CHAPTER – V

PROTECTIVE DISCRIMINATION IN FAVOUR OF MINORITIES

1. INTRODUCTION

The problem of minorities is not peculiar to India but it is a universal phenomena. There is no state in the world today which does not embrace minorities within its fold and has not to tackle their problems.\(^1\) The problem has differed in form and intensity in various parts of the world. There have been wars because of wrong methods used to deal with it and a number of national and international treaties and agreements have been concluded for the protection of minorities at different stages of world history.\(^2\) According to Professor Humayun Kabir, “There can be no question of minorities except in a democracy unless there is democracy the problem would not arise in that form at all.”\(^3\)

In India the problem of protection of minorities emerged a few decade before independence. The Nehru Committee Report\(^4\) of 1928 in addition to other things emphasized on the safeguards for minorities which included the right to freedom of conscience for minorities which included the right to freedom of conscience and free profession and practices of religion, elementary education for members of minorities, reservation of seats for Muslims where they were in minority and for

\(^3\) *Minorities in a Democracy* 2 (1968).
\(^4\) The appointment of the Simon Commission by British Government in November, 1927 impelled the Congress to draft a Constitution for future political set up. For this purpose the Madras Resolution of 1927 was passed. It provided for setting up a Committee to draft a Constitution. The Committee under the Chairmanship of Motilal Nehru came into being in 1928 and submitted its report known as Nehru Committee Report.
non-Muslim in NWFF. The Karachi Resolution, 1931[^5] stressed positive obligations of the state to remove inequality and discrimination inherent in the society. The demand for the rights of minorities was apparent also in the Sapru Report[^6] of 1945. It was clear that for homogeneous society and national unity, harmony among various communities in India was essential.[^7]

The most important problem which the framers of the Indian Constitution faced and had to find a solution was that of minorities. The minority problem, according to prominent members of the Constitution Assembly was the creation of British Government as a result of separate communal electorates.[^8] This had ultimately led to the partition of the country. The partition to some extent diluted the Muslim Minority problems but it did not solve it because a member of minority groups and a large number of Muslims were still in India.[^9] The other minority groups were scheduled castes, Indian Christians, the Sikh, the Anglo Indians and the Parsis.[^10] The objective resolution moved by Jawaharlal Nehru at very first sitting of the Constituent Assembly on December 13, 1946 stated that “adequate safeguards

[^5]: Adopted at Karachi by the Congress Session held in March, 1931.
[^6]: This committee was set up by Non-Party Conference held in Nov. 1944 mainly to examine the whole communal and minorities issues from constitutional and political point of view.
[^8]: According to K.M. Munshi, “The most important task before the Constitution Assembly was to secure political consolidation of the nation. Its basis had been destroyed by the British by Statutorily fragmenting political idea into religious communities under the guise of protecting minorities.” 1 *Indian Constitutional Documents, Pilgrimage to Freedom* 197 (1967).
[^10]: The 1941 Census. According to it the percentage of minority groups was (i) Muslim 24.3 per cent; (ii) Scheduled Castes 12.5 per cent; (iii) Sikhs 1.5 per cent; (iv) Indian Christians 0.8 per cent; (v) Anglo-Indians 0.04 per cent; (vi) Parsees 0.04 per cent and (vii) Tribal Communities 6.5 per cent – cited in Ralph H. Ratzlaff, “The Problem of Communal Minorities in the Drafting of the Indian Constitution” in R.N. Spann (ed.) *Constitutionalism in Asia* 56 (1963).
shall be provided for minorities, backward and tribal areas and depressed and other backward classes.”

Govind Ballabh Pant moved a resolution on January 24, 1947 for the setting up of an Advisory Committee on Fundamental Rights, Minorities an Tribal Excluded and Partially Excluded Areas and laid special emphasis on the problem of minorities. Although the Muslim League was not participating at this stage, the members of the Assembly were of the view that the Assembly and its Committees should proceed with their respective task and fullest opportunity should to be given to Muslim League if it decided at any stage to join the Assembly or its Committees. The Advisory Committees appointed by Constituent Assembly consisted of members drawn from Hindus of Bengal, the Punjab, the North-West Frontier Provinces, Baluchistan and Sind, scheduled castes, Sikhs, Indian Christians, Anglo-Indians and Parsis and representatives of Tribal Areas. This Advisory Committees was to be the principal instrument for securing the just consideration of minorities problems in terms of the Cabinet Mission Statement of May 16, 1946. The Advisory Committee which met on February 27, 1947 under the Chairmanship of Sardar Patel divided into four sub-committees. One of the sub-committees was on minorities. The sub-committee, finding its task difficult, formulated a

11 1 Constituent Assembly Debates 57.
12 He said, “The question of minorities everywhere looms large in constitutional discussion. Many a Constitution has foundered on this rock. A satisfactory solution of the question pertaining to minorities will ensure the health, vitality and strength of the free state of India that will come into existence as a result of discussion here. The question of minorities cannot possibly be over rated. It has been used so far for creating strife, distrust and cleavage between the different sections of the Indian Nation … But now it is necessary that a new chapter should start and we should all realize our responsibility. Unless the minorities are fully satisfied, we cannot make any progress – 1 Constituent Assembly Debates 310-311. See also B. Shiva Rao, The Framing of India’s Constitution – A Study 746 (1968).
13 Id. at 746-7.
14 Id. at 747.
15 The sub-committee was under the Chairmanship of H.C. Mookerji.
questionnaire\textsuperscript{16} to ascertain the views of the members.\textsuperscript{17} The scheduled castes, scheduled tribes, Sikhs and Anglo-Indians submitted memoranda demanding constitutional safeguards. No memorandum was presented on behalf of the Muslim League because it was not participating in the proceedings of the Assembly. However, no specific communal safeguards were demanded on behalf of Indian Christians and Parsis. Dr. Ambedkar’s\textsuperscript{18} AND Harnam Singh – Ujjal Singh\textsuperscript{19} submitted detailed demands on behalf of scheduled castes and Sikhs respectively. Dr. Ambedkar demands included both political and social safeguards. The political safeguards included minimum representation according to population of the scheduled castes in the legislatures, municipalities and local boards. He also demanded that on every public service commission and selection committee at least one representative of the Scheduled caste should have a membership. Jagjivan Ram emphasized that the guarantees should be directed to the protection of racial and religious minorities from “extinction” and assimilation of scheduled caste in the parent body.\textsuperscript{20} The memorandum on behalf of Sikhs demanded along with other things the same reservations and facilities for the backward communities among Sikhs as were to be provided by for scheduled castes, reservation of

\textsuperscript{16} The draft of the Questionnaire was as follows:
(1) What should be the nature and scope of the safeguards for a minority in the new Constitution?
(2) What should be the political safeguards of a minority (a) in the centre, (b) in the Provinces?
(3) What should be the economic safeguards of a minority (a) in the centre, (b) in the Provinces?
(4) What should be the religious, educational and cultural safeguards for a minority?
(5) What machinery should be set up to ensure that the safeguards are effective?
(6) How is it proposed that the safeguards should be eliminated, in what time and under what circumstances?

\textsuperscript{17} B. Shiva Rao II Selected Documents 391.
\textsuperscript{18} B. Shiva Rao, \textit{Ibid}.
\textsuperscript{19} B. Shiva Rao, \textit{The Framing of India’s Constitution – A Study} 749 (1968).
\textsuperscript{20} \textit{Id.} at 750.
six per cent of the seats in the central legislatures, five per cent of posts in central cabinet.\textsuperscript{21}

Memoranda were also submitted on behalf of Anglo-Indians by Frank Authority and S.M. Parter separately.\textsuperscript{22} No communal demands were put forward on behalf of Indian Cristians. Raj Kumari Amrit Kaur who submitted a memorandum on their behalf represented the national point of view. She opposed both reservation of seats and weightage for any community.\textsuperscript{23} The attitude of the Parsi community was also not communal.\textsuperscript{24}

The sub-committee after a prolonged discussion submitted a brief summary of the conclusions to the Advisory Committee on July 27, 1947. The sub-committee could not submit a detailed report because of shortage of time. The conclusions contained in the report were: (i) The demand for separate electrorates and weightage should be rejected and principle of joint electrorates with seats reserved for minorities on a population basis should be accepted; (ii) The demand for reservation of seats in the cabinet should be rejected; (iii) The demand for reservation of posts in the public services on a population basis should be accepted (iv) special officers should be appointed to look after the safeguards and interests of minorities.\textsuperscript{25}

The Minority Rights Committee while emphasizing the importance of giving safeguards to minorities said:

\begin{itemize}
  \item \textsuperscript{21} Id. at 751.
  \item \textsuperscript{22} B. Shiva Rao, \textit{op.cit.}, supra note 16 at 343-61.
  \item \textsuperscript{23} She said, “Privileges and safeguards really weaken those that demand them. They are a definite bar to unity, without which there can be no peace, as also to efficiency without which the standards of good governance are lowered.” \textit{Id.} at 310.
  \item \textsuperscript{24} Homi Modi who replied the questionnaire said, “they have never asked for any special privileges, but their position is that if other minorities are accorded representation anywhere, it is but fair that Parsis should receive treatment at least equal to that given to any of the smaller minorities”. \textit{Id.} at 323.
  \item \textsuperscript{25} B. Shiva Rao, \textit{op.cit.}, supra note 18 at 754-57.
\end{itemize}
Our general approach to the whole problem of minorities is that the state should be so run that they should stop feeling that they are minorities, but they have as honourable a part of play in the national life as any other section of the community. In particular we think that it is the fundamental duty of the State to take special steps to bring up minorities which are backward to the level of general community.26

The Advisory Committee endorsed almost all the conclusions arrived at by the sub-committee. The Advisory Committee in turn forward its report to the President of the Constituent Assembly.27 The first question decided by the Committee was that all the elections to central and provincial legislatures will be held on the basis of joint electorates with reservation of seats for certain specified minorities28 on basis of population ratio. These reservations shall be for ten years and at the expiry of the period position will be reconsidered. Fro Anglo-Indians, it was decided not to have reservation of seats for them but President and Governors were to have power to nominate their representatives in central and provincial legislatures if they fail to secure adequate representation in legislatures in the general election. For Parsis, there was to be no statutory reservation but they were to continue to be in the list of recognized minorities, ‘provided that if as a result of elections during the period prescribed … it was found that Parsi community had not secured proper representation their claim for reserved seats would be considered’.29 For Sikhs, the report suggested that question of safeguards their interest be postponed for

26 V. Constituent Assembly Debates 247.
27 While submitting this report, Sardar Patel said in the Constituent Assembly, “On the whole, this report is the result of careful sifting of facts on both sides” — supra note 26 at 247.
28 The recognized minorities were classified under three groups:
   Group A – Population less than ½% in the Indian Dominion, omitting States:
   Group B – Population not more than ½%: 4. Indian Christians 5. Sikhs
   See Id. at 248.
29 Ibid.
the present because of pending of the award of Boundary Commission in the Punjab. As regards Christians, Muslims and scheduled cases, it was decided that there shall be reservation of seats for them in Central and Provincial legislatures on population basis. They shall also have right to contest unreserved seats. It was also decided that an officer shall be appointed by the President at the centre and provincial legislatures respectively for supervising the working of safeguards provided for minorities.

The report of Advisory Committee was discussed by the Constituent Assembly on August 27 and 28, 1947 and its main recommendations were carried without any modification. The draft Constitution prepared by the Constitutional Advisor in October, 1947 incorporated decisions concerning minorities as passed by the Constituent Assembly.

The Advisory Committee in its meeting on May, 1949 passed a resolution for abolition of reservations which it had recommended in 1947 in the context of changes conditions. It recommended that reservations for Muslims, Sikhs, Christians or any other religious community should be abolished and reservation should be provided only for scheduled castes and scheduled tribes, because of their backwardness. This recommendation was passed by the Constituent Assembly by an overwhelming majority including members of all the communities. According to Pt. Nehru it was a “historical turn in our destiny”.

30 Ibid.
31 Ibid.
32 This was the proposal of Dr. Ambedkar which was carried, Ibid.
33 VII Constituent Assembly Debates 330.
Finally, protection to minorities was granted in two ways. First, was the inclusion of non-discriminatory treatment, freedom of religion, special provisions relating to cultural and educational right of minorities. The second was inclusion of certain provisions in constitution but outside fundamental rights. Such provisions include adequate minority representation in Parliament and State legislatures, Civil services etc.

The constitutional provisions for the protection of minorities have been enacted for doing social justice to them. These minority rights were considered essential for the merger of minorities and majority some day into one. This chapter is confined to Religious Freedom, Cultural and Educational Rights of Minorities.

II. WHAT IS MINORITY

The term ‘minority’ had its recognition for the first time at the Minority treaties and Declarations made under the auspices of the League of Nations after first World War and it has appeared in constitutions and laws of almost all the countries of the world and in international documents.

Grammatically speaking, the term minority is compound of the Latin word ‘minor’ and the suffix ‘ity’ means inter-alia ‘the smaller in number of the two aggregates that constitute a whole’.

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34 Anirudh Prasad, Social Engineering & Constitutional Protection of Weaker Sections in India 131-32 (1980).
35 The Constitution prohibits discrimination based on religion, race, caste etc. It recognizes single citizenship.
36 Article 25 lays down right to freedom of and free profession, practice and propagation of religion.
37 Article 29.
38 Article 30.
39 Dr. B.R. Ambedkar’s speech at the time of introduction of the Draft Constitution, VII Constituent Assembly Debates 39.
40 Kamlesh Kumar Wadhwa, op.cit., supra note 2 at 2.
The Encyclopedia Britannica defines minorities as “group held together by the ties of common descent, language or religious faith and feeling themselves different in these respects from the majority of the inhabitants of a given political entity”.\(^41\) This definition lays stress on the word “feeling”.

J.A. Laonce gives two definitions of the term. One is purely objective and second is purely subjective. A purely objectives definition would be “A minority is a group whose race, language or religion is different from the majority”. A purely subjective definition would be, “A minority is a group that thinks of itself as a minority”.\(^42\)

The report of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities furnishes the following definition: “The term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.”\(^43\)

This definition talks of wish to maintain separate identity by a group. But there is another type of minority also prevalent in number of countries based on race, caste etc. Negroes in the United States and Scheduled Castes and Scheduled Tribes in India are examples of the same. These groups are not minorities by choice or will but by force. They do not want to preserve their characteristics which are different from the majority, rather they want to be assimilated with the majority but are not allowed to do so due to opposition from within the ranks of the majority.\(^44\) So the attempt of united Nations to define the term is not free from fault.

\(^41\) 15 Encyclopedia Britannica 542 (1953).
\(^43\) Year Book on Human Rights for 1950, 490.
\(^44\) Kamlesh Kumar Wadhwa, op.cit., supra note 2 at 4.
Louis Wirth, a sociologist, regards minority as a group which is subjected to discrimination and unequal treatment and which, therefore, regards itself as object of collective discrimination.\textsuperscript{45} This definition emphasizes in addition to numerical size. The inferior or differential treatment which develops a consciousness of its inferior status. The definition is based on the subjectiveness of the group.

Thus none of the above definitions is free from criticism.

III. MINORITIES AND FREEDOM OF RELIGION

The Indian Constitution has brought into existence a secular State consistent with its democratic character. The intention to constitute India into a secular State was made explicit by Constitution (Forty-second Amendment) Act, 1976 by including the word “Secular” in the Preamble to the Constitution. Secularism according to Supreme Court of India is “neither pro nor anti God; it treats alike the devout, the agnostic and the atheist. It eliminates God fro the matters of the State and ensures that no one shall be discriminated against on the ground of religion.”\textsuperscript{46}

Article 25 to 28 deal with fundamental rights relating to freedom of religion which are available to all persons in India. This freedom is conferred on individuals as well as religious groups.

Hare it is pertinent to point that most of the Constitutions of the world provide for freedom of religion, but they do no explicitly guarantee the right to propagate religion as justifiable fundamental right.\textsuperscript{47}


\textsuperscript{47} The Constitution of People’s Republic of China lays down under Article 13, “The people shall have freedom of religious belief”. The French Constitution (1946) under the
A. Basis for Religious Freedom

The main basis of religious freedom for minorities is the provisions enacted under Articles 25 to 28 of the Constitution. The first Article dealing with religious freedom is Article 25. All persons, it declares, are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion; this right is subject to public order, morality and health and all other fundamental rights. Further, this right is also subject to any existing law or future law which (a) regulates or restricts any economic, financial, political or other secular activity which may be associated with religious practice; (b) provides for social welfare and reform or the throwing open of Hindu

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48 Article 25 which guarantees right to freedom of religion provides:
(1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and right freely to profess, practices and propagate religion.
(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law -
   (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.
   (b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I – The wearing and carrying of Kirpans shall be deemed to be included in the profession of Sikh religion.
Explanation II – In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jains or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

49 There was some opposition to inclusion of the word ‘propagate’. Particularly the Hindu members in the Assembly totally disagreed with the view that the propagation of religion should be considered a legitimate aspect of religious freedom. K.M. Munshi while explaining the word said that, “Even if the word were not there, I am sure, under the freedom of speech which the Constitution guarantees it will be open to any religious community to persuade other people to join their faith” – VII Constituent Assembly Debates 837.

