minority and conferment of educational rights should not be mere numerical inferiority of certain religious or linguistic groups. Dominance in the educational field when compared with the non minority can be a relevant factor in determining whether a group could be conferred minority status so as to enable them to avail minority educational rights. In Kerala, we have educational institutions established by different sub groups of major religions. When religious sub groups such as ezhavas, latin christians, nadar population etc. start minority educational institutions the percentage of students belonging to the particular sect who get admission in their educational institutions can be a relevant factor if the idea of conferring minority rights is to instill a sense of confidence and security among such groups so as to bring them on par with the majority. The issue is relevant in the context of reply to question no.2 by the Supreme Court in *TMA Pai* wherein Court opined that the meaning of expression 'religion' or whether the followers of a sect or denomination of a particular religion can claim protection under Art.30(1) on the basis that they constitute a minority in the State, even though the followers of that religion are majority in that State need not be answered by that particular bench and left it unanswered[8].

The factors to be considered in determining minority and minority educational institutions, the rights of managements pertaining to autonomy in the matter of admission of students, the extent of regulations to monitor admissions, autonomy in the matter of fixation of fee and the extent of regulation by which it can be controlled, the autonomy and freeships, quotas and powers of committees regulating admission are areas of conflicting opinions in the State of Kerala. The legislative and judicial approach in these areas in the State of Kerala is perused in this chapter.

[8] (2002) 8 S.C.C. 481 at p.708.

6.3. Attempt by State of Kerala in Redefining 'Minority' to Exclude Dominant Groups

The term 'Minority' is not defined in the Constitution but has been largely understood to mean religious and linguistic groups which are less than 50% of the population in a particular State[9]. The idea of giving some special rights to the minorities is not to create a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence[10] without hampering the secular traditions of the country. Further the Constitution of India provides under Article 30, a fundamental right to establish and administer educational institutions of their choice to the minority. This made the State of Kerala realize the need for redefining minority and minority educational institutions. Regulations in professional education in the State[11] to maintain the secular tradition and to provide equality of opportunities for education among different communities should be seen in this context. The Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non –Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006 was the first attempt to define minority and minority educational institutions[12]. The legislation was enacted in tune with the directives given by the Supreme Court in *Inamdar's* case[13] to Central/State Governments to bring in suitable legislation to regulate unaided professional educational institutions[14]. In Kerala, the majority of the professional educational institutions are under the management of the communities claiming

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9 *TMA Pai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481.

10 Justice H.R. Khanna in *St. Xaviers College* v. *State of Gujarat,* A.I.R. 1974 S.C. 1389 at p.1415.

11 The total population of Kerala was 29,098,518 in the year 1991. The population of Hindus was 16,668,587 which would be 57.28% of the total population. The Muslims at that time were 6,788,364 which would be 28.33% of the total population. The Christians at that time were 5,621,510 which would be 19.32% of the total population. The population of Buddhists and Jains and other religions is found nil to 0.04%. The percentage of population as in 1991 is stated almost to be the same even now.

12 Earlier in *Re, Kerala Education Bill,* para 21 the State of Kerala, contended that in order to constitute a minority which may claim the fundamental rights guaranteed to minorities by Arts. 29(1) and 30(1) persons must numerically be a minority in the particular region in which the educational institution in question is or is intended to be situated.

13 *P. A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537.

14 *Id.* at p. 609, para 155 wherein it is held that Central or the State governments in the absence of a central legislation should make legislation in the area governing professional education. The judiciary also should be vigilant in this regard. The Committees regulating admission procedure and fee structure should exist as a temporary measure till the central government or the State governments devise a suitable mechanism and appoint a competent authority in this regard.

minority rights. The attempt to redefine minority and minority educational institutions and governmental control of professional educational sector got challenged in *Lisie Medical and Educational Institutions* v. *State of Kerala*[15]. The legislation had made it clear that the status of the minority institutions shall be determined by Government on factors enumerated in S. 8[16]of the Act. This is a bold attempt by the State as merely being a numerical minority doesnot by itself automatically confer minority status to a group to avail rights under Article 30. Further, conditions for determination of status as minority educational institution, that the number of professional colleges or institutions run by the linguistic or religious minority community in the State shall be proportionately lesser than the number of professional colleges or institutions run by the non minority community in the State and that the number of students belonging to the religious or linguistic community to which the college or institution belongs undergoing professional education in all professional colleges or institutions in the State shall be proportionately lesser than the number of students belonging to the non minority community have been added[17]. Thus in the mode of admission and determination of minority status drastic changes have been made in the Act of 2006, so as to

[15] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409. The controversy in the instant case focuses on the rights of managements pertaining to autonomy in the matter of admission of students, the extent of regulations to monitor admissions, autonomy in the matter of fixation of fee and the extent of regulation by which it can be controlled, the autonomy and freeships, autonomy and quotas and autonomy and committees. The conditions that can be placed on minorities to exercise their right as a minority is also discussed.

[16] Kerala Unaided Professional Colleges (Admission of Students and Fixation of Fee) Regulations, 2002, Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non –Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006. S.8 states : *Determining factors for according recognition and conferring status as unaided minority professional college or institution*- "A minority unaided professional college or institution established and maintained by any linguistic or religious minority shall be accorded recognition and conferred status as an unaided minority professional college or institution only if it satisfies all the following conditions of demographic equivalence between the minority community to which the college belongs and the non minority community of the State, taken as a single unit, *viz*. the population of the linguistic minority community in the State which runs the professional college or institution shall be lesser than fifty percent of the total population of the State. The number of professional colleges or institutions run by the linguistic or religious minority community in the State to which the college or institution belongs shall be proportionately lesser than the number of professional colleges or institutions run by the non minority community in the State. The number of students belonging to the linguistic or religious minority community to which the college or institution belongs undergoing professional education in all professional colleges or institutions in the State shall be proportionately lesser than the number of students belonging to the non minority community undergoing professional education in all professional colleges or institutions in the State".

[17] *Ibid.*

confer status of minority educational institution only to educational institutions established by non dominant groups which are not educationally advanced as the non minority groups. The validity of S. 8 of the Act was challenged among other provisions in *Lisie Medical and Educational Institutions* v. *State of Kerala*[18]. The Court in *Lisie* felt that the fact that the minorities have established more educational institutions than the non minorities does not indicate that they have become advanced[19]or dominant. The Court observed :

> "…There may be some rationality in extending the benefit of Art.30 to a non dominant minority, but for that... Art.30 itself has to be amended…"[20]

The above observation is a welcome trend that linguistic and numerical minority has to be determined not solely on the basis of population of a State but some criteria regarding non dominance can also be taken into account. However, for that purpose, Art.30 needs an amendment incorporating non-dominance as a factor to exclude a group from being conferred with minority status.

6.3.1. Fixation of 50% Seats to be Filled From Minority Community

In Kerala, the students studying in the minority educational institutions doesn't have sufficient minority representation. As such, the purpose of

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[18] 2007(1) K.L.T. 409. The controversy in the instant case focuses on the rights of managements pertaining to autonomy in the matter of admission of students, the extent of regulations to monitor admissions, autonomy in the matter of fixation of fee and the extent of regulation by which it can be controlled, the autonomy and freeships, autonomy and quotas and autonomy and committees. The conditions that can be placed on minorities to exercise their right as a minority is also discussed. See generally, *Manager, Malankara Syrian Catholic Colleges Association and Others* v. *Kerala University, Thiruvananthapuram and Others,*2009(4) K.H.C. 241; *A.P.C.M.E. Society* v. *Govt of A.P.*,1986 K.H.C. 888; *Ahmadabad St.Xavier's College Society* v. *State of Gujrat*,1974 K.H.C. 429; *Aldo Maria Patroni* v. *E.C. Kesavan*,1964 K.H.C. 219; *Benedict Mar Grigorious* v. *State of Kerala and Others*,1976 K.H.C. 129; *Board of Secondary Education and Teachers Training* v. *Jt. Director of Public Instructions*,(1998) 8 S.C.C. 555; *Kurian Lisy* v. *State of Kerala*, 2006 K.H.C. 1014; *Manager, Assumption College and Another* v. *State of Kerala and Others*, 2008(1) K.H.C. 115; *Director L.F. Hospital* v. *State of Kerala,* 1991 (2) K.L.T. 827; *N. Ammad* v. *Manager, Emjay High School*, 1998 K.H.C. 460; *Rev.Fr.Daniel Kuzhithadathil* v. *Jose*, 2003 K.H.C. 345; *Secretary, Malankara Syrian Catholic College* v. *T.Jose*, 2007 K.H.C. 5043; *St.Berkman's College Changanacherry and Others* v. *Principal Secretary to Government, Higher Education Department and Others,*2009 (2) K.H.C. 41; *State of Kerala* v. *Very Rev Mother Provincial*, 1970 K.H.C. 127; *Very Rev Mother Provincial* v. *State of Kerala*, 1969 K.H.C. 159.

[19] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409 at p.441, para 20. The Court declared S.8 of the 2006 Act as unconstitutional.

[20] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409 at p.491, para 61.

establishment of minority educational institution to give best general and professional education to community members is not served. S. 10 of the 2006 Act was enacted to enable educational institutions which fulfills the objectives of Art.30 to be conferred the status of a minority educational institution. First part of S.10(8)[21] says that a minority unaided professional college or institution shall admit not less than 50% of students from within the State from the minority community to which the college or institution belongs. The other part of S. 10(8) is that from amongst the 50% seats, mentioned above, 50% of seats may be filled from within the minority community on the basis of merit cum means basis and rest in the order of merit in accordance with interse merit. This was with the intent to enable minority students to receive education in educational institutions set up by their community members so that the object of Art.30 to give best general and secular education to their community members is achieved[22]. The educational institutions set up by the minorities should be in truth and reality, minority educational institutions and not merely masked phantoms. Otherwise, such institutions need be allowed to function under Art.19 and not under Art.30.

The legislative attempt to redefine minority and minority educational institutions in the manner stated is negated by the Court in *Lisie* which takes support from *Sidhrajbhai* v. *State of Gujarat*[23] and held :

> '…The very background of providing rights to minority communities in the matter of running educational institutions and the said right

[21] The Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non exploitative Fee and Other Measures to Ensure Equity, and Excellence in Professional Education) Act, 2006. S.10 (8) A reads : "Minority unaided professional college or institution shall admit not less than fifty percent of the students from within the State from the minority community to which the college or institution belongs. Fifty percent of such seats may be filled up from among the socially and economically backward sections from within the minority community on merit cum means basis with the consent of the minority educational college or institution as prescribed and the rest in the order of merit in accordance with interse merit, both from the rank list prepared by the Commissioner for Entrance Examinations, based on the common application prescribed in the appropriate prospectus published by the State government".

[22] Justice Chinnappa Reddy in *A.P. Christian Medical Education Society* Case, A.I.R. 1986 S.C. 1490 at p. 1496.

[23] A.I.R. 1963 S.C. 540.

being not subject to any restriction would be clearly suggestive of the fact that once a community is a minority ,it would have the right...[24]' .

Thus the Court expressed the view that once a group could prove that it is a linguistic or religious minority in a State, it could establish educational institutions under Art.30. The institution need not admit 50% of students from members of their own community to achieve the object of furtherance of minority interest.

It is admitted that minority character achieved could remain intact by admitting non-minority members also into their educational institutions. But this shall not be used as a license to commit fraud upon the Constitution. Depending upon the local needs and the percentage of community members in a particular area, minimum number of students required to be admitted in a minority educational institution could have been permitted to be fixed. If minority interest in establishing the institutions itself is not meted out to the members of that community in any way, the institution should be allowed to function only under Art.19 and the special privilege under Art.30 be made unavailable. It should be kept in mind that the object of conferring minority right is to instill confidence and to bring minority on par with majority. The moment equality with the majority is seen achieved, the special protection should come to an end. Otherwise, it will amount to reverse discrimination. Further, the intention of the person who established the institution is also crucial. The intention should be nothing other than the betterment of the members of the minority community. This factor must be reflected by the number of students of that particular community who got admitted into the educational institutions claiming protection of Art.30.

6.3.2. Maintainability of Fixation of 50% Seats in Unaided Minority Professional Institution for Minority Students

Fixation of minimum 50% seats for minority under S.10(8)[25] of the 2006 Act cannot be justified even by relying on para 153 *TMA Pai*[26] and paras 101[27] and

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[24] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409 at p.489, para 57.

[25] *Supra* n. 21.

[26] See *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p.585, para 153 wherein it is stated : "We would, however, like to clarify one important aspect at this stage. The aided linguistic minority educational institution is given the right to admit students belonging to the linguistic minority to a reasonable extent only to ensure that its minority character is preserved

102[28] of *Inamdar* which were made in a different context[29] of cross border admission. The practice adopted by the institutions has shown that they will make admissions from across the border of the State where the concerned religious minority was not a minority. The observations in *Inamdar* that bulk or majority of admission of minority community has to be from within the State where the community is a minority with a sprinkling of admissions from across the border were made in this context. State may fix a minimum intake of minority and non minority students to be admitted by considering variety of factors like the kind of institution, the population of that community in the State and the need of the area in which the institution is located and other similar considerations. There is a need for a rational study for fixing the minimum percentage of students to be admitted to retain the minority character depending upon factors mentioned above. Thus though the attempt to redefine minority educational institutions by the State of Kerala is laudable, the conditions put forward to confer minority status to an educational institution is irrational for compliance. It is illogical to compel a minority institution to comply with the 2nd part of the s.10(8) of the 2006 Act, which may virtually lead to closing down of such institutions.

6.3.3. Fluctuation of Minority Status of Educational Institutions Under S.10 (8)

If a community constitute negligible section of population in a State, by using the yardstick under Section 10(8) that the number of students to be admitted therein

and that the objective of establishing the institution is not defeated. If so, such an institution is under an obligation to admit bulk of the students fitting in to the description of minority community. Therefore, the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group as far as that State is concerned. In other words, the predominance of linguistic students hailing from the State in which the minority educational institution is established should be present. The management bodies of such institutions cannot resort to the device of admitting the linguistic students of the adjoining State in which they are a majority, under the façade of the protection given under Article 30(1)…"

[27] *P.A. Inamdar* v. *State of Maharastra,* (2005) 6 S.C.C. 537 at p.592, para 101 reads : " In this background arises the complex question of transborder operation of Art.30(1)…If so, such an institution is under an obligation to admit the bulk of the students fitting in to the description of the minority community. Therefore the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group as far as that State is concerned…"

[28] *Id.*at para 102 : "It necessarily follows from the law laid down in *TMA Pai* that to establish a minority educational institution the institution must primarily cater to the requirements of that minority of that State…."

[29] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409 at p.507, para 75.

from the minority community within the State should not be less than 50% of the students studying in the concerned institution, they may never be able to exercise their right under Art.30. Moreover, the minority character of an educational institution may be restored or lost according to the number of students from the community which an educational institution gets in a particular academic year for admission. Such a condition to determine the minority status and regulation of admission is unsustainable in law.

6.4. Determination of Minority Educational Institutions-The Legislative Conflicts

In *TMAPai*[30], it was held in reply to qn.1 that, minority, both religious and linguistic, has to be determined State wise[31]. However the indica for conferring minority status to an educational institution was left unanswered. National Commission for Minority Educational Institutions Act, 2004 was enacted after *TMAPai* judgment. S.2 (g)[32] of the enactment makes it clear that once minority is determined at State level, persons/groups can establish an educational institution other than a university as minority educational institution. Thus the 2004 central legislation is an attempt at defining a minority educational institution which was left unanswered in *TMA Pai.* But, *Inamdar,* clarifying *TMA Pai* made it clear that the objective of establishment of a minority educational institution should be fulfilled so as to confer the status of minority educational institution to a particular

[30] (2002) 8 S.C.C. 481.

[31] Qn.1 What is the meaning and content of the expression 'minorities' in Article 30 of the Constitution of India? A. Linguistic and religious minorities are covered by the expression 'minority' under Article 30 of the Constitution. Since reorganization of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Thus, religious and linguistic minorities, who have been put on par in Article 30, have to be considered State wise. In reply to Qn. 3(a) regarding what is the indicia for treating an educational institution as a minority educational institution stated that this question will be answered by a regular bench.

[32] The National Commission for Minority Educational Institutions Act, 2004, S.2(g) defines minority educational institution to mean a college or institution (other than a University) established or maintained by a person or group of persons from amongst the minorities. Thus once the State government determines the linguistic and religious minority on the basis of population of the concerned State, as per S. 2(g) of the Central Act, he/the group can establish an institution other than a university as minority institution. In S.10(1) dealing with right to establish a Minority Educational Institution, it has been laid down that any person who desires to establish a Minority Educational Institution may apply to the Competent Authority for the grant of no objection certificate for the said purpose.

institution. Minority educational institutions have a right to admit students of its own choice and hence as a matter of its own free will, admit students of a non minority community[33]. The restriction on the free will of the minority educational institution admitting students belonging to a non minority community as envisaged in Article 30 is that the manner and number of such admissions should not be violative of the minority character of the institution[34]. The proposition in *Inamdar* is laid down after the 2004 enactment. After the Supreme Court decision in *Inamdar* the definition clause in S. 2(g) ought to have been amended suitably.

The Court in *Lisie*[35] holds that the State being bound by the provisions of the central statute could not take a different stand from the 2004 enactment[36] and therefore Ss. 8 and 10(8) of the 2006 Act are violative of S.2 (g) of The National Commission for Minority Educational Institutions Act, 2004 as it lays down further indicas for conferring minority status on an educational institution[37].

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[33] *P. A. Inamdar* v. *State of Maharastra* (2005) 6 S.C.C.537 at p .547.

[34] V. R. Krishna Iyer, 'Minority Rights and Wrongs', *The Hindu,*(Cochin), Oct.14, 2006. The renowned jurist observes that unless the primary and paramount purpose of an institution to devote all its resources for the particular community's advance is not accomplished, the special privileges of autonomy are negatived. Article 30 is conditioned by the special objective of the community constituting the minority becoming the focus of the institution. It is open to the state not to treat a college as a minority institution merely because its founder belongs to a certain sect or faith, if it makes money by admitting non-minority students on a large scale by exploiting its minority status. A sprinkling of non-minority pupils is welcome as a competitive or fraternal fraction.

[35] *Supra* n. 29.

