CHAPTER V

5.0 MINORITIES RIGHT TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTION

5.1 Introduction

Education has always held a special place in minority protection. It is able to transmit their culture, language or religion to their next generations through instruction which is essential for their existence as a distinct community. At the same time, accessing an education of equal value as that received by the children of majority community is significant in enabling minority members to enjoy equal social and professional opportunities. Accordingly, education can both be a means of identity preservation, and of social inclusion; a vehicle for maintaining their distinctiveness and an instruments of integration into mainstream society.\(^\text{439}\) Minorities’ right to education precisely includes two conflicting claims, equality of opportunity, on the one hand, and pluralism or identity transmission on the other.\(^\text{440}\) This dilemma epitomizes a query as to how to guarantee minorities right to equality while enabling them to maintain their own identity. How to protect their distinct, language, religion or culture while promoting their wider participations in the social, economic, political and cultural life of the mainstream society.\(^\text{441}\)

To resolve the apparent dichotomy between the rights to equality, and right to preserve their distinct cultural identities, the various issues of constitutional significance have emerged before the Supreme Court of India, and the Lordship of the Supreme Court is being asked to explore and find out the constitutional ambit of minority rights to establish and administer educational institutions of their choice, under Article 30(1) of the Constitution. In other words, what is the right assured under this Article to minorities? What are the true nature and scope of minorities’ right to run educational institutions and the conditions subject to which such right could be constitutionally explored? Is this special or additional right? Is this right absolute? Is it amenable to State control? Whether this Article has helped the minorities in conserving and preserving their identities, and if so upto what extent?


The basic concern of the present chapter is to explore and find out how the judiciary has constructed the minority right to establish and administer educational institutions of their choice under the Indian Constitution. The most controversial aspect of minority rights, i.e., Minorities Right to Establish and Administer Educational Institutions has been examined under the following captions:

1. Education under the Scheme of the Constitution.
2. Educational status of identified minorities.
3. Minority rights as group rights.
5. Basic Ingredients of Minorities Right under Article 30(1) of the Constitution.
6. Acquisition of Minority educational institutions properties.
7. Aligarh Quest for Minority Status.
8. Concluding observation.

Article 30(1) of the Constitution reads as follows:-

**Article 30: Right of Minorities to Establish and Administer Educational Institutions:**

1. All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

1A. In making any law providing for compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the rights guaranteed under that clause.

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

Article 30(1) confers dual Fundamental Rights on all minorities based on religion or language first, to establish, and second, to administer educational institutions of their choice. Prima facie, these dual Fundamental Rights looks very simple, but in reality it is not so. In fact, ever since independence and from the time
the Constitution came into force, Article 30 has always been a much debated Article in the Supreme Court of India as well as among different sections of the society. Therefore, before we proceed to analyse the provisions of Article 30, it is perhaps necessary to place the minority right to education in proper perspective.

5.2 Education in the Scheme of the Constitution

Education is the single most important instrument for social and economic transformation. A well educated population, adequately equipped with knowledge and skill is not only essential to support economic growth, but is also a precondition for growth to be inclusive, since it is the educated and skilled person who can stand to benefit most from the employment opportunities which growth will provide. The Government vision of realizing India’s human resource potential to its fullest, with equity and excellence, was already articulated by the makers of the Constitution of India.

The Preamble to our Constitution records the solemn resolve to the people of India to constitute India into Sovereign, Socialist and Secular, Democratic Republic. It sets out the people’s resolve to secure to all citizens justice, liberty, equality, and to promote among them all, fraternity assuring the dignity of the individual, and unity and integrity of the nation. One of the most cherished objects of our Constitution is, thus, to secure to its entire citizen the liberty of thought, expression, belief, faith and worship. Nothing provokes and stimulates thought and expression in people more than education. It is educations that clarify our belief and faith and helps to strengthen our spirit of worship.

To implement and fortify the above mentioned supreme purpose, Article 14 guarantees to every person equal protection of laws, and Articles 15 and 16 provide equality of opportunity in the matter of education and employment Articles 41, 45 (original) and 46 of the Constitution directs the State to secure the right to

---

442 The Approach to the XIIth Five Year Plan, (Para10.1)p.2 Available at http://mhrd.gov.in/minoedu. (Last visited on 6th January 2017)
443 In re-Kerala Education Bill, 1957, AIR 1958 SC. 956 at 960 (Para 5).
444 Article 41 read as: Right to work, to education and to public assistance in certain cases: - The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.
Article 45 (original) read as, the State must endeavour to provide within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years.
Article 45 (Amended by the Constitution (Eighty-Sixth Amendment) Act, 2002) provides: “Provisions for early childhood care, and education to children below the age of six years. The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.
education, to provide free and compulsory education to every child until he/she completes the age of fourteen years, and to promote with special care the educational and economic interests of weaker section.

The due legitimacy to the right to education as basic necessity of life and as one of the activities constituting, “the bare minimum expression of human itself, was accorded by the Supreme Court of India, by giving an extended meaning to constitutional expression like “life” and “personal liberty” under Article 21 of the Constitution.\textsuperscript{445}

In \textit{Francis C. Mullin v. Administrator, Union Territory of Delhi},\textsuperscript{446} the Court rightly observed that, the right to life includes, the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

In \textit{Bandhua Mukti Morcha v. Union of India},\textsuperscript{447} it was held that the right to education is implicit in and flows from the right to life. Further in \textit{Bapuji Education Association v. State of Karnataka},\textsuperscript{448} Justice Rama Jois pointed out that right to education is an essential attribute of personal liberty. The right of an individual to have and / or to import education, is one of the most valuable and sacred right.

Again in \textit{Mohini Jain v. State of Karnataka},\textsuperscript{449} Justice Kuldeep Singh observed that “The pronged Justice (social, economic and political) promised by the Preamble is only an illusion to the teeming-millions who are illiterate. It is only the education which equips a citizen to participate in achieving the objectives enshrined in the Preamble.”\textsuperscript{450}

The Court further remarked that the right to education flows directly from right to life. The right to life under Article 21, and the dignity of an individual cannot be assured unless it is accompanied by right to education. The State Government is under

\textsuperscript{446} AIR1981SC746 at 753.
\textsuperscript{447} AIR 1984 SC 802.
\textsuperscript{448} AIR 1986 SC Kant.119 at 129.
\textsuperscript{449} AIR 1992 SC 1858.
\textsuperscript{450} Id. at 1863.
an obligation to make endeavour to provide educational facilities at all levels to its citizen.\textsuperscript{451}

In \textit{Unnikrishnan v. State of A.P.}\textsuperscript{452} the Supreme Court held that right to life conferred by Article 21 includes right to free education until a child complete the age of fourteen years.

Subsequently the Constitution was amended by the Constitution (Eighty - Sixth Amendment) Act, 2002 and Article 21A \textsuperscript{453} was added requiring the State to provide free and compulsory education to all children in the age group of six to fourteen years in such manner as the State may, by law, determine.

In \textit{Environmental and Consumer Protection Foundation v. Delhi Administration}\textsuperscript{454} The Court expressed its anguish over the sorry state of affairs in the matter of right to education and held that the right of a child to free and compulsory education is a part of the Fundamental Rights under Article 21A of the Constitution. The total indifference of the Governmental authorities is leading to the violation of the Fundamental Rights of the children.

Further, in \textit{State of Tamil Nadu v. K. Shyam Sunder}\textsuperscript{455}, it reiterated that, the right of a child should be extended to have quality education, without discrimination on the grounds of child’s economic, social and cultural background.

Apart from Fundamental Right to education, the Fundamental Duties recognized by Article 51A includes, amongst the duty of Parent or the guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.\textsuperscript{456} The Fundamental Duties further imposed duties under Article 51A (h) to develop scientific temper, humanism and the spirit of inquiry and reform and Article 51-A (j) to strive towards excellence in all sphere of individual and collective activities so that the nation consistently rises to higher level of endeavour and achievements. None can be achieved or ensured except by means of education.\textsuperscript{457}

\textsuperscript{451} \textit{Id.} at 1864-65.
\textsuperscript{452} (1993) 1SCC 645.
\textsuperscript{453} Article 21A – Right to Education: The State shall provide free and compulsory education to all children of the age group of six to fourteen years in such manner as the state may by law, determine.
\textsuperscript{454} (2011)7SCC57.
\textsuperscript{455} (2011) 8 SCC 737 at 756.
\textsuperscript{456} Article 51A(k) (Added by the Constitution (Eighty Six Amendment) Act, 2002, read as (k), “who is Parent or guardian to provide opportunities for education to his child or as the case may be ward between the age of six and fourteen years.”
\textsuperscript{457} \textit{P.A. Inamdar v. State of Maharashtra}(2005) 6 SCC 537 at P. 587-588 (Para 87)
The Constitution of India provides for secular politics but right to education and right to establish educational institutions incorporating secular and religious instruction also have solid foundation in other parts of part III of the Constitution. For instance, Article 19(1) (g) guarantees to citizens, right to practice any profession or to carry on any occupation, trade or business. Article 25 recognizes the right to freedom of conscience and freely to profess, practice and propagate religion Article 26 set out the right of every religious denomination or section thereof, to manage its own affairs including, the right to establish and manage institutions for religious purposes. However, under Article 28(3) imparting religious instruction on an optional basis, without compulsion is allowed in private educational institutions receiving State aid.458

The Constitution also recognized the importance of imparting instructions in the mother tongue to children of linguistic minority in particular. Article 350-A requires the State and every local authority to provide adequate facilities for instruction in the mother tongue, to children belonging to linguistic minority groups at the primary stage of education.

In order to ensure full equality between the majorities and minorities, the religious and linguistic minorities have been given the right to establish and administer educational institutions of their choice. Thus, Article 30 was needed not for imparting religious instruction exclusively in an institution established by a minority, which could be done under Article 26, but to facilitate imparting of secular education by the minorities. Religion and language are indispensable at the earliest stage of education as parents would like their children to learn their language and know about their religion and way of life.459

In re-Kerala Education Bill, 1957,460 C.J. Das, speaking on behalf of the Court,

---

458 Article 28 Freedom as to attendance at religious instruction or religious worship in certain educational institutions
(1) No religion instruction shall be provided in any educational institution wholly maintained out of State funds
(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution
(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto Cultural and Educational Rights.


460 AIR 1958 SC 956.
held that Article 30(1) covers institutions imparting general secular education. The object of Article 30 is to enable children of minorities to go out in the world fully equipped. All persons whether in the majority or in the minority have right under Article 25 to freely profess practice and propagate religion, by section of citizen which includes the majorities as well as minorities, shall have under Article 29 the right to conserve their distinct language, script or culture. That is why the minorities are given a specific right in respect of educational institutions under Article 30. Article 30(1) gives the right to linguistic minorities as well where no question of religion arises."

In *Rev. Father W. Proost v. State of Bihar*,\(^{461}\) the Court reiterated that general secular education is covered by Article 30, and held that Article 29(1) is a general protection given to section of citizens to conserve their language, script or culture. Article 30 is special right to minorities to establish educational institutions of their choice.

