Chapter-5

Role of Judiciary in Determining the Scope of Right to Education of Minorities under Articles 29 and 30
Role of Judiciary in Determining the Scope of Right to Education of Minorities under Articles 29 and 30

An attempt has been made in previous Chapters to demonstrate various concepts relating with the educational rights of the minorities as well as the legal measures that are available at national and international level. Attempt has also been made to analyze the current position of the status of the minorities with regard to the education in India. The judiciary has also played an important role to throw the light on the provisions of the Constitution in case of ambiguity. The educational rights of the minorities are most contentious facets of the cases through which the Indian Courts have interpreted the various facets of the educational rights of the minorities. For the convenience the findings of the judicial pronouncements has been divided in the various sub heads such as nature and extent of minority right, right regarding the selection of students, appointment of teacher: head of the institution, management service condition, general administration etc. Attempt has also been made to sum-up the emerging trends of the various concepts relating to the educational rights of the minorities. The cultural and educational rights of minorities recognized by Articles 29 and 30 of the Constitution have remained highly contentious both in public and before judiciary.261 The litigation on the subject has been enormous.

Aside of it, there can be no two opinions about the utility and the role played by minority educational institutions in rendering most needed services to the country in terms of both quality and quantity. There have, however, been frequent efforts to restrict establishment of such schools, and also the private initiative in the field of education has been questioned. On the contrary, the minorities assert that the independence of the nation has to be appreciated as a message of protection and progress to all Indians. The adoption of the provisions of the Constitution about protection of minorities is to be understood in the same spirit. This chapter is primarily devoted to demonstrate the role of judiciary in determining the scope of right to education of minorities under Articles 29 and 30.

I. Meaning of Minority Educational Institution

Article 30 of the Constitution is in fact a seedbed from which several significant broad banded rights have sprouted. Right guaranteed by clause (1) of Article 30 is a right to establish and administer educational institution of their choice. Once it is proved that an educational institution is established by minority and it is a minority educational institution, be it linguistic or religious, then the question comes about right to administer. It is submitted that right, to administer, presupposes exercise and protection of right to establish educational institution. Both these rights are conjunctive and not an independent one. Right to administer is most critical and controversial right. Since the Constitution is silent about the nature of this right i.e. whether it is subject to some restrictions or is an absolute one, we have to rely on judicial decisions.

An important question which had been referred to the special bench in *T. M. A. Pai Foundation case*\(^{262}\) and which it did not answer, was this: “What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority?” It is not surprising that the special bench avoided to answer this question because a comprehensive and satisfactory answer to the question would require a principled analysis to find out some coherent rationale for the protection given under Article 30(1) and, in the author’s view, the present case law, excepting a few decisions like In Re: *The Kerala Education Bill, 1957*,\(^{263}\) lacks that feature. It was not of much consequence earlier because, some exceptions apart, most of the cases posed only the problem of permissibility of governmental intrusion into the internal administration of the institutions which were decidedly minority institutions, though frivolous objections were raised in some of the cases. Today, the position is quite different. There is an increasing demand for professional institutions and an ever-increasing number of such institutions are being established both as minority institutions and as non-minority institutions. The major headache of the governmental authorities and the courts is to ensure that this new-found enthusiasm does not become a thinly veiled business enterprise; but this has to be done without allowing unnecessary bureaucratic intrusion which might act as a damper. In the performance of this delicate job of oversight, the authorities have to concede, as per constitutional requirements, some comparative

---


\(^{263}\) AIR 1958 SC 956: (1959) SCR 995.
advantages and immunities to the minority institutions. Therefore, it becomes
crucial to determine that an institution claiming to be a minority institution is
genuinely a minority institution. In other words, it should not be enough for the
purpose that the person who has established the institution happens to belong to
a minority community. What are the additional conditions to be insisted upon?
That is what requires to be explored. However, before discussing the relevant
cases, one submission needs to be made at the outset. This is now the law laid
down by the Supreme Court that in order to avail the benefit of Article 30(1), it
has to be shown that the institution had been established by a minority
community and had also been administered by it. The same is the view of the
Supreme Court in relation to religious institutions.\textsuperscript{264} It is to be stated that this
proposition is unwarranted and has the effect of killing the ambit of the right in
important and sensitive areas. Such an insistence is akin to the grandfather
clause in the legislation of southern States of the United States of America
which was meant to rob the black Americans of their voting right given by the
XV Amendment on the specious ground that their grandfathers were not voters.
The rights under Articles 26(a) and 30(1) are the gifts of the present
Constitution and the scope of those rights cannot be curtailed on the ground that
something otherwise happened at a time when the then law did not give the
liberty to contest the same or object to that practice.

Now, let us discuss some of the cases. The first case where pleas having affinity
with the nature and concept of minority educational institutions were made was
\textit{In Re: The Kerala Education Bill, 1957}.\textsuperscript{265} Three of the pleas made by the State
of Kerala are important in this connection. First, it was contended that it is only
the institutions established after the commencement of the Constitution that
were eligible to claim the protection of Article 30(1). The Court rejected this


contention. It was pointed out that the Constitution gave two rights to the minorities—the right to establish and to administer and the right to administer could be exercised also in respect of those educational institutions which had been established before the commencement of the Constitution. Second, it was contended that only such institutions as admitted students only from the minority community were eligible to claim the protection. It was conceded that, in view of Article 29(2), the minority educational institutions could not refuse admission on the basis of religion, race, caste, language or any of them if they were to get State aid. This prompted S.R. Das, C.J. to remark that it amounted to saying that minority community educational institutions were not entitled to get State aid as minority institutions. The learned Chief Justice observed:

The real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution.266

Lastly, the Court pointed out that the right given under the Constitution to the minorities is the right to establish and administer educational institutions of their choice. In other words, the right is as wide as the word 'choice' indicates. There is no limit on the number of subjects that can be taught in the minority institutions. Specifically speaking, the right of linguistic minorities is not limited to the teaching of their language alone, and the right of religious minorities is not limited to the teaching of their religion, alone. S.R. Das, C. J., in the course of his judgment, observed:

As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher

266 Ibid. p. 1052 of SCR.
university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice will necessarily include institutions imparting general secular education also. In other words, the Article leaves it to their choice to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving a thorough, good general education to their children ...\(^{267}\)

The above observations indicate that they were made in response to the suggestion that, in order to qualify as a minority institution, the institution should restrict itself to the teaching of only such subjects as were conducive to the preservation of their particular religion, language or culture. A similar suggestion was made in *Rev. Father W. Proost v. State of Bihar*,\(^{268}\) but in this case, it is submitted that the response of the Court appears to have gone overboard. In a writ petition under Article 32 it was contended that Articles 29(1) and 30(1) rights of St. Xavier's College, Ranchi were violated because the college was being disaffiliated for not complying with the provisions of section 48A of the Bihar State Universities Act, 1960 as amended. This section had the effect of putting the appointments and terminations of teachers in the affiliated colleges under the control of the University Service Commission. But the minority colleges were exempted from this under section 48-B. St. Xavier's College was being refused that privilege on the ground that the college did not sufficiently fulfil the objectives of Article 29(1).

\(^{267}\) Ibid. p. 1053.

A constitution bench rejected this argument on the ground that for determining the minority character of institution considerations relevant to Article 29(1) could not be invoked. From the judgment it is not clear whether the Attorney-General was arguing that the institution should be exclusively or at least primarily meant to serve the interests mentioned in Article 29(1). If that is so, he was obviously wrong. This wrong view had already been rejected in Kerala Education Bill.\textsuperscript{269} That this stand of the Attorney General was wrong further becomes clear from three points which are found in the judgment. First, since the petition itself had alleged violation of Article 29(1), the promotion of Article 29(1) interests was very much a part of the scheme of the college. Second, Hidayatullah, C.J. in his judgment has mentioned that the Attorney General was very much putting emphasis on the use of the word ‘sprinkling’ in the judgment of S. R. Das, C.J. in \textit{In Re: The Kerala Education Bill, 1957},\textsuperscript{270} and the fact that the college was open to all the communities, was being argued as its minus point. This again shows that the argument of the Attorney General in this case was on the same misconceived lines as that of the counsel of the State of Kerala in Kerala Education Bill.\textsuperscript{271} Third, the college was established by the Jesuits of Ranchi in 1944 and was effectively under the management of the Jesuit Mission at Ranchi. This shows that the college was being run by a religious order and promotion of religion was one of its missions. It does not need much of an argument to prove that though conceptually culture is distinct from religion, still much of culture is shaped by religion. This shows that the institution was sufficiently devoted to the fulfilment of the purposes mentioned in Article 29(1) though that might not have been its exclusive or primary objective. Therefore, it would have been better if the Court had rejected the untenable contention of the


\textsuperscript{270} Ibid.

\textsuperscript{271} Ibid.
Attorney General in the way S.R. Das, C.J. had done in Kerala Education Bill, instead of saying something which gave birth to the theory that there was a divorce between Articles 29(1) and 30(1). At least that is how the case was interpreted in *Ahmedabad St. Xavier’s College Society.*

In Ahmedabad St. Xavier’s College Society, a nine-judge bench of the Supreme Court looked at the scope of Article 30(1) comprehensively. Though all the judges, who spoke in the case, did not comment on the relationship between Articles 29(1) and 30(1), but none said anything which can be said to amount to a dissent from the view that Article 30(1) did not have a necessary connection with Article 29(1). Even S.N. Dwivedi, J., who partly dissented from the majority on the operative portions of the judgment, distinguished the two provisions by the figurative observation that while Article 29(1) gave security to an interest, Article 30(1) gave security to an activity. He did not pause to reflect that the interest requires some activity for its protection and activity is related to some interest. However, the many arguments for the thesis that the two provisions were unconnected with each other were advanced by A.N. Ray, C.J. and K.K. Mathew, J. These arguments, especially those found in the judgment of the Chief Justice, stretch the principle of literal interpretation based on formal logic to the extreme. But, it will be shown here that they are devoid of merit. One such argument is that, whereas Article 29(1) right is available to all, Article 30(1) right is available only to the religious and linguistic minorities. The records of Constitution-framing show that Dr. B.R. Ambedkar used a broader language in Article 29(1) lest the availability of the protection may get confined to traditional religious minorities. It is true that the provision is being interpreted in its literal sense so

---


as to include the majority community also, but common sense suggests that in a democracy, the majority does not normally need constitutional protection to protect its language or culture.

