RIGHTS OF MINORITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS IN INDIA

ABSTRACT

THESIS

SUBMITTED FOR THE AWARD OF THE DEGREE OF

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IN

HUMAN RIGHTS

BY

SAYYEDA HANEE

Under the Supervision of

Dr. Aftab Alam

DEPARTMENT OF POLITICAL SCIENCE
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ABSTRACT

“A civilization can be judged by the way a society treats its minorities”.

Mahatma Gandhi

It is a curious fact that the world of today is made up of small number of states and a large number of minority groups. Like many countries India is also a multi-ethnic society but her diversity is unmatched in the world in term of her uniqueness and extent. Uniqueness of Indian diversity lies in the fact that there is no majority community. In a sense it is a land of minorities. Majority community is also divided in small groups based on religion, culture, language and region. It is for this reason that at times even majority community suffers from same unsafety with which minorities suffer and starts talking of one religion, one language and one culture. Certainly when majority becomes worried minorities become uneasy.

Ethnicity is a by-product of a historical process. Minorities may come into being either as a result of victory and subjugation, break-up of a multi-national empire or the process of amalgamation or political, social and economic inequalities, integration of ethnic groups, and immigration. Minority environment in India is the combination of these factors. Minority groups are not eternal entities but changing dynamic social units that may come out and disappear over time according to historical circumstances.

The problem of minority is the puzzling question to face for modern democracies. The problem is of universal phenomenon. The nature of the problem of minorities is not every where the same. There can be no question of minorities except in a democracy. Unless there is a democracy the problem would not arise in that form at all. In democracy recognition is given to equal rights and duties for all, without regard to their religion, race, caste or language. Minorities are not allowed to have
their separate identities in totalitarian state, as there everything exists for the state. In totalitarian state minorities dissolve their identity in the identity of the state.

The Framers of the Indian Constitution were alive to the intricate character of the problem. They believed that sound and healthy consciousness would increase if the minorities are guaranteed liberty, equality, fraternity and justice. They made every effort to incorporate a number of constitutional measures in the form of guaranteed rights, safeguards and protective rights. All this was done mainly in the broader interest of national integration and to inculcate confidence among the minorities so that they may be put on an equal footing with majority. The minorities should feel that they are partners and co-rulers in the country. Minority rights are more in the interest of majority and the democratic institutions of the country.

It is interesting to note that until the decision of partition had not became imminent, the member of the Constituent Assembly had placed before them the tasks of securing agreement on a constitutional arrangement which could on the one hand, reassure the minorities that their interest and their distinctive characteristics would be secured in the future political set-up and, on the other hand, ensuring for themselves that extremist demands of minorities were not to be conceded beyond a certain point. But the statement of June 3, 1947, providing for the partition of the country into two separate sovereign nations had the effect of changing the whole complexions of minority problem. The decision of partition and the great upheaval that was brought with it had the inevitable effect of materially alternating the situation both psychologically as well as strategically. Congress was no more in need of being extremely conciliatory, and was no more under extreme necessity to bring about 'consensus'. The problem of safeguards for minorities that had come to the forefront as a communal problem thus boiled down to lose its colour. The occurrence of events outside and the consequent change of attitudes inside the Assembly were the factors that greatly helped the Assembly in weeding out progressively the communal element from the minority problem.
Safeguards of minorities provided in the constitution are of two kinds: negative and positive. The matter in which the state is forbidden to take an action goes against the interests of any minority may be called as negative safeguards. These safeguards are guaranteed by the fundamental rights. The positive safeguards curtained to a large extent under part xvi of the constitution under Special Provisions Relating to certain classes are guaranteed safety security and opportunities for the development of general particular interests of minorities.

A wide range of minority rights are covered by the constitutional provisions relating to the fundamental rights. Articles 14, 15, 16 and 29(2) seek to protect them from hostile and discriminatory state action. Articles 25 to 28 guarantee non-discrimination in the exercise of the right to the freedom of religion. And Article 30 guarantees religious and linguistic minorities the most important right- the right to establish and administer educational institutions of their choice. By granting autonomy in culture and educational spheres, it was hoped that minorities would preserve their way of life and contribute in their own way to the prosperity and development of the country and towards its political unity. Directive Principles of State Policy are also relevant for the minority rights. Article 46 requires the state to take special care in promoting the educational and economic interests of the weaker sections of the people. Article 38 requires the state to promote the welfare of the people by securing a social order.

The constitutional Provisions to the minorities prove beyond doubt that the framers of the constitution of India have dealt with the problem in its historical perspective thoroughly. The Constitution provided political, social, economic and other safeguards to minorities to fulfill their legitimate desires and to satisfy their respective inspiration.

In the Constitution of India cultural and educational rights of minorities are the balancing approach to grow prosperous life and status for minorities. To bring about equalities, special rights have been designed in the Constitution for the minorities by
ensuring the preservation of the minority institutions and by guaranteeing autonomy in the matter of the administration of these institutions. These special rights given to minorities are intended to bring about exact balance. The majority in a system of adult franchise hardly needs any protection. It can look after itself and protect its interests. Majority can brought any measure without any difficulty on the statute book because the majority can get that done by giving such a mandate to the elected representatives. It is only the minorities who need protection and that is why to ensure equality by the Constitution of Indian in favour of the minorities.

The establishment and administration of educational institutions and cultural centers are undoubtedly effective means of preservation of culture and linguistic characteristic of minorities. Therefore, special care seems to have been taken by the framers to put substance in the right to establish and administer educational institutions including institutions for imparting general education through the language of administering minority. It is not limited to the institutions established after the commencement of the Constitution, but extends also to the administration and running of the old established institution.

Education has always been considered as a means of safeguard and advancing the culture and language of a group. The minorities have always felt strongly about their distinct educational institutions. In historical perspective education has been the responsibility of the community such as religious, ethnic and caste groups who have been creating educational activities for their community members. In the olden days Madarsas, Pathshalas or Gurukulas etc. were set up with the charity received by the religious institutions. The community action was needed for education during the British period when the contribution of Government was limited to the elite. Thus the emergence of 'Voluntary Educational Services' was the outcome of the defeat of the British Government to consider the promotion of education entirely as the state's responsibility because it did not show free of cost education as a necessity for every Indian. In pre-independence era private colleges established by different communities
and groups have formed better traditions and Christian mission schools have even excelled in fulfilling the goals of education.

In the Indian context the concept of national development goes far beyond the economic growth, it is concerned equally with the growth of a self-confident individual with a strong commitment to democratic values with the creation of a nation united in purpose out of people speaking different languages professing different religions and rooted in a variety of cultures. Education plays a critical role in breaking the poverty and underdevelopment.

The main aim of the present research work is to study and evaluate the rights of minorities to establish and administer educational institutions in India as safeguarded under Article 30 of the Indian constitution and approach of the judiciary while interpreting these rights. The present study contains 5 chapters beside introductory and concluding remarks.

Chapter 1 tells a story of the events that ultimately led to the adoption by the Constituent Assembly of the rights protecting minorities. In this section an attempt is made to investigate as to how the problem of Constitutional protection for minorities begun and how it finished up. It narrates the all important events that ultimately led to the adoption by the Constituent Assembly of the rights secured to minorities. The main aim behind this is to provide a perspective for a better understanding of the real spirit behind the adoption of the educational safeguards for the minority educational institutions. It notes that in the beginning the problem of the protection of minorities was basically seen as a political problem having more focus on the demand for more political safeguards and reservation in jobs etc. But the partition of the country completely changed the whole outlook of the Constituent Assembly and finally minorities had to satisfy themselves with certain guarantees in the areas of education, culture and language.