In *Ahmedabad St. Xavier’s College Society v. State of Gujarat*,\(^{462}\) Chief Justice Ray, remarked that “Article 30(1) of the Constitution is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering the educational institutions of their choice for the purpose of giving their children the best general educations to make them complete men and women of the country. The minorities are given this protection under Article 30 in order to preserve and strengthen the integrity and unity of the country. The sphere of general secular education is intended to develop the commonness of boys and girls of our country. This is the true spirit of liberty, equality and fraternity through the medium of education. If religious or linguistic minorities are not given protection under Article 30 to establish and administer educational institution of their choice, they will feel isolated and separate. General secular educations will open the door of perception and act as the natural light of mind for our countrymen to live in the whole”.

In *T.M.A. Pai Foundation v. State of Karnataka and others*,\(^{463}\) B.N. Kirpal, C.J. in response to question he himself has raised namely, “Is there a Fundamental Right to set up educational institution and if so, under which provision”? clarified the applicability of various provisions in the context of establishment of educational institutions as follows:

\(^{461}\) (1969) 2SCR73.

\(^{462}\) (1974) 1SCC 717 at 744.

\(^{463}\) (2002) 8SCC 481 at 533.
“With regard to establishment of educational institutions, three Articles of the Constitution came into play. Article 19(1)(a) gives right to all the citizens to practice any profession or the carry on any occupation, trade or business; this right is subject to restriction that may be placed under Article 19(6). Article 26 gives the right to every religious denomination to establish and maintain an institution for religious purposes which would include an educational institution. Article 19(1) (g) and Article 26, therefore, confer rights on all citizens and religious denominations to establish and maintain educational institutions. There was no serious dispute that the majority community as well as linguistic and religious minorities would have a right under Article 19(1)(g) and Article 26 to establish educational institutions. In addition, Article 30(1), in no uncertain terms, gives right to the religious and linguistic minority to establish and administer educational institutions of their choice.\(^{464}\)

After delineating the right to establish educational institutions in the aforesaid Articles the Court did not categorically refute the issues as to whether establishment of educational institutions would fall under the expression profession, trade or business, but the Court was certainly of the view that it would fall under the expression ‘occupation’ and observed as follows:

“The establishment and running of an educational institution, where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that result in imparting of knowledge to the students, must necessarily be regarded as occupation, even if there is no element of profit generation.\(^{465}\)

From the aforesaid discussion it is clear that there is an ample provision in the Constitution which has reference to education and right to education is implicit in right to life under Article 21 of the Constitution, apart from Articles 19(1)(g) and 26 of the Constitution. The minority have special right or additional protection\(^{466}\) under Articles 29 and 30 of the Constitution, to set up educational institutions for imparting secular education, including professional education from pre-primary to post-graduate levels, and thereafter.

---

\(^{464}\) Id. at 533.
\(^{465}\) Id. at 535.
\(^{466}\) Id. at 591.
5.3 Educational Status of Identified Minority:

Literacy is one of the qualitative aspects of human life and it mirrors the level of socio-economic development of the country. India being a welfare state, all its citizens enjoys equal economic, cultural and educational opportunities to grow and progress. But different religious communities show inequality in the level of literacy. It is unanimously agreed that illiteracy is one of the major contributors to poverty in any socio-religious community.

Following Table shows literacy rates among the religious communities in India.

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Communities</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>India</td>
<td>75.37</td>
<td>53.7</td>
<td>64.8</td>
</tr>
<tr>
<td>2.</td>
<td>Hindu</td>
<td>76.2</td>
<td>53.2</td>
<td>65.1</td>
</tr>
<tr>
<td>3.</td>
<td>Muslim</td>
<td>67.6</td>
<td>50.1</td>
<td>59.1</td>
</tr>
<tr>
<td>4.</td>
<td>Christian</td>
<td>84.4</td>
<td>76.2</td>
<td>80.3</td>
</tr>
<tr>
<td>5.</td>
<td>Sikh</td>
<td>75.2</td>
<td>63.1</td>
<td>69.4</td>
</tr>
<tr>
<td>6.</td>
<td>Buddhist</td>
<td>83.1</td>
<td>61.7</td>
<td>72.7</td>
</tr>
<tr>
<td>7.</td>
<td>Others</td>
<td>66.64</td>
<td>41.9</td>
<td>54.7</td>
</tr>
</tbody>
</table>

Table 4: Literacy Rate among Religious Communities in percentage (%).

From the above table, it is seen that literacy rate of Muslim females is only 50.1% which is lower than all other minorities and it is lower than the national average for all religious communities in India. The community-wise data of literacy segregated on the basis of religion has not been released for 2011 census. But as per census of 2011, the literacy rate of Hindu population is 64.5%, Muslim 60%, Christian 80.3%, Sikh 70.4%, Buddhist 73%, Jains 95% and other minorities group is having literacy rate of 50%. In contrast to 2001 census Report, the 2011 census shows that overall level of literacy of the country has increased from 61% in 2001 to 74% in 2011. Bihar (16.8%) and U.P. (13.5%) have shown substantial increase in the literacy percentage. It is, however, disappointing that states having large population of Muslims, i.e. U.P., Bihar, West Bengal and Assam, still continue to be far behind other states like Kerala, Tamil Nadu, Himachal Pradesh, Uttarakhand, Maharashtra, etc. in terms of literacy.

---


In contrast the highest literacy rate among the Jains, had deeper roots to the preaching of their wandering monks, who delivered lectures on religious scriptures, wherever, they stayed. Furthermore, the high proportions of Jains resided in urban areas, and high percentage of their total population was concentrated in Gujarat, which was the first State to introduce compulsory education more than century ago. The high literacy rate among the Buddhist was largely due to the social reform movement (Neo-Buddhist Movement), that increased the functional value of education.

As per Prof. M. Afzal Wani, due to the communal divide during British period and attacks on their religious institutions like waqfs by the rulers there, got created a gap between the State and the Muslim community. For this reason they became apprehensive of availing the government promoted education in modern set up and English language development. The efforts of Sir Syed were all directed to remove that apprehensiveness by establishing Anglo Oriental College in Aligarh. He succeeded in that effort after lot of resistance but started a new era of Muslims availing modern education. Muslim community had failed to set up such institutions in large numbers to provide its youth with modern education. Now it is their economic poverty that obstructs their further educational development. In independent India there no need to remain away from the main-stream and the Muslims should avail the government schemes launched by Minority Ministry for better performance of all.

The other view which is being projected as reason for gloomy literacy rate in Muslims is so called religious traditionalism, the lack of strong middle class, the deliberate neglect and moreover, the traditional Islamic injunction restricting girls to go in for education in public places or institutions - especially higher co-educational institutions. However, the propounders of this view may appreciate the advice of Muhammad\textsuperscript{saw} to his followers: “Acquiring of knowledge is obligatory for all Muslim males and Muslim females” [\textit{Talabul ilm farizatun ala kuli Muslimin wa Mulimah}] and “Acquire knowledge even if you have to travel to China (i.e., long distances from your dwelling places).

On the other hand, the Hindu, the Christian and the Sikh Communities had set up a network of good educational institutions, which provided general and professional education..\textsuperscript{470}

\textsuperscript{470} \textit{Ibid} at 3-4.
The low level of literacy rate of various religious minorities in general has invited the attention of the Government and several committees were set up to review and analyse the different aspects of the religion.

The Central Advisory Board of Education is the oldest and the most important advisory Board of the Government of India, was established in 1920 and revived in 1935 to review several aspects of education. The Education Ministry’s first conference was initiated in 1949 by then Education Minister Abul Kalam Azad, to consider measures to be adopted for the solution of crucial problems in education.

The National Policy on Education of 1968 and 1986, made passing reference to minorities’ education in their aim to promote national progress and sense of culture and national integration. The only notable reference to minority education in the National Policy on Education, 1986 was as follows:

“Since, minority groups are educationally deprived or backward, greater attention will be paid to the education of these groups in the interest of equality and social justice. This naturally includes the Constitutional guarantees given to them to establish and administer educational institutions and protection to their language and culture. Simultaneously, objectivity will be reflected in the preparation of textbook and in all school activities and all possible measures will be taken to promote an integration based on appreciation of common national goals and ideals, in conformity with core curriculum.”

The Prime Minister’s 15-point programme for the welfare of Minorities regarding the integration of the minorities in all walks of life, suggested only guidelines on coaching classes for competitive examination for weaker sections amongst educationally backward minorities.

Educational backwardness of Muslim Minority was also highlighted by Justice Rajinder Sachar Committee, constituted for the preparation of a Report on the Social, Economic, and Educational status of the Muslim community in India. According to the report, one-fourth of the Muslim children in the age group of 6 - 14 years has either never attended school or is drop-outs. For children above the age of 17 years, the

---


educational attainment of Muslims at Matriculation is 17%, as against the national average 26%, only 50% of Muslim who complete middle school are likely to complete secondary education, compared to 62% at national levels. The Report has also drawn attention to the low levels of educational attainment among Muslim women, Muslims in rural areas as well as in technical and higher education.474

Thus, several committees were set up from time to time to review and analyse the different aspects of education. Unfortunately none of these committees had any comprehensive agenda on the concerns and aspirations of religious and linguistic minorities. No clear cut time frame was formulated to eradicate mass illiteracy and regulate the educational rights of religious minorities, but how the educational empowerment will have far reaching implication for the growth and development of the society was highlighted in various approach paper of the Government and academicians.

In ‘India - Vision 2020” published by the Planning Commission of India, it is stated, “Education is an important input both for the growth of society as well as for the individual. Properly planned educational input can contribute to increase in the gross national product, cultural richness, build positive attitude towards technology and increase efficiency and effectiveness of governance. Education opens new horizons for an individual, provides new aspirations and develops new values. It strengthens competencies and develops commitment. Education generates in an individual, a critical outlook on social and political realities, and sharpens the ability to self-examination, self-monitoring and self-criticism.”475

In 1980, Alvin Toffler, has advanced the idea that power at the dawn of civilization resided in the muscle. Power then got associated with money and in the 20th century it shifted its focus to mind. Thus, the shift from physical power to wealth power to mind power is an evolution in the shifting foundation of economy. This shift supports the observation of Francis Bacon who said knowledge itself is power, and Winston Churchill once said,” the empire of the future shall be empire of the minds.”476

In today’s educational parlance the terms, ‘Knowledge society’ ‘information society’ and ‘learning society’ are familiar expressions. Educational empowerment of

475 Lok Sabha Secretariat, Reference Note No. 32/RN/Ref./December/2013 at Pp. 4 – 5.
476 P. A. Inamdar v. state of Maharashtra (2005) 65 CC 537 at 586.
the minorities is not merely a question of charity, but a dire necessity. India cannot think of becoming a superpower in the field of knowledge by constantly neglecting the educational needs of 18% of the minority population. Minorities need to be fully mainstreamed in social, political and economic sphere. On the lines of agricultural revolution and industrial revolution, there is a need for educational revolution to realize the constitutional imperatives of right to education.

In the background of these Constitutional imperatives, it is necessary to examine, how the Fundamental Rights of the minorities, to establish and administer educational institutions of their choice under Article 30 are being interpreted by the Supreme Court of India.

5.4 Minorities Educational Rights as Group Rights

Minorities’ educational institutions are pitted against several problems today in their efforts to exercise the right of establishing and administering their own institutions. The minorities’ right to establish and administer educational institutions of their choice is conferred on minorities as such, and not on each member of a minority.

As per the scheme of the Constitution, some provisions of the Constitution confer individual rights and some others deal with group rights. For instance, Articles 25(1), 28(3) and 29(2) conferring an individual right, while Article 26 confers a group right, on every religious denomination or any section thereof. Similarly, Article 29(1) confers the right on every section of citizens having a distinct language, script or culture of its own to conserve the same. Therefore, the right to establish and

477 Article 25(1) read as: Freedom of Conscience and free profession, practice and propagation of religion (1) Subjects to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and right freely to profess, practice and propagate religion.