50 Article 25 (1), The Constitution of India.
51 Article 25 (2) (a), Ibid.
religious institutions of a public character to all classes and sections of Hindus. The wearing and carrying of Kirpans is included in the Sikh religion. The term Hindu under the section includes persons professing the Sikh, Jains or Buddhist religion and reference to Hindu religious institutions is to be construed accordingly.

The second Article which lays down the basis for religious freedom is Article 26. It provides that “subject to public order, morality and health, every religious denomination or any section thereof shall have the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.”

Article 25 declares the right of the individual to freedom of religion whereas Article 26 protect the exercise of the right thereof. The rights conferred under these two Articles are subject to public order morality and health. So the laws prohibiting religious practices such as Sati, dedicating a virgin girl of tender ages to a God to function as Devadasi, sacrifice of human beings, sacrifice of animals in a way deleterious to well being of the community at large, or “offences Relating to Religion” under Chapter XV of the Indian Penal Code would all be valid exercise of the regulatory power of the State. Article 25(1) is also subject to the other provisions of Part III. For example Article 17 of the Constitution which abolishes the practice of untouchability or Article 16 (5) which protects a law providing that the incumbent of an office under the State in connection with the affairs of any religious institution shall be a person belonging to that particular

52 Article 25 (2) (b), Ibid.
53 Explanation I to Article 25, Ibid.
54 Explanation II to Article 25, Ibid.
55 Article 26, The Constitution of India.
religion. The religious freedom provided under Article 25(1) is further curtailed by Article 25(2) (a) and (b).

(i) Concept of Religion

The term ‘religion’ has not been defined in the Constitution and it is hardly susceptible of any rigid definition. The Supreme Court has defined it in number of cases.\(^57\) A religion is certainly a matter of faith and is not necessarily theistic. Religion has its basis in “a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being”, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion and these forms and observances might extent even to matters of food and dress.\(^58\)

Subject to certain limitations, Article 25 confers a fundamental right on every person not merely to entertain such religious beliefs as may be approved by his judgment or conscience but also exhibit his beliefs and ideas by such overt acts and practices which are sanctioned by his religion. Now what practices are protected under the Article is to be decided by the courts with reference to the doctrine of a particular religion and include practices regarded by the community as part of its religion.\(^59\) The courts have gone into religious scriptures to ascertain the status of a practice in question.\(^60\)

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60 In Rajasthan v. Sajanlal, A.I.R. 1975 S.C. 706, the Supreme Court surveyed the Jain religious tenants as regard to the management of Jain religion endowments.
In *Ratila Pan Chand Gandhi v. State of Bombay*, the Supreme Court held the requirement of offering food to the idol at the particular hours of the day, the daily recitals of sacred Texts and performing of periodical ceremonies in a certain way at a certain periods of the year as religious practices and thus essential part of the religion.

However, in *Mohd. Hanif Quareshi v. State of Bihar*, the Supreme Court found that religious practice did not form part of religion and could be regulated under Article 25 (2) (a). In the instant case the question before the Court was whether the prohibition of Cow slaughter violated the religious freedom of Muslims. The court after going through the evidence declared that cow sacrifice was not essential part of Islam. The act of marrying a second wife in the presence of the first is no integral part of any religion and, therefore, Rule 27 of the U.P. Government Servant’s Conduct Rules, providing that a Government Servant cannot marry a second wife in the presence of first without prior consent of the Government was held not violative of Article 25.

Performances of Shradha an offering of pandas have been declared as an integral part of Hindu religion and religious practices. In *Badruddin v. Aisha Begum*, a provision for monogamy was not said violative of Article 25 even in case of Muslims who are allowed under their personal law to have four wives. Having more than one wife is not integral part of their religion. In *Rov. Satinitas v. State of M.P.*, the Supreme Court held that right to propagate one’s religion under Article 25(1) does not grant the right to convert another person.

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65 A.I.R. 1957 All. 300.
to one’s own religion but to transmit or spread one’s religion by an exposition of its tenants.

In S.P. Mittal v. Union of India, the petitioners challenged the validity of Aurobindo (Emergency Provisions) Act, 1980, on the ground that it was violative of their freedom of religion under Article 25 and 26. In this case Sri Aurobindo and his disciples formed the Aurobindo society to preach Aurobindo’s philosophy of cosmic salvation and propagate the theme of integral yoga. He and his disciples formed the Aurobindo Society which is registered under West Bengal Societies Registration Act, 1961. The Society preaches and propagates the ideals and teachings of Sri Aurobindo and the Mother through its numerous centres in India and abroad. After his death the Mother proposed a project of setting up an international cultural township, Aurovelli in Pondicherry. The society received huge funds for the said purpose from the Centre and State Governments and different organizations in India and abroad. After the death of the Mother, complaints were made to the Government about mismanagement of affairs of the Society. This prompted the Government to enact the Aurovilla (Emergency Provisions) Act, 1980 which provided for taking over the management of Aurovilla for a limited period. By a majority of 4 to 1 with Chinnappa Reddy, J., dissenting, the Supreme Court held that the Memorandum of Association of the Society and utterings of Sri Aurobindo and the Mother that the Society and Aurovilla were not religious institutions and other documents make it clear that neither the society nor the Aurovilla constitute a religious denomination and Sri Aurobindo’s teaching did not constitute a “religion”. Therefore, taking over of the Aurovilla Ashram was not violative of the right of the petitioners (Society) under Articles 25 and 26 of the Constitution.

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67 A.I.R. 1983 S.C. 1
According to the Court the teachings of Sri Aurobindo only represented his philosophy and not a religion.

In a very recent case (popularly known as National Anthem case) the Division Bench of the Supreme Court has held that no person can be compelled to join in the singing of National Anthem against his will, “if he has genuine conscientious religious objection”. Such compulsion, according to the court would be violative of the fundamental right guaranteed under Articles 19(1) (a) and 25 (1) of the Constitution. The facts of the case in brief were as follows: Some children from a school in Kottayam, Kerala were debarred from attending their classes because they refused to sing the National Anthem of the country. These children belonged to Jehovah’s witnesses who worshipped only Jehovah – the creator – and none other. It was against the tenets of their religious faith which does not permit them to join in any rituals except if it be in their prayers to Jehovah. The school authorities had made it compulsory for the children to participate in morning school assembly when National Anthem was sung. The children who are petitioner in this case stood mutely and refused to sing National Anthem even tough there was circular to that effect issued by the Directorate of Education. Consequently they were expelled from the school on July 26, 1985. The petitioners moved the Kerala High Court. The High Court rejected their plea on the ground that National Anthem affected no body’s religious susceptibilities and thus appealed to the Supreme Court. The Supreme Court held that there was no provision in law which obliged any one of sing the anthem nor it is disrespectful to the anthem if a person stood up and did not join in the singing. “Such

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69 It comprised of Chinnappa Reddy and M.M. Dutt, J.J.
conduct does not either prevent the singing of the National Anthem nor causes disturbance to an assembly engaged in such singing so as to constitute an offence under section 3 of Prevention of Insults to National Honour Act, 1971. The court pointed out that Jehovah’s witnesses have the same attitude towards “God save the Queen” in Britain and “The Star-Spangled …” in the U.S.A. Neither their patriotism nor their nationalism has been called into question on this score. This decision has been seen by some as encouragement to separatism in India.

(ii) Restriction on the Freedom of Religion

(a) Religious Liberty subject to Public Order, Morality and Health

The freedom of religion guaranteed under Article 25 is subject to public order, morality and health of the public. The practice of untouchability or traffic in human beings in the form of institution of Devadasis cannot be allowed in the name of religious freedom. In Ramji Lal Modi v. State of U.P., the Supreme Court declared that section 295A of the Indian Penal Code which makes deliberate and malicious acts intended to outrage religious feeling of any class of citizens of India punishable is not inconsistent with Articles 25 and 26 of the Constitution.

71 Jehvoah’s witnesses have come into clash with law in number of times but here reference of two flag salute cases decided by Supreme Court of U.S.A. is sufficient. In Minersville School District v. Gobitis (1940) the religious freedom and salute to American flag was involved. Justice Frankfurter who gave the majority judgment (Justice Stone dissenting) held the religious freedom must give way to political authority. In the second case, West Virginia State Board of Education v. Barnette, Justice Jackson who gave the decision of the Court held that there can not be compulsion in the matter. He said, “To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of compulsory routine is to make an unfettering estimate of the appeal of our institution to free mind.

In *Rev. Stainiclaus v. State of M.P.*,\(^73\) where the constitutionality of Madhya Pradesh Dharma Swantantra Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967 was challenged on the ground that (i) they violate the right to propagate one’s religion under Article 25(i) and (ii) the State legislature had no competence to enact such law as it did not fall within the purview of Entry I of List II and Entry I of List III of the Seventh Schedule but it fell within the residuary Entry 97 of List I. The Supreme Court rejected the contention of the appellant and held that these impugned Acts fall within Entry I of List II as they are meant to avoid disturbances to public order by prohibiting conversion of from one’s religion to another in a manner reprehensible to the conscience of the community.

In *Masud Alam v. Commissioner of Police*,\(^74\) the banning of electrical loudspeakers was held valid. The court observed that every religion has right to have propagandists. But when such propaganda is made through loudspeakers in a crowded and noisy locality to detriment of public morals, health, order, it is prohibited by Article 25. A loudspeaker may take one to Hell instead of Heaven by very volume of its sound.

(b) Regulation of Economic, Financial, Political and Secular Activities Associated with Religion

Article 25 (2) (a) empowered the State to regulate financial, political and secular activities associated with religion. The religious activities as such are not covered under the regulatory power of the State. It is not always easy to find out whether an activity will be covered under religious practice or under financial, political or secular activity associated with religion. Certain activities even if involve

\(^73\) A.I.R> 1977 S.C. 908.  
\(^74\) A.I.R. 1956 Cal. 9.
expenditure or employment of servants and priests or uses of marketable commodities cannot be said to be secular activities under Article 25(2) (a). On the other hand the management of property attached to a religious institution or endowment has been held to be a secular activity subject to the regulatory power of the State.

(c) **Social Reform and Throwing Open Temples**

Article 25 (2) (b) enacts two exceptions (a) Laws providing for social welfare and social reform and (b) the throwing open of all ‘Hindu religious institutions of public character’ to all classes and sections of Hindus.

The freedom of religion under Article 25 (1) is, therefore, subject to the power of the State to enact laws for social welfare and social reforms. Thus, the banning of bigamous marriage was upheld as a measure of social reform. Similarly, the provisions of the Hindu Marriage Act, 1955 are protected under Article 25(2) (b). On the same basis the prohibition of evil of sati or system of ‘devdasi’ was upheld.

Article 25(2) (b) seeks to the State to throw open ‘Hindu religious institutions of a public character to all classes and sections of the Hindus’. Public institutions would include temples dedicated to the public as a whole also those for the benefit of sections or dominations thereof. The Article confers a right on all classes and sections of Hindus to enter a public temple for the purposes of worship. However, this right is not unlimited in character. For example, in *Venkataramana*

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v. State of Mysore,\textsuperscript{80} the Supreme Court of India held that no Hindu can claim as part of rights protected by Article 25 (2) (b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally perform those services which acharyas or pujaris alone could perform. Thus, the right recognized by Article 25 (2) (b) necessarily becomes subject to some limitations or regulations which arise in the process of harmonizing this right with that protected by Article 26 (b).\textsuperscript{81} In the instant case the facts were that in order to remove the disability imposed on harijans from entering into temples dedicated to the Hindu public generally, The Madras Legislature enacted the Madras Temple Entry Authorization Act, 1947. The Government passes an order that the Act would be applicable to a temple belonging to Godwa Saraswati Brahimin Community. The trustees of the temple filed a suit which ultimately reached the Supreme Court. Their contention was that the temple being denominational one, they were entitled to the protection of Article 26 and it was a matter of religion as to who were entitled to take part in worship. They further contented that opening of the temple to communities other than Godwa Saraswath Brahmans was violative of Article 26 (b) of the Constitution and this void.

It was held by the Supreme Court that the ‘matters of religion’ in Article 26 (b) include even practices which are considered by the community as part of its religion.

From above, it is clear that the courts while interpreting clauses (a) and (b) of Article 25 (2) and specially sub-clause (b) “have sought

\textsuperscript{80} A.I.R. 1958 S.C. 255.
\textsuperscript{81} Id. at 266.
to strike a reasonable balance between religious liberty of an individual or a group and the social control.\textsuperscript{82}

B. Freedom to Manage Religious Affairs

Under Article 26\textsuperscript{83} every religious denomination or a section of it has the guaranteed right to establish and maintain institutions for religious and charitable purpose and to manage its own affairs in matters of religion. Rights are also given to such denominations or a section thereof to acquire and own movable and immovable properties and to administer such properties in accordance with law.

The field of operation of Articles 25 and 26 differ to some extent in the sense that whereas former confers particular rights on all persons, the latter is confined to religious denominations of sections thereof. Again whereas Article 25 is made subject to public order, morality and health as also to other provisions of Part III of the Constitution, Article 26 is made subject only to ‘public order’, ‘morality’ and ‘health’.\textsuperscript{84}

(i) Religious Denomination

Article 26 speaks of religious denominations. The word denomination has been defined by Webster’s Dictionary as a ‘collection of individuals, classed together under the same name; now, almost, always, especially a religious sect or body having a common

\textsuperscript{82} Surya P. Sharma, “Freedom in Matters of Religion” in Mohammed Imam (ed.) \textit{Minorities and the Law} 267 (1972).

\textsuperscript{83} Article 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;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.

faith and organization and designated by a distinctive name”. The words’ religious denominations’ in Article 26 must take their colour from the world ‘religion’ and therefore, it must satisfy three conditions: (i) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well being, that is, a common faith; (ii) a common organization; and (iii) designation by a distinctive name.\textsuperscript{85}

So identity of a religious denomination consists in the identity of its doctrine, creeds and tenents and these are intended to ensure the unity of the faith which its adherents profess and the identity of religious views are the bonds of the union which bind them together as one community.\textsuperscript{86}

Since there are several religions in India such as Islam, Christienity, Zoroastrainism and Hinduism. The members of these religions would be a denomination.\textsuperscript{87} The followers of Madhvacharya, the Swetambar sect of Jains, the followers of Zoroastrain religion, the Gowda Saraswath Brahmins, the Dawood Bohers constitute religious denominations. A math or a spiritual fraternity represented by it would, therefore, come within the protection of Article 26.\textsuperscript{88} Sri Kanyak Parameswari Ann Satram, founded and managed exclusively by members of a Vyasa community, worshipping Kula Devatha as a special cult is a religious denominational institution.\textsuperscript{89} Imilarly, Hanifees, Shias or Chistis sects in Mohammedans are separate denominations. The Roman Catholic Mission is a ‘religious denomination’.\textsuperscript{90} The question whether a community is a religious

\begin{footnotes}
\item[88] M.P. Jain, Indian Constitution Law 528 (3rd ed. 1978). \\
\item[89] Sri Kanya Kaparameswari Anna Satram Committee v. Commissioner, Hindu Religious and Charitable Endowments, A.I.R. 1979 A.P. 121. \\
\end{footnotes}
denomination is a question of fact, or in any event a mixed question of fact and law.\textsuperscript{91}

(ii) **Right to Establish and Maintain Religious and Charitable Institutions**

In *Azees Basha v. Union of India*,\textsuperscript{92} the Supreme Court has said that words ‘establish and maintain’ in clause (a) of Article 26 must be read conjunctively. The right to maintain an institution for religious purposes can be claimed by a religious denomination. Only when the same is established by it. In the instant case the Supreme Court held that as the Aligarh Muslim University has been established under a statute, the Muslims as such cannot claim the right to maintain it.

An educational institution, in a larger sense, can be regarded as charitable.\textsuperscript{93} Even in *Azeez Basha’s case*\textsuperscript{94} while interpreting Article 26(a) the Supreme Court has simply assumed that educational institutions would come within Article 26(a) as institutions for charitable purposes.

