CHAPTER-III
HIGHER EDUCATION AND THE CONSTITUTION OF INDIA
- SOME OBSERVATIONS

"Right to receive education is a fundamental right guaranted to every citizen."

"Right to education is a basic right in a democracy".
- Justice Jagdish Sahai in Gajadhar Prasad Mishra V/s. University of Allahabad.

INTRODUCTION:

This chapter is confined to constitutional aspect of Higher Education. Special attention has been given as to whether University is state within the meaning of Article 12 of the constitution. What are the important implications of landmark judgments e.g. Bangalore Water Supply V/s. A. Rajappa and St. Xavier's College V/s. State of Gujarat? A detailed study has also been made as to the application of principles of Natural Justice to Education Institutions.

(1) **Right to Education under the Constitution**

If a right is not specifically named in the chapter of Fundamental right covered by some clause of its various articles, but if it is an integral part of a named fundamental right part it took the same basic nature and character as an embedded fundamental right. This was a theory enunciated by the Supreme Court of India in Maneka Gandhi's case in AIR 1978 S.C. 597. Relying on this logic the Delhi High Court held that the right to education would be a fundamental right that may be spelt out of the provisions of Articles 19 (1) (a), 19 (1) (b) and Article 21 of the constitution of India. In another decision of the same High Court it was held that in the right to receive higher education or a professional education which is a prerequisite to practising a particular trade or profession or to exercise some of the fundamental rights, such as the right to freedom of expression, will be in themselves fundamental rights on the basis of the aforesaid theory and there would be no escape from the conclusion that when the petitioner was sought to be deprived of the opportunity to pursue medical education by an improper order, the impugned action would constitute an infringement of his fundamental right. Where the right to pursue professional or technical studies, the completion of which would directly entitle a student to practise a

1. A.I.R. 1978 S.C. 597
profession, any improper interference in such a pursuit would attract the fundamental right to carry on the profession, because right to carry on the profession would be directly interfered with by such an improper action. From this it follows that even if a right is not specifically named in the fundamental rights chapter of the constitution, it may still be a fundamental right covered by some clause of its various articles, if it is an integral part of a named fundamental right or partook of the same basic nature and character as an embodied fundamental right. Thus the right to receive higher or professional education is itself a fundamental right. In the recent judgment S.C. has recognised Right to education as concomitant to the fundamental rights. It was observed by the S.C.

Every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions whether State-owned or State-recognised - in recognition of their "right to education"

under the Constitution. Charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen's right to education under the Constitution.

Indian civilisation recognises education as one of the pious obligations of the human society. To establish and administer educational institutions is considered a religious and charitable object. Education in India has never been a commodity for sale. Looking at the economic front, even forty-five years after achieving independence, thirty per cent of the population is living below poverty-line and the bulk of the remaining population is struggling for existence under poverty conditions. The preamble of Constitution promises and the directive principles are a mandate to the State to eradicate poverty so that the poor of this country can enjoy the right to life guaranteed under the Constitution. The State action or inaction which defeats the constitutional mandate is per se arbitrary and cannot be sustained. Capitation fee makes the availability of education beyond the reach of the poor. The State action in permitting capitation fee to be charged by State-recognised educational institutions is wholly arbitrary and as such violative of Art. 14. It would be spelt out of a number of clauses of Article 19 (1) read with Article 21 of the Constitution of India. Hence when a student is denied opportunity to
pursue medical education by an improper order the impugned action would constitute an infraction of his fundamental right. It is thus clear that where the right to pursue professional or technical studies, the completion of which would directly entitle a student to practise a profession is a fundamental right, any improper interference in such a pursuit would attract the fundamental right to carry on the profession, because the right to carry on the profession would be interfered with by such an improper action. In this view of the matter the impugned action on the student by the authorities in cancelling his examination impinges on his fundamental rights.

There is a good deal in common between educational institutions which are not university and those which are universities. Both teach students and both have teachers for the purpose. What distinguishes it is that university grants degrees of its own while other educational institutions cannot. It is this granting of degrees by a university which distinguished it from the ordinarily run educational institutions.

(2) Legislative Powers of Parliament and State Legislatures under the Constitution: Relative Scope:

Before dealing with the relative extent of legislative powers of the Parliament and the State Legislatures a brief reference may be made to the nature of Indian policy as disclosed by the various provisions of the constitution.
The topic is not beyond the realm of controversy to exclude a suggestion alternate to federalism which is apparently the intended form. Indeed, but for the detailed enumeration of legislative fields denoting the division of powers between the Parliament and the State Legislatures and certain other features relating to Centre-State relations, the 'Indian State' could be termed unitary in a loose sense. A via media stand to take would be to accept the opinion of certain academicians of repute who assert that it is quasi federal in nature.

The matters with respect to which the Parliament and State Legislatures have power to make laws are enumerated in the three lists called the Union List (List I), the State List (List II) and the Concurrent List (List III). Subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and no law made by Parliament could be deemed to be invalid on the ground that it would have extra territorial operation. The State Legislatures may make laws for the whole or any part of the respective States (Art. 245). The scheme of separation of legislative powers between the Parliament and the State Legislature is dealt with by Art. 246 which runs as follows:

**ARTICLE 246: SUBJECT MATTER OF LAWS MADE BY PARLIAMENT AND BY THE LEGISLATURES OF STATES:** (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the seventh schedule (in this Constitution referred to as
Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, has power to make laws with respect to any of the matters enumerated in List III in the seventh schedule (in this Constitution referred to as "Concurrent List").

Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the seventh schedule (in this Constitution referred to as the "State List").

Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is enumerated in the State List.

Parliament can also legislate for stated periods with respect to a matter in the State List in the national interest, if so declared to that effect by the Council of States by a resolution supported by not less than two-thirds of the members present and voting (Art. 249) or during emergency (Art. 250) or at the instance of two or more States which pass a resolution to that effect (Art. 252). The residuary power of legislation on matters not enumerated in any of the three Lists is vested with the Parliament (Art. 248 and Entry 97 of List I). The answer to any possible inconsistency between laws made by Parliament
under Articles 249 and 250 and laws made by the Legislatures of States is to be found in Article 251 which provides that "nothing in Article 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of law so made by the Legislature of a State is repugnant to any provision of a law made by Parliament, which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative'. Yet another provision dealing with inconsistency is Article 254 which would be relevant in the light of the fact that the Legislative entries relating to education in List I and List II do overlap to an extent. Article 254 runs as follows:

"ARTICLE 254: INCONSISTENCY BETWEEN LAWS MADE BY PARLIAMENT AND LAWS MADE BY THE LEGISLATURES OF STATES:

(1) If any provision of a law made by the Legislature of State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by
the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provision of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State;

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State*.

Prior to the Constitution, under the Government of India Act 1935, legislation on education including universities was a provincial subject with the exception of the Benares Hindu University and the Aligarh Muslim University which formed the subject matter of the Federation Legislative List. In the Constitution the power of the Union regarding education and especially at the higher level is greater and it has a supervening control over the State Legislation in so far as it is necessary to effect co-ordination and determination of standards in higher education. Reference to the relevant entries in
the Legislative Lists under the Government of India Act 1935 would make it easier to assess the effect of changes and additions brought about in the Constitution of India 1950.

Two of the important principles that are generally adopted by the courts in interpreting the entries vis-à-vis a piece of legislation are that (1) the widest possible amplitude must be given to the words used and each general word must be held to extend to ancillary or subsidiary matters which can be said to be comprehended in it and (2) where in an organic instrument such enumerated powers of legislation exist and there is a conflict between rival lists, it is necessary to examine the impugned legislation in its pith and substance, and only if that pith and substance falls substantially within an entry or entries conferring legislative power, is the legislation valid, a slight transgression upon a rival list notwithstanding.

Entries 63 to 65 of List I unlike Entry 66 do not lend themselves to so much interpretational difficulties either by themselves or in relation to Entry 11 of List II. Entry 66 is general in terms and might cover institutions in relation to which the State Legislatures could as well competently legislate under Entry 11 of List II. The entries undoubtedly overlap and the legislative competence could be ascertained only on an examination of the provisions of the particular enactments that may be challenged in a Court of law.
It is beyond doubt that the State Legislatures have the exclusive right to legislate with regard to primary and secondary education including all matters incidental to it. But there is room for conflict as regards power of legislation with respect to higher education concerning which Parliament could also legislate in its attempt to bring about co-ordination and maintenance of standards.

The Supreme Court, in Gujarath University Vs. Krishna Ranganath Madholkar, 1 dealing with the apparent conflict of powers of the Union and State Legislature with respect to matters such as prescribing of syllabi, medium of instruction etc., observed: the fact that the Union has not legislated, or refrained from legislating to the full extent of its powers does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union. It does not, however, follow that even within the permitted relative fields there might not be legislative provisions in enactments made each in pursuance of separate, exclusive and distinct powers which may conflict. Then would arise the question of repugnancy and paramountcy which may have to be resolved on the application of 'doctrine of pith and substance' of the impugned enactment. The validity of State legislation on University education and as regards the education in technical and scientific institutions not falling within Entry 64 of List I would have to be judged having regard to whether it impinges on the field reserved for the Union.

under Entry 66. In other words the validity of State Legislation would depend upon whether it prejudicially affects co-ordination and determination of standards, but not upon the existence of some definite Union Legislation directed to achieve that purpose. 'If the impact of a State law on a Central subject is so heavy and devastating as to wipe out or appreciably abridge the central field, then, it may be a ground for holding that the State law is a colourable exercise of power and that in pith and substance that it falls not under the state entry.' This view were reiterated by Subba Rao J, speaking for the majority in Chitralekha Vs. State of Mysore. Mudholkar J, in his dissenting view interpreted, the majority view in the Gujarat University case as not justifying the conclusion that it is only where the State law makes it impossible or difficult for Parliament to exercise its legislative power under Entry 66 that the State law would be bad but the validity of a State legislation would depend upon whether it prejudicially affects the co-ordination and determination of standards and that if it does so, that is enough to invalidate the legislation.

The Supreme Court has reiterated in State of Andhra Pradesh Vs. L. Narendra Nath that Entry 66 of List I gives

1. Per majority speaking through Shah J.
2. Per Subba Rao J.
power to Parliament to make laws for laying down how standards in an institution for higher education are to be determined and how they can be co-ordinated. So if the State Government should hold a test for admission, in the subject already in which candidates have been examined by a University, it would not amount to encroaching into entry 66 of List I.

Entry 66 of List I being wide in its terms and scope to cover even institutions on which the State Legislatures could legislate by virtue of entry 11 of List II, it becomes necessary to understand the connotation of the expression 'Co-ordination and determination of Standards'. 'Co-ordination, in its normal connotation means harmonising or bringing into proper relation in which all things coordinated participate in a common pattern of action. The power to Co-ordinate is not merely power to evaluate; it is a power to harmonise or secure relationship for concerned actions. The power of Parliament to legislate on co-ordination and determination of standards is not controlled by the existence of certain circumstances such as lack of disparity as a pre-condition requiring rectification. It is a power to co-ordinate and of necessity implied therein is the power to prevent what who would make coordination impossible or difficult

The problem arose in an interesting manner in the State of Andhra Pradesh. In 1986, the state legislature enacted the Andhra Pradesh Commissionerate of Higher Education Act 1986 providing for the creation of a commissionerate of higher education. The higher education was defined as meaning intermediate education and education leading to a degree or post-graduate degree including professional and technical education. The main objective of the enactment was to deal with several matters pertaining to higher education within the state and evolve a perspective plan for its development. It must monitor and evaluate academic programmes and coordinate academic activities of various institutions and universities. It must oversee the development and streamline higher education in the entire state. It must also perform functions necessary for the furtherance and maintenance of excellence in standards of higher education. It was also expected to control entire funds meant for universities, including grants given by the Central Government for higher education.

The constitutional problem arose because the subject of higher education has been specifically dealt with in the Union list. Though "education" (in the abstract) finds place in the concurrent list, that power is expressly made subject to the power of the Union under various legislative entries assigned to the Union list. Thus the Union list contains the entry: "Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions." The concurrent

1. Andhra Pradesh Commissionerate Higher Education Act 1986, s2(e)
2. List I, entry 66.
list contains the entry: "Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour." Obviously, the same subject cannot fall within both the lists. According to the Supreme Court, "power of the State to legislate in respect of education including Universities must to the extent to which it is entrusted to the Union Parliament be deemed to be restricted." This was already decided in Gujarat University v. Krishna Ranganath Mudholkar. Occasionally, courts take note of realities and permit legislation by states laying down criteria for admission to colleges within their territories from amongst students who secure minimum qualifying marks prescribed by a university.

But the power conferred on the commissionerate by the Andhra Pradesh Act went much further. It included the power to evaluate, harmonise and secure proper relationships amongst various institutions of higher education in the state. For this reason, it was difficult to sustain the validity of the Act as a measure within its competence. A challenge to the validity of the Act, though it failed in the Andhra Pradesh High Court, ultimately succeeded before the Supreme Court on appeal in Osmania University Teachers Association v. State of Andhra Pradesh.