[36] Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non –Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006. S. 8(b) and (c) pertains to an occupied field by central legislation by virtue of the provisions contained in National Commission for Minority Educational Institutions Act, 2004 as amended in 2006 and therefore the State of Kerala would lack legislative competence to enact the Act of 2006. The provisions are also in direct conflict with various judgments of the Supreme Court.

[37] *Id*. S.8 states : "*Determining factors for according recognition and conferring status as unaided minority professional college or institution* - A minority unaided professional college or institution established and maintained by any linguistic or religious minority shall be accorded recognition and conferred status as an unaided minority professional college or institution only if it satisfies all the following conditions of demographic equivalence between the minority community to which the college belongs and the non minority community of the State, taken as a single unit, *viz*. (a) the population of the linguistic minority community in the State which runs the professional college or institution shall be lesser than fifty percent of the total population of the State. (b) The number of professional colleges or institutions run by the linguistic or religious minority community in the State to which the college or institution belongs shall be proportionately lesser than the number of professional colleges or institutions run by the non minority community in the State. (c) The number of students belonging to the linguistic or religious minority community to which the college or institution belongs undergoing professional education in all professional colleges or institutions in the State shall be

Though Sections 8 and 10 of the 2006 Kerala Act, show divergence with S. 2 (g) of National Commission for Minority Educational Institutions Act, 2004 it is in consonance with the judicial approach in a plethora of cases culminating in *Inamdar*. Thus a reading of *Inamdar* makes it clear that if a minority educational institution has to claim protection under Article 30 the object underlying Article 30(1) to enable minority to conserve its religion and language and to give thorough, good, general education to children belonging to such community should be achieved[38]. Thus the judicial approach in a plethora of cases including *Inamdar* is rightly reflected in S. 8 of the 2006 Kerala Act. But 2004 central legislative scheme *ipso facto* confers minority status to an educational institution on being established by a minority. Additional criteria that establishment is to be complemented by fulfillment of objectives of establishing the educational institution requires incorporation into section 2(g) of the Central Act 2004.

6.5. Common Entrance Exam by the State and the Right for Admission

There are various allegations from the student community with regard to the way in which entrance tests for admission to various professional courses are conducted by the consortium of managements in the State of Kerala. The State of Kerala felt that merit, transparency and non exploitative admission can be secured by giving admission from the rank list prepared by the Commissioner of Entrance Examinations of the State. The admission of students in all professional colleges or institutions for all seats except NRI seats was directed to be made through Common Entrance Test conducted by the State Government[39] as per S.3 of the

proportionately lesser than the number of students belonging to the non minority community undergoing professional education in all professional colleges or institutions in the State". In addition S.10(8) states : "A minority unaided professional college or institution shall admit not less than fifty percent of the students from within the State from the minority community to which the college or institution belongs. Fifty percent of such seats may be filled up from among the socially and economically backward sections from within the minority community on merit cum means basis with the consent of the minority educational college or institution as prescribed and the rest in the order of merit in accordance with interse merit, both from the rank list prepared by the Commissioner for Entrance Examinations, based on the common application prescribed in the appropriate prospectus published by the State government".

[38] (2005) 6 S.C.C. 537 at p. 547 . See also *Kerala Education Bill, 1957*, *In re*, 1959 S.C.R. 995.

[39] Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non –Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006, S.3.

2006 Act. As right to conduct entrance test for admission is a facet of administration, the right to manage institutions, whether aided or unaided, whether run by the religious minority or otherwise, has been taken away by this provision.

Legality of laying down a condition under Section 3[40] that admissions are possible only from the rank list prepared by the Commissioner for Entrance Examinations in the Common Entrance Test, and that all allotments will be done by the Commissioner, except for NRI seats was challenged in *Lisie*[41]. The legality of Section 3 though attempted to be justified relying on paras 136[42], 137[43] and 155[44] of *Inamdar,* was held unsustainable. *Islamic Acadamy* in para 4 had spoken about the need for common entrance test, but it was to save the students from

[40] *Id.* S.3 *Method of admission in Professional Colleges or Institutions*- "Notwithstanding anything contained in any other law for the time being in force or in any judgment, decree or order or any other authority, admission of students in all professional colleges or institutions to all seats except NRI seats shall be made through Common Entrance Test conducted by the State followed by centralized counseling through a single window system in the order of merit by the State Commissioner for Entrance Examinations in accordance with such procedure as may be specified by the Government from time to time".

[41] *Supra* n. 29.

[42] Para 136 of *Inamdar* starts with the factual position, when there may be more than one similarly situated situations, whether minority or non minority and the aspirant seeking admission facing difficulty in taking various examinations. It is in that context that it has been observed that, if the candidate is required to appear in several tests, he would be subjected to unnecessary and unavoidable expenditure and inconvenience. It is further in that context that it was observed that, there was nothing wrong in an entrance test being held for one group of institutions imparting same or similar education and such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. In the first part of the sentence referred to above, the decision to hold test for one group of institutions whether situated in one State or in more than one State by joining together, the reference is to the common entrance test to be conducted by the institutions. It is in the alternative that it has been said that the State may itself or through an agency arrange for holding of such test. The words 'such tests' necessarily means a test on behalf of the institutions. This further necessarily means a test which would be otherwise conducted by the institutions conducted by the State for all the students in the State for all the institutions in the State.

[43] Emphasis on the sentence in para 137 of *Inamdar* that, if the admission procedure so adopted by a private institution or group of institutions fails to satisfy all or any of the triple tests, it can be taken over by the State substituting its own procedure, should take into account mentioning in the beginning of para 137 that minority and non minority unaided institutions can claim unfettered right to choose the students to be allowed admission and the procedure thereof following the triple test. The State can step in only on failure of triple test.

[44] As regards para 155 of *Inamdar,* the constitution of the Committee regulating admission and fee structure was said to be only a temporary measure. Until such time the central or state governments were to devise suitable mechanism even by legislation. The legislation in so far as admissions are concerned, would only relate to the triple test of fair, transparent and non exploitative method or procedure. An all sweeping legislation on all admission matters which may even result in complete take over and resulting to nationalization is wholly impermissible.

undue harassment and hardship to appear for several tests[45]. Para 136 and para 137 of *Inamdar* in its entirety shows that, it is to avoid students taking various tests, when there are many similarly situated institutions, that State may conduct exams on behalf of all the institutions[46]. *Inamdar* in para 137 held that State can step in only on the failure of triple test of fair, transparent and non exploitative procedure. Thus Section 3 of the Kerala Act 2006 is a complete take over of the admission procedure annihilating the right of the unaided institutions, minority or non minority, which would be in violation of Articles 19(1)(g) and 30(1).

6.6. Discretion to Decide 'Mode of Assessment' for Admission

S.3 of the 2006 Act infringes the discretion available to the management of an educational institution to decide the mode of assessment of merit for regulating admission. Right to establish and administer educational institutions includes right to admit students based on the choice made by the management. Right to admit can be fully exercised only if the management gets the discretion to conduct admission tests of their own. The State seems to have been under the misconception that *Islamic Academy*[47] mandates a common entrance test and it can be conducted for aided and unaided minority and non minority educational institutions. This is an infraction into the right to admission by management which is a facet of right to administration. A reading of second part of para 68 of *TMAPai* provides by way of illustration a mode by which merit can be determined by the management. This gives sufficient discretion that any other mode of determining merit can be adopted by the management[48]. Thus the managements can adopt various methods for determining merit. The 2006 Kerala Act mandates compulsory holding of common entrance test by the Commissioner of Entrance Examinations[49]. This is held

[45] *Islamic Academy* v. *State of Karnataka*, (2003) 6 S.C.C. 697 at p.720.
[46] *P.A. Inamdar* v. *State of Maharastra*, (2005) 6 S.C.C. 537 at p. 604, paras 136,137.
[47] *Supra* n.45.
[48] *Supra* n.30.
[49] S.3.*Method of Admission in Professional Colleges or Institutions*-"Notwithstanding anything contained in any other law for the time being in force or in any judgment, decree or order of any Court or any other authority, admission of students in all professional colleges or institutions to all seats except NRI seats shall be made through CET conducted by the State followed by centralized counseling through a single window system in the order of merit by the State Commissioner for Entrance Examinations in accordance with such procedure as may be specified by the Government from time to time".

violative of the right of the managements to administration under Art.30 as well as 19(1)(g).

6.6.1. Alternatives to Common Entrance Test Does not Ipsofacto Negate Equality

Common entrance test for determining merit is preferred by *Islamic Academy,* to save students from the burden of applying for so many entrance tests to be conducted by different managements and also to save their time and money. Unaided managements can decide on the mode of admission to be adopted by them without infringing merit.

The unaided educational institutions have the right to frame rules for admission and to admit students and the only requirement or control is that the rules for admission must be subject to the rules of the university as to eligibility and qualifications[50]. Further, para 59 of *TMAPai* deals as to, how to determine the merit by giving illustration and it does not rule out any other method of determining merit which may also include marks obtained in the qualifying examination. Paragraphs 58[51], 59[52] and 68[53], must be allowed to be given effect to and read conjointly[54]. Thus common entrance test need not be followed and any other mode of determining merit can be adopted by the managements.

In *Minor S. Aswin Kumar* v. *State of Tamil Nadu*[55], it was held that abolition of Common Entrance Test does not have the effect of lowering the standards. The only effect is that selection is not based on a common platform and therefore

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50 *Minor P. Rajendran* v. *State of Madras,* A.I.R. 1968 S.C. 1012.

51 *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481 at p.545, para 58 wherein it is stated : "For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants…."

52 *Id.* at p.546, para 59, wherein it is stated that merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

53 See *TMA Pai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 481.

54 *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at p.776, para 171.

55 2007(2) C.T.C. 677.

vulnerable to challenge based on the principle of equality. This vulnerability can be overcome by equalization and obtaining equality upto a reasonable level by any other method. Further, absolute equality is a myth even when Common Entrance Test is held, because of the inherent possibility of ticking some answer merely by guess.

In *John Andrew's case*[56] it was held that Common Entrance Test is devised primarily with a view to provide for a common platform to ensure equality among candidates rather than to keep up a particular standard. Failure to follow the CET alone cannot have the effect of lowering the standard. By following a rational method of equalization, principles of equality can be maintained and a plea of violation of Art.14 could be repelled.

6.6.2. Adding Marks of Qualifying Examination for Admission

There can be various modes of determining merit of candidates for admission to professional courses. Institutions can conduct tests on their own or through a consortium of managements. State can also provide for Common Entrance Test to be conducted on behalf of the institutions. After determining merit in CET, marks obtained in qualifying examinations are added to it by the managements in certain cases. This raises the following issues: Once the merit of a candidate is determined in a competitive examination, the process of adding marks obtained in the qualifying examinations may amount to denial or curtailment of merit of certain candidates depending upon the criteria fixed by different boards or universities for valuation of papers in the qualifying examination. In such cases, the propriety of equating the marks obtained by candidates in qualifying examinations without working out equivalence among the different Boards conducting the qualifying examinations is also doubtful. Some argue that in entrance examinations assessment of merit cannot be properly done as students who make guess work may also get qualified and adding marks in the qualifying exam will in a way help

[56] As observed in para 8 of *K.S.F.E.C.M.A.* v. *Admission Supervisory Committee For Professional Colleges,* 2007(3) K.L.T. p. 143.

the students having real merit to get listed. Effect of adding of marks for the previous examinations as an equalizing factor is to be tested.

In *Self Financing Engineering College Managements Association* v. *Admission Supervisory Committee For Professional Colleges*[57], the order dated 21.3.2007 by the Admission Supervisory Committee, stating that the managements should admit students from the rank list prepared by the State Entrance Commissioner for the seats set apart for the management relying on Section 3[58] of 2006 Act by the State of Kerala was challenged. Petitioners evolved a method of adding marks obtained in the qualifying examination for Physics, Chemistry and Mathematics with the marks obtained by the candidate in CET. The Court held that Admission Supervisory Committee has the power under subsection (6) of Section 4[59] of Act 19 of 2006 to supervise and guide the process of admission, with a view to ensure that the process devised by the petitioner should be fair, transparent, merit based and non-exploitative but cannot insist that marks obtained by the candidates in the qualifying examination for determining shall not be added to assess the merit of the candidates as failure to follow the CET alone cannot have the effect of lowering the standards.

6.6.3. Taking Over Admission on Single Instance of Failure of Triple Test

The right of the private educational institutions to conduct admission test is not absolute. It can be taken over by the government on their failure to follow the triple tests of fair, transparent and reasonable procedure. But if a single time failure to comply with the triple test is held to be enough to take over the admission and

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[57] 2007(3) K.L.T. 143.

[58] Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non Exploitative Fee and Other Measures To Ensure Equity and Excellence in Professional Education)Act, 2006, S.3 *Method of Admission in Professional Colleges or Institutions*: "Notwithstanding anything contained in any other law for the time being in force or in any judgment, decree or order of any Court or any other authority, admission of students in all professional colleges or institutions to all seats except NRI seats shall be made through CET conducted by the State followed by centralized counseling through a single window system in the order of merit by the State Commissioner for Entrance Examinations in accordance with such procedure as may be specified by the Government from time to time".

[59] *Id*. S.4(6) reads : "The Admission Supervisory Committee shall supervise and guide the entire process of admission of students to the unaided professional colleges or institutions with a view to ensure that the process is fair, transparent, merit based and non exploitative under the provisions of this Act".

nationalize the education for ever, it would be a travesty of justice. The State had taken over the admission process on observation by the Committee headed by Justice K.T.Thomas[60], that the single test conducted by the Self Financing Institutions imparting Medicine, Ayurveda, Dental and Siddha Courses, have not followed the triple test[61]. Whether the right of consortium of managements to hold a test could be taken away for ever by a legislative provision[62] based on this single instance is posed before the Court. Though the consortium test doesn't pass the triple test[63], a single complaint with regard to a single test with regard to the consortium would not constitute abrogation of all examinations conducted by the Consortium of managements thus nationalizing the entire admission system. The Court upheld the right of the managements to hold their own admission tests relying on *TMA Pai* and remarked :

> … the decision in *TMA Pai*[64] recognizes the right of the unaided colleges to conduct their own entrance test… [65].

But in para 37, the Court observed :

> ...Surely, if the procedure of admission in the State of Kerala had gone totally haywire and merit had become causality, this important aspect could not possibly be missed out and the legislative wisdom could well have made provisions regulating the admission by the State... [66]

Thus the Court while granting the managements the right to have an admission procedure of their own, cautions that if the managements fail to adhere to the triple test, the right can be taken over by the government. But the practical difficulty faced by student community continues as the State can step in only on the failure of the triple test, as the managements argue every time that single instance of failure is not enough to take over a fundamental right. Thus, if the managements continue to fail the triple test, can it be an adequate reason for the State to come

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60 Former Judge, Supreme Court of India.
61 *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409 at p .440.
62 S.3 of the 2006 Kerala Act.
63 *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at p.729, para 19.
64 *TMA Pai Foundation* v. *State of Karnataka*, (2002) 8 S.C.C. 481 at p.581, para 68.
65 *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409 at p.459, para 36.
66 *Id.* at para 37.

forward with a legislative provision taking over a fundamental right, is under dispute as in a case of reasonable restrictions, subject to which a right may be available, are not adhered to, the solution would lie in correcting it and not taking away that right.

6.7. Determination of Fee by Government

Admission right is inextricably connected with the collection of fees. A private educational institution should have the right to determine its fee and to collect a reasonable surplus. The 2002 Regulations by the State of Kerala[67] fixed the maximum fee that could be collected by a private educational institution imparting medical education at a meager rate of Rs. 28,750. This was challenged by the educational institutions. In O.P.No.39420 of 2002, it was held that the fee of Rs 1.5 lakhs as admitted by the State government as expenses per student in the medical colleges run by the State and this amount can be collected by the private colleges as an interim measure. It was also held that a Committee be constituted within three months under Regulation 6[68] and as per this decision, in 2004 the Committee headed by Justice K.T.Thomas was appointed as Admission Supervising and Fee Fixation Committee. The Committee headed by Justice K.T. Thomas held that the fee fixed by the Committee of private self financing colleges as excessive.

In *State of Kerala* v. *Pushpagiri Medical Society*[69], the judgment holding that the fixation of fee by the State as unreasonable, was sustained in the review petition also. Thus the intervention by the judiciary seems to ensure that the managements doesn't charge exploitative fee and the State doesn't fix the fee to be at a low rate so as to make the functioning of the institution an impossibility. The institution should be able to collect the fee to meet its expenses in running the institution and to have a reasonable surplus.

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[67] Kerala Unaided Professional Colleges (Admission of Students and Fixation of Fees) Regulations, 2002.
[68] *Id*. Regulation 6.
[69] 2003(1) K.L.T. 923.

6.7.1. Attempt by the State of Kerala for 50% Mandatory Freeship Seats

Before the decisions in *TMA Pai Foundation*[70], *Islamic Academy of Education*[71] and *Inamdar*[72] were rendered by the Supreme Court, the State of Kerala came up with the regulations known as the Kerala Unaided Professional Colleges (Admission of Students and Fixation of Fee) Regulations, 2002. The regulations provided for reservation of seats to the extent of 50% by the Government[73]. Regulation of 2002 was challenged by the petitioner's college in O.P.No.39420 of 2002. Meanwhile, *TMA Pai*[74] decision was rendered by the Supreme Court and relying on that, the High Court held that reservation of seats to the extent of 50% by the Government was not valid in view of the decision in *TMA Pai Foundation case*[75]. It was also held that a Committee be constituted within three months under Regulation 6 and in the meantime, the institutions would fill up the seats in the ratio 75:25. The communal and regional reservations envisaged by the regulations were also held impermissible.