Article 28 read as: Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Article 29(2) read as: No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them
administer educational institutions of their choice is the right of a minority as a group which can be exercised by a person representing the minority for the benefit of the community.

In *State of Kerala v. Very Rev. Mother Provincial* 478 the Lordship of the Supreme Court held that under Article 30, the first right is the initial right of the minority to establish institutions of their choice. ‘Establishment’ here, means bringing into being of an institution and it must be by a minority community.

Chief Justice Hidayatullah, speaking on behalf of the Court further remarked as follows:

“It matters not if a single philanthropic individual, with his own means founded the 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 a minority community by a member of that community.” 479

In *Rajesh Memorial Basic Training School v. State of Kerala* 480 the Kerala High Court said that the person who moved the Court for the enforcement of Article 30(1), must prove that the educational institution in question, was established and administered by or on behalf of a particular minority - the mere fact that the School was founded by a person belonging to the minorities would not be enough. The petitioner must prove by satisfactory evidence that the school in question, was one established and administered by minority, whether based on religion or language, was recognized as that of belonging to Anglo-Indian Community whose mother tongue is English.”

In *Chikkala Samuel v. District Education Officer, Hyderabad* 481, the Andhra Pradesh High Court pointed out that minority institutions imparting general secular education in order to claim the benefit of Article 30(1), must show that it serves or promotes in the same manner, the interest of the minority community or considerable section thereof. Without such proof, there would be no nexus, between the institution and minority as such.”

---

478 1970(2) SCC 417 at 420.
479 Ibid at 420 (Para 8),
480 AIR 1973 Ker. 87.
In A.P. Christian Medical Educational Society v. Government of A.P. 482 The Supreme Court rejected the contention on behalf of the petitioner, that even a single individual belonging to a minority could found a minority institution and that neither a government nor a University could deny such a right- asserting that the Government, or the University and ultimately the Court, have the undoubted right to pierce the ‘minority veil’.

Chinnappa Reddy, J. speaking on behalf of the Court observed as:

“The object of Article 30(1), is not to allow bogies to be raised by pretenders, but to give the minorities a sense of security and a feeling of confidence, not merely by guaranteeing the right to profess, practice and propagate religion to religious minorities, and right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer institutions of their choice. These institutions must be educational institutions of the minorities in truth and reality, and not mere masked phantoms.”483

The Court further remarked that “what is important and what is imperative, is that there must exist some real positive index, to enable the institution to be identified as an educational institution of the minorities.”484

In St. Stephen’s College v. Delhi University485 the Supreme Court again reiterated that minority aided educational institutions, are entitled to prefer their community candidates to maintain the minority character of the institutions, subject to University standards.

In T.M.A. Pai Foundation v. State of Karnataka486, the Supreme Court again reiterated that depending upon the level of the institutions, whether it be a primary or secondary or high school or a college, professional or otherwise, and the population and educational need of the area in which the institution is to be located, the State is to properly balance the interests of all by providing for such a percentage of students of the minority community to be admitted, so as to adequately serve the interest of the community for which the institution was established.”

482 (1986) 2 SCC 667.
483 Ibid.
484 Ibid.
486 (2002) 8 SCC 487 at 584 (Para 151)
Article 30 confers a group right on the minority to establish and administer educational institutions of their choice and unless the institution is established by a minority, it cannot claim a right to administer it under Article 30 of the Constitutions.

5.5 Nature and Scope of Article 30(1)

By Article 30 of the Constitution all religious and linguistic minorities have a Fundamental Right to establish and administer educational institutions of their choice. The very purpose of giving special right to minorities, is to enable the minorities to preserve their identity, to bring up their children in an atmosphere congenial to their growth and to bring about equality by ensuring the preservation of their institutions and consequently, much needed protection as minorities.487

In re-Kerala Education Bill 1957, C.J. Das, remarked that, “The minorities evidently desire that education should be imparted to children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognized the validity of their claim, and to allay their fears, conferred on them the Fundamental Rights to establish and administer educational institutions of their choice. But the conservation of the distinct language, script or culture, is not the only object of choice of minority communities. They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with qualifications necessary for useful career in life”.488

In Ahmedabad St. Xavier College v. State of Gujarat489, Justice Khanna observed that, the idea of giving special rights to the minorities is not to have a kind of a 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 to the minorities, autonomy in the matter of the administration of these institutions. The differential treatment for the minorities, by giving them a special right is intended to bring about an equilibrium so that the idea of equality may not be reduced to a mere abstract idea, but should become a living reality and results in true, genuine equality.490

488 AIR 1958, SC 956 at 984.
490 Ibid at 772 (Para 71).
He further remarked that “the minorities are, as much the children of the soil as the majority, and the approach has been to ensure that nothing should be done as might deprive the minorities of a sense of belonging, of a feeling of security, of consciousness of equality and of the awareness that conservation of their religion, culture, language and script as also protection of their educational institutions is Fundamental Right enshrined in the Constitution.... In fact the provisions for protection of the minorities can be said to be an index of the level of civilization and catholicity of a nation, as to how far their minorities feel secure and not subject to any discrimination or suppression.”

Thus, Article 30 is intended to bring equality between the minority and majorities in the matter of education. They can set up educational institutions as will serve both purposes, namely the purpose of conserving their religion, language or culture and also the purpose of giving a thorough good secular and professional education to their children.

5.6 Basic Ingredient of Article 30(1)

Article 30(1) confers dual Fundamental Rights on all minorities, based on religion or language. Firstly, to establish, and secondly, to administer educational institutions of their choice. On the face of it these dual Fundamental Rights look very simple, but in reality, it is not so. In fact, ever since independence, and from time the Constitution came into force, Article 30 has always been a much debated Article in the Supreme Court of India as well as among different sections of the society.

For a proper appreciation of the full extent of the guaranteed right would require an analysis of each ingredient of Article 30(1), and that is what follows hereafter.

5.6.1 All minorities whether based on religion or language

Minorities for the purpose of Article 30(1) are the minorities as qualified therein, namely, linguistic or religious minorities. The minorities of any other description are not relevant for the purpose of Article 30(1).

The test for determination, whether a group claiming the right under Article 30(1) is minority or not, is already discussed in detail in Chapter III of the thesis.

---

491 Ibid at 781 (Para 89).
A minority for the purpose of Article 30(1) need not be based both on religion and language. In *Ahmedabad St. Xavier College v. State of Gujarat*\(^{493}\) the Lordship of the Supreme Court, already clarified that clause (1) of Article 30 gives right to all minorities, whether based on religion or language to establish and administer educational institutions of their choice. The right conferred by this clause is only two types of minorities based either on language or religion.

For the purpose of Article 30(1), minority educational institutions may be established by an individual or group of individuals belonging to minority community. The basic requirement is that it must be established for the benefits of the students of the minority community, and there must be some real positive correlation between the educational institutions and the minority community.

In *re-Kerala Education Bill, 1957*\(^{494}\) the Supreme Court pointed out that the right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the need of their community and the scholars who resort to their educational institutions.\(^{495}\)

In *Bishop S.K. Patro v. State of Bihar*\(^{496}\), it was held that since prior to the enactment of the Constitution, there was no settled concept of Indian citizenship, and it cannot be said that Christian Missionaries who had settled in India and local Christian resident do not form a minority community.

The Court further clarified that, it is true that the minority competent to claim the protection of Article 30(1), and on that account, the privilege of establishing and maintaining educational institutions of their choice must be, a minority of residing in India. It does not confer upon foreigners, not resident in India, the right to set up educational institutions of their choice. The person setting up educational institution, must be resident in India and, they must form a well defined religious or linguistic minority.\(^{497}\)

The fact that funds were obtained from the United Kingdom for assisting in setting up and developing the school, or that the management assisting in setting up and developing the school or that the management of the institution was carried on by

---

\(^{494}\) AIR 1958 SC 956.
\(^{495}\) *Ibid* at 1623.
\(^{496}\) (1969) 1SCC 863.
\(^{497}\) *Ibid* at 868 (Para 17).
some person who may not have been born in India, is not a ground for denying the protection of Article 30(1).  

In *St. Stephen’s College v. University of Delhi*\(^{99}\), the Court further observed that “the minority under Article 30 must necessarily mean those who form a distinct and identifiable group of citizens of India. They must have formed a well defined religious or linguistic minority. It does not envisage the rights of the foreign missionary or institutions however, laudable their objects might be, and there should be nexus between the means employed and the ends desired. There must exist some positive index to enable the educational institutions to be identified with religious or linguistic minorities. Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities, and no ill fit or camouflaged institution should get away with constitutional protection.\(^{500}\)

In *T.M.A. Pai Foundation v. State of Karnataka* \(^{501}\), Kirpal, C.J; (speaking for himself and the group of five other judges) opines that minority status of a group of persons is to be determined on the basis of the population of the State or Union Territory concerned, and not the whole India. The mere reason for taking State as unit is that division of India into States is on linguistic basis. Religious minorities shall also be construed State wise, because it is put on par with linguistic minority.

**5.6.2 The expression “…shall have right…”**

Article 30(1) grants a special and a privileged or additional protection to linguistic and religious minorities. This is so because it is a right which is not available to others. And being couched in affirmative positive term, it is a right which can be asserted, and not merely one which can be put forward to prevent violation of one’s right by others.

In other words, Article 30(1), grants both positive and negative rights, on the linguistic and religious minorities, to establish and administer educational institutions of their choice. It is positive in sense that, it is a right to establish and administer educational institutions, and it is negative in the sense that, it is a right not to have the same denied by the State, whether directly or indirectly.

---

\(^{498}\) *Ibid* at 869 (Para 18).

\(^{499}\) (1992) 1SCC.

\(^{500}\) *Ibid* at 560.

\(^{501}\) AIR 1958 SC 956.
In *re-Kerala Education bill, 1957*, Chief Justice Das, speaking on behalf of the Court pointed out that, Article 30(1) belongs to the same category as Article 25, 26 and 29, and confers on minorities, religious or linguistic, the right to establish and maintain their own educational institutions without any interference or hindrance from the State. It imposes negative obligation on the State, to not prohibit the establishment of such institutions, and it should not interfere with the administration of such institutions by the minorities.

Even if the State frames regulation for recognition of educational institutions then also,

(1) The State is under a positive obligation to give equal treatment in the matter of aid or recognition to all educational institutions, including those of the minorities religious or linguistics.

(2) The State is under a negative obligation as regards those institutions, not to prohibit their establishment, or to interfere with their administration. However, the Court cautioned the manager of minorities educational institutions by saying that “the true intention of Article 30 is to equip minorities with a shield whereby, they could defend themselves against attacks by majorities, religious or linguistic, and not to arm them with sword whereby they could compel the majorities to grant concessions.”