1. List III, entry 25.
So far as the interpretation of constitutional aspects goes, the above judgment cannot be faulted. Entry 66 of the Union list deals with two aspects of higher education. In the first place, it covers co-ordination of standards in such institutions for higher education. Thus the moment a law begins to concern itself with improving or maintaining excellence in institutions of higher learning, the Union list takes over and the concurrent list must take leave.

Coming to the Andhra Pradesh Act, one of the major duties of the commissionerate, as mentioned in section 7(1) of the Act, was "to evolve a perspective plan for the development of higher education in the State." 1 Again section 11(g) vested in the commissionerate the function to "co-ordinate the academic activities of various institutions of higher education in the State." 2 Then, there was the residuary function as mentioned in the section 11(g) to "perform any other functions necessary to the furtherance and maintenance of excellence in the standards of higher education in the State." 3 These are examples selected at random to show how some of the provisions of the Act were directly relateable to co-ordination and determination of standards in institutions of higher education and research. The problem which those, who defended the validity of the Act, had to face was how to escape this position. Besides, a comparative examination of provisions of the University Grants Commission Act 1956 and Andhra Pradesh Act under dispute showed considerable similarity and overlapping. Only a few years ago,

1. Emphasis added.
2. Emphasis added.
3. Emphasis added.
the Supreme Court had specifically held that the former falls under entry 66 of the Union list. In the result the Andhra Pradesh Act was held to be beyond the power of the state.

Nevertheless, as the Supreme Court pointed out, the need for improvement in standards does not disappear by adjudicating upon the validity or otherwise of a state law. It was a high power committee of the Government of Andhra Pradesh, appointed in February 1986, whose report had led to the enactment of the Act. It had pointed out the absence of a policy perspective in the development of higher education in the state. It had emphasised the need for streamlining higher education. The state government had accepted the recommendations and passed the Act. The court said:

"The Act now disappears for want of legislative competence. What about the need to enact that Act? It will not vanish to the thin air. The defects and deficiencies pointed out by the High Power Committee in regard to higher education may continue to remain to the detriment of the interests of the State and the Nation. Such defects in the higher education may not be an isolated feature only in the State of Andhra Pradesh. It may be a common feature in some other states as well."
Thus the court made a constructive suggestion which the authorities concerned with educational administration should take note of. Of course, this judgment also tempts one to draw attention to one aspect of legal research and knowledge in India also.

Our Constitution, by no means a simple document, has been the subject matter of many academic treatises and articles. But, by and large, these have concentrated on two specific areas of constitutional law, viz., fundamental rights and directive principles of state policy. An important area has not so far been cultivated in a noticeable degree. That is the topic of distribution of legislative powers between the Centre and states. The somewhat intricate scheme of distribution of legislative topics now deserves greater academic attention than it has received so far. Not only should the general scheme be studied in detail, but there is also scope for an examination in depth of specific legislative entries. For example, what is the dividing line between security of the state—a Union subject—and maintenance of public order—a state subject? How does one demarcate the boundaries of public health—a state subject—and other entries relevant to public health? Again, what is the precise scope and ambit of entries relating to criminal law which appear in the concurrent list at the very head of the list? The last mentioned issue assumes practical importance every time when a state legislature passes a law regulating some social or economic activity. It arose, incidentally, in regard to the recent
Rajasthan legislation relating to sati, viz., the Commission of Sati (Prevention) Act 1987. It is likely to arise whenever other social malpractices are subjected to legislative regulation or prohibition. Fundamental rights are, of course, important. But in depth studies of so many legislative entries still await good research, thinking and reflection in India. The Supreme Court judgment on higher education analysed above is an example of the need for clarifying our concepts.

At the same time, as pointed out above, observations made by the court as to the need to have a second look at some aspects of our administration of institutions concerned with higher education should receive immediate attention. Probably, the composition and functioning of the University Grants Commission could be revised so as to provide for (i) more attention being paid to peculiar problems experienced by some of the states; (ii) greater emphasis being laid on a study of local problems; and (iii) more active participation of state governments, not only in the formulation of policies but also in the execution of policy measures. The object could be better achieved by small meetings frequently held in state capitals, rather than by very ambitious and large meetings where nothing concrete can be achieved.

(3) Education and Educational Institutions as defined by the Courts of Law:

Education is what one thinks of it from his view point of interest. The concept of education has many angles
depending on who conceives it and how, say from the point of the academicians, the teacher, the student, the parents and not to miss the unfortunate lot of the uneducated themselves. The law courts too have had their say on the concept of education, though incidentally, while deciding some major questions having a bearing on it. To 'educate' would include proper moral, as well as intellectual and physical instruction and 'education' may be directed particularly to either the mental or physical powers and faculties but in its broadest and best sense it would refer to them all. It is generally more applicable to the younger portion of life, when the mind and the moral nature are unstocked and life undeveloped; while instruction may be given or received on specific points or departments of knowledge at all periods. Instruction makes men wiser; education ought to make them better and wise; and breeding will make them more polished and agreeable, training makes men perfect by instruction, exercise and discipline. It cannot always be said that nothing could be educational which did not involve teaching, in the sense of a master teaching a class. If one considers the domain of art, for instance, it cannot be said that the only thing that could be educational, would be the education of the executants;

2. The Law Lexicon by P.R. Iyer.
the teaching of the painter, the training of the musician
and so forth. Lord Greene M. R. Protest ing against making
any such narrow conception in the field of aesthetic
education, said, 'very few people become executants, or
at any rate executants who can give pleasure either to
themselves or to others; but a very large number of people
can become instructed listeners with a trained and cultivated
taste. In my opinion a body of persons established for
the purpose of raising the artistic taste of the country
and established by an appropriate document which confines
them to that purpose, is established for educational
purposes, because the education of artistic taste is one
of the most important things in the development of a
civilised human being. "

Yet another view taken in the case of Reinstitution of Civil Engineering is that education in its broadest sense comprehends not merely
the instructions received at School, or college but the
whole course of training moral, intellectual and physical;
it is not limited to the ordinary instruction of the child
in the pursuits of literature. It also comprehends a proper
attention to the moral and religious sentiments of the
child. And it is sometimes used as synonymous with
"learning".

1. Royal Chorol Society Vs. Inland Revenue Commissioners
   (1943), 2 All E. R. 101 (C.A.)
2. 19 2. B. D. 610.
The definition of an educational institution or a discussion on aspects of its legal status is of least importance to the academician. But in granting reliefs to institutions or persons connected with it, the courts of law will have to probe, at times into the legal status of educational institutions within the limitations of the statutes, the benefit of which is sought for by the claimant. As for instance questions had cropped up before the courts as to whether educational institutions could be called 'charitable' institutions (Articles 26) or "the State" (Article 12); or authority or person (Article 226); or an industry (Industrial Disputes Act) etc., and in such cases to uphold their rights or deny the benefits which the law does not really extend to them, the Courts will be constrained to ascertain whether a particular institution by definition would come within the framework of the law in question.

(A) Aspects of Legal status of Educational Institutions:

The phrase 'educational institutions' is of wide import and would cover universities as well. Though there is a good deal in common between educational institutions which are not universities and which are universities in that both teach students and have teachers for the purpose, yet what distinguishes a university from other educational institutions is that a university grants degrees of its own while other educational institutions cannot. It is this granting of degrees by a university
which distinguishes it from the ordinary run of educational institutions. This finds support also in St. Davids College, Lampeter Vs. Ministry of Education wherein, the principal, tutors, and professors of St. Davids' College, Lampeter, claimed against the Ministry of Education a declaration that the College was a University and that it was providing a University Education. The question arose because of the refusal of the Minister of education to treat the college as a University for the purpose of the Regulations for State scholarships and University Supplemental awards 1948. Certain factors, were enumerated as essential requisites for an institution to be considered as a University viz., (1) it must be incorporated by the highest authority, i.e. by the sovereign power succeeding no doubt to the papal privilege which was exercised in Christendom in the middle ages by the proper and indeed only body which could incorporate and give authority to a great teaching institution; (2) that to be a university an institution must be open to receive students from any part of the world; (3) that there must be a plurality of masters i.e. that there cannot be a university with only one teacher; (4) that a university to be such, must be an institution in which at least one of the higher faculties is taught, those higher faculties being, of course, theology, the queen of sciences, law or philosophy which

2. 1951 (1) All E. R. 559.
in some definitions are regarded as identical, and thirdly medicine. Vaisey J observed:

"In my judgment, the word 'University' is not a word of art, and although for the most part one can identify a University when one sees it, it is perhaps not easy to define it in precise and accurate language. There are obviously universities which are such by common consent, the status of which as such, no man could deny. One of the witnesses described it as in its nature unique, and I ventured to use a phrase of identical meaning and to call it sui generis, i.e., it is an institution which stands in a class by itself. The question which falls for me to decide is - is that class within the ambit of the definition and proper understanding of the University or is it not? I have left until last what is stated to be the most obvious and most essential quality of a University, that is, that it must have power to grant its own degrees. Although I must not be supposed for one moment to think that a University has to be judged by the size or the number of its pupils or by the range of instructions which it gives, still, size is a matter of some consideration."

The declaration was not granted as there was no express intention to make it a University and it was found to possess the power to grant degrees only to a limited extent.
University whether 'State' within Articles 12 of the Constitution:

Article 12 of the Constitution defines 'the State' for the purposes of part III dealing with fundamental rights as including "the Government and Parliament of India and Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India" unless the context requires otherwise.

The question whether Universities established by Acts of Legislature could come within the expression "Local or other authorities" mentioned in Article 12 and thus fit into the definition of 'the State' for the purposes of enforcing the appropriate fundamental rights against them came up for consideration in Shantha Bai Vs. University of Madras wherein a student who was refused admission into a college on the ground of sex, acting under certain directions issued by the University of Madras, sought a writ of Mandamus to admit her into a course to which the institution had permission to admit not more than 10 girl students. The learned single Judge after holding that the refusal was discriminatory issued a Writ of Mandamus directing the University and the College to reconsider her application as the Principal of the College had not opposed the application. The University was assumed (as there was no argument contra)

to be an authority within the territory of India and thus
'State' within the meaning Article 12. In the case on
appeal in University of Madras Vs. Shantha Bai the
contention that Article 15.(1) prohibits discrimination
only by the State and the University of Madras was not a
State was considered, in detail, with reference to decisions
of the Supreme Court and of the State Courts of America
which dealt with the question of applicability of the
equality clause contained in the 14th amendment to the
American Constitution, to certain institutions. In those
decisions the distinction between the State-maintained
and the State-aided institution was highlighted for denying
enforcement of the equality clause against the latter
category of institutions. The Madras High Court relying
on the American decisions and reinforced by the fact that
Constitution of India also recognises such a distinction,

2. Missouri Ex Rel Gains Vs. Canada. 83 L. Ed. 208; 305 U.S. 337
   Sipuel Vs. University of Oklahoma 92 L. Ed. 247; 332 U.S. 631
   Sweatt Vs. Painter 94 L.Ed. 1114; 339 U.S. 629 McLaurin Vs.
   Oklahoma S. Regents 94 L.Ed. 1149 339 U.S. 637 Rules or
   regulations made by State maintained Universities which were
   repugnant to the 14th amendment held unconstitutional. People
   Ex. Rel; Tink Vs. North Western University 93 L. Ed. 383;
   335 U.S. 829 University considered not a State.
vide Art. 28 (2) 28 (3) 29 (2) § held that no fundamental rights could be enforced against institutions which are just-State aided and not State-maintained. The Madras High Court further held that the expression "local or other authorities" in Article 12 should be "construed ejusdem generis with Government or Legislature and so construed can only mean authorities exercising governmental functions "and that they would not include "persons" natural or juristic who cannot be regarded as instrumentalities of the Government". On facts the Court held that the University of Madras was only a body corporate created by Madras Act VII of 1923 and it was not charged with the execution of any governmental functions, the purpose being one of purely promoting education. It was a State-aided and not a State-maintained institution, as it was authorised (though there was provision for financial contribution from the local Government) to raise its own funds from fees, endowments and the like.