In *State of Kerala* v. *Pushpagiri Medical Society*[76] the petition for review of the order[77] invalidating reservation of 50% seats in unaided institutions made by the State was rejected. The Court held that government can lay down the minimum conditions of eligibility to ensure maintenance of educational standards, but its claim to fill up 50% of the total seats on its own would amount to ignoring the difference between aided and unaided institutions. While fixing the number of seats the government has not even remotely indicated 'local needs'. In para 68 of *TMAPai,* the Government was allowed to fix the percentage of seats according to the local needs but it should not be arbitrary. As the government has not disclosed

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70 *Supra* n. 64.
71 *Supra* n. 63.
72 *Supra* n. 46.
73 As per Kerala Unaided Professional Colleges (Admission of Students and Fixation of Fee) Regulations, 2002. 50% of the seats were earmarked to be filled up by the Commissioner for Entrance Examinations for Travancore/Malabar, Ezhava, Muslim, SC/ST candidates and vide orders dated 19.12.2002, the State government fixed the fee of Rs.8, 750/- per student per year for the 50% of students allocated by the Controller of Examinations and special fee upto Rs. 20, 000/- was also permitted.
74 *Supra* n.64.
75 *Ibid*.
76 2003(1) K.L.T. 923.
77 Order in O.P. No. 39420 of 2002.

any considerations for local needs and the institutions insist on no share for the government, the Court weighed the equities and felt that 25% seats as government quota would be proper as it would provide government with reasonable number of seats to ensure that weaker sections of the society are duly represented.

In the 2006 Kerala Act, the government again attempted to bring back the *Unnikrishnan Scheme* by providing 50% free ship[78] in unaided professional educational institutions. This was challenged in *Lisie*[79] wherein the question posed was whether there could be 50% seats as mandatorily freeship seats as per Section 9(2)[80] of the 2006 Kerala Act. The Court relying on *TMAPai*[81], *Islamic Academy*[82] and *Inamdar*[83] held that *Unnikrishnan* Scheme cannot be worked out by the 2006 Act. The High Court in *Lisie* relied on the finding in *Inamdar*[84] that para 68[85] should not be read in isolation[86]and the Scheme of *Islamic Academy* for seat

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78 S.2(g) reads : "'Freeship' means full or partial remission of tuition fee awarded to scheduled castes and scheduled tribes and other socially, educationally and economically backward students on merit cum means basis by an unaided professional college or institution as may be prescribed".

79 *Supra* n. 65.

80 See S.9 (2) of the 2006 Kerala Act dealing with collection of fees reads : "All unaided professional colleges or institutions shall provide free ship to the extent prescribed for a minimum of 50% of the students admitted".

81 Para 68 reads : " It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the University or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counseling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non minority unaided and professional colleges. The same principles may be applied to other non professional but unaided educational institutions *viz.* graduation and post graduation non professional colleges or institutions".

82 Question 3 and 4. Whether the private unaided professional colleges are entitled to fill in their seats, to the extent of 100% and if not, to what extent and question number 4. Whether private unaided professional colleges are entitled to admit students by evolving their own method of admission.

83 *P.A. Inamdar* v. *State of Maharastra*, (2005) 6 S.C.C. p.601,paras 125 and 126.

84 *Ibid.*

85 *TMAPai,* para 68.

86 See paras 126 to 130 of *Inamdar* wherein it is laid down that nowhere in *Pai Foundation* there is justification for imposing seat sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management

sharing does not lay down the correct law. So far as freeship is concerned, the State argued that the provisions contained in of Sections 7[87] and 9[88] of the 2006 Act are only an extension of rich subsidizing the poor and as the State fully subsidises all SC/ST students and the affluent student subsidises the other educationally and economically weaker section of the society, no loss of revenue would be caused to the managements. The argument of the State that fixation of fee by the state level committee was expressly approved and acted in *Islamic Academy*[89] and was allowed as a permissible regulatory measure in *Inamdar*[90]doesn't hold good. In *Islamic Academy*, *TMA Pai* was interpreted to say that there cannot be rigid fee[91]. The Supreme Court then directed that the respective State governments/concerned authority shall setup in each State a Committee headed by a retired High Court

seats. Para 68 is mentioning about the possible consensual arrangements that could be reached between managements and State. State regulation should be minimal and only with a view to maintain fairness and transparency in admission and with a view to maintain fairness and transparency. Thus the scheme evolved in *Islamic Academy* to the extent it allows the States to fix quota for seat sharing between the management and the States on the basis of local needs and that part of the judgment is observed as counter to *Pai Foundation.*

87 S.7 of the 2006 Kerala Act -*Factors for Determination of Fee*. "The Fee Regulatory Committee shall determine and fix the fee or fees to be charged by an unaided professional college or institution taking into consideration the factors, such as - (a) the obligation on the part of all unaided professional colleges or institutions to provide free ship to a minimum of 50% of the students admitted and the additional expenses, if any, required for the same over and above the excess funds generated from non resident Indians, charity on the part of managements and contribution by the Government for providing freeship for scheduled caste and scheduled tribe students'; (b) the nature of the professional course; (c) the available infrastructure; (d) the expenditure on administration and maintenance; (e) a reasonable surplus required for the growth and development of the college; (f) any other factor as the Committee may deem fit".

88 S.9 of the 2006 Kerala Act- *Fees not to be Collected Excessively*. "(1) No unaided professional college or institution shall collect any fee by whatever name called from the candidate for admission over and above the fee determined by the Fee Regulatory Committee and the fee prescribed by the University concerned: Provided that the Fee Regulatory Committee shall fix the fee for Non Resident Indian seats and the amount so collected over and above the fee fixed for other students in the college or institution in such seats shall be utilized for providing free ship to socially and economically backward students. (2) All unaided professional colleges or institutions shall provide free ship to the extent of the students admitted. (3) Any officer of the State or Central government or any other public officer or authority who issues an income certificate which conceals the actual income of the person to whom the certificate is issued and any recipient of such certificate who by making use of the certificate claims any benefit with regard to free ship or scholarship shall be liable for penalty under S.15 of the Act. (4) Notwithstanding anything contained in any other provisions of this Act, the fixation and levy of fees at the rates fixed by the Committee constituted before the date of coming into force of this Act shall be deemed to be validly fixed and collected".

89 *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697 at p.774, paras 154 to 156. The Court held that reasonable surplus should ordinarily vary from 6% to 15% and it should be utilized for expansion of the system and development of education.

90 *Inamdar* v. *State of Maharastra*, (2005) 6 S.C.C. 537.

91 *Lisie Medical and Educational Institutions* v. *State of Kerala*, 2007(1) K.L.T. 409 at p.471, para 45.

Judge and the Committee will be at liberty to approve the fee and it shall be binding for a period of three years. In *Inamdar's* case, question no 3 framed by it, with regard to the correctness of the judgment in *Islamic Academy* in issuing guidelines in the matter of regulating fee payable by students to the educational institutions was under discussion. It was held that, every institution is free to devise its own fee structure, subject to limitation that there can be no profiteering or capitation [92]. The Court held that right given under Section 6(4)[93]of 2006 Act to the Fee Regulatory Committee to determine and fix the fee to be charged by the institution would infringe the right of the institution to fix its own fee structure and that reading down the provision will save it from being struck down. Harmonius reading of Section 6 in its entirety shows that the Committee was not bestowed with any unbridled power. The Section 7[94] which gives sweeping powers to the Committee cannot survive[95]. The fee structure determined by the Colleges and

[92] Reliance was placed on paras 56 to 58 and 161 of *TMA Pai Foundation* v. *State of Karnataka*. See also paras 139, 140 and 144 *Inamdar*. The Constitution Bench in *Inamdar* attempted to formulate the gist of answers to *Islamic Academy* as understood by it. On the first question as to whether educational institutions are entitled to fix their own fee structure, the Bench in *Inamdar* observed that each minority educational institution is entitled to fix its own fee structure, subject to the condition that there can be no profiteering and capitation fee cannot be charged. A provision for reasonable surplus should be made. The relevant factors that should be taken into consideration for fee structure would be infra structure and facilities available, the investments made, salaries paid to the teachers and staff, and future plans for expansion and betterment of the Institution

[93] S.6(4) reads : "The Fee Regulatory Committee shall have power to (a) require each unaided professional college or institution to place before the Committee the proposed fee structure of such college or institution with all relevant documents and books of accounts for scrutiny well in advance of the commencement of the academic year *i.e*., not later than 31st December of the previous academic year; (b)verify whether the fee proposed by each college or institution is justified and it does not amount to profiteering or charging of capitation fee; (c) approve the fee structure or determine some other fee which can be charged by the college or institution".

[94] S.7 reads : *Factors for Determination of Fee*. "The Fee Regulatory Committee shall determine and fix the fee or fees to be charged by an unaided professional college or institution taking into consideration the factors, such as,-(a) the obligation on the part of all unaided professional colleges or institutions to provide free ship to a minimum of 50%of the students admitted and the additional expenses, if any, required for the same over and above the excess funds generated from non resident Indians, charity on the part of managements and contribution by the Government for providing free ship for scheduled caste and scheduled tribe students'; (b) the nature of the professional course; (c) the available infrastructure; (d) the expenditure on administration and maintenance; (e) a reasonable surplus required for the growth and development of the college; (f) any other factor as the Committee may deem fit".

[95] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409 at p.476, para 49.

approved by the Regulatory Committee shall be binding on unaided professional colleges or institutions for a period of three years[96].

6.7.2. Whether Right to fix Fee can be Abrogated by the Fee Regulatory Committee

Committee for Regulating Fee has got power only to regulate the profiteering and charging of capitation fee[97]. It cannot therefore interfere with the power of the managements in fixing the fee structure. As discussed earlier, Section 6 of the 2006 Act was read down in *Lisie*[98] to save it from being struck down. The Court held in *Lisie*[99] that the right to fix fee is vested with the management and only its appropriateness can be decided by the Committee.

In *Lisie*[100] it is held :

> ...The Committees that may be constituted or the law that may be even made could only regulate the profiteering and charging of capitation fee. The Committees would themselves have every right to modify the fee structure fixed by the institutions and debar institutions by an order and if legislation is made to that effect by law, to reduce the fee in the event of its coming to a finding that the fee structure had a

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[96] Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non Exploitative Fee and Other Measures To Ensure Equity and Excellence in Professional Education) Act, 2006. S.6(5) reads : "The fee determined by the Committee shall be binding on the unaided professional college or institution for a period of three years. The fee so determined shall be applicable to a candidate who is admitted to a college or institution in that academic year and shall not be revised till the completion of his course in the said college or institution. No unaided professional college or institution shall collect a fee amounting to more than one year's fee from a candidate in an academic year. Collection of more than one year's fee in an academic year shall be construed as collecting of capitation fee and shall be liable to be proceeded against".

[97] In para 10 where the facts are stated as follows: The Government had entered into an agreement with few medical colleges in the State for seat sharing and fees sharing. Ext. P7 is one of such agreements. Agreement would indicate that the average fee agreed to by the Government would be around Rs. 3,67,500/- Agreement would indicate that the total revenue permissible under the agreement is Rs. 3,37,50,000/-plus Rs 30,00,000/-*i.e.* Rs 3,67,50,000/-Agreement would indicate that the average fee works out to more than Rs 3 lakhs in the place of Rs. 1,38,000/-fixed by the Regulatory Committee so far as the petitioner is concerned. Petitioner has made a fee structure of Rs.3,20,000/ which is lesser than the amount agreed to vide Ext.P7 agreement. True, as per the agreement there has been seat sharing between the Government and the Management, but that will have no bearing on the expenditure to run the Medical College.

[98] *Supra* n.95, paras 46,48 and 50.

[99] *Id*.

[100] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. 409, see also *TMAPai Foundation and Others* v. *State of Karnataka,*(2002) 8 S.C.C. 481; *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 S.C.C. 697; *P.A. Inamdar and Others* v. *State of Maharastra*, (2005) 6 S.C.C. 537.

> component of profiteering and/or capitation fee, but nothing beyond that. The fixation of fee structure is the right of an institution particularly when unaided. The right of the Committees that may be constituted or the Government to legislate, in our considered view, cannot go beyond examining the fee structure to find out therein the element of profiteering or capitation fee, be it by monitoring committees or by legislation.

In *Malankara Orthodox S.C.M.College* v. *Fee Regulatory Committee*[101], the challenge was that the Fee Regulatory Committee exceeded the powers conferred on it under Section 6 of the Act[102] as it interfered with the power of the management in fixing the fee structure. Committee has got the power only to regulate the profiteering and charging of capitation fee. The Committee ought to have pointed out anomalies, if any in writing so that the area of disagreement could be narrowed down. There is non application of mind in not following that procedure which would have allowed the Committee and management to enter into a consensus regarding reasonable fee structure taking into consideration the overall public interest. Thus in the case of conflict of opinion between the committee and management regarding the fee structure, a reconciliation is to be attempted first rather than arrogating the right by the Committee.

6.8. Legality of Principles of Reservation in Minority Unaided Institutions

93rd amendment of the Constitution expressly prohibits reservation in minority educational institutions aided or unaided. But Section 10[103] of the 2006

[101] 2007(4) K.L.T. 530.

[102] Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006(Kerala) S.6.

[103] S.10 *Allotment of Seats*: "(1) In every professional college or institution other than a minority college,- (a) ten percent of the total number of sanctioned seats shall be earmarked for the Scheduled Castes and Scheduled Tribes; (b) 25% of the total number of sanctioned seats to the Other Socially and Educationally Backward Classes; (c) 3% of the total number of sanctioned seats shall be earmarked for physically challenged persons; and 12% the total number of sanctioned seats shall be earmarked for the other sections of society not covered under items (a), (b) and (c) of this sub section on merit cum means basis: Provided that in an unaided professional college or institution the provisions in item and (d) shall apply in accordance with the consensus based on mutual agreement arrived at between the unaided professional college or institution and the Government and following such principles and in such manner as may be prescribed: Provided further that the admissions contemplated in items (b),(c) and (d) above shall be in compliance with the rules as may be prescribed. (2) In an unaided professional college or institution belonging to both minority and non minority, upto 15% of the total number of sanctioned seats may be filled by candidates under the category of NRI seats. Seats not filled

Act by the State of Kerala dealing with allotment of seats requires minority unaided educational institutions to provide for reservation in admission. In *Lisie*[104] it was held that the 2006 Act so far as it provides for reservation in minority unaided institutions is invalid as per the 93rd amendment to the Constitution. The decision in *Lisie*[105] has now been reiterated by the decision in *Pramati Educational and Cultural Trust* v. *Union of India*[106] wherein the Court held that minority educational institutions, both aided and unaided need not provide reservation in admission .

6.9. Regulation of Standards in Admission

The attempt by the State of Kerala, to fix upper age limit for admission to private nursing schools and to limit the quota for management to 40% failed on the finding of the Court that, the Act under question doesnot empower the State to

up under NRI seats shall be filled up from general merit seats. (3) In an unaided professional college or institution belonging to both minority and non minority community, upto 15% of the total number of sanctioned seats may be filled by candidates under the category of privilege seats in the manner as may be prescribed. Seats not filled up under privilege seats shall be filled up from general merit seats. (4) In an unaided non minority professional college or institution 18% of the total number of sanctioned seats shall be filled up from general merit seats. (5) In an unaided non minority professional college or institution, 2% of the total number of sanctioned seats shall be filled up by students who have made outstanding contribution in the field of culture or sports, on the basis of criteria as may be prescribed. Seats not so filled up shall be filled up from general merit seats. (6) Where students of specified categories surrender the seats after selection, the same shall be filled by the candidates belonging to the same category from the merit list of the common entrance. (7) Where the seats specified for the SC or ST and SEBC are left unfilled due to non availability of candidates from the same category, the seats shall be filled up by rotation from other categories within the specified seats as may be prescribed. Provided that any spilover thereafter arising shall be filled up from the general merit seats. (8) A minority unaided professional college or institution shall admit not less than 50% of the students from within the State from the minority community to which the college or institution belongs. 50% of such seats may be filled up from among the socially and economically backward sections from within the minority community on merit cum means basis with the consent of the minority educational college or institution as prescribed and the rest in the order of merit in accordance with interse merit, both from the rank list prepared by the commissioner for entrance examinations, based on the common application prescribed in the appropriate prospectus published by the State government. (9) A minority unaided professional college or institution may surrender upto 18% of the seats to be filled up by the commissioner of entrance examinations from the specified seats and general merit seats in equal proportion. The first portion shall be filled up on the basis of merit cum means basis as prescribed. The second portion shall be filled up from the general merit seats. Any seats not surrendered shall also be treated as minority seats and filled up as such. (10) A minority unaided professional college or institution may surrender upto 2% of the total number of sanctioned seats to be filled up by students who have made outstanding contribution in the field of culture or sports, on the basis of criteria as may be prescribed. Seats not so filled up shall be filled up from general merit seats.

[104] *Supra* n.100.

[105] *Ibid.*

[106] 2014(2) K.L.T. 547 (S.C.), para 26.

make such regulations and infringes the rights for admission of an institution managed by the minority[107]. The Court held that the Christian Community is a minority community and they have the right to establish and administer educational institutions. The right is amenable only to restrictive rigors like public order, decency, and morality. It is nobody's case that the regulatory measures[108] imposed are, on considerations of public order, decency or morality[109]. The argument advanced by the State, that public interest requires such restrictions was not held good by the Court. The State was unable to show how public interest arises in this context, that too, when Art.29(2) doesn't come into play as the institutions are not state aided. The Court relied on *Sidhrajbhai Sabhai* v. *State*[110]and the instruction prescribing conditions, except to the extent of prescribing regulations for the conduct of examinations and prescribing the course of training, was held unconstitutional. In *Association of Kerala Jews* v. *State of Kerala*[111], the Court held that reservation for jews or anglo Indians comes within the special reservation which is an amalgam of reservation and merit. When it is intended on the basis of para 5.2(i)[112] of the prospectus that one should have obtained at least a minimum merit, it cannot be stated to be arbitrary.

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[107] *Director, L.F. Hospital* v. *State of Kerala*,1991(2) K.L.T. 827. Travancore –Cochin Nurses and Midwives Act, 1953, S.36 contemplates delegation of enumerated powers for specific purposes. It cannot be used to prescribe upper age limit for admission to nursing school or restrict percentage of seats available to management.