The very first question that arises in the interpretation of educational rights of minorities is to decide the meaning of the term minority because in order to bring a
case under Article 30 of the Indian Constitution, a community has first to establish its character as linguistic or religious minority. Chapter 2 attempts to find out the meaning of the very word ‘minority’. It highlights the fact that how difficult has always been the task of defining the term ‘minority’ which is at the core for securing certain rights for the minorities. It points out that there is no valid and definite yardstick to define the term ‘minority’ as such. The question of defining ‘minority’ has always been a hotly contested issue in international and domestic levels. The adoption of the United Nations Declaration on Minorities could be made possible only after a decision to let the term be undefined. The Indian Constitution uses the term minority/minorities in four Articles, namely, Articles 29(1), 30, 350A, and 350B. However, what is amazing is that the Constitution nowhere defines the term ‘minority’, nor does it identify the minority groups or prescribe a definite test for identifying the same. Thus it has been left for the courts to ascertain whether a group claiming protection is one identifiable by the characteristics of religion or language and is numerically non-dominant. The courts now, however, come out with various kinds of rulings, not answering the problem in a uniform way. Consequently the term ‘minority’ under Article 30 is still not clear in its meaning and import.

In Chapter 3 an attempt is made to answer the question that when and what kind of proof the courts require from a minority claiming to have established the institution in question. The name of the institution, the persons involved in the establishment, the source of fund, the subjection of an institution to legal provisions, expression of the intention, nature of the claim as to whether it was a mere clock or presentation and the real motive was business adventure have, singly or in combination with each other, served as positive index proving the claim of establishment. The Courts have used such a wide discretion in placing emphasis on the factors for determining the adequacy of the proof, they have, consequently, failed to achieve uniformity in approach. The absence of any fixed formulae and the consequent use of wide discretion have led the courts to arrive at conclusion which are not always rational. Particular emphasis is placed upon Azeez Basha case to find out whether the
assumptions on which the Supreme Court proceeded to decide the case were historically, factually and logically correct. Chapter 3 also seeks to know whether the object of establishment should be to confine the benefits of the institution to the members of the minority alone or to keep the institution open to all religious or linguistic groups. It further explore whether the protection of Article 30 is confined to only such minority educational institutions established with the object of preserving language script or culture or extends to those institutions offering general secular education.

The right of minorities to administer educational institutions has many facets like appointment of teachers, admission of the student, choice determination of language of the educational institution etc. The object of Chapter 4 is to put a focus on the power of the minority to administer educational institution of their choice. An attempt is made here to find out how far minorities are free to decide for their institutions the medium of instruction. The Supreme Court has recognized that implicit in the Article 30 is the right of the minorities to impart instruction to their children in their own language. It is true that the State can provide for imparting education in a particular language but it must not stifle the language, script or culture of any section of the citizens as such course would be trespass on the rights of those citizens who have a distinct language or script and which they have a right to conserve through educational institutions of their own.

The admission policy is a matter which is considered very much within the realm of the administration of a minority educational institution. Chapter 4 ascertains the scope of the right of minority institutions in matters of admission of students. The right of minority institutions to select students could be regulated but it must be reasonable. It should be conducive to the welfare of the minority and must not be annihilative of their minority character. The question as to what extent the State can interfere in the matter of admission in minority institutions has also been addressed in this Chapter and points out that the Courts have failed to lay any definite guidelines in this regard.
Chapter 4 also enquires about the power of the minority institutions in the matter of selection of their staff and to further seeks to find out as to what kind of conditions can be imposed by the State in this regard. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. The Courts have generally observed that so long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management.

The aim of chapter 5 is to find out as to what extent the State can exercise its regulatory power vis-a-vis minority educational institutions. The attempt has also been made to find out as to whether the courts have been successful in laying down any viable method for determining the constitutionality of a regulatory measure. The decisions on the scope and applicability of Art.30 seem to have long settled that as no right can be absolute, Art.30, being no exception, cannot have its operation as an unbridled license, and can have its effectiveness only within specified limits. The judiciary has consistently recognized that reasonable restrictions can be imposed. But only such regulations are permissible which do not restrict the right of administration of the minority community but facilitate and ensure better and more effective exercise of that right for the benefit of the institutions.

Chapter 5 also discusses about the vital issues of recognition and affiliation as without them the right to establish and administer educational institutions would remain an empty proposition. It seeks to find out the answer for the question whether recognition or affiliation can be claimed as a matter of right. Further attempt is made to know that what kind of regulatory conditions can be attached to the grant of affiliation and recognition. Though there is no express right to recognition or affiliation under Article 30 it cannot be denied or withheld arbitrarily by the State and only such conditions can be attached to the affiliation or recognition that do not render the operation of Article 30 illusory. Chapter 4 also examines issues relating to disciplinary control over staff and fees regulation.
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Certificate

This is to certify that study entitled "Rights of Minorities to Establish and Administer Educational Institutions in India" carried out by Ms. Sayyeda Hanee in the Department of Political Science, Aligarh Muslim University, Aligarh, is to the best of my knowledge an original work and is suitable for the submission for award of the degree of Doctor of Philosophy in Human Rights.

Dr. Aftab Alam

Dated: [Date]
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(SAYYEDA HANEE)

\[H \text{\scriptsize{ANEE}}\]

\[11/11/2012\]
INTRODUCTION

When India became independent after its partition on religious ground, religious minorities became very apprehensive of their identity. Therefore, one of the biggest challenges before the framers of our Constitution was to assuage their apprehensions and to maintain the unity of India without compromising its rich diversity. This object was very beautifully achieved by declaring India a secular State and conferring constitutional safeguards on its minorities, both religious and linguistic. Minority rights were made cornerstone of the constitution of independent India. It is gratifying to note that at a time when even international communality was grappling with the problem of recognition of minority rights in international law in the post 2nd World War, the Indian constitution not only provided safeguards to minorities against discrimination and ensured equality of treatment it also granted special rights to them as well. All this was done mainly in the broader interest of national integration and to inculcate confidence among the minorities so that they may be put on an equal footing with the majority and should enjoy all opportunities to participate in the democratic functions of the country. The framers of the Indian constitution wanted to lay down the foundation of a strong and vibrant democratic country with secular outlook and minority safeguards.

The constitution of India provides ample safeguards to minorities to suit their specific needs, to fulfill their legitimate desires, and to satisfy their respective aspirations. Articles 15, 16, and 29 enjoin that the State shall not discriminate against any citizens on grounds of religion, race, caste, place of birth or any of them. Similarly Articles 25 to 28 guarantee non-discrimination in the exercise of the right to the freedom of religion. And Article 30 guarantees religious and linguistic minorities
to most important right- the right to establish and administer educational institutions of their choice. The reason for giving fundamental right status to the educational rights of the minorities was to make it immune from the ordinary State interference though the State can impose reasonable restrictions on the exercise of this right. The present study is a modest attempt to examine the nature and scope of the Article 30 in the light of judicial pronouncements.

Education has always been considered as a means of preserving and advancing the culture and language of a group. Education is recognized as an important input both for the growth of the society as well as for the individual. The education generates in an individual a critical outlook on social and political realities and sharpness the ability to self-examination, self-monitoring and self-criticism. The minorities have always felt strongly about it. Furthermore the religious, ethnic and caste groups have always been organizing educational activities for their members. They have shown interest in educational uplift of their members. In India the need for more active engagement of communities in the field of education was felt more during the British period as the contribution of the then government was limited and had no mass appeal. It is against this background emerged the tradition of establishing private educational institutions by different communities and groups in India. The Christian minority community took more serious interest in setting up of educational institutions in India followed by Muslims and other minorities.

