

CHAPTER 1

RIGHT OF MINORITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS.

Introduction

1.1 MINORITIES

The Preamble of *our* Constitution aims at securing the ‘unity and integrity of the nation’. Religious and cultural safeguards have been guaranteed by the Constitution to minority communities in order to ensure them ‘justice, freedom of thought, expression, belief, faith and worship’.

Treating unequals as equal is as bad as treating equals as unequals. Our Constitution provides for equality, for equality of opportunity to all but meting out equal treatment to those who did not start off equally in the first place means treating unequals as equals. Minorities in India have had to face adverse discrimination and, therefore, do not stand on equal footing with others, which made the framers of the Constitution, through Article 29 and Article 30, accord special rights to the people who form religious or linguistic minority in India.

The idea of giving some special right to the minorities is not to hurt a privileged section of the population but to give to the minorities a sense of security. Special rights for minorities were designed not to create inequalities but to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing autonomy in the matter of administration of these institutions.

The universally accepted reality is that education enlightens and empowers societies. Education is an important marker of Human Development. It brings excellence, enriches the mind and illuminates the spirit. Improvements in the functional and analytical ability

of children and youth through education open up opportunities leading to both individual and group entitlements. Improvements in education are not only expected to enhance efficiency (and therefore earnings) but also augment democratic participation, upgrade health and quality of life. It is well accepted by the thinkers, philosophers and academicians that if JUSTICE, LIBERTY, EQUALITY and FATHERHOOD, including social, economic and political justice, the golden goals set out in the preamble to the constitution are to be achieved, the Indian polity has to be educated and educated with excellence. Education is a national wealth which must be distributed equally and widely, as far as possible, in the interest of creating an egalitarian society, to enable the country to rise high and face global competition. In a democratic setup education plays a vital role for cultural enrichment, social upliftment and social transformation.

Article 29 and 30 of the Indian Constitution lay down the provision relating to “Cultural and Educational Rights of Minorities”. Article 29 and 30, which provide for the protection of interests of minorities and Right to establish and administer educational institutions respectively are explained below.

1.2 MINORITY AND THEIR EDUCATIONAL RIGHTS UNDER THE CONSTITUTION

Through the perusal of the constitution of India it is found that expression “minorities” has been employed only at four places in the constitution of India. Head note of the article 29 uses the word, minorities. Then again the expression minorities or minority has been employed in head note of Article 30 and sub clause (1) & (2) of Article 30. It may be noted that the expression “minorities” has been used in Article 30 on two sense one based on religion and other based on language.¹

That expression “minority” needs to be discussed in details. The expression “*minority*” has been derived from the Latin word “minor” and suffix “ity” which means “*small in numbers*”. According to Encyclopedia Britannica minorities means “*group held together*”

¹ <http://indiankanoon.org/search>

by ties of common decent, language or religious faith and feeling different in these respects from the inhabitant of a given political entity.”

The U.N Sub –Commission on Prevention of Discrimination of Minorities has defined minority as under:

1) The term “minority” includes only those non –documents group of the population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristic markedly different from those of the rest of the population;

2) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristic ; and

3) Such minorities should be loyal to the state of which they are nationals.

1.3 ARTICLE 29:- PROTECTION OF INTERESTS OF MINORITIES:-

1. Any section of the citizens residing in the territory of India or any part thereof having a district 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.

1.3.1 ARTICLE 30: 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.

2. 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 as would not

restrict or abrogate the right guaranteed under that clause. (Clause 1A to Art. 30 was inserted by the Constitution (Forty-fourth Amendment) Act, 1978).

3. 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.

In re the Kerela Education Bill, the Supreme Court observed that while it was easy to say that the minority meant a community which was numerically less than 50% is not in relation to the entire legislation. If it is a State law, a minority would be determined in relation to the population of the State. Where a law passed by the purpose of Article 29 and 30 would be determined by reference to the entire population of that State. Accordingly, it was held in re Kerela Education Bill, that Christians, Muslims and Anglo Indians would be minorities in the State of Kerela.

The expression 'linguistic minority' for the purpose of Art. 30(1) is one which must have separate spoken language and that language need not have a distinct script. In India, a number of languages are spoken having no script of their own. But people speaking such a language having no script of its own constitute a linguistic minority for the purposes of Article 30(1). A linguistic minority is to be determined with reference to the language spoken by the community and not with reference to any other language which the community wants its children to study.