(iii) **Right to Manage its Own Affairs in Matters of Religion**

The right of a religious denomination to manage its own affairs under clause (b) of Article 26 means that when the domestic matters of a religious denomination are concerned with questions of religion, the legislation of the State cannot interfere unless the management by the denomination runs counter to public order, morality or health.\textsuperscript{95}

\textsuperscript{92} A.I.R. 1968 S.C. 662, para 30.
\textsuperscript{94} A.I.R. 1968 S.C. 662.
The term ‘matters or religion’ in Article 26(b) is synonymous with the term ‘religion’ in Article 25 (1). ‘Matters of religion’ embraces not merely matters of doctrines and beliefs pertaining to the religion but also the practice of it. An Act relating to administration of religious institution which confers unrestricted right to enter sacred parts of a temple for the purpose of exercising any power under it has been held to be violative of Article 26(a). Since offering of food as bhog, by religious institution is part of established ritual, a religious institution can show that a compulsory levy of food grain imposed under clause 8 of order under Rule 125 of Defence of India Rules, has interfered with religious practice of such religious institution guaranteed under Article 26(b). In Saifuddin Saheb v. State of Bombay, Excommunication on the basis of religious grounds has been held to be a part of management by the community of its own religion and a statute prohibiting excommunication on religious grounds is violative of Article 26(b) and is not protected by Article 25(2) as a matter of social reform. In the instant case, the petitioner, who was of Dawoodi Bohra community challenged the constitutionality of the Bombay Prevention of Ex-communication Act, 1949, on the ground that the provisions of the Act were negation of the rights guaranteed in Articles 25 and 26. This decision of the Supreme Court is subject to criticism because it prefers the denomination right to the individual freedom of conscience guaranteed by Article 25.

B.P. Sinha, C.J., who dissented said that right of excommunication was not a purely religious matter and that it had its

social implications in making ex-communicated person a sort of “untouchable” in his community which would be contrary to Article 17 of the Constitution by which untouchability has been abolished. Similarly, the power of the Roman Catholic Mission to expel a nun from sisterhood for her unbecoming conduct of a nun has been upheld.\textsuperscript{102}

As already discussed Article 25(2) (b) provides for throwing open of religious institution of a public character to all classes and sections of Hindus.\textsuperscript{103} The words “religious institution” include institutions of religious denominations and thus these can be thrown open to all classes and sections of Hindus. The question whether Article 25 (2) (b) should override 26(b) or vice versa was dealt with by the Supreme Court in \textit{Venkataramana Devaru v. State of Mysore}.\textsuperscript{104} The Court said that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Article 26(b) must yield to the overriding right declared by Article 25(2) (b) in favour of public to enter into temple for worship. But where the right claimed is exclusion of the public from certain religious service which are limited by the rules of the foundation to the members of the denominations then the question is not whether Article 25(2) (b) overrides that right so as to extinguish it, but whether it is possible so as to regulate the rights of the persons protected by Article 25(2) (b) as to give effect to both the rights. If the giving effect to denominational rights substantially reduce the right given by Article 25 (2) (b) then Article 25(2) (b) prevails over thing substantial of the right of worship is left to the public then the court would given effect to Article 26(b) and

\begin{footnotes}
\textsuperscript{104} Ibid.
\end{footnotes}
the right of denomination in matters which are strictly denominational shall remain unaffected.\textsuperscript{105}

(iv) Right to Own and Acquire Property

Article 26(c) has conferred on every religious denomination the right to own and acquire property both movable and immovable. This protection does not prevent nor is intended to prevent, the State from acquiring, by law, property belonging to a religious body.\textsuperscript{106} In Acharya Maharaj Shri Narendra Prasadji Anand Prasadji Acharya Maharaj Shri v. State of Gujrat,\textsuperscript{107} the Supreme Court said that I setting right the imbalance between competing interests with the Directive Principles distinction has to be made between those laws which directly infringe the freedom of religion and others, although indirectly affecting some secular activity of a religious body or institution. What is not to be interfered with is the core of the religion. Article 26(c) does not confer an absolute right or unqualified right to the extent that no agrarian reform can touch upon the lands owned by the religious denomination.\textsuperscript{108} The right under Article 26 cannot take away the right to compulsory acquire property in accordance with provisions of Article 31(2). When property is acquired by the State under Article 31(2) the acquisition cannot be assailed in any valid ground and right to own property “vanishes” as that right is transferred to the State.\textsuperscript{109}

(v) Right to Administer Property

Article 26(d) guarantees to the religious denomination or any section thereof, the right to administer he property attached to a religious institution in accordance with law. The State can regulate the

\textsuperscript{105} Id. at 269.
\textsuperscript{107} A.I.R. 1974 S.C. 2098.
\textsuperscript{108} Id. at 2104.
\textsuperscript{109} Id. at 2103.
administration and management of property belonging to a religious denomination. Although religious matters are entirely outside the pale of law but property has to be held and enjoyed according to law.\textsuperscript{110} All that is safeguarded by Article 26(d) is that so long as religious denomination administer its property in accordance with the law made by the State such right cannot be interfered with.\textsuperscript{111} A law which takes away the right of administration altogether from religious denomination and vests it is other secular authority has been held to be violative of the right guaranteed by Article 26(d).\textsuperscript{112} Thus, in Commissioner H.R.E. v. L.T. Swamiar,\textsuperscript{113} section 56 of the Madras Religious and Charitable Endowments Act, 1951 which empowered the Commissioner to deprive at his discretion the mahant of his right to administer the trust property even if there was no negligence or maladministration on his part was held to be violative of Article 26(d).\textsuperscript{114}

In K. Krishnankutty v. State of Kerala,\textsuperscript{115} the Kerala High Court has held that as the ordinance is a legislative exercise of the Governor under Article 213 of the Constitution and this law has provided for the Constitution of a Board to manage and supervise the temples and their properties, there is no case that ordinance has taken away the right of administration altogether from religious denominations and vested it is any other secular authority. There is thus no violation of Article 26(d).\textsuperscript{116} Though the State is empowered under Article 26(d) to regulate administration of religious property, it is noted that the religious denomination itself has been given the right to administer the property in accordance with law. Thus, though law can regulate the administration of religious property but it cannot take away

\textsuperscript{111} Raikanda Giri v. State of Bihar, A.I.R. 1954 Pat. 266.
\textsuperscript{113} A.I.R. 1954 S.C. 282.
\textsuperscript{114} Id. at 295.
\textsuperscript{115} A.I.R. 1985 Ker. 148 (FB).
\textsuperscript{116} Id. at 157.
the right of the denomination to administer such property and vest in any other body.\textsuperscript{117} Thus in Tilkayat Shri Gowindalji Maharaj v. State of Rajasthan,\textsuperscript{118} the validity of the Nathdwara Temple Act, 1959 had been challenged under Article 26(d). A Board had been constituted to administer the temple property. The members of the Board other than the collector were required not only to profess Hindu religion but were also to belong to Pushti-Margiya valla bhi Sampradaya. The Supreme Court said that the Constitution of the Board had been deliberately so prescribed by the legislature as to ensure that the denomination was adequately and fairly represented on the Board.\textsuperscript{119} Thus, the administration of religious property was in the hands of the denomination itself and law was held valid. Similarly, Muslim Wakfs Act which provided for constitution of the Wakfs Board of which every member was to be a Muslim was held valid for it did not deprive the such religious denomination from administering Wakf property.\textsuperscript{120} However, Article 26(c) and (d) are declaratory in character and does not create any right in any denomination. They simply safeguard the continue of the denominational right already existed. In Durgah Committee, Ajmer v. Syed Hussain Ali\textsuperscript{121} the respondent who was a Khadim and a Chisti Muslim in his representative suit claimed a denominational right to administer the property of Durgh of the Khwaja Sahib of Ajmer. However, the history of the Durgah Committee and the report of committee appointed by the Government of India showed that the management of the Durgah property was carried on by the mutawali. The power of appointment, dismissal and removal of the mutawali was with the government since the time of Emperor Shahajahan. The Supreme Court held that as the denominational right

\textsuperscript{117} Surya P. Sharma, \textit{op.cit. supra note} 82 at 272-273.
\textsuperscript{118} A.I.R. 1963 S.C. 1638.
\textsuperscript{119} Id. at 1662. See also Ram Chandra v. State of Orissa, A.I.R. 1959 Ori. 5.
\textsuperscript{121} A.I.R. 1961 S.C. 1402.
to manage the property of the Durgah had never been in the hands of the sect and, therefore, could not be claimed. The Court ruled that Article 26(c) and (d) do not create rights in any denomination or its section which it never had. They merely safeguard and guarantee the continuance of rights which such denomination or its section had. “If the right to administer properties never vested in the denomination or had been validity surrendered by it or has been otherwise effectively and irretrievably lost of it Article 26 cannot be successfully invoked.”

The Supreme Court has emphasized the above principle again in the State of Rajasthan v. Sajjanlal, where it ruled that as the properties and management of Jain temple had been taken over by the Ruler of Udaipur, Jains had lost their right of managing the temple. They could not now get it back by having courses to Article 26 (d).

c. Freedom as to Payment of Taxes for Promotion of any Particular Religion

The next provision for the protection of religious freedom of the minorities is Article 27 which prohibits the laying of a tax the proceeds of which are meant specifically for payment of expenses for promotion or maintenance of any particular religion or religious denomination. India being a secular State, where freedom of religion is guaranteed by the Constitution both to individual and to religious groups it is against the policy of the Constitution to pay money for promotion out of promotion or maintenance of any particular religion or religious denomination out of public funds. This Article prohibits levying

122 Id. at 1416. Also, Azeez Basha v. Union of India, A.I.R. 1968 S.C. 662. Here the Supreme Court held that the Muslim minority could not claim the right to administer property vested in the Aligarh Muslim University.
124 Article 27 reads: Freedom as to payment of taxes for promotion of any particular religion
   – No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.
of tax and not of fee. According to the Supreme Court, 125 “a tax is in the nature of a compulsory exaction of money by a public authority for public purpose.” It is imposed for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the tax-payer. Tax is a common burden and in turn tax-payer gets participation in common benefits of the State. Fees on the other hand are a payment primarily in public interest but for some special service rendered or some special work done for the benefit of those from whom payments are demanded. A provision in a State low levying what in effect is a tax, would be beyond the legislative competence of the State legislature. However, the levy would not violate Article 27 of the Constitution as the purpose is to see that religious trusts and institutions wherever they exist are properly administered and no question favouring any particular religion or religious denomination, would arise. 126

Similarly, the W.B. Wakf Act, 1934 as amended in 1973 which required Muslim Wakfs to contribute to a fund for promotion of education of Muslim students was held as not amounting to levy of tax for the promotion of a particular religion. 127 In K. Raghunath v. State of Kerala 128 where Government of Kerala agreed to meet the cost of restoring the Hindu and Muslim places of worships which had been destroyed as a result of communal riot to the pre-riot condition was held to be valid. In Suresh Chandra v. Union of India, 129 where the Government of India agreed to support a cultural programme on 2500th anniversary of attainment of salvation of the founder of the Jain religion, Mahavir, it was held not violative of Article 27.

D. Freedom as to Attendance at Religious Institution or Religious Worship in certain Educational Institutions

The last provision dealing with protection of religious freedom of minorities is Article 28.\(^{130}\) Clause (1) of the Article provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds. Thus, the institutions which are wholly maintained out of State funds are not amendable to this provision. The restriction laid down in clause (1) would not apply under clause (2) where an educational institution though administered by the State has been established under an endowment or trust. Article 28 (3) provides that in educational institution recognized or aided by the State, no student can be required to take part in religious instructions given in that institution unless he consents or if he is a minor, his guardian consents to it.

Article 28 makes a distinction among three types of educational institutions i.e., institution of completely public nature, where there is absolute prohibition on religious education; the institution where State acts as trustee, religious instructions are allowed: the institution aided by the State, the religious instructions are permitted on a voluntary basis. Article 28 (3) thus supplements Article 30(1).\(^{131}\)

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\(^{130}\) If reads: Freedom as to attendance at religious institution 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 religions instructions shall be imparted in each 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 to attend any religious worship which may be conducted in such institution or in any premises attached thereto unless such person or if such person is minor his guardian has given his consent thereto.

\(^{131}\) M.P. Jain, \textit{op.cit. Supra note} 101 at 535.
From the above discussion it is quite clear that Courts have interpreted Articles 25 and 26 as striking a careful balance between the freedom of the individual or the group in regard to religion and the need for State regulation or control, in the interest of the community. As regards Articles 27 and 28 it is quite clear that Article 28 along with Article 27 is intended to strengthen the secular foundation of the Constitution.

IV. Cultural and Educational Rights

The Constitution of India under Article 29 and 30 guarantees certain cultural and educational rights to cultural, religious and linguistic minorities. The marginal note to these Articles reads as ‘protection of interest of minorities’. It is, therefore, obvious that the said Articles have been enacted with a view to protect the cultural, religious and linguistic minorities. These provisions connote three things: (a) right to conserve; (b) right to freedom of education; and (c) right to state aid.

A. Minorities Right to Conserve Language Script or Culture

Article 29 (1) gives protection to every section of citizens having a distinct language script or culture by granting their right to conserve them. It reads:

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.\(^{133}\)

The right under Article 29(1), however, is subject to clause (2) of the Article which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid

\(^{132}\)Kamlesh Kumar Wadhwa, op.cit., supra note 2 at 98.

\(^{133}\)Art. 29(1) of the Constitution of India.
out of State funds on grounds only of religion, race, caste, language or any of them.\textsuperscript{134}

(i) **Scope of Article 29(1)**

The word 'conserve' in clause (1) has been interpreted very liberally by the judiciary. The Supreme Court in *Jagdev Singh Sidhanti v. Pratap Singh Daulta*,\textsuperscript{135} held that “the right to conserve the language of the citizens include right to agitate for the protection of the language including political agitation. In the instant case the appellant who was declared elected to the House of People was alleged to have used corrupt practices to promote communal enmity between Hindu and Sikh Communities and thus violated Section 123 (3) of the Representation of People Act, 1951. The allegation of corrupt practice was on the ground that (i) the appellant by taking he help of Hindi agitation, propagated that the respondent was an enemy of the Arya Samaj and the Hindi language and (ii) that appellant used a religious symbol a flag “On Dhwaj” in his meetings. While rejecting the allegation the Court said that S. 123 (3) of the Representation of People Act, 1951 which made a provision for an appeal by a candidate to vote, or refrain from voting, for a person on the ground of language a corrupt practice must be read subject to Article 29(1) for it cannot be construed so as to trespass upon the fundamental right in question. Unlike Article 19(1) Article 29(1) is not subject to any reasonable restrictions.\textsuperscript{136} The right to ‘conserve’ under Article 29(1) is absolute unqualified and positive.

In *D.A.V. College, Jullundur v. State of Punjab*,\textsuperscript{137} the Supreme Court unanimously held that Arta Smajists who speak Hindi and have

\textsuperscript{135} A.I.R. 1965 S.C. 183.
\textsuperscript{136} Id. at 188.
\textsuperscript{137} A.I.R. 1971 S.C. 1737.
Devanagri as their script are distinct from that of Sikhs who form the majority and have Gurmukhi as their script. The Arta Smajists claim to be religious minority having a distinct script of their own is justified and thus are entitled to invoke the right guaranteed under Article 29(1).¹³⁸

Promotion of the majority language does not mean stifling of the minority language or script. To do so will be trespass on the right guaranteed under Article 29(1).¹³⁹ According to D.K. Sen, the right to conserve includes following rights; (i) the right to profess, practice and preach its own religion, if it is religious minority; (ii) the right to follow its own social, moral and intellectual ways of life; (iii) the right to impart instruction in its tradition and culture; (iv) the right to perform any other lawful act or to adopt any lawful measure for the purpose of preserving its culture.”¹⁴⁰ So from above it is quite clear that scope of Article 29(1) which protects the right of every citizen to conserve language script and culture is of wide import. It assures the minorities that their language, script and culture will be fully guarded and they have the right to conserve the same.

(ii) Article 29(2)

Article 29(2)¹⁴¹ of the Constitution prohibits discrimination against any citizen on the grounds only of religion, race, caste, language, or any of them in the matter of admission into any educational institutions maintained or aided by the State. The right conferred by the above provision is an individual right given to the

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¹³⁸ Id. at 1744 para 18.
¹³⁹ Id. at 1737.
¹⁴¹ It reads:
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.
citizens as such and not as a member of any minority community unlike clause (1) which protects the rights of a section of citizens.

The expression only of religion, race, caste or language in Article 29(2) shows that the emphasis is on the word ‘only’ which means solely or exclusively. The significance of the word ‘only’ is that other qualifications being equal, the religion, race, caste, etc. of a citizen shall not be ground of preference or disability. The judiciary refused to give it restricted meaning to include only minorities for the purpose of non-discriminatory treatment under the said clause. To limit this right only to minorities would amount to holding that citizens of majority groups have no right to be admitted to institutions for the maintenance of which they contributed by way of taxes.142

(a) Distinction between Articles 29(2) and 15

Article 15 provides protection to all citizens against the State on grounds mentioned therein, whereas Article 29(2) extends against State or any body who denies the right conferred by it. Article 15 gives protection to all citizens against discrimination generally while Article 29(2) is a protection against denial of admission into educational institutions maintained or aided by the State. Article 15 (1) prohibits discrimination inter alia on the ground of ‘sex’ or ‘place of birth’ but these two grounds are omitted from Article 29 (2). Article 15(1) is broader in scope than Article 29 (2), because the forbidden grounds are more numerous under the former. Thus, the denial of admission in an educational institution on the ground of sex or place of birth will be violative of Article 15 (1) if not so under Article 29(2). Educational institutions intended exclusively for men and women could be

maintained by the State without violation of the Constitution.\textsuperscript{143} Similarly reservation of seats for residents of a particular area\textsuperscript{144} or discrimination on the ground of place of residence\textsuperscript{145} does not violate Article 29(2). In \textit{Joseph Thomas v. State of Kerala,}\textsuperscript{146} the Kerala High Court observed that where discrimination is made on a ground not covered by clause (2) of Article 29 or Article 15, it does not means that it would be valid. Such discrimination can be questioned under the general provision of Article 14 unless it is justified on the principle of reasonable classification under that Article.