Second, it has been argued that whereas Article 29(1) mentions culture (instead of religion), Article 30(1) talks of linguistic and religious minorities (and not cultural minorities). It is submitted that since culture is an abstract concept, it is difficult to identify a cultural minority. Moreover, though culture is distinct from religion, it is largely shaped by religious traditions. This is exemplified by that portion of the judgment of Jackson, J. of the US Supreme Court in *McCullum v. Board of Education*, which Mathew, J. has reproduced in paragraph 137 of his judgment.

Then, how has the Supreme Court defined a minority institution and what rationale, if any, has it advanced for the preferential treatment of the minorities? With regard to the first issue, the observations of Hidayatullah, C.J. in *State of Kerala v. V. R. M. Provincial* can be taken to be standard and representative in this respect. The institution should have been brought into existence by the minority community for its benefit. "It matters not if a single philanthropic individual with his own means founds the institution or the community at large contributes the funds. The position in law is the same and intention in either case must be to found an institution for the benefit of

---

275 333 US 203 (1948). The relevant portion of Jackson, J.’s judgment quoted by Mathew, J. is the following: "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon ..." Quoted in *St. Xavier’s College* (1974) 1 SCC 717, 800.
a minority community by a member of that community ...” 277 And it does not make any difference that persons from other communities also take advantage of that institution. "Such other communities bring in income and they do not have to be turned away to enjoy the protection.”278 But, the definition leaves the benefits unspecified, unless the opportunity to attend the institution is considered the sole benefit contemplated in the definition. One believes that the idea is of a unique institution where the minority community children should study. It is that uniqueness which requires to be specifically defined. In A. P. Christian Medical Education Society v. Government of A. P., 279 a division bench of the Supreme Court insisted that before an institution could claim the status of a minority institution, there must be proved to “exist some real positive index” of this. But, while we indicate those positive indices, we must also look at the second point: What is the rationale behind giving to the minorities a special privilege in comparison to the majority community?

After the 11-judge bench decision of the Supreme Court in Pai Foundation, 280 the assumption, if there was one, that the right to establish private educational institutions was confined only to the minorities, stands totally demolished. R.C. Lahoti C. J.’s judgment in P. A. Inamdar v. State of Maharashtra, 281 and S. B. Sinha, J.’s judgment in Islamic Academy282 clearly indicate that all the Indian citizens, including the minorities have the right to establish and manage educational institutions under Article 19(1)(g) as an occupation and under

277 Ibid. p. 420.

278 Ibid.

279 (1986) 2 SCC 467.


Article 26(a) as charitable institutions. The minorities have an additional right under Article 30(1) to ensure that they are not subjected to some limitations which may permissibly be imposed under Article 19(6) or Article 26(a). Therefore, there is no scope to advance the kind of rationale which Mathew, J. advanced in Ahmedabad St. Xavier's College Society.\textsuperscript{283} In that case, he had rightly held that parents should have the liberty to choose the kind of education they wanted to give to their children and, consequently, should have the liberty to establish institutions of their choice including institutions where education was imparted in a religious environment of their own. The only flaw in this argument is that this does not succeed in distinguishing the requirements of the minorities from those of the rest of the society. His argument based on the opinion of the Permanent Court of International Justice in Minority Schools in Albania\textsuperscript{284} is also beside the point because in the liberal democracy of India that situation cannot be envisaged and Article 30(1) cannot be presumed to have been inserted to take care of that situation. We find the correct answer only when we look at some of the special privileges which the minority institutions enjoy and then try to find out their rationale. Mention here may be made of three prominent privileges which are uncontroversial and undisputed. First, the minority institutions, despite Article 29(2), can prefer their own community candidates in the matter of admission. Second, a minority community can insist on establishing an institution of its own even though there may be enough number of other institutions available which are not even fully utilised. Third, the minority community institution can select a teacher if he just fulfils the minimum prescribed qualifications and this it can do in preference to others who are far superior to him. All these privileges are relatable to just one urge of the minority community that its children should get education in an institution


\textsuperscript{284} Referred to by Mathew, J. in his judgment at pp. 798-799 of (1974) 1 SCC 717.
which is imbued with the spirit of their religion, language and cultural ethos and those who impart the instructions should also be imbued with the same spirit. Let it be clear here: religion alone would not work because in view of Article 28(1), the majority does not have any edge over the minority in this respect. It is in the matter of language and culture that the majority has an advantage over the minority which is sought to be set right by Article 30(1). Religion, of course, will be there, but it will be just an appendix to culture.

II. Cultural and Educational Rights of Minorities

There is unending debate, as to the scope of Articles 29 and 30 of the Constitution of India, almost from the inception of the Constitution. In *St. John's Educational Development Society v. Government of Andhra Pradesh*, 285 the Andhra Pradesh High Court held that Articles 29 and 30 of the Constitution enable the persons belonging to a religious or linguistic minority, to establish institutions of their choice and any restriction placed upon such institutions is violative of the fundamental rights guaranteed under the Constitution. Thus, a citizen, who wants to enjoy the special privilege and immunity conferred on the basis of a law, must strictly abide by it in its entirety. He cannot be choosy and violate the latter, which is not beneficial to him. Where the education imparted by a minority institution is special for that community, the ratio between the minority and non-minority students admitted into such courses, becomes irrelevant. Where however such institutions impart general and secular education, the students must be predominantly from the concerned minority.

Section 24 of the Bihar Madarsa Education Board Act, 1981, as it was originally enacted, inter alia, had a provision that "no teacher of the Madarsa can be discharged or dismissed from the service without the prior approval of

the Board". This clause had squarely come up for consideration before the Division Bench of the Patna High Court in *Anjuman Ahle-Hadees v. State of Bihar*\(^{286}\). The Court declared it *ultra vires* and against the rights of minorities who administered the institution. Again, in *Anjali Jain v. State of Bihar*,\(^{287}\) it has been held that in view of the Articles 29 and 30 of the Constitution, a minority is entitled to administer its educational institution without Governmental interference even if such institution receives substantial aid from the Government. Why reference has been made to Section 24 of the Act by the Court in the judgment is because if this provision is ignored, having been declared ultra vires, then the Madarsa Education Board also lacks jurisdiction in the matter where a teacher may be dismissed by the Managing Committee of the Madarsa then his only remedy would be to approach the Civil Court.

In *T. M. A. Pai Foundation v. State of Karnataka*\(^{288}\) eleven judge bench of the Supreme Court has considered the scope of the minority’s right to establish and administer educational institutions of their own choice. On the question of the scope of right of minorities to establish and administer educational institution of their choice under Article 30 (1) read with Article 29 (2) doubt arose on the correctness of *St. Stephen's College* case.\(^{289}\) In that case the court decided that (i) the minorities right to admit students under Article 30(1) had to be balanced with the right conferred under Article 29(2). Therefore, the state could regulate the admission of students of minority institutions so that the children of the minority community filled in not more than 50 per cent of the available seats; and (ii) the minority institution could evolve its own procedure for selecting...

\(^{286}\) 1985 PLJR 837: AIR 1985 Pat 315.

\(^{287}\) 2011 (3) BBCJ 522: 2011 (3) PLJR 702.


students for admission in the institutions. It was also pleaded before the eleven judge bench that *Unni Krishnan’s case*\textsuperscript{290} also requires reconsideration. In *Unni Krishnan’s case* the Supreme Court had framed certain guidelines under which 50 per cent of the seats in every professional college were to be filled by the nominees of the government or the university, selected on the basis of merit determined by a common entrance test (CET). These seats were referred to as the “free seats”. The remaining 50 per cent seats, which were called “payment seats”, were to be filled by those candidates who pay higher fee and there was no quota reserved for the management or for any family, caste or community, which established any such college. Subsequently, the Supreme Court in order to help the private educational institutions permitted within the payment seats some percentage of seats to be allotted to non-resident Indians (NRI) against payment of a higher amount as determined by the authorities. The infirmity which was pointed out was that experience showed that most of the free seats were generally occupied by students from affluent families, while the students from less affluent families were required to pay much more to secure the admission to payment seats. Thus, the scheme formulated by the Supreme Court in fact helped the privileged from richer urban families, even after they ceased to be comparatively meritorious. It also resulted in economic losses for the educational institutions concerned and made them financially unviable. Accordingly, the counsel for the petitioner as also the Solicitor General conceded before the Supreme Court that the scheme framed by it in *Unni Krishnan* requires reconsideration.

When the hearing in the case of *T. M. A. Pai* commenced before the eleven-judge bench on 3.4.2002, the court formulated following 11 questions to cover the entire field. Before coming to these 11 questions it may be mentioned that this eleven-judge bench has dealt with not only the rights of and permissible

restrictions upon minority institutions, both aided and unaided, but as well as with rights in general of non-minorities to establish and administer educational institutions, both aided and unaided. The majority judgment on behalf of six judges was delivered by Kirpal CJ. While Khare J by a separate opinion concurred with majority, Quadri J, Ruma Pal J, and Variava J (on behalf of himself and Bhan J) by their separate opinions partly dissented.

The Supreme Court after reviewing the whole case law relating to the right of the minorities to establish and administer educational institutions of their own choice answered the eleven questions as under:

*Question No.1.* What is the meaning and content of expression "minorities" in Article 30 of the Constitution of India?

According to the majority, the opening words of Article 30 (1) make it clear that religious and linguistic minorities have been put on a par, insofar as that article is concerned. Therefore, whatever is the unit, whether state or whole of India, for determining a linguistic minority it would be the same in relation to religious minority. Linguistic and religious minorities are covered by the expression "minority" under Article 30 of the Constitution. Since reorganization of the states in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the state and not the whole of India. Thus, religious and linguistic minorities, who have been put on a par. in Article 30, have to be considered Statewise. Khare and Quadri JJ also concurred with the majority opinion. Variava and Bhan JJ, also concurred on this point with the majority opinion, whereas Ruma Pal J, disagreed with the majority

---

291 The majority consisted of Kirpal CJ, and Pattanaik, Rajendra Babu, Balakrishnan, Venkatarama Reddi and Pasayat JJ.


293 Ibid, at 592, 597, 598 and 620-621.

294 Ibid, at 668 and 707.
opinion on this question.

**Question No.2.** What is meant by the expression "religion" in Article 30(1)? Can the followers of a sect or denomination of a particular religion claim protection under Article 30(1) on the basis that they constitute a minority in the state, even though the followers of that religion are in majority in that state?

The Supreme Court did not answer this question and it was observed that a regular bench would deal it with.