The view of the Madras High Court that Universities would not come within the definition of State in Article 12 was followed in several subsequent cases dealt with by High Courts in other States. In Ema Gosh Vs. State of West Bengal the Calcutta High Court took the view that a sponsored college would not come within the definition of 'the State' as defined in Article 12. Again the Mysore High Court in Devadas Vs. Regional Karnataka Engineering College took the view the College though it had contribution

from the Central and State Governments and in its prospectus it was mentioned that the institution was a joint enterprise of the Central Government and the Mysore State Government and was subject to audit control by the Government, it could not come within the definition of the State. Dealing with the term 'authority' occurring in Article 12, the Court observed "Term authority" in the ordinary dictionary sense may comprise not merely a person or a group of persons exercising governmental power but also any person or group of persons or by virtue of their position in relation to other person or persons. But there is an essential difference between a political association of persons called the State giving rise to political power connected by the well known expression 'imperative law' and a non-political association of person for other purposes by contract, consent or similar type of mutual understanding related to the common object of persons so associating themselves together giving rise to power which operates not in the manner in which imperative law operates but by virtue of its acceptance by such associating persons based upon contract, consent or mutual understanding. The several matters enumerated in the inclusive definition of 'law' contained in Art. 13 (3) (a) are also those that are in the nature of imperative law, that is to say, those that are in the nature of imperative law whose power arises by virtue of political association of persons forming themselves into a State and not by virtue of any contract, consent or mutual understanding. In this view, the term 'authorities' occurring in Article 12 could only
mean a person or group of persons who exercise the Legislative or executive functions of a State or through whom or through the instrumentality of whom the State exercises its legislative or executive power. The last portion of Article 12 reading "within the territory of India or under the control of the Govt. of India" which merely qualifies the term "authorities" occurring immediately before it does, not in our opinion, seek to destroy or take away the essential meaning of the term 'authorities' which, as already stated, has to be ascertained ejusdem generis with the term or expressions occurring in the earlier part of Article 12".

The Court also took the view that the question of contribution of control by the Government in certain matters would not bring the college within the definition of 'State'. Similar view was taken in the case of a Board of Secondary Education over which the Central Government had control in certain matters. Other High Courts also had held that since the function of a University is merely to promote education and since it is not charged with any Governmental function and so long as the University is not maintained by the State it would not come within the definition of 'State'.


In the case of Ashalata Vs. M.B. Vikram University the Madhya Pradesh High Court held that the Vikram University, like most of the Universities in our country, is an autonomous corporation constituted by a statute (Madhya Bharat Act 18 of 1955) and maintained by the State of Madhya Pradesh and as such it was held to have come within the definition of 'State', the phrase to "all local or other authorities" being wide enough to include a University maintained by the State funds.

The decision of the Madras High Court in University of Madras Vs. Shantha Bai and all the other decisions which followed it on the construction of the phrase "local or other authorities" are overruled by the Supreme Court in Rajasthan State Electricity Board Vs. Mohan Lai. The Supreme Court disapproved the idea of applying the principle of ejusdem generis while interpreting the expression 'other authorities' in Article 12. To apply that rule, there must be a distinct genus or category running though the bodies already named in the provision and it is absent in Article 12.

The Supreme Court observed, 'In Article 12 of the constitution, the bodies specifically named are the executive Governments of the Union and the States, the Legislatures of the Union and the States, Local authorities. We are unable to find any common genus running through these named bodies, nor can these bodies be placed in one single category on any rational basis. The doctrine of ejusden generis could not therefore, be applied to the interpretation of the expression "other authorities" in this Article.

The Supreme Court, on the meaning of the word 'authority' adopted meaning given in Websters 'Third New International Dictionary' a public administrative agency or corporation having quasi governmental powers and authorities to administer a revenue producing public enterprise, and observed "This dictionary meaning of the word 'authority' is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi governmental functions. "The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Govt. of India, and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Art. 12 of the Constitution.

It is not at all material that some of the powers
conferred may be for the purpose of carrying on commercial activities. Under the constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Article 19 (1)(g). In part IV the State has been given the same meaning as in Art. 12 and one of the Directive Principles laid down in Article 46 is that the State shall promote with special care the educational and economic interests of weaker sections of the people. The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people.

1. Shan J however expressed the view that Article 12 would not include all the educational institutions and observed:

"The expression 'authority' in its etymological sense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command to be obeyed. In considering whether a statutory or constitutional body is an authority within the meaning of Art. 12, it would be necessary to bear in mind not only whether against the authority fundamental right in terms absolute are intended to be enforced, but also whether it was intended by the constitution makers that the authority was invested with the sovereign power to impose restrictions on very important and basic fundamental freedoms...authorities, constitutional or statutory, invested with power by law but not sharing the sovereign power do not fall within the expression "State" as defined in Art.12. These authorities which are invested with sovereign power, i.e., power to make rules or regulations and to administer or enforce them to the detriment of citizens & others fall within the definition of 'state' in Art.12 and constitutional or statutory bodies which do not share that sovereign power of the State are not, in my judgement, 'State' within the meaning of Art.12 of the Constitution."
After the decision of the Supreme Court, the view now taken is that Universities are public statutory bodies created by the appropriate Acts of Legislature and they have been empowered to make statutes, ordinances and regulations. Such laws made by the Universities would come within the definition of law as given in Article 13(3)(a) and consequently they must conform to the fundamental rights provided in part III of the Constitution. The Universities do perform functions which may be called governmental functions as they legislate and bind the conduct of persons or bodies falling within the purview of the concerned Act. The phraseology of Article 12 itself clearly indicates that the Constitution makers were considering authorities other than local authorities also to be included within the definition of the State.

The decision of the Supreme Court in the Rajasthan State Electricity Board's case has not encouraged the courts of law to bring within the definition of the State, all the educational institutions as, in fact, it cannot be done so.

1. Umesh Chandro Vs. V.N. Singh A.I.R. 1968 Pat. 3
2. G.F.D. College Vs. University of Agra A.I.R. 1968 All 188.
   Sher Singh Vs. Punjab University AIR 1969 P & H 391 G.V.
   Bangalore University (1967) 2 Mys L.J. 592 Amir Jamia Vs.
As for instance, a private Medical College, run by a Society, in which the Government's involvement is only to the extent of grant in aid, affording the facility of a hospital and participation by some ministers and officers as members of the Society, would not bring the institution within the meaning of the 'State' in Article 12. There may be helpful co-operation between the Government and the private institution but that by itself will not transform the activities of the institution into state action.

Similar view was reiterated by the Andhra High Court in regard to another private college. The Court declined to hold the college to be State unless it was shown to exercise governmental functions. The fact that the Government gives financial assistance does not bring a private college under its control, if it does not exercise any control either in the management of the college or in the matter of appointment or removal of the members of the staff.

In Mahinder Singh Vs. Union of India an institution

which was being managed by the Government was handed over to a society registered under the Societies Registration Act, after which the Government literally ceased to have any control over the institution in its day to day administration. Following the decision of the Supreme Court in the Rajasthan State Electricity Board's case the Court held that the Society could be 'State' within Article 12 as the Society controlling and administering the schools is an authority created under a statute on whom powers are conferred by law under which it was registered. It is a body created for the purpose of promoting educational interests of the people. The decision however held that the regulations framed by the Society cannot be said to be statutory in nature. But where the rules are made on behalf of the Government by a College which is run by the State it would be Statutory and come within the definition of 'law'.

(C) Educational Institutions—Whether 'Charitable Institutions'

Article 26 of the Constitution guarantees to every religious denomination or any section thereof the fundamental right to establish and maintain institutions for religious and charitable purposes, to public order, morality and health. A religious denomination is a collection of

individuals classed together under the same name, a religious sect or body having a common faith and designated by a distinctive name. But the right to establish and administer institutions does not directly relate to educational institutions as in the case of the fundamental right of the minorities to do so under Article (30) (1) of the Constitution. So, the question of educational institutions being characterised as charitable institutions may assume importance when such a status for the institution is claimed by religious denominations who do not prove to be minorities for being entitled to the fundamental right of establishing and administering educational institutions. The decisions of courts of law have not either categorically or conclusively held that an educational institution could, by the very nature of its object and function be characterised as one for charitable purposes. In Sidhrajbhai Sabbai Vs. State of Gujarat it was observed by the Supreme Court that Article 26 occurs in a group dealing with freedom of religion and is intended to protect the right "to manage religious affairs". By clause (a) of Article 26, every religious denomination,

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or any sect thereof, has, subject to public order, morality and health, the right to establish and maintain institutions for religious and charitable purposes, and in a larger sense an educational institution may be regarded as charitable. 1 But the court did not express any final opinion on this question as the protection under Article 30 (1) itself was extended to the petitioner before the Court. When the question was again raised before the Supreme Court in Azeez Basha Vs. Union of India 2 the Court expressed the view that even assuming educational institutions would also come within Article 26 of the Constitution, as institutions for charitable purposes, yet that right could be claimed only by those religious denominations which have established the particular educational institutions. The Patna High Court in S.K. Patro Vs. State of Bihar 3 held the view that a religious institution may have as one of its functions the imparting of religious education, but the kind of educational institutions pure and simple, which has been specifically dealt with under Art. 30 cannot be characterised an institution for religious and charitable purposes within the general provisions of Article 26. This decision of the Patna High Court has been reversed by the Supreme Court but, however, no direct reference has been made to the view

of Patna High Court on this aspect. The claim of a Nair Service Society, which chose to rely on Article 26 being a religious denomination, as having a fundamental right to establish and administer educational institutions for religious and charitable purposes was not acceded to by the Kerala High Court, as it was not shown that the institutions were established and were being maintained for and on behalf of the Nair Community.

(D) Educational Institution—Whether an 'Industry'

The term 'Industry' in common parlance would normally connote a business or trade involving capital and labour engaged in producing the material requisites at large of the society. Questions as to whether an educational institution could be termed an 'industry' had cropped up for decision, not in the general sense but with reference to Sec. 2 (j) of the Industrial Disputes Act (14 of 1947). The importance of the decision either way would have an effect on the rights of the employees of the educational


2. Section 2 (j) of the Industrial Disputes Act: "Industry" means any business, trade undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft or industrial occupation or avocation of workmen.
institution in regard to their service matters if they are brought within the term 'workman' as defined in Sec. 2 (s) of the Act.

The case mostly relied on the Courts in India to negative such a concept is the one decided by the High Court of Australia in Federated State School Teachers' Association Vs. State of Victoria and others. The question that came up for consideration was whether the educational activities of the State carried on under the appropriate statutes and the statutory regulations of each State relating to education constituted an 'industry' within the meaning of Sec. 4 of the Common Wealth Conciliation and Arbitration Act 1904-28, and whether the occupation of teachers so employed was not an industrial occupation and whether the disputes which existed between the State and the teachers employed by them was not an industrial dispute within the meaning of Sec. 51 of the Constitution of Australia. In

1. Section 2 (s) of the Industrial Disputes Act: "workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical, or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment had led to that dispute; but does not include any such person.

2. 1960 (1) L.L.J. 521.
the oft quoted decision of the Court, Knox C.J. stated
"Testing this case, therefore, by the other suggested
criteria or badges of industrialism, can it be said that
the educational activities of the States constitute an
industry? So far as the matter is one of fact, we would
say that they cannot. They bear no resemblance whatever
to an ordinary trade, business or industry. They are not
connected directly with or attendant upon the production
or distribution of wealth; and there is no co-operation
of capital and labour, in any relevant sense, for a great
public scheme of education is forced upon the communities
of the States by law. It was said that if the activities
were carried on by a private, person such as a school
master, then the operations would be described as a business,
a trade or an industry. Shortly, that argument is met by
the fact that a person could no more carry on this system
of public education than he could carry on His Majesty's
Treasury or any of the other executive departments of
Government, and if he were authorised to do so, which is
almost inconceivable, then he could no more carry on an
industry than the State does now".

In the above decision, a dissenting note was struck
by Issac J who was of the view than an industry is not
confined to the production of wealth but also of service.
The basis for this question in our country was the analogy
drawn from certain decisions of our courts where services
rendered in hospitals etc., were held to come within the
definition of industry as defined in the Industrial Disputes Act. The Supreme Court in State of Bombay Vs. Hospital Mazdeor Sabha interpreting the word industry in Section 2 (j) observed that as a working principle it may be stated that an activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees is an undertaking. Such an activity generally involves the co-operation of the employer and the employees; and its object is the satisfaction of material human needs. It must be organised or arranged in a manner in which trade or business is generally organised or arranged. It must not be casual nor must it be for oneself nor for pleasure. Thus the manner in which the activity in question if organised or arranged, the condition of the co-operation between employer and the employee necessary for its success and its object to render material service to the community can be regarded as some of the features which are distinctive of activities to which Section 2 (j) applies'. The Court further made it clear that only the sovereign or regal functions of the Government, which a private individual cannot exercise, would be outside the purview of the Act, but activity undertaken by the Government in the interest of socio-economic progress of the country as beneficial measure is not exempted from the operation of the Act which in substance is a very important beneficial measure in itself.

1. 1960 (1) L.L.J. 251.
In the wake of the decision of the Hospital Mazdoor Sabha case the Supreme Court had held that a Pharmacy college (which was also running a hospital) wherein ayurvedic medicine was prepared on a mass scale and bulk of it marketed, would come within the definition of industry and it would be so even if students were occasionally taken to the pharmacy to acquaint them with ways of manufacturing medicine on large scale.

It is however to be noted that in both the cases referred to above the Supreme Court had left open the question whether running an educational institution would be an industry within the ambit of the term as defined in the industrial Act.