In \textit{Shantabai v. University of Madras,}\textsuperscript{147} the Madras High Court held that Article 29(2) was a special provision relating to the admission in educational institutions and should be regarded as the controlling provision and not Article 15(1). This view has gained support by the Supreme Court in \textit{State of Bombay v. Bombay Education Society,}\textsuperscript{148} where Court observed that Article 15 protects all citizens against discrimination generally but Article 29(2) is a protection against a particular species of wrong namely denial of admission into educational institution. The denial of admission to an educational institution for not possessing requisite qualification is not violative of Article 29(2).\textsuperscript{149} Expulsion of a student from an institution for acts of indiscipline is not contrary to Article 29(2).\textsuperscript{150}

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\textsuperscript{146} A.I.R. 1964 Ker. 39.
\textsuperscript{147} A.I.R. 1965 Mad. 67.
\textsuperscript{149} Nageshwara Rao \textit{v. Principal, Medical College}, A.I.R. 1962 A.P. 212.
\textsuperscript{150} Ramesh \textit{v. Principal, B.B. College}, A.I.R> 1953 All. 90.
\end{flushleft}
(b) **Scope of Article 29(2)**

The question of application of Article 29(2) arose for the first time in *State of Madras v. Srimati Champakam Dorairajan*,\(^{151}\) where Constitutional validity of the communal G.O. of the State of Madras was examined by the Supreme Court in the context of Article 29(2).

The facts in brief were as follows. The State of Madras maintained four medical and four engineering colleges. It allotted seats in these colleges proportionately to several communities by an order which came to be known as Communal G.O. Under the order seats were allotted to non-Brahmin Hindus, Backward Hindus, Brahmins, Harijans, Anglo-Indians, Indian Christians and Muslims.

The said G.O. was challenged by a Brahmin candidate who could not get admission to an engineering college inspite of his having secured higher marks than many non-Brahmins who had been admitted in the college, as violative of Article 29(2). The Supreme Court held that Communal G.O. violated Article 29(2) because the classification in the G.O. was based on religion, race and caste. The only reason for denying admission to the petitioner was that he was a Brahmin. However, the Constitution was amended by the Constitution (First Amendment) Act, 1951 and clause (4) was inserted in Article 15 providing for special provisions for advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes. By this amendment the effect of *Champakam case* has not been mitigated. Thus clause 4 introduced has not in any way effected the correctness of the decision of the Supreme Court in *Champakam*. In that case the Court had declared classification based on communal lines as violative of Article 29(2). But under the First

\(^{151}\) A.I.R. 1951 S.C. 226. In fact the court took up two case jointly i.e., *The State of Madras v. Shrimati Champakam Dorairajan* and *the State of Madras v. C.R. Srinivasan*. 
(Amendment) Act, the reservations have been validated for scheduled castes, scheduled tribes and backward classes and so it does not touch reservation on the communal basis. This judgment had nipped in the bud the attempt made by the States to strengthen the caste system which was expressly discouraged by the Constitution.\footnote{152}{K. Subba Rao, \textit{Social Justice and Law} 78 (1974).}

\section*{(c) Right to Admission in Minority Educational Institutions}

The question of right of majority not to be discriminated in matter of admission in educational institutions established by minorities came for decision of the Supreme Court in \textit{State of Bombay v. Bombay Education Society}.\footnote{153}{A.I.R. 1954 S.C. 561.} In that case the Bombay Government issued a circular order directing the schools teaching English as medium of instruction to admit only Anglo-Indian and citizens of non-Asiatic descent in classes taught in English language. The Government argued that the object of the said order was to promote Hindi or any other Indian language and that order did not debar citizens from admission into English medium schools only on the ground of religion, race, caste, language. The court turned down this argument and declared it invalid under Article 29(2). The Court also did not agree to limit the non-discriminatory character of Article 29(2) to minorities. Regarding the scope of Article 29(2), the Supreme Court ruled that (i) the language of Article 29 (2) is wide and unqualified and covers all citizens; whether they belong to majority or minority groups; it \textit{ex facie} puts no limitation or qualification on the expression ‘citizens’; (ii) the protection given by the said Article extends against the State or any body who denies the right conferred by it; (iii) the said Article confers a special right on citizens for admission into the State maintained or State-aided educational institutions and (iv) the marginal heading of the Article referring to minorities does not control heading of the Article
referring to minorities does not control the plain meaning of the language in which Article 29 (2) has been couched.

Das D., in the judgment for the court highlighted the untenability of the argument to limit the scope of Article 29 (2). “To limit this right only to citizens belonging to minority groups will be to provide a double protection for 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 contribution by way of taxes. We see no reason for such discrimination.”154 The Supreme Court in this decision has gone a long way in strengthening the social integration by declaring Government order void. The social impact of the Government order was segregation of school on the basis of language and race. Again in re Kerala Education Bill,155 the Supreme Court while highlighting the real import of Article 29 (2) and Article 30 (1) observed that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting non-members into it, the minority institution does not shed its character and ceases to be a minority institution. The court rejected the contention that the protection in Articles 29 (2) was limited to members of the community for whose benefits the school was established.

(d) Article 15 (4) and 29 (2)

As discussed earlier the clause (4) of Article 15 was added by First Amendment Act, 1951 after the decision in Champakam case. This amendment has been made in order to bring Articles 15 and 29 in line with Articles 16 (4), 46 an 340. It enacts a provision to ensure advancement of the socially and educationally backward classes of

154 Id. at 566.
citizens or of the scheduled castes and scheduled tribes. Article 15 (4) provides that the State is not prevented from making any special provisions for the advancement of any socially and educationally backward classes of citizens of for the scheduled castes and scheduled tribes. So any reservation of seats in educational institutions not justified by Article 15 (4) cannot be valid. The kind of reservation which was made in Champakam would still not be valid under Article 15 (4) if reservation made therein was based on religion, caste, race and was not for the backward classes, scheduled castes and scheduled tribes only.156

The right guaranteed to citizens under Article 29 (2) has been abridged by the insertion of clause 4 of Article 15. If a provision is aimed for the advancement of backward classes or scheduled castes and scheduled tribes, it cannot be held to be infringement of the fundamental right of other citizens not belonging to such classes or castes under Article 29 (2).157

E. Educational Right of Minorities

As discussed above the minorities have been guaranteed the right to conserve their language script and cultural under Article 29 (1). One important method of conservation of language, script and culture is through educational institutions. It has been rightly said, “The school is to a language what church is to a religion – the condition of survival.”158 The minorities attach great value to the right to the freedom of education. This right is enshrined under Article 30 of the Constitution. This right has been declared by the Constitution to be a fundamental right whereas in the draft article this had been given the status of an ordinary right. The reason for the amendment was stated

156 K. Subba Rao, op. cit. Supra note 152.
158 J.A. Lapance, op. cit. supra note 42 at 53.
by Dr. B.R. Ambedkar in the Constitution Assembly. According to hi to had been converted into a fundamental right so that if a State made any law which is inconsistent with the provision it would be invalid. The minorities based on religion or language have four types of rights under Article 30 of the Constitution. These rights are: (i) the right to establish education institution; (ii) the right to administer educational institutions; (iii) the right to determine the nature of the educational institution of their choice; and (iv) the right not to be discriminated against in the matter of State-aid to such institutions.

Article 30(1) guarantees to all linguistic and religious minorities the ‘right to establish and right to administer’ educational institutions of their own choice. This right under Article 30(1) is absolute. However, the State may provide regulative measures provided (1) they are not annihilative of the right itself; and (2) are in the public interest and in the interest of the institution. The State is empowered to prescribe standards of teaching and scholastic efficiency expected from an educational institution and may also provide for the condition of employment of teachers, hygiene and other physical facilities for students.

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159 7 Constituent Assembly Debates 923.
160 Article 30 reads: 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.
(1A) In making any law providing for 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 such property is such as would not restrict or abrogate the right guaranteed under that clause. (Inserted by the Constitution (Forty-fourth Amendment) Act, 1978).
(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.
161 I.P. Massey, “Constitutional Protection to Educational Institutions of Minorities in India” in Mohammed Imam (Ed.) op.cit. Supra note 9 at 334.
162 Ibid.
(i) **Definition of Minority under Article 30**

Clause (1) of Article 30 declares that “All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice”. This declaration empowers the courts to ascertain if the group claiming benefit of Article 30 is entitled to be called ‘minority’.

The term ‘minority’ has not been defined in the Constitution. Article 30(1) speaks of linguistic or religious minorities. The work ‘or’ here means that a minority may be either linguistic or religious and it does not have to be both. A linguistic minority for the purpose of Article 30(1) is one which must have a separate spoken language.\(^\text{163}\) The question of definition came before the Supreme Court of India in 1958 in *In re. Kerala Education Bill 1957*.\(^\text{164}\) The State of Kerala basing its argument on *Ramani Kanta Bose v. Gauhati Municipality*,\(^\text{165}\) decided by Assam High Court, contended that the ‘minority’ under Article 29(1) and (30) 1 means minority in the particular region in which the educational institution in question is or is intended to be situated. The Supreme Court found this test as fallacious and raised the question, “Are we to take as our unit a district or a sub-division or a taluk or a town or its suburbs or a municipality or its wards.”\(^\text{166}\) The Court speaking through S.R. Das, C.J., observed that when a Bill is passed by a State Legislature, which extends to whole of the State the minority must be determined by reference to the entire population of the State.\(^\text{167}\) In the instant case the Court held that minority means a “community which is numerically less than 50 per cent of the total population. The Kerala opinion was followed by the Kerala High Court.


\(^{164}\) A.I.R. 1958 S.C. 956 at 977.

\(^{165}\) A.I.R. 1951 Assam 163.

\(^{166}\) Ibid.
in *A.M. Patroni v. E.C. Kesavan*,\(^{168}\) wherein on the basis of 1961 census report it declared Roman Catholics a minority for it constituted 22 per cent of the population of the State. In *D.A.C. College, Jullundur v. State of Punjab*,\(^{169}\) it was argued on behalf of the State that existence of minority should be decided by keeping population of whole of India in view. The Supreme Court by the unanimous judgment rejected this contention. The court speaking through Jaganmohan Raddi, J., said that minority is to be determined only in relation to a particular legislation in question. In case of State legislation the minority have to be determined in relation to the entire population of the State.\(^{170}\) In this case Hindus in Punjab were declared as religious minority and the Arya Samaj is who have a distinct script of their own namely Devnagri, were held to be entitled to invoke the right guaranteed under Article 29(2) because they are section of citizens having a distinct script and under Article 30(1) for being a religious minority.\(^{171}\) The said view of the Supreme Court has again been confirmed in *D.A.V. College, Bhatinda v. State of Punjab*,\(^{172}\) where referring to the decision in the earlier case, Jaganmohan Reddi, J., said:

> We had … held that what constitutes a linguistic or religious minority must be judged in relation to the State in as much impugned Act is a State Act and not in relation of whole of India.\(^{173}\)

In *Arya Samaj Education Trust, Delhi v. The Director Education Delhi Education*,\(^{174}\) the Delhi High Court has dealt with question of minorities. In the instant case the Arya Samaj the Jains and the Sikhs

\(^{168}\) A.I.R. 1965 Ker. 75.
\(^{170}\) Id. at 1742.
\(^{171}\) Id. at 1744 para 18.
\(^{172}\) A.I.R. 1971 S.C. 1731.
\(^{173}\) Id. at 1734.
\(^{174}\) A.I.R. 1976 Del. 207.
by three different writ petitions claimed to be ‘minorities based on religion’ within the meaning of Article 30(1) and thus entitled to the right to establish and administer educational institutions of their choice. On that basis they challenged certain provisions of the Delhi School Education Act, 1973 and the Rules framed thereunder as violative of the fundamental rights guaranteed by Article 30(1). The preliminary ground raised by the respondents was that the petitioners were not “minorities based on religion” and not, therefore entitled to protection of Article 30(1). The argument raised on behalf of the Arya Samaj Education Trust was that the word ‘religion’ used in Article 30(1) means not only the religions such as Hinduism, Islam or Christianity as a whole but also sect or parts of religion and that a religious denomination would also be a ‘religion’ within the meaning of Article 30(1). The division Bench of Delhi High Court negatived the argument. The court speaking through Deshpande, J., held that Arya Samaj is a religious denomination for the purpose of Article 30(1). Arya Samaj is a reformed sect of Hinduism which had revolutionized the Hindu way of thinking and that it is a part of Hinduism and not a separate religion in the Union Territory of Delhi.175 Article 30(1) is confined to well defined religions of India such as Hinduism, Islam, Sikhism, Christianity, Jainism etc. while giving reason for such a view the court observed that the right under Article 30(1) being derived from political concept of minority was confined only to politico-religious minorities namely those minorities base don religion which kept their identity separate from the majority, the Hindus.

The court further said that it various classes and sections of Hindus are regarded as minorities for the purpose of Article 30(1) then the Hindus will cease to be a majority at all but would consist of

175 Id. at 218.
numerous religious minorities.\textsuperscript{176} Thus, it follows from this case that there cannot be a ‘religion’ within a religion though a section of a religion may constitute a religious denomination as such cannot be called a minority based on religion. Muslims, Christians, Sikhs,\textsuperscript{177} Jains,\textsuperscript{178} Buddhists\textsuperscript{179} have been held to be entitled to the protection of Article 30(1) as minorities based on religion. In this case the opinion of the Delhi High Court appears to be ‘self-contradictory’.\textsuperscript{180} The court appears to have accepted the position that a ‘political minority’ such as the Sikhs could from a numerical majority in a State and similarly, the political majority, the Hindus, could form a religious minority. The court seems to have accepted Sikh being a majority and Hindus as a whole a minority in Punjab. It has thus contradicted its own observation that “minority rights under Article 30(1) were admitted to only those religious minorities which had claimed political right separate from those of the Hindus prior to the Constitution.”

So form the case law surveyed above the judicial opinion seems to favour application of two tests – statistical and geographical and the application of these tests together means that a religious or linguistic group claiming the right to establish and administer educational institutions of its own choice under Article 30(1) “must be numerically smaller as against the total population within the boundaries of a particular State.”\textsuperscript{181}

\textsuperscript{176} Id. at 215.
\textsuperscript{177} Id. at 207.
\textsuperscript{178} Ibid.
\textsuperscript{179} Ibid.
\textsuperscript{180} Dr. Anwarul Yaqin, \textit{Constitutional Protection of Minority Education Institutions in India} 63 (1982).
\textsuperscript{181} Id. at 49.
(ii) **Right to Establish Educational Institutions**

The right to establish and administer educational institutions of their choice has been conferred on religious and linguistic minorities so that the majority who can always have their rights by having proper legislation do not pass a legislation prohibiting minorities to establish and administer educational institutions of their choice.\(^{182}\)

Article 30(1) confers on a religious or linguistic minority the right to establish educational institutions of their own choice and it is through the educational of the children that the group culture can be maintained. In *re. Kerala Educational Bill*,\(^ {183}\) S.R. Das, C.J., has made it clear that it is by and through educational institutions established by the minority that it can effectively conserve its language, script or culture. As to the question whether the right of a minority to establish educational institution is limited to the purposes laid down in Article 29(1) or it extends to imparting secular education, the Supreme Court has held Article 30(1) to be of widest import and includes both the purpose of conservation of the language script or culture and imparting secular education and the same is indicated by the use of word ‘choice’ in the sub-clause. The right to establish means the right to bring into existence an institution by a minority community whether by a single individual or a group. The words ‘establish and administer’ are to be read conjunctively and not disjunctively which means that the minority community has a right to administer an educational institution provided it has been established by it. In *Azees Basha v. Union of India*,\(^ {184}\) where Aligarh Muslim University (Amendment) Act, 1965 had been challenged on the ground that it deprived the Muslim minority community of its right to manage the University established by it. The


court held the amendment Act as valid and not violative of Article 30(1) because notwithstanding the history of facts and events which led to the establishment of the University, it could not be said to have been established by the Muslim community. The word education institution has been interpreted very widely. University is covered under the term “education institution”. The Supreme Court has recognized the right of minority to establish a University under Article 30(1).185