In *Rev. Father W. Proost and others v. State of Bihar*, C.J. Hidayatullah, speaking on behalf of the Court while deliberating the interplay between Article 29(1) and Article 30(1), said as follows:

“The width of Article 30(1) cannot be cut-down by introducing in it consideration on which Article 29(1) is based. Article 29(1) is general protection which is given to minorities, to conserve their language, script or culture. Article 30(1) is a special right to minorities to establish educational institutions of their choice. This choice is not limited to institutions seeking to conserve language, script or culture, and the choice is not taken away if the minority community, having established an educational institution of its choice, admits members of other communities, that is, circumstances irrelevant for the

---

502 AIR 1958 SC 956.
503 AIR 1958 SC 956 at 1000 (Para 37).
504 (1969) 2 SCR 73.
application of Article 30(1), since no such limitation is expressed and none can be implied.\(^505\)

In *TMA Pai Foundation v. State of Karnataka*\(^506\) B.N. Kirpal, C.J. speaking on behalf of majority said that the right under Article 30(1) is not so absolute as to prevent the Government from making any regulation whatsoever. Any regulation framed in the national interest, must necessarily apply to all educational institutions, whether run by the majorities or the minorities. Such limitations must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulation in that behalf. It is, of course, true that governmental regulation cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion, but the right under Article 30 is not absolute as to be above the law.\(^507\)

Thus, the minorities have privileged right or additional protection, to set up educational institution of their choice under Article 30(1) of the Constitution but it is not an absolute right but subject to reasonable restrictions, which may be imposed by the State in national interest.

### 5.6.3 To establish and Administer Educational Institutions

Article 30(1) gives linguistic and religious minorities two fold rights: (a) to establish and (b) to administer educational institutions of their choice. The right to establish obviously precedes the right to administer.

The expressions “establish” means different things in different context. In shorter Oxford Dictionary, the word ‘establish’ means, “To notify, confirm, and settle, to found, to create”. In Webster’s third New International Dictionary the word ‘establish’ means, “To found or base squarely; to make firm or stable’ to bring into existence; to create, make; start; originate”. The Chamber’s Twentieth Century Dictionary defines ‘establish’ to means “to settle or fix, to set up, to place in fixed position; to found.”\(^508\)

The Dictionary meaning of the word, ‘establish’ proves that the expression has got a number of meanings, depending on the context in which it is being used. We are here concerned with the meanings in the context of Article 30 of the Constitution.

\(^{505}\) *Ibid* at 77 (Para 8).
\(^{506}\) (2002) 8SCC 482 at P. 563.
\(^{507}\) *Ibid* at 563 (Para 107).
\(^{508}\) *AIR* 1968 SC 662 at 672 (Para 25).
In *State of Kerala v. Very Rev. Mother Provincial*[^509], Hidayatullah, C.J. clearly pointed out that in context of Article 30(1), “The word establishment means, 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 the 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 benefits of a minority by a member of that community.”[^510]

The word, ‘Administration’ means “management of the affair” of the institutions. The management must be free of control so that the founders or their nominee can mould the institution as they think fit, and in accordance with their ideas of how the interest of the community in general, and institution in particular, will be best served.[^511]

The expression establishment and administration were subject to judicial review in various cases by the Supreme Court of India.

In *re-Kerala Education Bill, 1957*[^512] educational institutions of their choice. The right to administer, cannot obviously include, the right to maladministration.

The Supreme Court also rejected the contention on behalf of the State that the protection guaranteed by clause (1) of Article 30, extends only to educational institutions established “after the commencement” of the Constitution and held that “there is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30(1) gives the minorities two rights, namely, to establish and to administer, educational institutions of their choice. The second right clearly covers pre-Constitution Schools, just as Article 26 covers the right to maintain pre-Constitution religious institutions.”[^513]

In *Bishop S.K. Patro v. State of Bihar*[^514], Justice Shah, cited with approval the aforesaid opinion of C.J. Das, and observed that:

[^509]: AIR 1970 SC 417.
[^510]: *Ibid* at 420 (Para 8).
[^511]: *Id.* at 421 (Para 9).
[^512]: AIR 1958 SC 956.
[^513]: AIR 1959 SCR 995 at 1051.
[^514]: (1969) 1 SCC 863 at 865 (Para 7).
“The guarantees of protection under Article 30 is not restricted to educational institutions established after enactment of the Constitution, institutions which had been established before the Constitution and continued to be administered by minorities, either based on religion or language, qualify for the protection of the right of minorities declared by Article 30 of the Constitution.

The same position was reiterated by the Supreme Court subsequently in Ahmedabad St. Xaviers College, St. Stephen’s, as well as TMA Pai Foundation case.

Thus, Article 30(1) made no distinction between the minority institution existing from before the Constitution came into being, or established thereafter.

In S. Azeez Basha v. Union of India Chief Justice Wanchoo, clearly pointed out that, the word “establish and administer” in Article 30, must be read conjunctively and so, in real sense it gives the right to minority to administer an educational institution provided it has been established by it.

Article 30(1) clearly postulates that the religious community will have the right to establish and administer educational institutions of their choice, provided they have established it not otherwise. The article cannot be read to mean, that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because for some reason or the other, it might have been administering it before the Constitution came into force.”

5.6.3.1 Institution held to be established by Minority

If we analyse the approach of judiciary regarding the establishment of educational institutions by minority, in the following cases, the Court accepted the claims of minority and found that the following institution as minority institution without much scrutiny.

In State of Bombay v. Bombay Education Society, the concerned school known as Bernes High School at Deolali in Nasik District in the State of Bombay was recognised as that of belonging to Anglo-Indian community, whose mother tongue is English. The Court accepted the claim of the Anglo-Indian School that it was a

515 (1974) 1 SCC 7171.
516 (1992) 1 SCC 558.
517 (2002) 8 SCC 481.
518 AIR 1968 SC 662.
519 1955 (1) SCR 568.
linguistic minority institution, entitled to protection under Article 30(1) of the Constitution.

In Sidhajbhai Sabhai v. State of Bombay\textsuperscript{520}, the Supreme Court considered the legal status of a Training College for teachers, known as the "Mary Brown Memorial Training College", at Borsad, District Kaira. The cost of maintaining the training college was met out of donations received from the Irish Presbyterian Mission, fee from scholars and grant-in-aid under the Education Code of the State Government. The College and other forty-two primary schools were run for the benefit of the religious denomination of the United Church of Northern India and Indian Christians generally, though admission is not denied to students belonging to other communities. The Training College was therefore, held to have been established and administered by the Christian minority.

In Rev. Father W. Proost v. State of Bihar\textsuperscript{521}, there was again no serious dispute that the institution concerned, that is, St. Xavier's College was founded by Jesuits of Ranchi, who were a Christian minority.

Similarly, in Gandhi Faiz-E-Aam-College, Shahjahanpur v. University of Agra\textsuperscript{522}, the appellant was a registered society, formed by the members of the Muslim community at Shahjahanpur. It was running the Gandhi Faiz-E-Aam- College. The management claimed protection of Article 30(1) against interference by the Agra University.

The Court proceeded on the basis that the community ranks as a minority in the country and the educational institution run by it, has been found to be what may loosely be called a 'minority' institution, within the Constitutional compass of Article 30. The Court reached the conclusion on a rapid glance at the evolution of the institution.

In D. A. V. College, Jallundur v. State of Punjab\textsuperscript{523}, the College established by Arya Samaj in the State of Punjab, claimed protection under Articles 29(1) and 30(1) of the Constitution. It was conceded by the State of Punjab, that the Hindus of Punjab are a religious minority in the State, though they may not be so in relation to the entire country. The claim of Arya Samaj to be a linguistic minority was, however, contested.

\textsuperscript{520} 1963 (3) SCR 837.
\textsuperscript{521} 1969 (2) SCR 73.
\textsuperscript{522} 1965 (2) SCC 283
\textsuperscript{523} 1971 (2) SCC 269.
The Supreme Court held that, “linguistic minority for the purpose of Article 30(1), is one which must at least have a separate spoken language, but it is not necessary that that language should also have a distinct script of its own. The sections of people who speak a language which has no script, will also be a linguistic minority entitled to protection of Article 30(1)”.

The Court further said that since Arya Samaj, have a distinct script of their own, namely Devanagari, they are entitled to invoke the right guaranteed under Article 29(1), because they are a section of citizens having a distinct script. Further they are also, entitled to the right under Article 30(1), because of their being a religious minority in the State of Punjab.

The Court also remarked that, “the religious or linguistic minorities need not be so in relation to the entire population of the country, and it is enough if they are so in relation to the particular legislation, or the State concerned. After referring to the history of Arya Samaj, it was stated that, though the Hindu community is a majority community in the whole of India, the Arya Samaj which comprises members of the Hindus community, is a religious minority in Punjab and that, they are entitled to claim the right under Articles 29(1) and 30(1), since the College was established and administered by that religious minority with a script of its own.

5.6.3.2 Right to Administration is subject to Reasonable Restriction

The nature and scope of right to administer educational institutions of their choice was subjected to judicial review in various cases by the Lordship of the Supreme Court.

In re-Kerala Education Bill, 1957\textsuperscript{524}, S.R. Das, C.J. clearly pointed out, that the right to administration,cannot obviously include, right to maladministration. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. It stands to reason, then, that the Constitutional Right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure excellence of the institution to be aided.

\textsuperscript{524} AIR 1958 SC 956.
Thus, the arguments based on the absolute freedom from State control, of the minority right to administer their educational institutions, was expressly negated by Chief Justice Das in *Kerala Education Bill, 1957* case. He clearly laid down a principle that a regulation which is not destructive or annihilative of the core or substance of the right under Article 30(1), could legitimately be imposed. However, the absolute theory of minority was again sought to be imposed by Justice Shah, in *Rev. Sidhajbhai Sabhai v State of Bombay*<sup>525</sup>, where the Court negated the contention of the State that a law could not be deemed to be unreasonable unless it was totally destructive or annihilative of the right under Article 30(1) by stating that:

“The right established by Article 30(1), is a Fundamental Right declared in terms is absolute. Unlike the fundamental freedom guaranteed by Article 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of minorities in the matter of setting up of educational institution of their choice. The right is intended to be effective and is not to be whittled down by so called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order, while maintaining the formal character of a minority institutions destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be but a “teasing illusion”, a promise of unreality”.

*Ahmedabad St. Xavier’s College Society v. State of Gujarat*<sup>526</sup> The right to administer is said to consist of four principal matters. *First* is the right to choose its managing- or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons selected by them. *Second* is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. *Third* is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. *Fourth* is the right to use its properties and assets for the benefit of its own institution.<sup>527</sup>

---

<sup>525</sup> (1963) 3 SCR 837.  
<sup>526</sup> (1974) 1 SCC 717.  
<sup>527</sup> Ibid at 745-746.
The scope of right to administer and permissible power of regulation was subject to judicial scrutiny in various cases.

In *Ahmedabad St. Xaviers College Society case*, C.J. Ray (on behalf of himself and Palekar, J.) pointed out as, “The right conferred on the religious and linguistic minorities to administer educational institutions of their choice, is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration”.

The Court further observed that, the minority institutions have the right to administer their institutions. This right implies the obligation and duty of the minority institutions, to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclectic in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character.

Regulations which will serve the interest of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions. Education should be a great cohesive, force in developing integrity of the nation. Education develops the ethos of the nation. Regulations are, therefore, necessary to see that there are no divisive or disintegrating forces in administration.

Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration is day to day administration. The choice in the personnel of management is a part of the administration. The University will always have a right to see that there is no maladministration. If there is maladministration, the University will take steps to cure the same. There may be

\textsuperscript{528} *Id* at 746.
control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students.

In *re Kerala Education Bill, 1957*, Das, C.J. summed up in one sentence the true meaning of the right to administer by saying that, the right to administer is not the right to maladminister.