Though it is now established that educational institutions will not come within the term industry, it is not an unreserved conclusion as it should inevitably exclude those institutions which are seemingly educational but are in fact intended to promote the prospects of profit earning capacity of regular industries as, for instance, a research association or a research institute jointly sponsored by the various textile mill owners for the purpose of carrying on research and other scientific work in connection with the textile trade or industry. In such cases though the activities of the institution may be conducting research

1. Lalith Hari Ayurvedic College Pharmacy Vs. Lalith Hari Ayurvedic College Pharmacy Worker's Union. 1960 (1) LLJ 250 (S.C.)
yet the object or idea underlies in helping the individual members mills to improve the methods of production in order to secure greater efficiency, rationalisation and reduction of costs. To such cases the dicta laid down in the Australian case will not apply.

In Osmania University Vs. Industrial Tribunal the Andhra High Court, following the Australian case held that the University could not be said to be an industry. The definition of a word in a statute must be read in its context with the scheme of the statute and what the enactment intended to remedy. The Industrial Disputes Act was enacted at a time when there were acute disputes between the employers and the employees. Analysing the criteria for bringing in an institution within the definition of industry, the Court was of the view that the essence was one of co-operation between capital and labour, however varied the co-operation may be. The definition in the enactment was not intended to cover what would not be disputes between capital and labour, nor disputes connected with or attendant upon, the production of distribution of wealth. The Andhra High Court thus applying the above distinctive and significant test held that any educational institution and with particular reference


2. 1960 (I) LLJ 593 (A.P.).
to Osmanian University where that co-operation does not exist would not be covered by the definition of 'industry'. In that view the reference of industrial dispute raised by the employees of the University like Chaprasla, cycle orderly, head ayahs, ayahs, sweepers, washerman, telephone operators, scavengers and milkmen, regarding their demand for revision and fixation of wage scales and dearness allowance was quashed as incompetent.

The same question was also considered with regard to a reference to an industrial tribunal, of a dispute between the non-teaching staff and two colleges, run by an education society registered under the Societies Registration Act. When the reference was sought to be quashed at the initial stage, the Court remanded the matter back to the Tribunal as it was considered that it was a premature state and the question could be considered only in the light of facts adduced in evidence. The Court, however, observed that an undertaking which depends on the intelligence or capacity of an individual does not become an industry simply because it has a large establishment. Even the existence of profit motive would not be a decisive factor as the institution might get profit because of the excellence of the teachers which is an incidence of their

1. Brahma Samaj Education Society Vs. West Bengal College Employees' Association 1960 (1) LLJ 472 (Cal.)
intellectual skill of any individual but is an organisation where a number of individuals join together to render services which might have a profit motive, on which lines are run many technical institutions. Such institutions which do business by manufacturing things and selling them thereby making a profit, certainly would come within the definition of industry.

The above case when it cam up again after an order by the Tribunal in favour of the employees, the High Court analysed the matter on its facts and held that the non-teaching staff of the colleges were not workmen and the dispute was not an industrial dispute. The Court observed that the imparting of education as in the hands of the teachers and lecturers and the administration of the colleges was entrusted to their executive bodies. After referring to the nature of services rendered by accountants, library clerks, and others as only personal service, the court observed that their association with educational institutions must not be taken to degenerate the educational institutions into industrial institutions and to convert clerical and menial staff into industrial workmen.

The Calcutta High Court, in coming to the conclusion

as it did, relied on the Supreme Court decision in University of Delhi Vs. Ramanath. But before referring to this decision it would be relevant to refer to another decision of the Supreme Court in Corporation of City of Nagpur Vs. its employees and others where it was held that the Education Department of the Corporation would come within the definition of industry. This question was decided while considering the nature of all the other departments as well as of the Corporation and the Court laid down the following tests to determine whether they would come within the definition of 'industry'.

"1) The definition of 'industry' in the Act is very comprehensive. It is in two parts; one part defines it from the stand point of the employer and the other from the stand point of the employee. If an activity falls under either part of the definition it will be an industry within the meaning of the Act.

(2) The history of industrial disputes and the legislation recognise the basic concept that the activity shall be an organised one and not that which pertains to private or personal employment.

1. A.I.R. 1963 S.C.
2. 1960 (1) LLJ 523 (S.C.).
(3) The regal functions described as primary and inalienable functions of the State though statutorily delegated to a corporation are necessarily excluded from the purview of the definition. Such regal functions shall be confined to legislative power, administration of law and judicial power.

(4) If a service rendered by an individual or a private person would be an industry it would equally be an industry in the hands of a Corporation.

(5) If a service rendered by a Corporation is an industry the employees in the departments connected with that service, whether financial administrative or executive, would be entitled to the benefits of the Act.

(6) If a department of a municipality discharges many functions some pertaining to industry as defined in the Act and other non-industrial activities, the predominant functions of the department shall be the criterion for the purpose of the Act.

On the facts of the instant case, the Supreme Court held regarding the Education Department of the Nagpur Corporation as follows:

"Education Department: This Department looks after the primary education, i.e. compulsory primary education within the limits of the Corporation. This service can equally be done by private persons. This department
satisfies the other tests. The employees of this department coming under the definition of 'employees' under the Act would certainly be entitled to the benefits of the Act".  

This case was cited and distinguished by the Supreme Court in Universities of Delhi Vs. Ramanath earlier referred to. In this case, to an application made under Section 33 C (2) of the Industrial Disputes Act, a preliminary objection was taken on behalf of the University that it can not be called an industry and an 'employer' within the meaning of the terms in the Act.

The objection was overruled by the Tribunal and on special leave the question whether an educational institution could be termed an industry had to be decided by the Supreme Court. The question turning round as to whether the concept of co-operation between the teachers and their institutions being treated as similar to the co-operation between labour and the capital fitted in with the scheme of the Act, it had to be resolved on the contents of the definitions of

2. Section 2 (g) defines employer as follows: "employer means in relation to an industry carried on by or under the authority of any department of the Central Government or a State Govt., the authority prescribed in this behalf, or where no authority is prescribed the head of the department; (ii) In relation to an industry carried on by or on behalf of a local authority, the chief executive officer of that authority."
(1) employer, (2) industry and (3) workmen. The non-teaching subordinate staff may be called workmen but in the main scheme of imparting education the teachers employed by educational institutions, whether the said institutions are imparting primary, secondary, collegiate or post-graduate education, are not workmen under section (2)(s) and any disputes between them and the institutions which employed them are outside the scope of the Act. In other words, if imparting education is an industry under section 2(j) the bulk of the employees being outside the purview of the Act, the only disputes which can fall within the scope of the Act are those which arise between such institutions and their subordinate staff, the members of which may fall under section 2(s). Further it was observed that having regard to the fact that the work of education is primarily and exclusively carried on with the assistance of the labour and co-operation of teachers, the omission of the whole class of teachers from the definition prescribed by section 2(s) has an important bearing and significance in relation to the problem. So, when the majority of the employees of an institution were held not entitled to invoke the benefit of the Act, it was naturally difficult for the court to presume that the policy of the enactment intended to protect a very minor and insignificant section of the staff, namely the subordinate non-teaching workmen. So reading sections 2 (g) (j), and (s) together, the Court was inclined to hold that the work of education carried on by educational
institutions like the University of Delhi is not an industry within the meaning of the Act. After reaching this conclusion the Supreme Court observed: ".... it may be legitimate to observe that it is not surprising that the Act should have excluded education from its scope, because the distinctive purpose and object of education would make it very difficult to assimilate it to the position of any trade, business or calling or service within the meaning of section 2 (j). Education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development. To speak of this educational process in terms of industry sounds so completely incongruous that one is not surprised that the Act deliberately so defined workmen under Section 2 (s) as to exclude teachers from its scope. Under the sense of values recognised both by traditional and conservative as well as the modern and progressive social outlook, teaching and teachers are not no doubt assigned a high place of honour and it is obviously necessary and desirable that teaching and teachers should receive the respect that is due to them. A proper sense of values would naturally hold teaching and teachers in high esteem, though power or wealth may not be associated with them. It cannot be denied that the concept of social justice is wide enough to include teaching and teachers and the requirements that teachers should receive proper emoluments and other amenities which is essentially based on social justice can not be disputed but the effect of excluding teachers from section 2 (s) is only this that the remedy available for
the betterment of their financial prospects does not fall under the Act. It is well known that Education Departments of the State Governments as well as the Union Government, and the University Grants Commission carefully consider this problem and assist the teachers by requiring the payment to them of proper scales of pay and by insisting on the fixation of other reasonable terms and conditions of service in regard to teachers engaged in primary and secondary education and collegiate education which fall under their respective jurisdictions. The position nevertheless is clear that any problems connected with teachers and their salaries are outside the purview of the Act, and since the teachers form the sole class of employees with whose co-operation education is imparted by educational institutions, their exclusion from the purview of the Act necessarily corroborates the conclusion that education itself is not within its scope. 

It is beyond doubt that unlike commercial industries educational institutions of the nature of a University are not established and run with any profit motive though the absence of profit is not by itself a relevant factor to exclude an institution from the definition of an industry; education in its true aspects is more a mission and a vocation rather than a profession or trade or business, however wide may be the denotation of the two latter words under the Act.

The earlier decision of the Supreme Court in the case
of The Corporation of the city of Nagpur Vs. Its workmen was referred to by the Court and distinguished on the ground that the department of education formed an integral part of the Corporation which taken as a whole by the nature of its predominance came within the definition of the industry. The main plank of the argument in the Corporation case was based on an attempt to exclude the Corporation from the purview of the Act on the ground that it exercised regal or governmental functions and this was negatived. But in the case of a University the predominant activity is imparting education and is outside the Act. And teaching and teachers do not come within its purview and the minor and incidental activity carried on by the subordinate staff which may fall within the purview of the act cannot alter the predominant character of the institution.

Following this decision, institutions, the main purpose, object and function of which are the advancement of learning and investigation into matter of literary, scientific and artistic interest are excluded from the purview of the Act. The fact that such institutions incidentally carry on some commercial activities like printing, publishing and selling books would not bring them within the ambit of the Industrial Disputes Act respectively when the selling of such publications is only an ancillary

1. 1960 (1) LLJ 523 (S.C.).
activity and the employees are engaged in rendering clerical assistance in this matter just as the employees of a solicitors' firm help the solicitors in giving legal advice and service.

In the Bangalore Water Supply and Sewerage Board v. A. Rajappa, the majority of a seven-Judge Bench has held that the test is not the predominant number of employees entitled to enjoy the benefits of the Act but the true test is the predominant nature of the activity. In the case of the University or an Educational Institution, the nature of the activity is ex hypothesi education which being a service to the community is an industry. Besides, there may be any number of activities of an Educational Institution such as a printing press, a transport department and clerical


2. Bangalore Water Supply & Sewerage Board v. A. Rajappa, (1978) Lab. I.C. 467 (499-502) (S.C.), per Krishna Iyer, J. for himself, Bhagwati and Desai JJ. and Beg C.J. and Chandrachud C.J. concurring, while Jaswant Singh and Tulsapurkar, JJ. concerning only on the question that the appeal of the Bangalore Water Supply and Sewerage Board should be dismissed and dissenting from the wide construction, without any limitations, being put on the words used in the definition of industry by the majority.
and menial staff etc. which may be severable from the teaching activities of the University. These operations viewed separately or collectively, by themselves, may be treated as an 'industry'. On this reasoning the Court held that the University of Delhi was wrongly decided and education in its institutional form is an 'industry'. But in Bangalore Water Supply case, in fact, the question whether an educational institution is an industry was not under consideration of the Court. Therefore, its holding on this point is only in the nature of an obiter. But even in this case, the Court did not specifically decide the question as to whether the activity of teaching will fall within the ambit of the expression used in the definition? and, therefore, whether a teacher would be a workman? The question is still at large. A single Judge of the Kerala High Court has observed that the matter has to be considered in the light of the evidence as to what type of work does a teacher do. The duties which a teacher in such a school

discharges has to be proved by adducing relevant evidence.
A division Bench of the Madras High Court in Christian
Medical College Vellore Association v. Government of India
has held that education in its institutionalised form is an
'industry'. A priori, the Christian Medical College Hospital
even as an educational institution, is an 'industry'. But
in view of the protection of Art. 30(1) of the Constitution,
the provisions in S.9–A, S. 10, S. 11–A, S.12 and S.33 are
not applicable to this institution. But in Miss. A.
Sundarambal v. Government of Goa, Daman & Diu, a division
Bench of the Bombay High Court held that even if an
educational institution is 'industry' according to the holding
in Bangalore Water Supply case, the nature of the work
of teachers teaching in educational institutions will not
fall within any of the categories of work enumerated in
S. 2(a). On a proper analysis of the definition and on
appreciation of the nature of work done by a teacher, the
Court held that a teacher is not a 'workman'.