[108] Under S. 36(b) regulations can only be made for the purpose of 'the conduct of any examinations which may be prescribed by rules as a condition of admission to the register and any matters ancillary to or concerned with such examinations'. See also, *Bimal Chandra Banerjee* v. *State of M.P*., A.I.R. 1971 S.C. 517; *Hukkum Chand* v. *Union of India,* A.I.R .1972 S.C. 2427; *Bar Council of Delhi and Another* v. *Surjeet Singh and Others*, A.I.R. 1980 S.C. 1612; *Powell* v. *May,* 1946(1) K..B. 330; *Hoff-man La Roche and Co* v. *Secretary of State,* 1975 (Appeal Cases) 295; *Laker Airways* v. *Department of Trade,* 1977 Q.B. 643; *Zaverbhai* v. *State of Bombay,* A.I.R. 1954 S.C. 752; *Karunanidhi* v. *Union of India,* A.I.R. 1979 S.C. 898 for scope of delegated legislation

[109] See also, *St.Xaviers College* v. *State of Gujarat,* A.I.R. 1974 S.C. 1389; *Frank Anthony P.S.E.Association* v. *Union of India,* A.I.R. 1987 S.C. 311; *State of Kerala* v. *Manager,C.M. of Schools,* 1970 K.L.T. 106; *Yunus Kunju* v. *State of Kerala,* 1988 (2) K.L.T. 299.

[110] A.I.R. 1963 S.C. 540.

[111] 2002(3) K.L.T. 490.

[112] S.5.2 (i) states : 'In the case of special reservation seats earmarked for MBBS course which are filled on the basis of the rank in the entrance examination, only candidates who have scored rank upto 5 fold of the total number of seats sanctioned in the State MBBS course before the commencement of the allotment process 2002, alone will be selected for admission'.

6.10. Reservation for Economically Backward Members of Forward Communities

Poverty or economic backwardness is the worst form of social evil. After the enactment of the land reform legislations, the economic backwardness among the forward communities has created a social havoc. In *Kerala Muslim Jama Ath Council* v. *State of Kerala*[113], Government Order directing 10% of the seats in all courses, at the graduate and post graduate level in government colleges and 7.5% of the seats in Departments under the universities shall be reserved for the students belonging to economically backward sections of the forward communities below poverty line. Upholding the Government order the Court held :

> ...At any rate the poor segment of people belonging to forward communities should not be given some solace, be it in the form of reservation of a few seats in government colleges or otherwise ,is totally uncharitable, to say the least…[114]

Thus judiciary in Kerala remains seems so vibrant to the problems of the different communities.

6.11. Time Schedule for Admission

The right of managements to conduct admission tests of their own results in many malpractices. Some management fixes the time schedule for various stages of the entrance examinations according to their whims and fancies. There will be no time gap between inviting applications and the conduct of tests in certain cases. In other cases, admissions are made very early that students join a particular institution paying the fee as they cannot take risk of non performance in a future test conducted by some other consortium. The time schedule for various stages of the entrance examination for MBBS admission in the country are to be mandatorily complied with by every medical college in the State, whether Government, aided or private self financing[115].

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[113] 2010 (1) K.H.C. 348.
[114] *Id*. at p.352, para13.
[115] See *Mridul Dhar and Another* v. *Union of India and Other*s, (2005) 2 S.C.C. 65, paras 8 to 12; *Medical Council of India* v. *Manas Ranjan Behera and Others,* (2010) 1 S.C.C.173.

The Kerala High Court in *Fathimma Haseena*[116] referring to *Mridul Dhar*[117] held :

> ...the above would go to show that the Supreme Court issued those directions as having general applicability for all situations and not only in the context of safeguarding interests of students seeking admission in the All India Quota alone. As far as the reliance by the counsel for the 5th respondent in *Madhu Singh's case*[118]is concerned, suffice to say that even if it supports the case of respondents 5 and 6, which itself is not conclusive, the same being an earlier decision of a bench of lesser strength, the later decision in *Mridul Dhar's* case, by a larger bench, would no doubt prevail over the same. ….If all entrance examinations for admission to various medical colleges in the State for the same year are completed simultaneously, the chances of manipulations in admission by unscrupulous managements can be reduced to the minimum. Unaided managements will not get the opportunity to doctor their rank list after knowing about the rank list published by the Commissioner of Entrance Examinations[119]. Simultaneous completion of admission process at all levels in all medical colleges in the State would ensure fairness, transparency and non exploitation in admissions in unaided medical colleges also to the maximum, which is what the Supreme Court repeatedly called for in all their decisions on the subject[120].

In *Noorbina Banu* v. *State of Kerala*[121], the Court held that in admission to medical colleges the time schedule fixed by All India Medical Council for different stages of admission has to be mandatorily complied with[122]. This helps in

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[116] 2008 (3) K.L.T. (Suppl.)143.
[117] (2005) 2 S.C.C. 65, paras 8 to 12.
[118] *Medical Council of India* v. *Madhu Singh and Others,* (2002) 7 S.C.C. 258.
[119] In any event, since the Medical Council of India has incorporated the time schedule in the Graduate Medical Education Regulations, the time schedule has attained statutory character. That time schedule can be changed only by the Supreme Court of India which the Supreme Court has occasionally done for very compelling reasons.
[120] *Noorbina Banu* v. *State of Kerala,* 2010(3) K.L.T. 581, para 11.
[121] 2010 (3) K.L.T. 581.
[122] *A.I.I.M.S. Students' Union* v.*A.I.I.M.S.,*2002 K..H.C.1096; *Asha. P* v. *State of Kerala and Others*, 2009(4) K.H.C. 721; *Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 S.C.C.1; *Dr.Jayakumar E.K* v. *Director of Medical Education and Others*, 2003 K.H.C. 626; *Himani Malhotra* v. *High Court of Delhi*, A.I.R. 2008 S.C. 2103; *Harish Verma and Others* v. *Ajay Srivastava and Another,*(2003) 8 S.C.C. 69; *K.Doraiswamy* v. *State of T.N.*,(2001) 2 S.C.C. 538; *K.H.Siraj* v. *High Court of Kerala*, (2006) 6 S.C.C. 395; *Manjusree* v. *State of A.P*, (2008) 3 S.C.C. 512; *P.V.Indiresan* (2) v. *Union of India and Others*, (2011) 8 S.C.C. 441; *Pre PG Medical Sanghos Committee* v. *Dr.Bajrang Soni and Others*, (2001) 8 S.C.C. 694; *Relly Susan Mathew* v. *Controller of Entrance Examinations,Trivandrum and Others*,1997 K.H.C. 604; *State of Punjab* v. *Dayanand Medical College and Hospital and Others*,(2001) 8 S.C.C. 664; *Vijendra Kumar Verma* v. *P.S.C.,*(2011) 1 S.C.C. 150.

maintaining fairness, transparency and non exploitativeness in the admission procedure.

6.12. Approval of the Committee at Every Stage of Selection Process

In *Amina Nahna* v. *State of Kerala*[123] the Court held that at every stage of admission process, Association of colleges should get the approval of the Committee. The Committee submitted before the Court that apart from granting conditional approval of the prospectus, it had not approved anything that the Association has done. In *Noorbina Banu*[124]it was specifically stated that 'prior approval 'is to be mandatorily obtained' and 'prior consultation' by the Association at every stage is a legal requirement. It cannot be contended that until disapproved the action holds well.

6.13. Justifiability of Prescribing Different Minimum Percentage of Marks for Qualifying Examination for Different Member Colleges of the Consortium

In *Miss A. Karthiga* v. *The Secretary and Others*[125], the learned single judge of the Madras High Court had upheld the autonomy of the private unaided professional institutions to fix a higher minimum mark to be obtained in the qualifying examination in order to become eligible to write the common entrance test. Different boards and universities conducting qualifying examination will have different standards. Students studying under a board or a university which adopts liberal standards will have an edge over students undergoing study in universities adopting stricter standards. There has to be some equalizing criteria for the marks obtained by students in qualifying examinations under different boards or universities. Prescribing different minimum percentage of marks for qualifying examination for different member colleges act as equalizing criteria in such cases and hence allowable.

[123] 2011(3) K.L.T. 753 at p .769, para 42.
[124] *Noorbina Banu* v. *State of Kerala*, 2010(3) K.L.T. 581.
[125] 2007 K.H.C. 3467.

6.14. Guidelines for Holding Entrance Test in Future

The judicial verdicts upholding the rights of private managements to conduct entrance tests on their own have created some thorny problems. Some managements, in order to make maximum profit out of the courses holds entrance tests much ahead of the time schedule adopted by other consortiums. There will be little time gap between the issue of prospectus and the conduct of the test. Eligibility criteria for admission to a course by modifying or amending the prospectus after the last date fixed for submission of applications are resorted to in certain cases[126]. Moreover, sufficient advertisements inviting applications were not put up. The High Court of Kerala has given a welcome relief to the students and parent community with regard to the conduct of entrance examinations for professional courses by giving directions for conduct of entrance exams in future.

In *Fathima Haseena's* case it was held :[127]

> ...the notification specifically states that applications will not be sent by post. In this connection, it is pertinent to note that…issued to only those who agreed to pay capitation fee. At least to obviate such a complaint application forms should have been issued by post to those who seek the same. Another foolproof and less time consuming system would have been to make facility to download the application form from the Internet….Stipulation that application forms will not be sent by post does not satisfy the triple test of being fair, transparent and non exploitative[128].

Further guidelines for holding entrance test in future are made as under:[129]

> …. for coming years, the following requirements shall be strictly complied with by unaided medical colleges, who opt to conduct their own entrance test for selection of students for admission:(a) The time schedule prescribed as per the Medical Council of India Regulations as approved by the Supreme Court of India in *Mridul Dhar's* case[130] shall be strictly followed. If, for any reason, entrance test cannot be conducted within the said time schedule, admission shall be completed by admitting students from the rank list published by the

[126] *Varghese Philip* v. *State of Kerala*, 2004 (1) K.L.T. 581. (1997) 4 S.C.C.18 relied on. I.L.R. 1997 (2) Ker. 489 distinguished.
[127] *Fathima Haseena . P* v. *State of Kerala,* 2008 (3) K.H.C. 544.
[128] *Noorbina Banu* v. *State of Kerala,* 2010(3) K.L.T. 518, para 17.
[129] *Fathima Haseena . P* v. *State of Kerala,* 2008 (3) K.H.C. 544.
[130] (2005) 2 S.C.C. 65.

> Commissioner of Entrance Examinations of the Government of Kerala for the year, ensuring interse merit of the candidates, subject to orders that may be issued by the Supreme Court of India, if any, in that regard. (b) At every stage of the admission process, issue of notification inviting applications, preparation of prospectus, issue of application forms, setting of question papers, deciding the method of valuation, publication of list of applicants, conduct of written test, preparation of prospectus, issue of application forms, setting of question papers, deciding the method of valuation, publication of list of applicants, conduct of written test, preparation of rank list, counseling etc., approval from the Admission Supervisory Committee appointed under S.4 of Act 19 of 2006 shall be mandatorily obtained, failure of doing which would render such selection invalid. (c) Notification inviting applications shall contain all essential particulars and shall be published in all leading daily newspapers, both English and Malayalam, sufficiently early. (d) Application forms shall be made available by post and courier also and candidates must be permitted to submit application in forms downloaded from the internet. The government shall ensure that the colleges make available sufficient number of application forms through public information officers of the Government of Kerala in each district collectorate. (e) After the last date fixed for submitting applications a list of applicants who have submitted valid applications, shall be published including in the website. (f) The results of the entrance test with marks obtained by each candidate and the rank list prepared shall also be similarly published, accessible to individual candidates. (g) Separate lists of admitted candidates in each category shall be duly published, accessible to candidates….all directions issued by the Admission Supervisory Committee for ensuring a fair, transparent, merit based, non exploitative admission procedure as contemplated in the decision of the Supreme Court of India in *P.A. Inamdar's* case shall also be strictly complied with ….As nearly as possible the conduct of the Common Entrance Test shall conform in form, procedure and substance with that conducted by the Commissioner of Entrance Examinations of the State of Kerala[131].

This creates more transparency with regard to the conduct of the exams and merit based admissions can be sufficiently ensured.

6.15. Admission Process by Colleges Without Affiliation or Recognition Along With Consortium of Colleges Similarly Placed

The Admission Regulatory Committee should see to it that the members of the consortium who start the admission process have sufficient infrastructure and

[131] *Noorbina Banu* v. *State of Kerala,* 2010(3) K.L.T. 581, para 15.

eligibility to start the admission process during a particular year. In *Noorbina Banu*[132]the Court held that colleges which don't have permission to run the colleges for the year could not start admission process as a part of consortium of colleges similarly placed. This would to an extent prevent colleges which have not satisfied the minimum requirements to start a course during a particular year from taking undue advantage of being member of a consortium to get in to the admission process and later get permission. In case such colleges do not qualify to get permission to start admission process, those students who have already joined the course believing that the institution will get permission will be in trouble.

6.16. Contract With Government

The consensual agreement between the government and educational institutions with a view to provide admission to the weaker sections is permissible as per the declaration of law in *Inamdar*. In *Inamdar* it was held that para 68 of *TMAPai* allows consensual arrangements which can be made between the government and the educational institutions concerned. However, the constitution bench decision totally disapproved the *Unnikrishnan Scheme,* whereby the fees of the 50% students get subsidized by the other 50% students. The documents relating to consensual agreement between the State of Kerala and managements of various professional educational institutions running Engineering[133], Medicine[134] and B. Ed[135] Courses for various years reveal that the attempt is to bring back the

[132] 2010(3) K.L.T. 518, para 18.

[133] Copy of the agreements between the government and Collective Association of Engineering Colleges issued as per Letter.No.44454/G3/2011/H.Edn.Higher Education (G) Department Trivandrum, dated 23.1.2012 received from the State Public Information Officer, under Right to Information Act in response to an application dated 5.11.2010 and 09.12.2011 by the research scholar speaks about existence of 75 Engineering Colleges.

[134] Copy of the agreements between Government and Private Medical Managements issued as per Letter No.52996/S3/2011/A.K.V. Health and Family Welfare Department (S) Department, Trivandrum, dated 17.1.2012, received from State Public Information Officer, of the above department, as per application given by the research scholar on applications dated 5.11.2011 and 9.1.2012.

[135] See G.O.(Rt) No. 226/11/H.Edn. dated 8/2/2011 giving administrative sanction for conducting B.Ed course in Auxilium College of Education Angamaly under Kottiyam Auxilium Society for the year 2010-2011 and G.O.(Ms) No.361/10/H.Edn dated Trivandrum,1.11.2010; on renewal of N.O.C. issued for starting B.Ed Special Education (Mental Retardation) Course in Sneha Sadan College of Special Education, Ankamaly, Ernakulam District with intake of 25 students for the year 2010-2011. Above orders were received by letter No.39991/B4/11/H.Edn., Higher Education (B) Department, Trivandrum, dated 25.11.2011 by the State Public Information Officer, of the above department as per application dated 5.11.2011 of the research scholar.

Unnikrishnan Scheme which is declared unconstitutional. Documents relating to Medical admission for the years 2008-2009[136], 2009-2010[137], 2010-2011[138], 2011-2012[139] have been perused. Documents relating to Engineering admission for the years 2008-2009[140], 2009-2010[141], 2010-2011[142], and 2011-2012[143] are also looked into.

In the Academic year 2011-2012, in the agreement entered into between 75 engineering colleges and the government, 50% of the total seats were set apart as government quota. Out of the above government quota, 50% seats (25% of the total seats) was earmarked for lower income group with the annual fees for Rs 35,000. In the remaining 50% seats out of the government quota annual additional special fees of Rs.25,000 was permitted. The table provided therein shows that the management is given liberty to collect Rs.99, 000/-as tuition fees and 25,000 as special fees from 35% of the seats set apart for them. In the remaining 15% NRI seats, the annual tuition fees was at Rs.1,50,000/- with a special fees of Rs.25,000/. Against the 50% of seats being filled by management, an interest free refundable deposit of Rs.1,50,000/-is also permitted to be collected. From the terms of the fee

[136] G.O (Rt.) No.2243/2008/H and FWD dated, trivandrum, 28.6.2008. The managements concerned shall be entitled to collect a total annual fees at a concessional rate of Rs.45,000/- during the entire course of study from the students, except SC/ST, admitted against the 50% seats in government quota 35% of the total seats shall be filled up by the management concerned .

[137] G.O (Rt.)No.1898/2009/H and FWD dated, trivandrum, 6.7.2009.

[138] G.O (Rt.)No.2431/2010/H and FWD dated, trivandrum, 19.6.2010.

[139] G.O (Rt.)No.3096/2011/H and FWD dated, trivandrum, 27.8.2011.

[140] In 2008, the government of Kerala entered in to a contract with Kerala Self Financing Engineering College Managements' Association for admission to B. Tech degree course in 49 member colleges. In the agreement, it was stated that the government ensures that admission in 50% seats in private self financing professional colleges shall be from the CET conducted by the State in accordance with the principle of merit and complying with the reservation principles in government colleges and the members agree to it in mutually acceptable terms which is within the framework of decision in *P.A. Inamdar*. In the agreement regulating medical admission, six private self financing colleges imparting medical admission entered into contract with the government for the academic year 2008-2009 . In that agreement also it was stated that 50% of seats will be following merit based admission from the CET conducted by the government, following reservation principles. In the colleges having minority status, 20% seats of the above 50% seats will be filled up by the government from the list prepared by the Commissioner for Entrance Exams by the students belonging to the community which established the member colleges based on their interse merit.

[141] No.44454/G3/2011/H.Edn.Higher Education (G) Department, Thiruvananthapuram, dated 23.1.2012 issued by the State Public Information Officer under Right to Information Act dated 5.11.2010 and 9.12.2011.

[142] *Ibid.*

[143] *Ibid.*

structure, it is evident that cross subsidy, prohibited in *Unnikrishnan* Scheme, is brought back under the cover of consensual agreement. It is unfortunate that the Fee Regulatory Committee gave approval for such contracts which are not permissible as per the directions of the highest court of the land.

Thus it can be seen that inspite of the judicial interventions one after the other, the State governments with a view to satisfy certain sections of the people are compelling the managements to follow the principles of cross subsidy which is forbidden in law. A student, who is an aspirant to professional courses, will have every right to invoke the remedy under Article 226 to enforce his fundamental right to get merit based admission in a non exploitative manner in view of the dictum laid down through the decisions.

6.17. Privilege Seats

According to the 2006 Kerala Act, in admissions to privilege seats , interse merit has to be complied with[144]. Seven colleges under the Kerala Private Medical College Managements Association on 22nd June 2012, signed fresh seat-fee pact with the government[145], wherein 15% of the total seats in each institution would be deemed as 'privilege seats' carrying a fee of Rs. 6.5 lakhs and a deposit of Rs.1 lakh. As per the terms therein, the managements would not be bound by the rank position of a candidate on the medical rank list while making admissions against those privilege seats. Only requirement is that candidates should be eligible for admission to the MBBS course as per the conditions laid down by Medical Council of India. Inter se merit has been given done away with by the above decision. The government is finding it very difficult to regulate admissions and is coerced to concede the illegal demands of the profit motivated private managements.