**Question No. 3.(a).** What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?

The Supreme Court did not answer this question also and it was observed that a regular bench would deal with it.

**Question No. 3(b).** To what extent can professional education be treated as a matter coming under minorities' rights under Article 30.

The Supreme Court held that Article 30 (1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30.

---

295 Ibid. at 647-48.
296 Ibid. at 161, 247 and 708.
297 Ibid.
298 Ibid.
299 Ibid. at 588.
Question No.4. Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the state government or by the university to which the institution is affiliated?

According to the majority opinion, with regard to admission of students to "unaided minority educational institutions", i.e., schools and undergraduate colleges where the scope of merit based selection is practically nil, it cannot be regulated by the state or university concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards. According to the court the state government or the university may not be entitled to interfere with the right guaranteed under Article 30 so long as the admission to the unaided educational institution is on a transparent basis and the merit is adequately taken care of. Since the right to administer is not absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof and it is particularly more so in the matter of admissions to professional institutions.

With regard to "aided minority educational institutions" the court observed that it does not cease to be a minority institution the moment the grant-in-aid is received by it. Accordingly, it was held that they would be entitled to have the right of admission to students belonging to the minority group and at the same time, they would be required to admit a reasonable extent of non-minority students, so that the rights under Article 30(1) are not absolutely impaired and further the citizens' rights under Article 29(2) are not infringed. The court clarified that the reasonable extent would vary (i) from the types of institutions, (ii) the courses of education for which admission is being sought, and (iii) other factors like educational needs. The state government concerned has to notify the percentage of non-minority students to be admitted in the light of the above said observations. Observance of inter se merit amongst the applicant belonging to the minority group could be ensured. With regard to "aided professional
institutions", it can also be stipulated that passing of the common entrance test (CET) held by the state agency is necessary to seek admission. As regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of common entrance test held by the state agency followed by the counselling wherever it exists.\textsuperscript{300} According to Khare J it is necessary that minority be given preferential rights to admit students of their own community in their own institutions in a reasonable manner.\textsuperscript{301} Quadri J also agreed with the majority on this question. Variava and Bhan 11 also agreed with the conclusions of both the Chief Justice as well as Khare J that Article 29(2) applies to Article 30.\textsuperscript{137} However, Ruma Pal J disagreed with the majority opinion insofar as it holds that Article 29(2) is applicable to Article 30(1) of the Constitution.\textsuperscript{302}

\textit{Question No. 5(a)}. Whether the minorities' right to establish and administer educational institution of their choice will include the procedure and method of admission and selection of students?

In this regard the court held that a minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not tantamount to maladministration. The court further pointed out that even an unaided minority institution ought not to ignore the merit of the students for admission.\textsuperscript{303}

\textsuperscript{300} Ibid. at 615-16.
\textsuperscript{301} Ibid. at 668, 671 and 708.
\textsuperscript{302} Ibid. at 647-48.
\textsuperscript{303} Ibid. at 588-89 and 709.
Question No. 5(b). Whether the minority institution's right of admission of students and to lay down procedure and method of admission, if any, would be affected in any way by the receipt of state aid?

To this question the court answered that while giving aid to the professional institutions, it would be permissible for the authority giving aid to prescribe bye-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with reservation policies of the state *qua* non-minority students. The merit may be determined either through a common entrance test (CET) conducted by the university or the government concerned followed by counselling, or on the basis of an entrance test conducted by the individual institution. In the case of such institution, it will be permissible for the government or the university to provide that consideration should be shown to the weaker section of the society.\(^{304}\) All the judges except Ruma Pal J agreed on this point.\(^{305}\)

Question No. 5(c). Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

In this regard the court held that so far as statutory provisions regulating the facets of admission are concerned, in case of unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management,

\(^{304}\) Ibid.

\(^{305}\) Ibid. at 647.
like the appointment of staff, teaching and non-teaching, and administrative
control over them, the management should have the freedom and there should
not be any external controlling agency. However, a rational procedure for the
selection of teaching staff and for taking disciplinary action has to be evolved
by the management itself.

For redressing the grievances of employees of aided and unaided institutions
who are subjected to punishment of termination from service, a mechanism will
have to be evolved, and in the court’s opinion, appropriate tribunals could be
constituted, and till then, such tribunals could be presided over by a judicial
officer of the rank of district judge.

The state or other controlling authorities, however, can always prescribe the
minimum qualification, experience and other conditions bearing on the merit of
an individual for being appointed as a teacher or a principal of any educational
institution.

Regulations can be framed governing service conditions for teaching and other
staff for whom aid is provided by the state, without interfering with the overall
administrative control of the management over the staff. Fees to be charged by
unaided institutions cannot be regulated but no institution should charge
capitation fee. All the judges were in agreement on this point.306

Question No. 6 (a). Where can a minority institution be operationally located?
Where a religious or linguistic minority in state A establishes an educational
institution in the said state, can such educational institution grant preferential
admission/reservations and other benefits to members of the religious/linguistic
group from other states where they are non-minorities?

306 Ibid. at 589-9, 616-17, 621 and 709-10.
Question No. 6(b). Whether it would be correct to say that only the members of that minority residing in state A will be treated as the members of the minority vis-a-vis such institution?

Question No. 7. Whether the member of a linguistic non-minority in state can establish a trust/society in another state and claim minority status III that state?

The Supreme Court did not answer questions 6 (a), 6(b) and 7 and it was observed that a regular bench would deal with them.307

Question No. 8. Whether the ratio laid down by this court in St. Stephen's College (St. Stephen’s College v. University of Delhi) is correct? If no, what order?

The majority upheld the basic ratio laid down by the Supreme Court in St. Stephen’s College case. However, rigid percentage of the minority and non-minority students who are to be admitted in the minority institutions was not stipulated. The court observed that it has to be left to the authorities to prescribe a reasonable percentage having regard to (i) the type of institution; (ii) population; and (iii) education needs of the minorities.308 Ruma Pal J and Variava and Bhan JJ, in their separate opinion did not agree with the majority opinion and observed that the ratio laid down in St. Stephen s College case is not correct. According to them once state aid is taken and Article 29(2) comes into play, then no question arises of trying to balance Articles 29(2) and 30(1) and Article 29(2) must be given full effect.309

Question No. 9. Whether the decision of this court in Unni Krishnan, J.P. v. State of A.P. (except where it holds that primary education is a fundamental

307 Ibid, at 590, 621 and 710.
308 Ibid., at 590.
309 Ibid, at 667 and 710.
right) and the scheme framed thereunder require reconsideration/modification and if yes, what?

With regard to this question the court observed that the scheme framed by this court in *Unni Krishnan* and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.\(^\text{310}\)

*Question No. 10.* Whether the non-minorities have the right to establish and administer educational institution under Articles 21 and 29(1) read with Articles 14 and 15(1), in the same manner and to the same extent as minority institutions? and

*Question No. 11.* What is the meaning of the expression “education” and “educational institutions” in various provisions of the Constitution? Is the right to establish and administer educational institutions guaranteed under the Constitution?

The court held that expression “education” in the Articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression “educational institutions” means institutions that impart education, where “education” is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, and to minorities specifically under Article 30. All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this

\(^{310}\) Ibid. at 590, 620 and 710-11
right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group in the manner as discussed in this judgment.\textsuperscript{311}

It is submitted that from the perusal of the above findings of the Supreme Court it is clear that the court did not answer four out of eleven questions it had formulated in the beginning when the regular hearing of the case started. In other words, the Supreme Court, instead of settling the law as binding precedent under Article 141 of the Constitution, has left open at least four important areas in this field and thus more litigations may come. Further, in answering question no.3, the court held that aided minority institutions would admit "a reasonable extent of non minority students" which expression appears to be vague. No doubt that the court has mentioned certain indicators which shall be kept in mind while determining the "reasonable extent" but this will further open the gate for more litigation. In fact the court has left it to the state to notify the percentage of non-minority students to be admitted in the minority institutions. This will also mean that the law in this regard will vary from state to state. Similarly, while answering question no. S (c) the court has not made it clear as to when the fee charged by the unaided institutions would take the colour of "capitation fee" which is not permissible.

In the case of \textit{Manager, St. Thomas U.P: School v. Commissioner & Secy. to General Education Deptt.},\textsuperscript{312} the question before the Supreme Court was whether an institution established by an individual with his own means can subsequently acquire the status of minority institution? In this case a Christian had purchased land and set up the appellant school in the year 1964 by making use of his personal funds. It was in the year 1980 that it was bought by the then

\textsuperscript{311} Ibid. at 591 and 711.

\textsuperscript{312} (2002) 2 SCC 497.
Archbishop of Thiruvananthapuram of the Malankara Syrian Christians. The court held that it cannot be said to be non-minority institution merely on the ground that initially the school in question was established by an individual belonging to the minority.

In Society of St. Joseph's College v. Union of India\textsuperscript{313} it was held that Article 30 (I-A) requires the state, that is to say, Parliament in case of central legislation or a state legislature in the case of state legislation, to make a specific law to provide for the compulsory acquisition of the property of minority educational institutions, the provisions of which should ensure that the amount payable to the educational institution for acquisition of its property will not be such as will in any manner impair the functioning of the educational institution.

In the case of Father Thomas Shingare v. State of Maharashtra\textsuperscript{314} there was a complaint against an unaided institution run by a religious minority for demanding capitation fee. The court on perusal of facts found that the State of Maharashtra by a statute provided for prohibition of capitation fee, defined as being in excess of fees “approved” by the state government for unaided institutions, but the state government had not actually approved any rates of fee. Accordingly, the court held that on the basis of facts mentioned above a criminal complaint could not be sustained. However, no final pronouncement was made by the court as to the question whether legislature has the right to fix an upper limit regarding fees chargeable by unaided minority institutions.

\textbf{III. Permissible Limits of State Interfere in Administration of a Minority Educational Institution}

What is the extent to which the state can interfere with the administration of a minority educational institution has always been a vexed question before the

\begin{itemize}
\item \textsuperscript{313} (2002) 1 SCC 273.
\item \textsuperscript{314} (2002) 1 SCC 758.
\end{itemize}
courts. It has, however, consistently been held that the state had a limited power of regulation in respect of minority educational institutions. It cannot control the establishment and management of such institutions. The power to make appointment of teachers and other staff is a part of regular administration and management of the school. In *Sindhi Education Society v. Chief Secretary, Govt. of NCT of Delhi*, the impugned rule 64(1)(b) of the Delhi Education Rules, 1973 made under the Delhi Education Act, 1973 read:

64. (1) No school shall be granted aid unless its managing committee gives an undertaking in writing that......