The Honorable Supreme Court of India by their judicial dictum tried to interpret the ‘letter and spirit’ of the constitutional provisions regarding the minorities right to education keeping in view the recent socio-economic jurisprudential orientation and the new trend of unaided minority educational institution. To satisfy the new trend of the liberalization, privatization and globalization intelligent judiciary in TMA Pai Foundation case has overruled the view of the Unni Krishnan that is the nationalization of education and surrendering the total process of selection to the state
but TMA Pai foundation allowed to educational institutions to generate reasonable surplus to meet cost of expansion and augmentation of facilities which would not amount to profiting. In the case of Islamic Academy\textsuperscript{3}, the ratio of Pai Foundation\textsuperscript{4} that autonomy of unaided non-minority institutions is an important facet of their right under article 19(1) (g) and in case of minority under Article 19(1)(g) read with Article 30 of the constitution has been ignored.

The main aim of the present research work is to study and evaluate the rights of minorities to establish and administer educational institutions in India as safeguarded under Article 30 of the Indian constitution and approach of the judiciary while interpreting these rights. The present study contains 5 chapters beside introductory and concluding remarks.

Chapter 1 narrates the events that ultimately led to the adoption by the Constituent Assembly of the rights protecting minorities. In this section an attempt is made to investigate as to how the problem of Constitutional protection for minorities begun and how it finished up. It narrates the all important events that ultimately led to the adoption by the Constituent Assembly of the rights secured to minorities. The main aim behind this is to provide a perspective for a better understanding of the real spirit behind the adoption of the educational safeguards for the minority educational institutions. It notes that in the beginning the problem of the protection of minorities was basically seen as a political problem having more focus on the demand for more political safeguards and reservation in jobs etc. But the partition of the country completely changed the whole outlook of the Constituent Assembly and finally minorities had to satisfy themselves with certain guarantees in the areas of education, culture and language.

The very first question that arises in the interpretation of educational rights of minorities is to decide the meaning of the term minority because in order to bring a
case under Article 30 of the Indian Constitution, a community has first to establish its character as linguistic or religious minority. Chapter 2 attempts to find out the meaning of the very word ‘minority’. It highlights the fact that how difficult has always been the task of defining the term ‘minority’ which is at the core for securing certain rights for the minorities. It points out that there is no valid and definite yardstick to define the term ‘minority’ as such. The question of defining ‘minority’ has always been a hotly contested issue in international and domestic levels. The adoption of the United Nations Declaration on Minorities could be made possible only after a decision to let the term be undefined. The Indian Constitution uses the term minority/minorities in four Articles, namely, Articles 29(1), 30, 350A, and 350B. However, what is amazing is that the Constitution nowhere defines the term ‘minority’, nor does it identify the minority groups or prescribe a definite test for identifying the same. Thus it has been left for the courts to ascertain whether a group claiming protection is one identifiable by the characteristics of religion or language and is numerically non-dominant. The courts now, however, come out with various kinds of rulings, not answering the problem in a uniform way. Consequently the term ‘minority’ under Article 30 is still not clear in its meaning and import.

In Chapter 3 an attempt is made to answer the question that when and what kind of proof the courts require from a minority claiming to have established the institution in question. The name of the institution, the persons involved in the establishment, the source of fund, the subjection of an institution to legal provisions, expression of the intention, nature of the claim as to whether it was a mere clock or presentation and the real motive was business adventure have, singly or in combination with each other, served as positive index proving the claim of establishment. The Courts have used such a wide discretion in placing emphasis on the factors for determining the adequacy of the proof, they have, consequently, failed to achieve uniformity in approach. The absence of any fixed formulae and the consequent use of wide
discretion have led the courts to arrive at conclusion which are not always rational. Particular emphasis is placed upon *Azeez Basha* case to find out whether the assumptions on which the Supreme Court proceeded to decide the case were historically, factually and logically correct. Chapter 3 also seeks to know whether the object of establishment should be to confine the benefits of the institution to the members of the minority alone or to keep the institution open to all religious or linguistic groups. It further explores whether the protection of Article 30 is confined to only such minority educational institutions established with the object of preserving language script or culture or extends to those institutions offering general secular education.

The right of minorities to administer educational institutions has many facets like appointment of teachers, admission of the student, choice determination of language of the educational institution etc. The object of Chapter 4 is to put a focus on the power of the minority to administer educational institution of their choice. An attempt is made here to find out how far minorities are free to decide for their institutions the medium of instruction. The Supreme Court has recognized that implicit in the Article 30 is the right of the minorities to impart instruction to their children in their own language. It is true that the State can provide for imparting education in a particular language but it must not stifle the language, script or culture of any section of the citizens as such course would be trespass on the rights of those citizens who have a distinct language or script and which they have a right to conserve through educational institutions of their own.

The admission policy is a matter which is considered very much within the realm of the administration of a minority educational institution. Chapter 4 ascertains the scope of the right of minority institutions in matters of admission of students. The right of minority institutions to select students could be regulated but it must be reasonable. It should be conducive to the welfare of the minority and must not be
annihilative of their minority character. The question as to what extent the State can interfere in the matter of admission in minority institutions has also been addressed in this Chapter and points out that the Courts have failed to lay any definite guidelines in this regard.

Chapter 4 also enquires about the power of the minority institutions in the matter of selection of their staff and to further seeks to find out as to what kind of conditions can be imposed by the State in this regard. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. The Courts have generally observed that so long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management.

The aim of chapter 5 is to find out as to what extent the State can exercise its regulatory power vis-a-vis minority educational institutions. The attempt has also been made to find out as to whether the courts have been successful in laying down any viable method for determining the constitutionality of a regulatory measure. The decisions on the scope and applicability of Art.30 seem to have long settled that as no right can be absolute, Art.30, being no exception, cannot have its operation as an unbridled license, and can have its effectiveness only within specified limits. The judiciary has consistently recognized that reasonable restrictions can be imposed. But only such regulations are permissible which do not restrict the right of administration of the minority community but facilitate and ensure better and more effective exercise of that right for the benefit of the institutions.

Chapter 5 also discusses about the vital issues of recognition and affiliation as without them the right to establish and administer educational institutions would remain an empty proposition. It seeks to find out the answer for the question whether
recognition or affiliation can be claimed as a matter of right. Further attempt is made

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affiliation and recognition. Though there is no express right to recognition or

affiliation under Article 30 it cannot be denied or withheld arbitrarily by the State and

only such conditions can be attached to the affiliation or recognition that do not

render the operation of Article 30 illusory. It also examines issues relating to

disciplinary control over staff and fees regulation.

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3  Islamic Academy v. State of Karnataka, AIR 2003 SC 3724.

4  AIR 2003 SC 355.

5  Azeez Basha v. Union of India, AIR 1968, ISCR 833.
CHAPTER - I

FRAMING OF THE CONSTITUTION AND MINORITY RIGHTS

The Constituent Assembly created by the will of the Indian people. It came in the last scene of the last act, with the help of the British. Constituent Assembly drafted a constitution for India in the years from December 1946 to December 1949. In the Assembly Indians were for the first time in a century and a half responsible for their own governance. They were at last free to mould their own destiny, to shape their long-proclaimed aims and aspirations, and to establish the national institutions that would facilitate the fulfillment of these aims. These tasks the members approached with remarkable idealism and strength of purpose born of the struggle for independence. Constituent Assembly members intended to light the way to make a new India.