[144] Kerala Professional Colleges or Institutions(Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education)Act, 2006, S.2(q) states : Privilege seats means seat filled up through the single window system from the common merit list prepared by the Commissioner of Entrance Exams through the CET, on the basis of interse merit from the applications submitted by the management of each unaided professional college or institution, as may be prescribed.

[145] 'Medical Colleges Sign Fresh Pact' *The Hindu,*(Cochin),Saturday, June 23, 2012, p.5.

6.18.Conditions in Prospectus Affecting Students

In *Deepa Thomas* v. *Medical Council of India*[146]prospectus contained a mistake as to eligibility criteria for admission .When the MCI regulations insist on a minimum of 50% marks both in the qualifying exam and in the CET, separately, the prospectus did not specify that 50%marks were necessary in the CET also. Though the appellants had secured more than 50%marks in the qualifying exam, they could secure only less than 50% marks in the CET. The Court held that, as the candidates took admission without being aware of the difference between the MCI regulations and the prospectus regarding the eligibility criteria for admission, on considerations of equity, the students could be allowed to continue the course[147].

In *Vinod K.M.(Dr.) and Others* v. *State of Kerala and Others*[148], the Court held that amendment brought out in the prospectus for admission to post graduate medical degree withdrawing negative marking for in service quota candidates as discriminatory as against other group of candidates and quashed the amendment to the prospectus .

6.19. Conclusion

Thus we can find that there have been sufficient legislative efforts to revamp the educational sector in Kerala particularly with regard to the professional sector. The legislature wisely realized that the peculiar demographic situation in the State with minority domination in the educational sector should be regulated. Hence there have been attempts to redefine minority and minority educational institutions. Even from the time of the *In Re Kerala Education Bill*, this trend could be seen. Moreover, the judiciary has also attempted to balance minority rights in running educational institutions with the rights of the student community by bringing in fairness, transparency and non exploitative ness in admission procedure. The legislative boldness in redefining minority and minority educational institutions could not be upheld by the judiciary as the precedents of the higher judiciary fetters

[146] 2012-LAWS(SC)-1-54.
[147] *Supreme Court Bar Association* v. *Union of India and Another,*(1998) 4 S.C.C. 409.
[148] 2012 (2) K.H.C. 797(D.B.).

them. But the arguments of the State in redefining minority found a sympathetic consideration from the judicial forum[149].

> ...There may be some rationality in extending the benefit of Art. 30 to a non dominant minority, but for that, as mentioned above; Art. 30 itself has to be amended. ..

This is a welcome change which should give material for thought for the higher judiciary in conferring educational rights to the minorities so that no reverse discrimination happens to the non minority in deserving cases.

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[149] *Lisie Medical and Educational Institutions* v. *State of Kerala,* 2007(1) K.L.T. p.491, para 61.

Chapter - 7

ADMISSION TO MINORITY STUDENTS IN EDUCATIONAL INSTITUTIONS IN UNITED STATES OF AMERICA AND INDIA: A COMPARISON

Chapter - 7

ADMISSION TO MINORITY STUDENTS IN EDUCATIONAL INSTITUTIONS IN UNITED STATES OF AMERICA AND INDIA: A COMPARISON

"All men are created equal, except Negros"

Abraham Lincoln[1]

7.1. Introduction

In recent debates on admission to educational institutions in the US, the notions of equity and access go beyond the concept of minority to diversity and affirmative action has become race exclusive. The nature and scope of admission to minorities in educational institutions in United States of America is examined in the instant Chapter. Religious and linguistic minorities are recognized in India whereas minorities based on race are found in America. The census bureau of America defines a minority as 'anyone who is not single race white and not Hispanic[2]'. Unlike religious and linguistic minorities who get right to establish and administer educational institutions as a fundamental right in India, there is no fundamental right to minorities to establish and administer educational institutions or to get admission in educational institutions in the US. Moreover, segregation of racial minorities in access to educational institutions and public places used to be practiced in the United States. In India, minority rights are given under Part-III of the Constitution providing for fundamental rights and they do not have to ask for the mercy of the State by way of any affirmative action programmes. But in some States in India where muslims, Christians, Jains etc. are identified as 'socially and educationally backward' or 'backward classes', they could claim the benefit of Art.

[1] Famous quotation by Abraham Lincoln. This was part of an election debate Lincoln was having with Judge A. Douglas, They were both contesting for the position of Senator from Illinois.

[2] Laxman, Narayan, "White Babies Now a Minority in The U.S'', *The Hindu*(Cochin), Saturday, May 19, 2012.p.16.

15(4)[3] and Art.16(4)[4] respectively. Affirmative action policies including quotas providing for admission to minorities in public educational institutions prevail in the US but government programmes which provide for quotas to minorities have to show compelling governmental interest. These programmes have to be narrowly tailored and are strictly scrutinized[5]. Governmental initiatives which provide for quotas to minorities have to establish that there are no alternatives other than quotas as affirmative action programmes. Further, admissions to minorities have to pass the 5th and 14th Amendment tests.

7.2. Segregation in Admission to Minority Students in Public Educational Institutions and 14th Amendment

Segregation between children in admission on the basis of race used to be practiced by educational institutions in America. The authorities used to argue that the institutions providing education to white and the negros are equal without taking into account the psychological effects of segregation in the minds of negros. Such practices deprive the children of the minority group of equal educational opportunities. Constitutionality of segregation in public education was subject to challenge before the judiciary as violative of 14th amendment which provides for equality before law and equal protection of laws. The authorities justified segregation on the basis of *separate but equal concept.* Separate but equal was a legal doctrine in United States constitutional law that justified and permitted racial segregation, as not being in breach of the Fourteenth Amendment to the United States Constitution which guaranteed equal protection under the law to all citizens, and other federal civil rights laws. Under the doctrine, government was allowed to require that services, facilities, public accommodations, housing, medical care,

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

[4] Article 16(4) reads : "Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State".

[5] Gutta, Asha, "Affirmative Action in Higher Education in India And The U.S. : Study in Contrasts", Research & Occasional Paper Series: CSHE.10.06 University of California, Berkeley at http://cshe.berkeley.edu/ visited on 6.6. 2011. See also, Ramesh Babu.B., *Minorities and the American Political System*, South Asian Publishers, New Delhi,(1989).

education, employment, and transportation be separated along racial lines, provided that the quality of each group's public facilities was equal[6].

7.2.1. Separate but Equal Concept-Violative of Equal Protection of Laws of 14th Amendment

There are laws requiring or permitting segregation according to race in various States of America. In a plethora of cases, it was held that based on tangible factors the negro and white educational institutions may be equalized but due consideration should be given to intangible factors and psychological effects of segregation[7]. In *Brown* v. *Board of Education*[8], the Negro race sought the aid of the Court in obtaining admission to the public schools on a non segregated basis. Contention was that separate but equal doctrine of *Plessey*[9] formulated in 1896[10], is not right law[11] and segregated public schools cannot be made equal and hence they are deprived of equal protection of the laws[12]. The Court concluded that in the

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6 The phrase was derived from a Louisiana law of 1890, although the law actually used the phrase "equal but separate''. See also, John Rawls, *A Theory of Justice,* Harvard University Press, (1999).

7 *Brown* v. *Board of Education*, 349 U.S. 294:99 L. Ed. 1083 (1955). See also *Gaines* v. *Canada,* 305 U.S. 337(1938); *Sipuel* v. *Oklahoma,* 332 U.S. 631–same as Gaines. *Sweatt* v. *Painter*, 339 U.S. 629 deals with admission to Texas University. In *Sweatt*, the Court relied in large part on those qualities which are incapable of objective measurement but which makes for greatness in a law school. *Mc Laurin* v. *Oklahoma State Regents,* 339 U.S. 6 deals with segregation of black students in State university. Even though these cases involved the doctrine, there was no need to re examine the doctrine. In *McLaurin*, the Court resorted to intangible considerations such as the ability to study, to engage in discussions and exchange views with other students and in general to learn the profession.

8 *Brown* v. *Board of Education,* 349 U.S. 294:99 L. Ed. 1083 (1955).

9 *Plessey* v. *Ferguson,*163 U.S.537:41 L Ed 256(1896), Court introduced 'separate but equal' concept (transportation case). *Plessey*, involved a challenge to Louisiana statute that provided for equal but separate accommodations for black and white passengers in trains, the United States Supreme Court was of the view that racial segregation was a reasonable exercise of the State police power for the promotion of the public good and upheld the law.

10 41 L.Ed .256 :1163 U.S. 537(1895).

11 In *Cumming* v. *County Board of Education*, 175 U.S. 52 and *Gong Lum* v. *Rice*, 275 U.S.78, the validity of the doctrine itself was not challenged. In *Cumming,* it was held that school board should resume a high school for negros. In *Lum Gong,* Chinese student was held to be wrongly admitted to negro school misapplying the doctrine.

12 These cases were from the States of Kansas, South Carolina, Virginia and Delaware. In each of the cases, minors of the Negro race seek the aid of the Courts in obtaining admission to the public schools of their community on a non segregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. In most of the cases, the Courts below denied relief relying on the so called 'separate but equal' doctrine announced by this court in *Plessey*. The plaintiffs contend that segregated public schools are not "equal", and cannot be made "equal" and that hence they are deprived of the equal protection of the laws. See also *Slaughter house* case-Court said that 14th amendment proscribed all state imposed restrictions against negro race.

field of public education the doctrine of 'separate but equal' has no place as separate educational facilities are inherently unequal and violative of equal protection clause. In the early cases, construing the 14th amendment, the Court interpreted it as proscribing all state imposed discriminations against Negro race. In *Cumming* v. *County Board of Education*[13] it was held that the School Board should resume high school for Negros. Further in *Lum Gong* v. *Rice*[14] a Chinese student was wrongly admitted to Negro school misapplying the doctrine. In more recent cases, all on the graduate school level, effect of segregation itself on public education was not looked into; but inequality was found in that, specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications[15]. The effect of segregation itself on public education was looked into by the Court in *Brown* v. *Board of Education*[16], wherein the Court held that education is one of the most important functions of State and local governments and it is a right which must be available to all on equal terms and the impact of segregation is greater when it has the sanction of the law and should not be promoted.

7.2.2. Due Process and Segregation in Admission Based on Race

The Fifth Amendment[17] dealing with due process does not contain an equal protection clause. The concepts of equal protection under 14th amendment and due process under 5th amendment, both based on fairness, are not mutually exclusive, and discrimination could be unjustifiable as to be violative of due process. Liberty under 5th Amendment could be restricted for a proper governmental objective. In *Bolling* v. *Sharpe*[18], which was decided on the same day as *Brown*[19], the Court held

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13 175 U.S. 52.
14 275 U.S. 78.
15 *Missouri ex rel.Gaines* v. *Canada,* 305 U.S. 337(1938); *Sipuel* v. *Oklahoma,* 332 U.S. 631; *Sweatt* v. *Painter*, 339 U.S. 629; *Mc Laurin* v. *Oklahoma State Regents,* 339 U.S. 6.
16 98 L. E d. 873 : 347 U.S. 483(1955).
17 5th Amendment reads : "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".
18 347 U.S. 497(1954).
19 98 L. Ed .873 : 347 U.S. 483(1955) .

that racial segregation in the district of Columbia public schools violated the due process clause of the 5th Amendment since segregation in public education is not reasonably related to any proper governmental objective and thus it imposes on Negro children of the district of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the due process clause.

7.3. Affirmative Action in Admission to Higher Education in America

Affirmative action is a device aimed at serving as 'corrective' for past governmental, social or individual bias against women, groups or minorities based upon caste, class, creed or ethnicity. 'Affirmative action' or 'positive discrimination' aims to provide justice to those who are ill-treated, discriminated against or under-represented due to inherent socio-economic and cultural traits and to prevent those in power from doing wrong to caste/class/creed-based minorities. Affirmative action is only 45 years old in the USA[20] and has originated as a response to the civil rights movement[21] against discrimination in educational and job opportunities for the non-whites in general and African Americans and women, in particular[22]. Reservations or quotas are methods for promoting affirmative action.

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[20] Historically, it was associated only with race, gender or lower socioeconomic status but the civil rights movement in the early 1960s gave it a new meaning and purpose. Today, it implies "positive" or "reverse discrimination" in favour of the oppressed, whether the working class, women, minorities, Migrants, of people from lower socio-economic strata or disadvantaged areas. Affirmative action is no longer confining to either caste or class. In a paradigm shift from minorities to diversity, it has extended well beyond the concerns and actions of a particular interest group based on caste, class, creed, ethnicity, gender or region. The human rights movement has also given a new meaning and content to the notion of affirmative action based upon equity, justice, accessibility, neutrality with respect to gender and/or to physical or mental disability, fairness and other liberal democratic ideals. See also, Alan M. Dershowitz, *America on Trial,* Warner Books, Newyork, (2004).

[21] See, Title VI of the Civil Rights Act, 1964. Title VI of the Civil Rights Act of 1964 subjects all institutions that receive federal funds to any court determinations as to what constitutes "discrimination".

[22] The earliest use of the term "affirmative action" appeared in an Executive Order 100925 in the USA in 1961. It declared discrimination in employment practices based upon race, color, religion, sex or national origin unlawful. Similarly, President Lyndon Johnson's Executive Order 1124 in 1965, made it mandatory for federal government and federal contractor with fifty or more employees and a contract of the value of US $50,000 or more to ensure that minority groups comprised of the Blacks, Native Americans, Natinos, Hispean Americans and women got adequate representation their workforce. See also, Philip.C.Aka, "The Supreme Court and Affirmative Action in Public Education, With Special Reference to the *Michigan* Cases", *Brigham Young University Education and Law Journal*, 1,19 (2006).

7.4. Quotas for Minorities in Admission *Vis a vis* Equality Clause

In USA, affirmative action programs are designed to benefit African Americans, Hispanic Americans, Native Americans and women[23]. Affirmative action programs provide some relaxation or bonus points for admission purposes and/or financial assistance or scholarships. Providing reservation or quota systems in admission to educational institutions as a form of affirmative action can be resorted to only as a last resort[24]. For instance, in *Regents of the University of California* v. *Bakke*[25] the Supreme Court held that the UC Davis Medical School violated the "equal protection clause" of the XIV Amendment of the US Constitution by fixing quotas for underrepresented minorities. According to this verdict, race and ethnicity could be considered as "one factor among many", but not as "a dominant factor"[26]. One can give some weight to race or gender or any other factor, but that cannot be the sole criteria for admission to a college or university in the USA[27].

Similarly, in *Gratz* v. *Bollinger*[28], the Supreme Court ruled on the admission policy of the University of Michigan which took race into account numerically, finding it to be "too mechanical" and hence unconstitutional[29]. In *Grutter* v.

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[23] Asian Americans are not amongst the beneficiaries at most universities because of their higher performance rate at universities and colleges than other racial groups.

[24] Linda F. Wightman, "The Threat to Diversity in Legal Education: An Empirical Analysis of The Consequences of Abandoning Race as a Factor in Law School Admissions Decisions", *New York University Law Review* 72(1), pp.1–53,(1997). Wightman computed the number of minority students who would have been admitted on the basis of undergraduate grades and standardized test scores alone using data on every student who applied in 1990–91 to all 173 American Bar Association-approved U.S. law schools.

[25] 57 L .Ed. 2d 750:438 U.S. 265(1978).

[26] *Ibid*. In *Bakke*, Justice Powell concluded that achieving the educational benefits of diversity was a compelling reason for considering race in making admissions decisions. But he never suggested that this was the only compelling purpose. Derek Bok and others, in the instant case proposed that that educating individuals who can play leadership roles in helping to meet contemporary societal needs is another vital purpose. See, "The Uncertain Future of Race-Sensitive Admissions", pp. 2–12, January 2003; available at *http://www.nacua.org/documents/Unceratin_Future_of_Race_Sensitive_Admissions_Revised.pdf* visited on 26.6.2010.

[27] Caroline M. Hoxby, "The Effects of Geographic Integration and Increasing Competitiveness in The Market For College Education", May 2000 Revision of NBER Working Paper No. 6323.

[28] (2003)156 L. Ed .2d 257.

[29] It rejected the policy of granting a 20-point bonus on a 150-point scale to blacks, Hispanic and American Indian applicants. See also, Gerald Gunther, "The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", 86 *Harv.L.Rev.*1, 8 (1972).

Bollinger[30], the Court gave approval to the policy of considering race as one of the criteria for admission into the law schools in order to get benefits arising from a diverse student body[31]. It was held that Michigan's efforts to maintain a "critical mass" of minority students did not amount to using an illegal quota, as it granted admission based on individual considerations and not on a group basis.

The combined effect of the *Bakke,*[32]*Grutter*[33], and *Gratz*[34] is that no one has a legal right to have any demographic characteristic they possess, be considered a favorable point on their behalf, but an employer has a right to take into account the goals of the organization and the interests of American society in making decisions. In principle, in American law, quotas are not consistent with equality as laid down in *Bakke*[35], *Gratz*[36]and *Grutter*[37]. In *Paradise*[38], quotas were approved but it was a special case where there was a proven hostile exclusion in that establishment over decades and the quota was temporary with controlled application in that circumstance[39].

In all other respects the attitude as regards quotas for minorities in admission is thus:

(i) Equality also includes affirmative action but it should not necessarily trammel the interests of the non minority community[40],

(ii) Quotas are permitted only when there is a demonstrated case of overt and defiant hostility[41].

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30 (2003)156 L .Ed. 2d 304.

31 William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, Princeton, NJ: Princeton University Press, (1998), pp. 232–3, 241–7. Recognition of the educational value of diversity has a substantial history. For an extended discussion of the value of diversity in higher education as viewed by 19th and 20th century thinkers, see Neil L. Rudenstine, *Diversity and Learning, The President's Report*: 1993–95, Harvard University, (1995), pp. 3–12.

32 *University of California Regents* v. *Bakke*, 57 L. E d. 2d 750:438 U.S. 265 (1978).

33 (2003)156 L. Ed. 2d 304.