After laying down this proposition, Das, C. J. held these regulatory measures as a permissible regulation. These are such as the manager of an aided school to be appointed subject to the approval of such officer as the Government might authorise. It is for the Government to prescribe the qualifications for appointment as teachers. The Public Service Commission to select candidates for appointment as teachers. The conditions of service were to be the same as in Government schools. No teacher was to be dismissed, removed, or reduced in rank or suspended without the previous sanction of the officer authorised by the Government in this behalf.

However the clauses authorised the Government to take over any aided school under certain circumstances was negated by the Court. The Court found that those clauses amounted to expropriation of the schools. The schools were, recognised on condition that they submitted to those clauses. Such submission amounted to surrender of the right under Article 30.

In *Rev. Father W. Proost case* the Court held that Section 48-A of the Bihar University Act which came into force from 1 March 1962, completely took away the autonomy of the governing body of St. Xavier’s College, established by the Jesuits of Ranchi.

Section 48-A of the said Act provided inter alia that appointments, dismissals, removals, termination of service by the governing body of the College, were to be made on the recommendation of the University Service Commission and subject to the approval of the University. There were other provisions in that section, viz., that the Commission would recommend to the governing body, names of persons in order of preference, and in no case could the governing body appoint a person who was not recommended by the University Service Commission.


---

529 AIR 1958 SC 956.
530 1969 (2) SCR 73.
the Church Missionary Society School, Bhagalpur to constitute a managing committee of the school in accordance with an order of the State. The Court held, that the State authorities could not require the School to constitute a managing committee in accordance with their order.

In *D. A. V. College v. State of Punjab* 532 clause 17 of the impugned statute in that case which provided that the staff initially appointed shall be approved by the Vice-Chancellor and subsequent changes would be reported to the University for the Vice-Chancellor's approval, was found to interfere with the right of management.

In *State of Kerala v. Very Rev. Mother Provincial* 533 the Court found Sections 48 and 49 of the Kerala University Act, of 1969, to be infraction of Article 30 of the Constitution. It is having the effect of displacing the administration of the College and giving it to a distinct corporate body which was in no way answerable to the institution. The minority community was found to lose the right to administer the institution it founded. The governing body contemplated in those sections was to administer the colleges, in accordance with the provisions of the Act, statutes, ordinances, regulations, bye laws and orders made, thereunder.

The powers and functions of the governing body, the removal of the members and the procedure to be followed by it, were all to be prescribed by the statutes. These provisions amounted to vesting the management and administration of the institution in the hands of bodies with mandates from the University.

Thus these rulings indicate how and when there is taking away or abridgement of the right of administration of minority institutions in regard to choice of the governing body, appointment of teachers and in the right to administer.

Durga Das Basu 534 in his commentary on the Constitution of India has summarised the right covered under Article 30 in the areas of administration broadly comprised of the following rights:-

(a) not to be compelled to refuse admission to students;
(b) to set up a reasonable fee structure;
(c) to constitute governing or managing body;
(d) to appoint staff teaching and non teaching;

(e) to use its properties and assets for the benefit of the institution;
(f) to select its own medium of instruction; and
(g) to take action if there is dereliction of duty on the part of the employees.

Detailed discussions on various facets of administrations and the regulatory powers of the State have been taken in the next Chapter of thesis.

5.6.4 An Educational institute of their choice

The question that has arisen in a number of cases before the Supreme Court has been, as to the kinds of educational institution which minorities based on language or religion as specified in Article 30(1) have the right establish. Obviously, it cannot be only of the kinds mentioned in Article 29(1), for then, Article 30(1) would be redundant. It has been already pointed out in the beginning of this Chapter that the rights under Article 29(1) and Article 30(1) are distinct and separate.

In Article 30(1) what is specified is the kinds of minorities entitled to enjoy the rights guaranteed by it, requires that the minority must be one based on language or religion. But as to the kinds of educational institutions that may be setup, the choice is left entirely to the concerned minorities, for the words used are „of their choice‟. This has consistently been the point of emphasis of courts in India, more so, the Supreme Court.

In re Kerala education bill 1957, \(^{535}\) the philosophy underlying this aspect of the guarantee of article 30(1) was explained by Das C.J as, „minorities will ordinarily desire that their children should be brought up properly and efficiently, and be eligible for higher University education and go out into the world fully equipped with such intellectual attainments, as will make them fit for entering public services. Educational institutions of their choice will hence necessarily include institutions imparting general secular education also\(^{536}\)."

In other words, it was clarified, „the Article leaves it to their choice to establish such educational institutions, as will serve both purposes, namely, the purpose of giving a thorough good general education to their children‟ \(^{537}\) it was emphasised that „the key to the understanding of the true meaning and implication of the Article under consideration are the words of their own choice. It is said that the

---

\(^{535}\) AIR 1958 SC 956.

\(^{536}\) *Ibid* at 1053.

\(^{537}\) *Ibid*. 

159
dominant word is ‘choice’ and the context of that Article, is as wide as the choice of
the particular minority community may make it”538.

In Reverend Father W. Proost v. State of Bihar 539, the Supreme Court held that
“the width of Article 30(1) cannot be cut down, by introducing in it consideration on
which Article 29(1) is based”. The court pointed out the general nature of Article
29(1) as a right of minorities (and of the majority as well), to conserve their language,
script or culture, and the special nature of Article 30(1) as a right exclusively of the
minorities based on religion or language to establish educational institutions of their
own choice”. This choice, it was held is not taken away or lost if the minority
community also admits into the educational institution members of other communities.
It was held that this is a circumstance irrelevant for the application of Article 30(1),
since non limitation is expressed and name can be implied.

In St Stephen’s College v. University of Delhi540, the Constitution bench of five
judges of the Supreme Court held that aided minority educational institutions were
entitled to preferably admit their community, candidates so as to maintain the
minority character of the institution, and the State may regulate the intake in this
category of the institution, and the ‘State may regulate’ was intended to save but this
intake should not be more than 50% in any case.

In other words, minorities are not entitled to have educational institutional of
their choice, exclusively for their own benefit.

In T.M.A Pai Foundation and others v. State of Karnataka and others541, the
Supreme Court held that, the basic ratio laid down by this Court in the St. Stephen’s
College case is correct. However, rigid percentage cannot be stipulated. It has to be
left to authorities to prescribe a reasonable percentage having regard to the type of
the institution, population and educational needs of minorities.542

In other words, minorities be given preferential rights to admit students of
their own community in their own institutions, in a reasonable measure otherwise
there would be no meaningful purpose of Article 30 in the Constitution543.

538 Ibid.
539 Ibid.
540 AIR 1992 SC 1630.
541 (2002) 8 SCC481.
542 Id. at 76 ( Para 162) as per Kirpal C.J.
543 Id. at 102-103 ( Para 225) as per Khare J.
In *State of Bombay v. Bombay Education Society*\textsuperscript{544} the Supreme Court while striking down circular issued by the State of Bombay, prohibiting admission to a class where English is used as the medium of instruction, of any pupil who is not an Anglo-Indian and citizen of non-Asiatic descent held that the State did not have the power to prohibit, contrary of the rights guaranteed under Article 29(2), the admission of students to Anglo-Indian School whose mother tongue was not English. Such a prohibition is obviously, an infringement of the right of the minorities under Article 30(1).

In *D.A.V. College, Bathinda v. State of Punjab*\textsuperscript{545} the Supreme Court held that, “the right of the minorities to establish and administer educational institutions of their choice, would include the right to have a choice of the medium of instruction also which would be the result of the reading Article 30(1) with Article 29(1). The Court further remarked, “No inconvenience or difficulty administrative of financial, can justify the infringement of the guaranteed right.”\textsuperscript{546}

In *Ahmedabad St. Xavier's College society and others v. State of Gujarat*\textsuperscript{547} while endorsing the view of Chief Justice S.R. Das, *in Re Education Bill 1957*\textsuperscript{548} C.J. Ray expressed opinion that since the Kerala Education Bill Case, this Court (i.e. the Supreme Court of India) has consistently held, that general secular education is covered.

By Article 30 the perspective of national interest. Underlying the guarantee there the Supreme Court pointed out, “The minorities are given the protection under Article 30 in orders to strengthen, the integrity and unity of the country. The sphere of general secular education is intended to develop the communities of boys and girls of our country. This is the true spirit of liberty, equality and fraternity through the medium of education\textsuperscript{549}. To treat it otherwise will be to induce a sense of isolation and separateness in the minorities\textsuperscript{550}.

On other aspect, it has been held by the Supreme Court that, under Article 30(1) of the constitution minority communities have the right to establish school for boys or girls or co-educational institution as they wish and that the State cannot curtail the freedom.

\textsuperscript{544} AIR1954 SC 561.
\textsuperscript{545} AIR 1971 SC 1731.
\textsuperscript{546} Id at 1735.
\textsuperscript{547} (1974) 1 SCC 717.
\textsuperscript{548} AIR1958 SC956.
\textsuperscript{549} Ibid.
\textsuperscript{550} Ibid.
In *Rt. Rev. Msgs. Mark Netto v. Government of Kerala* 551 the Catholic Diocese of Trivendrum was conducting St. Vincent’s School as a boy’s school. Afterwards, the management decided to add a wing for girls as well, in the same School. But at the petition of a Muslim community which was conducting a girls school nearby, the Government disallowed the starting of the girls section. On the Government’s action being upheld by the High Court, the management appealed to the Supreme Court.

It was held by the Supreme Court that the government’s disallowance was violative of Article 30. It held that the Christian community in the locality, for various reasons, which are not necessary to be allowed here, wanted the girls also, to receive their education in this School and especially of their community. They did not think (it) their interest to send them to the Muslim Girls School, which is an educational institution run by other minority.

It thus, stands established that the right under Article 30(1) includes, the freedom for minority community to start girls or boys school, or co-educational school, and that this is contained in their right to establish and administer educational institution of their choice.

Thus, the minorities have constitutional rights to open educational institutions of their choice as wide as the choice of the community can make it.

### 5.7 Acquisition of Minority Educational Institutions Property

Clause (1-A) of Article 30 was introduced in the Constitution by the Constitution (Forty-Fourth Amendment) Act, 1978. The basic reason for adding this provision is that the Parliament in its constituent capacity apprehended that minority educational institution may be compelled to close down, or curtail their activities by expedient of acquiring their property, and paying them inadequate amounts in exchange.552

Article 30(1-A) read as follows:

In making any law providing for compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property, is such as would not restrict or abrogate the right guaranteed under that clause.

551 1976 1SCR 609.
552 (2002) 1SCC 273 at 278 (Para 8).
The nature and scope of Article 30(1A) was considered by the Supreme Court in society of St. Joseph’s College v. Union of India. S. P. Bharucha, C.J. speaking on behalf of the Court laid down the following postulates:

1. “Article 30(1-A) obligates the State, to make a specific law to provide for compulsory acquisition of the property of minority educational institutions.

2. Such law must ensure the amount payable to minority educational institutions for the acquisition of its property, will not in any manner impair the functioning of the educational institution.

3. It is not necessary that a separate statute should be enacted exclusively for the compulsory acquisition of the property of the minority educational institution, but it is necessary that in a law that provides, in general, for the compulsory acquisition of property, there should be enacted, by amendment thereof, a provision that relates specifically to the acquisition of the property of minority educational institutions.”

