CHAPTER — II
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JUDICIARY AND THE PROTECTION OF THE RIGHTS OF MINORITIES IN INDIA

The constitution of India is replete with provisions, which aim at safeguarding minorities' both particular and general interests. The constitution adopts a two-pronged approach in providing protection to them. While one aims to guarantee the protection from discrimination ensuring equality of treatment and freedom of religion, the other relates to the provision of some special rights needed to preserve their identity and culture. The former set of rights is common and has to be shared with other citizens of the country; the latter is specific and intended for members of minority group only. Thus the rights that matter most to Indian minorities can broadly be described as 'right to equality', 'freedom of religion' and 'cultural and educational rights'. These safeguards as guaranteed to minorities were incorporated in the most important part of the Indian constitution called chapter on fundamental rights.

While Article 15 of the constitution under 'right to equality' unequivocally talks of prohibition of discrimination on the ground of religion, caste etc., Articles 25-28 provide various facets of freedom of religion including right to freedom of conscience, profession, practice and propagation of religion. Articles 29-30 on the other hand grant special rights for minorities regarding their culture and education. The purpose of this chapter is to study in detail the contents of these constitutional provisions and to examine their implication for minorities in real life situation as pronounced by the judiciary in various cases. In this connection, an attempt will also be
made to find out as to how effective they have been in practical terms.

**Principle of Equality and Question of Discrimination**

The provisions relating to equality in the Indian constitution are found to be more elaborate than those of any other constitution. By incorporating Article 14, they guarantee equality before law and equal protection of laws. But the guarantee is of equal treatment in equal circumstances. In other words, it does not mean that every law must have universal application for all persons or group of persons who by circumstances or natural attainment are not equal. The guiding principle is that 'like must be treated alike'. The varying needs of different classes of people may therefore, require separate treatment. The need of protective discrimination thus becomes imperative for any group who is weak and vulnerable including minorities. The government's policy of reservation for Scheduled Castes, Scheduled Tribes and other backward classes in services and legislatures is a case in point. Moreover, the same feeling of equality also inspires the current talk about the need for affirmative action for Muslims whose backwardness is an established fact now.

The Supreme Court of India, time and again, in its several landmark judgements has accepted this very sound principle. This was first endorsed in (*Ahmedabad St.Xaviers College Society V. State of Gujarat*) case in 1974. In this case Justice Khanna and Justice Mathew dealt with the purpose and the background of the rights of minorities at length. Justice Khanna in his final observation made it clear that:

The idea of giving some special rights to the minorities is not to have a kind of privileged or pampered section of
the population, but to give to the minorities a sense of security and a feeling of confidence.... Special rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institution and by guaranteeing to the minorities autonomy in the matter of the administration of these institutions. The differential treatment for the minorities by giving them special rights is intended to bring about equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea, but should become a living reality and result in true, genuine equality, an equality not merely in theory, but in fact.

Justice Mathew while agreeing with Justice Khanna also stressed the point by stating: ³

It may sound paradoxical, but it is nevertheless true that minorities can be protected not only if they have equality but also, in certain circumstances, differential treatment.

Later in its decision in St. Stephen's college the Supreme Court held that equality means the relative equality, namely the principle to treat equally those who are equal and unequally those who are unequal. To treat un-equals differently according to their inequality is not only permitted but required.⁴ The Court acknowledged that it had “acted on the same principle in relation to socially and educationally backward classes, that is the principle of protective discrimination” and applied this principle to minority institutions also.⁵ Justice Shetty speaking for the Court made the following important observations. “It is well said that in order to treat some persons equally, we must treat them differently. We have to recognise a fair degree of discrimination in favour of minorities”.⁶ What is implied in all these Court observations is that the special consideration made for minorities does not constitute negation of equality. Moreover, to ensure genuine de facto equality, differential treatment to minorities in certain circumstances is in the words of a
well-known Indian jurist, not only warranted but also constitutional compulsion.7

In India in recent years the term minority and minority rights have unfortunately come to be associated with the notion of privilege, appeasement and separatism resulting from vigorous anti minority campaign by politically motivated groups. The idea of multiculturalism, which has gained worldwide acceptance under the aegis of human rights movement and treats people’s ethnic, religious and linguistic diversity as part of their dignity, freedom and equality, seems to have eroded from the Indian psyche. Under human rights norms, it is the common domain of polity and economy of a country wherein all citizens must enjoy effective equality for which special measures are required to be taken to remove varying degrees of exclusion and discrimination that minorities are generally exposed to. This is how a desirable integration of all sections of society can be brought about by adopting a policy of making all national institutions reflect the existing social diversity as far as possible.8 In the separate domain of religion, language and culture, the smaller and weaker segments i.e minorities have not only the right to preserve their identity but the state has an obligation to create conditions favourable for the preservation of that identity. For example making necessary arrangements for Indian Sikhs to visit to their holy shrines in Pakistan is an obligation of the Indian State.9

The very introductory part of the Indian constitution, the Preamble, pledges to secure equality of status and of opportunity to its entire people. By declaring under Article 15 that there shall be no discrimination here in this country against any one on the grounds of religion, our constitution registered the existence of religious pluralism in the country.10 As mentioned earlier, it has also
protected the right to equality and equal protection of laws to various religious communities found in India.