The Constitution was to nourish the achievement of many aims. Transcendent among them was that of social revolution. Through this revolution would be fulfilled the basic needs of the common man and it was hoped, this revolution would bring about fundamental changes in the structure of Indian cultural and traditional society. Assembly members believed of the infusion of powerful energy to adopt parliamentary government and direct elections, many aspects of Executive, Legislative, Judicial provisions, Fundamental Rights and Directive Principles of the Constitution. The practical provisions were largely a product of the Assembly members experience in government and of the exigencies of the times. The members of the Constituent Assembly did not work in a vacuum. Not only did they act as the nation's parliament from August 1947 until January 1950, but many of them were also the leaders of the Union and Provincial Governments.

The Constituent Assembly was able to draft a constitution that was both a declaration of social intent and an intricate administrative blueprint because of the extraordinary sense of unity among the members. The members disagreed hardly at all about the ends they sought and only slightly about the means for achieving
them, although several issues did produce deep dissension. The atmosphere of the Assembly, generally speaking, was one of trust in the leadership and a sense of compromise among the members. The Assembly’s hope, which it frequently achieved, was to reach decisions by consensus. And there can be little doubt that the lengthy and frank discussion of all the provisions of the future constitutions by the Assembly followed by sincere attempts to compromise and to reach consensus, have been the principal reason for the strength of the Constitution.  

1.1 The Origins of the Constituent Assembly

By the end of the 2nd World War, India was ready for a Constituent Assembly and her leaders were demanding one. Gandhi had changed his skeptical attitude of 1934 and had proclaimed himself more and more “enamoured” of an Assembly. Most important, Britain, in the person of Sir Stafford Cripps, had accepted the idea that an elected body of Indians should frame the Indian Constitution. The proposals that Cripps put forward on his mission to India in 1942 were not accepted for a variety of reasons but Cripps made it clear that Indians would write their own constitution.

On 14th September, 1939, the following resolution was passed by the Congress: “The committee wishes to declare again that recognition of India’s independence and the right of her people to frame their constitution through a Constituent Assembly is essential. This Assembly can frame a constitution in which the rights of accepted minorities would be protected to their satisfaction and in the event of some matters relating to minority rights not being mutually agreed to they can be referred to arbitration. The Constituent Assembly should be elected on the basis of adult suffrage, the existing separate electorates being retained for such minorities as desires them. The number of these members in the Assembly should reflect their strength.” (Emphasis added)

The substance of the demand for a Constituent Assembly was accepted by the British Government in the August offer of 1940. The Cripps Proposal of 1942
went a step further and laid down the principles according to which the Constituent Assembly was to be set up.

This state of affairs continued till the end of the Second World War in 1945. When the Labor Party came to power in England in 1945, it decided to send the famous Cabinet Mission which visited India in March 1946. The joint statement issued by the Cabinet Mission and Lord Wavell on 16th May, 1946, gave a clear picture of the constitution-making machinery which was to be set up by the British Government to frame a constitution for Indians. It has already been pointed out that the legislative Assemblies of the provinces were to elect the members of the Constituent Assembly on the basis of one representative for one million of the population.

The Mission made its plan public on 16th May, 1946. By the end of June, after infinitely detailed negotiations, both the League and the Congress had accepted it, but both had publicly and privately record their reservations. Jinnah accepted the Cabinet Mission Plan "because the foundation of Pakistan is inherent in compulsory grouping and because it (the League) hopes it will ultimately result in independent Pakistan". The Congress accepted the plan subject to its own interpretations of certain provisions being accepted by the British and the League.

The Constituent Assembly elected under the terms of one portion of the Cabinet Mission Plan. The members of three communal categories in the legislatures Muslim, Sikh, and general (Hindu and all other communities), would elect separately, according to their percentage of the province's population, their proportion of the provincial delegation. The Princely States, according to the Mission Plan, were to have ninety three representatives in the Assembly, but the method of selecting them was left to consultation between the Assembly and the States' rulers. The negotiations between the Constituent Assembly States Committee and representatives of the Princes resulted in an agreement that provided at least 50 per cent of the States' representatives being elected to the
Assembly; the rulers could nominate members up to 50 per cent, but it was hoped that the greater proportion would be elected.\textsuperscript{11}

The cabinet Mission had failed. It failed because the Congress and the League had almost certainly become too estranged for reconciliation, which in any case was out of the question so long as the British were a third party to whom each side could appeal against the other. Yet if the three members of the Cabinet Mission could not hold together Muslim and non-Muslim India \textsuperscript{12} (Indian Muslim Community had a population of about 100 millions, of which approximately 65 million became Pakistanis), something that only Indians, if they, could have accomplished, a portion of the Mission’s efforts lived on in the Indian Constituent Assembly.

In August 1946 India was heading towards independence and the problem was how to bring the Congress and the League together in the Constituent Assembly and obtain their cooperation in forming the Interim Government envisaged in the Cabinet Mission Plan. The Congress went ahead with its plans for the Assembly, appointing an experts committee to draft fundamental rights and to arrange the early sessions.\textsuperscript{13} And the Congress, at the League Viceroy’s invitation formed the Interim Government. The League continued to ignore the Assembly. It referred to join the Interim Government, but later changed its mind and joined with the stated purpose of wrecking it.\textsuperscript{14}

Nehru and other Assembly leaders continued to hope throughout December 1946 that the League would instruct its members to join the Assembly, and outside that body the Congress changed or differed policies to this end. Partition was in the air at the end of 19th April when the Assembly met for the third time. For this reason it postponed debate on preliminary federal prevision. Throughout May 1947, however, Assembly Committee continued to work, as they had during the previous six months, within the framework of the Cabinet Mission Plan.\textsuperscript{15} The Constituent Assembly was still marking time.
On June 3, 1947 Lord Mountbatten, Viceroy since March, announced that on 15th August England would recognize the existence of two independent states on the sub-continent, India and Pakistan. India and more than half of her Muslims under Jinnah were to go separate ways. The Indian Independence Act passed by the British Parliament came into effect in 15th August, 1947, giving legally to the Constituent Assembly the status it had assumed since its inception. The Cabinet Mission Plan became outmoded and the Constituent Assembly settled down to draft free India's Constitution.

The Congress overwhelming majority in the Constituent Assembly resulted from the December 1945, provincial legislature elections and from partition. Under the scheme of indirect election in the Cabinet Mission plan, the Constituent Assembly reflected the complexion of the provincial legislature. Hence in the July 1946, election to the Assembly, League members own all but seven of the seats reserved for Muslims. Although the outcome of the Assembly elections in July 1946 had made the Congress master of the Assembly, party policy ensured that Congress members their represented the country. This was a result of the in written and in questioned belief that the Congress should be both socially and ideologically diverse and of a deliberate policy that represent in the Assembly.

As a result of Congress policy, the minority communities were fully represented in the Constituent Assembly, usually by members of their own choosing. The Indian Christians had seven representations in the Assembly, the Anglo-Indians three, the Parses three, and so on. After partition, when the composition of the Assembly except for the representation of the Princely States, had become settled the minorities had 88 of the 235 seats allotted to the provinces, or 37 percent of the provincial membership.