1. Christian Medical College Vellore Association v. Government
of India, (1983) II L.L.J. 372 (382–83) (Mad.) (D.B.), per
Ramaswami, J. This view is based on the decision of the
Supreme Court in St. Xaviers College v. State of Gujarat,
A.I.R. 1974 S.C. 1389, per Mathew, J.
II L.L.J. 491 (498) (Bom.) (D.B.) Pannaji Bench (Goa), per
Jahagirdar, J.
The Supreme Court in Bengaluru Water Supply and Sewerage Board v. A. Ranappa, overruled the following cases:

2. Rabindra Nath Sen v. First Industrial Tribunal
6. Management of Safdarjung Hospital v. Kuldip Singh Sethi,
7. Dhanrajgirji Hospital v. Workmen,
8. And rehabilitated the case of State of Bombay v. Hospital Mazdoor Sabha.

1. AIR 1978 SC 548 (7 Judges).
(3 Judges).
5. AIR 1968 SC 554 : (1968) 1 SCR 742.
Applying the test laid down in the Bangalore Water Supply decision it has been held that activities under the Coffee Board, Swaraj Ashram Sarvodaya, Nagpur, Calcutta Telegraphs, Railways, Security Paper Mills, Hoshangabad, Octroi Department of Municipal Council Company renting out flats with services etc. will come under 'industry'.

Thus the sweep of the Bangalore Water Supply decision has widened the coverage of industry to comprehend educational, teaching and research institutions, hospitals, professional services of lawyers, solicitors, editors etc., if the evocation in question satisfied the triple test formulated by the Supreme Court in that decision. This situation demanded for a more comprehensive definition with clarity in the light of the uncertainty brought about by the conflicting decisions of the Supreme Court.

   Also see AIR 1967 SC. 1857; 1978 Lab. I.C. 467 (SC) and AIR 1970 S.C. 564.
In fact Mr. Justice Y.B. Chandrachud (as he then was) made a pertinent observation in the Bangalore Water Supply decision when he observed that the problem is too much policy oriented. Parliament must step in and legislate in a manner which will leave no doubt as to its intention. That alone can afford a satisfactory solution to the question which has agitated and perplexed the judiciary at all levels.

The new definition:-

The new definition given to the term 'industry' by the 1982 amendment is to be appreciated in the background stated above. The amendment gives due deference and recognition to the guidelines and triple test evolved by the Supreme Court in the Rajappa decision. However the amendment expressly excludes hospitals, educational and research institutions, charitable and Philanthropic Services, activities of Government Departments involving Sovereign functions etc. from the purview of industry.

Under Section 2(j) 'industry' means any systematic activity carried on by corporation between an employer and his workmen for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes which are not merely spiritual or religious in nature, whether or not.

(i) any capital has been invested for the purpose of carrying on such activity; or
(ii) such activity is carried on with a motive to make any gain or profit.

This includes any activity of the Dock Labour Board under S.5A of the Dock Workers (Regulation of Employment) Act, 1948, any activity relating to the promotion of sales or business or both carried on by an establishment. Soil conservation or irrigation or departments rendering material services to the community will come under 'industry' by applying the Dominant Nature Test.

Exclusions:- The amendment expressly excludes the following vocations and activities from the definition of 'industry'.

They are:- (1) any agricultural operation not associated with any other activity which is a predominant one involving the characteristics of industry as stated above; or

(2) Hospitals or dispensaries; or

(3) educational, scientific, research or training institutions; or

(4) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) Khadi or Village industries; or

1. Superintending Agri. Officer v. Vaidya, 1986 I LLJ.318 (Bom)
(6) any activity of the Government relatable to the Sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or

(7) any domestic service; or

(8) any activity, being a profession practiced by an individual or body or individuals, if the number of persons employed by the individual or body of individuals in relation to such profession is less than ten; or

(9) any activity, being an activity carried on by a co-operative society or any other like body of individuals, if the number of persons employed by the Co-operative Society, Club or other like body of individuals in relation to such activity is less than ten.

The extended provision has provided clarity and achieved certainty to the law. The exclusion clauses have restricted the coverage of the definition and that the wide import given to the term 'industry' in the Bangalore Water Supply and subsequent decisions of the Supreme Court is substantially negatived. Hospitals, educational institutions, sovereign functions of the Government etc.

1. Superintending Agri. Officer v. Vaidya. 1986-I LLJ. 318 (Bom)
are taken out of the fold of 'industry'. Parliament has enacted a law namely, Hospital and Other Institutions (Settlement of Disputes) Act, 1982 for hospital workers etc.

As a result of the amendment, hospitals, educational or research or scientific institutions, solicitors firm with less than ten workmen, Coffee board, telephones, Charitable institutions, Octroi department etc. are excluded from the ambit of 'industry'.

(a) Principles of Natural Justice and Educational Institutions:

Here it would be pertinent to make a reference to the concept of natural justice, the enforcement of which is ordered in writ applications. Of course, natural justice is not a matter of fundamental right. Nonetheless, every one has an inherent right to demand justice and fair play in protecting his rights.

The requirement of application of the concept of natural justice pervades almost all facets of disputes in educational matters, be it in refusing permission to establish educational institutions or the interference of authorities in their administration or service matters of the staff members, or disciplinary proceedings, against management, staff or students or any act affecting their right, all are tested in the light of application or denial of the principles of natural justice. Yet, there are no fixed elements of principles to define what is natural justice. It is primarily called in to aid
where there are no statutory rules governing the conduct of the parties and of procedure for redressal of grievances. Even where there are rules but are silent as to adopting a quasi judicial approach, it could be required to be adopted by implication. On the principles of natural justice, the Supreme Court has observed: 'It is true that if a statutory provision can be read consistently with the principles of natural justice, the courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power the nature of the effect of the exercise of that power.

Therefore it is explicit that the aim of rules of natural justice is to secure justice or to put it negatively

elimination of any perverse opinion or decision of authorities whether their function be quasi judicial or administrative, having civil consequences in the functions of the latter category. Being a common law principle, there are essentially no codified rules of procedure or of evidence regulating natural justice. So long as the decisions and actions of authorities reflect no perversity in fair play, they would be valid and cannot be impeached in a court of law. The principles of natural justice are intended to stem out bias and assure good faith in all actions and decisions.

The entire concept is based on two principles of common law (a) nemo debet esse judex in sua propria cause, that is 'an adjudicator be disinterested and unbiased' and (b) audi alteram partem, which means none shall be condemned unheard. The privilege of natural justice can by no means be made a substitute for the judicial process of the courts of law. There may be many facets of the concept of natural justice having semblance to the aspects of the judicial process, but it is not necessary that all should be applied in every dispute. The rules of natural justice would vary with the constitution of the authority or the tribunal and even before the same authority it might vary depending upon the circumstances of a particular dispute. The principles of natural justice comes into play
to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it.

(4) Principles of Natural Justice and Educational Institutions:

The need for applying the principles of natural justice was stressed by the Kerala High Court which held that an agency which is bound to apply pre-existing rule having the force of statute to a situation and arrive at a decision, cannot be said to function in a purely administrative capacity. In Sckharkherda Education Society Vs. State of Maharashtra also the need for application of the principles of natural justice of giving a hearing before granting or refusing permission to establish a school was pointed out. In the instant case, however, the educational authority was to refuse or grant permission to the applicants on the basis of a recommendation by the district committee as to the requirement of an additional school in the local area concerned. The district committee was to take into consideration the relevant factors contained not only in the code but also those specifically emphasised in

   See also Suresh Koshi George Vs. University of Kerala A.I.R. 1969 S.C. 198.
the circular letters of the Government and press notes which gave them ample guidance to take a decision. The application was to contain numerous particulars concerning the applicants as also the schools proposed to be established. In view of so many safeguards against any arbitrary actions, the Supreme Court reversed the decision of the Bombay High Court in Lok Sikshan Sanstha Vs. State of Maharashtra and held that the impugned provision discussed above was not violative of Article 14 of the Constitution. The Supreme Court further held that when all the relevant circumstances have been taken into account by the District Committee and Educational authorities there would be no violation of any principle of natural justice merely for the reason that the applicants were not given a hearing by the Educational authorities before the applications were rejected. The particulars which had to be mentioned in the prescribed application form were very elaborate and complete, giving proper guidelines.

A similar view had been expressed earlier by the Madras High Court in A.N. Parasuraman Vs. State of Tamil Nadu upholding the validity of certain provisions of

1. A.I.R. 1973 S.C. 388
2. A.I.R. 1972 Mad. 123.
the Madras Private Educational Institutions (Regulation) Act 1966 Section 6 of the Act provided for vesting power in an authority to be appointed for permitting the continuance or establishment of private educational institution. Apparently no guidelines were prescribed in the Act for the exercise of power. However Section 4 required an application to be made in the prescribed form disclosing detailed particulars regarding almost all aspects of the institution including its academic side. The High Court held that the power vested in the authority when viewed in the light of the particulars which would be furnished by the institution, would not give room to characterise the provision as arbitrary. The fact that standards of requirements for a private educational institution have not been prescribed cannot by itself give rise to an argument that the power vested in the competent authority to grant or refuse permission is unreasonable or arbitrary.

Natural Justice and Election disputes:

For deciding the election disputes the jurisdiction will be vested in a high ranking authority like the Chancellor by the University Act itself. It is settled law that where such question arises as to whether any person has been duly elected or appointed or is entitled to be a member of any authority or body of the University the Chancellor or any other authority in whom the jurisdiction is vested has to act judicially or quasi judicially.
in arriving at a decision. In deciding the dispute the Chancellor has not only to exercise his discretion but has to take a decision thereon which necessarily implies that in determining the disputes referred to him he has to act judicially. The Chancellor is not to consider the question whether in his opinion a person has been elected or appointed but has to determine whether he has been duly elected, that is in accordance with the provision of the statute.  

'The Chancellor though is not a judge in the real sense of the term but constituted only as an administrative authority, exercises quasi judicial functions in deciding whether a person has been duly elected or not. This does not mean that the party affected is entitled to a personal hearing though it is open to the authority to grant the request of the affected individual to hear him in person. It is not incumbent on him to hear a party by counsel or in person. The party affected is entitled only to make his representations.

Generally the statutes of the University might themselves prescribe the grounds on which the Chancellor might base his decision in deciding elections disputes. Even in the absence of any guidelines the power given to the Chancellor cannot be considered to be arbitrary thus lending itself to be struck down as violative of Article 14 of the Constitution.

The power to decide disputes would, depending on
the wording of the provision may even empower the Chancellor
to declare a person duly elected in certain circumstances.
For instance, section 38 of the Punjab University Act 1947
which deals with disputes as to the constitution of the
University provides. If any question arises as to whether
any person has been duly elected or appointed as, or is
entitled to be, a member of any authority or other body
of the University the matter will be referred to the
Chancellor whose decision thereon will be final. Under
this section, the Chancellor can decide whether any person
has been duly elected as a member of any authority or other
body of the University. The word 'is entitled to be'
confer ample jurisdiction on the chancellor to declare
any person, who should have been declared as elected accord-
ing to the rules, to have been elected if the Returning
Officer did not announce the result in accordance with the
rules and thus failed in the discharge of his duties as
laid in the regulations.

Invalidity of Votes:

On the question of validity or invalidity of votes
there are two decided cases. In K. Nandan Vs. Ravaneshwar

where in an election of a representative from amongst the members of the Bihar Legislative Council to the Senate of the Bihar University in accordance with S. 17 of the Bihar University Act 1960 votes were cast contrary to the instructions to the voters not to place cross mark against more than one name of the candidate, on the same Court held that existence of special circumstances and the special circumstances and the special remedy excluded the right of the University to invoke its general power, not to start with, but after special situation and obtained a code for dealing with special kinds of cases and where the law generally allows alternative remedies one or the other or both can be invoked unless one remedy is expressly or by necessary implication excluded by the other. In the instant cases the implication is not only one way but it was clear was well. The Supreme Court held the view that the switch ever to the ordinary procedure would not be legal having once invoked statute No.30 in the special circumstances. If the statute had left the discretion to the Executive Council to take such action thereon as it may think fit it can only be understood to give the liberty of action on the recommendations of the Reviewing Committee. The liberty was not to take action outside the statute.

The State Legislatures have ample powers to make appropriate legislations to rectify all the irregular
appointments, termination of services or dismissals made by colleges affiliated to any University within the State. Such measures can limit the operation of the screening to a period between specified dates and a such provision will not be discriminatory and violative of Article 14 of the Constitution. Thus in Jagadish Pande Vs. Chanceloor, University of Bihar a legislative measure brought in by way of an amendment (Act of 13 of 1962) to the Magadh University Act 1961 (Bihar Act 4 of 1962) and the Bihar State Universities (University of Bihar, Bhagalpur and Ranchi) Act 14 of 1960 provided for reviewing certain appointments dismissal, etc., of teachers of non-governmental affiliated colleges to be subject to the Chancellor's order on the recommendation of the University Service Commission established under the Act. Section 4 of the amending Act which empowered the Chancellor to review the appointment etc., made after the 7th day of November 1961 and before judicial in nature and it obligates him to give a hearing to the parties and record reasons in support of the order that he may pass. This would apply to the Chancellors of Universities as well, who are given powers to annul the proceedings which are not valid. The Chancellor has to hear the University and other persons whose rights are likely to be affected and pass an order thereon. Once

2. Dr. Gyanavati Trivedi Vs. Dr. Sarojini Varshnay 1970 All.L.J. 1015.
where certain officers or authorities are vested with jurisdiction to decide petitions or appeals or revision by teachers aggrieved against orders of the management and the rules governing such matters are not statutory, the authorities are but domestic tribunals and they at best only bear a quasi judicial approach in deciding the matters before them. Where the Government had undertaken to decide the matter over and above that of the prescribed authorities it is only but fair that the Government should observe at least the minimum requirements of natural justice.