The guarantee of equality becomes more meaningful especially if it is applied in respect of state-controlled employments and public appointments. In 1951 by the constitution first amendment act, a clause was carefully incorporated under article 15 plainly declaring that nothing in the equality provision shall prevent the state from "making special provisions for the advancement of any socially and educationally backward class of citizens or for the Scheduled Castes and the Scheduled Tribes". Further under the chapter on Directive Principles of State Policy in Article 46, the state is specifically directed to "promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes". There is another similar injunction inserted in Article 16 which empowers the state to make "provisions for the reservation of appointments or posts in favour of any backward class of citizens". Whom did the framers of the Indian constitution mean by weaker sections of the people and backward class of citizens other than Scheduled Castes and Scheduled Tribes? Read together, these two descriptions as used by them surely include educationally and economically handicapped minorities of the country as well. Nothing in the wording of these provisions implies that the religious minorities lie outside the purview of this provision.\(^\text{11}\)

Now the pertinent question is what has been the response of state as far as these constitutional mandates and directives are concerned. There are many studies, which suggest that state has failed in upholding its duty enshrined in Article 51\(\text{A}\) of the constitution itself "to abide by the constitution and respect its ideal and
institutions”. The constitutional motto of ensuring equality of status and opportunity is belied when we see the situation on ground in terms of minorities’ presence in governments and legislature, in educational institutions, in public and private sector employment. While some communities are found to be adequately represented, others either remain under represented or without representation at all.\textsuperscript{12} Such a state of affair is nothing but reflective of the prevalent discriminatory practices in our national lives.

Some variations from principle of equality seem to even get articulated in the constitution and formal law of the country. For example, the Hindu Code Bill of 1955-56 for the purpose of defining a Hindu, fixes certain criteria such as (1) a person who is Hindu by religion in any of its forms or development; (2) any person who is Buddhist, Jain or Sikh by religion and (3) any person domiciled in territories to which this Act extends who is not a Muslim, Christians, Parsi or Jew by religion unless it is proved that any such person would have been governed by Hindu laws or customs. In other words, all are Hindus other than those belonging to religions originating outside India. Thus the definition of Hindus embodies the well established principle that application of term Hindu is not confined to persons actually professing Hinduism in form but extend to all persons except those belonging to religion of foreign origin.\textsuperscript{13}

Similarly under the Hindu Marriage Act, a Hindu can marry a Buddhist, Jain or Sikh but he is restrained to do so with a Christian or Muslim. If any of the Hindu couple decides to change his/her faith to any religion of Indian origin i.e Buddhism, Jainism or Sikhism, it would have no effect on the status of marriage but his/her conversion to some other religion like Islam or Christianity may affect their marriage providing a ground for divorce. Several other statutory laws of India show similar bias towards so called non-
Indian religions and therefore provide ground for discriminatory practices.\textsuperscript{14} We will discuss them later in new section under the freedom of religion.

Various state agencies have got their own interpretation of right to equality in recent years in clear contravention of the intentions of founding fathers of the Indian constitution. In the context of influx from Bangladesh, certain vested political groups brand millions of Indian Muslims as foreigners. The security forces and the Election Commission have interpreted laws in continuation of this onslaught. In one incident in 1992, the BSF arrested a number of Muslim adults and children from the slums of Delhi on the supposed ground that they were foreigners. They were severely tortured in police custody, paraded before the public with shaven head and pushed forcibly into Bangladesh without being tried in the court of law to determine their nationality. Even the high constitutional authority such as the Chief Election Commissioner had passed order regarding disenfranchisement of Muslims. In Assam, he asked for removing the names of foreigners from precisely those constituencies where Muslims are concentrated. In Maharashtra, the Election Commission demanded that suspected Bangladeshis and Pakistanis be removed from the voter's list unless they produce 'whole host of documents' most Indian would find difficult to produce.\textsuperscript{15}

Even on the part of judiciary, there have been some aberrations on the constitutional principle of equality and non-discrimination. For example, in the famous \textit{Shahbano case} the court besides deciding on the point of entitlement of maintenance to divorced Muslim women, used the occasion to issue an \textit{obiter dictum} on the state to enact a Uniform Civil Code to do away with the system of personal laws.\textsuperscript{16} In the case of \textit{Faruqi vs. Union
Government, the validity of the Acquisition of Certain Areas Act 1993 was challenged in the Supreme Court. In this case, two significant questions were involved: could places of worship be acquired by the state without violating the freedom of religion and did the Act not give a preferred treatment to Hindus as against Muslims? In its majority judgement (Verma, Venketachalliah and Ray), the Court gave positive response to the first question and negative to the second question. On this judgement, justice Suresh observes “the majority judgement of the Supreme Court while returning the Presidential reference on Ayodhya...is blatantly perverse. The whole world knows who were responsible for the demolition of the mosque, yet the Supreme Court says that the demolition was the act of unidentified persons”.

We have yet another case of the Bombay High Court exonerating Shiv Sena chief Bal Thakre for his inflammatory writings in party’s mouth piece, Saamna, leading to violence against Muslims and the Supreme Court refusing to entertain a special leave petition against this judgement. The Supreme Court's decision is what was termed in the words of justice Suresh as ‘shocking and subversive of the rule of law.’ Similarly Supreme Court judgement on Hindutva was also not befitting for an apex court of a secular nation. A Constitutional Court, with secularism as part of its basic structure, ought not to praise one religion as being more tolerant and generous than other religions. Therefore, it was amazing that the Supreme Court found nothing objectionable in Manohar Joshi’s statement that if his party comes to power, Maharashtra would be the first Hindu state. For some of these biased views, the Court has been taken to task. The Court was cautioned in the following words:
The Court's claim in many judgements that Hinduism is a uniquely pluralistic, democratic and tolerant religion... may or may not be true. But...Court should not be in a business of defining what the essential characteristics of any religion are. These are a matter for historical and theological arguments. But suggesting Hinduism is, in some senses, morally privileged, the Court has given needless succour to those who would paradoxically use Hinduism's supposedly tolerant qualities to break up other religions, particularly Islam and Christianity.