The expression 'religion minority' means 'that the only and principal basis of the minority must be adherence to one of the many religions and not a sect or part of the religion. Jains and Sikhs have been held to be minorities based on religion within the meaning of Article 30(1) in the Union Territory of Delhi. Right of Minorities to establish and manage Educational Institutions:- Article 30(1) guarantees to all linguistic and religious minorities the '**right to establish**' and the '**right to administer**' educational institutions of their own choice. The word 'establish' indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Thus, it leaves it to the choice of the minority to establish such educational institution as will serve both purposes, namely, the

purpose of conserving their religion, language or culture, and also the purpose of giving through general education to their children in their own language.

Clause (2) of Article 30 prohibits the State from making discrimination in the matter of grant of aid to any educational institution on the ground that it is managed by a religious minority or linguistic minority.

In *State of Bihar v. Syed Raza*, AIR 197 SC 2425 – It has been held that for creation of post in a minority institution for appointment prior approval of the Vice-Chancellor is not necessary and the persons so appointed would be entitled to grant in aid in view of Art. 30(1) of the Constitution. Clause (2) of Art. 30 provides that 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.

Consequent upon the delivery of the judgment of the eleven judges bench in T.M.A. Pai Foundation) the Union of India, various state government and perspectives. The state governments framed different statutes / regulations to implement the judgment. The respective state governments enforced the said statutes in respect of self - financing private institutions, minority or otherwise. The UGC, AICTE and Medical Council of India also issued provisional / adhoc guidelines covering the same subject purported to be in terms of the provisions. This led to litigations in several courts and the orders passed therein were assailed before the Supreme Court. When these matters came up before a bench of the Supreme Court, the parties to the write petitions and special leave petitions interpreted the majority decision in T.M.A. Pai Foundation in way which suited them and, therefore, at the request of all, these matters were placed before a bench of live judges in *Islamic Academy of Education v. State of Karnatak*. 151 In this case the constitution bench was constituted so that doubts/anomalies, if any, in the T.M.A. Pai Foundation could be clarified.

Most of the petitioners/applicants were unaided professional educational institutions (both minority and non – minority). It was submitted on their behalf that (a) fixation of percentage of seats that could be filled in unaided professional colleges (both minority

and non – minority) by the management was impermissible; (b) private unaided professional institutions had been given complete autonomy not only as regards the admission of students but also as regards the determination of their own fee structure and there could be no interference by the government; and (c) the right to admit students was an essential facet of the right to administer, and so long as admission to unaided educational institutions was on a fair and transparent basis and on the basis of merit the government had no right to interfere. On behalf of non-minority institutions it was contended that they had a fundamental right to establish and administer educational institutions and that the majority judgment in T.M.A. Pai Foundations put them on a par with the minority. On the other hand, the Union of India, various state government and some students submitted that (a) the right to set up and administer an educational institution was not an absolute right. This was subject to reasonable restrictions and national interest; (b) The Union of India, the states and the universities had statutory rights to fix the fees and to regulate the admission of students in order to ensure that (i) there was no profiteering (ii) capitation fee was not charged; (iii) admission was based on the principle of merit, and (iv) persons from backward classes and poorer sections of the society also had an opportunity to receive education, particularly professional education. (c) Unless it was ensured that colleges admitted students strictly on the basis of merit at a common entrance test, it would be impossible to ensure that capitation fees were not charged and there was no profiteering: and (d) minority educational institutions could not claim any higher or better rights than those enjoyed by non- minority educational institutions.

1.4 In view of the rival submissions by the parties before the court the following core questions arose for consideration before the Supreme Court:

1. Whether educational institutions are entitled to fix their own fee structure;
2. Whether minority non-minority educational institutions stand on the same footing and have the same rights;

3. Whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100%, and if not, to what; and

4. Whether private unaided professional colleges are entitled to admit students by evolving their own method of admission.

Before proceeding further it must be noted that in the present case the constitution bench confined itself to the interpretation of the judgment in T.M.A. Pai Foundation leaving other questions open for consideration by appropriate benches. In these matters the Supreme Court was not at all concerned with the rights of aided minority and non-minority institutions and restrictions imposed by the states upon them but was concerned only with the rights and obligations of private unaided institutions run by minorities and non-minorities.