In the *Society of St. Joseph’s College, Tiruchy v. Union of India* the Madras High Court again reiterated the need to enact separate law or an appropriate amendment in land acquisition Act, to ensure appropriate compensation in case of acquisition of property of minority educational institutions. Unfortunately, no such law has been enacted for this purpose.

5.8 Aligarh Muslim University - A Quest for Minority Status

The legal status of the Aligarh Muslim University has been bone of contention since independence because of the dual status of the University as Central University on the one hand and the claims of the Muslim Minority as Institution established by them, as a testimony of central symbol of the Muslim survival in independent India. Before examining the legal status and rationality of the decision of the Azeez Basha Case, it would be appropriate to first examine the background of its genesis.

5.8.1 Its Genesis

In the historical context, way back in 1870, Sir Syed Ahmed Khan conceived the idea of imparting liberal education to Muslims in literature and science to ameliorate...
the Muslim community from educational backwardness and to impart them modern education.\textsuperscript{556}

For educational regeneration of Muslims he constituted a Committee known as Muhammadan Anglo-Oriental College Fund Committee, to raise money for this purpose. In year 1873, a School was opened which later converted into a High School in the year 1876. In the year 1877, Lord Lytton, the then Viceroy of India, laid the foundation stone for the establishment of the Muhammadan Anglo-Oriental College, at Aligarh.\textsuperscript{557}

After the death of Sir Syed Ahmed Khan in 1899, the Muslim Community decided to setup a Muslim University and for this purpose, a Muslim University Association was formed for taking up the matter with the British Government. The British Government imposed a condition that a sum of Rs. 30 lakhs to be deposited as reserve fund of the University, with the Government and the existing Mohammedan Anglo-Oriental College to be made the central point of the proposed University, along with all the properties to be handed over to the authorities for this purpose. After the completion of all formalities, the Aligarh Muslim University was incorporated by the Aligarh Muslim University Act, 1920.\textsuperscript{558}

5.8.2 Salient features of Aligarh Muslim University Act, 1920

The title of the 1920 Act, provides that “An Act to establish and incorporate a teaching and residential Muslim University at Aligarh”.

The Preamble of the 1920 Act, says “is meant to establish and incorporate a teaching and residential University at Aligarh” by adding that it transferred and vested in the said University, “all properties and rights” of the Mohammedan Anglo Oriental College and of the Muslim University Association.\textsuperscript{559}

Section 3 of the 1920 Act, prescribed that “the first Chancellor, Pro-Chancellor and the Vice-Chancellor shall be appointed by the Governor-General by notification in the Official Gazette, were all to be Muslims. It also provided the legal personality to

\textsuperscript{556} S. Azeez Basha v. Union of India AIR 1968 SC 662 at 663.
\textsuperscript{557} Ibid.
\textsuperscript{558} Ibid.

“Preamble of the Aligarh Muslim University Act, 1920 read as” It is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, and dissolve the societies registered under the Society Registration Act, 1860 which are respectively known as the Muhammadan Anglo Oriental College, Aligarh and the Muslim University Association and to transfer and vest in the said University all properties and rights of the said societies and of the Muslim University Foundation Committee".
the University as body corporate having a perpetual succession and common seal and could sue and be sued by the name.

Section 4 of the 1920 Act, dissolved Muhammadan Anglo - Oriental College, Muslim University Association and Muslim University Foundation Committee and all their movable and immovable property etc. were vested in the University and to be used to the object and purpose for which Aligarh Muslim University was incorporated.

These provisions show that three previous bodies legally came to an end and everything that they possessed of, was vested in the University as established by the 1920 Act.  

Section 6 of 1920 Act is significant because it laid down that “the degrees, diplomas and other academic distinctions granted or conferred, to or on person by the University shall be recognized by the Government as are corresponding degrees, diplomas and other academic distinction granted by any other University incorporated under any other enactment.”

Section 7 provides for reserve funds, including the sum of rupees thirty lacs. Section 8 provides that “the University shall subject to provisions of the Act and the Ordinances, be open to all persons of either sex and of whatever race, creed or class”.

Section 9 gave power to the ‘Court’ of the University to make statutes providing that instruction in the Muslim religion would be compulsory in case of Muslims students. By Section 13, the Lord Rector of the University had been given power to carry out inspection and enquiry of the University infrastructure and academic facilities and for this purpose the necessary direction may be issued to the University for its Compliance.

560 AIR 1968 SC 662 at 664.
561 Ibid.
562 Section 13(1) of 1920 Act, provided that, “the Governor General shall be Lord Rector of the University”. Section 13(2) provided that “the Lord Rector shall have the right to cause an inspection to be made by such person or persons as he may direct, of the University, its buildings, laboratories and equipments and of any institution maintained by the University and also of the examinations, teaching and other work conducted or done by the University, and to cause an enquiry to be in like manner in respect of any matter connected with the University. The Lord Rector shall in every case give notice to the University of his intention to the cause an inspection or inquiry.” After the enquiry, the Lord Rector had the power to address the vice-chancellor with reference to the result of such inspection and inquiry and vice-chancellor was bound to communicate to the Court the views of the Lord Rector with such advice as the Lord Rector might offer upon the action to be taken thereon. The Court was then required to communicate through the vice-chancellor to the Lord Rector such action if any as was proposed to be taken or was taken upon the result of such inspection or inquiry. Finally, the Lord Rector was given the power where the Court did not within a reasonable time, take action to the satisfaction of the Lord Rector to issue such direction as he thought fit
Section 14 of the 1920 Act, provided for the Visiting Board of the University which comprises of the Governor, the members of the Executive Council, the Ministers and one member nominated by the Minister in charge of Education.

The Visiting Board had the power to inspect the University and to satisfy itself that the proceedings of the University were in conformity with the Act, Statutes and Ordinances after giving notice to the University of its Intention to do so. The Visiting Board was also given power, by order in writing, to annul any proceedings not in conformity with the Act, Statutes and Ordinances, provided that before making such an order, the Board had to call upon the University to show cause why such an order should not be made, and to consider such cause of shown within reasonable time.\textsuperscript{563}

Sections 15 to 21 deals with the Officers of the University and Rectors and
provides that “the power of officers of the University, other than the Chancellor, the Pro-Chancellor, the Vice-Chancellor and the Pro-Vice-Chancellor shall be prescribed by the Statutes and Ordinances.”\textsuperscript{564}

Section 22 prescribed for the Court, the Executive Council and the Academic Council and such other authorities as might be declared by the Statutes to be authorities of the University.”

Section 23 is the most significant provisions of the 1920 Act from the perspective of the Muslims Community because it provided not only for the composition and power of the Court but also providing for exclusive Muslim membership to the Court.

Proviso to sub-section (1) to section 23 laid down that “no person other than a Muslim shall be a member thereof”. By section 23(2), the Court was to be the Supreme governing body of the University, and would exercise all the powers of the University, not otherwise provided for by the 1920 Act, the Statutes, the Ordinances and the regulations. It was given power to review the acts of the Executive and the Academic Councils, save where such Councils had acted in accordance with powers conferred on them under the Act, the Statutes or the Ordinances and to direct that necessary action be taken by the Executive or the Academic Council, as the case might be on any recommendation of the Lord Rector.

\textsuperscript{563} AIR 1968 SC 662 at 665.\textsuperscript{564} Id.
The power of making Statutes was also conferred on the Court along with other powers necessary for the functioning of the University.\textsuperscript{565}

Section 24 dealt with Executive Council. Section 25 deals with the Academic Council. Section 26 deals with other authorities, of the University. Section 27 laid down what the Statutes might provide.

Section 28 dealt with the question of the first Statutes and how they were to be amended, repealed and added to. It provided that, “no new Statute or amendment or repeal of an existing Statute, shall have any validity until it has been submitted through the visiting Board (which may record its opinion thereon) to the Governor General in Council and has been approved by the latter, who may sanction, disallow or remit it for further consideration.”\textsuperscript{566}

Section 29 of 1920 Act, dealt with Ordinances and what they could provide for and Section 30 provided which authorities of the University could make Ordinances.

Section 30(2) provided that, “the first Ordinance shall be framed as directed by "The Governor General in Council" and Sub-Section (3) of Section 30 laid down that no new Ordinance or amendment or repeal of an existing Ordinance or amendment or repeal of an existing Ordinance shall have any validity until it has been submitted through the Court and the Visiting Board (which may record its opinion thereon) to the Governor - General in Council, and has obtained the approval of the latter, who may sanction, disallow or remit it for further consideration.”\textsuperscript{567}

Section 31 provides for the making of Regulation which had to be consistent with Statutes and Ordinances. Section 32 provided for admission of Students to the University and Sub-Section (4) thereof provided that, “The University shall not save with the previous sanction of the Governor General in Council recognized (for the purpose of admission to a course of study for a degree) as equivalent to its own degree, any degree conferred by any other University or as equivalent to the Intermediate examination of an Indian University, any examination conducted by any other authorities.”\textsuperscript{568}

Section 40 of 1920 Act, is another significant feature. It provides that “if any difficulty arises with respect to the establishment of the University or any authority of the University or in the connection with the first meeting of any authority of the

\textsuperscript{565} Ibid at 665 – 666.
\textsuperscript{566} Id. at 666.
\textsuperscript{567} Id.
\textsuperscript{568} Id.
University, the Governor - General in Council, by order may make any appointment or do anything which appears to him necessary or expedient, for the proper establishment of the University or any authority thereof, or for the first meeting of any authority of the University.”

5.8.3 The AMU (Amendment) Act, 1951: the Beginning of Trouble

After the Constitution of India, came into force the Parliament enacted the Aligarh Muslim University (Amendment) Act, 1951 to incorporate certain changes in 1920 Act, to make it in conformity with the Constitutional provisions.

Section 8 of the 1920 Act, was amended and substituted by a new provisions which provided that, The University shall be open to persons of either sex and of whatever race, creed, caste or class, and it shall not be lawful for the University to adopt or impose on any person, any test whatsoever of religious belief or profession in order to entitle him to be admitted therein, as a teacher or student, or to hold any office therein or to enjoy and exercise any privilege thereof, except in respect of any particular benefaction accepted by the University where such test is made a condition thereof by testamentary or other instrument creating such benefaction.”

Proviso to Section 8 provided that “nothing in this section shall be deemed to prevent any religious instruction being given in the manner prescribed by the Ordinances, to those who have consented to receive it.”

Section 9 of 1920 Act was deleted, which gave power to the Court to make Statutes, providing for compulsory religious instruction in the case of Muslim students.

This repeal was necessitated in view of Article 28(3) of the Constitution, which prohibit the imparting of compulsorily religious instruction to attend any religious worship in state recognized or state aided educational institution.

Section 13 was amended and in place of Lord Rector, the University was to have visitor. Further, the power of visiting Board was conferred on the Visitor by addition of a new Sub-Section (6) to Section 14.

569 Id. at 666 – 67.
570 Id.
571 Article 28(3) of the Constitution provides, “No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institutions or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given consent thereto.”
Further, proviso to section 23(1) which required that all members of the Court would only be Muslim was deleted. This clause had provided for exclusive Muslim Membership to the Court.

5.8.4 The AMU (Amendment) Act 1965: A Watershed

The Aligarh Muslim University Act, 1920 was again amended in 1965, when M.C. Chagla, a Khoja Muslim jurist from Bombay, was then Union Minister for Education, who was known for their deep commitment to secularism. The main change was introduced in respect of Section 23 of 1920 Act, which deals with the composition and the powers of the Court of the University. Sub-Sections (2) and (3) of Section 23 were deleted with the result that the Court no longer remained the Supreme governing body and could not any longer exercise the powers conferred by sub-section (2) and (3) of Section 23.