The principle of secularism as being integral to the Indian constitutional scheme is of much relevance to minorities in India as this is essentially based on the idea of religious tolerance, non-discrimination and non-alignment of state to any religious persuasion. The solemn assurance given to minority religious groups that their belief and way of life would be given equal regard and respect and that they would not be discriminated against, stands belied and has undoubtedly come under stress by such practices of the Indian State.

**Freedom of Religion**

The preamble to the constitution of India proclaims that its purpose is to secure to all its citizens liberty of thought, expression, belief, faith and worship. This together with Articles 25-28 guarantee equality in matters of faith and religion. To avoid interference of state and its organs in matters of religion, the rights mentioned in Articles 25-28 were made part of justifiable fundamental rights and religious freedom were thus designed to be fully ensured. This guarantee of religious freedom presupposes that state has to maintain utmost neutrality as far as religion is concerned. It has neither to establish nor to foster any religion. But it is to be kept in mind that State has however not been completely debarred from
exercising its regulatory power in areas of religion in the larger interest of public order and welfare and peace.

Let us first discuss those constitutional provisions contained in Articles 25-28 that were provided for in the context of freedom of religion. To begin with, first of such provision, Article 25 which has got two clauses and two explanations. In the first place, Article 25(1) assures all persons subject to public order, morality and health, of equal entitlement of the right to freedom of conscience and the right to freely profess practice and propagate religion. Next comes Article 25(2) with its two distinct clauses. Clause (a) here clarifies that constitutional guarantee of right to freedom of religion does not put a bar on the present and future laws “regulating or restricting any economic, financial, political or secular activity which may be associated with religious practices”. The clause (b) of Article 25 (2) speaks of two different things. It first excludes from the purview of the fundamental right to freedom of religion, the existing and future laws “providing for social welfare and reform”. This is a general provision not meant for any particular community. The second provision of clause (b) is restricted in its application to particular communities. This provision excludes from the scope of freedom of religion the existing and future laws “throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. This significant provision, initially and mainly addressed to Hindus is extended in its scope and application to three other communities namely the Buddhists, the Jains and the Sikhs. This is done by one of the two explanations appended to Article 25. The other explanation in Article 25 relates to the Sikhs only and protects their religious right of wearing and carrying kirpans.
These multidimensional provisions of Article 25 relate to the individuals’ right to freedom of religion. These are followed by Article 26, which recognises and guarantees important religious rights for communities. This is available to every religious denomination or any section thereof. Like the individual right under Article 25, Article 26 providing for community’s rights is also subjected to public order, morality and health. The other fundamental rights to freedom of religion under Article 26 include (i) establishing and maintaining institutions for religious and charitable purposes (ii) managing their own affairs in matters of religion and (iii) owning and acquiring movable and immovable properties and administering it in accordance with law. Articles 25 and 26 spell out the general religious freedom of individuals and communities along with their scope and conditions. These are followed by two more specific provisions, one of which is contained in Article 27 ensures citizen’s “freedom as to payment of taxes” for religious purposes. It declares that no person can be compelled to pay taxes “the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The other provision contained in Article 28 is for all its purposes more important than the first provision as it relates to the sensitive question of religious worship and instructions in educational institutions. In very unequivocal terms Article 28 provides two different principles:

(i) If an educational institution is wholly maintained out of state funds, no religious instruction shall be provided in it.

(ii) If an educational institution is recognised or aided by the state, no one will be required there to attend any religious worship or participate in any religious instruction except with his or if a minor, his guardian’s free consent.
Explanation II of Article 25 has given rise to some misgivings about the legal status of Sikhism, Buddhism and Jainism as independent religions. There are some people in India specially votaries of Hindutva who believe that this explanation of Article 25 declares and recognises these three religious faith to be part and parcel of Hinduism and abolishes their independent identity. But a closer examination of this provision reveals that this is not at all supported either by the language of the law or by the intention of the lawmaker. The Supreme Court of India in its 1965 judgement in *Punjab Rao* case did clarify the correct legal position. In fact provision of Article 25 of the constitution empowers the state to remove by law customary restriction on the entry of low caste Hindus to Hindu Temple and it further says that if there is any such caste based restriction on entry to places of worship in practice also among the Sikhs, Buddhists and Jains, the state will have the power to remove them by law. While caste based temple entry restrictions do widely exist among Hindus and there certainly is the need for state power for their effective removal, among other three communities such a custom may be existing even if it is not found to be widely practiced. It is for this reason state power has been extended also to the Sikhs, Buddhist and Jains as a precautionary measure. If and when restriction on the entry to any place of worship among these communities come to the notice of state it may remove it by law. As such Article 25 is just an enabling provision not even remotely talking of the legal status or identity of Hinduism, Sikhism, Buddhism and Jainism as independent religions.

Let us now turn to discuss four distinct aspects of religious freedom guaranteed by the constitution, namely freedom of conscience, profession of religion, practice of religion and propagation of religion. All these four dimensions of religious
freedom are closely interwoven and deeply interconnected and affects each other's working.

The composite rights to religious freedom enunciated under Article 25 (I) divides it into four categories – conscience, profess, practice and propagate. These can be broadly classified into two categories of belief and practice. Conscience means belief, faith and opinion. To profess in one sense implies to belong to, membership, adherence which is again faith. Profess in other sense is to declare, to practice and propagate are the exercise aspect of the right. Both the belief and practice aspects enjoy constitutional protection. As Justice B. K. Mukherji explains: ²³

Article 25, as its language indicates, secures to every person, subject to public order health and morality, a freedom not only to entertain such religious belief as may be approved by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and propagate and disseminate his ideas for the edification of others

The constitutional connotation of the term conscience is belief, faith and the conceptual aspect of religion. It thus means freedom or right to believe. In the Shirur Muth case the Supreme Court stated: ²⁴

Religion is certainly a matter of faith with the individual or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent first cause. A religion undoubtedly has its basis in system of beliefs or doctrines, which are regarded by those who profess that religion as conducive to their spiritual well being.