Disciplinary Proceedings: Natural Justice:

The duty to act judicially is implicit in the exercise of the power to dismiss an employee on charges of misconduct. So even if the rules governing the service of the employee are silent as to the procedure to be adopted in dismissing an employee, the authorities are duty bound to follow the principles of natural justice and hold an enquiry before passing the order of dismissal. The mere fact that there was a 'report' against the employee would not exonerate the employer such as a District Board from holding a regular enquiry. The enquiry to be held

must be a regular enquiry. The enquiry to be held must be real and reasonable. A personal hearing to the employee must be given especially when a demand is made to that effect. Even the permission granted or order issued by the authority cannot absolve the management from holding an enquiry. So when the Inspector of Schools ordered a teacher to be removed from service on the ground that he was a member of the communist party, the management was bound to hold an enquiry before dispensing with the services of the teacher.

Where a form of agreement between management and employees to be adopted by all aided managements provided by a clause right of appeal for the aggrieved party to the educational authorities, it was contended that the orders passed thereon would be of a quasi judicial nature. The question was however left open by the Kerala High Court which was of the view that conferment of the right of appeal though was by virtue of the Educational Rules, it was still not sufficient to import a judicial element into the orders which are impugned in the case. In Kalyana Sundaram High School Educational Society Vs. Director of Public Instruction.

1. Rama Kanta Banik Vs. District School Board of Mald AIR.1969 Cal.397.
5. 1956 Mad. W.N. (Jour) 104.
the Madras High Court however took the view that the Director of Public Instruction was a public authority entrusted with the public duty of exercising supervision over secondary schools and in the discharge of that duty if the Director hears and determines the appeal, it is a quasi judicial function that he performs though the rules under which that function is performed are at best administrative instructions. Even assuming that the position of the Director was that of an arbitrator, it was not an arbitration that the contracting parties voluntarily agreed to when they entered into the agreement.

(5) Right to Establish And Administer Educational Institutions:

General: Education in India can be broadly divided into those stages, namely, Primary, Secondary, and Higher Secondary or Collegiate Education. Though primarily it is the duty of the State to impart education to its citizens and though this duty is enjoined on the State by certain Directive Principles of the State policy, yet the State cannot shoulder the entire responsibility considering the ever increasing number of pupils and at least the minimum standard that has to be maintained in imparting instructions. There is no legal inhibition to individuals, or associations of individuals, societies etc., establishing and running educational institutions. Primary or basic education is generally provided by private schools and schools established and run by the local authorities like the Zilla Parishads,
Panchayats, Municipalities etc. The Government, through the office of Director of Public Instruction, regulates the administration of Schools established for secondary and higher education. All the educational institutions are controlled by the appropriate Acts of the State Legislatures and the rules made thereunder.

All the 'agencies', to use a common expression, who wish to establish and administer educational institutions have to necessarily obtain permission from the Government or the concerned educational authorities statutorily or empowered to grant such permission. Only in the event of obtaining such permission which, apart from entailing the institutions certain benefits, monetary or otherwise, recognition etc., would be entitled to accord the requisite academic qualifications for sending its alumni for studies in higher education. So far as individuals are concerned they have to fully abide by the educational acts and the rules and unlike societies or associations there may be no other law governing their individual status and conduct.

A society has to be registered under the Societies Registration Act XXI of 1860, which Act was passed for improving the legal conditions of societies established for the promotion of literature, science or the fine arts, or for the diffusion of useful knowledge and of political education or for charitable purposes. The private or public limited companies establishing and running educational
institutions have to be incorporated under the Companies Act (1 of 1996) and this Act empowers the Central Government to direct, by the grant of licence, that an association may be registered as a company with limited liability, without the addition to its name of the word 'limited' or the words 'private limited' if the Central Government is satisfied that an association is to be formed as a limited company for promoting commerce, art, science, religion, charity, or any other useful object and intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment any dividend to its members. A trust created for the purpose of promoting education would be governed by the Indian Trusts Act (II of 1882). In Indian law, charitable purposes would include expending money for the purpose of promoting education. Even under the Transfer of Property Act (IV of 1882) certain restrictions such as the 'rule against perpetuity' would not apply in the case of a transfer of property made for the advancement of religion, knowledge, commerce, health safety, or any other object beneficial to mankind.

Though the legal entities like the societies, companies, etc. are governed by the particular legislation passed by the Central or the State legislatures as the case may be, yet the educational institutions, established and run by them would be governed by, to use a common nomenclature, the educational Acts, and the rules made thereunder. If
incidentally the legal entities which run the institutions are affected with regard to their rights under the legislations governing their origin and establishment by education Acts, it cannot be claimed that the latter legislations are bad as running derogatory to the former. But this is not to say that a legislation could be passed in derogation of any fundamental right guaranteed to persons or societies running educational institutions. Thus, in Damayanti Naranga Vs. Union of India certain institutions run by a Society registered under the Societies Registration Act were sought to be taken over and vested in a Sammelan created by a law passed by Parliament, called The Hindi Sahitya Sammelan Act (1962). The Society was declared to be one of national importance. The Sammelan, which was a corporate body itself was to consist of certain personnel as members nominated by virtue of the Act or the rules made thereunder. When this was challenged as violative of Article 19(1)(c) i.e., the right to form an association, in that the members of the Society were compelled to admit persons against their choice, the claim was upheld and the Supreme Court observed: 'The right to form an association


in our opinion, necessarily implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are introduced in the Voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to from an association. If we were to accept the submission that the right guaranteed by Art 19(1)(c) is confined to the initial stage of forming an Association and does not protect the right to continue the Association with the membership either chosen by the founders or regulated by rules made by the Association itself, the right would be meaningless because as soon as an Association is formed, a law may be passed interfering with its composition, so that the Association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association. The Court held that the Act in so far as it interfered with the composition of the Society, in constituting the Sammelan violated the rights of the original members of the Society to form an Association guaranteed under Article 19 (1)(c). On the question of the provision being protected by Article 19(4) the Court
held that the clause on the face of it could not be called in aid to claim the validity for the Act.

The State may permit establishment of educational institutions subject to the satisfaction of certain relevant conditions prescribed by or under the Education Act or the rules made thereunder. Thus where the rules prescribe that the permission is to be granted after considering the claims with particular reference to:

(i) the existing schools in and around the locality in which the proposed school is to be started; (ii) the strength of the several standards and the accommodation available in each of the existing schools; (iii) the distance from each of the existing school to the site in which it is proposed to locate the next school (iv) the nature of the management and the guarantee it offers of the financial stability and (v) the extent to which the educational needs of the locality require a new school and the permission is granted to a claimant by the appropriate authority on extraneous considerations its decision would be tainted by mala fides and the Court has power to compel the authority to consider the applications properly. Similarly when sanction is granted for the establishment of the school in violation of an education

Act or the rules made thereunder, such an order would be liable to be quashed by the grant of a writ of certiorari. Thus where the rule provides that no permission to open a new school shall be granted, "(i) if the applicant does not possess absolute ownership or right to be in exclusive possession for a period of not less than six years over the site building and other properties of the schools; (ii) if the application is defective in material respects; (iii) if the declaration regarding the financial guarantee, where necessary, is not furnished; (iv) if the educational needs of the locality do not require the opening of a new school; (v) if the situation of the school is inaccessible to all the members of the public; (vi) if a person convicted of an offence involving moral turpitude is a member or an office bearer of the managing body," any non-compliance with the mandatory provision would invalidate the sanction. The Court would in such an event be entitled to go into the question whether the objective satisfaction is properly made on the materials disclosed.

In Sakharkerda Education Society Vs. State of Maharashtra two societies were refused permission to establish new schools and the rules contained in the Grant-in-aid code which regulated such matters were challenged as vague and arbitrary. The rules prescribed certain conditions

inter alia requiring consideration of the following factors: Rule 3: (1) The School is actually needed in the locality and it does not involve any unhealthy competition with any existing institution of the same category in the neighbourhood; (2) The Management is competent and reliable and is in the hands of a properly constituted authority or managing committee. The Court observed:

Clause (1) of Rule 3 is too vague to afford any standard whatsoever both as to the need in the locality and also as to unhealthy competition with existing institutions. Clause (2) is also equally vague as competency and reliability of the management without any standard is meaningless. Again, there is no provision that any particular authority shall make a reasonable inquiry into each of these matters and thereafter impartially determine each of the elements necessary to be considered. These rules it was held, cannot therefore be regarded as reasonable or reasonably necessary. The authorities cannot refuse permission on the ground of any possibility of some schools indulging in malpractices or having so indulged in the past. The Court further observed, "It is hardly possible for any person to subscribe to the view that merely because there have been malpractices in the past, the very opening of an institution should be prevented in the expectation that every institution that is started will commit malpractices. The prevention of unhealthy competition, i.e. undue pressure either on students or on parents can be prevented by appropriate rules and not by refusing to
recognise a school altogether in its inception. " The Court further observed that it is well known that "the schools are very much congested and every sensible person will wish that the number of students in each class are limited so that the teacher could easily attend to all the students and impart proper instruction. The public is tasting the fruits of monopoly business. It is well experienced that it is only competition that induces efficiency. If there are 2 or 3 institutions in a locality, those who want to study have got a choice and they would necessarily select the institution where the standard of education imparted is very high. Even paucity of funds for granting aid cannot be a ground for refusing permission to establish a new school. ' The Court observed that in such cases instead of giving a sum in proportion to the allowable expenditure of a school, the grant could be based on so much percentage per student on the basis of so much number of students in a class. But these observations came in for sharp criticism by the Supreme Court, which in State of Maharashtra Vs. Lok Sikshan Sanstha reversing the judgement of the Bombay High Court observed: "The High Court in their judgement under attack had made certain observations regarding what according to it should be the policy adopted by the educational authorities in the matter of permitting the starting of a new school or of an

additional school in a particular locality or area. It is enough to state that High Court has thoroughly misunderstood the nature of the jurisdiction that was exercised by it when dealing with the claims of the two writ petitioners that their application has been wrongly rejected by the educational authorities. So long as there is no violation of any fundamental right and if the principles of natural justice are not offended it was not for the High Court to lay down the policy that should be adopted by the educational authorities in the matter of granting permission for starting schools. The question of policy is essentially for the State and such policy will depend upon an overall assessment and summary of the requirements of residents of a particular locality and other categories of persons for whom it is essential to provide facilities for education. If the overall assessment is arrived at after a proper classification on a reasonable basis it is not for the courts to interfere with the policy leading to such assessment.

It appears that an educational institution might also be brought to existence as a result of conceding the demands of industrial workers for the benefit of their children. It is logically deducible from the decision of the Supreme Court in Dhrangadhra Chemical Works Vs. Their Workmen 1 that in the event of the conditions prevailing

1. 1962 (1) L.L.J. 197.
contrary to those adverted to in the decision or circumstance otherwise affording justification, a company or a firm or the Government could be compelled to establish the school. In this case the workmen had claimed that the company should establish a school on the salt works for the education of their children and the tribunal directed that the company either get the government to establish a school or should itself do so within a period of one year. Setting aside this award of the tribunal the Supreme Court observed: "we find that there are schools four miles and a half away from the work. It is not unfair to expect the children to attend these schools. Furthermore, it is in evidence that during the rains, the lands of the work have any permanent structure for a school on such land. Again, the schools would not be required except during the season, that is except for about eight months in a whole year. It seems to us that no much useful purpose can be served, by such schools. We also think that as the wage fixed by the tribunal is a fair wage, it cannot be right to burden the appellant with the cost of providing a school for the children of the workmen."

The right to establish an educational institution is not made expressly a fundamental right except in the case of minorities. However, a decision of interest to note on the question of Article 19(1)(g) being extended to
establishing an educational institution is the case in Sakharkherda Educational Society Vs. State of Maharashtra wherein it was contended that in as much as Article 30(1) refers especially to educational institutions Article 19 (1) (g) could not be intended to include such institutions.

The Court negativing the contention observed that the scope of Article 19 (1) (g) and Article 30 very much differ and while the former is a general guarantee of a particular kind of fundamental right in wide words, the latter is intended to guarantee certain rights to minorities and unless in the enumeration of the rights, the right of education were mentioned probably, it would have been excluded. But the Supreme Court on appeal in State of Maharashtra Vs. Lok Sanstan has reversed the judgement of the Bombay High Court but the question of applicability of Article 19 (1) (g) was not considered as the Supreme Court took the view that during the proclamation of emergency, claimants could not have invoked Article 19 in respect of the right to establish educational institutions. Thus the question whether the rules concerned were saved or not by the exception clause of Article 19 was not considered. Once the right to establish an educational institution is brought within the ambit of Article 19 (1) (g) it would necessarily lead the courts to examine the restrictions imposed on the exercise of the right as to their reasonableness.