The amended sub-section (2) to Section 23 assigned the following functions to the Court:

(a) To advise the visitor, in respect of any matter which may be referred to the Court for advice;

(b) To advise any other authorities of the University, in respect of any matter which may be referred to the Court for advice; and

(c) To perform such other duties and exercise such other powers as may be assigned to it by the visitor, or under this Act.\(^572\)

Further the powers of the Executive Council were correspondingly increased by the Aligarh Muslim University (Amendment) Act, 1965, by amending Sections 28, 29, 34 and 38 of the AMU Act of 1920. Until then, the Court had been the Supreme governing body of the Aligarh Muslim University, with only modification which was introduced by 1951 Act, which provided for dropping of exclusive membership of Muslims to the Court. But under the 1965 Act, the Court was reduced to a nominated advisory body, while authority was concentrated within the hands of the Vice-Chancellor and members of Executive Council, who were themselves, nominated by the visitor (President of India) or were ex-officio members.

M.C. Chagla, who was the then Education Minister, expressed the view that the Aligarh Muslim University is not a minority institution and neither was it established, nor maintained by the Muslims Community.\(^573\)

\(^{572}\) AIR 1965 SC 662 at 668 (Para 17).
The Constitutionality of 1951 and 1965 Amendment Acts were challenged before the Supreme Court in *Azeez Basha and others v. Union of India*. 574

It was contended by the petitioner that, “The Aligarh Muslim University was established by the Muslims minority and therefore, they had the right to administer it and the Acts of 1951 and 1965, that take away or abridge any part of the right, are ultra vires Article 30(1) of the Constitution”. 575

On the other hand, the Union of India contended that the Aligarh Muslim University was established by the Aligarh Muslim University Act, 40 of 1920 by the Government of India, therefore, the Muslims minority could not claim any Fundamental Right to administer the Aligarh University under Article 30(1) of the Constitution.

The Constitution Bench of the Supreme Court comprising of K.N. Wanchoo, C.J., R.S. Bachawat, V. Ramaswami, G.K. Mitter and K.S. Hegde, JJ., in their unanimous opinion held that, the Aligarh Muslim University was neither established nor administered by the Muslim Minority and therefore, there is no question of any amendment to the 1920 Act being unconstitutional under Article 30(1) for that Article does not apply to the Aligarh University. 576

K.N. Wanchoo, C.J. speaking on behalf of the Court, laid down the following propositions to negate the claim of the Muslim Minority that the Aligarh Muslim University is established by them.

(1) “The preamble of the 1920 Act, clearly shows that it was to establish and incorporate a teaching and residential Muslim University at Aligarh. The two societies, namely, Muhammadan Anglo-Oriental College, which was nucleus of the Aligarh Muslim University and Muslim University Foundation Committee, formed for collecting funds for establishment of the University, was dissolved and all their properties and rights, debts, liability and obligation were transferred and vested in the University established by the AMU, 1920 Act.

(2) By Section 3 of the Act, the Aligarh Muslim University was accorded the status of body corporate, with perpetual succession and had common seal, with capacity to sue and be sued by that name.

574 *AIR* 1968 SC 662.
575 *Ibid* at 662.
576 *Id.* at 674.
(3) The Minority will have the right to administer educational institutions of their choice, provided they have established them, but not otherwise. The Article 30 cannot be read, to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or the other, it might have been administering it before the Constitution came into force.

(4) The word, “establish and administer” in Article 30 must be read conjunctively, and so read, it gives the right to the minority to administer an educational institution, provided it has been established by it.

(5) The Court also relied upon the observation of the Supreme Court in Dargah Committee, Ajmer v. Syed Hussain Ali 577, where the Court while dealing with Article 26(a) and (d) of the Constitution held that, even if it be assumed that certain religious institution was established by a minority community, it may lose the right to administer it in certain circumstances by observing as:

“If the right to administer the properties never vested in the denomination or had been validly surrendered by it, or had otherwise been effectively and irretrievably lost to it. Article 26 cannot be successfully invoked.” 578

(6) Relying on the above observation, the Court held that there was no prohibition against the establishment of the Universities by the private individuals or bodies, but the Government was not bound to recognize their degree. In the absence of that, the very purpose of establishing the University, would have been futile. In view of this, the Muslim Community approached the Government for incorporating the University.

(7) Therefore, when the Aligarh University was established in 1920, and by Section 6, its degree was recognized by the Government. An institution was brought into existence which could not be brought into existence by any private individual or body for such individual or body could not insist.

577 (1962) 1SCR 383.
578 Id. at 414.
upon the recognition of the degree conferred by any University established by it. The enactment of Section 6 in 1920 Act, clearly shows that when it came to be established in 1920, it was not established by the Muslim Minority, for the Minority could not insist on the recognition by Government, of the degrees conferred by any University established by it.

(8) It is true that the nucleus of the Aligarh University was M.A.O. College but the conversion of that college into the University was however not by the Muslim Minority, but it took place by virtue of 1920 Act, which was passed by the Central Legislature.

(9) Further, the mere fact that all the members of the Court, had all to be Muslims, there was nothing in 1920 Act to suggest that the administration of the Aligarh University was in the Muslim Minority, as such under Section 13, the Governor-General had overriding powers over all matters relating to the administration of the University. Under Section 14, the Governor-General, the visiting Board and the members of Executive Council, who were not necessarily Muslims, had the overriding power over the administration of the University. Even under Section 28(2), no new statute, or amendment, or repeal of an existing statute, made by the University would have any validity, until it had been approved by the Governor-General in Council. These clearly prove that even administration was not vested in Muslim Minority but was vested in the statutory bodies created by the 1920 Act.

(10) Thus, the Aligarh Muslim University, when it came into existence in 1920, was established by the Central Legislature by the 1920 Act. It may be that the 1920 Act was passed as a result of the efforts of the Muslim Minority. But that does not mean, that Aligarh University when came into being, under 1920 Act, was established by the Muslim Minority.”

The Supreme Court’s decision in Azeez Basha, was subject to severe criticism by the Muslim Minority, constitutional experts, as well as by historians. For instance, H.M. Seervai, criticised the approach of the Supreme Court in these terms,

---

“It is the first case in which the Supreme Court has departed from the broad spirit in which it had decided cases on cultural and educational right of the minorities... It is submitted that the decision is clearly wrong and productive of grave public mischief, and it should be overruled.”

Sh. Tara Chand, the historian, who was at that time nominated member of Rajya Sabha, reacted to the approach of the Supreme Court by saying that, “it will be a falsification of the history of India if it is asserted from any quarter that Aligarh Muslim University was not established by the Muslim and primarily, for the educational advancement of Muslim in India.

Mr. Soli J. Sorabjee has observed: “The record of the Supreme Court, however, has not been free from aberrations. Its judgement in the Aligarh Muslim University case, based on dubious premises and marked by strained reasoning, is a glaring instance.

The Central Government also took a serious note of widespread anger of the Muslim Community, and appointed a committee of eight members known as the Beg Committee, to suggest measures to defuse the crisis. In spite of the suggestions by the Beg Committee that Aligarh Muslim University shall be deemed to have been established by the Muslim Minority in India, as an educational institutions of their choice and shall be administered and managed as provided for in Article 29 and 30 of the Constitution and to provide it all India character, by nominating the Muslim legislators, four from each zone, the Government introduced some cosmetic change by the Aligarh Muslim University (amendment) Act 1972. Section 5(2) of 1972 amendment provided that the function of the Aligarh Muslim University, would be:

(a) To promote Oriental and Islamic studies, Muslim Theology etc. and

(b) To promote the study of religion, civilization and culture of India.

Besides it, 1972 amendment concentrated too much power in the hands of the Vice-Chancellor and it was designed to democratise the Aligarh Muslim University by giving greater voice to the faculties and students by associating them with administration. Representation given to members of the Parliament was also increased.

581 Ibid.
Another significant development took place after the AMU (Amendment) Act. 1972 was in year 1978, when the Minority Commission was created. The Minority Commission took up the AMU matter as its first assignment the Chairman of the Commission, Minoo Masani, the well known Parsi figure and two other members of the Commission, Justice M.R.A. Ansari and V.V. John, a Christian educationist, produce a comprehensive document, to ensure autonomy and democratic functioning of the University.583

The Minority Commission proposed the following to “meet the needs of the case, “University means the educational institutions of their choice established by the Muslim of India and which was incorporated and designated as Aligarh Muslim University in 1920 by this Act.”. The Commission was of the view that, this formulation lies in the fact that while it accepts the legitimate claims of the Muslims that Aligarh Muslim University should be entitled to the constitutional guarantee of the Fundamental Rights embodied in Article 30, it would in no way affect the power of the Parliament to discharge its proper functions in regard to “an institution of national importance.”584

The Janta Party government did not appreciate the proposal of the Minority Commission. After the fall of the Janta Party government, the Congress Party in its election manifesto in 1979 assured to the Muslim Community that “the Minority Character of the Aligarh Muslim University will be assured.”585

The Janta Party also promised in its election manifesto that “The Janta Party will give priority to enacting appropriate legislation to restore the autonomy and original character of the University as an institution for Oriental and Islamic studies, and for the promotion of the educational and cultural advancement primarily, of the Muslim Community.586

In year 1979, Sh. Trilok Singh, a Congressman, introduced a private member’s bill, proposing that, the Aligarh Muslim University, should be “deemed to have been established at the instance of the Muslims of India”, which was widely acclaimed by his colleagues.

584 Id. at1774.
585 Indian Nation Congress (I), Election Manifesto, 1980.
But the then Union Education Minister, Shankaranand, moved a “single clause” bill in (the 1980 Amendment Bill), seeking to amend the definition of the University” in the AMU Act, 1920 as:

“The educational institutions of their choice established by the Muslim of India which originated as the Mohammedan Anglo - Oriental College, Aligarh, and which was subsequently incorporated as the Muslim University.

Amid protests, the 1980 Amendment Bill was withdrawn and fresh Bill was introduced, and it amended 1920 Act, comprehensively as the AMU (Amendment) Act, 1981.

Significant changes introduced by the AMU (Amendment) Act, 1981, were as follows:

(1) The AMU (Amendment) Act, 1981, has deleted the word, “establish” from the title and preamble of the Aligarh Muslim University Act, 1920. The 1920 Act, read as follows, “An act to establish and incorporate a teaching and residential Muslim University at Aligarh”.

The 1981 Act, provided a comprehensive definition of the word ‘University’ means, the educational institutions of their choice established by the Muslims of India, which is originated as the Mohammedan Anglo - Oriental College, Aligarh and which was subsequently, incorporated as the Aligarh Muslim University.

(2) Section 5 of 1920, provided for the power of the University including power to hold examination, and to grant and confer degrees and other academic distinctions. But by 1981 Amendment Act, Section 5(2) (c) was added which reads: “to promote especially the educational and cultural advancement of Muslims of India”

(3) Section 8 of 1920 Act, provided that “the University shall subject to provisions of this Act and Ordinances be open to all persons of either sex and of whatever race, creed or class.”

It was first substituted by 1951 Act and it read: “the University shall be open to all persons of either sex and of whatever race, creed, caste or class and it shall not be lawful for the University to adopt or impose on any person, any test whatsoever of religious belief or profession, in
order to entitle him to be admitted therein, or to graduate at or to enjoy or exercise any privilege thereof....