34 (2003)156 L .Ed .2d 257.

35 *University of California Regents* v. *Bakke*, 57 L. E d .2d 750:438 U.S. 265(1978).

36 *Supra* .n.34.

37 *Supra* .n.33.

38 *United States* v. *Paradise,* 1987 L. Ed.203.

39 *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 S.C.C. 1 at p. 201.

40 *University of California Regents* v. *Bakke*, 57 L. Ed. 2d 750 at pp. 774-6, 780-82 (*per* Powell, J.) and *United Steel Workers* v. *Weber*, (1979) 61 L .Ed . 480 at p. 492 (*per* Brennan,J.); p.497 (*per* Blackmun, J.).

(iii) Rigorous scrutiny is called for in respect of affirmative action programmes which must be narrowly tailored[42].This is also in consonance with the *Indra Sawhney*[43] and *Nagaraj* [44]decisions.

7.4.1. Standards for Judicial Review Against Reservation or Quotas in Admission

Whenever an affirmative action programme which provides for quotas for minorities in admission is challenged as unconstitutional, Courts must ask themselves how much deference they will give to the legislature. The United States Supreme Court has evolved three standards to review Government action that treats people differently.

(1.) *Rational Basis Standard*

When the classification is rationally related to any legitimate government purpose, the Court defers to the State and upholds the classification. This is the most deferential of the three standards.

(2.) *Intermediate Scrutiny*

This standard is less deferential to government. Here, the Court asks whether the classification is substantially related to any important government purpose.

(3.) *Strict Scrutiny*

The third and highest level of review is known as strict scrutiny, whereby the Court requires that the classification is narrowly tailored to a compelling state interest. The strict scrutiny test is least deferential to the Government. The Supreme Court of the US is of the view that affirmative action plans must rest upon a

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41 *Wendy Wygant* v. *Jackson Board of Education,* (1986)90 L.Ed. at pp.269, 270 (*per* O' Connor,J.); *United States* v. *Paradise*, L.Ed. at pp. 222-224,230-32 (*per* Brennan,J.); p. 234(*per* Powell, J.); p.235(*per* Stevens,J.).

42 *University of California Regents* v. *Bakke*, 57 L. E d. 2d 750:438 U.S. 265(1978) at pp.787-789 and 790-92 (*per* Powell, J.); *Gratz* v. *Bollinger*, L.Ed .2d at pp.280-84 (*per* Rehnquist, J.); *Grutter* v. *Bollinger*, L.Ed. 2d at pp.336-339(*per* O'Connor,J.); *City of Richmond* v. *Croson,* (1989)102 L .E d .2d 854 at p.876, at pp.881-82;888; and 890-91(*per* O'Connor,J.)Seattle decision.

43 (1992) Supp. 3 S.C.C. 217.

44 (1964) 6 S.C.R. 368. See also *Firefighters Local Union* v. *Scotts,* (1984) 467 U.S. 561 at p.499 (*per* White, J.); p.505 (*per* O'Connor, J.); *Wendy Wygant* v. *Jackson Board of Education,* (1986) L.ed 2d at p.268 (*per* Powell ,J.), at p.277, (*per* O'Connor, J.)

sufficient showing or predicate of past discrimination which must go beyond the effects of societal discrimination[45].

In a catena of decisions of the United States Supreme Court ranging decades of jurisprudence, a heavy burden has been placed on institutions whose affirmative action programmes are getting challenged before the United States Supreme Court on grounds that have been recognized as suspect or unconstitutional since they rely on suspect forms of classification (such as race). Those practicing these affirmative action programmes have to adhere to a very high standard of proof, known as the '*strict scrutiny'* test. The first limb of the *strict scrutiny test* elucidates the '*compelling institutional interest*' and is focused on the objectives that affirmative action programmes are designed to achieve. The second limb, of strict scrutiny i.e. '*narrow tailoring',* focuses upon details of specific affirmative action programmes and on the specific people it aims to benefit[46].

7.4.2. Compelling Institutional Interest

The first limb of the strict scrutiny test necessitates "compelling institutional interest'' which is focused on the objectives that affirmative action programmes are intended to achieve. "Compelling Institutional Interest" can be justified only on two grounds. *Regents of the University of California* v. *Bakke*[47] provided a starting point and from this case onwards, affirmative action programmes can be justified only on two distinct grounds of *remedial justification* and *diversity* and these grounds have been recognized as compelling enough so as to satisfy the '*strict scrutiny*' test, as developed by the United States Supreme Court.

7.4.3. Remedial Justification

All efforts aimed at remedying past injustices against groups of people, who were unlawfully discriminated against in the past, serve as adequate justifications

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[45] *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 S.C.C. 1 at p. 517, para 199. See also, Lewis .F. Powell Jr., "Carolene Products Revisited", 82 *Columbia L. Rev.*1087(1982); Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts", 59 *Vanderbilt L.Rev*.793(2006).

[46] *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 S.C.C. 1 at p.204.

[47] 57 L.Ed. 2d 750 : 438 U.S. 265 (1978). See generally, Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press,(2000).

and all affirmative action programmes with this aim serve the compelling institutional interest in removing discrimination that occurred in the past. In *City of Richmond* v. *J. A. Croson Co*[48], the United States Supreme Court held that if a university is able to show 'some showing of prior discrimination' in its existing affirmative action programme, then the university may take 'affirmative steps to dismantle such a system'. However, it is to be noted that the U.S Supreme Court also attached a warning with the above observation on the following lines:[49]

> … Court would make searching judicial inquiry in to the justification for such race based measures... (and to)identify that discrimination... with some specificity before they may use race-conscious relief.

7.4.4. Diversity

All affirmative action programmes aimed at bringing about racial diversity among the scholarship of the institution(s) may be said to be in furtherance of compelling institutional interest. The starting point for this ground is Powell, J.'s observation regarding the issue of diversity in *Regents of the University of California* v. *Bakke*[50]. In this case, according to Powell, J. the attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education[51]. It was observed that it is the business of a university to provide that atmosphere conducive to speculation, experiment and creation. The atmosphere essential to the quality of higher education is widely believed to be promoted by a diverse student body. Exposure to the ideas and values of students from diverse groups is essential for building up a strong nation.

7.4.5. Narrow Tailoring

The second limb, of strict scrutiny is '*narrow tailoring*'. It focuses upon details of specific affirmative action programmes and on the specific benefits the affirmative programme is intended to achieve. The affirmative action programme of University has to be designed in the narrowest possible manner, in order to

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48 488 U.S. 469(1989).
49 *Croson* case, 488 U.S. 469(1989).
50 57 L. Ed .2d 750:438 U.S. 265 (1978).
51 *Sweezy* v. *New Hampshire,* 1 L. Ed .2d 1311: 354 U.S. 234 (1956); *Keyishian* v. *Board of Regents,* 17 L. Ed. 2d 629:385 U.S. 589 (1966).

benefit only deserving groups, thus serving the 'compelling purposes' of the affirmative action programme. Otherwise, it may be possible that the rights of other people may be infringed upon, which would make the affirmative action unconstitutional[52].

In *Parents involved in Community Schools* v. *Seattle School District No.1*[53], there was a failure on the part of districts to show that they considered methods other than racial classifications to achieve their stated goals. The following propositions were laid down by the Court:

(1) The school districts must demonstrate that their classifications are narrowly tailored to achieve compelling government interest[54].
(2) To establish that racial classifications are narrowly tailored, the government must demonstrate that the classifications are employed, in terms that are not so broad and imprecise that they cannot withstand strict scrutiny[55].
(3) Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives'[56].
(4) Plans directed towards 'racial balance' (and not racial diversity, which is permissible) are violative of the equality principle, hence unconstitutional[57].
(5) All races based government decision making, regardless of context is unconstitutional and cannot be justified by remedial purpose or good faith.[58]
(6) Application of racial criteria results in exclusion of some people, which pits race against each other, exacerbates racial tension and provokes resentment[59].

Thus, for any affirmative action programme to survive, the strict standard of judicial scrutiny by the courts requires 'compelling evidence' that proves without any doubt that the affirmative action programme is narrowly tailored and serves only the most compelling of interests. Thus, the bar for the State or institution that

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52 *Ashoka Kumar Thakur* v. *Union of India,*(2008) 6 S.C.C. 1 at p.203. See also, Lauterpacht, *An International Bill of the Rights of the Man,* Columbia University Press, Newyork,(1945).
53 551 U.S. 701(2007).
54 *Id.* Roberts, C.J. at pp.2,13.
55 *Id.* Roberts, C.J., Scalia., Thomas., Alito,J.J. at p.5.
56 *Id.* as observed by Roberts, C.J., Scalia., Thomas., Alito, J.J. at pp.4,6,22 and 64.
57 *Id*. Roberts, C.J., at p.19.
58 *Id.* Thomas, J. at pp.33-34.
59 *Id.* Thomas, J. at p.39.

practices affirmative action programmes based on suspect classification has been effectively raised. Therefore, in cases where a compelling interest is found, race based methods may be used only after all other methods have been considered and found deficient. It should be used only to a limited extent required to remedy a discrimination that has been identified. Further the identified beneficiaries should have suffered previously in the past. Finally, it should be resorted to only if all undue burdens that may impinge upon the rights of other non beneficiaries are avoided.

7.5. Minority Availing Benefit of Affirmative Action Under Art. 15(4) as SEBCs

Article 15(4) of the Indian Constitution provides for making special provisions for the advancement of socially and educationally backward classes of citizens or for the Scheduled castes and Scheduled tribes[60]. The 'special provisions' under Art.15(4) used to be invoked by various States to provide reservation in admissions to educational institutions before the introduction of Art.15(5). Now the issue is whether the communities claiming minority status under Art.30 could also avail the reservation benefits under Art.15(4). In various States like Kerala and Karnataka, the governments have approved Muslims and certain sections of Christians as socially and educationally backward. The fact that Muslims, Christians and Jains are not excluded for the purpose of conferring the benefits under Art.15(4) or 16(4) was recognized as early as *M.R. Balaji* v. *State of Mysore*[61] . In *T. Muralidar Rao* v. *State of A.P.*[62],the Court held :

> ...How is one going to decide whether Muslims, Christians, or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to these groups, but that would hardly justify the exclusion of these groups in toto from the operation of Art.15(4)…

In the above case J. Chelameswar, in his concurring opinion in para 398 made the following observation:

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

[61] A.I.R. 1963 S.C. 649.

[62] 2004 (6) A.L.D. 1 at para 23.

> The very concept of 'class' denotes a number of persons having certain common traits, which distinguish them from others…The question is not whether the Muslim community is a class, rather , the real question is whether it qualifies as a 'backward class of citizens'. ..For Muslims as a whole, in the State of Andra Pradesh to be treated as socially backward class of citizens, ...is absent in the entire Muslim community and is found merely in a group or sect thereof, then such group or sect among Muslims, and not muslims as whole, would constitute a 'socially backward class' of citizens under Art.15 and 16[63].

In *B. Archana Reddy* v. *State of Andra Pradesh*[64], the Court declaring the Andra Pradesh reservation of seats in the educational institutions and appointments/posts in the public services under the State to Muslim Community Ordinance, 2005, as unconstitutional, held that though there is no prohibition to declare muslims as a community, as socially and educationally backward, they have to satisfy the test of social backwardness.

7.5.1. Sub Quota for Minorities Within Backward Class Quota

The Central Educational Institutions (Reservation in Admission) Act, 2006 provides for 27% reservation to OBCs in admission. The National Commission for Religious and Linguistic Minorities in its report dated 10th May 2007 recommended creation of a sub quota of 4.5% for socially and educationally backward class of citizens belonging to minorities in admission to Central Educational Institutions from the 27% quota breaking the reservation into two segments. *i.e*. 22.5% for OBCs and 4.5% reservation in admission for socially and educationally backward class citizens belonging to minorities[65] and the Government attempted to carry out the recommendations. The sub quota has been

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63 *Id.*at para 398.

64 2005-LAWS (APH)-11-64.

65 Official Memoranda dated 22.12.2011 reads : "The Central Government has decided to carve out , with effect from 1st January, 2012, a sub quota of 4.5% for socially and educationally backward classes of citizens belonging to minorities, as defined in clause (c) of Section 2 of the National Commission for Minorities Act,1992 from within the 27% reservation for other backward classes as notified by the Government in accordance with O.M.No.36012/22/93-Estt(SCT), dated 8.9.1993 from time to time, referred in the preceding paragraph subject to the same conditions and restrictions mentioned therein''. See also, Marc Galanter, "Who are the OBCs? An Introduction to a Constitutional Puzzle", 13 *Economic and Political Weekly*, 1812 at p.1824(1978).

recommended solely on the basis of religion without any empirical evidence and that offended Art.15(1) of the Constitution. The maintainability of the sub quota in favour of the minority communities came up for consideration in *R .Krishnaiah* v. *Union of India*[66] wherein the Court has set aside the attempt to carve out sub quota in favour of minorities[67]. Thus minorities in India can claim reservation in admission under Art.15(4) as socially and educationally backward classes also[68] but the claim should be supported and recommended by the respective Backward Class Commission based on empirical data[69].

7.6. Comparative Position

The United States Supreme Court has held that race may be one of the many factors that can be taken into account while structuring an affirmative action programme for admission to minorities in educational institutions in the US. In US, quotas in admission to racial minorities are to be attempted to only as a last resort after resorting to alternative methods. Affirmative actions providing for quotas in admission are subjected to strict scrutiny and are to be narrowly tailored and race can be only one of the factors and not a dominant factor in providing reservation in admission to educational institutions. At this stage, an analogy may be drawn with

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66 2012-LAWS(APH)-5-1.

67 *Id*. para 24. The notification dated 23.10.93, issued by the National Commission for Minorities Act, 1992, identifies Muslims, Christians, Sikhs, Buddhists and Zoroastrians as minorities and clubbing these diverse communities into one group is an unreasonable classification. Further the National Commission for Backward Classes has not been consulted.

68 See generally, *A.P. State Backward Classes Welfare Association* v. *State of Andra Pradesh, Backward Classes Welfare Department*, 1995 A.L.D .147(F.B.) p.92. See also, Cass R. Sunstein, *Free Markets and Social Justice*, Oxford University Press,(1997).

69 National Commission for Backward Classes Act,1993, S.9 reads : *Functions of the Commission* "(1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over inclusion or under inclusion of any backward class in such lists and tender such advice to the Central government as it deems appropriate. (2) The advice of the Commission shall ordinarily be binding upon the Central government". Section 2(c) of the NCBC Act reads : Definitions "(c) 'lists' means lists prepared by the Government of India from time to time for purposes of making provisions for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of Government of India'. Section 11 reads : "*Periodic revision of lists by the Central government* - (1) The Central government may at any time, and shall, at the expiration of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes. (2) The Central government shall, while undertaking any revision referred to in sub section (1) consult the Commission".

the Indian situation wherein the Supreme Court of India, in various cases[70], has held that caste may be one of the factors that can be taken into account, while providing for reservations for the socially and educationally backward classes. However, caste cannot be the 'only' factor, just as race alone cannot be the only factor in the United States, while structuring reservation or affirmative action programmes.

Further more, the Courts, both in India as well as in United States of America, have looked with extreme caution and care at any legislation that aims to discriminate on the basis of 'race' in the US and 'caste' in India. The US Supreme Court elucidated in *Grutter* v. *Bollinger*[71] , "Because the fourteenth Amendment protect(s) 'persons', not 'groups', all governmental action based on race ought to be subjected to a very detailed and careful judicial inquiry and scrutiny so as to ensure that the personal right to equal protection of the laws has not been infringed".

But this doesn't mean that affirmative action providing for quotas in admission in United States and India could be equated mechanically. There are structural differences in the Constitution of India and the Constitution of United States of America. The decisions of the United States Supreme Court have not been applied in the Indian context as the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries[72]. The fourteenth amendment to the US Constitution *interalia* provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws', whereas in India, Articles 14 to 18 are differently structured and contain special provisions for the advancement of SEBCs, STs and SCs. Further, the preamble to the Indian Constitution and the Directive Principles of State policy give a positive mandate to the State and the State is obliged to remove

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[70] See, *Peeriakaruppan* v. *State of T.N.*,1968 (3) S.C.R.595; *P.Rajendran* v. *State of Madras*, 1968(2) S.C.R.786.

[71] 156 L. Ed. 2d 304: 539 U.S. 306(2003).

[72] *Saurabh Chaudri* v. *Union of India* ,(2003)11 S.C.C.146; *Bhikaji Narain Dhakras* v. *State of M.P.*, A.I.R. 1955 S.C. 781; *A.S. Krishna* v. *State of Madras*, A.I.R. 1957 S.C. 297; *Kameshwar Prasad* v. *State of Bihar*, A.I.R. 1962 S.C. 1166*; Kesavananda Bharat*i v. *State of Kerala*,(1973) 4 S.C.C..225; *A.K. Roy* v. *Union of India,*(1982)1 S.C.C.271.

inequalities and backwardness from the society. While considering the constitutionality of a social justice legislation, the objectives which have been incorporated by the constitution makers in the preamble of the Constitution and how they are sought to be secured by enacting fundamental rights in Part III and Directive Principles of State Policy in Part 1V of the Constitution are to be taken into account. The fundamental rights represent the civil and political rights and the directive principles embody social and economic rights. Together, they are intended to carry out the objectives set out in the preamble of the Constitution[73]. The recent amendment to the Constitution inserting clause 5 to Article 15 enables States to provide for reservation in admission to SEBCs and SC, ST in educational institutions including professional educational institutions except aided and unaided minority educational institutions. Reservations in admissions to educational institutions in India where caste is one of the factors to be taken into account are to be harmoniously balanced keeping in mind the objectives of the Preamble, Fundamental Rights and Directive Principles. This is a divergence from the American situation where quotas in admission has to pass the requirement of the 5th and 14th Amendment which provides for due process and equality clause. Race based quotas for minorities have to prove compelling state interest. As the gamut of affirmative action in India is fully supported by constitutional provisions[74] the principles laid down by the United States Supreme Court such as 'suspect legislation', 'strict scrutiny', and 'compelling state necessity' are not applicable for challenging the validity of affirmative action contemplated under provisions of the Indian Constitution[75] and we have been following the doctrine that every legislation passed by Parliament is presumed to be constitutionally valid unless otherwise proved[76].