1.2 Origin of the Minority Problem

The problem of protection of minority interests has essentially been a communal problem, emerging as it did in the few decades before independence
out of almost a non-existent issue and developing into one which pervaded the entire political and social scene and ultimately served as the prime factor in dividing the sub-continent into two independent nations. The reasons, however, which helped push the problem into the forefront of national politics ultimately seeking solution through the constructional method, were such on which opinions differed widely from each other. To many, the problem was entirely a British creation born of the introduction of separate communal electorates under the Minto-Morley reforms of 1909, the system being a part of the policy of ‘divide and rule’ which the British had profitably followed since long. To others, the British could not have divided and ruled unless the ruled were ready to be divided and that the emergence of the problem was a necessary consequence of the differences in religion, culture, history, tradition and political and economic interests of the different communities, more particularly of Hindus and Muslim.

In the previous century, despite occasional communal outbursts and occasional manifestations of a strained relationship, the two largest communities of India, Hindu and Muslim, had lived fairly peacefully. They were the subjects of a colonial power and hardly anything political to quarrel about. It was only in the present century that the political element came to have its way into their relations. As soon as the independence movement supported by the fervor of nationalism, because strong enough to win from the British at least the promise of self-government and as soon any prospect of even a limited transfer of powers became visible on the country’s political scene the two communities, as also the other political identities became increasingly conscious of their political position in future India.

Establishment of self-government involved the development of representative institutions gradually developing into a full-fledged parliamentary system on the British model. Introduction of any system of representation based upon direct election and majority rule meant a government by individuals responsible to the elected representatives of the majority. In the Indian conditions, where political
action was almost bound to be an expression of religious or ethnic group consciousness, the rule of the majority meant hardly anything else than the rule of the Hindu majority. In this political system, new and uncertain, the minorities being smaller in number were destined to remain in a position of disadvantage, perhaps perpetually. The principal moving forces, thus, behind the question of constitutional safeguards for minorities were fear and insecurity, intensified, indeed, by political and economic competition.

1.3 Safeguards for Minorities: Extra Constitutional Developments

Whatever the reasons underlying the origin, ever since the problem of minorities had assumed colour, the Congress had held the view that the only solution to the problem of minorities, which would be compatible with the ideal of nationalism, was to incorporate in the constitution a detailed list of fundamental rights, applicable to any particular religion. The emergence of the nationalist movement and the birth of the Indian National Congress in 1885 were the direct result of the discriminatory treatment meted out to Indians in their own country. The desire to have some basic rights for all the Indians was in fact the desire of all the Indians represented by the Indian National Congress. In the earlier stages of the nationalist movement the Congress had demanded for the people the same rights and privileges that their British masters had enjoyed in India and were available to them in their own country. It was a demand to bring to an end the discrimination inherent in the colonial regime.

The demand for guarantee of fundamental rights had first appeared in the Constitution of India Bill, framed by the Indian National Congress and was thereafter expressed in several resolutions passed by the Congress, particularly between 1917 and 1919. By the mid-twenties, the Congress and its leaders had become increasingly conscious of their Indianness and, consequently, their demands for civil rights were no more directed solely at establishing the rights of Indians. Mrs. Besant’s Commonwealth of India Bill, 1925, stressed the need for
equality before the law, individual liberty, freedom of conscience, free expression of opinion, free assembly, right of free education, free profession and practice of religion, and for some other rights. The Nehru Committee Report of 1928 was a step further in that it recommended for being included in the proposed constitution not only a list of guaranteed fundamental rights but also it laid great emphasis on the safeguards for minorities, which included the right to freedom of conscience and free profession and practice of religion, elementary education for members of minorities, reservation of seats for Muslims where they were in minority and for non-Muslim in NWFP.

The appointment of the Simon Commission by the British Government in November, 1927 impelled the Congress to draft a Constitution for future political set-up. For this, it passed what is known as the Madras Resolution, 1927, which provided for setting up a Committee to draft a constitution on the basis for a "declaration of rights". The Committee under the chairmanship of Motilal Nehru, came into being in May, 1928, and submitted what is known as the Nehru Report. The Karachi Resolution, 1931 was another major step in the development of constitutional rights for the Indian people and was somewhat unique for its emphasis on states positive obligations towards betterment of social and economic conditions of the people and removal of inequality and discrimination inherent in the society.

Sapru Report, 1945, which was the last major document of the pre-Constituent Assembly period, incorporated a number of fundamental rights including liberties of the individual; equality of rights of citizenship of all nationals irrespective of birth, religion, colour, caste or creed; full religious toleration, including non-interference in religious beliefs, practices and institutions; protection to language and culture of all communities. It also incorporated, for being included in a future constitution, a number of suggestions to ensure and safeguard the interests of minorities, which included provision for appointment of minority commission both at the centre and in each of the
provinces, reservation of seats in the legislatures ten percent of the total seats to be allotted to some special interests and the rest to be distributed among Hindus, Scheduled Casts, Muslims, Sikh, Indian Christians, Anglo-Indians, and other Communities. The committee also made a recommendation, a definite improvement upon any earlier recommendations, for a composite executive at the Centre representing Hindus, Scheduled Castes, Muslims, Sikh, Indian Christians, Anglo-Indians, their representation being, as far as possible a reflection of their strength in the legislature. The Committee also recommended for India, to be at far with the representation given to the Hindus, provided the Muslim agreed to the substitution throughout of joint electorates with reservation of seats for separate communal electorates.\(^\text{32}\)

1.4 Safeguard for Minorities: Constitutional Channel

At the beginning the debate on constitutional safeguards for minorities centered around the issue of the method of selection of Indian representative to the legislative institutions. Thought several minority groups were involved in the debates over this issue, the principal disputants were the Muslim League, claiming to be the sole spokesman for the Muslims of India, and the Indian National Congress, claiming to be the sole spokesman for the nationalist movement representing all the Indians of all creeds and communities. The British were the third party to the dispute. The attempts to resolve the dispute and to secure communal accord resulted in the gradual introduction of a series of safeguards in the constitutional system.

The first in the series were Minto-Morley Reforms of 1909\(^\text{33}\) by which the Muslim were given separate electorate, while retaining their right to vote also in the general electorate. Thereafter, the question of separate electorates was recognized by the Montague-Chelmsford Reforms of 1919.\(^\text{34}\) The question became one of the most contentious issues at the Round Table Conference.\(^\text{35}\) Here not only the Muslims but also the representatives of other minority communities pressed
for this form of protection. Unable to reach an agreed solution, the British Government felt itself compelled to give what is known as the Communal Award\textsuperscript{36} in 1932 which was afterwards incorporated in the Government of India Act, 1935. This not only but extended the system to include Sikhs, Anglo-Indians, Indian Christians, Untouchables (Scheduled Caste) and even to Europeans and other classes of people needing protection.\textsuperscript{37}

Besides separate electorates and provision for additional seats for minorities in the legislatures in excess of the number they would ordinarily merit on a direct population basis, known as ‘weightage’, the British also adopted the policy of reservation of posts in the public services for the minorities.\textsuperscript{38} For the purpose of redressing the inequalities as between the various communities the adopted from 1925, a policy of reserving a certain percentage of direct appointments to public services the main object of this policy was to secure increased representation for Muslims. This policy was placed in 1934 on a formal basis as 25 percent of the total seats to be filled by direct recruitment of Indians were to be earmarked for Muslims and about 8 percent of such seats were to be reserved for other minorities. Some special quotas were also fixed for Anglo-Indians in certain categories of subordinate services.\textsuperscript{39}

In the last decade before independence, the communal question was inseparately linked to the proposal for the creation of a constitution making body which in turn depended upon a decision on the question whether India was going to be the sole successor of the British Government or the demand for an independent State of Pakistan was to be conceded. During this decade, as the prospects of British withdrawal from the Indian scene grew, the differences between the Congress and the League became more pronounced and uncompromising,\textsuperscript{40} and with this the problem of communal minority assumed formidable proportions. The Congress took its stand on independence, almost immediate and unconditional, the League on self-determination. Under the exigencies of the War, the British Government moved a considerable distance
towards a settlement. One step was the August Offer (Statement made by Lord Linlithgow on 8 August, 1940) which recognized that the framing of the new constitution would be primarily the responsibility of the Indians themselves and that the body framing the constitution would be represented by the “principal elements in India’s national life”, which means the different communities in India. The Congress did not accept the offer as it did not meet its immediate demand for a national government. The Muslim League welcomed the assurance that no new constitution would be adopted without the consent of the minorities but simultaneously its demand for a separate State. The Cripps Mission Proposals, which granted the right of secession to provinces and Indian States, were another step to protect the interests of religious and racial minorities, but were unacceptable to Congress on the ground of being against the concept of Indian unity, and to Muslim League on the ground that they failed to incorporate a provision for a separate Constituent Assembly.