Administration of Educational Institutions:

The right to establish and administer educational institutions is not a specific fundamental right for persons who are not minorities and the Courts of law have not finally settled this question with reference to Articles 19 or 26 of Constitution. So much so, when any stringent legislation is made by the Legislature or rules are framed by the Executive to control the administration of the educational institutions, even where they corrode into what in the similar situation would be the fundamental right in the case of minorities, there is no yard stick with which to test the validity or efficacy of the provisions made. Unlike in the case of minorities, the courts of law may have to test the validity of the provisions only in the light of the general run of Constitutional provisions and comment upon their reasonableness on a theoretical concept of "the interest of the institutions." Even if the right to administer educational institutions is brought to fit within Article 19, yet the controlling legislative measures might be justified as reasonable restrictions which are quite different from reasonable regulations as obtain in the case of minorities. Perhaps the case of the majority would be a shade better if the body of persons administering the educational institutions are a compact religious
'denomination' in which case Article 26 of the Constitution might be the touchstone for testing the validity of the law affecting such administration.

Government institutions may be excluded from control. In exercise of the legislative or executive powers the State can completely exclude from the purview of the controlling measures all the recognised institutions run by the Government itself. In such an event exclusion of the government institutions could be justified as a reasonable classification having rational relation to the object sought to be achieved by the enactment. The State can always make a distinction also between institutions properly run and those badly managed.

In Katra Education Society Vs. State of Uttar Pradesh a certain society registered under the Societies Registration Act challenged some of the provisions of Section 16 (A) to 16 (1) which were added by way of amendment to the Intermediate Education Act (2 of 1921). In the first instance section 16 (A) which required all the institutions including the society to submit a scheme administration inter alia for the constitution of the management of committee for the for which the Headmaster or the Principal was to be selected by rotation, was challenged as affecting the right of the society to administer the institutions in accordance with

the memorandum of the association of the society. This claim was negatived by the Supreme Court on the ground that the impact of the Act upon the rights of the trustees or the management of the charitable institutions was purely incidental, the true object of the legislation being to provide for control over educational institutions which was well within the competence of the legislature.

Selection of teaching Staff:— Section 16 F (4) was challenged as conferring an uncontrolled power upon the Regional Deputy Director of Education to appoint teachers or Principals where the choice of the management was twice rejected by the officers. Such a provision was upheld by the Supreme Court as enacted in the interest of the students of the institution, and that it was implicit in the provision that the power could be exercised by the educational authority only in the interest of the educational institution and for serving the cause of education.

(6) Constitution of India, Article 29 and admission of students who are indisciplined to the University Colleges:—

Article 29 (2) of the Constitution of India provides that—

"No citizen shall be denied admission into any
educational institution maintained by the State or receiving aid out of the State funds on grounds only of religion, race, caste, language or any of them."

By this Article the doors of the University have been kept open for all persons irrespective of religion, race, caste and language; but that does not mean that everybody is entitled to get admission to the University Colleges. This Article does not confer a right on every Tick Doun and Harry to get admission to University Colleges. Admission to University Colleges can be refused on some other reasonable grounds except on the grounds given in Article 29 (2).

The High Court of Punjab and Haryana, in this connection, have observed that it is erroneous to read into the constitutional provision the guarantee of admission into every educational institution maintained or aided by the State. The Article confers only a negative fundamental rights on the citizens. It envisages that though admission into any educational institution may no doubt be refused on valid ground, it shall be never

3. Ibid
refused on the ground only of religion, race, caste, language or any of them. The Article does not confer an absolute right of admission into any institution.

The provision made under Article 29 (2) that no citizen shall be denied admission into any educational institution on grounds only of religion, race, caste or language does not mean that every citizen shall be given admission into any educational institution irrespective of the religion, race, caste or language to which he or she may belong. The word "only" used in this Article has got a special meaning. It means that admission shall not be refused only on the ground of religion, race, caste or language but can be refused on other reasonable and valid grounds.

If the above interpretation is taken to be correct then if a University opens the doors to all persons irrespective of sex, nationality, race, creed, caste or class, it cannot be interpreted to mean that the University must admit even those students who are likely to indulge in indiscipline and questionable behaviour. Similarly a University can refuse admission to students whose educational record and career is poor or far from being satisfactory.

In fact no educational institution in the country can at present admit all the candidates who offer themselves for admission. Valid and reasonable restrictions have,

1. Ibid 2. Ibid.
therefore, necessary to be laid down by all the educational institutions to enable them to observe uniform standards of admission to various courses based on educational and other qualifications, age etc. So long as admission is not guaranteed to every student, it goes without saying that in order to maintain discipline in educational institutions, the authorities responsible for admission thereto have even in the absence of a relevant rule or regulation the inherent right to refuse admission to an eligible candidate if the admitting authorities are satisfied that he is not desirable person to the sense that he is likely to indulge in undesirable activities and create problems of indiscipline and law and order for the educational institution.

The Article 29 (2) of the Constitution of India does not impinge such an inherent right.

Admission to University can be refused on the grounds of qualifications, age, indiscipline and questionable behaviour, nationality, residence etc. but not only on the grounds given in Article 29 of the Constitution. In short right of admission to a University College is negative and restricted right.

1. Ibid
2. Ibid
3. Ibid.
Generally all the University Acts or the statutes or Ordinances framed thereunder confer power on the Vice-Chancellor to award punishment to students who are indisciplined. It is for the Vice-Chancellor to choose nature and magnitude of the punishment to be awarded. He has to exercise this power in all cases of indiscipline and against every student exactly in the same manner. The statute of Allahabad University conferring powers on the Vice-Chancellor to take disciplinary action says:

"The Vice-chancellor shall be responsible for maintaining discipline in University and he shall have all the powers necessary for the purpose."

In one of the cases it was argued before the Allahabad High Court that these powers were expressed in very wide and indefinite terms and were capable of being exercised in very wide and indefinite terms and were capable of being exercised in such manner as to bring about discrimination under Article 14 of the Constitution of India. It was further argued that nature and extent of punishment that may be awarded by the Vice-Chancellor was not indicated at all and no limitations were placed on his power of awarding any type of punishment that he desired due. It was urged that the language of the Statute
would permit the Vice-Chancellor if he so desired, to
direct that a student who has been found responsible
for an acts of indiscipline, be shot dead. ¹ It was
on these grounds that the validity of the powers conferred
on Vice-Chancellor to take disciplinary action against
student was challenged.

The Allahabad High Court while deciding the case
observed that because no specific limitations have been
placed to the nature and extent of the punishment which
can be awarded it cannot be interpreted to mean that this
power is entirely unfettered and vague. It is to be
noticed the statute which confers power on the Vice-
Chancellor, first makes him responsible for maintaining
discipline and then grants to him only such powers as
may be necessary for that purpose. ²

The High Court further observed that the powers
are to be exercised for maintaining discipline to the
extent necessary for achieving that object. ³ This itself
a sufficient limitation on the powers of the Vice-Chancellor
and it is not necessary to indicate the various forms of

3. Ibid.
punishment which can be awarded by the Vice Chancellor.  
The Statute lays down that the powers of the Vice-Chancellor 
are to be exercised, when it is necessary to do so, for the 
purpose of maintaining discipline and the powers are confined 
to the extent that might be necessary for that purpose. 
There are then clear limitations on the powers of the Vice-
Chancellor and they are not unlimited and unfettered and do 
not violate any of the provisions of the Constitution of India.

In short it is not necessary to lay down a Penal 
Code for the students in which a punishment can be prescribed 
for every act and form of indiscipline of the students and 
the Vice-Chancellor can do without it as the powers to take 
disciplinary action conferred on him are of a very restricted nature.

Different provisions made in different University Acts and 
Article 14 of the Constitution of India:-

Article 14 of the Constitution of India States, "the 
State shall not deny any persons equality before law or equal protection of the laws within the territory of India."

1. Ibid
2. Ibid.
Article 14 does not require that the provisions in the every University Acts must always be the same. Each University has problems of its own ....... It is for the Legislation to decide what kind of Constitution should be conferred on a particular University, established by it. This is the observation made by the Supreme Court in Azeez Basha Vs. Union of India (AIR 1968 SC 662). The Supreme Court further observed that it is no discrimination that other University Act provide for a different set up. Each University is a class by itself and it is for the Legislature to make provision as it thinks fit provided they do not contravene the provisions of the Constitution of India. The Court is not concerned with the policy of the Legislature in enacting a University Act or with the merits of its provisions. Each University is a class by itself and may require a different set up according to the requirements and needs of a particular situation. Such provisions do not affect the Constitutionality of University Act on the ground that it is hit by Article 14 of the Constitution.

(8) Universities vis-a-vis the minorities:

Article 26 of the Constitution of India is as below—

1. AIR 1968 SC 662
2. Ibid
4. Ibid.
Subject to public order, morality and health, every religious denomination or any section thereof shall have the right - (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

The words "establish and maintain" must be read conjunctively and it is only institutions which a religious denomination establishes which it can claim to maintain. Where a University has not been established by a majority but by the State, the question of having a right to maintain such a University does not arise. A minority can claim of a right under Article 26 (a) only when the institution is established by a religious denomination and it is in that event that it can claim to maintain it.

Before a minority could claim a right to administer a particular University or an educational institution it has to satisfy one more condition that such University or
educational institution was established by the minority claiming such a right. There is great difference between a University established by the minority and a University established for the minority. The University established by a minority can claim protection under Article 26; but a University established for the minority cannot claim any protection under the Article. The same rule applies to the educational institutions as well.

The persons employed or students studying in a University who belong to a minority community cannot claim of a preferential treatment under Article 26 in the matter of employment and admission if University has been established by the State for the minority as against the members who belong to a majority community. Under Article 29 of the Constitution of India no citizen can be denied admission to any educational institution maintained by the State or receiving aid from the State on the ground of religion.

The High Court of Punjab and Haryana, in this connection, have observed that it is erroneous to read into the constitutional provision the guarantee of admission into every educational institution maintained or aided by the State. The article confers only a negative fundamental rights on the citizens. It envisages that though admission into any educational institution may
no doubt be refused on valid ground, it shall be never refused on the ground only of religion, race, caste, language or any of them. The Article does not confer an absolute right of admission into any institution.

The provision made under Article 29 (2) that no citizen shall be denied admission into any educational institution on grounds only of religion, race, caste or language does not mean that every citizen shall be given admission into any educational institution irrespective of the religion, race, caste or language to which he or she may belong. The word "only" used in this Article has got a special meaning. It means that admission shall not be refused only on the ground of religion, race, caste or language but can be refused on other reasonable and valid grounds.

If the above interpretation is taken to be correct then if a University opens the doors to all persons irrespective of sex, nationality, race, creed, caste or class, it cannot be interpreted to mean that the University must admit even those students who are likely to indulge in indiscipline and questionable behaviour. Similarly a University can refuse admission to students whose educational record and career is poor or far from being satisfactory.
In fact no educational institution in the country can at present admit all the candidates who offer themselves for admission. Valid and reasonable restrictions have, therefore, necessary to be laid down by all the educational institutions to enable them to observe uniform standards of admission to various courses based on educational and other qualifications, age etc.

Clause (1) of Article 30 of the Constitution of India contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds institution or the community at large contributes the funds the position in law is the same and the intention in either case must be to found an institution for the benefit of minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority community or even from

2. Ibid
3. Ibid
4. Ibid
5. Ibid.
the majority community can take advantage of these institutions. Such other communities may in-come and they do not have to be turned away to enjoy the protection.

The next part of the right relates to the administration of such institutions. Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right.

St. Stephen College v. University of Delhi Supreme Court observed:

The words "establish" and "administer" used in Art. 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution

1. Ibid
2. Ibid
3. Ibid
4. Ibid
5. Ibid
6. Ibid
depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution. Prior to the commencement of the Constitution of India, there was no settled concept of Indian citizenship. The minority under Art. 30 must necessarily mean those who form a distinct and identifiable group of citizens of India. Whether it is "old stuff" or "new product", the object of the institute should be genuine, and not devices or dubious. There should be nexus between the employed and the ends desired. There must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. Article 30 (1) is a protective measure only for the benefit of religious land linguistic minorities and it is essential, to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection.

There is, however, an exception to this and it is that standards of education are not part of management as such. These standards concern the body politic and are directed by considerations of the advancement of the country and its people. Therefore, if Universities established the syllabi for examinations, they must be followed subject, however, to special, subjects which

1. Ibid.
the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standard and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management to decline to follow the general pattern. While the managements must be left to them they may be compelled to keep in step with others.