With regard to the first question, namely, whether educational institutions were entitled to fix their own fee structure, Khare C.J, delivering the majority judgment observed that in view of para 56 of T.M.A. Pai Foundation there could be no fixing of rigid fee structure by the government. Each institute must have the freedom to fix its own fee structure taking into consideration their need to generate funds to run the institution and to provide facilities necessary for the benefits of the students. They must also be able to generate surplus, to be used for the betterment and growth of those educational institutions. Profit surplus could not be diverted for any other use of purpose.

With regard to statues and regulation governing the fixation of fees it was observed that the respective state governments/authority concerned shall set up, in each state, committee headed by a retired high court judge who shall be nominated by the chief justice of that state. He shall nominate the other specified members as well. The committee should be free to nominate /co-opt another independent person of repute. Each educational institution must place before this committee its proposed fee structure well in advance of the academic year. The fee fixed by the committee shall be binding for a period of three years, at the end of which period the institution would be liberty to apply for revision. If it was found that the institution was charging fee more than that fixed by

the committee then the said could be appropriately penalized and also face the prospect of losing affiliation. The court clarified that this direction for setting up of a committee was given under article 142 of the Constitution and it shall remain in force till appropriate legislation was enacted by Parliament.

The Supreme Court held that the Right to Education Act would not apply to unaided minority schools.

“Reservation of 25 per cent in such unaided minority schools will result in changing the character of the schools if the right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools. Thus, the 2009 Act including Section 12(1) (c) violates the right conferred on such unaided minority schools under Article 30(1).”

“The Act has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunities to all. There is a power in the 2009 Act coupled with the duty of the state to ensure that only such government funded schools, which fulfil the norms and standards, are allowed to continue with the object of providing free and compulsory education to the children in the neighbourhood school.”

1.5 By interpreting Article 29 and 30 the scope of minority rights can be summarized as under:

- 1. To preserve the language, script or culture**
- 2. To establish the educational institution**
- 3. To administer educational institution**
- 4. To administer according to their choice**

It can be said that a minority can preserve language, script, culture through the educational institution .But the right to minority education doesn't indicate rel

teaching but general secular education. Generally establish means coming into existence of an educational institution by the minority and administer means day to day administration of the institution. The power of administration has many facets like appointment of teachers, admission of the students, choice to determine the language of educational institution etc. The observation of the Supreme Court in Re Kerala Education Bill that, "*the right conferred on minorities to administer educational institutions of their choice is not an absolute right* "

The minority educational institution can be classified into:

- (1) Recognized aided institution
- (2) Recognized unaided institution.
- (3) Unrecognized institution

The unaided minority institution is also subject to regulation of the Government. To satisfy the new trend of liberalization, privatization and globalization the judiciary in T.M.A Pai Foundation case has overruled the view of Unnikrishnan that the nationalization of education and surrendering the process of selection to the State but T.M.A Pai Foundation allowed educational institutions to generate a reasonable surplus to meet the cost of expansion and augmentation of facilities which would not amount to profit. In case of Islamic Academy, the ratio of Pai Foundation that autonomy of unaided non-minority institutions is an important facet of their right under Article 19(1)(g) and in case of minority under Article 19(1)(g) read with Article 30 of the Constitution has been ignored.

CHAPTER 2

NATIONAL COMMISSION FOR MINORITY EDUCATIONAL INSTITUTIONS²

(National Common Minimum Programme).

1. The genesis of the National Commission for Minority Educational Institutions can be traced to the UPA Government's manifesto called 'National Common Minimum Programme'. In the NCMP, in its Section on "National Harmony, Welfare of Minorities", it was mentioned that a Commission for minority educational institutions would be established which will provide direct affiliation for minority professional institutions to Central Universities.
2. The NCMEI Act was an outcome of detailed consultations in a meeting held on Minority Education and Welfare at New Delhi which was followed by subsequent discussions in the National Monitoring Committee on Minority Education.
3. The Government brought out an Ordinance in November 2004 establishing the Commission. Later a Bill was introduced in the Parliament in December 2004 and both Houses passed the Bill. The NCMEI Act was notified in January 2005.
4. The Commission is mandated to look into specific complaints regarding deprivation or violation of rights of minorities to establish and administer educational institutions of their choice. Protection of rights of minorities are enshrined in Article 30 of the Constitution which states that "all minorities, whether based on religion or language shall have the right to establish and administer educational institutions of their choice".
5. Thus, the Commission can look into any complaints relating to violation and deprivation of rights of minorities to establish and administer educational institutions of their choice.