(b) it shall fill in the posts in the school with the Scheduled Caste and the Scheduled Tribe candidates in accordance with the instructions issued by the Central Government from time to time.

The appellant, a linguistic minority running a school receiving grant-in-aid from the government, was required to furnish the undertaking as required under the above rule for receiving grant. The appellant contended that being a minority institution, it was not obligatory for it to give effect to the government's reservation policy. The Supreme Court had no difficulty in holding that the Sindhi Education Society was not state under article 12 of the Constitution so as to apply the policy of reservation formulated under Articles 15 and 16. Whereas article 15 expressly excludes minority educational institutions from the purview of clause (5) of Article 15, reservations in appointments and employment can be made only in respect of state services. The minority institution not being 'state', no reservations could be insisted upon them. The court, therefore, held that rule 64(1)(b) could not apply to the appellant and the

aid to the appellant cannot be denied on the ground of not furnishing the undertaking stipulated under the above rule.

In *Kolawana Gram Vikas Kendra v. State of Gujarat*,\(^{316}\) by a circular issued by the state government, all government-aided educational institutions of the state (primary, middle and higher secondary schools and colleges, *Sanskrit pathshalas, sangeet vidyalayas*) were directed not give effect to any appointment in teaching and non-teaching posts without prior approval of the government/competent authority. The appellant, a minority institution getting 100 per cent grant from the state, had selected some candidates in direct pay scheme but the district education officer refused permission for the same. The appellant had not intimated the department before making the selection. The appellant contended that the circular was violative of Article 30 of the Constitution as it amounted to interference in the administration of a minority educational institution. The Supreme Court did not accept the contention on the ground that the circular was meant only for ensuring that the proposed appointment was within the framework of the rules considering the workload and the availability of the post in the institution and whether the selected candidate possessed the prescribed qualifications. This was necessary to ensure that the grant received from the state is properly utilized. The circular did not require as to who should be appointed and did not interfere with the internal administration of the minority educational institution.

In *G. Vallikumari v. Andhra Education Society*,\(^{317}\) the controversy related to dismissal of an employee of the respondent which was a registered society running a private linguistic minority school receiving 95 per cent aid from the government. After an enquiry conducted against the appellant clerk on the

\(^{316}\) 2009 (13) SCALE 361: (2010) 1 SCC 133.

charges of neglecting duties, availing leave without prior permission absence from duty, flouting directions of the management, etc., she was removed from service by an order passed by the chairman of the managing committee. No prior approval of the director as required under section 8(2) of Delhi Education Act, 1973 was obtained for removal. The Supreme Court, relying on earlier decisions of the court held, inter alia, that section 8(2) of the Act interfered with the rights of minority educational institutions and, therefore, the same was inapplicable to such institutions. On facts of the case, the court found that after the enquiry report was sent to the appellant to show cause and receipt of the representation by the appellant, the chairman passed the impugned order without adverting to the contents of the representation and applying his mind. The court held:

There is no escape from the conclusion that the order of punishment was passed by the Chairman without complying with the mandate of the relevant statutory rule and the principles of natural justice. The requirement of recording reasons by every quasi-judicial or even an administrative authority entrusted with the task of passing an order adversely affecting an individual and communication thereof to the affected person is one of the recognised facets of the rules of natural justice and violation thereof has the effect of vitiating the order passed by the concerned authority.

In view of the above, the court struck down the impugned order but instead of remitting the matter for disposal afresh, the court altered the punishment from


removal to stoppage of three increments without cumulative effect and payment of 20 per cent of back wages.

In Committee of Management Kanya Junior High School Bal Vidya Mandir, Etah, U.P. v. Sachiv, U.P. Basic Shiksha Prishad the Supreme Court held that merely because an educational institution is managed by a person belonging to a particular religion it would not ipso facto make the institution an institution run and administered by minority. It was also held that the rights of minorities under Articles 29 and 30 of the Constitution are no higher rights but mere additional protection conferred on minorities and that minority communities have no higher rights than majority communities. The court referred to its earlier decision in P. A. Inamdar v. State of Maharashtra. This proposition appears to be contrary to ratio of the decisions of larger benches like T. M. A. Pai Foundation v. State of Karnataka and Ahmedabad St. Xaviers College v. State of Gujarat. It also appears to be contrary to the ruling of 13 judges decision in Kesavananda Bharati v. State of Kerala wherein it was held that minority rights form part of the basic structure of the Constitution. Can such a right which form part of the basic structure of the Constitution be held as nothing more than or higher than the rights of the majority? The very existence of Article 30 of the Constitution appears to be in jeopardy. Are the Articles 29 and 30 mere toppings on the constitutional cake as a decorative piece or as a precautionary re-statement of the rights already available to the majority?

---

323 (1975) 1 SCR 173.
In *Secretary, Malankara Syrian Catholic College v. T. Jose*[^325] the Supreme Court examined the right of the minority educational institutions to have a person of its choice as principal in the context of the Kerala University Act, 1974. The freedom to choose the person to be appointed as principal has always been recognized as a vital facet of the right to administer the educational institution. This has not been, in any way, diluted or altered by *T. M. A. Pai*.[^326]

Having regard to the key role played by the principal in the management and administration of the educational institution, there can be no doubt that the right to choose the principal is an important part of the right of administration and even if the institution is aided, there can be no interference with the said right. The fact that the post of the principal/headmaster is also covered by state aid, will make no difference. The Supreme Court while setting aside a judgment of the Kerala High Court demonstrated that the interpretation of minority rights by the 11 judge bench decision in *T. M. A. Pai Foundation* has not changed the prerogative right of the minority management to appoint a principal of their choice even in an aided educational institution. In spite of all the previous declarations by the Supreme Court, the controversy arose since there were some observations in the *T. M. A. Pai* decision by the eleven judge bench regarding the lesser autonomy of minority institutions which receives governmental aid. Now the court has clarified that those observations in that case cannot mean to take away the right to select and appoint the principal of their choice even in aided institutions. While ruling so the Supreme Court also examined what are the additional control the government or university can exercise in view of the grant of aid to minority institutions.


In *Usha Mehta v. State of Maharashtra*\(^{327}\) the petition stemmed from a policy decision made by the Maharashtra State Government whereby study of Marathi language was made compulsory throughout the schools in that state. Consequently, the English-medium schools run by Gujarati linguistic minorities were compelled to teach four languages as against the accepted “three language formula”\(^{328}\). The Supreme Court held that the right of minorities to establish and administer educational institutions of “their choice” under Article 30(1) read with Article 29(1) of the Constitution would include the right to have choice of medium of instruction. It is difficult to read Articles 29 and 30 in such a way that they contain the negative right to exclude the learning of regional language. But this exercise of “choice” of instructive language in schools by the linguistic minorities is subject to the reasonable regulation imposed by the state concerned. Thus, a particular state can validly take a policy decision to compulsorily teach its regional language. In other words, the state can impose reasonable regulation on institutions covered by Article 30 for protecting the larger interest of the state and the nation\(^{329}\).

**IV. Admission of Minority Students**

The admission of students is an area which must be within the control of the minorities if their right to administer their educational institutions has any meaning. Other aspects of the right to administer that we have discussed are largely only of an instrumental value. Those rights are meant to enable the minorities to impart education in their own mode, and also of their own kind to


an extent, to the students they want to educate. This means that they must have the right to choose or select the students. Of course, like any other right, it is also not absolute and cannot be exercised arbitrarily. Still, their preferences, and their chosen mode of selecting the students, unless irrational, have to be honoured. And, if there are certain express constitutional limitations, they have to be obeyed, or at least adjusted with their right of admission of students.

But, the scope of the right has generally been a matter of some controversy. In the beginning, it was contended that to retain the minority character of their institutions, the minorities must not admit students from outside their own community. This assertion was made quite emphatically in *re Kerala Education Bill* 330 and was rejected. Attention was drawn to the provisions of Article 29(2) which provide that “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.”331 It was pointed out by the Court that if the above contention were accepted, it would mean that the minority institutions, as minority institutions, were not entitled to get any State aid. Now, the situation has changed and Article 29(2) is being perceived as a limitation on the right of the minorities to admit students of their choice.332 The demand for admission to minority institutions, especially those which are being run by the Christian community, is progressively increasing; on the other hand, these minorities are being more mindful to accommodate their own community candidates. The reasons for this phenomenon are many. It is believed that while educational standards are coming down in general


educational institutions, the minorities are able to maintain standards in their own institutions. Again, while the teaching of English and imparting of education through English medium is being in a way discouraged, the demand for admission to English-medium schools is increasing. This demand is being largely met by the minority institutions administered by the Christian community. And, above all, there is a rush for admission to professional courses such as engineering and management. Some of these institutions are managed by minorities. They may be inclined to give preference to the candidates of their own community in these institutions. It is this new phenomenon which has opened the debate in a big way on the interrelationship between Articles 29 (2) and 30(1).

The Supreme Court decision in *St. Stephen’s College, Delhi v. University of Delhi*\(^\text{333}\) gives us a glimpse of the new issues that have emerged and how they are to be resolved in the changed context. But before that, we have to take note of the Supreme Court decision in *Sidhajbhai Sabhai v. State of Bombay*,\(^\text{334}\) because it is in that case that for the first time a minority institution was asked by the Government to reserve a certain percentage of the seats for admission to the teachers’ training course for the candidates nominated by the Government. To be specific, the Government, acting under the Rules, asked the petitioners, as it had asked the managers of other private training institutions, to reserve 80 per cent of the seats for the candidates nominated by the Government failing which the institution could lose the grant and even recognition. The Supreme Court held that the Government’s order, and the Rules under which it had acted, were violative of the petitioner’s right under Article 30(1) of the Constitution. However, this case does not throw any light on minority institutions’ obligations.