Thus religious belief and opinion are guaranteed in our constitution and this guarantee extends to not only religious opinion but also acts done in pursuance of religion. Under the freedom of
Conscience clause of the constitution one can freely renounce one’s religion or change it for another. For example a born Muslim can remain a Muslim all his life, renounce Islam and become an unbeliever or embrace another religion despite provision of punitive law on apostasy in Islam. Similarly any non-Muslim – though his birth religion may regard Islam as false religion or Muslim as malichh – may freely embrace Islam. In other words term like infidel, apostate etc. have no place in the public law of India. Here the state can not use its authority to enforce the dictates of any particular religion on apostasy or conversion. It can only recognise one’s claim of being or not being the followers of a particular religion.  

Like one who has never changed his religion, a convert in India can freely choose to practice or not to practice his new religion or to pick and choose for himself from its belief and practices. The constitution does guarantee both profession and practice of religion but certainly not as necessary compliments for one another. This was very much clarified in a Madras case.  

The profession and practice of religion are indeed inseparable component of religious freedom. If a person is allowed to merely profess his religion but not practice, this will be meaningless and futile because religion by its very nature is not mere profession of some belief but it also demands them to be translated into practice. If an unreasonable belief-practice dichotomy is unduly imposed by the state on the right to freedom of religion, it will turn this fundamental right into a state controlled and state licensed permissive provision. Moreover, to determine particular practices of religion as essential or non-essential should not be the state function. If any state is allowed to assume this function, miscarriage of justice will be the ultimate result. In *Ratilal Panachand Gandhi v. State of Bombay*, the Supreme Court made it very clear that
religious practice or performances of acts in pursuance of religious beliefs are as much a part of religion as faith or belief in particular doctrines. Thus, the freedom under Article 25 is not limited to matters of doctrine or belief. It extends to acts done in pursuance of religion as well, and therefore contains a guarantee for rituals and observances, ceremonies and modes of worship, which are integral parts of religion. What constitutes an essential part of a religion or religious practices has to be decided by the Court with reference to doctrine of a particular religion or the Court should take into account practices which are held and regarded by the community as a part of its religion.

To illustrate this point we can take for example the case of Sikh women in Delhi being directed to wear helmets while riding pillion on two wheelers and Muslim men in the Army being denied the right to grow the beards. In these two cases the decisions of the Court demonstrated its double standards. While in case of former, the Court recognised the religious rights of the Sikhs, on the other hand in case of latter, it refused to oblige aggrieved Muslim Army man saying how keeping beards could be an essential religious practice in Islam when late President General Ziaul Haque did not adhere to it. By doing so, the judicial authorities created a palpably unconstitutional discrimination not warranted by constitutional principle of both equal protection of laws and religious freedom together. In this case, the judge was perhaps misled by the opinion or practice of "profane dissenters" and did not care to take note of the dominant view or consensus found among the followers of the religion.

Further if a person is compelled to adopt a religious practice of others, which is explicitly or implicitly disapproved by his own faith, this will clearly amount to denying him the right to profess
religion of his choice. There is nothing in Article 25 or anywhere else in the constitution that may allow to any extent forced imposition of any religious practice of any particular community on the members of any other community. The Supreme Court also in an important case of *Bijoe Emmanuel v. State of Kerala* (also known as National Anthem case) held no person can be compelled to sing the National Anthem if he has genuine, conscientious religious objection. Prohibition of such a forced imposition is also clear from the provision of Article 28, which forbids compulsory religious worship and instruction in educational institutions. Although this principle enshrined in Article 28 is mentioned in the context of educational institutions its application cannot be confined to educational institutions only. It can be equally applicable in all other situations and places such as government offices and official functions.

In India, the most controversial aspect of the right to freedom of religion has been concerning change of religious faith or issue of conversion, which has unfortunately seldom led to religion based group violence and unrest in the country. This aspect is therefore needed to be discussed in some details. As stated earlier that Article 25 while guaranteeing freedom of conscience also talks about the right to freely profess, practice and propagate religion. By virtue of this fundamental right, every individual in this country besides professing and practicing is also free to propagate his religion. Constitutionally speaking, the right of propagation of religion like that to profess and practice religion is subjected to public order, morality and health and other provisions relating to fundamental rights in the constitution.

The Committee on Minorities in the Constituent Assembly had recommended that since religion like Islam and Christianity were
proselytizing faith, it was advisable to include in the constitution the right to propagate religion as a fundamental right. While the first draft considered by the Assembly sought to restrain conversion from one to another religion except by one's own free will, the second would guarantee "right to preach and convert within the limits compatible with public order and morality". Finally, the Constitution adopted the term 'propagation of religion' under the right to religious freedom without specifically assuring the right to convert others. It was left to the future interpreters of the constitution to decide whether the right to propagate religion included the right to convert others to the religion of propagator or preacher. Initially in the Constituent Assembly debates, the right of propagation of religion was discussed in the Christian context mainly but later it was finally made clear that this right was meant for all communities found in India including Muslims.

Both the Muslims and Christians believe in evangelism as a basic tenet of their religion. It is taken as a sacred duty by them to propagate their faith with a view to attracting followers of other religions or believers of no religion. Though there are no organised Muslim missionaries like those of Christians in India, yet Muslims do have organisation like Tablighi Jamaat, which works for dawah i.e an invitation to embrace Islamic faith and way of life. Theologians of both the religions as part of their religious obligation are generally found to be exalting virtues of their religions in their respective fields so as to attract people of other faith and keep the door open to facilitate conversion. All these activities have clearly got the sanction of Indian constitution under its guarantee of the right to propagate religion. Moreover, our constitution approves the right of every individual to change his religion or belief, as the idea underlying freedom of conscience is the free choice of religion. But this freedom unfortunately has been subjected to varied
interpretation and misinterpretation because of which conversion as a right under some pretext, has even been sought to be banned by law in some parts of the country.