² <http://ncmei.gov.in/index.aspx>

6. This is the first time that a specific Commission has been established for protecting and safeguarding the rights of minorities to establish and administer educational institutions of their choice. This Commission is a quasi-judicial body and has been endowed with the powers of a Civil Court. It is headed by a Chairman who has been a Judge of the Delhi High Court and two members to be nominated by Central Government. The Commission has 3 roles namely adjudicatory function, advisory function and recommendatory powers.

7. So far as affiliation of a minority educational institution to a university is concerned, the decision of the Commission would be final.

8. The Commission has powers to advise the Central Government or any State Government on any question relating to the education of minorities that may be referred to it.

9. The Commission can make recommendations to the Central Government and the State Governments regarding any matter which directly or indirectly deprives the minority community of their educational rights enshrined in Article 30.

10. The empowerment of the Commission has provided a much needed forum for the minority educational institutions to highlight their grievances and to get speedy relief. The subject matter of a petition / complaint include non issue of No Objection Certificate (NOC) by the State Governments, delay in issue of NOC, refusal / delay in issue of minority status to minority educational institutions, refusal to allow opening of new colleges / schools / institutions by minorities, refusal to allow additional courses in minority educational institutions, delay / refusal in the release of grants in-aid, refusal to give financial assistance, denial of permission to create new posts of teachers in minority educational institutions even though there is increase in the number of students, approval of appointment of teachers being denied, non equality in pay scales of minority schools teachers as compared to Government school teachers denial of teaching aids and or other facilities like computers, library, laboratory etc. to minority educational institutions on par with Government institution, non availability of books in Urdu in all subject for students of Urdu school, non appointment of Urdu knowing teachers, in adequate

payment to Madrasa employees, non-release of grants to Madrasa, non-payment of retirement benefits to teachers and non-teaching staff of minority schools, extension of Sarva Shiksha Abhiyan facilities to minority educational institution especially in the deprived rural areas etc.

2.1 MINORITY RIGHTS & EDUCATIONAL INSTITUTIONS: LATEST DEVELOPMENTS

“In fact, one may well compare our nation to a big Jumbo jet flying through turbulent weather to a golden destination. For this flight every section of the people must be galvanised together as firmly as the various parts of the frame. The strength of the frame is equal only to the strength of the weakest section of the frame. *One little crack, i.e. a disgruntled minority, would force the jet to the ground till the crack is repaired.*” This is what Justice S.M. Sikri, former Chief Justice

of India, has once said about the importance of minority rights. **The protection of the rights of minorities is a *sine qua non* in a healthy democracy.**

The Constitution of India protects minorities in different ways. Under Article 30, **it provides a fundamental right to religious and linguistic minorities to establish and administer educational institutions of their choice.** As per the interpretation of the Supreme Court, the right to establish and administer broadly comprises the following rights:

a) to admit students; b) to set up a reasonable fee structure; c) to constitute a governing body; d) to appoint staff (teaching and non-teaching); and e) to take action if there is dereliction of duty on the part of any employees.

The depth and extent of these rights have been determined by a number of recent developments, including verdicts by the Apex Court and actions by the Legislative and the Executive. The recent trends of judicial interpretation and political interventions can

be classified as positive and negative. **The positive trends** (I) are the emphasis on pluralism, secularism and equality as not only permitting but mandating special rights for the minorities, thus calling for a sympathetic and liberal interpretation of the educational right of the minorities. **The negative trends** (II) are the inroads created by unsympathetic judicial interpretations and unwarranted executive interferences, coupled with a few self-inflicted drawbacks by the minority institutions and their managements.

2.2 (1). Positive Trends

Pluralism and Minorities

The Supreme Court, through a Constitution Bench of eleven Judges, has reasserted in 2002 that “**India is a land of different castes, peoples, communities, languages, religions and cultures**”. In the context of minority rights, the Court has used the imagery of a relief map in mosaic: “The one billion population of India consists of 6 main ethnic groups and 52 major tribes; 6 major religions and 6,400 castes and sub-castes; 18 major languages and 1,600 minor languages and dialects.”

Secularism and Minority Educational Rights

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.* Thus, it has declared baseless all kinds of theories founded on the concepts of pseudo-secularism or pampering of minorities. It has also overruled the view that unequal treatment or special rights and privileges in favour of minorities, especially religious minorities, is inconsistent with the ideal of secularism. The Supreme Court indeed unequivocally declared: “*The essence of secularism in India is the recognition 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.*”⁵

Special Rights and Equality

The Apex Court has moreover set at rest the speculations regarding the content of the constitutional ideal of equality, as to whether giving special rights for special classes and groups is an exception to equality or whether it is a necessary ingredient and a mandatory requirement of equality itself.

“Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instil in them a sense of security and confidence...”

2.3 Liberal and Sympathetic Approach to Articles 29 & 30

In 2002, the 11-Judge Bench in the TMA Pai’s case has quoted with approval the observations of Justice Khanna in the *St. Xavier’s case*, wherein he advocates that the provisions of the Constitution should be construed according to a liberal, generous and sympathetic approach. *“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.* 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.” The Judgment adds that it can “be said to be *an index of the level of civilisation and catholicity of a nation as to how far their minorities feel secure and are not subject to any discrimination or suppression*”.

Conditions for State Regulations

The state can make reasonable regulations for minority institutions, but it must respect certain conditions. In this regard, the 11-Judge verdict approved and upheld in 2002 the dual test already

Minority Rights & Educational Institutions 5 6 Integral Liberation Vol. 9, No. 1 March 2005 laid down in the Sidhajibhai's and St. Xavier's cases: "Recognising that the right to administer educational institutions could not include the right to maladminister, it was held that regulations could be lawfully imposed for the receiving of grants and recognition, while permitting the institution to retain its character as a minority institution. *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'...*

The selection and appointment of teachers for an educational institution was regarded as one of the essential ingredients under Article 30(1).¹³ This is applicable even in Aided Schools.

2.4 Rights of Minorities Unaffected by Receipt of Aid

It was further held in the St. Stephen's case that the state could lay down reasonable conditions for obtaining a grant-in-aid and for its proper utilisation, but that the state had no power to compel minority institutions to give up their rights under Article 30(1). The present judgment reaffirms that the "regulation cannot change the character of the minority institution... *The rights under Article 30(1) remain unaffected even after securing financial assistance from the government.*"

Explaining the implication of Article 30(2), the judgment reasserts that "the receipt of aid cannot be a reason for altering the nature or character of the recipient educational institution". Thus, "any grant that is given by the state to the minority institution cannot have such conditions attached to it, which will in any way dilute or abridge the rights of the minority institution to establish and administer that institution".

2.5 Article 29(2) Cannot Annihilate Minority Rights

The 2002 judgment states: “Article 30(2) is an injunction to the state not to discriminate against any minority educational institution and prevent it from receiving aid... While, therefore, a minority educational institution receiving grant-in-aid would not be completely outside the discipline of Article 29(2), *by no stretch of imagination can the rights guaranteed under Article 30(1) be annihilated.*”

The word ‘only’ in Article 29(2) “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).” **It is thus permissible to give preference to minority students even in aided institutions:** “As long as the minority educational institution permits the 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.*”

The Ratio of St. Stephen’s Upheld

The 2002 judgment upholds the ratio of the decision in the Stephen’s case (except the rigid ceiling of 50% in admission for minority students):

“The right of the aided minority institution to preferably admit students of its community, when Article 29(2) was applicable, has been clarified by this Court over a decade ago in the St. Stephen’s College case. While upholding the procedure for admitting students, this Court also

held that *aided minority educational institutions were entitled to preferably admit their community candidates so as to maintain the Minority Rights & Educational Institutions 7 8 Integral Liberation Vol. 9, No. 1 March 2005*

2.6 (II). Negative Trends: The Inroads into Minority Rights

The recent judgments of the Supreme Court in the TMA Pai's case, Islamic Academy case, Modern School case, Brahma Samaj Case and Usha Mehta case **have however made serious inroads into the constitutional rights of minorities** – contrary to the consistent interpretation held all through the past several decades. *The explicit negative trends are the prescription of the territorial unit alone for determining the minority status, the compulsory reservation for non minorities in aided minority institutions, the provision for external appellate tribunals, and the permissibility of the national interest as a basis for regulations.*

Territorial Unit for the Determination of Minority Status

*The main judgment by the majority of the Judges, delivered through Chief Justice B.N. Kirpal, has held that the unit for the determination Minority Rights & Educational Institutions 9 10 Integral Liberation Vol. 9, No. 1 March 2005 of a linguistic or religious minority should be the State, i.e. the province. All the other judgments except that of Justice Ruma Pal have concurred with this view. **However, it appears that this view is incorrect, while that of Justice Ruma Pal is correct.***