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[73] *Ashoka kumar Thakur* v. *Union of India,* (2008) 6 S.C.C. 1 at p. 73, paras 190 and 194.

[74] *Id.* at p. 74,para 209.

[75] *Dred Scott* v. *Sanford,* 15 L. Ed 691; *Plessey* v. *Ferguson*, 41 L.Ed. 256; *Brown* v. *Board of Education,* 98 L.Ed. 873; *Gratz* v. *Bollinger*, 156 L. Ed. 2d 257; *Regents of the University of California* v. *Bakke*, 57 L.Ed .2d 750; *Grutter* v. *Bollinger*, 156 L.Ed. 2d 304; *Adarand Constructors Inc*. v. *Pena*,132 L. Ed. 2d 158; *Parents Involved in Community Schools* v. *Seattle School District*, 168 L.Ed. 2d 508.

[76] *Asok kumar Thakur* v. *Union of India,* (2008) 6 S.C.C.1 at p. 74, para 209.

The U.S. principles of 'strict scrutiny' and 'suspect legislation' were rejected by the Supreme Court of India in a plethora of cases. In *Saurabh Chaudri* v. *Union of India*[77] speaking for the Bench , V.N.Khare, C.J., said:

> The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by shri Salve cannot be applied in a case where legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be exfacie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same.

7.7. Alternatives of Affirmative Action to Minorities in Admission

American educationalists feel that affirmative action in the name of race, or minority status can have deeper psychological scars on the groups, according to who receives preferential treatment and who does not. Enhancing access, equity and diversity in higher education does not mean that all must be treated as equal or exactly the same. Nor does it imply equal or proportional representation in all areas of higher education and institutional operations. It simply implies being systematically fair. Consideration for all on an equal footing requires that inequities, when they occur, should be justified by overall benefit and gains to all concerned and that they should be in the public interest. Some alternatives to affirmative action should also be devised to strike a balance between equity and equality, on the one hand, and individual gain and public accountability, on the other.

Some of the alternatives to affirmative action that have been suggested in America are employing lottery system, using family income, education and social capital as criteria, ranking of the school last attended etc. Ascertaining opportunity costs based on neighbourhood, convincing the non-beneficiaries to believe in the fairness of the system, guaranteeing a percentage of seats to students from local schools (for instance, the mandated 20% in Florida, 10% in Texas, and 4% in California) etc. also forms good aternatives . In certain cases, low performance due

[77] (2003) 11 S.C.C.146, para 36.

to circumstances but not due to the lack of individual capabilities is given due recognition. Ascertaining future potential even in the case of low credential applicants is resorted to, using modern psychological methods. Bonus points are allotted for various factors that have resulted in the loss of opportunity or poor performance. Excellence in sports, co-curricular activities and community leadership as also Compensation for physical or mental challenges, etc. are also resorted to.

7.8. Conclusion

In a paradigm shift from 'minority' to 'diversity', the affirmative action policies in higher education in the USA have created a new vision for universities. It has been taken for promoting the equality of opportunity to a proactive role in selecting students from the under- represented strata in order to promote diversity. Diversity on the campuses is seen as important for not only for the students and faculty, but also the entire nation *per se* for three different reasons: (1) it makes the blending of ethnicities, cultures, races, religions and genders possible in an enabling and inclusive environment of civility, collegiality and mutual respect; (2) it makes good business sense to provide quality education to the fastest growing segments of society if a nation wants to compete in the global economy effectively; and (3) it helps the hitherto unrepresented and underrepresented sections of society in realizing their best potential. Standardized testing is not adequate to tap such a vast pool of human resource[78].

Affirmative action in admission to minorities in higher education in the USA is in sharp contrast with that in India. The framers of the Indian Constitution wanted educational opportunities to be equally available to all. Though educational rights for minorities were given under Fundamental Rights Chapter, it is not an absolute right. They are given to minorities to instill a feeling of confidence and security in their minds and the moment equality is achieved, special privileges to

[78] John F. Kain and Daniel M. O'Brien, "Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates", presented at the National Bureau of Economic Research Meeting on Higher Education (Boston: November 9, 2001; revised December, 2002). See also, Marta Tienda, Kevin T. Leicht, Teresa Sullivan, and Kim Lloyd, "Closing the Gap?: Texas College Enrollments After Affirmative Action" , working paper (January 2003).

minorities are to end. Affirmative action can be claimed by minorities under Articles 15(4) and 16(4) if they could satisfy the criteria with regard to 'social and educational backwardness' and 'backwardness' respectively. In America, affirmative actions in the form of quotas to minorities in educational institutions can be attempted only as a last resort. Governmental programmes providing quotas have to show compelling governmental interest and have to pass through the test of strict scrutiny and are to be narrowly tailored. Similarly, only the deserving groups should alone get minority status in India. Status of minority educational institutions should be given to an educational institution which fulfills the object of its establishment.

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Chapter - 8

CONCLUSIONS AND SUGGESTIONS

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8.1. Conclusions

Education is one of the most important entitlements which enables us to make informed choices with regard to every aspect of life. Access to education should be made available to the deserving candidates, inspite of their inability to pay. State regulations in the field of admission and allied matters are necessary to ensure merit taking into consideration, the demands of the weaker sections of the society including minorities. In the changing political and economic scenario in our country, governmental machinery cannot sufficiently cater to the educational requirements of the student community due to lack of resources in its command. In this context, private players in the educational sector have a crucial role to play. Private institutions however, have an obligation to act fairly in consonance with the fundamental rights as well as other regulations framed by Governments. State, while granting recognition/affiliation to educational institutions is obliged to impose conditions for maintaining standards and ensuring fairness, in admission. The issue of regulating access to education becomes even more complicated in the case of minority educational institutions. They claim admission as a facet of administration under Art.30 of the Constitution. Balancing the rights of the minority managements and other stake holders in admission in private unaided/aided recognised/affiliated educational institutions conducting professional as well as non professional courses *vis a vis* regulations imposed by the State is the narrow area of research attempted at.

When a group claim absolute right to admission claiming themselves to be minorities, it is crucial to find out whether they deserve to be termed as minorities to get such rights. The Constitution of India does not define who constitute minority. Religious and Linguistic minority groups are the categories which can claim cultural and educational entitlements as minorities in our country. In this

context, it is worth analyzing how 'minority' is conceptualized at the international level. There is a pragmatic approach followed by international organizations and also by eminent thinkers to keep the definitional clause for minorities open ended so as to allow only the deserving groups to claim minority protection. In India also, there has been attempts to confer minority status only to non-dominant groups so as to put them equally with the non minorities in 'fact and law'. Conferring minority status to groups which are dominant may lead to reverse discrimination to the non minority communities. Instead of looking at the numerical strength of every group at the State level, other criteria like their social, political, economical and educational status has also to be looked into, to see whether a group is a minority or not. It is alarming to note that in some States in India, minority groups claim sub quota within the SEBC quota along with Art.30 protection provided in the Constitution. Too much emphasis on diversity of a group is against national unity and may perpetuate disintegration and hence should not be encouraged. The legislature as well as the judiciary should be vigilant against these tendencies.

The claims of the minority communities that educational rights in admission are absolute in nature and hence they can claim admission rights as a facet of administration should be looked into in the light of the debates in the Constituent Assembly. Reconciliation of Art.29 and Art.30 negates the claims of minorities that, since Art. 30 does not contain any reasonable restriction under that provision, it is absolute in nature. As conferment of status as minority institution bestows an educational institution with multitude of rights, identification of indices to confer such status should be laid down. The legislative attempts to define minority educational institutions have not so far been effective or conclusive. The National Commission for Minority Educational Institutions Act, (2004) confers an educational institution established or administered by a person or a group belonging to minority as a minority educational institution. The Central Educational Institutions (Reservation in Admission) Act, 2006 also defines minority educational institution as the same as defined in National Commission for Minority Educational Institutions Act. The intention of the founders of the institution, the achievement of the object of furtherance of the interests of the minority community etc. should be reflected in the criteria to be laid down to

confer the status as minority educational institution. There should be criteria with regard to the minimum number of members of the minority community to be admitted in a particular educational institution, to give it a minority status. If such criteria is not fulfilled, an educational institution should be allowed to work under Article 19 only and should not be given rights under Art.30 of the Constitution. It should always be remembered that the object of conferring minority status upon an educational institution is to enable it to work for the upliftment of the members of its community and not to create a fraud upon the Constitution.

Every year admission to unaided professional educational institutions run by minority comes for judicial scrutiny for various reasons. Minority managements claim autonomy in the matter of admission of students of their choice, monitoring admissions, fixation of fee, and autonomy in the matter of conducting entrance test. They consider freeship, quotas in admission and appointment of Committees to regulate admission and fixing of fees as violative of minority right to administer its institutions. Quotas in admission, consideration of local needs and essentiality certificates are other areas of dispute raised by the minority community.

Scheme of cross subsidy, whereby there shall be 50% government seats and 50% payment seats in private professional educational institutions is favoured as a better option by some educationalists, commenting that it will ensure merit based and non exploitative admission at least to half of the available seats. But when the scheme is put into practice, there is a disadvantage that majority of the students who get better position in the rank list are affluent students who could easily outscore their counterparts from poor background with less facilities. The effect of the scheme would be that top rank holders from rich background will study at the cost of the students from lesser surroundings who will be compelled to opt for payment seats. The *Unnikrishnan Scheme*[1] was overruled in *TMAPai*[2] wherein the Court laid down that private educational institutions have the right to rational selection of students and surrendering the total process of selection to the State is

[1] *Unni Krishnan.J.P.* v. *State of A.P.*,(1993) 1 S.C.C. 645.
[2] *TMAPai Foundation* v. *State of Karnataka,* (2002) 8 S.C.C. 482. See paras, 35, 37, 38, 45,161 and ans. to qn.9 in the instant case.

unreasonable. In *Islamic Academy*[3] Supreme Court interpreted the word 'common entrance test' suggested in *TMA Pai*[4] and held that each institute could not conduct entrance test separately and state may conduct a common entrance test. The Court in *Inamdar*[5] overruled compulsory holding of common entrance test by the State as it is against the right to administration of unaided educational institutions. The State can only provide a procedure for holding examination and only in the event of failure of triple test of fair, transparent and non exploitative method[6], step in to the shoes of the management in conducting the test. Moreover, the managements could fix a rational fee structure, but capitation fee and profiteering in any form is not allowable. In *Modern Dental College and Research Centre* v. *State of Madya Pradesh*[7], the Court held that there is a lacuna in *Inamdar*[8] as the Court doesn't mention the body which will decide the compliance of the triple test. It cannot be left to the unilateral decision of the State government to decide the issue as it will give unbridled, absolute and unchecked power to the State.

Islamic Academy[9] while answering the question whether minority and non minority educational institutions stand on the same footing, held that minority institutions stand on a better footing than non minority educational institutions. Minority educational institutions under Article 30 have a guarantee that they can establish educational institutions of their choice and State legislation cannot favour non minority institutions over minority institutions. The regulations to promote academic excellence and standards do not encroach upon the guaranteed rights under Article 30. Therefore, aided and unaided minority educational institutions can be required to observe *inter se* merit amongst the eligible minority applicants. In aided minority, non minority candidates can be admitted on the basis of common entrance test conducted by the State agency.

Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of the unfair practice of granting admission

3 (2003) 6 S.C.C. 697, para 16.
4 *Supra* n.2, para 68.
5 (2005) 6 S.C.C .537, paras 136 and 137.
6 *Ibid*.
7 (2004) 8 S.C.C. 213.
8 *Supra* n.5.
9 *Supra* n.3, para 9.

on available seats guided by the paying capacity of the candidates would be impossible to curb. Thus Admission Regulatory Committees and Fee Regulatory Committees are better options than post audit checks.

With regard to the scope of reservation in admission, para 53 of *TMAPai*[10] lays down that compliance with conditions that a small percentage of weaker section of students can be admitted to private educational institutions is a reasonable restriction in admission rights of unaided professional educational institutions including minority educational institutions. But this condition cannot be forced upon private educational institutions and can only be the result of a consensual arrangement between the State and the management of educational institutions including minority educational institutions. Thus the consensual arrangement which could be devised as envisaged in the illustration provided in the second part of para 68 of *TMAPai*[11] is relied on by *Islamic Academy*[12] in providing that State quota for weaker sections should be provided in admission in unaided professional educational institutions on the basis of Common Entrance Test. The majority judgment stresses on the importance of taking into consideration the needs of the locality but doesn't define local needs. In his separate judgment Sinha,J. attempted to give clarity to 'local needs'. Accordingly, State government alone would be in a position to determine 'local needs'. Other factors such as the percentage of the relevant minority in the State, the number of minority professional colleges belonging to that particular linguistic/religious minority, percentage of poorer and backward sections in the State, total number of professional colleges therein, would all be relevant factors. Moreover, local needs would vary from State to State. It may be difficult to give a restrictive meaning to the expression 'local needs' *i.e.* keeping the same confined to the area where the educational institution is sought to be established, in as much as the right of minority extends to the entire State and thus, the local needs may also have a direct nexus having regard to the needs of the State. Local needs, if it is compelling State interest, will have a primacy over the need of the Community.

[10] *Supra* n.2.
[11] *Ibid*.
[12] *Supra* n.3, para 13.

The difference between minority and non minority unaided professional educational institutions is that maintaining minority character could be given priority when balancing between local needs and community needs in a minority educational institution while local needs has to be given more priority in non minority educational institutions. *Inamdar*[13] holds that a reading of the majority judgment in *Pai Foundation*[14] in its entirety, supports the conclusion that while the first part of para 68 thereof is the law laid down by the majority, the second part is only by way of illustration, amounting to just a suggestion or observation, as to how the State may devise a possible mechanism so as to take care of the poor and backward sections of the society. The second part of para 68 therefore cannot be read as law laid down by the Bench. It is only an observation in passing or an illustrative situation which may be reached by consent or agreement or persuasion.

Art.15(5) was inserted into the Constitution with an intention to get over the direction in *TMAPai*[15] as well as *Inamdar*[16] to the effect that unaided educational institutions in general, have unfettered right in administration. The appropriation or reservation in unaided institutions was held impermissible under the Constitution. In order to overcome the impact of these judgments, Art.15(5) was inserted into the Constitution. But there are doubts about the constitutionality of Art.15(5). Art.15(5) and Art.15(4) are found to be mutually exclusive. The rationale of the justification is highly doubtful. The Court in *Ashoka Kumar Thakur* v. *Union of India*[17] opined that if the intention of the Parliament was to exclude Art.15(4), they would have very well deleted Art.15(4) of the Constitution. The above observation doesn't hold good in view of the fact that Art.15(4) is not limited to admission in educational institutions, but has a wider application. There is direct inconsistency between Arts.15(4) and 15(5), as one provision provides for such reservation in aided minority educational institutions while the other prohibits such reservations in aided minority educational institutions. Moreover, the special laws that may be made under Art.15(5) would not be subject to Arts.15 and 19(1) (g), but the same

[13] *Supra* n.5, paras 126-130.
[14] *Supra* n.2.
[15] *Ibid*.
[16] *Supra* n.5.
[17] (2008) 6 S.C.C.1.

would be certainly subject to the provisions contained in Arts. 14, 21, 26 and 30 of the Constitution. The complete exclusion from the liability to provide reservation in running of educational institutions especially unaided minority educational institutions puts minority in a better position, giving undue advantage over non-minorities. The majority judgment in *Ashoka Kumar Thakur*[18] has not attempted to decide the challenge with regard to discrimination between minority and non-minority unaided educational institutions but evaded the issue by holding that, the affected institutions should have approached the Court and vindicated their rights[19]. While answering the question whether the minority institutions' right to admission of students and to lay down procedure and method of admission, if any, would be affected in any way by the receipt of State aid, the Supreme Court in *TMA Pai*[20] in Answer to question No. 5(b) held that while giving aid to professional educational institutions, it would be permissible for the authority giving aid to prescribe bye rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State *qua* non minority students. In view of this enunciation, the impugned portions of the amendment in so far as it excludes aided minority institutions from the purview of extending special provisions under Art.15(5) is violative of rights of aided minority *vis a vis* aided non minority. Moreover, SC/ST students, may lose existing reservation in admission which they used to get hither to in aided minority educational institutions. Moreover, discriminating the minority and non minority under Art.15(5) is against national unity and principles of secularism enshrined in the Constitution. We cannot justify 93rd amendment holding that there is only a limited infringement of rights under Art.19, which is negligible. There is total deprivation of rights as far as unaided non minority educational institutions are concerned as it will affect the quality of students getting admitted to such institutions, which in turn will affect the reputation and the very existence of such institutions.

[18] *Ibid.*
[19] *Id.* at p.718, para 668.
[20] *Supra* n.2.

Article 21A directs State to provide free and compulsory education to children of the age 6-14 years. But, it is not a stand alone provision and is subjected to Article 19(1)(g) and Article 30(1) of the Constitution. Children who opt to get admission in an unaided private educational institution cannot claim that right as against the unaided private educational institution, since they have no constitutional obligation to provide free and compulsory education under Article 21A of the Constitution and the state cannot offload its obligation on the private unaided educational institutions. Article 21A has used the expression 'State shall provide' and not 'provide for', hence the constitutional obligation to provide education is on the State and not on non-state entities. Moreover, making of legislation under Article 21A has to be in constitutionally permissible manner. Further, the judgment in *Pai Foundation*[21] was finally pronounced on 25.11.2002 and Article 21A, new Article 45 and Article 51A(k) were inserted in the Constitution on 12.12.2002. *Pai Foundation* has laid down that private unaided educational institutions including schools to have maximum autonomy in admissions. Parliament was presumed to be aware of the judgment in *Pai Foundation*[22], and hence, no obligation was cast on unaided private educational institutions but only on the State, while inserting Article 21A. It is hyper technical to distinguish *TMAPai*[23] as well as *Inamdar*[24], on the ground that the dictum therein will be applicable only to professional educational institutions. Though professional educational institutions were the parties therein, most of the declarations of rights in that case were related to educational institutions in general. All the questions which were framed, considered and answered by *TMAPai* were related to the rights of educational institutions by minorities and non minorities. No where in the judgment, the Court had attempted to restrict the scope of the declaration of law to professional educational institutions alone. It was not a decision on inter party dispute but mere declaration of law on the questions framed by the Court.