Before the dawn of independence, no anti conversion law was enacted by the central or provincial governments. Only outside British India, Hindu rulers of some so-called Princely states had enacted laws on religious conversion in an attempt to prevent occasional conversion of low caste Hindus to non-Hindu religion. Even after independence, no central law directly dealing with the subject has ever been enacted. All attempts periodically made to introduce such a law in Parliament through private member Bill failed – the last such abortive attempt was made in 1979. Thus the constitutional provision found in Article 25 guaranteeing the fundamental right to free choice of religion through freedom of conscience and propagation of religion remains intact even today. But at the state level during 1967-68 two states of India, Orissa and Madhya Pradesh enacted local laws called Orissa Freedom of Religion Act 1967 and the *Madhya Pradesh Dharma Swatantra Adhiniyam* 1968. Along similar lines ten years later, the Arunachal Pradesh Freedom of Religion Act 1978 was enacted to provide for prohibition of conversion from one religious faith to any other by use of force or inducement or by fraudulent means. The another addition to this corpus of anti conversion laws was the Tamil Nadu Prohibition of Forcible Conversion of Religion Ordinance promulgated by the Governor on October 5, 2002 and subsequently adopted by the State Assembly. The T.N. Bill was later repealed in 2004. All these laws made forced conversion a cognisable offence punishable with imprisonment or fine or with both.

But these legislations became a subject of litigation and acrimonious debates as it had constitutional ramification for various
religious segments in the country. The first two Acts (Orissa and Madhya Pradesh Freedom of Religion Acts) were challenged in their respective High Courts, which gave differing views on those laws. The Orissa High Court held that the law was against the spirit of Article 25, which gives all Indians the freedom to profess, practice and propagate religion. However, Madhya Pradesh High Court upheld the validity of the state’s law in clear contrast to the decision of its Orissa counterpart. This judgement of M.P. High Court was challenged in the Supreme Court by some Christian priests because of its effect on the enjoyment of their right to propagate religion and their missionary activities. It involved the very basic question whether the fundamental right to propagate one’s religion granted under Article 25 included the right to convert others to one’s own religion, which the Supreme Court had to look into. This case that came to be known as Rev. Stainislaus case was decided by a five-judge bench of the apex Court in 1977. While deciding the case the then Chief Justice, A. N. Ray, in his observation relying on the dictionary meaning of the word ‘propagate’ as to “disseminate”, “diffuse” and “spread” belief, practice etc. concluded that:

We have no doubt that it is in this sense that the word ‘propagate’ has been used in Article 25(I), for what the Article grants is not the right to convert another person to one’s own religion by an exposition of its tenets. It has to be remembered that Article 25(I) guarantees ‘freedom of conscience’ to every citizens, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no Fundamental Right to convert another person to one’s own religion, because if a person purposely undertakes conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the ‘freedom of conscience’ guaranteed to all the citizens of the country alike.

It has to be appreciated that the freedom of religion enshrined in the Article is not guaranteed in respect of
one’s religion only but covers all religions alike and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions. What is freedom for one, is freedom for others in equal measure, and there can, therefore, be no such thing as a Fundamental Right to convert any person to one’s own religion.

By way of this observation, the Court created the distinction between the right to propagate and conversion of a person from one religion to another. It however left the door open for misinterpretation because it did not answer question about whether right to propagate included the right to convert in Christianity. Commenting on the observation of Justice A. N. Ray, a noted constitutional expert, H. M. Seeravai states:

It is unfortunate that the legislative history of Article 25 was not brought to the attention of the Supreme Court.... It is clear that this conclusion runs counter to the legislative history; but that does not conclusively establish that the conclusion is clearly wrong.... The right to propagate religion gives a meaning to freedom of choice (of religion), for choice involves not only knowledge but an act of will. A person can not choose if he does not know what choices are open to him. To propagate religion is not to impart knowledge and spread more widely, but to produce intellectual and moral conviction leading to action, namely, the adoption of that religion. Successful propagation of religion would result in conversion.

Chief Justice Ray mistakenly believed that if ‘A’ deliberately set out to convert ‘B’ by propagating ‘A’s religion, that would impinge on ‘B’s “freedom of conscience”, but, as we have seen, the precise opposite is true: ‘A’s propagation of his religion with a view to its being accepted by ‘B’, gives an opportunity to ‘B’ to exercise his own free choice of a religion.

Therefore conversion does not in any way interfere with the freedom of conscience but is a fulfillment of it and gives a meaning to it.
The Supreme Court judgement is clearly wrong. It is productive of the greatest public mischief and ought to be overruled.

Apparently harmless and reasonable state laws prohibiting religious conversion against one's free will, it however, was very much evident that the concern of makers of these laws was not just forced conversion as such. But their actual main aim was the subversion of people's conversion to any religion other than Hinduism especially Christianity and Islam. In the Orissa and Madhya Pradesh Acts, the punishment was to be doubled if the offence had been committed in respect of a minor, a woman or a person belonging to the Scheduled Caste or Scheduled Tribe community. These may be seen as further reinforcing the several statutory penalties for ceasing to be a Hindu such as the 1955-56 Hindu Law enactment namely Hindu Minority and Guardianship Act 1956 (section 6), Hindu Adoption and Maintenance Act 1956 (Section 7, 8, 9, 11, 18-24), Hindu Marriage Act 1955 (Section 13 (ii), 13 A) and the Hindu Succession Act (Section 26) – all framed during the first decade of country’s independence. The penalties that a Hindu convert (by definition Buddhist, Jain and Sikh included for that matter) would invite are indeed severe. On the whole, modern Hindu Code of 1955-56 has a lot in it to dissuade Hindus from thinking to converting to Islam or Christianity and once they do become Muslim and Christian, the Code offers them enough inducement to return to the fold of Hinduism. What emerges from them is the fact that most of these laws are aimed to keep the low caste Hindus within the fold of Hinduism. So while law prohibits conversion, reconversion of low caste is permissible. If a low caste Hindu who had converted to another faith or any of his descendants reconverts to Hinduism, he might get back his original caste. This enables him to entitlement of all the previous benefits he was made to forfeit as a result of his conversion.
Cultural and Educational Rights