The question whether Article 30(1) restricts the right of minorities to establish education institutions of their choice only to the case where such institutions are concerned, with language, script or culture of the minorities was dealt with thoroughly by the Supreme Court in Ahmedabad St. Xavier College v. State of Gujarat.186 In the leading majority judgment of Ray, C.J., and Palekar J., rejected the contention to restrict the scope of Article 30(1) to purposes mentioned in Article 29(1) for the reasons (i) Article 29 confers the fundamental right on any section of citizens which will include the majority section where as Article 30(1) confers the right on all the minorities; (ii) Article 29(1) is concerned with language, script or culture whereas Article 30(1) deals with minorities of the nation based on religion or language; (iii) Article 29(1) is concerned with the right to conserve language, script or culture whereas Article 30(1) deals with right to establish and administer educational institutions of the minorities; (iv) the conservation of language, script or culture under Article 29(1) may be by means wholly unconnected with educational institution and similarly establishment and administration of educational institutions by a minority under Article 30(1) may be unconnected with any motive to conserve language script or culture.187 They have very rightly said that if the scope of Article 30(1) is to establish and administer educational

185 Ibid.
187 Id. at 1394.
institutions to conserve language, script or culture of minorities it will render the word ‘religion’ used in the Article 30 redundant.\textsuperscript{188}

For getting benefit of Article 30(1), the community must show(s) that it is a religious\textsuperscript{189} or linguistic minority and (b) that the institution was established by it. The right under Article 30(1) extends to the institutions established prior to the Constitution as well as to those established after its commencement.\textsuperscript{190} However, right to establish such institution must of course be sought to be exercised after commencement of the constitution.\textsuperscript{191} The Madras High Court has held that educational institutions established by persons who were not a minority at the time of establishment but later became a minority are entitled to protection of Article 30(1).\textsuperscript{192}

It must be pointed out that the right to establish educational institutions guaranteed under Article 30(1) is not absolute. The Kerala High Court in Fr. Mathew Munthiri Chinthyil Vicar, St. Mary’s Church Anikkampoil v. State of Kerala,\textsuperscript{193} while dealing with the claim of minority institution to establish educational institutions without following the procedure laid down for applying for establishment of institution has pointed out that Article 30(1) does not contemplate to give absolute power to a minority institution to establish educational institutions. Gopalan Nambiyar, C.J. while delivering the judgment of the court said:

\begin{quote}
We think too, that such an extreme positing entitling the minority to ask and to be given, the educational institutions wherever it wants to
\end{quote}

\textsuperscript{188} Ibid.
\textsuperscript{191} Ibid.
\textsuperscript{192} N. Parameswara Kurup v. State of Tamil Nadu, A.I.R. 1986 Mad. 126 at 127.
\textsuperscript{193} A.I.R. 1978 Ker. 227.
establish, at any moment when the cry is raised is not the scope and content of Article 30.\textsuperscript{194}

Similarly, in Charlesh Robson v. State of Tamil Nadu,\textsuperscript{195} the Madras High Court declared that the right to establish educational institutions under Article 30 does not include right to admit girl students in boy’s school even if there is a separate girl’s school in the vicinity. Thus a notification of the State Government which directs that in areas where there are separate girls schools, girls should not under any circumstances be admitted in boy’s school except with the specific and prior approval of the inspecting officials and that for valid reasons was held that violative of Article 30(1). However, a contrary view was taken by the Supreme Court in Rt. Rev. Magr. Mark Netto v. Government of Kerala.\textsuperscript{196} The appellant in this case was manager of a Roman Catholic Mission School, Trivandrum (for boys). He applied to the Educational Authorities in Kerala for permission to admit girl students in their High School although there was already in existence a facility for the education of girls in the locality. The Education Authorities refused permission under the Kerala Education Rules, 1959 on the ground that (i) the said school was not established as mixed school and it was purely a boys school and (ii) there was also facility for education of girls in the Muslim Girls High School situated within radius of one mile. The appellant challenged Rule 12 (iii) of Chapter VI of Kerala Education Rules, 1959 as violative of Article 30(1) of the Constitution. The Supreme Court after analyzing earlier cases on Article 30(1) stated that the main ground for High Court’s conclusion was that there was a girl’s school in the vicinity, it was desirable that girls school not be admitted into boy’s school The Supreme Court pointed out that the rule itself permitted girls to be admitted into Boy’s

\textsuperscript{194} Id. at 230 para 3.
\textsuperscript{195} A.I.R. 1978 Mad. 292.
\textsuperscript{196} A.I.R. 1979 S.C. 83.
school if there was no girl school in the vicinity provided arrangements for necessary conveniences were made. The school had put up a separate building of admission of girls. The Supreme Court held that if the rule was interpreted widely to include all schools, it would be violating the right of the Christians community to have schools of their own choice for teaching girls belonging to their own community. The court thus interpreted the rule narrowly and declared that it was not necessary to strike down the rule but merely to say that it was not applicable to minority communities.

According to H.M. Seervi, the judgment of the Supreme Court is “clearly right.” According to him, the right to establish an educational institution must include the right to decide whether it should be co-educational, subject to provisions being made for necessary conveniences for girls.”

In the recent case of Andhra Pradesh Christian Medical Educational Society, the Supreme Court had ruled that the right guaranteed to minorities under Article 30(1) cannot be used as “smokescreen” for launching financial adventures. The facts of the case in brief are that the Andhra Pradesh Christian Medical Educational Society opened a Medical College in Medak district. The College had no teaching hospital, necessary equipment, staff or funds. The only condition for affiliation it fulfilled was that if had appointed one Dr. K. Sanjeeva Rao as the Principal. The College admitted students over the last two years claiming that it had the recognition of Osmania University. This was false. When the University published through the media that college had no recognition the college countered it through its own advertisements. When the permission to staff the medical college was ultimately denied, the society moved the High Court

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198 The Indian Express (Delhi ed.) p. 7, Col. 2, 3 dated 25th April, 1986.
claiming minority rights. The writ petition was dismissed. Then they moved the Supreme Court.

The argument of the society was that it had a right to start educational institution for minorities. According to the Supreme Court the Government and the University had a right to go behind the claim of minority rights and to investigate whether the claim was well founded. Regarding object of Article 30(1) the Court said:\(^{199}\)

The object of Article 30(1) is not to allow bogies to be raised by pretenders but to give the minorities a sense of security and a feeling of confidence. The institutions must be institutions of the minorities in truth and reality and not mere masked phantoms.

(iii) **Right to Administer Educational Institution**

The right to ‘administer’ educational institution under Article 30(1) means the right to ‘manage’ the institution which employs the right to ‘sufficient freedom; to the founders of the institution to manage and mould the institution according to their vision and purpose. It is an essential element of freedom of education guaranteed to the minorities. The right to ‘administer’ cannot be separated from the right to ‘establish’ because if either of two is taken away the remaining would become meaningless.\(^{200}\) The right to administer may be said to consist of the following rights:\(^{201}\)

\[\text{(a) to choose its managing or governing body;\(^{202}\)}\]

\[\text{(b) to choose its teachers;\(^{203}\)}\]

\[^{199}\text{Ibid.}\]


\[^{203}\text{Id. at 1398 (para 30).}\]
(c) not to be compelled to refuse admission to students;\textsuperscript{204}

(d) to use the properties and assets for the benefits of the institution;\textsuperscript{205}

(e) to select its own medium of instruction;

hence a legislation which would penalize by disaffiliation from the University any institution which uses a language as the medium of instruction other than the one prescribed by it, offends against Article 30(1).\textsuperscript{206}

(iv) State’s power to Regulate Minority Educational Institutions

   Minorities have full freedom in administration of educational institutions under Article 30(1). This Article is not subject to any limitation or exception unlike fundamental rights under Article 19. Article 30(1) is not subject to ‘reasonable restriction’ to be imposed by the State in the interest of general public. However, this right is subject to the police power of the State which is an inherent attribute of sovereignty of the State.\textsuperscript{207} In order to regulate educational institutions of minorities under police power, the State, in addition to satisfy the usual test of public interest, must conform to two more tests: (i) that the regulation must be reasonable; and (ii) that the regulation is conducive to make the institution as effective vehicle of education for minority community or other persons who resort to it.\textsuperscript{208}

\textsuperscript{204} Id. at 1389.
\textsuperscript{205} Id. at 1422 (para 91).
\textsuperscript{207} I.P. Massey, \textit{op.cit. supra note} 196 at 340.
\textsuperscript{208} \textit{In re, Kerala Educational Bill}, A.I.R. 1958 S.C. 956.
In Sidharajbhai v. State of Gujrat, the Supreme Court applied the above test and struck down the State Government order which directed an institution run by a minority community to reserve 80 per cent of seats for its nominees although it satisfied the test of public interest, it did not satisfy the other test i.e. the regulation must be of educational character in the interest of minority community. The court said:

If every order which while maintaining the formal character of minority institution, destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an education institution, the right guaranteed by Article 30(1) will be put a ‘testing illusion’ a promises of unreality.

The right of the State to regulate education institutions of minorities can also be justified on the ground that Article 30(1) which empowers to ‘administer’ does not give a power to mismanage the institution. In re. Kerala Education Bill Das, C.J., observed:

The right to administer cannot include the right to maledminister ... It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the state to prescribe reasonable regulations to ensure the excellence of the institution.

The right to choose a Head Master is the most important incident of the right to administer a school and imposition of any

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209 A.I.R. 1963 S.C. 540. In this case the Government of Gujrat had issued an order requiring the Marry Brown Training College at Borsad; District Kaira (an institution run by United Church of Northern India) to reserve eighty per cent of seats for government nominees.

210 Ibid.

211 Supra note 208.

212 Ibid.

213 Ibid.
trammel on the right except to the extent of prescribing requisite qualification or experience would be nothing sort of violation of the guarantee available to minority under Article 30(1).

The extent of the State’s regulatory power is a complex question. The courts have to determine from case to case whether a particular regulation violated the fundamental right under Article 30(1). The cases on the point are discussed below:

(a) **State’s Power of Prescribe Medium of Instruction and Admission Pattern in Minority Institutions**

The question of the extent of State’s power to prescribe medium of instruction and to restrict the right to admission to the minority institutions came for consideration of the Supreme Court for the first time in *State of Bombay v. Bombay Educational Society*. The Court speaking through S.R. Das, J., pointed out that “where … a minority … has fundamental right to establish and administer educational institutions of their choice … there must be implicit in such fundamental right to impart instruction in their own institutions to the children of their own community in their own language.” The Court in this case reconciled between the State’s regulatory power and minority right to determine the medium of instruction and held that “such being the fundamental right the police power of the State to determine the medium of instruction must yield to the fundamental right to the extent it is necessary to give effect to it and cannot be permitted to run counter to it.” Similar issues came up before the Gujrat High Court in

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214 Aldo Maria Patroni v. E.C.Kesavan, A.I.R> 1965 Ker. 75.
215 (1955) 1 S.C.R. 568. In this case the State of Bombay had issued a circular according to which no school where English is used as medium of instruction shall admit any student whose another tongue is not English. This order was challenged as violative of Article 30(1).
216 Id. at 586.
Gujrat University v. Shri Krishna.\textsuperscript{217} The facts in brief were as follows: In 1961 the Gujrat University acting under Statutes 207, 208, 209 purposed to have been enacted under the Section 4 (2&0 of the Gujrat University Act sought to impose Gujrati or Hindi as the exclusive medium of instruction for institutions affiliated to it. The validity of these statutes was challenged. The Gujrat High Court expressed the view that the right to determine the medium of instruction was a necessary part of the rights secured to minorities under Article 29(1) and 30(1). The right to conserve the language and right to administration and establishment of education institution on the choice of the minority cannot be effectively exercised and enjoyed unless a further choice is left to the minority to decide for itself what medium it will adopt for instruction and examination. The court, therefore, held that imposition of a language as a medium of instruction on minority institution would not only mean a denial to at least that minority whose mother tongue is English (Anglo-Indian) the right to establish institutions of their choice but would also therefore with the rights of the minorities in general under Article 30(1). On appeal the Supreme Court did not express any opinion as to violation of Article 30(1) and dismissed the appeal on some other ground not relevant for our present discussion. However, the court disallowed the right to prescribe the sole medium of instruction and examination.\textsuperscript{218} The law on the point was made more clear in the \textit{D.A.V. College, Bhatinda v. State of Punjab},\textsuperscript{219} where a circular issued by the Punjabi University in 1970 under the Punjabi University Act, 1961 was challenged as unconstitutional by the petitioner – colleges managed and administered by Arya Samaj is a linguistic minority in Punjab. The circular made Punjabi and exclusive medium of instruction as well as for examination and the script was to

\textsuperscript{217} A.I.R> 1962 Gujrat 88.
\textsuperscript{218} A.I.R. 1963 S.C. 703.
\textsuperscript{219} A.I.R. 1971 S.C. 1731.
be Gurmukhi exclusively. The Supreme Court held that the directive for exclusive use of Punjabi language and the Gurmukhi script as the medium of instruction and for examination affected the petitioners – colleges maintained by a religious minority and directly infringed their right to administer their institutions under Articles 30(1) of the Constitution. The court observed that the right of the minorities to establish and administer to have a choice of medium of instruction also which would be the result of reading of Article 30(1) with Article 29(1).

From the two Arya Samaj’s cases decided by the Supreme Court i.e. D.A.V. College, Bhatinda v. State of Punjab, and D.A.C. College, Jullunder v. State of Punjab the following propositions emerge:

(i) The minority right to impart instruction to children of such community in their own language is implicit in the fundamental rights under Article 29 and 30;

(ii) In order to harmonise State power to prescribe medium of instruction with minority right to follow their own language, the Supreme Court has suggested two alternatives – either to allow instruction in their own language or script or to allow affiliation with some other universities in the other States where instruction is given in such medium or script. The Court emphatically ruled that "no inconvenience or difficulties administrative or financial justify the infringement of these guaranteed rights", and

(iii) The University Act providing for compulsory affiliation must of necessity cater to their needs and allow them to administer their institutions in their own way and impart instructions in the medium and write examination in their own script.

The question of State’s power to regulate admission in minority education institution was considered by the Supreme Court in Rav. Sidharajbhai v. State of Gujrat. In the instant case the Gujrat Government issued an order directing 80 per cent of seats to be reserved in the Training Colleges for the Government nominees and threatened withdrawal of aid and recognition in case of disobedience. The said order was challenged by a minority Christian institution, The Brown Training College, Board as violative of Article 30(1) is so far as it interfered with the right of minorities to administer educational institutions. The Government had issued the order because of the necessity of having a large number of trained teachers in District School Boards and authorized municipalities. The court struck down the impugned order as violative of Article 30(1). The court observed that “the 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.” Thus in the above case the court gave absolutist interpretation to Article 30(1). The above decision has been followed in Director of School Education, Government of Tamil Nadu v. G. Arogiasamy, by the Madras High Court where it held that the right of minority under Article 30(1) included the right to admit students of its choices, Government regulation affecting it must be reasonable and in the interest of the institution and not in the interest of outsiders.

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224 Ibid.
225 A.I.R. 1971 Mad. 440. In this case the Government of Tamil Nadu issued an order to 1960 under which it was laid down, that a list of candidates selected by the Managements should be got approved by the District Education Officer or the Inspectress of Girls schools as the case may be before the selected candidates are actually admitted into the training schools. The respondent represented the society of Brothers of Sacred heart of Jeesus, Palyamcottal which professed Roman Catholic faith and was funning the Chroithuraja Training School, aggrieved by the order filed the appeal.
226 Id. at 22.
(b) States Power to Regulate Appointment and Conditions of Service of Teaching Staff in Minority Educational Institutions

The extent of State’s power to regulate appointment and conditions of services of teaching staff in minority educational institution came up before the High Court of Kerala in Aldo Maria Patroni v. E.C. Kesavan.227 The court applied the width of minority right under Article 30 recognised by the Supreme Court in re. Kerala Education Bill 1957228 and Sidharajbhai v. State of Gujrat.229

In that case a junior member of the staff of a Roman Catholic High School was appointed as the headmaster of the School in preference to the teacher who was senior to him in services in the school in violation of rule 44 of Kerala Education Rule which laid down adherence to seniority rule. The Director of Public instruction directed that the senior teacher to be appointed which the petitioners challenged as violative of Article 30(1) of the Constitution. The court while recognizing the fact that the post of the headmaster is of pivotal importance in the life of a school around whom wheels the tone and temper of the institution and on him depends the continuity of its traditions, the maintenance of discipline and efficiency of the teaching230 declared the impugned order as violative of Article 30(1). The High Court speaking through Madhavan Nair, J., said:231

The right to choose the headmaster is perhaps the most important fact of the right to administer a school; and we must hold that the imposition of any trammel thereon except to the extent of prescribing the requisite qualifications and

227 A.I.R. 1965 Ker. 75.
228 A.I.R. 1958 S.C. 556.
230 A.I.R. 1965 Kerala 75 at 77.
231 Ibid.
experience – cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution. To hold otherwise will be to make the right “a teaching illusion”.

In *Thomas v. Deputy Inspector of School*, the order of the State Government which directed a particular minority school not to appoint secondary grade teachers in higher grade was challenged as violative of Article 30(1) of the Constitution.

The Madras High Court held the impugned order as inconsistent with the minority right under Article 30(1) which was held to give power to minorities to appoint more qualified teachers in the interest of higher standard of teaching irrespective of the fact that the impugned order insisted upon absorbing higher grade teacher’s in higher grades so as to mitigate unemployment problem among higher grade teachers.