Article 21A casts an obligation on the State to provide free and compulsory education to children of the age of 6 to 14 years and not on unaided non-minority

[21] *Supra* n.2.
[22] *Ibid*.
[23] *Ibid.*
[24] *Supra* n.5.

and minority educational institutions. Rights of children to free and compulsory education guaranteed under Article 21A and Right of Children to Free and Compulsory Education Act,(2009), ought to have been enforced only against the schools defined under Section 2(n) of the Act, except unaided minority and non-minority schools. Section 12(1) (c) dealing with extent of State responsibility for admission by schools of specified category and unaided schools not getting grant, should be read down so far as unaided non-minority and minority educational institutions are concerned, holding that admission to weaker sections and disadvantaged groups, can be given effect to, only on the principles of voluntariness, autonomy and consensus and not on compulsion or threat of non-recognition or non-affiliation. No distinction or difference ought have been drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c) of the Act. Such an appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Duty imposed on parents or guardians under Section 10 should be considered directory in nature and it is open to them to admit their children in the schools of their choice, not invariably in the neighbourhood schools, subject to availability of seats and meeting their own expenses. Moreover, Section 4, dealing with special provision for children who have not been admitted or who have not completed elementary education, Section 10 dealing with duty of parents, Section 14, dealing with age, Section 15 dealing with denial of admission and Section 16, dealing with prohibition of expulsion and holding back are to be directory in their content and application. The provisions of Section 21 regarding the composition of School Management Committee, should not be made applicable to the unaided schools not receiving grant, covered under sub-section (iv) of clause (n) of Section 2. They shall also not be applicable to minority institutions, whether aided or unaided. In *Society for Unaided schools, Rajasthan* v. *Union of India and Others*[25],the Court held that unaided minority schools neednot provide for free and compulsory education under S.12 of the Act. In *Pramati Educational and Cultural Trust* v.

[25] (2012) J.T. 3-137.

Union of India[26], the Court held that S.12 to the extent of providing for free and compulsory education by minority schools, both aided and unaided is unconstitutional. The reasoning given by the Court in *Pramati,* was that admission to SC/ST and SEBC will annihilate the minority character of the institution. For maintaining the requirements of Art.29(2), suggestion was made to follow admission based on merit to the non minorities. At the same time, non minority educational institutions have to provide reservation to the above category. The contention that excellence will be compromised by admission from amongst the backward classes and SC/ST is held to be contrary to the Preamble of the Constitution which promises to secure to all citizens, fraternity assuring the dignity of the individual and unity and integrity of the nation. However, compromising the excellence by admitting reserved candidates in minority institutions and will annihilate the minority character and thus unconstitutional. No rational reasoning is laid down by the Court on how minority character is affected merely on admitting few students from weaker sections other than compromising the excellence. Therefore, it cannot be said that the law regarding reservation in admission in minority and non-minority institutions has been settled. The reasoning in *Pramati* must certainly be a subject of judicial scrutiny by a larger bench of the Supreme Court.

The professional educational scenario in Kerala is different from that existing in most of the other Indian States. The total number of students admitted from non minority communities for professional courses is much less than the other communities considering the percentage of population. The minority communities are obtaining admissions in the governmental institutions at a rate more than their percentage of population and they are having their institutions, which will cater the additional needs of their own community. The non minorities largely rely on the minority educational institutions for their educational requirements. Most of the governmental initiatives to regulate admission in professional education sector gets struck down on the ground that it is against the right to establish and administer educational institutions by the minority.

[26] 2014(2) K.L.T.547.(S.C.).

Dominance in the educational field when compared with the non minority should be made a relevant factor in determining whether a group should be conferred minority status so as to enable them to avail minority educational rights given to them under the Constitution. In Kerala, we have educational institutions established by different sub groups of major religions. When religious sub groups such as ezhavas, latin christians, nadar population etc. start minority educational institutions the percentage of students belonging to the particular sect who get admission in their educational institutions should be a relevant factor if the idea of conferring minority rights is to instill a sense of confidence and security among such groups so as to bring them on par with the majority. The issue is relevant in the context of reply to question no. 2 by the Supreme Court in *TMAPai*, wherein the Court opined that the meaning of the expression 'religion' or whether the followers of a sect or denomination of a particular religion can claim protection under Art.30(1) on the basis that they constitute a minority in the State, eventhough the followers of that religion are majority in that State need not be answered by that particular bench and left it unanswered.

There is a need for a rational study for fixing the minimum percentage of students to be admitted to retain the minority character depending upon factors of non dominance and purpose of establishment of an educational institution. Though, the attempt to redefine minority educational institutions by the State of Kerala is laudable, the conditions put forward to confer minority status to an educational institution is irrational to be complied with. It is illogical to compel a minority institution to comply the 2nd part of the section 10(8) of the 2006 Act, that 50% of the students of an educational institution who get admission under the minority category should be weaker sections from the very same minority community, as it may be difficult to get that much percentage and may virtually lead to closing down of such institutions. More over, the minority character of an educational institution may be restored or lost according to the number of students from the community which an educational institution gets in a particular academic year for admission. Such a condition to determine the minority status and regulation of admission is unsustainable in law. Sections 8 and 10 of the 2006 Act dealing with status of an educational institution and allotment of seats show divergence with Section 2 (g) of

National Commission for Minority Educational Institutions Act, 2004 but it is in consonance with the judicial approach in a plethora of cases culminating in *Inamdar*[27]. Section 3 of the Kerala Act, 2006 dealing with common entrance test is a complete take over of the admission procedure annihilating the right of the unaided institutions, especially those run by minorities, which would be in violation of Articles 19(1)(g) and 30(1). This is against the decision of the Supreme Court in para 136 and 137 of *Inamdar*[28] also. The Court has tried to balance the right of management and the need to maintain fairness pointing that, Admission Supervisory and Fee Regulatory Committee ought to have pointed out anomalies, if any, in writing so that the areas of disagreement could be narrowed down. Thus in the case of conflict of opinion between the committee and the management regarding the fee structure, a reconciliation is to be attempted first rather than arrogating the right by the Committee. There is non application of mind if the procedure is not followed, which acts in the way of the Committees governing admission and fee fixation, and management entering into a consensus regarding reasonable fee structure taking into consideration the overall public interest.

The judiciary in Kerala remains very vibrant to the problems of the different communities and holds that poverty is the worst form of social evil and arguing that poor segment of people belonging to forward communities should not be given some solace, in the form of reservation of a few seats in government colleges or otherwise, is totally uncharitable[29].

The copies of contracts entered into by the State of Kerala with engineering and medical managements for the last 5 years evidenced that inspite of the judicial interventions one after the other, the State governments with a view to satisfy certain sections of the people are compelling the managements to follow the principles of cross subsidy which is forbidden in law. A student, who is an aspirant for admission to professional course, will have every right to invoke the remedy under Article 226 to enforce his fundamental right to get merit based admission in

[27] *Supra* n.5.
[28] *Ibid*.
[29] 2010(1) K.H.C. 348 at p.352, para 13.

a non exploitative manner in view of the dictum laid down by the Supreme Court decisions.

The sympathetic observations by the High Court of Kerala in *Lisie*[30], that there may be some rationality in limiting the benefit of Art.30 to a non dominant minority, but for that, Art.30 has to be amended, is a welcome comment which should give material for thought for the higher judiciary in conferring educational rights to the minorities so that no reverse discrimination happens to the non minority in deserving cases.

In the USA, affirmative action programs are designed to benefit minorities such as African Americans, Hispanic Americans, Native Americans etc. In India, linguistic and religious minorities are conferred with fundamental right under Art. 30 to establish and administer educational institutions of their choice. Affirmative action programs for minorities in America, provide some relaxation or bonus points for admission purposes and/or financial assistance or scholarships. Providing reservation or quota systems in admission to educational institutions as a form of affirmative action can be resorted to only as a last resort. Governmental programmes which provide for quotas to minorities have to show compelling governmental interest. These programmes have to be narrowly tailored and are strictly scrutinized. Governmental initiatives which provide for quotas to minorities have to establish that there are no alternatives other than quotas as affirmative action programmes. Further, admissions to minorities have to pass the 5th and 14th Amendment tests.

Affirmative action providing for quotas in admission in United States and India could not be equated mechanically. There are structural differences in the Constitution of India and the Constitution of United States of America. The decisions of the United States Supreme Court have not been applied in the Indian context as the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries. The fourteenth amendment to the US Constitution *interalia* provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws",

[30] 2007(1) K.L.T. 409.

whereas in India, Articles 14 to 18 are differently structured and contain special provisions for the advancement of SEBCs, STs and SCs. Further, the preamble to the Constitution and the Directive Principles of State Policy give a positive mandate to the State and the State is obliged to remove inequalities and backwardness from society. While considering the constitutionality of a social justice legislation, the objectives which have been incorporated by the constitution makers in the preamble of the Constitution and how they are sought to be secured by enacting fundamental rights in Part III and Directive Principles of State Policy in Part 1V of the Constitution are to be taken into account.

The recent amendment to the Constitution inserting clause 5 to Article 15 enables States to provide for reservation in admission to SEBCs and SC, ST in educational institutions including professional educational institutions except aided and unaided non minority educational institutions. Reservations in admissions to educational institutions in India, where caste is one of the factors to be taken into account are to be harmoniously balanced keeping in mind the objectives of the Preamble, fundamental rights and directive principles. This is a divergence from American situation where quotas in admission have to pass the 5^{th} and 14^{th} Amendment which provides for due process and equality clause. Race based quotas for minorities have to prove compelling state interest. As the gamut of affirmative action in India is fully supported by constitutional provisions, the principles laid down by the United States Supreme Court such as 'suspect legislation', 'strict scrutiny', and 'compelling state necessity' are not applicable for challenging the validity of affirmative action contemplated under provisions of our Constitution and we have been following the doctrine that every legislation passed by Parliament is presumed to be constitutionally valid unless otherwise proved.

Some of the alternatives to affirmative action that have been suggested in America are employing lottery system, using family income, education and social capital as criteria, ranking of the school last attended, ascertaining opportunity costs based on neighbourhood, convincing the non-beneficiaries to believe in the fairness of the system, guaranteeing certain percentage of seats to students from local schools (for instance, the mandated 20% in Florida, 10% in Texas, and 4% in

California), allowing for low performance due to circumstances but not due to the lack of individual capabilities, motivation or determination, using modern psychological methods for ascertaining future potential even in the case of low credentialed applicants, allotting bonus points for various factors that have resulted in the loss of opportunity or poor performance, awarding bonus points for excellence in sports, co-curricular activities and community leadership or compensation for physical or mental challenges, etc.

Diversity on the campuses is seen as important not only for the students and faculty, but also the entire nation *per se* for three different reasons: (1) it makes the blending of ethnicities, cultures, races, religions and genders possible in an enabling and inclusive environment of civility, collegiality and mutual respect; (2) it makes good business sense to provide quality education to the fastest growing segments of society if a nation wants to compete in the global economy effectively; and (3) it helps the hitherto unrepresented and underrepresented sections of society in realizing their best potential. Standardized testing is not considered adequate to tap such a vast pool of human resource.

Affirmative action can be claimed by minorities under Articles 15(4) and 16(4) if they could satisfy the criteria with regard to 'social and educational backwardness' and 'backwardness' respectively. In America, affirmative actions in the form of quotas to minorities in educational institutions can be attempted only as a last resort. Similarly, only the deserving groups alone should get minority status in India. Status of minority educational institutions should be given to an educational institution which fulfills the object of its establishment. Otherwise such institutions should be allowed to be maintained under Art.19 only.

8.2. Suggestions

The following suggestions can be made for regulating admission in minority educational institutions in India.

8.2.1. Suggestions for Amendment of Minority Educational Institutions Act, 2004

1. The definition of minority should include only non dominant groups of the population. Conferring minority status automatically to a religious or

linguistic group merely because they constitute less than 50% of the population of a State is not a rational criterion. If so, all communities in state of Kerala may qualify for minority status within few years. The economic and social status, educational and political dominance etc. should also be taken into account for the conferment of minority status.

2. The conferment of minority status should be to instill a sense of confidence among the minority and to bring them on par with the majority. The moment equality is achieved, further protection should end. Otherwise it may lead to reverse discrimination.
3. The concept of religion and whether sub-sects within a religion can claim minority status should also be clarified.
4. The judicial approach in *Bal Patil*[31] that conferring affluent groups with minority status should be discouraged as it will lead to divisive tendencies is a good indicator of how claims with regard to minority status should be assessed.
5. The status of minority educational institution should be given to an educational institution established and maintained by a person or group belonging to minority community. "Established and maintained" should be read conjunctively and not disjunctively.
6. The intention of the founding fathers of the Institution should be indicative of the minority character of the institution; otherwise protection under Article 30 need not be extended.
7. An effective state mechanism to work out a comparative admission of students from each community need to be framed and the average admission of 3 consecutive years be taken as a relevant criteria to fix the quota mandatorily to be filled in by a minority management from their own community.
8. The purpose of establishment of minority educational institution should be for the general welfare of the minority community. To prevent fraud on the Constitution, the minority institution which fails to provide a minimum percentage of quota for minority students for three consecutive years, should

[31] (2005) 6 S.C.C. 690.

be permitted to work only under Arts.19(1)(g) and 26 (a) and therefore the special privileges under Art.30 are to be dispensed with.

9. The National Commission for Minority Educational Institutions Act,(2004) and Central Educational Institutions (Reservation in Admission) Act,(2006) should be amended suitably to confer status of minority educational institution to such institutions which fulfils the above mentioned criteria.
10. There is no infirmity in giving absolute control in admission to a minority institution, when the entitlements are restricted to non- dominant deserving groups.
11. The initiative by Kerala legislature to redefine minority educational institutions is appreciable. The rigid percentage fixed under second part of Section 10(8) of the 2006 Kerala Act, that 50% among the minority should be weaker sections from the minority community seems, too high a standard, but a reasonable percentage depending upon local needs and other criteria could be framed.

8.2.2. Need for Amending Article 15(5) of the Constitution

1. The 93rd Amendment of the Constitution which inserted Art.15(5) should be amended suitably. In case social obligation of providing reservation in admission need to be implemented, it should be made equally applicable to minority and non-minority educational institutions.
2. Art.15(5) regarding reservation in admission should not be made mandatory in private educational institutions, run both by minority and non minority. A consensus needs to be worked to provide a small percentage in favour of weaker sections.

8.2.3. Amendments to Right to Free And Compulsory Education Act, 2009

1. The rights of children to free and compulsory education guaranteed under Article 21A and RTE Act ought have been enforced against the schools defined under Section 2(n) of the Act, except unaided minority and non-minority schools.

2. Section 12(1)(c) dealing with admission to children belonging to weaker and disadvantaged sections, ought have been read down so far as unaided non-minority and minority educational institutions are concerned, holding that it can be given effect to only on the principles of voluntariness, autonomy and consensus and not on compulsion or threat of non- recognition or non-affiliation.
3. No distinction or difference ought be drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c) of the Act. Such an appropriation of seats cannot be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.
4. Duty imposed on parents or guardians under Section 10 to provide admission to their child in a neighbourhood school, should be directory in nature and may leave it open to them to admit their children in the schools of their choice, not invariably in the neighbourhood schools, subject to availability of seats and meeting their own expenses.
5. Moreover, Section 4 dealing with special provision for children who have not been admitted or who have not completed elementary education, Section 10 dealing with duty of parents, Section 14, dealing with age, Section 15 dealing with denial of admission and Section 16 dealing with prohibition of expulsion and holding back are to be made directory in their content and application.
6. The provisions of Section 21 regarding the composition of School Management Committee should not be made applicable to the schools covered under sub-section (iv) of clause (n) of Section 2. At any rate, they shall not be made applicable to minority institutions, whether aided or unaided.
7. The decision in *Pramati Educational and Cultural Trust* v. *Union of India*[32] holding that S.12 of the 2009 Act is unconstitutional as far as minority

[32] 2014(2) K.L.T. 547(S.C.).

educational institutions are concerned should be reconsidered on the touchstone of equality clause.

8.2.4. Reservation for Poor Among Forward Communities

The reservation in admission for weaker sections of forward communities as approved by Kerala High Court is a welcome trend[33]. A percentage could be kept apart for weaker sections among the forward communities in admission to all educational institutions.

8.2.5. Quota for Weaker Sections

1. The US position that quotas for admission to minorities could be resorted to as part of affirmative action if no other alternatives are available can be positively considered.
2. Quotas in admission for minorities as part of SEBCs should be based on adequate evidence.
3. The possibility of fixing a reasonable quota for weaker sections from among the minority community needs to be worked out in minority institutions.

8.2.6. Scheme for Regulating Admission in Professional Educational Institutions

1. A minority institution which decides to conduct their own entrance test should mandatorily follow the time schedule fixed by Medical Council of India or All India Council for Technical Education as the case may be for the purpose of admissions. In case of failure to conduct entrance examination on time, the admission should be permitted only from the Common Entrance Test conducted by the Commissioner of Entrance Exams.
2. Notification inviting applications should be published in English and local newspapers. List of applicants should be published within two days from the last date of submission of applications and atleast two weeks before the conduct of the examinations. Separate list of candidates selected against each category have to be published.

[33] 2010 (1) K.H.C. 348.

3. Every educational institution including minority educational institutions shall publish the list of faculty, their qualification, achievements etc. in their website. The result of previous years and achievement of the colleges should be published to enable the students to choose the best college of their choice.
4. Consensus agreement reinventing the *Unnikrishnan*[34] scheme will bring troubles to the selection process. Therefore strict laws should be made prohibiting cross subsidy.
5. Even in admission against "privilege seats" *interse* merit should be followed. Permitting to overlook merit even on consensus will result in gross illegality. Rejection of admission to a meritorious student by an unaided institution, including that of minorities, if proved should invite penal consequence.
6. Admission Supervisory Committee headed by a High Court Judge should be empowered by a statutory provision to decide whether admissions are conducted in a fair, transparent and non exploitative manner for the purpose of recommending taking over of admission procedure by the State. In case the admission procedure fails to fulfill the triple test for consecutive three years, State may take over admission procedure in unaided professional educational institutions, including that of minorities.

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[34] *Unnikrishnan* v. *State of Andra Pradesh,* (1993) 1 S.C.C. 645.

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