The constitutional Articles of 29 and 30 incorporated as fundamental rights in Part III of the Indian constitution provide for what are collectively termed as the ‘Cultural and Educational Rights’. The two Articles have also been given separate head notes of ‘protection of interest of minorities’ and ‘Right of minorities to establish and administer educational institutions’ respectively. The text of Article 29 reads as follows:

i. Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

ii. Citizens shall not be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

Whereas Article 30 makes the following reading.

i. All minorities, whether based on religion or language, shall have the right to establish and administer educational institution of their choice. In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (I), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

ii. The state shall not, in granting aid to educational institution, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Each of the Article has two distinct clauses. First Article 29(I) provides that any section of the citizens residing in the territory of
India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. The second part of this provision which is Article 29 (2) enjoins the state not to deny any citizen admission to any educational institution maintained by it or receiving aid from it on the grounds only of religion, race, caste, language or any of them.

Talking specifically about religious and linguistic minorities, Article 30 (I) sanctions for them the right to establish and administer educational institution of their choice. The second clause of the Article 30 prevents the state from having a discriminatory policy towards minority educational institutions in granting aid or recognition to them. But given this constitutional setting of the two Articles, the litigation on the subject has been enormous. Over a dozen precedents are existing before the Supreme Court involving minority educational institutions on this issue. While discussing their scope, the interpretation of Article 29 (2) and its relation with Article 30 (I) needs to be taken note of, because the former tends to rob the vitality of the latter. But before looking into this problem, let us examine the contents of Article 30, which guarantees some specified rights to religious and linguistic minorities.

Article 30 (I) bestows dual fundamental rights on all minorities based on religion or language namely the right to establish and administer educational institution of their choice. To establish simply means to bring into existence. This expression was examined in some details in a well-known case, which came before the Supreme Court in the year 1967. The main issue in the case was about the question of administration of the Aligarh Muslim University, which was established in 1920 through a Central Legislative Act. But prior to attaining the status of a university, it was Mohammedan Anglo-Oriental College developed from a school, which was founded by
Sir Syed Ahmed Khan to impart liberal modern education to Muslims. The question of management was linked with the establishment of the University in this case. Though flawed, the Supreme Court's decision rested on the argument that the University came into existence through a Central Act of the government. Therefore, the Muslims as a minority could have no right to administer it. In respect to the meaning of the expression 'to establish', Justice Wanchoo in this case clarified: ⁴⁴

'Establish and administer' in the Article must be read conjunctively and so in real sense it gives the right to the minority to administer an educational institution provided it has been established by it.

Later in the famous St. Stephen's College v. University of Delhi case, Justice Kasliwal further made clear the meaning of the expression 'to establish' by saying: ⁴⁵

The right of establishment means to bring into being an institution by a minority community. It matters not if a single philanthropic individual within his own means funds the institution or the community at large contributes the funds.

With regard to administration it was clarified that the right to administer implies 'management of the affairs' of the institution. This management has to be free from control so that the founders can run the institution in accordance with their ideas of how the interest of the community and institution is best served. But the universities or government can intervene for the advancement and to maintain the standard of education. As regards the use of phrase 'of their choice' in Article 30, Justice Khanna in the Ahmedabad St. Xavier's College v. State of Gujarat case observes: ⁴⁶

The words "of their choice" qualify the educational institutions and show that the educational institution established and administered by the minorities have the
right and freedom to establish and administer such educational institution as they choose.

Justice Ray also says in this regard that the choice is given to minorities so that they may be able to give their children general secular education which will help them to become good citizens of the country and which will also help bring about unity and integrity of the country.47

Sometimes impression is given that the right given to minorities in Article 30 (1) is restricted to the establishment and administration of institutions of their choice in order to conserve their language, script or culture only. But this is an erroneous view resulting from mixing up of it with Article 29. While Article 29 (1) grants a fundamental right to all sections of the citizens of the country, which includes majority as well, Article 30 (1) is specifically meant for religious and linguistic minorities only. Further under Article 29 (1) conservation of language, script or culture can be undertaken through any means without necessarily establishing educational institutions; similarly institutions established under Article 30 (1) may not be for the purpose of conserving language, script or culture alone.48

The most vexed aspect of litigation on the rights of minorities granted under Article 30 (1) has been the issue of its relationship with citizens rights given under 29 (2). Judicial precedents have almost established that an institution established by the minority community can not be exclusively meant for members of that community only. Non-community candidates have also to be considered for admission because under the constitution there can not be discrimination only on the ground of religion or language.49 But the question arises as to why minorities have been given the specific rights guaranteed in Article 30 (1)? Answer is because there
is felt a need for minorities of education for their survival and development. To preserve its religio-cultural identity, minorities want to establish educational institutions where its members may have congenial atmosphere conducive to the growth of their distinct identity. This facilitates entry of boys and girls from the community into the arena of education, who would have otherwise not joined any other institution for a perceived threat and insecurity to their culture and religion from the institutions of other dominant groups. This very rational scheme of survival of any distinct group demands that the primary freedom of choice guaranteed in Article 30 (I) should be mainly available in deciding the kind or type of education to be imparted and in selecting the target group, i.e., students from its own community whose survival and development as a distinct group is supposed to have been object of the constitutional guarantee.50