If the executive or legislative action of the Union is under challenge, then the unit for the determination of the minority character should be the Union. If the action of a state is under challenge, then the unit should be that of the state. This principle is very clear from the observations of Justice Mathew in the St. Xavier's case, to the effect that minority rights are a necessary concomitant of a democracy which, in fact, is a majority-rule. *Otherwise, when a majority in a state is a minority in relation to the whole nation, it would have no protection at the national level. This would greatly restrict the content and extent of the rights under Article 30.*

The principle of adopting a liberal, sympathetic and purposive approach towards Article 30 moreover demands that, when there are two possibilities, we accept the more

favourable interpretation for the minorities, the one which protects the greater number of groups and people. Furthermore, there is no incongruity or absurdity in adopting different criteria for the identification of the linguistic and the religious minorities. *Otherwise, the Christians residing in many North-Eastern States, the Muslims of Jammu & Kashmir and the Sikhs of Punjab would not belong to the minority communities of India!*

2.7 Compulsory Reservation for Non-Minorities

Even though the TMA Pai's judgment has attempted to interpret Articles 29(2) & 30 in a sound manner and discern the interplay between them through the principle of harmonious construction, the Judges (except Justices Quadri and Ruma Pal) have erred by prescribing a compulsory reservation and quota for non-minorities in minority institutions because they happen to receive some aid from the government. This does not even follow from the interpretation of Article 29(2) given by the majority judgment. This judgment indeed concludes

from the word "only" that a preference by minority institutions to admit their own students does not go against Article 29(2). Hence, there is no reason to have a compulsory reservation or quota for nonminority students *as long as there are minority students*. **The interpretation of Justices Quadri and Ruma Pal thus appear to be the correct and sound one.**

2.8 Permissible Regulations in View of the National Interest

In the Sidhajibhai's case, the Court had observed that the minority right under Article 30(1) "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 (its) power of administration is held justifiable because it is in the public or national interest..., the (minority) right will be but a 'teasing illusion', a promise of unreality."

In his delivery of the 2002 majority judgment, Justice B.N. Kirpal thus ‘clarified’ these observations: “In the Sidhajbhai’s case, it was laid down that regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality and public order could be imposed. If this is so, it is difficult to appreciate how the government can be prevented from framing regulations that are in the national interest... Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. *Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the government from framing regulations in that behalf.*

2.9 Territorial Restrictions in Aided Linguistic Minority Institutions

The TMA Pai’s judgment has prescribed that *the aided linguistic minority institutions must admit the bulk of their minority students from the state where they operate.* 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 as far as that state is concerned. *In other words, (there should be a) predominance of linguistic students hailing from the state...* 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 facade of the protection given under Article 30(1). If not, the very objective of conferring the preferential right of admission... may be distorted.” **These directions are limited to aided linguistic minority institutions.** *However, there can be a danger that some states may unscrupulously apply this principle to religious minorities too. Let us hope it will not be applied to unaided minority institutions!*

CHAPTER 3

Dissenting Judgments

Before proceeding further let us discuss few cases related to Article 29 and 30; wherein the right of minorities to establish educational institutions is the issue.

3.1 The Islamic Academy Case

In the Islamic Academy case, the Supreme Court (through a Constitution Bench of five Judges) introduced a few principles regarding the admission procedures and fee structure in unaided professional (medical and engineering) educational institutions. The verdict arose to clarify some doubts related to the decisions in the TMA Pai's case. Conceptually, the judgment observed that minority institutions are on a different footing than non-minority institutions.

However, on the ground that even unaided minority institutions are subject to the national interest, these institutions were brought at par with private unaided non-minority colleges, with a few cosmetic Minority Rights & Educational Institutions. with a few differences. In effect, the Court has directed the constitution of two committees: one for deciding the fee structure and another for overseeing the admission procedures and common entrance test. *The minority institutions are also subjected to these two committees.*

Instead of clarifying doubts, the Islamic Academy decisions have created more confusions regarding the constitutional rights of the minority educational institutions. This is strengthened by the fact that a Constitution Bench of 7 Judges of the Supreme Court has started hearings to further clarify the doubts raised by the Islamic Academy and TMA Pai's decisions.