After the failure of the Cripps Proposals, the Cabinet Mission which came to India is the spring of 1946 issued a statement known as the statement of May 16, which contained its recommendations on three matters - the demand for partition, the basic form of the constitution, and the machinery for constitution making. While rejecting the demand for partition, it proposed for a weak centre with considerable provincial autonomy with a view to “very real Muslim apprehensions that their culture and political and social life might become submerged in a purely unitary India, in which the Hindu with their greatly superior numbers must be a dominating element. The weak centre was thus a concession to communal apprehensions. The statement also provided further safeguards for minorities suggesting for a provision to be made in the new constitution that any question raising a major communal issue in the legislature should require for its decision by a majority of the representatives, present and voting, of each of the two major communities as well as majority of all the members present and voting. It also provided for inclusion in the Constitution a bill of rights, as partial answer to the question of minority rights, the specific nature of which was a matter for the
Constituent Assembly to decide. The Cabinet Mission also made it clear that the secession of sovereignty to the Indian people on the basis of Constitution framed by the Constituent Assembly would be conditional on adequate provision being made for the protection of minorities. The Mission suggested for a Constituent Assembly\(^45\) and proposed the setting up by the Constituent Assembly, in a preliminary meeting, of an advisory committee on the rights of citizens, minorities and tribal and excluded areas.

1.5 Minorities’ Questions in the Constituent Assembly Debates

The demand for a Constituent Assembly elected on the basis of universal adult franchise had been reiterated in Congress resolution since 1934. The Muslim League and the Scheduled Casts Federation had been less enthusiastic about such a body, holding that it would entrench Congress dominance over the transfer of power from colonial rule. From the 1940s onwards, the colonial state had been increasingly receptive to the idea.

Elections were held to the Constituent Assembly in July 1946, in accordance with the Cabinet Mission Plan of May 16, 1946. The plan had stipulated that "the cession of sovereignty to the Indian people on the basis of a constitution framed by the Assembly would be conditional on adequate provisions being made for the protection of minorities"\(^46\). Member of three communities- Muslim, Sikhs and general (Muslim and all other) elected their representatives separately by the ‘single transferable vote’ system of proportional representation. The Congress and the Muslim League won overwhelming proportions of general and Muslim places respectively, with the Congress majority in the Assembly rising to 82 percent after the partition of the country\(^47\).

The Constituent Assembly began its proceeding as scheduled on December 9, 1946, with the Muslim League boycotting its sessions. In the Assembly deliberations, the minorities question was regarded as encompassing the claims of three kinds of communities: religious minorities, backward castes and tribals, for
all of whole safeguards in different forms had been instituted by the British and by
princely states during the colonial period. The representatives of most of the
groups claiming special provisions in some form emphasized that the group was a
minority of some kind. The employment of the term minority did not, however,
denote the numerical status of the group so much as the claim that the groups
suffered from some disadvantages in respect the rest which entitled it to special
treatment from the state. In minority claims, a given group’s numerical status was
invoked most frequently to denote numerical strength (rather than numerical
disadvantage) which made the group a force to reckon with and gave it better title
to safeguards than smaller groups.48

Representatives of each group sought to establish that their group was more
eligible for safeguards or deserving of greater representation than any other - on
grounds, for instance, that it was numerically superior, more backward than others,
more distinct from the majority in its cultural practices and so on. Representatives
of each group claiming minority status also frequently referred to the safeguards
they had enjoyed under the colonial system and the assurance that the Congress
had given their community.

Minority status was claimed for most of the backward castes during the
debates, but cultural distinctness from the majority community did no usually
figure in the claims rather, the claims emphasized that the backward classes were
culturally a part of the Hindu community, or at least that they were different from
the religious minorities. It was stressed that each of these classes was a ‘political
minority’49, that the term ‘minority’ in each such case connoted not numerical
disadvantage but entitlement to special treatment on account of social and
economic backwardness.50 Not all representatives of the scheduled castes claimed
minority status and political safeguards for their larger community.

Minority safeguards were sometimes reluctantly admitted as temporary,
transitional measures, necessary until backward sections of the population were
brought up to the level of the rest or until groups accustomed to privileges under
the colonial system had adjusted to the new order. While arguments, from national unity, secularism, democracy and justice are analytically distinguishable these grounds were used together and interdependently, with mutually reinforcing normative force, in the arguments against minority safeguards.51

Speeches in the Constituent Assembly employed several variants of arguments from national unity, secularism, democracy and equality in opposition to minority safeguards. Such safeguards were regarded as instruments of the colonial ‘divide and rule’ policy, deliberately fashioned by the duplicitous colonial rulers to misguide the minorities, to create strife between different sections of the nation, to deny Indian nationhood and to delay the transfer of power once it became inevitable.52

The dominant opinion in the house also regarded minority safeguards as undesirable since they compromised the nationalist ideal of secularism. In terms of the state’s stance towards religion, most arguments in the Constituent Assembly emphasized that secularism did not imply state antagonism to religion. A secular state was not a state that denied the importance of religion faith or sought to inculcate skepticism about religious belief among its citizens. Rather, secularism was most commonly construed as implying that the state would not identify with, or give preference to, particular religion.53

Secularism has a somewhat different inflection in its Nehruvian version. Here, religion and inscriptive affiliations in general were regarded as vestiges of pre-modern era that modernization and development would make redundant.54 This view was opposed to minority safeguards not just on the ground that they would perpetuate communalism as a relic of a bygone era or an era that would soon pass.55 Claims for minority safeguards were regarded as out of step with the times and as distractions from the more pressing issues of development and the basic needs of the common man.
During this period, liberal notions in nationalist opinion were mostly to be found in the ideal of citizenship based on equal individual rights. Minority safeguards were understandable from this standpoint because they accorded centrality to the community rather than to the individual citizens.\textsuperscript{56} The opposition to minority safeguards on liberal grounds in the period was cast in the language of justice, equality, and fair play.

In the debates about minority safeguards, the language of liberal-secular nationalism was inflected by norms drawn from traditional political idioms. The most salient instance was the conception of the tolerance and the generosity of the hence and the majority community towards the minorities. This theme was reiterated both by Congressmen and by minority representatives particularly after the partition of the country in 1947. Explicitly or implicitly, it evoked filial norms: the majority community was cast in the role of the responsible, easy-going, benevolent and self-sacrificing elder brother, indulgent, protective and accommodating of even the excessive and unreasonable demands of his younger and weaker brother, the minorities.\textsuperscript{57}

1.6 Nationalist Resolution of Minorities’ Question

The question of political safeguards for minorities in the Constituent Assembly was referred to the advisory committee on fundamental rights, minority, tribal and excluded areas whose creation had been mandated by the Cabinet Mission Plan. The committee’s first report on minorities, discussed in the assembly in August 1947, rejected some of the central components of the British system of safeguards such as separate electorates and weightage. It offered an alternative set of political safeguards.