If under this provision any minority community in India, like the Muslims, Christians or Sikhs chooses to establish an educational institution of any type for the benefit of its own members it must enjoy the freedom to regulate admission to ensure either exclusive membership or at least preponderant majority from the community concerned. This valid goal cannot be achieved if admissions are to be given only on the basis of merit alone. In any unregulated open competition, the numerical composition of the society at large will be reflected in the composition of students in the institution, given that the average level of educational achievement is the same. If the minority is also educationally backward those members of the community who seek admission will be elbowed out by more numerous and better equipped members of the majority. This process of elimination of minority community members wanting to be educated by merit based admission process will render the chances of their survival rather bleak. This will in effect nullify the very
purpose for which special rights have been guaranteed. The only course that is left to a minority group establishing an institution for its own members is to exercise the freedom to select the students either exclusively from the concerned community or at the most have some number of members from other community.

At a number of occasions, the Court has held that the freedom of choice guaranteed to minorities in Article 30 (I) includes the freedom to choose the kind of education they desire. It need not necessarily and exclusively aim at conserving language or culture. It has also been established that the minority rights granted under Articles 29 and 30 are not subject to restriction that regulate and restrict the exercise of other fundamental rights. The only regulation or restriction that a minority educational institution can be subjected to is the one that promotes the interest of minority and the purpose of institution itself such as one relating to academic standards and norms, qualification of teachers etc. Thus a logical conclusion can be drawn that there is nothing to prevent a minority from confining its membership to its own community. It has even been ruled by the court that:

No general fundamental right to equality of admission on merit can be invoked under any constitutional provision against an educational institution established and maintained by a minority.

Later a full bench making similar observation that endorsed this judicial opinion ruled:

It would seem to follow that if a minority institution which receives no aid of the State-funds chooses to bar its door against citizens not belonging to the same community, it would be well within its right to do so.

What about institutions that receive state funds or are fully maintained by the State? Clause (2) of Article 30 enjoins the state
not to discriminate against a minority educational institution in granting aid. It is arguable that this clause does not establish minority's right to claim grant in aid for any educational institution that it chooses to establish. This clause only prohibits the state from discriminating against such an institution. But any law does not exist in abstraction; it has some sociological basis. It is highly impossible for any educational institution to maintain its existence in India without state aid and support – more so for disadvantaged minority institutions. Giving the right to establish and administer an educational institution without the right to recognition and receiving adequate aid, which is essential for its meaningful survival, would be similar to conferring on an individual the fundamental right to life without the right to all that makes life possible and meaningful.

It is quite possible that the government as well as the judiciary may use clause (2) of Article 29 to put unreasonable restriction on the right of minorities guaranteed in Article 30 (1) disregarding the fact that subjecting the principal right to establish and administer educational institutions of their choice to such restrictions, makes it what was once termed "teasing illusion and a promise of unreality" by the Court.\(^{54}\) It was due to the overnight rephrasing in original draft as Article 23 (2) that created a room for such possibility. The word ‘minorities’ found therein was replaced with ‘citizen’ by accepting an amendment moved by Thakur Das Bhargava in the Constituent Assembly resulting in a strangulating effect on the intent and purpose of the neighbouring Article.\(^{55}\)

Now coming to the question of inter-relationship between the two Articles 29 (2) and 30 (1), let us focus our attention on the majority judgement delivered by the 11-Judges Constitutional Bench of the Supreme Court of India on 31\(^{st}\) October, 2002 on educational rights of minorities. Before reaching at its own judgement and
deciding on different ramifications, the constitutional Bench took into consideration over a dozen earlier decisions of the Supreme Court on the interpretations and inter-play of Articles 29 and 30.\textsuperscript{56} It is to be noted that all earlier major judgements on minority institutions had taken it for granted that these institutions were primarily, though not exclusively meant for students of the community with a 'sprinkling' from other communities. It was the Allahabad High Court that in 1989 in the \textit{Allahabad Agricultural College} case ruled that though Christians had established the institution, they could not reserve any seat for students of their community. This was the first case in which right of preferential admission was the issue.\textsuperscript{57} Though it was over ruled by the Apex Court in the \textit{St. Stephen’s College judgements}, the learned court could not fully emancipate Article 30 from the strangulating grip of Article 29(2). The judgement stipulated that the intake of minority students should not go beyond 50 per cent.

A careful perusal of the Supreme Court landmark judgement of 2002 reveals that the Court does not provide for any such ceiling. While considering Article 29 (2) as applicable to aided minority educational institutions, it does not rule out minority’s claim to reservation of seats in it to adequately serve the interests of the community. Moreover, this judgement has unequivocally affirmed that a minority institution does not cease to be so just by receiving aid. The Court laid down the principle that grant in aid, though not a constitutional imperative, can not "in any way dilute or abridge the rights of the minority institutions to establish and administer that institution".\textsuperscript{85} (para 143)

The Supreme Court appears to have struck a delicate balance in this case by adopting a position aimed at harmonising constitutionally sanctioned special minority rights on the one hand
with the constitutional guarantees of non-discrimination on the other. The judgement grants unaided minority educational institutions maximum autonomy in the recruitment of teachers, charging of fees and admission of students. It says conditions of recognition should not be such as "to whittle down the right under Article 30" (para 139). The Court has affirmed the principle requiring preferential treatment of minority for securing effective equality with the majority on which St. Xavier's College as well as St. Stephen's College judgements were based. Without prescribing any quota for minority seats and seats in the open category, it has enabled the aided minority educational institutions to admit its own students far beyond 50 per cent in case their educational needs and type of education and the area they are serving so require. Though decision for fixing the adequate extent for admission is left to the state, it is required to do so in a manner so as to "adequately serve the interest of the community for which the institution was established". (para 151).