\(^{334}\) AIR 1963 SC 540: (1963) 3 SCR 837.
under article 29(2) and on the relationship of this provision with Article 30(1). For that we turn to *St. Stephen's College* case.\(^{335}\)

St. Stephen's College, Delhi is an affiliated college of the Delhi University and it is administered by the Christian minority community belonging to the Church of North India. The same church also manages the Allahabad Agricultural Institute. The Institute had reserved 50 per cent of its seats for the Christians and that was impugned for violation of Article 29(2) of the Constitution which prohibits discrimination, inter alia, on the basis of religion by any State maintained or State-aided educational institution; and the Allahabad Agricultural Institute is State-aided. The Allahabad High Court had held the 50 per cent reservation for Christians to be violative of Article 29(2) and against that decision an appeal had been filed in the Supreme Court. This appeal was heard by a constitution bench along with the controversy relating to the admission process in *St. Stephen's College* which is also State-aided. Admission process in *St. Stephen's* was impugned on two counts: First, the college had been taking admissions by interviewing the candidates whereas the University required it to take admissions strictly on the basis of marks obtained in the qualifying examination. Second, the college itself had admitted that it gave preference to Christian candidates. All the applicants were short-listed on the basis of their marks in the qualifying examination. Thereafter, they were interviewed by a team of teachers and the admission was finalised on the basis of consensus arrived at amongst the members of the team. The Christian candidates were given some weightage for being eligible to be shortlisted. The assertion of the college was that they were not given any other kind of preference. As a proof of this the college relied on the admission figures which showed that the total admission of Christian candidates in different years ranged

between six to ten per cent. The two Christian institutions asserted that the admission process adopted and practised by them—admission by interviewing the candidates, preference being given to the Christian candidates at the time of short listing, and 50 per cent reservation made by the Allahabad Agricultural Institute for Christian candidates—was protected as a part of their right of administration under Article 30(1) of the Constitution. The bench, by a majority of 4:1 agreed.

As far as the religion-based reservation or preference is concerned, the majority appears to be arguing on a relatively strong ground, even though judicial observations in earlier cases and statements made in the Constituent Assembly are to the opposite effect, and the dissenting judge (Kasaliwal, J.), heavily relied on them. Shetty, J., speaking for the majority, persuasively argued that there was an apparent conflict between Article 29(2) and Article 30(1), and that they had to be harmoniously construed. By so doing he reached the conclusion that the minority educational institutions can reserve up to a maximum of 50 per cent seats for the candidates belonging to their own community. After all, the minorities establish the institutions primarily to educate the children and students of their own community, and if in the admission process they get excluded, the whole purpose would get frustrated. And the possible suggestion that the minorities can accommodate their undeserving candidates by not seeking the State aid, is not only unrealistic but would also possibly conflict with clause (2) of Article 30.

However, St. Stephen's mode of admission by interview in defiance of the University's prescribed mode of admission poses a more difficult problem. Let us accept the proposition that the minority institution's right of admission includes the right to choose its own distinct mode of admission. Let us also take the stand that too much emphasis on standardisation and uniformity in educational matters can prove to be counter-productive by discouraging...
innovation and experimentation. But the main hurdle in the case lay in the earlier constitution bench’s decision in *Ajay Hasia v. Khalid Mujib Sehravardi*,\(^{336}\) that oral test could be used only as a supplemental measure and that not more than 15 per cent marks could be allocated for the oral test. It is submitted that the majority judgment does not offer any coherent reason for departing from that ruling. St. Stephen’s own response was also evasive which the dissenting judgment of Kasaliwal, J. fully highlights. It appears that on this issue the majority judgment is perhaps grounded in some inarticulate premise. It was one of the refrains of St. Stephen’s that the interview method had been operative in that college for more than 100 years and that it had been working well. That appears to have influenced the majority.

The whole question was reconsidered by the 11-judge bench of the Supreme Court in *T. M. A. Pai Foundation v. State of Karnataka*.\(^{337}\) By a majority of 7:4, the bench generally agreed with the approach of the majority in *St. Stephen’s College*; but prescribing of a rigid percentage of 50 per cent was disfavoured. Instead, it was held that the authorities should fix a suitable percentage in each case taking into account the type of the institution, population, and the educational needs of the minorities. The remaining four judges were divided into two blocks of two each, holding two extreme views. Syed Shah Muhammad Quadri and Ruma Pal, JJ. took the view that Article 29 (2) was not applicable to minority institutions, whereas S. N. Variava, J., speaking for himself and Ashok Bhan J., said that aided minority institutions were as much subject to Article 29(2) as any other aided institution. However, both the blocks, despite their apparent doctrinal extremity, also left room for some flexibility. Thus, Quadri and Ruma Pal, JJ., did not contemplate minority institutions limiting the admissions exclusively to the candidates of their own community.


Similarly, Variava and Ashok Bhan, JJ., did not rule out the scope for the minority institutions to give some preference to the candidates of their own community in an admission process which was otherwise fair and transparent. The majority also accepted the proposition that the minority institutions could devise their own distinct mode or modes for admission. The dissenting judges do not appear to have taken a different view on this point. It is, of course, assumed that the distinct mode of admission chosen by a minority institution will be rational and transparent rather than the one which leaves room for illegitimate favours and disfavours or for arbitrariness.

V. Constitution of Managing Committee

The essence of the power of management lies in the right to decide as to who the managers shall be, i.e., the right to constitute the managing committee. Therefore, if a law provides for the nomination of certain outsiders on the managing committee, it would be clearly violative of Article 30(1). Nor can the law stipulate some such condition that the managing committee should be approved by the Government or some other designated official or official agency. The Supreme Court decisions that we give now illustrate these propositions fully. In *State of Kerala v. V. R. M. Provincial,*\(^{338}\) the constitutionality of certain sections of the Kerala University Act, 1969, was under attack for violation of Article 30(1) insofar as they applied to educational institutions being run by the minorities. Some of those sections related to the constitution of the managing committee. The Act required every educational agency running an educational institution to constitute a managing committee for the same which was accorded a corporate status. The agency was to nominate six out of eleven members and the remaining five places were to be occupied by the Manager, Principal, a teacher from amongst the permanent


187
members of the teaching staff, a nominee of the Government, and a nominee of the University. The manager was to be the President of the committee and members were to hold office for a period of four years from the date of the constitution of the committee. The committee had the total control over the management and was in no way answerable to the educational agency. The Supreme Court held that the relevant provisions of the law were void for violation of Article 30(1). From the judgment it is not clear whether the provisions of the Kerala University Act were held to be void because Article 30(1) brooked no interference with the choice of the minority educational agency or because the managing committee was so evenly divided between the designated members and the members nominated by the educational agency that it could often happen that the designated members prevailed over the nominated members.

The facts in *D. A. V. College Jullundur v. State of Punjab*\(^3\) showed that the Statutes of Guru Nanak University, Amritsar, Act, 1969, inter alia, required that every affiliated college shall have a managing committee of not more than 20 members approved by the senate of the University and that it would include, among others, two representatives of the University and the principal of the college ex officio. The Supreme Court held that the provision was violative of article 30(1) of the Constitution. In *Ahmedabad St. Xavier's College Society v. State of Gujarat*,\(^4\) the vires of some of the provisions of the Gujarat University Act, 1949, as amended by the Gujarat University (Amendment) Act, 1972, was in issue. Section 33A(1)(a) provided that every affiliated college “shall be under the management of a governing body which shall include amongst its members the Principal of the College, a representative of the University nominated by the Vice-Chancellor, and three representatives of the teachers of the college and at

\(^3\) *(1972) 2 SCC 417.*

\(^4\) *AIR 1974 SC 1389; (1974) 1 SCC 717.*
least one representative each of the members of the non-teaching staff and the students of the college, to be elected respectively, from amongst such teachers, members of the non-teaching staff, and students. This provision was also held to be violative of article 30(1) of the Constitution because it interfered with the right to administer given to the minorities.

The above decisions came for interpretation before a three-judge bench of the Supreme Court in *Gandhi Faize-E-Am College, Shah-Jahanpur v. University of Agra*.\(^\text{341}\) In issue was the vires of Statute 14A of the university. It required the managing committee of every college affiliated to the University to consist of, among others, the Principal of the college and a teacher of the college selected by rotation on the basis of seniority who was to be on the managing committee for a period of one year. The bench was divided 2:1. Krishna Iyer J. delivered the majority judgment for himself and A.C. Gupta, J. and upheld the validity of the statute. KK Mathew, J. dissented. While upholding the validity of the statute, Krishna Iyer, J. emphasised on two facts: First, he pointed out that all along it has been the view of the Court that regulations which were facilitative and not restrictive in the management of the institution, were permissible; Second, the determinative factor in the earlier cases was the induction of rank outsiders and induction of proportionately large number of members who were not the choice of the minority community. By contrast, the facts of the present case showed that the forced induction was only of two members and that too of the Principal and a teacher who were themselves the choices of the minority community and it was on them “that the tone and temper of the educational institution” depended. Defining the kind of regulation that would be permissible in the area of the constitution of the managing committee, he observed:

\(^{341}\) (1975)2 SCC 283.
Where the object and effect is to improve the tone and the temper of the administration without forcing on it a stranger, however superb his virtues be, where the directive is not to restructure the governing body but to better its performance by a marginal catalytic induction, where no external authority's fiat or approval or outside nominee is made compulsory to validate the Management Board but inclusion of an internal key functionary appointed by the autonomous management alone is asked for, the provision is salutory and saved. ... 

The disagreement of the dissenting judge was not on the details but on the fundamental issue whether the composition of the managing committee could be subjected to any kind of regulation at all. Mathew, J. thought that the regulations could define the mode of working of the committee and not its composition. He said:

The right to shape its creation is one thing: the right to regulate the manner in which it would function after it has come into being is another. Regulations are permissible to prevent maladministration but they can only relate to the manner of administration after the body which is to administer has come into being.