In *St. Xavier College v. State of Gujrat* the Supreme Court examined the question of regulation for appointment and condition of services of teaching staff in minority institutions in detail. In this case the Society of Jesus, the petitioners, were running the Sty. Xavier’s College at Ahmedabad with the object of providing higher education to Christian students. However, students of all classes and creeds were admitted to the college. The college was an affiliated college under the Gujrat University Act, 1949. The college challenged sections 33A, 40, 41, 51A and 52A of the Gujrat University (Amendment) Act, 1972 as violation of Article 30. Section 33A dealt with the Constitution of governing body and selection committee, section 40 and 41 were regarding conversions of affiliated colleges into constituent colleges and Section 51A and 52A concerning dismissal, removal and

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232 Ibid.
233 Ibid.
termination of services of the staff of the college and reference of
dispute to arbitration.

The Supreme Court speaking through Ray, C.J., said:

It is, therefore manifest that the appointment of
teachers is an important part in educational
institutions. The qualifications and character of
teachers and really important. The minority
institutions have the right to administer
institutions. This right implies the obligation and
duty of the minority institutions to render the very
best to the students. In the right of
administration, checks and balance in the shape
of regulatory measures are required to ensure
the appointment of good teachers and their
condition of service.\textsuperscript{235}

In the same case Khanna, J., in his concurring judgment held
the regulation for ensuring a regular payments of salaries before a
particular date of the month permissible. Regarding disciplinary control
over the teachers of the minority educational institutions be said:\textsuperscript{236}

Although disciplinary control over the teachers of
minority educational institution would be with the
governing council, regulations, in my opinion can
be made for ensuring proper conditions of
service of teachers and for securing a fair
procedure in matter of disciplinary action against
teachers. Such provisions which are calculated
to safeguard the interest of teachers would
result to security of tenure and thus inevitably
attract competent persons for the post of
teachers. Regulations made for this purpose
should be considered to be in the interest of
minority educational institutions and as such
they would not be violative of Article 30(1).

From the above the following propositions emerge:\textsuperscript{237}

\textsuperscript{235} Id. at 1398.
\textsuperscript{236} Id. at 1427.
\textsuperscript{237} Anirudh Prasad, \textit{op. cit. supra note} 34 at 150.
1. The minority institutions have full freedom to choose personnel for their staff;

2. The State has right to prescribe qualifications an experiences for certain posts;

3. The State may also regulate service conditions and fair procedure etc.

(c) Minorities right to prescribe Fee Tables and State’s Obligation to Enforce Free Education

The question whether Minority Educational Institution has the right to prescribe fees for the students admitted in such an Institution or in exercise of its regulatory power the State can prohibit charging of fee in primary and secondary schools run by the minorities in furtherance of the Directive Principles of State Policy laid down under Article 45of the Constitution which requires it to endeavour to provide free and compulsory education for all children until they complete the age of 14, came before the Supreme Court in the re. Kerala Education Bill case. 238

In the instant case Clause 3 (5) read with clause 20 of the Kerala Education Bill prohibiting charging of tuition fee in the primary classes was also challenged as violative of Article 30(1). The court tried to reconcile the claims of both the minorities and the State. It held that the duty cast upon the State under Article 45 to provide free education can not be so discharged as to prohibit minority school from charging fee and thus paying the way for their closure in view of Article 30(1). There is nothing to prevent the State from discharging that solemn obligation through Government and aided schools. The court said that “if the Bill becomes law all these schools will have to forego

this fruitful source of income. There is, however, no provision for counter balancing the loss of fees which will be brought about by clause 20 when it comes into force.\textsuperscript{239} However, it can safely be said that the State is entitled to prohibit minorities schools from charging fees provided it undertakes to compensate the loss suffered by minority educational institutions.

(d) Right of Minority Educational Institution to Receive Recognition or Affiliation and Regulatory Powers of State

By seeking recognition a minority institution expresses its choice to participate in the system of general education and also its intention to adopt for itself the courses of instruction prescribed for other institutions. Recognition is a facility which the State grants to an educational institution for enabling the students of such institution to sit for an examination conducted by the State in the subjects prescribed and to obtain certificate or degrees and thus become eligible for higher studies or public services.\textsuperscript{240} Similarly, affiliation to a University by a minority educational institution is sought for the purpose of enabling the students of the institution to appear for an examination conducted by the University and obtain degrees conferred by it.\textsuperscript{241}

It is very clear that minorities have the right to establish educational institutions of their choice which includes the right to establish real institutions which effectively serve the needs of their communities. Without recognition and affiliation a seniority educational institution cannot really serve its purpose. So recognition and affiliation create an interest in minorities and these also create the interest in the recognition or affiliating authorities and the interest is to see that the institution seeking recognition or affiliation fulfills the conditions

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{239} Id. at 1069.
\item \textsuperscript{240} Dr. Anwarul Yaqin, \textit{op. cit.}, supra note 180 at 167.
\item \textsuperscript{241} Ibid.
\end{itemize}
\end{footnotesize}
prescribed for the purpose. This has proved to be a complex problem and often brought before the courts.

In re. Kerala Education Bill, the Supreme Court, speaking through Das, C.J., very clearly pointed out that there is no fundamental right to recognition by the State. He said:

There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to educational institutions except upon terms tantamount to surrender of their constitutional right of administration of educational institutions of their choice is in truth and in effect to deprive them of their right under Article 30(1).

From the above it follows that State is empowered to impose reasonable regulations for recognition of a minority educational institution.

In St. Xavier College v. State of Gujrat, the nine judges Bench of the Supreme Court reviewed the whole case law on the scope of Article 30(1) including the question of recognition and affiliation. Here the Court held that although there is no fundamental right to affiliation but recognition or affiliation are necessary for meaningful exercise of the right to establish and administer educational institutions conferred on the minority institutions under Article 30(1). Ray, C.J., speaking on behalf of himself and Palekar J., said:

The consistent view of this court has been that there is no fundamental right of minority institution to affiliation … Any law which provides for affiliation on terms which will involve abridgement of the right of linguistic and religious minorities to administer and establish

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243 Id. at 985.
educational institutions of their choice will offend Article 30(1). The educational institutions set up by minorities will be robbed of their utility if boys and girls cannot be trained in such institutions for university degrees. Minorities will virtually lose their right to equip their children for ordinary careers if affiliation be on term which would make them surrender and loose their right to establish and administer educational institution of their choice under Article 20.245

In the instant case Ray, C.J., (as he then was) explained the earlier case of State of Kerala v. Very Rev. Mother Provincial246 decided by the Supreme Court and said:

> When a minority institution applies for affiliation it agrees to follow the uniform courses of study. Affiliation is regulating the educational character and content of minority institutions. These regulations are not only reasonable in the interest of general secular education but also conducive to the improvement in the stature and strength of the minority institution …. Affiliation mainly pertains to the academic and educational character of the institution. Therefore, measures which will regulate the courses of study the qualification and appointment of teachers, the health and hygiene of students, facilities of libraries and laboratories are all matters germane to affiliation of minority institution. These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational courses and do not violative any fundamental right of the minority institutions under Article 30.247

Thus from above it follows that to a limited extent affiliation of minority institution to university or colleges concerned was held to be a regulatory measure and if these regulatory measures are for uniformity efficiency and excellence in education courses then it is not violative of

245 Id. at 1395.
Article 30. The court said that the minority institution have the right to administer institutions and this right implies the obligation and duty of minority institutions to give the very best to the students. “In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration.”

In the instant case four out of nine judges rejected any idea of recognition and affiliation being mere a privilege. Jaganmohan Reddy, J., speaking on behalf of himself and Alagirswami, J., observed:

The right under Article 30 cannot be exercised in vacuo. Nor would it be right to refer to affiliation or recognition as privileges granted by the State. In a democratic system of Government with emphasis on education and enlightenment of its citizens, there must be elements which give protection to them. The meaningful exercise of the right under Article 30(1) would and must necessarily involve recognition of secular education imparted by the minority institutions without which the right will be a mere husk. The court has so far consistently struck down all attempts to make affiliation or recognition on terms tantamount to surrender of its rights under Article 30(1) as abridging or taking away those rights.

Similarly, Mathew, J., speaking on behalf of himself and Chandrachud, J., referred to a decision of the United States Supreme Court in *Frost & Frost Trucking Co. v. Railroad Comm.* Where it had denied any claim on the part of the State to compel the surrender of a constitutional right as a condition of its favour, said:

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248 Id. at 1398.
249 Id. at 1406-1407.
250 (1925) 271 U.S. 583.
This decision clearly declares that though the State may have privileges within its control which it may withhold, it cannot use a grant of those privileges to secure a valid consent to act, which it imposed upon the grantee in invitum would be beyond its constitutional power.\textsuperscript{251}

At the same time the learned Judge said:

The heart of the matter is that no educational institution established by a religious and linguistic minority can claim total immunity for regulations by legislature or the university if it wants affiliation or recognition.\textsuperscript{252} According to Khanna, J., if an educational institution requests for affiliation or recognition then it is implicit in the request that the said institution would abide by the regulations made by the authority granting recognition or affiliation.\textsuperscript{253} The learned judge further said:

Regulations made by the authority concerned should not impugne upon that right. Balance has, therefore, to be kept between two objectives, that of ensuring the standard of excellence of the institution and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations which embrace and reconcile the two objective can be considered to be reasonable.\textsuperscript{254}

Beg, J., Held right to affiliation as a statutory right and not a fundamental right.\textsuperscript{255}

Dwivedi, J., refused to read Article 30(1) as implying a right to recognition or affiliation. Thus he dissented from the majority view. He said:

\begin{itemize}
\item [\textsuperscript{251}] Id. at 1439.
\item [\textsuperscript{252}] Id. at 1443.
\item [\textsuperscript{253}] Id. at 1443.
\item [\textsuperscript{254}] Ibid.
\item [\textsuperscript{255}] Id. at 1449.
\end{itemize}
Evidently, there is no express grant of the right of affiliation in Article 30(1). In my opinion it is also not necessarily implied in Article 30(1).\footnote{256}

Thus in \textit{St. Xavier College} case there is no single judgment dealing with the issue. However, the spirit of all separate judgments discussed above is that State has a right to impose reasonable restrictions for granting affiliation or recognition but that should not be tantamount to surrender of minority right to administer institutions of their choice.\footnote{257}

From Das, C.J.’s judgment in \textit{In re Kerala Education Bill}\footnote{258} and \textit{St. Xavier College} case\footnote{259} it can be concluded that no condition can be imposed for grant or refusal of recognition or affiliation which will compel minorities to surrender of their right to establish and administer educational institutions of their own choice and that recognition or affiliation is not a fundamental right, recognition affiliation cannot be given on conditions which will force minorities to give up totally or partially their right under Article 30(1).

The Supreme Court has held in \textit{Managing Board of the Mill Talima Mission Bihar v. State of Bihar},\footnote{260} that arbitrary and unreasonable refusal of grant, or recognition or university affiliation to a minority institution would be violative of Article 30(1).

\textbf{(a) Right to Minority Educational Institution to Receive State aid and Regulatory Power of State}

An educational institution is unlikely to survive today without Government grants. The institution which do not seek aid are very few
in number. The Constitution secures the right to minority educational institutions with respect to financial aid from the State.

Clause (2) of Article 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.

The expression 'aid' used in Articles 29(2) and 30(2) includes grants as contemplated under Article 337. The institutions which seek aid from the Government may be divided into two categories: (i) Those which are by the Constitution itself expressly made eligible for grants; and (ii) Those which are not so eligible for grant under any express provision of the constitution but nevertheless seek it.

The former possesses constitutional right under Article 337. This Article entitled Anglo-Indian educational institutions to continue to receive the same special financial grants to which they were entitled before 1948 for a period of ten years from the commencement of the Constitution. The second proviso to the Article imposes upon the educational institutions run by the Anglo-Indian community as a condition of such special grant that atleast 40 per cent of annual admission therein must be made available to members of other

261 Article 337 reads:
Special provision with respect to educational grants for the benefit of Anglo-Indian Community:
During the first three financial years after the commencement of this Constitution, the same grants if any shall be made by the Union and by each State for the benefit of the Anglo-Indian community in respect of education as were made in financial year ending on the thirty-first day of March, 1948.
During every succeeding period of three years the grants may be less by ten per cent than those for the immediately preceding period of three years;
Provided that at the end of ten years from the commencement of this constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community, shall cease:
Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent of the annual admission therein are made available to members of communities other than the Anglo-Indian community.
communities. Under Article 337 State was not entitled to lay down any other condition for giving grant to the Anglo-Indian educational institutions. It has been held in State of Bombay v. Bombay Educational Society,\(^{262}\) that the order of the Government which prohibited schools from admitting children of other communities would be violative of constitutional obligation laid down under Article 337.

The educational institution falling under second category have no express right to claim grant from the State.

Article 337 again came for consideration before the Supreme Court in In re Kerala Education Bill.\(^{263}\) In this case clause 8(3) and 9 to 13 which curtailed the constitutional right to manage their own institution as a price for the grant to which they were constitutionally entitled under Article 337 was sought to be applied to the Anglo-Indian institutions. The Supreme Court speaking through S.R. Das, C.J., held the above clause of the Bill sought to impose onerous conditions which violated both Article 337 as well as Article 30(1).

In the above two decisions\(^{264}\) the Supreme Court did not allow the imposition of any other conditions on the rights of Anglo-Indian educational institutions than which Article 337 itself lays down.

The educational institutions falling under second category have no express right to claim grant from the State. However, in In re Kerala Education Bill, 1957,\(^{265}\) the Supreme Court speaking through Das, C.J., pointed out:

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Although there was no constitutional right to the grant of aid except for Anglo-Indian educational institutions under Article 337 of the Constitution, State aid was indispensable to educational institutions and Articles 28(2), 29(2) and 30(2) clearly contemplated the grant of such aid and Article 41 and 46 charged the State with the duty of aiding educational institutions and promoting such interests of the minorities.266

There is no doubt that State can impose certain regulatory constitution for educational institutions seeking State grant. But these constitutions must but be violative of Article 30(7). For finding out whether a pre-condition is valid or not regard must be bed to the real affect and impact thereof on the fundamental right.267

(e) Autonomy of Minority Institutions and State’s Right to Regulate General Administration of such Institutions

Article 30(1) prima facie confers an unqualified right on minorities to administer the institutions established by them. In practice, however, this right is not absolute. The State or the University to which a minority institution is affiliated may practice standards of education, conditions of employment of teachers and their qualifications, facilities for students and like matters. But what amount to surrender of minority right is a question to be decided on the basis of facts and circumstances of such case. Following are the important cases in which the judiciary has dealt with the extent of State’s regulatory power to prescribe internal administration pattern for minority education institutions.

266 Id. at 1062.
In re Kerala Education Bill 1957,\footnote{A.I.R. 1958 S.C. 956. The main issues in the cases were: (1) Whether the power given to the Government under the Bill not to recognize new schools or higher classes started in the existing school without complying with the Act was arbitrary and violated minority right to establish and administer educational institutions. (2) Whether the provision in the Bill under which the fees collected in Government aided school were to be given to the Government and also the provision which empowered the Government to place school under its direct control were arbitrary and violated rights of a minority.} the Supreme Court speaking through Das, C.J., emphasized:

The right of the minorities to administer their educational institutions under Article 30(1), was not inconsistent with the right of the State to insist on proper safeguards against mal-administration by imposing reasonable regulations as conditions precedent to grant of aid.

In the instant case the court did not uphold the validity of clauses 14 and 15 in the Kerala Education Bill 1957. These clauses authorized the Government to take over any aided school under certain circumstances. The court found that those clauses amounted to expropriation of the schools. The schools were recognized on condition that they submitted to those clauses. Such submission amounted to surrender of right under Article 30(1).

Similarly, in \textit{State of Kerala v. Very Rev. Mother Provincial},\footnote{A.I.R. 1970 S.C. 2079.} the Supreme Court held sections 48 and 49 of the Kerala University Act, 1969 as violative of Article 30(1). Those sections were found by the court to have the effect of displacing the administration of the college and giving it to be a distinct corporate body which was in no way answerable to the institution. The minority community was found to lose the right to administer the institution it founded.
In Rev. father W. Proost v. State of Bihar,\textsuperscript{270} the Supreme Court held that Section 48A of the Bihar Universities Act, which came into force from 1\textsuperscript{st} March, 1962 completely took away the autonomy of the governing body of St. Xavier’s College established by the Jesuits of Ranchi and thus ultra vires. The section provided that appointments, dismissals, removals, termination of services by the governing body of the college were to be made on the recommendation of the University. In Rt. Rev. Bishop S.K. Patro v. State of Bihar,\textsuperscript{271} the Supreme Court held the order of the State of Bihar requesting the Church Missionary Society School, Bhagalpur to constitute a managing committee of the school in accordance with the order of the State as violative of minority rights under Article 30(1).