The Court was of the view that although the right to administer includes within it a right to grant admission to students of their choice under Article 30 (I). But when such a minority institution is granted the facility of receiving grant-in-aid, Article 29 (2) would become applicable. As a result, one of the rights of administration of the minorities would be eroded to some extent. Article 30 (2) is an injunction against the state not to discriminate against the minority educational institution and prevent it from receiving aid on the ground that the institution is under the management of a minority. While, therefore a minority educational institution receiving grant-in-aid would not be completely outside the discipline of Article 29 (2) of the constitution, by no stretch of imagination can the rights guaranteed under Article 30 (I) be annihilated. It is in this context some interplay between Article 29 (2) and Article 30 (I) is required.
In St. Stephen's case it was observed “the fact that Article 29 (2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special rights guaranteed to minorities in Article 30 (I)”\(^6^1\). The word ‘only’ used in Article 29 (2) is of considerable significance and has been used for some avowed purpose. Denying admission to non-minorities for the purpose of accommodating minority students to a reasonable extent will not be only on grounds of religion etc., but is primarily meant to preserve the minority character of the institution and effectuate the guarantee under Article 30 (I). The best possible way is to hold that as long as the minority educational institutions permit admission of citizens belonging to the non-minority class to a reasonable extent based on merit, it will not be an infraction of Article 29 (2), even if the institution admits students of the minority group of its own choice for whom the institution was meant.\(^6^2\) (para 149)

Thus, the Supreme Court has ruled that the right to administer is not absolute but is subjected to reasonable regulations. Moreover, it has been of the opinion that Article 30 (I) must be used so as to ensure the constitutional principles of equality and secularism.\(^6^3\) As per decision of the Court, the Articles 29 and 30 must not be read separately but together with other Articles such as 14, 19, 25, 26 and 28. The Court has reached this conclusion that the language and religion based minorities have full and unconditional right to establish their own institutions but they don't have full rights over the management and the administration of their institution.\(^6^4\)

It is now very much clear that the decision of the Apex Court is based on the combined implications of the two Articles of 29 and 30 of the constitution. According to its rulings, the minority educational institution has the freedom to run its administration as well as to select students, but this freedom exists until it accepts any aid from
the government. Though grant-in-aid does not affect its status as a minority institution yet it brings the institution under certain restrictions. It puts an obligation to grant admissions to certain number of non-minority students as well. The number of such students would be decided by the state as per the regional requirement. Such minority institutions not getting government aid certainly have some broader rights of their own but the rule of essential qualifications and recognition is equally applicable to these institutions as well to ensure quality education. A minority institution may have its own procedure and method of admission as well as selection of students but this must be fair and transparent and the selection of students in professional and higher educational institutions should be on the basis of merit.

The recent initiative of 50% reservation of seats for Muslims in Aligarh Muslim University, Aligarh at the behest of central HRD Ministry can be seen in the context of Supreme Court's this landmark rulings. Given the constitutional scheme of minorities' empowerment, the proposal of HRD Ministry and the University had its own merits. But the subsequent striking down of this proposal by the Allahabad High Court opened a Pandora's box of problems. The High Court has in fact nullified the AMU Amendment Act 1981 according minority status to the University. The Court said since the Act itself was unconstitutional; AMU was not a minority institution.

Conclusion

As a matter of fact the constitution of India has demonstrated ample concern for the country's vulnerable minorities so as to make them enjoy security of life with dignity and equality of rights as citizens along with preserving their distinct identity. These
constitutional concerns expressed in terms of right to equality, right to freedom of religion and educational and cultural rights have even received endorsement from the judiciary as guardian of the Indian constitution in its various judicial pronouncements. But as the study reveals, the judiciary on occasion has failed to act without folly and there have been some aberrations on its part on vital issues involving minorities concerns.

The tenet of secularism enshrined in the Indian constitutional scheme is factually founded on the idea of religious tolerance, non-discrimination and non-alignment of state to any religious persuasion. But the lopsided role of the Indian Courts as discovered in this chapter goes against this very constitutional spirit.

Endnotes


3. Ibid, p.281


5. Ibid

6. Ibid
7. Ibid, p.166


11. Ibid, p.35

12. See Gopal Singh Panel Report, Vol. II, Ministry of Home Affairs, New Delhi, 1983 & I. Also see a study conducted by Iqbal A. Ansari, Jamia Hamdard, New-Delhi


15. Imtiaz Ahmad, n.13, pp.169-70


17. Cited in Imtiaz Ahmad, n.13, p.170


22. Ibid, pp.38-39


24. Ibid, p.113

25. Tahir Mahmood, n.14, p.58


27. Tahir Mahmood, n.21, pp.39-40


29. Ibid, p.199

30. Tahir Mahmood, n.21, p.40

31. A. K. Pandey, n.28, p.199

32. Tahir Mahmood, n.21, p.40
33. B. Shiva Rao, *Select Documents*, vol. II, Indian Institute of Public Administration, New-Delhi, p 208-09


36. Ibid


40. Arpita Anant, n.35

41. Tahir Mahmood, n.14, pp.72-74


43. *S. Azeez Basha v. Union of India*, AIR 1968 SC 662-70

44. John Vallamattam and Mani Jacob, n. 2, p.159

45. Ibid, p.854

46. Ibid, p.279

48. Ibid, pp.40-41


52. Cited in Iqbal A. Ansari, n. 50, p.124

53. Ibid


55. Iqbal A. Ansari, n. 50, p. 494


59. Ibid, p.77

60. Ibid, pp. 84-85

61. Ibid, pp.82-83

62. Ibid, p.83

63. Ibid, p.87

64. Muzzaffar Hussain, Insight into Minoritism, India First Foundation, New-Delhi, 2004, p.87