3.2 The Modern School Case

The negative effect of moving with non-minority institutions became more evident for the minority-run schools of Delhi in the Modern School case. This case arose from the decision of the High Court of Delhi with regard to the regulation of the fee structure in the unaided private schools of Delhi. The case related to both minority and non-minority unaided private schools. The minority schools involved in the case included Mater Dei School, Carmel Convent School, St. Xavier's School and Mount Carmel School. The special rights of the minority-run schools could not be considered in detail in the said case, but the directions bind them also. The most harmful effect of the decision is that it has applied and upheld, even in the case of minority schools, the directive of the Director of Education to the effect that *no amount of money whatsoever shall be transferred from the school fund to the Society or the Trust or any other institution*. The argument based on Rule 77 of the Delhi Education Act that it is permissible for the schools to assist or set up other schools under the same management was repelled.

3.3 The Brahma Samaj Case

That the distinction between the rights of minority and nonminority educational institutions is disappearing became evident in another case, i.e. the Brahma Samaj Education Society Vs. State of West Bengal. The Brahma Samaj Society claimed the minority status as a religious minority and challenged the State Government's interference in the selection of the teachers of their college. The Supreme Court held that, even in the case of aided colleges, interference in the selection and appointment of teachers is unwarranted. But the Court did so by interpreting the fundamental right under Article 19(1)(g) as given to any citizen to start and run educational institutions as an occupation. Thus, the Court held that it need not examine the minority rights of the Brahma Samaj Education Society.

3.4 The Usha Mehta Case

The concept of the so-called larger interest of the state and the nation got further approval from the Supreme Court when it ruled that a minority educational institution has to teach a state language. The case stemmed from a policy decision of the Maharashtra Government that the study of Marathi be made compulsory throughout the schools of the state. As a result, the English-medium schools run by Gujarati linguistic minorities were compelled to teach four languages (Hindi, English, Marathi and their mother tongue Gujarati) as against the accepted “three-language formula”. The constitutional validity of the imposition of Marathi as a compulsory study in schools run by linguistic minorities was the main matter for judgment in this case.

The Supreme Court interpreted the said imposition of the fourth language as the larger interest of the state and upheld it as not violative of Article 30.

3.5 Justice K.S. Radhakrishnan in his dissenting judgment³ said: “Article 21A, as such, does not cast any obligation on the private unaided educational institutions to provide free and compulsory education to children of the age 6 to 14 years. Article 21A casts a constitutional obligation on the state to provide free and compulsory education to children of the age 6 to 14 years.”

He said though the purpose and object of the Act was laudable, “that is, social inclusiveness in the field of elementary education, the means adopted to achieve that objective is faulty and constitutionally impermissible. The law is well settled that the state cannot travel beyond the contours of Clauses (2) to (6) of Article 19 of the Constitution in curbing the fundamental rights guaranteed by Clause (1), since the Article guarantees an absolute and unconditional right, subject only to reasonable restrictions. Article 21A requires non-state actors to achieve the socio-economic rights of children in the sense that they shall not destroy or impair those rights and also owe a duty of care.”

³ <http://thepeopleschronicle.in> – by Sarungbam Lucy Bsc, LLM

The judge said: “The state, however, cannot free itself from obligations under Article 21A by offloading or outsourcing its obligation to private state actors like unaided private educational institutions or to coerce them to act on the State’s dictates. Private educational institutions have to empower the children, through developing their skills, learning and other capacities, human dignity, self-esteem and self-confidence and to respect their constitutional rights. Children who opt to join an unaided private educational institution cannot claim that right as against the unaided private educational institution, since they have no constitutional obligation to provide free and compulsory education under Article 21A. Needless to say that if children are voluntarily admitted in a private unaided educational institution, they can claim their right against the State, so also the institution.”

CHAPTER 4

How can Minority Institutions Promote Their Rights?

4.1 Problems of Enforcement

Almost all the minority educational institutions, both aided and unaided, face a number of problems and hardships in enforcing their constitutional rights of establishing and administering the educational institutions of their choice. *Ignorance, social polarisation, antiminority prejudices, political opportunism, economic constraints, nonviability of judicial remedies, etc., are some of the serious problems which deter the enforcement of minority rights.* Non-access or insufficient access to economic resources by the minorities and the requirement of huge financial resources in higher education will continue to plague the minority institutions. *This will become more glaring in competition, as the unaided non-minority institutions have been armoured with a new-found fundamental right under Articles 19(1)(g) and 26(a).*

Confronted with the problems of enforcement and the infringement of their fundamental rights, the minorities are often led to approach the High Courts and the Supreme Court through writ proceedings, thus spending much of their scanty resources. **The best suggestion should therefore be to adopt ways and means to avoid litigation as far as possible.**

4.2 Fighting Ignorance

Fighting ignorance is the most important step in this direction. There is a wide-range ignorance, even among the minorities themselves, with regard to the extent of their rights, the limits of governmental interference, and also the available remedies even prior to going for litigation. *Once the respective authorities are made aware of the extent of these rights, many of the problems and hardships could be avoided or nipped in the bud itself.* Appropriate information with all the relevant material, including the rulings by the Supreme Court and the respective High Courts, should therefore be made available to the concerned authorities.