In D.A.V. College, Jullundur v. State of Punjab,\textsuperscript{272} the Supreme Court held clause 17 of the Guru Nanak Dev University Act which provided that the staff initially appointed shall be approved by the Vice-Chancellor and subsequent changes would be reported to the University for Vice-Chancellor’s approval as violation of Article 30(1) of the Constitution.

The issue of autonomy of minority run educational institution in its administration and permissible limits of State regulation was elaborately discussed by the Supreme Court in St. Xaviers College v. State of Gujrat.\textsuperscript{273} The petitioners in this case challenged the validity of sections 33A, 40, 41, 51A, 52A of the Gujrat University Act, 1949 as amended by the Act of 1973 as violative of their rights guaranteed under Article 30(1) of the Constitution. Section 33A (1) (a) provided that every college other than the Government College or College maintained by the Government shall be under the management of a

\textsuperscript{270} A.I.R. 1969 S.C. 465.
\textsuperscript{271} A.I.R. 1970 S.C. 259.
\textsuperscript{272} A.I.R. 1971 S.C. 1737.
\textsuperscript{273} A.I.R. 1974 S.C. 1389.
governing body which shall include among its members representative of the university nominated by the Vice-Chancellor and three representatives of teachers and at least one representative of non-teaching staff and students and students of the college. Section 33A (1) (b) provided that selection committee for the recruitment of Principal shall consist of a representative of the University to be nominated by the Vice-Chancellor and in the case of recruitment of a member of teaching it shall consist of a representative of university nominated by the Vice-Chancellor and the Head of the Department if any for the subject taught by such persons. Section 40 provided that teaching and training shall be conducted by the university and shall be imparted by teachers of the university. Section 41 provided that all colleges affiliated by the university shall be constituent colleges of the university. Section 51A provided that no member of the teaching or non-teaching staff of the affiliated college shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges, given in reasonable opportunity of being heard and make representation against such penalty proposed to be inflicted and penalty is approved by the Vice-Chancellor or any officer of the university authorized by him. Section 52A provided for reference of any dispute connected with conditions of service between the governing body and members of the teaching, other academic or non-teaching staff of an affiliated college which is connected with the conditions of service of such member to a tribunal of Arbitration consisting of one member nominated by the governing body of the college, or member nominated by the member concerned and an umpire appointed by the Vice-Chancellor.

This case was heard by the Bench consisting of nine judges (Ray, C.J., Jaganmohan Reddy, D.G. Palekar, H.R. Khanna, K.K.
Mathew, N.H. Beg, S.N. Dwivedi, Y.V. Chandrachud, and A. Aligiriswami, J.J.). six separate judgment\textsuperscript{274} were delivered.

Ray, C.J. (on behalf of himself and Palekar J.) declared that provisions of sections 33A (1) (a) and (b) were not applicable to minority institutions. By applying the provisions the autonomy of administration was lost. The learned judge observed:

\begin{quote}
The provision contained in Section 33A (1) (a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost.\textsuperscript{275}
\end{quote}

According to the learned C.J., the autonomy in administration means “right to administer effectively and to manage and conduct the affairs of the institution … The choice in the personnel of management is part of administration”.\textsuperscript{276} Thus, the provisions of Section 33A (1) and (b) were held violation of Article 30(1) of the Constitution.

However, the learned C.J., conceded that the University “will always have right to see that there is no mal-administration. If there is mal-administration the university will take steps to cure the same.”\textsuperscript{277}

Regarding sections 40 and 41 the learned C.J., held that effect of these provisions is that the “affiliated college becomes constituent colleges. The minority character of the college is lost.”\textsuperscript{278} Thus, the fundamental right to administer the educational institution is taken away.

\textsuperscript{274} First judgment was delivered by Ray, C.J., for himself and Paleker, J., the second by Jaganmohan Reddy, J., for himself and Alagiriswami, J., the third by Khanna, J., the fourth by Mathew, J., for himself and Y.V. Chandrachud, J., the fifth by Beg, J., and sixth by Dwivedi, J.
\textsuperscript{275} A.I.R. 1974 S.C. 1389 at 1400.
\textsuperscript{276} Id at 1399.
\textsuperscript{277} Ibid. para 41.
\textsuperscript{278} Id at 1398 para 36.
As regards section 51A the learned Chief Justice said that the provision contained in section 51A clause (b) cannot be said to a permissive regulatory measure in as much as it conferred arbitrary powers on the Vice-Chancellor to take away the right of administration of minority institutions\textsuperscript{279} and Section 52A “will introduce an era of litigious controversy inside the educational institution.”\textsuperscript{280}

Jaganmohan Reddy, J., (on behalf of himself and Aligiriswami, J.J., The learned judge said, “we agree with the judgment of Hon’ble the Chief Justice just pronounced and with his conclusions that sections 40, 41, 33A (1) (a), 33A (1) (b), 51A and 52A of the Act violate the fundamental rights of minorities and cannot, therefore, apply to the institutions established and administered by them.”\textsuperscript{281}

Khanna, J., the learned judge held section 33A as violative of fundamental right of minorities under Article 30(1) because it interfered with the choice of governing body and selection committee. As regards sections 40a and 41 of the Act he declared them as violative of Article 30(1). According to him “A provision which makes it imperative that teaching in under-graduate courses can be conducted only by the University and can be imparted only by the teachers of the university plainly violates the right of minorities to establish and administer their education institutions.”\textsuperscript{282} Regarding Section 51A and 52A the learned judge held clause (a) of sub-clause (i) and (2) of Section 51A as valid for it made a provision for giving a reasonable opportunity of show cause against penalty to be proposed on a member of the staff of an educational institution. Clause (b) of those sub-sections which gives a power to the Vice-Chancellor and Officer of University authorized by him to veto the action of the managing body of an educational

\textsuperscript{279} Id at 4400 para 43.
\textsuperscript{280} Id at 1400 para 44.
\textsuperscript{281} Id at 1401 para 50.
\textsuperscript{282} Id at 1428 para 107.
institution in awarding punishment to a member of staff was held to interfere with disciplinary control of the managing body over its teachers. According to the learned judge no guidelines had been laid down for the exercise of power of approval. Thus, Clause (D) of each of the two sub-sections of Section 51A were held to be violative of Article 30 (1) so far as minority educational institutions are concerned.

Section 52A was declared as violative of Article 30(1) so far as minority educational institutions were concerned. The learned judge objected to the power give to the Vice-Chancellor to nominate the umpire. The judge observed:283

(T)here is nothing objectionable to select the method of arbitration for setting major disputes connected with conditions of service of staff of educational institution ... what is objectionable ... is the giving of the power to the Vice-Chancellor to nominate the umpire.

He was of the view that the result of all this would be “that the power would vest for all intents and purposes in the nominee of the Vice-Chancellor to decide all disputes between governing body and the member of the staff connected with latter's conditions of service. The governing body would thus be hardly in a position to take any effective disciplinary action against a manner of the staff.284 This, according to the learned judge must cause an inroad in the right of the governing body to administer the institution.

Mathew, J., (on behalf of himself and Chantachud, J.): The learned judge held that the provisions of sub-section (1) (a) and (1) (b) of Section 33A abridged the right of the religious minority to administer institutions of their choice. The requirement that governing body shall include persons other then the members of the governing body of

283 Id at 1428 para 106.
284 Ibid.
Jesus was taken as taking away the management of the college from the governing body. As regards 33A (1) (b) which deals with the provisions for selection of Principal and other staff the learned judge observed:

So long as the persons chosen have the qualification prescribed by the university, the choice must be left to the management. 285

The provision which deprived the religious minority of its right of teaching, training and instruction in the courses of study in which university was competent to hold examination was held by the learned judge to take away the right to administer the educational institution guaranteed under Article 30(1). 286

Regarding 51A (1) (b) which gave general power to the Vice-Chancellor to veto on the right of the management to dismiss a teacher, the learned judge said that if the purpose of the approval is to see that the provisions of sub section 51A (1) (a) are followed then there can possibly be no objection. “But an uncanalised power without any guidelines to withhold approval would be a direct abridgment of the right of management to dismiss or remove a teacher or inflict any other penalty after conducting enquiry.” 287

The learned judge held section 52A which provided for Tribunal of Arbitration as violative of Article 30(1) for it sub-served no purpose and that it will needlessly interfere with the day-to-day management of the institution. 288

Beg, J.: The learned judge held section 33A which dealt with composition of governing body as valid. According to him “the mere

285 Id. at 1445 para 183.
286 Ibid.
287 Id. at 1446 para 192.
288 Id. at 1447 para 194.
presence of the representatives of the Vice-Chancellor, the teachers, the members of the Non-teaching staff and the students of the college would not impinge upon the right to administer … such a “sprinkling” is more likely to help to make administration mete effective and acceptable to everyone effected by it. A minority institution can still have its majority on the governing body.»

Sections 40 and 41 which according to the learned judge had the effect of converting an affiliated college into a constituent college was held violative of Article 30(1) because it interfered with autonomy of the minority institution.

As regards section 51A dealing with general conditions for the dismissal, removal, reduction in rank and termination of services of the members of the staff of all colleges to which it applies, Bed, J., held it as valid. He said, “a greater degree of interference with the right to administer or manage an institution can be held to be permissible as a logical consequence of the exercise of an option of a minority for an institution governed by a statute with all its benefits as well as advantages, it seems to me that provision of section 51A do not constitute unreasonable encroachment on the essence of right of minority institution protected by Article 30(1) of the Constitution which consists of freedom of choice.”

The learned judge for the similar reasons held section 52A as not violative of Article 30(1). In short be held only section 40 and 41 of the Act as violative of the right of petitioning minority to manage college protected by Article 30(10 of the Constitution.

Dwivedi, J.: The learned judge did not agree with the majority view on all points and delivered a dissenting judgment. He held section

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289 Id. at 1452 para 212.
290 Id. at 1452 para 213.
33A (1) (a) as obnoxious to Article 30(1) but did not express any option on section 33A (1) (b). The learned judge declared sections 40, 41, 51(A) and 52A as valid. He did not find any legitimate objection to the section 40 (1). According to him “merely because an affiliated college is made a constituent college of the university would not necessarily offend Article 30(1).” Regarding section 51A the learned judge said, “The purpose of Section 51A is to check this kind of misuse of the right to fire an employee. So, the Vice-Chancellor's power of approval is not unguided and unreasonable. After the Chancellor, the Vice-Chancellor is the next highest officer of the University. It should be presumed that in granting or withholding approval he would act according to reason and justice.” As regards section 52A, the learned judge said, “This provision is also intended to check the abuse of power of administration by the managing body and to provide a cheap and expeditious remedy to the small pursued teaching and non-teaching staff.”

Thus, the court by majority held sections 33A, 40, 41, 51A (1) (b), 51A (b) and 52A of the Gujrat University Act, 1949 as amended in 1973 not applicable to institutions established and administered by linguistic and religious minorities. The Supreme Court decisional pattern in the instant case is as follows:

Section 33A – declared by 8:1 majority as violative (Beg, J., Contra)

Section 40 and 41 – declared by 8:1 majority as violative (Dwivedi, J., Contra)

291 Id. at 1469 para 293.
292 Id. at 1470 para 297.
293 Id. at 1471 para 304.
Section 51A and 52A – declared by 7:2 majority as violative
(Beg and Dwivedi, J.J., Contra).

In G.F. College, Shahjahanpur v. Agra University,\textsuperscript{294} where the University directive required that the managing committee of an affiliated college shall consist of the principal and one member of the staff in order of seniority of rotation was declared valid by the Supreme Court with 2:1 majority. Krishna Iyer, J.,\textsuperscript{295} who delivered the majority judgment relied on the St.Xavier's case\textsuperscript{296} and held that the regulation of the manner of the functioning of the managing committee of a minority college to obviate mal-administration is permissible. The principal, is an important functionary in a college and is the appointee of the management. He is not a stranger to the college. His inclusion in the managing committee will ensure better administration of the college. The same can be said about the senior most member of the teaching staff who is appointed by the management. Their inclusion into the managing committee would improve the administration of the college and not inhibit the autonomy of the institution.\textsuperscript{297} The court distinguished the present case from the earlier cases of State of Kerala v. Mother Provincial,\textsuperscript{298} D.A.V. College, Jullundur v. State of Punjab,\textsuperscript{299} and St. Xavier's College v. State of Gujrat.\textsuperscript{300} what was held invalid in these cases was the induction of ‘rank outsides’ into the managing committee of the institution and thus compromising the autonomy of the institution.

\textsuperscript{294} A.I.R. 1975 S.C. 1821.
\textsuperscript{295} A.I.R. 1974 S.C. 1389.
\textsuperscript{296} On behalf of himself and A. C. Gupta, J. (Mathew, J., dissertation).
\textsuperscript{297} Id. at 1832.
\textsuperscript{298} A.I.R. 1970 S.C. 2079.
\textsuperscript{299} A.I.R. 1971 S.C. 1737.
\textsuperscript{300} A.I.R. 1974 S.C. 1389.
In Lily Kurian v. St. Lewina, the provisions of ordinance 33 framed by the Syndicate of the university of Kerala under Section 19(1) of the Kerala University Act, 1957 was challenged as violative of Article 30(1) of the Constitution. Under the ordinance the power to take disciplinary action against a teacher was vested in the management of the institution, but the teacher concerned could appeal to the Vice-Chancellor against management’s order. The Supreme Court held the Ordinance 33 (4) as violative of the right of the minority to administer educational institution of its own choice guaranteed under Article 30(1). The court pointed out that right of minority to manage the affairs of the institution is subject to the regulatory power of the State as Article 30(1) cannot be a character for maladministration. But State regulation is permissible only to the extent that the minority’s right to administer may be better exercised for the benefit of the institution. According to the court the power of appeal conferred on the Vice-Chancellor was not only a grave encroachment on the institution’s right to enforce and ensure discipline but was “uncanalised and unguided” in the sense that no restrictions are placed on the exercise of the power. The conferral of such wide powers on the Vice-Chancellor amounts in reality, to a fetter on the right to administration under Article 30(1).

In All Saints High School v. Government of Andhra Pradesh, the appellants who run minority Christian School challenged the validity of certain provisions of the Andhra Pradesh Recognised Private Educational Institutions Control Act, 1975 as violation of Article 30(1). They challenged the provisions of sections 3 to 7 of the Act on the ground that they deprive the appellants of their right to administer the affairs of minority institutions by vesting the ultimate administrative

control in an outside authority. These contentions having been rejected by the Andhra Pradesh High Court, the appellants have filed the present appeals.

Section 3 (1) provides that no teacher employed in any private educational institution shall be dismissed, removed or reduced in rank without the prior approval of the competent authority. Section 3 (2) requires that such a proposal shall be approved by the said authority if satisfied. Section 3 (3) (a) provides that no teacher shall be suspended unless an inquiry is contemplated against him and if enquiry is not completed within two months the teacher shall be deemed to have been restored as a teacher. Section 3 (3) (b) provides that no such suspension shall remain in force for more than a period of two months and if the enquiry is not completed within that period the teacher shall without prejudice to the inquiry be deemed to have been restored as teacher. Section 3 (4) lays down that every teacher placed under suspension shall be paid subsistence allowance during the period of his suspension. Section 4 provides that a teacher against whom any of the actions mentioned above is taken or his conditions of service are altered may prefer an appeal to such authority or officers as may be prescribed. Section 5 is consequential upon section 4. Section 6 lays down that where any retrenchment is necessary it may be effected with prior approval of the competent authority. Section 7 provides that the pay and allowances of a teacher shall be paid on nor before such day of a month and in such manner and by or through such authority, officer or person, as may be prescribed.

The majority (Kailasam, J., and Chandrachud, C.J.) (Fazal Ali, J., dissenting) held sections 3 (3) (a), 3 (3) (b) and 6 of the Andhra Pradesh Recognised Private Institutions Control Act, 1975 as valid whereas, sections 3(1), 3 (2), 4 and 5 of the Act were declared invalid.
and not applicable to minority institutions. All the three judges held section 7 as valid.

Chandrachud C.J., and Fazal Ali, J., (P.S Kailasam, J.,) Contra held sections 3(1) and 3 (2) as violative of Article 30(1) of the Constitution and wholly inapplicable to minority educational institutions because they conferred “blanket power” to outside authority and thus bound to interfere, substantially with the minority right to administer institutions of their choice.

Chandrachud, C.J., and P.S. Kailasam, J., (Fazal Ali, J., dissenting) held sections 3(3) (a) and (b) and (4) as valid and not violative of Article 30(1) of the Constitution.

According to them, these provisions are regulatory in nature and are intended to safeguard the teachers from being suspended for unduly long periods without being an enquiry and at the same time does not deny the management the right to proceed against the erring teacher. Section 3 (4) which provides for subsistence allowance during suspension is also a regulatory in nature. Sections 3 (3) and (4) contain an elementary guarantee of freedom from arbitrariness to the teachers.