If the Government or any other official agency does not have the power to interfere unduly with the constitution of the managing committee, a fortiori, the management of the institution cannot be taken over by the Government except when the minority community itself makes an unequivocal request for the same. But the surprising fact is that, despite this obvious proposition, it has been necessary for the Supreme Court to iterate it and, frequently, to declare the provisions of law to the contrary, invalid. Thus, the Supreme Court held, In Re:

---

342 Ibid. p. 291.

343 Ibid. p. 301.
The Kerala Education Bill, 1957, clause 14 of the Bill to be invalid because it authorised the Government in certain contingencies to take over the management of the institution for a limited durations.\(^{344}\) Similarly, in *State of Kerala v. V. R. M. Provincial*,\(^{345}\) the Supreme Court pronounced Section 63(1) of the Kerala University Act, 1969 to be violative of Article 30(1) because the aforesaid provision provided for temporary takeover of the management of an educational institution in certain contingencies. The Court held that the provision was void in its application to minority institutions. The facts of *B. S. M. Education Board, Patna v. M. C. of M. H. A. College*\(^{346}\) present some difficulties. In the two cases referred to earlier, the Court was dealing with abstract provisions contemplated to be applied in certain contingencies. In the present case, the respondent institutions were actually found to be in breach of their obligations and they had failed to pay salary to teachers despite directions from the Government. Consequently, the Bihar State Madrasa Board constituted under the Bihar State Madrasa Board Act, 1982, in the exercise of its statutory powers, dissolved the managing committees of the institutions and appointed in their place ad hoc managing committees. Both the Patna High Court and the Supreme Court held that the relevant provision of the Act empowering the Board to intervene in the matter was violative of article 30(1). But the judgments do not enlighten us as to what the State should do in such circumstances to tackle the problem created by derelict managing committees. Perhaps, it would be competent for the State to suspend or withdraw recognition and aid. But then, it will have to face the wrath of innocent students and teachers. This leads us to a blind alley and in such a situation the decisional law will have to find some escape route. The whole thing cannot be dismissed as the


\(^{345}\) (1970) 2 SCC 417.

product of an imaginary pessimist nor does it cast any stigma on minorities as such. Management disputes giving rise to ongoing litigation are recurrent problems in private educational institutions and nothing can be ruled out as mere figment of imagination.

Now we can revisit the Aligarh Muslim University case\(^{347}\) which was discussed earlier in connection with the right to establish an educational institution. As pointed out there, a University partakes of the regulatory power of the State. Consequently, the State cannot exercise its regulatory function in the case of a University externally or from outside the University as it can do in the case of other institutions: it has to do it by making safeguards within the University system itself. In other words, the minority community cannot claim that autonomy in the constitution of University bodies as other institutions can claim. Moreover, if an institution is not merely Government aided but Government maintained and its composition is regulated by law, a provision would be of doubtful validity if it creates disqualifications for membership of relevant bodies purely on the ground of religion, caste, or gender. In the particular case, the grievance of the petitioners was that the amendments made in 1951 and 1965 by Parliament in the Aligarh Muslim University Act of 1920 were, among other things, violative of Article 30(1) of the Constitution.

The principal change brought about by the 1951 Amendment Act was to omit the provision which made a non-Muslim ineligible to be a member of the court. Perhaps, this was necessary after the commencement of the Constitution to bring the 1920 Act in consonance with the new republican Constitution. It appears that the Aligarh Muslim University realised it and the change introduced by the 1951 Act was not challenged then. It is the 1965 Amendment Act which really created the controversy. The principal innovation introduced

by this Amendment was that in the place of the court, it conferred on the small body of the Executive Council, the crucial powers in the matter of the governance of the University. There is no denying the fact that the court is more democratically constituted than the Executive Council and it is better rooted in the academic fraternity of the University and others who keep interest in the institution. But, this change only reflected the new thinking of the democratic Governments at the Central and State levels in independent India that makes it easier for Government-appointed Vice-Chancellors to survive administratively. This undemocratic idea of academic governance is open to much criticism; but this in no way suggests that, after the controversial amendments, the Muslim minority's say in the affairs of the University was reduced, or was intended to be reduced. What really happened was that the scope for bureaucratic interference and for induction of hand-picked people in the University considerably increased. It is unfortunate that the amendments were not attacked for what they were, and the Court in the circumstances validated them by giving the reason that the University was not a minority established institution. The confusion became worst confounded when Parliament chose to override the Court by enacting an Act that the University was a minority University. The Allahabad High Court has rightly held that the Court's decision could not be reversed by law.348

It would appear that in case a minority community intends to establish an institution like University, its aspirations should be accommodated by giving the institution the status of a deemed University under the 1956 UGC Act, or by enacting another law which allows scope for the establishment of a private University.

348 See Aligarh Muslim University Aligarh v. Malay Shukla, (2) AU 528 (2006).
VI. Right of the Minorities to Establish and Administer Educational Institutions

The right of the minorities to establish and administer educational institutions of their choice as interpreted by the courts has given a somewhat privileged position to the minorities. This right came up for adjudication once again in *St. Stephen's College v. University of Delhi*[^349]. St. Stephen's College was a minority established and administered college and it had its own admission procedures. The University of Delhi to which St. Stephen's College was affiliated issued circulars regulating the admission procedures. The circular required the colleges affiliated to it to give admission strictly according to merit. St. Stephen's College was alleged to have been not acting in accordance with the above circular. A student had filed a writ petition in the Delhi High Court and the court had issued an order staying the announcement of the admissions by the college until the disposal of the writ petition. St. Stephen's College, thereafter, filed a writ petition in the Supreme Court under Article 32. The college contended that the university circular violated its fundamental right guaranteed under Article 30. From the beginning the college had been exercising certain obvious and inherent managerial powers, one of them being to fix reasonable dates for admission and the other was to interview the candidates. The provision for interview according to the petitioners, was an integral part of the administration of the college and selection on the basis of marks alone would be unreasonable and violative of the right under Article 30. Another appeal filed by the Allahabad Agricultural Institute (AAI) under Article 133(1)(a) of the Constitution was also heard along with the above writ petition. The AAI was a minority institution established and administered by the Christian minority. They reserved 40 per cent seats for church sponsored students and this was challenged before the Allahabad High Court and the High Court.

Court having decided against, AAI came in appeal to the Supreme Court. The court was required to consider three questions:

(i) Was St. Stephen's College a minority institution?
(ii) Was it bound to act according to the circular issued by the University of Delhi; and
(iii) Could St. Stephen's College and AAI give preference to Christian students while giving admissions?

On facts, the first question was answered in the affirmative. Regarding the second question the court observed that the interview method adopted by St. Stephen's College was quite fair. The court, therefore, held that St. Stephen's College was not bound to abide by the university's circular.

The third question was crucial. On behalf of the respondents, it was contended that any preference in admission to students on the ground of their religion violated article 29(2) of the Constitution which prohibited discrimination in respect of admission to any educational institution, on the ground of religion, race, caste, language or any of them. On the other hand, the petitioners/appellant contended that such preference to students of their own religion was the main purpose of establishing and administering such educational institutions by the minorities and, therefore, must form part of the right to establish and administer educational institutions guaranteed by article 30. The court had to resolve the conflict between articles 29(2) which mandates equality in admissions to educational institutions and prohibits discrimination on the ground of religion or caste and article 30 which guarantees preservation of the identity of the minority based on religion or language. Jaganmohan Shetty J, on behalf of Kania J (as he then was), Fatima Beevi and Yogeshwar Daya, and himself held that the minority educational institutions were entitled to prefer their community

\[350\] Ibid, at 614 (SCC).
candidates to maintain the minority character of the institutions. The state might regulate the intake in this category with due regard to the needs of the community in the area which the institution was intended to serve. However, the court cautioned that “in no case such intake shall exceed 50 per cent of the annual admission.” The minority institutions shall make available at least 50 per cent of the annual admission to members of communities other than the minority community. Kasliwal J, dissenting, however, held that the right conferred on the minorities to establish and administer educational institutions under article 30(1) was not absolute and was subject to reasonable regulations. If a minority had established and administered an educational institution without receiving any aid out of state funds, clause (2) of article 29 would not come into play. However, if such educational institution received aid out of state funds, it would be subject to the rigour of clause (2) of article 29 and it could not deny admission on the ground of religion, race, caste, language or any of them. The judge said:

The controversy involved in the cases in hand before us is between clause (2) of Article 29 and clause (1) of Article 30. The framers of the Constitution were fully knowing about the necessity of granting protection of interests of minorities but at the same time they wanted that if any educational institutions are run by receiving aid out of state funds then no citizen could be denied admission on the grounds only of religion, race, caste, language or any of them. The rights conferred on the minorities under Article 29 (1) or Article 30(1) are enabling ones while clause (2) of Article 29 is a mandate. The right guaranteed under Article 29(2) is a special right which would prevail over the general right guaranteed to the minorities under Article 30(1). It is a well known rule of construction that special law prevails over the general law ... If the contention raised on behalf of the College is accepted then it would necessarily involve the

---

351 Ibid. at 633(SCC).
importation of the words "for their community" in Article 30(1). Clause (2) of Article 29 does not make any exception to any educational institution established by the minorities and it clearly provides in unmistakable terms that it applies to any educational institution maintained by the State or receiving aid out of State funds whether run by a minority or majority.

It is respectfully submitted that the dissenting view is preferable. In Director, L.F. Hospital v. State, L.F. Hospital v. State, a regulation made by the Kerala Midwives and Nursing Council under Section 36 of the Travancore-Cochin Nurses and Midwives Act, 1953 which provided for age limit for admission and restricted the percentage of seats available to the management of a minority institution was held to be violative of the right guaranteed by Article 30. The regulation could also have been struck down as being ultra vires the regulation making power because the power to make regulations was confined to the conduct of examinations and matters ancillary thereto. A minority institution was, however, bound to substantially comply with various conditions laid down in the rules for admitting students.353

VII. Right to Select and Appoint Principal and Teachers in a Minority Institution

The Principal and teachers undoubtedly constitute the backbone and soul of any educational institution. Therefore, the right of the minorities to administer their educational institutions will become fictitious if they are not conceded the right to have the decisive say in the selection and appointment of Principal and teachers of the institution. Since selections are done through the instrumentality of a selection committee, in practical terms the right becomes the right to constitute the selection committee. Since the obvious purpose of Article 30(1) right is to enable the minorities to provide for their children to get education in


an atmosphere which is infused with the philosophy of life of the community, they would like to hire teachers who can be trusted to translate that aspiration into reality. Naturally enough, the State’s regulatory power must also exert itself to ensure that the teachers are competent and for that it can prescribe certain eligibility requirements and minorities cannot claim any exemption from that. Still, they are not bound to appoint the person who from a purely academic angle is the best: a lesser qualified person, but fulfilling the eligibility criteria, can be selected who fits in their scheme of things. The State may also insist on following a procedure which ensures that reasonable publicity is given of the impending selection so that maximum number of eligible candidates may apply and that short listing of applicants is made on some rational basis and persons called for interview are given reasonable notice of the same. The State can further devise some machinery and procedure for checking that selections have been done according to prescribed rules and by following the prescribed procedure. But the authority entrusted with the responsibility can not be given the power to veto the selection if there is no legal or procedural infirmity. Thus, there has to be a judicious mix of both the considerations—the minority’s right to select its staff and the regulator’s anxiety that educational standards are not subverted and the whole process is carried on fairly and within the confines of law. The cases we discuss now illustrate the above principles.