Section 8 has been substituted by the Aligarh Muslim University Amendment Act, 1981, as: “The University shall be open to all persons (including the teacher and students) of either sex and of whatever race, religion, creed, caste or class.”

(4) Section 17 and 18 of 1920 Act, was amended by 1972 Amendment Act provided that the Chancellor and the Pro-Chancellor of the University shall be appointed by the visitor of the University.

But by Clause (1) of Section 17 and Clause (1) of Section 18 was amended by 1981 Act, now provided that the Chancellor and the Pro-Chancellor of the University, shall be appointed by the ‘Court’ of the University, in such manner and for such term as may be prescribed by the Statute.

(5) The next significant change was introduced in Section 23 of 1920 Act which deals with the power and functions of the Court, proviso to Clause (1) to Section 23 of 1920 Act, as originally stood provided that, “no person other than Muslim, shall be member thereof”

The 1951 Act, deleted this provisions and 1965 Act, reduced the power of the Court and increased the power of Executive Council by amending Sections 28, 29 and 34 of 1920 Act.

But by the 1981 Amendment Act, the Court was again recognized as the Supreme governing body of the Aligarh Muslim University and it was considerably enlarged to make it all India in character.

The Section 23 of AMU (Amendment) 1981, Act read as:

(i) The Court shall consist of the Chancellor, the Pro-Chancellor, the Vice-Chancellor and the Pro-Vice-Chancellor (if any), for time being and such other person as may be specified by the statute.

(ii) The Court shall be the Supreme governing body of the University and shall examine all the power of the University, not otherwise, provided for by this Act, the Statutes, the Ordinance and the Regulations and it shall have the power to review the acts of the
Executive and the Academic Council (save where the council have acted in accordance with the powers conferred on them under this Act, the statute and ordinances).

(6) Further, by amending section 14 of 1920 Act, the 1981 Amendment Act enlarged the composition of the Court to include Chancellor, Pro-Chancellor, Vice-Chancellor etc., the representatives of Departments and Colleges, teaching and non-teaching staff, representatives of donors, ex-students, profession, industry and commerce, all India Muslim Education Conference, students, representatives of Muslim Culture and Learning etc.

Thus, by the AMU (Amendment) Act, 1981, the Court was again recognized as the Supreme governing body of the University, with all India representative characteristics, and the specific mission of the AMU was formerly and clearly recognized.

The Constitutionality and the claims of the Aligarh Muslim University as a minority institution in view of the AMU (Amendment) Act, 1981 was challenged before the Allahabad High Court in Dr. Naresh Agarwal v. Union of India, in this case, the petitioner challenged the AMU reservation policy for admission to post graduate medical course on the ground that the AMU is not a minority institutions, but created by the Government of India. Therefore, the reservation provided for Muslim Candidates is wholly without jurisdiction, and violative of Article 29(2) of the Constitution.

On the other hand, the Union of India and the AMU contended that in view of 1981 Amendment Act, the basis of the judgement of Azeez Basha was changed and the AMU was founded by the Muslims and it has been incorporated as a University by the Act of 1920. There has been no change in the substance of the original minority character of institution by such incorporation.

The Allahabad High Court allowed the petition and held that the Judgement of the Supreme Court in Azeez Basha still holds good even subsequent to the Aligarh Muslim University Amendment Act, 1981. The AMU is not a minority institution within the meaning of Article 30 of the Constitution of India. Therefore,

---

the University cannot provide any reservation in respect of students belonging to particular religious community. The Court also quashed the resolution of Academic Council, Executive Council and its approval granted by the Government and reservation of 50% granted to Muslim candidates, was also cancelled.\textsuperscript{588}

The Allahabad High Court decision is under consideration of the Constitution bench of the Supreme Court, and the Supreme Court is required to determine the claims of the Aligarh Muslim University as Minority Institution.

In view of the sub-judice matter, in order to determine the status of the Aligarh Muslim University, the claims of the opponents of the minority character of the AMU and the claims of the Muslim community, need to be relooked to resolve the controversies relating to its status. In view of 1981 Amendment Act.

The opponents of the AMU Minority status contend the following:

1. If the ‘title’ the preamble and section 4 of 1920 Act are read together, then it suggests that, the Aligarh Muslim University was established at Aligarh by dissolving the Muhammedan Anglo-Oriental college, the Muslim University Association and the Muslim University Foundation Committee, by transferring their properties and rights in the Aligarh Muslim University.

2. Even after the deletion of the words, “establish” and from title and preamble of the 1920 Act, the word “to incorporate” means a body on which legal personality is conferred by the Act. Section 3 of 1920 Act, proves that the Aligarh Muslim University is a body incorporated by the Aligarh Muslim University Act, 1920.

3. If the Muslim Minority had either stopped at M.A.O. College, or if they had converted it into a University, without dissolving the societies, it would have retained its minority status within the meaning of Article 30(1) of the Constitution.

4. The provisions of Section 5(2)(c), which provide for “to promote especially the educational and cultural advancement of Muslims of India”, is similar to Section 4\textsuperscript{589} of the Guru Nanak University, Amritsar

\textsuperscript{588} \textit{Ibid} at. 3475.

\textsuperscript{589} \textit{AIR} 1971 SC. 1737.
Act, 1969, whose constitutionality is upheld by the Supreme Court in *D.A.V. Jallandhar v. State of Punjab.*

(5) Further under section 17(1) and 18(1) of AMU Act, 1920, as amended by 1981 Act, the Chancellor and Pro-Chancellor, instead of being appointed by the visitor, would be elected by the Court. Since, non-Muslims can be member of the Court and so can be Chancellor or Pro-Chancellor.

(6) Section 19(3) of 1920 Act, as amended by 1972 Act, has increased the powers of the Vice-Chancellor, to the considerable extent. It provides that the Vice-Chancellor may, if he is of opinion that immediate action is necessary on any matter, exercise any power conferred on any authority of the University by or under this Act and, shall report to such authority the action taken by him on such matter, provided that if the authority concerned, is of opinion that such action ought not to have been taken, it may refer the matter to the visitor, whose decision thereon shall be final.

(7) They also argue that reservation of admission to Muslim candidates to any extent, is beyond the power of the University under Section 5(2)(c) of the Act. The Act of the Parliament cannot override the rights of the citizen under Article 29(2) of the Constitution.

Thus, the Aligarh Muslim University is not a minority institution and it was enacted by the Government of India under the 1920 Act. Though the AMU (Amendment) Act, 1981 has undoubtedly increased the power of the Court but still it has not changed the substance or status of the University.

On the other hand, the supporters of the Aligarh Muslim University as Minority Institution argue the following:

(i) The long title and the preamble of the 1920 Act, provides An Act to establish and incorporate a teaching and residential Muslim University at Aligarh. By the 1981 (Amendment) Act, to Aligarh Muslim University, omitted the word, “establish and now Section 2(1) of the Act, gives comprehensive definition of the word, University, which in the AMU

---

590 Section 4 of the Guru Nanak University, Amritsar Act, 1969 read as “(2) to make provision for the study and research on the life and teaching of Guru Nanak and their cultural and religious impact in the context of India and world civilizations. (3) To promote studies to provide for research in Punjabi Language and literature and to undertake measures for the development of Punjabi Language, Literature and Culture.”
Case, means the educational institution of their choice established by the Muslims of India, which originated as the Muhammedan Anglo-Oriental College, Aligarh and which was subsequently incorporated as the Aligarh Muslim University.

This clearly proves that, University, had not been “established” by the 1920 Act, but only incorporated by the Act of Parliament and nobody can seriously dispute that the Aligarh Muslim University comes under the category of Minority Institution under Article 30 of the Constitution.

(ii) The Aligarh Muslim University Act, 1920 was enacted at the behest of the Muslim Minority, which had agreed to the dissolution of the pre-existing societies, which were running the school and college and transfer of all their assets to the new University. The name of the University itself is indicative of the fact that it was established by and for the benefit of the Muslim.

(iii) The 1981 (Amendment) Act, of the AMU merely clarifies that the University is an educational institution of their choice, established by the Muslim community, which originated as Mohammedan Anglo-Oriental College of Aligarh and was subsequently incorporated as the Aligarh Muslim University. The 1920 Act is merely declaratory rather than Constitutive in nature. It merely gives recognition to an existing entity, for which the Muslim Community raised Rs. 30 Lakhs in 1920 as reserve funds, a precondition; put up by the Governor-General for the establishment of the University.

In view of the arguments and counter arguments from both sides and because of sub judice matter, it is suggested that whether a particular institution is minority institution or not, is a question of fact. A law can neither confer the status of minority educational institution nor can it destroy it, if the facts provided that educational institution was established by either religious or linguistic minority then it would be entitled to protection of Article 30 of the Constitution. It is an admitted fact, that the nucleus of the Aligarh Muslim University lies in the Mohammedan Anglo-Oriental College which was established at the initiative of Sir Syed Ahmed Khan. For the administration of the University, the Muslim Community collected Rs. 30 Lakhs as precondition set up by the Governor-General of India, otherwise the Muslim Community would not had taken the pain of collecting such huge money, if they knew that the Aligarh Muslim University would be like any other Universities of India.
Shri Tara Chand, an eminent historian also remarked that “it will be a falsification of the history of India, if it was asserted from any quarter that the AMU was not established by the Muslims and primarily for the educational advancement of Muslims in India.

Further, the recognition of the historical fact recognizes pragmatism on the part of the majority, rather than the technical and legalistic interpretation, as adopted by Lordship of the Supreme Court in Azeez Basha Case. Article 30 was declared as “an article of faith” by the Supreme Court in Lilly Kurian v. Lewina and in re-Kerala Education Bill, 1957, Chief Justice Das firmly stated that “so long as the Constitution stands as it is, and is not altered, it is, we conceive the duty of this Court to uphold the Fundamental Rights, and thereby honour our sacred obligation to the minority community, who are of our own.”

It is also a matter of fact that in 1920, we were not having the provisions like section 3 of the UGC Act, 1956, where the private individual could have established deemed University, and the only provisions for establishment of the University was that it would had to be established by the Act of the legislature, with power to award valid degree. In view of the above, it is submitted that the AMU may be accorded the status of the Minority Educational Institution and they may be given the liberty to set up society to administer and manage the AMU.

5.9 Concluding Observations

Education is the single most important instruments for social and economic transformation of minorities. Minorities’ right to education precisely includes two conflicting claims, equality of opportunity in one hand, and pluralism or identity transmission, on the other. It is being able to transmit their culture, language or religion to their children through instruction, which is essential for their existence as a distinct community. A well educated population, adequately equipped with knowledge and skill, is not only essential to support economic growth, but is also a precondition for growth to be inclusive since it is the educated and skilled persons who can stand to benefit most from the employment opportunities which growth will provide. Article 30(1) as a group right, empowers the minorities whether based on religion or language to establish and administer educational institutions of their choice which will effectively serve the needs of their community and the students who avail to their educational institutions. Minorities may establish educational institution for the purpose of conserving their language script and culture as well as for providing general and professional education to their children. But if any institution is established by the
persons of minority community, then there must exist some real positive index for institutions to be identified as an educational institution of the minorities. However the minority can claim right to administer the educational institution provided they have established it. Under this Article, the minority may establish the educational institution for providing education starting from a primary to postgraduate levels, including professional education.