In view of the above decision of the Supreme Court, the teachers working in the colleges run by a minority Community stand to lose in comparison with the teachers who are employed in the colleges not run by a minority. The teachers working in the colleges run by a minority community cannot take advantage of the protection given to the teachers by the Statutes or Ordinances of the

1. Ibid
2. Ibid
3. Ibid
5. Ibid.
University while the teachers working in the colleges run by a majority Community can. It appears that the framers of the Constitution did not visualise of such a possibility otherwise they would have drafted Article 30 of the Constitution in a different manner.

St. Xaviers College v. State of Gujarat dealt with important issues, which called for a review of the corpus of the decisional law on the minority rights contained in article 29(1) and 30(1) of the Constitution. The State of Gujarat had enacted provisions clearly inconsistent with the entire jurisprudence of the Supreme Court on minority rights. These provisions, added through amendments to the Gujarat University Act, 1949, provided for conversion of affiliated colleges into constituent colleges; takeover of teaching in undergraduate courses; university control over selection, appointment and punishment of teachers; and interference by the university in the Constitution of governing bodies of the affiliated colleges. The challenge to the validity of these provisions raised, among others, three constitutional questions:

(1) What is the scope of the right to establish educational institutions?

(ii) Is there a fundamental right to affiliation?

(iii) What is the content and extent of the right to administer?

There are in all six opinions in this case. In view of the case it is necessary to run through each one of them.

Ray C.J. identified and authenticated the differences between articles 29(1) and 30(1) with a view to delineating the contours of the right to establish educational institutions. He found that these two articles addressed themselves to different groups of persons and guaranteed different rights. Any section of the citizens having a distinct language, script, or culture, mentioned in article 29(1) and religious and linguistic minorities referred to in article 30(1) are not identical groups of persons. Conservation of language, script or culture, guaranteed in article 29(1), and establishment and administration of educational institutions, protected by article 30(1), are also not identical rights, though they may, in some cases, overlap. For these reasons the right in article 30(1) was not confined to establishment of educational institutions, which would facilitate conservation of language, script or culture. A minority group may establish an institution for imparting secular education, which does not aim at conservation of language, script or culture.
For this conclusion Ray C.J. drew support from 
1. Das C.J. in Kerala Education Bill and Hidayatullah C.J. in Father Proost. Das C.J. had held that the object of article 30(1) was to enable children of the minorities to go out into the world fully equipped to seek employment or pursue higher education. Hidayatullah C.J. had held that no consideration on which article 29(1) was based could cut down the width of article 30(1). Ray C.J. therefore, held that article 30(1) prohibited the university in this case from converting the affiliated colleges of the minorities into constituent colleges and from taking over teaching in undergraduate courses.

The court had consistently denied that there was any right to affiliation, it had also asserted that the conditions for affiliation should not abridge minority rights. Otherwise the minority institutions would be robbed of their utility if the students could not be trained for university degrees. Establishment of an educational institution by the minorities was meaningful and real only if they were affiliated to a university for the purpose of conferment of degrees on students.

Affiliation consisted of two parts. One part dealt with curricula, syllabi, qualifications of teachers, library, laboratories and health and hygiene of students. This part was related to establishment of educational institutions. The second part, which consisted of terms and conditions of management of institutions, was related to administration of educational institutions. With regard to affiliation the institution must follow the statutory measures regulating educational standards and efficiency, the prescribed courses of study, and the principles regarding the qualifications of teachers and educational qualifications for entry of students into educational institutions. Hidayatullah C.J. had in Mother Provincial underlined the impact of these measures on the standard of education, in which the Nation was vitally interested. These regulatory measures were reasonable. They contributed to the excellence of the minority institution. They were, therefore, valid.

The entire controversy, however, centred around the extent of the right of minorities to administer their educational institutions. The petitioners claimed that this right encompassed (i) the right to choose the governing body, (ii) the right to choose teachers, (iii) the right not to be compelled to refuse admission to students,

and (iv) the right to use its properties and assets for the benefit of its institutions. After a careful survey of the decisional law on this question, Ray C.J. held that the right to administer available to the petitioners in this case precluded the university from interfering with the constitution of the governing body and selection, appointment and punishment of teachers. The Chief Justice pointed out that the minority's right to administer could validly be regulated by measures, which aimed at improvement of administration of the institution through the existing management and not by displacing it. He endorsed the famous view of Shah J. in Sidhrajbhai when he said:

Restrictions on the right of administration imposed in the interest of the general public alone and not in the interest of and for the benefit of minority educational institutions concerned will affect the autonomy in administration.

The opinion of Reddy J. is devoted to the question of affiliation. If there was no affiliating university in a state, what should a minority, which had established a college, do? The advisory opinion in Kerala Education Bill would in a way say that in such a case the minority had no right to demand from the state the facility of

2. Supra note 133 at 1399.
3. See supra note 134.
affiliation. The D.A.V. College case gave a different answer to this question. In that case the Supreme Court had held that insistence upon compulsory affiliation of a minority institution imparting instruction in Hindi to a university, which had prescribed Punjabi as the medium of instruction, violated article 29(1) and 30(1).

Following this case Reddy J. held:

If.....compulsory affiliation is bad, it will leave them (minority institution) free to get affiliated to a university in that linguistic state which provides facility for the language and script of the minorities. This presupposes that there is a right to get recognition or affiliation.....

What is the remedy available to a minority when there is no affiliating university in a state? Reddy J. said:

In such circumstances, education, including university education, being a state subject and the legislative power also being subject to article 29(1) and 30(1), minorities...can insist on recognition (of) their...degrees,

2. Supra note 133 at 1407-8.
3. Id. at 1408.
diplomas, or other certificates, which conform to the educational standards prescribed by the state for the recognition of such degrees, diplomas and other certificates.

Khanna J. was of the view that if a minority established an educational institution unrelated to its religion, language and culture, the right to administer such an institution flowed from article 30(1). If the minority institution was related to its language, script or culture, the right to administer that institution came from article 29(1). He, therefore, rejected the view that a minority had no right under article 30(1) to establish an institution unconnected with its language, script or culture.

On the question of affiliation Khanna J. argued with the view expressed in the earlier cases. He said that though recognition and affiliation were not mentioned in article 30(1), the state was not free to demand surrender of the minority right to administer in return for recognition or affiliation. He emphasized that the right in article 30(1) was a real and meaningful right and not an abstract right to be exercised in vacum.

He held that choice of governing body, selection and
appointment of teachers and disciplinary control over teachers were part of the right to administer. The state should not, therefore, seek to veto either selection or appointment of qualified teachers or punishment of teachers by the management in accordance with law. He differed from the advisory opinion in Kerala Education Bill, which had upheld state-control over appointment and punishment of teachers. He conceded, however, that the state was entitled to prescribe qualifications for teachers and to lay down service conditions to ensure security of tenure and to secure a fair procedure in the matter of disciplinary action against the teachers. For, such regulations were in the interests of the institution.

Mathew J. dealt with the vicissitudes of the American doctrine of unconstitutional condition. Holmes J. had formulated this doctrine in McAuliffe and the American Supreme Court had later adopted it. In McAuliffe Holmes J. had held that the policeman had a constitutional right to talk politics; he had no constitutional right to be policeman. In 1925 in Frost and Frost Tucking Co. v. Railroad Comm. the court held that the government, which was free to deny a privilege, might grant it subject to conditions. But those conditions should not demand relinquishment of any constitutional rights:

1. Supra note 134.
If the state may compel the surrender of one constitutional right as a condition of its favour, it may in like manner compel a surrender of all. It is inconceivable that the guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Mathew J. said that the advisory opinion in Kerala Education Bill had adopted a similar approach. Following this approach, the learned judge held that a condition stringed on to a governmental privilege might be as effective a deterrent as prohibition. Therefore, to offer affiliation subject to such a condition would, because of the importance of affiliation, amount to coercing the minority to give up its constitutional right. As the members of a minority community were necessarily fluctuating, they were not, at any given time, competent to waive the minority rights in such a way as to bind the future members. This was because the future members would not derive these rights by succession. For these reasons affiliation or recognition should not be made an instrument of suppression of the guaranteed rights of the minorities.

Mathew J., therefore, asserted that "infringement
of a fundamental right is nevertheless infringement because accomplished through the conditioning of a privilege.

He conceded, however, that the state might validly stipulate a condition reasonably related to the object of affiliation. The object of affiliation was to enable the students in a minority institution to take the recognized examinations in the prescribed subjects. He also said that if a minority institution received aid, the state was entitled to see that the aid was utilized for the benefit of the institution and for the purpose for which it was granted.

The opinion of Beg J. sharply conflicts with the reasoning of Mathew J. The approach of Beg J. to the minority rights may be stated in his own words:

The essence of the right guaranteed by article 30 (1) of the Constitution is a free exercise of their choice by minority institutions of the pattern of education as well as of administration of their educational institutions. Both these, taken together, determine the kind or character of an educational institution which a minority has the right to choose. Where these patterns are accepted voluntarily by a minority institution itself, even though the object may be to secure certain advantages

1. Supra note 133 at 1451.
for itself from their acceptance, the requirement to observe these patterns would not be a real violation of rights protected by article 30(1).

The following observation is very clear and revealing:

All that happens is that the statute exacts a price in general interest for conferring its benefits. It is open to the minority institution concerned to free itself from any statutory control or fetters if freedom from them is considered to be essential for the full exercise of its fundamental rights under article 30(1) of the Constitution.

According to this barter system, once the minority community and the state exchanged their goods, affiliation and minority rights, the minority institution would lose for good its constitutional rights. In pursuance of this approach, he upheld the validity of all the challenged provisions except sections 5, 40 and 41.

Dwivedi J. said that the right in article 30(1) was subject to articles 29(2) and 28(3). The former prohibited discrimination on certain grounds in respect of admission of students to aided or recognized institutions. The

1. Ibid.
latter prohibited imparting of religious instruction on a compulsory basis in such institutions. Choice was inherent in every freedom. Therefore, the words of their choice in article 30(1) did not enlarge the area of choice implicit in that article. Like article 30(1), the American First Amendment and the Indian article 14(3) employed unqualified language. They were, nevertheless, open to regulation and restriction. For all these reasons the right in article 30(1) was not absolute. He disagreed with Hidayatullah C.J. to maintain that prescribing a curriculum and syllabus formed a part of administration of an institution. He did not also agree with the statement of Das C.J. that regulation of the right to administer must be shown to be conducive to the excellence of the minority institution.

Dwivedi J. went further than Beg J. in upholding the challenged provisions. He upheld the provisions authorizing the university to take over teaching in undergraduate courses and to control selection, appointment and punishment of teachers.

The multiple opinions in this case should be welcome to a student of constitutional law for more than one reason even though they break no new ground so far as interpretation of articles 29 and 30 is concerned. These opinions throw light on the social values underlying the minority rights. The reiteration of the rule in Kerala Education Bill, on
which the counsel for the respondents had launched a frontal attack, that a minority group has a fundamental right in article 30(1) to establish an educational institution for imparting secular education should set at rest the controversy raised on this issue by some schools. It is more than obvious that the object of the right to establish educational institutions and the means of conservation of language, script and culture are not, ordinarily identical. Jagdev Singh, in which it was held that the right in article 29(1) includes the right to agitate for the protection of language, shows that the means of conservation of language are implicit in article 29(1). Similarly, the object of the right to establish schools or colleges is implicit in article 30(1). For these reasons, the object of the right in article 30(1) cannot be limited to conservation of language, script or culture. It has been held in more than one case that the right to prescribe a language other than the language of the minority as medium of instruction in its institution flows from article 30(1), while article 29(1) gives the minority the right to prescribe its own language as the medium of instruction.

The right to establish a school or college to conserve the language of a minority has now lost its utility and usefulness. The switch over to regional languages as the

media of administration in many states and the preference given by these states to regional language-medium graduates in respect of employment advise the linguistic minorities to focus attention on imparting of secular education in English or in the language of their respective regions and to search for means other than schools and colleges for the conservation of their languages.

The court has to make explicit the means of conservation of language implicit in article 29. In the present state of affairs, for the conservation of minority languages, the minimum that the government can do is to arrange for teaching of these languages in government schools and colleges as one of the languages when the minorities ask for it. This facility is not as expensive as imparting of education in the language of every linguistic minority in government institutions in every state. It will enable the pupils from the minority groups to learn their language along with English and the regional language. The question now is whether the duty on the state to provide for this facility can be inferred from article 29(1). If the court keeps in view the sociology of the problem and looks at the positive content of the right to conserve language and the positive duty it imposes on the state, it will not be difficult to infer this facility from article 29.

This case has brought into sharp focus the fact
that the minority rights do not obstruct the state from protecting and maintaining standards of education. Just as there is no minority right to maladminister so also there is no minority right to lower standards of education and to impart substandard instruction. The minority schools and colleges have to follow the prescribed syllabi, admit qualified students and appoint qualified teachers. Every condition conducive to the maintenance of standards of education and excellence of the institution is binding on a minority institution. The state can take steps to ensure that the grants given to a minority institution are utilized by it properly. All this shows that there is no room here for a philosophy like that of Herbert Spencer in Man v. State and that the permissible restrictions on minority rights are as important as the rights.