A system of joint electorates with representation for communities in proportion to population was proposed for 10 years. The instrument of instructions to the President and the Governor suggested the desirability of including members of important minority communities in cabinets as far as practicable.\textsuperscript{58}
declaration was adopted to the effect that “in the all India and provincial services, the claims of all the minorities shall be kept in view in making appointments to these services consistently with the consideration of efficiency of administration”. Some special provisions of a temporary nature were also made for the Anglo-Indian community in the spheres of representation, education and the services. This report was regarded as representing the high watermark of Congress concessions to the minorities – made several months after the partition of the country, when the need for conciliating the minorities, particularly the Muslims, had greatly diminished. Provision was made for special minority officers at central and provincial levels to report to the legislatures on the working of various safeguards of minorities.

These decisions were incorporated under ‘special provisions relating to minorities’ in the draft constitution published in February 1948. But amendments were adopted to negate each of these articles during discussions of the draft in October 1949. The amendments effectively removed religious minorities from the purviews of these safeguards and restricted the scope of these articles mainly to the Scheduled Castes and the Scheduled Tribes.

1.7 Political Representation

Separate electorates, reserved quotas for communities in the legislatures in proportion to population and various forms of proportional representation were the chief mechanism proposed in the Constituent Assembly facilitating the representation of minorities in the legislatures. Muslim representatives were at the forefront of such demands although similar claims were put forwards by Sikhs and backwards advocacy of caste representatives.

The most forceful political safeguards for religious minorities is to be found in the arguments for separate electorate made by some Muslim League members. The case for separate electorates was built around a contention over the concept of representation. Typically, it invoked the following arguments. Firstly, it was
asserted that minorities were a permanent feature of every human society and not mere creatures of colonial machinations. There were fundamental differences between communities which were inherent in the very nature of things.

Secondly, it was argued that the very existence of distinct communities meant that these communities had to be represented in the legislature so that their needs could be taken into account in the framing of legislation. Representation in sectional terms was privileged area over individual representation as embodied in a system of territorial constituencies. The implicit assumption in such views was that an individual’s political choices and affiliations derived from his membership of a religious community. The Muslim League’s demands for separate electorates for Muslims stemmed from a notion of representation as a descriptive activity, distinct from conventional liberal-democratic notions of representation.

Thirdly, representation would not be authentic and hence effective under the person representing a community was chosen by members of that community. It was not sufficient for minority representation that the representative be a member of a community. To be able authentically to represent the views and the interests of the community, she or he had to command the confidence of the community. Separate electorates were defended as being the best mechanism for securing this end.

The house rejected the proposals for separate electorates. The most prominent argument against the proposal was based on considerations of nationhood and national unity. Separate electorates, it was asserted, were historically associated with a policy based on the premise that India was a conglomeration of distinct communities and not a nation. Further, it was felt that they has aggravated communal differences to the extent of causing the vivisection of the country and that their perpetuation would sabotage the creation of a national political community.
Separate electorates were also opposed on secular grounds, as they involved the introduction of religious considerations into the political sphere. It was also argued that separate electorates were vestiges of an undemocratic colonial system in which legislatures had been mere advisory bodies without policy-making powers and in which the function of representatives was to act advocates of their communities rather than to share in the governance of the country.  

Minority claims for special representation assumed forms other than those for separate electorates. At different stages of constitution making various forms of proportional representation were proposed by minority representatives, primarily in the context of the election of members to the lower house and the formation of the cabinet. During the initial stage, when religious minorities were included in provisions for quotas in legislatures, proportional representation was forwarded so that members of minority groups could have a greater voice in the election of their representatives and minority representation could thus be more authentic. Legislature quotas under joint electorates were regarded as an illusory safeguard as they did not allow the members of the community to have a preponderant voice in the selection of representatives and hence did not ensure that the person elected was a ‘true’ or ‘real’ representative of the community. In the later stages of constitution-making proportional representation was proposed as mechanism that would facilitate the representation of minority opinion, and, as one of its consequences, enable some representatives belonging to minority communities to be elected.

The arguments invoked in the case for proportional representation were substantially similar in their various incarnations during the career of the Constituent Assembly. Proportional representation was justified on democratic grounds. In the argument about the democratic merits of proportional representation, notion of political equality blended with notion of the representativeness of assemblies. If the electoral system made for a better realization of the individual’s right to be represented, minority political opinion
would have a better chance of being represented in the legislatures. This was desirable, it was argued as it would enhance the representativeness and in turn the democratic character of assemblies.

The various proposals for proportional representation put forward by minority representatives were rejected by the house. It was argued that they shared the flaws of communalism and separatism which beset separate electorates; that they were impracticable in an illiterate country; that they would promote government instability; that they would make parliamentary democracy based on collective responsibility unworkable.

However, the fact that proportional representation increasingly replaced separate electorates as the favoured institutional mechanism for minority representation is significant. The representation of minorities through proportional representation was thus defended on the grounds that it would make for a more adequate realization of democratic principles and that, unlike separate electorates, it would not tend to undermine secularism or national unity.

While separate electorates were a particular nationalist taboo, the grounds on which they were opposed were employed against every other proposal for special representation of minority groups. These included provisions for reservation of seats in the legislature for religious minorities, scheduled caste and scheduled tribes that had initially been accepted by the house. The provision has been admitted as exceptions to these norms, as measures of compromise whose existence was an aberration, a necessary evil in a period of transition. They were regarded as temporary measures for communities that needed assistance for a short period.

In the house, no defense of political safeguards for religious minorities had been found. Not any attempt was made by the constitution-making to evolve an alternative legitimacy for political safeguards for the religious minorities in the edifice they were fashioning. Political safeguards were intended to facilitate the
eventual integration into the nation of communities that were not immediately in a position to integrate.\textsuperscript{69}

1.8 Reservations in Employment

The debates on quotas in the services in the Constituent Assembly reveal a pattern similar to the debates on special representation provisions. The dominant opinion in the house regarded quotas in the services as undesirable in general, although necessary for the backward classes in the short run. By and large, other methods of ameliorating backwardness, such as channeling more economic and educational resources towards these groups were considered preferable to quotas in services. The general grounds position to group preference provisions for minorities were invoked against reservation in the public services for the backward classes.

Quotas were regarded unfair because they allegedly conflicted with fundamental rights which guaranteed equality of opportunity and non-discrimination in matters of state employment. They were also opposed for their supposedly deleterious effects on a desired social good efficiency of administration and good governance. Merit considerations were prominent in the latter form in this period\textsuperscript{70}.