The first case is the advisory opinion of the Supreme Court *In Re: Kerala Education Bill, 1957.* In this case, there was the provision that the private schools, including the minority schools, seeking aid and recognition from the State were to appoint teachers out of a panel prepared by the Public Service Commission. The Court agreed that that made serious inroad into the managerial right of the minority institutions, but refrained from invalidating it. Subsequent cases show that the Court has completely shifted from that stand

---

and, perhaps, correctly so. Thus, in *Rev. Father W. Proost v. State of Bihar*, section 48-A of the Bihar State Universities Act, 1960 provided that all appointments in private colleges were to be made on the recommendation of the University Service Commission which was created by the Act. Later on, the Government of Bihar by introducing section 48-B exempted the minority institutions from the application of section 48-A, and they were required to make their own selections subject to the approval of the University Service Commission and the University Syndicate. The petitioners had initially challenged the vires of section 48-A; but after the amendment of the Act they were ready to withdraw the petition provided the Government agreed to give the institution the benefit of the new section 48-B. To this, the Government did not agree because it contested the minority character of the institution. Thus, the Supreme Court decision in this case has become a leading decision on the interrelationship of Articles 29(1) and 30(1), which we have already discussed. However, subsequent decisions of the Supreme Court hold that even a provision like section 48B would also not be upheld. For example, Statute 17 of the Guru Nanak University, Amritsar, Act, 1969, which required that the whole of the then existing staff and also the subsequent appointments should be approved by the Vice-Chancellor of the University, was held to be violative of Article 30(1) in *D. A. V. College, Jullundur v. State of Punjab*. In *All Bihar Christian Schools Association v. State of Bihar*, the Supreme Court upheld the validity of Section 18(3)(b) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981, which required the concurrence of the School Service Board for every appointment of a teacher by the managing committee of a private institution including the minority institutions.


But, this was done by the Supreme Court by giving it a restricted meaning. The Court held that the School Service Board was only to look into the legality and regularity of the appointment, and that it was not necessary to obtain prior approval; it could be even subsequent to the appointment.

Now, we take note of the two important cases of *State of Kerala v. V.R.M. Provincial*" and *Ahmedabad St. Xavier’s College Society v. State of Gujarat*. In the first case, the Supreme Court invalidated the provisions of the Kerala University Act, 1969 which authorised the syndicate of the university to veto the appointment of the Principal of a minority private college and which conferred the power to appoint teachers of such institutions on an autonomous body under the control of the syndicate of the university. In the second case, the relevant provision in issue was section 33A(1)(b) of the Gujarat University Act, 1949. It interfered with the constitution of the selection committee of a private college including a minority private college. The Act made it mandatory that the selection committee for the selection of a principal shall have, among other members, a nominee of the University appointed by the Vice-Chancellor, and a selection committee for the appointment of other teachers was to consist of, among other members, a nominee of the University appointed by the Vice-Chancellor, and the Head of the Department, if any, concerned with the subject to be taught by such teacher. The Supreme Court invalidated the provision for violation of article 30(1). Mathew, J., in his concurring judgment, stated the basic principle succinctly when he said that “So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management.” This very principle is reflected in two other decisions of the Supreme Court where in issue was the appointment of the Principal/the

360 Ibid. p. 816 (SCC).
Headmaster in minority institutions. In *Board of Secondary Education and Teachers Training v. Jt. Director of Public Instructions*\(^{361}\) the concerned institution had selected the senior most teacher, who was qualified and eligible, as the Principal of the institution in preference to another teacher who was also qualified. The educational authorities of the State preferred to approve the appointment of the teacher who had been rejected by the institution in place of the teacher who had been selected. The Supreme Court stood by the choice made by the institution. In *N. Ammad v. Manager, Emjay High School*\(^{362}\) the institution preferred to appoint as the Headmaster a person who was qualified and who had come to the institution by transfer, instead of promoting the person who was the senior most teacher in the institution and had been working there from the very beginning. The District Education Officer intervened at the instance of the teacher who was not considered, but this did not help him. Then he started litigation and the matter ultimately reached the Supreme Court. Here again, the Court upheld the right of the institution to have its choice.

VII. Conditions of Service and Disciplinary Proceedings

Now we consider the important issue as to what extent the State can regulate the service conditions of the minority school teachers and how far can it circumscribe the disciplinary powers of the minority school managements. We shall examine the state of the law under three sub-heads: (i) Prescription of service conditions; (ii) Exercise of disciplinary powers; and (iii) Creation of forums for dispute resolution. However, a few prefatory remarks may not be out of place. Almost until recently, it has been the most important issue in this branch of the law as to what shall be the ideal balance between the exercise of regulatory power by the State to ensure reasonable service conditions for the

\(^{361}\) (1998)8 SCC 555.

teachers and to prevent their exploitation, harassment, and victimisation, on the one hand, and the power of the management to ensure discipline and a proper work culture on the other. The Supreme Court opinion in *Kerala Education Bill, 1957*\(^{363}\) was quite sensitive to the poor lot of the teachers and, also quite accommodating of the State’s regulatory power. However, soon, a shift in the opposite direction started and it reached its zenith in the decision of the special bench of the Supreme Court in *Ahmedabad St. Xavier’s College Society v. State of Gujarat*\(^{364}\). A slight shift again appeared thereafter and now the law can be taken to have stabilised. What needs to be emphasised is that the law’s response is always the product of the prevailing judicial perception about the existing problems and needs in a particular sector of the society. Earlier the perception was that the teachers were a poor lot and they were victims of exploitation. Rightly or wrongly, today the perception appears to have changed. It is quite possible that it may have an impact in the days to come. But, one thing is definite: having a contented and secure teachers in an institution is conducive to better functioning of the institution and to its good educational reputation. Therefore, the regulatory power of the State extends to taking such measures and framing of such rules as may help achieve the above objective. The only point of debate can be whether the lines have been correctly drawn and the State has not overstepped its limits. And that is a matter of detail and the cases we now discuss, it is hoped, will help the reader in understanding the same.

**VIII. Prescription of Service Conditions**

The expression ‘service conditions’ has a very wide connotation. It can cover even the safeguards to be discussed under the two other sub-heads. Therefore, under the present sub-head, we are confining ourselves to the payment of salary,

\(^{363}\) AIR 1958 SC 962: (1959) SCR 995.

pension, provident fund, gratuity, prescribing a definite age of retirement, leave, conditions and hours of work, and availability of certain facilities like maternity leave and medical allowance. The Supreme Court decision in *Frank Anthony Public School Employees Association v. Union of India*\(^\text{365}\) should be considered as the leading case on the point though there are stray observations in some other cases as well which emphasise the point that satisfactory service conditions attract good and competent teachers, which is essential to the healthy growth of an educational institution. The only discordant note that can be traced is found in the judgment in *State of Kerala v. V. R. M. Provinciat*,\(^\text{366}\) and that was about a particular kind of service condition. Section 58 of the Kerala University Act provided that membership of the Legislative Assembly or that of the Parliament would not disqualify a teacher from continuing in his job and that the institution would grant the teacher the necessary leave for the period. With regard to this provision, Hidayatullah, C.J. remarked that it would enable the political parties to come into picture in the administration of the minority institutions and that they might not like that interference.

Now, let us come to *Frank Anthony Public School Employees Association*.\(^\text{367}\) Section 12 of the Delhi School Education Act made the beneficial provisions of Sections 8 to 11 of the Act inapplicable to the minority unaided schools. Immediately, we are concerned with section 10 which requires that-“the scales of pay and allowances, medical facilities, pension, gratuity, provident fund, and other prescribed benefits of the employees of the recognised private schools

---


shall not be less than those of the corresponding institutions run by the appropriate authority. The petitioners argued that section 12 was violative of article 14. On the other hand, from the side of the Government and the Frank Anthony Public School, it was argued that it would be violative of Article 30 to apply the provision to the minority unaided schools. The Court accepted the argument of the petitioners. Chinnappa Reddy, J. observed: “The management of a minority Educational Institution cannot be permitted under the guise of the fundamental right guaranteed by Article 30(1) of the Constitution, to oppress or exploit its employees any more than any other private employee (sic employer).”

IX. Exercise of Disciplinary Powers

The ability to exercise disciplinary power is the biggest source which helps in keeping administrative control over the persons working within the system. Therefore, this right has to be given to one who is given the responsibility to administer anything. But the power can be exceeded and it is possible that it may be even abused. Accordingly, the power is always hedged with some safeguards. These safeguards can be of different varieties. But the whole thing should be considered as one single whole comprising different facets of the same. The first and foremost safeguard is that before any major punishment is inflicted or action is taken, the rules of natural justice should be observed. Then, if the person punished has complaints that law was violated or fair procedure was not followed, it would be advisable to give the responsibility to some senior administrative authority to check the whole thing before the action or punishment becomes effective. However, care should be taken that such administrative authority should not assume itself to be an appellate authority because the decision of the minority institution on merits cannot be overridden by such an authority. That can be done, if at all, only by an independent judicial authority or by a substitute body like a tribunal which is equally independent


and credible. Again, disciplinary proceedings may take some time and during this period the teacher may have to be put under suspension. This power is also liable to be misused for causing harassment to the teacher. As a safeguard against such a possibility, it may be provided that exceptional cases apart, suspension order would not be effective without the approval of some supervisory authority and, that too, should be only for a limited duration. These are, in substance, the general propositions which can be said to have been culled out from the numerous decisions given by the courts. Out of them, some of the important decisions given by the Supreme Court are now discussed. These decisions illustrate and affirm the above propositions.

In *State of Kerala v. V. R. M. Provincial*, the issue before the Court was the vires of certain provisions of the Kerala University Act, 1969, out of which we are immediately concerned with clauses (2) and (4) of section 56. Because of clause (2), no teacher could be dismissed, removed, or reduced in rank without the previous sanction of the Vice-Chancellor, nor could he be kept under suspension for a continuous period exceeding 15 days without such previous sanction. Clause (4) afforded the right to a teacher against whom disciplinary action had been taken to appeal to the Syndicate of the University and the syndicate had the power to order reinstatement in the case of dismissal or removal, and in other cases such remedial measure, as it thought fit. The Court said that the aforesaid provisions had the effect of taking away the disciplinary power from the governing body or the managing council of a college, and in their application to minority colleges, they were violative of Article 30(1). We shall shortly see that the Supreme Court has given a second thought as far as the power of suspension is concerned.