The fundamental rights, especially the minority rights, should not be allowed to be silenced or waived for a little practical convenience. We should remember that these rights are provided not merely for the present institutions but also for the future generations and the other minority communities. At the same time, it should be prudently seen that the minority rights are not over-emphasised to the extent of creating reactions or unnecessary heart-burn or jealousy.

It is important that all the persons concerned with minority institutions fully know the relevant regulations, clearly distinguishing what is and what is not permissible. **It is also very important to conscientise the staff, parents and students about the minority rights and their relevance.**

4.3 Practising Transparency

A reasonable transparency in all matters affecting the students, staff and the public has to be the rule rather than the exception. The principle that justice should be shown to be done is applicable in the case of these institutions also, especially since they are fulfilling a public or societal function. The 2002 judgment of the Supreme Court has also insisted on transparency. A few steps like fixing the procedures for all educational matters, including admissions and appointments, and keeping all records, would to a great extent answer the requirement of transparency. It would be ideal to publicise the results of the admissions, selections, etc., at least within the institution itself, unless there is any detriment to the reasonable interest of the institution.

4.4 Following the Principles of Natural Justice

A strict compliance with the principles of natural justice would prevent a lot of litigation while following the requirements of fairness and transparency. The principle of *nemo iudex in sua causam* requires a procedure free of any appearance of bias. *Nobody should be seen as judging his own case.* Whoever has an interest in a particular matter should avoid taking any decision or action, especially those which will have negative

consequences on others. The other principle of *audi alteram partem* (hear the other party) is equally important. *Everybody has a right to a hearing before being subjected to any detrimental consequence. Alternative dispute redressal mechanisms like arbitration, mediation and reconciliation ought to be used in all matters relating to minority institutions.*

Using the Existing Opportunities

In view of the liberalisation opened up by the national policies and the judicial interpretations, the minorities can consider a number of options to use these opportunities in the service of the nation, especially the poorer sections of the people. The possibility of starting unaided, self-financing and even autonomous educational institutions of excellence need to be explored, even those with foreign collaboration. A caution would however be relevant. The minorities should not be wary of establishing aided institutions for fear of difficulties and restrictions arising out of the aided nature of the institutions. **In spite of the additional regulations and restrictions, it would be worthwhile to go for aid wherever possible in order to serve the poorer sections, especially the Scheduled Castes, Scheduled Tribes and women.**

It is necessary for the minorities to constantly remind themselves that the concept of minorities and the necessity to ensure special rights for them, even in a democratic form of government, evolve from *the basic tension and dialectics between the unit and the whole, or the individual and the society/organisation*. Usually, people's consciousness gradually expands from the narrower to the wider. The expansion from the minority to the majority without annihilating the minority is a great vision still relevant in the age of the small global village.

CHAPTER 5

Minority educational institutions have a great and momentous role to fulfill not only for themselves but also for the nation and the world.

5.1 Conclusion

This is all the more true in the context of our fundamental duty to cherish the composite culture of this country and to aim at unity in diversity.

The religious and linguistic minorities need to realise that they are not the only minorities who need protection. The educational rights assured by the Constitution are not merely meant for their own benefits. Exercising their special rights, **these minorities need to be in the service of the nation and the real minorities, the numerous marginalised groups like the poor, children, Dalits, Adivasis/ Tribals, women and those who are mentally or physically challenged.** These constitute the voiceless millions who appear to have lost even their face in the demonic dance of modern democracy, which is not only scripted and directed but also funded by the unseen hands of the exploiters, oppressors and criminals, successfully hiding behind the attractive masks of different religions and popular political parties.

If the educational institutions are not masked phantoms lurking behind but are truly for the benefit of the minority, *then the possibilities and potentialities are huge not only for the members of the minority but also for the non-minorities and the nation as a whole.*

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