All the three learned judges held sections 4 and 5 unconstitutional as being violative of Article 30(1) of the Constitution. Section 4 gives right to appeal to a teacher who is dismissed, removed or reduced in rank and whose services are terminated. No guidelines are provided for exercise of such power. Moreover, no provision has been made which entitles the minority institution to be heard by the appellate authority. This infirmity invalidates the section 4. Section 5 is consequential upon section 4 and must fall within it. Section 6 was held valid by the majority.
Chandrachud, C.J., and P.S. Kailasam, J. (Fazal Ali, J. Contra) held section 6 as valid. The majority said that it was difficult to share the view that retrenchment of teachers was purely domestic affair of the minority institution. Section 6 was aimed at affording a minimal guarantee of security of tenure to a teacher by avoiding the passing of malafide orders in the garb of retrenchment.

Section 7 which provided that pay and allowances of teachers were to be paid on a particular date and in a particular manner was held regulatory in nature and did not affect the administrative autonomy of the minority institution.

According to Professor M.P. Jain, the instant case represents “three stands of thought: (i) on the one extreme, a very narrow view of Article 30 holding all statutory provisions in question valid. (ii) On another extreme, a very broad view of Article 30 holding all the provisions invalid. (iii) In between, a middle view between the two extremes, holding some of these provisions valid and some invalid.”

The Patna High Court in Governing Body of Karim City College v. State of Bihar held that Section 57 of the Bihar State Universities Act, 1976 which provided the termination of services of teachers of affiliated colleges run by the minorities based on religion or language could be ordered only after prior approval by the college service commission was unconstitutional. According to the court the statute framed under the said section of the Act did not give adequate guidelines for exercise of power by the college service Commission.

V. Appraisal

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303 M.P. Jain, op.cit. supra note 88 at 35-36.
The preamble of the Constitution declares to make India a Welfare State with an egalitarian society based on the concept of ‘social justice’. The ‘social justice’ includes within its ambit and scope affording adequate protection to the minorities. The term ‘minority’ has not been defined in constitution. From the decisions in re Kerala Education Bill 1957, D.A.V. College, Jullundur, Arya Samaj Education Trust cases judicial opinion seems to favour application for two tests – statistical and geographical. The application of these tests together means that a religious or linguistic group claiming the right under Article 30(1) must be numerically smaller as against the total population within the boundaries of a particular State. Therefore, Arya Samajists in Punjab have been held to be a minority but not so in Delhi. The framers of the Constitution enacted several provisions for the protection of minorities so that they are able to keep their identity while assimilating in due course in the main stream. Article 25, 26, 27 and 28 of the Constitution guarantees the freedom of religion. These Articles make the Constitution a secular one. Subject to certain limitations, Article 25 confers a fundamental right on every person not merely to entertain religious beliefs but also exhibit the same by such overt acts and practices which are sanctioned by his religion. The courts have gone into religious scriptures to ascertain the status of a particular practice. Whether a particular practice is part of religion and is protected under the Article is to be decided by the Courts. The Supreme Court has displayed an excellent sense of tolerance and broad-mindedness in the National Anthem case by declaring that no person can be forced to join in the singing of the National Anthem.

against his will and such compulsion is violative of Article 19(1) (a) and 25 (1). Although it is true that every citizen must honour and respect the National Anthem to ensure national unity, integrity and security but by compulsion a feeling of respect or honour cannot be instilled. The court has very rightly said, “Our philosophy teachers tolerance, our Constitution practices tolerance. Let us not dilute it.”

Religious freedom under Article 25 is subject to (1) public order, morality and health; (2) Regulation of financial, political and secular activities associated with religion; (3) Social reforms.

Article 26 guarantees right to religious denomination or section of it to establish and maintain institutions for religious and charitable purposes and to manage their own affairs in matter of religion. In S.P. Mittal v. Union of India, the Supreme Court has said that words ‘religious denominations’ must take their colour from the word religion and must satisfy (i) that it is collection of individuals who have a common faith; (ii) common organization and designation by a distinctive name. The members of Islam, Christianity, Zoroastrainism and Hinduism would be a denomination. The follower of Madhvacharya, the Swetamber seat of Jains, the Gowda Saraswath Brahmins, the Dawood Bohars, Hanfees, Shia or Chistis sects constitute religious denominations. Whether a community is a religious denomination is a question of fact or in any event a mixed question of fact and law. The words ‘establish and maintain’ in clause (a) of Article 26 must be read conjunctively. A religious denomination can claim the right to maintain an institution only when the same has been

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311 Supre note 68.
312 A.I.R. 1983 S.C. 1
313 Id. at 20-21.
315 Supra note 91.
established by it. The State cannot interfere with right under clause (b) of Article 26 unless the management of the denomination runs counter to public order, morality or health. The term ‘matters of religions’ in Article 26(b) is synonymous with the term ‘religion’ in Article 25 (1). ‘Matters of religion’ embraces not merely matters of doctrines and beliefs concerning the religion but also practice of it. The religious denomination under Article 26 (c) has right to own and acquire property and under Article 26 (d) has the right to administer the property attached to a religious institution in accordance with law. If the right to administer properties never vested in a denomination or had been validity surrendered by it or has been otherwise effectively and irrevocably lost to it Article 26 cannot be successfully invoked.

Article 27 prohibits the levying of a tax the proceeds of which are meant specifically for payment of expenses for promotion or maintenance of any particular religion or religious denomination. This Article prohibits levying of tax and not of fee. Article 28 deals with protection of religious freedom of minorities. Clause (1) of the Article prohibits providing of religious instructions in educational institutions wholly maintained out of State funds. The restriction in clause (1) would not apply under clause (2) if the educational institution though administered by the State has been established under an endowment or trust. Article 28(3) prohibits a student of an educational institution recognized or aided by the State from taking part in religious instructions given in that institution without his or his guardian’s consent in case the student is minor.

317 Ibid.
318 Supra note 95.
319 Supra note 96.
320 Supra note 97.
321 Supra note 121 at 1416. Also Azeez Basha v. Union of India, A.I.R. 1968 S.C. 662.
Thus, it is clear from above that the judiciary while interpreting Articles 25 and 26 has maintained a careful balance between the freedom of individual or the group, in regard to religion and need for State regulation. Whenever, the courts was “matter of religion” they have prevented the State from interfering with the same.

Article 29 and 30 of the Constitution guarantee certain cultural and educational rights to cultural, religious and linguistic minorities. It is clear from the marginal note to these Articles that they have been enacted with a view to protect the interests of minorities. These provisions connote three things: (a) right to conserve, (b) right to freedom of education and (c) right to state aid.

Article 29(1) guarantees to every section of citizens having a distinct language, script or culture to conserve them. The Supreme Court has held that the right to conserve the language of the citizens includes right to agitate for the protection of the language. The right to conserve includes (i) right to profes, practice and preach the own religion; (ii) right to follow its own social, moral and intellectual ways of life; (iii) right to impart instruction in its tradition and culture and (iv) the right to perform any other lawful act or to adopt any lawful measure for the purpose of preserving its culture. Article 29 (2) prohibits discrimination against any citizen on the grounds only of religion, race, caste, language or any of them in the matter of admission into educational institutions maintained or aided by the State. This right is given to the citizen as such and not as a member of any minority community. The Supreme Court in State of Bombay v. Bombay Education Society, and re Kerala Education Bill, has held that members of majority community are entitled to seek admission in

minority institution. Thus, the decision of the court in these cases have gone a long way in strengthening the social integration.

The denial of admission to an educational institution for not possessing the required qualification is not violative of Article 29 (2). 326

Article 30 of the Constitution guarantees following four types of rights to minorities based on religion or language. These are:

(i) the right to establish education institution;
(ii) the right to administer educational institution;
(iii) the right to determine the nature of the educational institution of their choice and
(iv) the right not to be discriminated against in the matter of State aid to such institutions.

It is through the education of children that group culture can be preserved. The Supreme Court has held that the right of minority to establish educational institution under Article 30(1) is not limited to the purposes laid down in Article 29(1). 327 This Article is of widest import and includes both the purposes of language, script and culture and imparting of secular education. The words ‘establish and administer’ in Article 30(1) are to be read conjunctively and not disjunctively. 328 For getting benefit of Article 30(1) the community must show (i) that it is a religious 329 or linguistic minority and (ii) that the institution has been established by it. This right is available to both pre-constitution and post-constitution institutions but the right must of course be sought to be exercised after commencement of the Constitution. 330 The right

328 Ibid.
granted under Article 30(1) is not an absolute one.\textsuperscript{331} In a very recent case of Andhra Pradesh Christian Medical Education Society,\textsuperscript{332} the Supreme Court has very emphatically said the right guaranteed to minorities under Article 30(1) cannot be used as a “smokescreen” for launching financial adventures. “The institutions must be institutions of the minorities in truth and reality and not mere marked phantoms.”\textsuperscript{333}

The right to administer educational institutions means ‘sufficient freedom’ to the founders to manage and mould the institutions according to their own vision and purpose. The right to administer may be said to consist\textsuperscript{334} of the (i) right to choose managing or governing body; (ii) to choose its teachers; (iii) right not to be compelled to refuse admission to students; (iv) right to use properties and assets for the benefit of the institution; (v) right to select its own medium of instruction. Although the right to administer minority educational institutions guaranteed under Article 30(1) is not subject to any limitation or exception unlike Article 19, however, this right is subject to the police power of the State which is inherent attribute of sovereignty of State. For regulating the educational institution under police power, the State in addition to satisfy the usual test of public interest must also conform to two more tests i.e. the regulation is reasonable and is conducive to make the institution an affective vehicle of education for the minority concerned.\textsuperscript{335} The judiciary has recognized the right of the minorities to choose the medium of instruction in their institutions.\textsuperscript{336}

\textsuperscript{332} The Indian Express (Delhi ed.), 25th April, 1986 p. 7 Col. 2 and 3.
\textsuperscript{333} Ibid.
\textsuperscript{334} D.D. Rasu, op.cit., supra note 201.
\textsuperscript{335} In re Kerala Education Bill, A.I.R. 1958 S.C. 956.
The courts have also struck down the regulation interfering with the right of minorities to admit students of their choice.\textsuperscript{337}

From the Supreme Court judgment in \textit{St.Xavier’s} case,\textsuperscript{338} it is quite clear that (a) the minority institutions have full freedom to choose their staff; (b) the State has a right to prescribe qualifications and (c) the State may also regulate service conditions and fair procedures. Regarding problem of affiliation and recognition and State aid, it has been held\textsuperscript{339} that there is no fundamental right to affiliation. State has right to impose reasonable conditions for granting affiliation or recognition but such conditions must not tantamount to surrender of minority right to administer educational institutions of their choice. The State in furtherance of its duty under Article 45 to provide free and compulsory education can regulate or restrict fee etc., if it undertakes to compensate the loss suffered by a minority institution as a result of non-realization of fees.\textsuperscript{340} The State can impose certain regulatory conditions on educational institutions seeking State aid but these conditions must not be violative of Article 30(1). In order to find out whether a precondition is valid or not regard must be had to real affect and impact on the fundamental right. So far as the autonomy of minority institutions are concerned the judiciary has conceded the regulatory power of the State to rectify maladministration.\textsuperscript{341} But if conditions are imposed which are likely to oblige the minority to surrender its right to establish and administer educational institutions


\textsuperscript{338} A.I.R. 1974 S.C. 1389.


\textsuperscript{341} Ibid.
of its choice or render it unreal or ineffective such conditions will be violative of Article 30(1).\textsuperscript{342}

The critical examination of the re Kerala Education Bill 1957,\textsuperscript{343} Rt. Rev. Bishop S.K. Patro v. State of Bihar,\textsuperscript{344} State of Kerala v. Very Rev. Mother Provincial;\textsuperscript{345} St. Xavier College v. State of Gujrat,\textsuperscript{346} Lily Kurian v. Sr. Lewina,\textsuperscript{347} and All Saints high School v. Government of A.P.\textsuperscript{348} cases reveal that educational institutions established and administered by the minorities imparting secular education enjoy a superior and privileged position than those run by majority in matter of government or university control the Supreme Court by its generous and liberal interpretation of Article 30 has resulted in denial of security of tenure to teachers of minority educational institutions imparting general secular education. This situation has arisen because of the Supreme Court rejection of the arbitration clause between management of minority institution and teachers in St.Xavier's case.

Justice Fazal Ali after an exhaustive analysis of the whole case law during the last two decades has summarized the scope and ambit of the fundamental right enshrined in Article 30(1) and propositions and principles that emerge as follows:\textsuperscript{349}

1. Article 30(1) enshrines fundamental right of minority institutions to manage and administer the educational institutions which is completely in consonance with the secular nature of democracy and the Directives in the Constitution itself.

\textsuperscript{343} A.I.R. 1958 S.C. 950.
\textsuperscript{344} A.I.R. 1970 S.C. 259.
\textsuperscript{345} A.I.R. 1970 S.C. 2079.
\textsuperscript{346} A.I.R. 1974 S.C. 1389.
\textsuperscript{347} A.I.R. 1979 S.C. 52.
\textsuperscript{348} A.I.R. 1980 S.C. 1042.
2. The right under Article 30(1) is absolute, unfettered and unconditional unlike Article 19. It does not give a licence to maladministration so as to defeat the avowed object of the Article namely to advance excellence and perfection in the field of education.

3. Although the State or other statutory authorities have no right to interfere with the internal administration of management of the minority institution, but State can take regulatory measures to promote efficiency and excellence of the educational standards and issue guidelines for the purpose of ensuring the security of the services of the teachers or other employees of the institution.

4. The State or any university cannot at the same time, under the garb of adopting regulatory measures tend to destroy the administrative autonomy of the institution so as to render the right under Article 30(1) nugatory or illusory.

5. The university is asked for affiliation canto refuse the same without sufficient reason or try to impose conditions which would completely destroy the autonomous administration of the educational institution.

6. The introduction of an outside authority, however, high it may be either directly or through its nominee in the governing body or the managing committee of the minority institution to conduct the affairs of the institution would be violative of Article 30(1). There may not be any serious objection if a high official like the Vice-Chancellor or his nominee in administration particularly that part of it which deals with the conditions of service of the teachers yet such authorities should not be thrust so as to have a
controlling voice in the matter and thus overshadow the powers of the managing committee. The Government if satisfied that the powers of the governing body or managing committee are grossly abused it is entitled to curb such powers.

7. Government or university is empowered to frame rules and regulations governing the condition of service of teachers in enter to secure their tenure of service and to appoint a high authority armed with sufficient guidance to see that the said rules are not violated.

8. Where a university enjoins an affiliated institution to adopt the courses of study or the syllabi or the nature of books prescribed and holding of examination to test the ability of the students of the institution concerned is not violation of Article 30 of the Constitution.

9. Setting up a high authority to supervise the teaching staff so as to keep a strict vigilance on their work and to ensure the security of tenure for them may be valid provided the concerned authority is provided with proper guidelines under the restricted field which they have to cover. Before coming to any decision which may be binding on managing committee, the Head of the institution or the senior members must be associated and they should be allowed to have a positive say in the matter. If an outside authority enjoys absolute powers in taking decision without bearing them and such orders are binding on the institution, it will amount to violation of Article 30(1). A provision for appeal of revision against the order of the authority by the aggrieved member of the staff alone or the setting up of an Arbitration Tribunal is also not
permissible because Ray, C.J. has pointed out is St. Xavier College case that such course of action introduces an stance of litigation and would involve the institution in unending litigation. This would thus impair educational efficiency.

In the recent case of Frank Anthony Public School Employees Association v. Union of India and the Management of the Frank Anthony School,\textsuperscript{350} Justices O. Chinnappa Reddy and G.L. Oza declared that section 12 of the Delhi School Education Act which makes section 8 to 11 inapplicable to such schools is unconstitutional except for section 8(2). The consequence of this is that all such schools will have to abide by section 10 which requires all recognized private schools to ensure that conditions of service of their employees" shall not be less than those of the employees of the corresponding status in schools run by the appropriate authority". The appropriate authority must direct such schools to observe this and if the direction is not complied with then the authority can withdraw the recognition of the school. The judges declared that section 8 to 11 are regulatory provisions which only ensure excellence of the educational institutions and hence do not violate the fundamental right of any religious or linguistic minority under Article 30 of the Constitution to “establish and administer educational institution of their choice”. They pointed out that all the Supreme Court judgment on this question from 1957 to 1980 including the nine judges bench decision in St. Xaviers College Society case had declared that extent of the right under Article 30 is to be determined not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves. The court observed that the management of a minority educational institution cannot be permitted under the guise of

\textsuperscript{350} Reported in \textit{The Hindustan Times} (New Delhi) November 18, 1986 p. 1. column 1.
the fundamental right guaranteed under Article 30 to oppress or exploit its employees any more than any other private employer. Oppression and exploitation will defeat the objective of making these institutions an effective vehicle of education. As a result of this landmark judgment the unaided private minority schools recognized by the Delhi Administration are bound to pay their teachers and other employees the scales and pay, allowances, medical facilities, pension, gratuity, provident fund and other benefits as are paid to corresponding teachers and employees of government schools.

351 Ibid.