In *Lily Kurian v. Sr. Lewina*, the appellant was the Principal of St. Joseph’s Training College for Women, Ernakulam (Cochin), It was a minority college and was affiliated to the University of Kerala. She was dismissed by the management on the charge of misconduct. The Vice-Chancellor of the University, in the exercise of his appellate power conferred on him under ordinances framed by the Syndicate of the University, quashed that order. The Supreme Court held that no appellate power in disciplinary matters could be exercised by the Vice-Chancellor in relation to the teachers of minority

---


institutions. Sen, J., delivering the judgment of the bench, observed that the authority conferred on the Vice-Chancellor constituted not only an "encroachment on the institution’s right to enforce and ensure discipline in its administrative affairs" but it also suffered from the vice of being uncanalised because the relevant ordinance neither specified the grounds on which the Vice-Chancellor could interfere nor did it impose any limits with reference to the punishments where his interference could be prayed for. That the conferring of an uncanalised power constituted an infirmity was pointed out also in *Committee of Management, St. John Inter College v. Girdhari Singh*, where the Supreme Court reversed the decision of the Allahabad High Court which had made inoperative the order of termination of the services of some employees of the appellant only on the ground that prior approval of the competent authority had not been taken as required under the provisions of the Uttar Pradesh Intermediate Education Act 1921. Since the appellant institution was a minority institution, the provision was even otherwise inapplicable to it. Indeed, the Legislature itself had removed the infirmity by providing otherwise in another law enacted in 1982.

That the requirement of prior approval of an external executive authority cannot be insisted upon in the case of minority institutions before terminating the services of an employee or a teacher has been amply made clear by the Supreme Court time and again. Thus, in *Yunus Ali v. Mohamed Abdul Kalam*, it was held that section 10-A of the Orissa Education Act, which required prior approval of the Director before termination of the services of an aided institution was not applicable to a minority institution like the appellant’s Madrasa. In *Bihar State Madrasa Education Board v. Anjuman Ahle-Hadus*, the Supreme Court refused to interfere with the order of the Patna High Court holding, among other things, that section 24 of the Bihar State Madrasa Education Board Act was void for violating article 30 (1) of the Constitution.

---


373 JT 2000 (4) SC 355.


The aforesaid provision provided that "No teacher of the Madrasa shall be discharged or dismissed from service without the prior approval of the Board." In *Managing Committee, Khalsa Middle School v. Mohinder Kaur*, it was held that the termination of the services of the respondent without the approval of the Director of Education was not bad for non-compliance with section 8(2) of the Delhi School Education Act because it could not be applied to the appellant school which was a minority institution. It is also impermissible to require that the institution take action only on the recommendation of an external higher authority like the University Service Commission, as was the case in *Fr. W. Proost v. State of Bihar*.

In the nine-judge bench decision of the Supreme Court in *Ahmedabad St. Xavier's College Society v. State of Gujarat*, section 51A of the Gujarat University Act, 1949, as amended. in 1973, required that a member of the teaching or non-teaching staff of an affiliated college could not be dismissed, removed or reduced in rank without giving him an adequate hearing and, where his services were to be otherwise terminated, without affording him a reasonable opportunity of showing cause against the proposed termination. However, in either case, prior approval of the proposed action by the Vice-Chancellor or by any officer of the university authorised by him in that behalf was necessary. Insistence on the observance of the rules of natural justice was found by the Court to be unexceptionable. But, it was held that the requirement of approval of the proposed punishment by the Vice-Chancellor or his nominee was violative of Article 30(1) of the Constitution in its application to the minority institutions.

In *All Bihar Christian Schools Association v. State of Bihar*, the constitutionality of section 18(3) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 was in issue. Here, we are concerned with Section 18(3)(d). Section 18(3)(e) required the minority private institutions to frame rules defining the service conditions of the teachers and the rules were to be in consonance with the rules of natural justice

---


and the prevailing law, and a copy of the rules was to be sent to the State Government for information. Section 18(3)(d) empowered the managing committee to discharge a teacher from service, to terminate his service, to dismiss or remove him or take any other disciplinary action against him, with the approval of the School Service Board. However, the Board did not possess unlimited and uncanalised power to accord approval or to refuse it. Its job was limited to scrutinising whether the action had been taken in accordance with the rules or not. The Supreme Court found it unexceptionable and held that it was permissible to seek approval even after taking the action. In other words, what the Supreme Court insists upon is that the power to decide the substantive issue whether an action should be taken or not should remain with the minority institution and should not be given to any external executive authority. We shall now see that independent judicial or other similar authorities can be entrusted with the jurisdiction of an appellate nature and the minority institutions are also subject to the general law of the land regarding dispute settlement.

Finally, we discuss the case, *All Saints High School, Hyderabad v. Government of Andhra Pradesh*.\(^{380}\) The facts of the case and the decision of the Court, present in a very succinct form, the nature of the balancing that the Court does between the rights of the minority institutions in disciplinary matters and the regulatory power of the State to ensure to the teachers security of job and protection against harassment. It was a three-judge bench decision and on a few issues the Court was unanimous; but on the majority of the issues, it was divided and the decision was arrived at by a majority of 2:1. We shall discuss one of the issues under the next sub-head, but we shall examine the rest here. It is the constitutionality of some of the provisions of the Andhra Pradesh Recognised Private Educational Institutions Control Act, 1975 that was in issue. All the three judges agreed that section 7 was valid. It only provided that pay and allowances of a teacher shall be paid on or before a certain date of a month and by a prescribed officer or authority in a prescribed manner. The very fact that the validity of such an innocuous provision was challenged speaks about the nature of autonomy that the minority institutions, at times, claim and assert. The Court also upheld, by a majority, the validity of two other kinds of provisions which were meant to protect teachers against unnecessary and long durations of suspension, and against fraudulent cases of retrenchment. Section 3(3) of the Act dealt with the issue of suspension of a teacher by the

---

management. It provided that a teacher could be suspended during the course of inquiry on a charge of gross misconduct. However, it limited the duration of suspension to two months which could be extended by a competent authority (that is, an authority other than the management) for another period of two months provided that the authority was satisfied for reasons to be recorded in writing that the completion of the inquiry was delayed because of the teacher. This meant that in all other cases and situations the teacher would continue to be on duty even though the inquiry was being held against him on certain charges. Section 6 provided that if the management wanted to retrench a teacher under the cover of some governmental scheme or order, it needed the prior approval of the competent authority.

However, section 3(1) and (2) was held to be inconsistent with article 30(1) of the Constitution, and this decision was also arrived at by a majority of 2:1. Section 3(1) provided that no teacher of a private institution could be dismissed, removed or reduced in rank except with the approval of the competent authority; nor could his services be terminated except with the approval of the competent authority. Section 3(2) defined the nature of the power that the competent authority was expected to exercise while dealing with a proposal from the management for the aforesaid kinds of action. The competent authority was to accord its approval only if it was satisfied that there were adequate and reasonable grounds for taking the proposed action. The majority, quite rightly, held that this virtually transferred the disciplinary power of the aforesaid kind to the competent authority from the management. Therefore, these provisions could not be applied in relation to the minority educational institutions whose power to discipline the teachers was seriously compromised.

X. Creation of Forum for Dispute Resolution

The autonomy of minority institutions does not mean that the decisions of the management in matters relating to teachers or employees can in no way be challenged. However, the Court does not favour the entrustment of this job of dispute resolution to the different categories of executive authorities. For example, in *All Saints High School*,

381

discussed above, one of the provisions of the Andhra Pradesh Act that was unanimously held to be inoperative in relation to minority institutions was section 4. This section conferred the right on a

381 Ibid.
teacher of a private educational institution to appeal to a competent authority against his dismissal, removal, or reduction in service, or termination of service made otherwise; and also against any disadvantageous alteration or interpretation in respect of his pay and allowances and service conditions generally.

But, the Supreme Court has gone a step further. It has invalidated in relation to minority educational institutions even the provision for arbitration in matters of service-related disputes. This happened in Ahmedabad St. Xavier's College Society and section 52A of the Gujarat University Act which provided for this was held to be inconsistent with article 30(1) of the Constitution. One of the flaws of the provision, as perceived by the bench, was that the arbitrator was to be appointed by the Vice-Chancellor. The Court gave a majority decision. Beg, J. and Dwivedi, J. dissented. The other reason given by the majority was that it would unnecessarily embroil the institution into litigation like activities. It is submitted that the majority view on this point questions the very concept of creation of appropriate forums for redressal of grievances. Indeed, the access to justice is the most basic right and an essential ingredient of the rule of law. One believes that the majority did not mean to say that a teacher or employee aggrieved with the decision or non-decision of a minority institution did not have the right to knock the doors even of a civil court. Alternative forums are needed, and are consequently suggested, because a poor teacher or employee finds himself totally incapacitated to match the resources of the institution in ordinary litigation which may not even reach the final decision stage in his lifetime. In T. M. A. Pai Foundation, Kirpal, C.J., in his majority judgment, has devoted one paragraph (para. 64) to the discussion of the present issue. He has not only stressed the need for cutting the cost of litigation but also the need for saving the time. His suggestion was that the Government should constitute an educational tribunal in each district and, in case the tribunals are very few in number they should function on a circuit basis and, pending the constitution of such a tribunal, he suggested that the State Government in consultation with the High Court should designate the District Judge or some other judge who may be approached by the aggrieved teacher against the decision of the managing committee.


It emerges from the foregoing discussion that after *Pai Foundation*, there is a continuous progression towards autonomy of private educational institutions especially the self-financing ones. Because of article 30(1), the minority institutions will always have some special position though, with the march of time, the gap between the respective positions of both the minority and the non-minority institutions should gradually narrow down. Indeed, article 30(1) and the Supreme Court jurisprudence on article 30(1) should work as driving forces for conceiving facets of autonomy that is possible and feasible. When we look at the whole thing in this light, the entire debate between Khare, C.J. and S.B. Sinha, J. in *Islamic Academy*, it is submitted, appears to have been misconceived and misdirected. But one thing must be said rather emphatically: Nationalisation of education in a liberal democracy, which Khare, C.J. thought as permissible in relation to non-minorities in his judgment in *Islamic Academy*, is difficult to imagine and still more difficult to swallow. Perhaps, old ways of thinking, like old habits, die hard. The right to establish educational institutions with reasonable autonomy in administration is part of the right to educational freedom, and at the root of the educational freedom is the liberty of thought and expression.

---

384 Ibid.