Reservation in government posts was regarded as undesirable not only for the country but also for the backward castes themselves. Here the most common arguments were that not only would quotas stigmatise the recipients induce feelings of inferiority among them and stifle initiatives for self-development but also that they would benefit only a few, already privileged sections within the group.\textsuperscript{71} It was also feared that such provisions would open the way for more and more groups claiming special treatment for an indefinite period. Thus it was urged that the constitution ought to clearly specify and limit groups on the category ‘backward’ besides fixing the duration for which such provisions would apply.\textsuperscript{72}
Nevertheless, unlike the case of the religious minorities, there were principled arguments within nationalist opinion in the Constituent Assembly in favour of quotas for the backward classes. Such provisions were justified on grounds of equality in both fairness and general welfare arguments. In the fairness type of arguments, it was opened that unless the entry of members of disadvantaged groups was facilitated by special measures, the constitutional provisions for equality of opportunity for all citizens would remain mere paper declarations. Thus, it was argued that such provisions were necessary in order to remove inequalities between groups and raise the backward sections that were dragging the nation to the level of the rest. It was also argued that unlike minority claims in general the claim for quotas for the backward classes was not a communal one.\footnote{13}

While the representatives of religious minorities did not participate significantly in early debates on quotas in the services, the restriction of provisions for quotas in the services to the backward classes in the later stages of constitution-making was rigorously opposed by some Sikh and Muslim representatives.\footnote{60} It asserted that the religious minorities, or sections within these communities, were backward and that quotas were required to give effect to the principle of equality of opportunity for individuals when such individuals belonged to groups discriminated against in matters of recruitment to the public services. It was also argued that such provisions would assuage minority fears and thereby promote national integration.\footnote{74}

1.9 Sub-Committee on Minorities

The Advisory Committee met on February 27, 1947 under the Chairmanship of Sardar Patel and divided itself into four sub-committees-two of them being Sub-Committee on Minorities and Sub-Committee on Fundamental Rights. The remaining two sub-committees were on tribal and excluded areas. It was in these two Sub-Communities that the problem of safeguards for minorities was gradually settled.
The Sub-Committee under the Chairmanship of H.C. Mookerji met the same day it was created, February 27, 1947. The Sub-Committee, finding its tasks difficult, formulated a questionnaire and wanted to ascertain the views of the members. Memoranda were submitted on behalf of the Scheduled Castes, Scheduled Tribes, Sikhs, and Anglo-Indians demanding constitutional safeguards. No memorandum was presented on behalf of Muslim League as it was still not participating in the proceeding of the Assembly.

The most detailed demands came from Dr. Ambedkar who submitted then on behalf of the Scheduled Castes. These included both political as well as social safeguards. Jagjiwan Ram suggested generous provision in the constitution for upliftment of the Scheduled Castes. He also suggested that the guarantee of religious and cultural freedom to racial and religious minorities should be permanent feature of the Constitution whereas provisions regarding Scheduled Castes could be eliminated when their condition became satisfactory.

A memorandum on behalf of Sikhs was submitted by Harnam Singh and Ujjal Singh which included a demand for retaining the Punjab as the “homeland and holy land of the Sikhs”. On behalf of the Anglo-Indians, the demands included a guarantee as a fundamental right of facilities to receive education in English, liberal educational grants secured for Anglo-Indians and European Schools by the Government of India of India Act 1935 to be not only continued but also increased in relations to their requirement, and a provision for securing a preferential claim to a certain percentage of appointments in Railways, Customs, and Posts and Telegraph Departments - a privilege they had enjoyed in the past. They also demanded reservation in the legislatures. Some members of the Sub-Committee gave their own suggestions. Syama Prasad Mookerji suggested for a Minority Commission in each province, and Jairamdas Daulatram suggested for a minority court to adjudicate on complaints by minorities of unfair treatment. Both of them suggested representation of minorities in various ministries. M. Ruthnaswamy also
suggested the provision by the state of schools for minority communities where their religion and culture would be taught.

The Sub-Committee met on April 17, 18, and 19, 1947 to consider the widely divergent views. In these meetings the Sub-Committee also considered the interim proposals of the Fundamental Rights Sub-Committee in so far as those proposals had a bearing on minority rights. After considering what rights were conceded to minorities by way of fundamental rights, the Sub-Committee again met on July 21, 1947, to consider the proposals which had been submitted before it. By this time the question of partition had been decided and the Muslim League was also represented in the Sub-Committee. The issues which the Sub-Committee formulated on the basis of the replies received to the questionnaire issued to the members covered the following:

(i) Representation in legislatures, joint versus separate electorates and weightage;
(ii) Reservation of seats in the Cabinet;
(iii) Reservation in services;
(iv) Administrative machinery to ensure protection of minority rights

After a prolonged discussion on these issues the Sub-Committee arrived at certain decisions. The Sub-Committee could not make a detailed report due to shortage of time and its report submitted before the Advisory Committee on July 27, 1947 contained merely a brief summary of the conclusion reached by it. The report contained the following decisions:

(i) The demand for separate electorates and weightage should be rejected and the principles of joint electorates with seats reserved for the minorities on a population basis should be accepted;
(ii) The demand for reservation of seats in the Cabinet should be rejected;
(iii) The demand for reservation of posts in the public services on a population basis should be accepted;
(iv) Special officers should be appointed to look after the safeguards and interests of minorities.  

1.10 The Advisory Committee Stage

When the report of the Sub-Committee came up for consideration before the Advisory Committee in July, 1947 the committee endorsed almost all the conclusions reached by the Sub-Committee except with regards to Anglo-Indian for which it appointed a Sub-Committee to report on the position of this community in certain services and the existing educational facilities for them. The Advisory Committee accepted by very large majority the recommendation of the Sub-Committee on minorities that there should be no separate electorates for elections to the legislatures on the ground that these had in the past widened communal differences. The Advisory Committee recommended as general rule that seats for the different recognized minorities should be reserved in the different legislatures on the basis of their population. It also accepted the principle that no weightage should be given, but members of a minority community would be entitled to contest unreserved seats. It recommended that the Muslim and Scheduled Castes should get reserved seats in proportion to their population. The Committee accepted the recommendation of the Sub-Committee that there should be no statutory provision for reservation in Cabinet. It also disfavoured any specific provision for reservation of appointments in the public services and favoured a general provision that in appointments the claims of the minorities should be kept in view consistently with the efficiency of administration. As the community had in the past completely depended on its representation in certain categories of public services, the committee adopted the recommendation of the Sub-Committee that the reservation in the services should be continued. It also accepted the recommendation of the Minorities Sub-Committee that special educational grants which had been previously made available to Anglo-Indians School should be continued for a period of ten years. The Advisory Committee also recommended for the appointment of a special Minority Officer both at the
Centre and in the Units charged with the duty to ensure implementation of the guarantees and safeguards provided for the minorities in the constitution. The committee also accepted the recommendation for setting up of a statutory commission to investigate, inter alia, into the conditions of all socially and educationally backward classes and to recommend the steps to eliminate the hardships.  

1.11 The Assembly Stage

The report of the advisory committee was considered by the Constituent Assembly on August 27 and 28, 1947. The Assembly adopted all the recommendations of the Advisory Committee without any modification. The draft constitution prepared by the Constitutional Advisor in October, 1947 incorporated the decisions of the Constituent Assembly on the problems of minorities.

When the drafting committee met on February 5 and 6, 1948, it formulated the various provisions into ten articles and placed them in Part XIV under the title "Special provisions relating to Minorities". This part of the Draft constitution was based on the decisions of the Constituent Assembly and the recommendations of the two Sub-Committees on tribal people.

The report of the Sub-Committee was considered by the Advisory Committee on December 30, 1948 but consideration of the report was postponed. At this meeting a suggestion of a very fundamental character was made. Some of the members sought to submit resolutions seeking to do away with reservations for all minorities.

The Advisory Committee again met on May 11, 1949 and submitted its proposals to the Constituent Assembly. The Committee also placed before the Assembly the views expressed by some members at its meeting held on December 30, 1948 for abolition of all kinds of reservations. It observed that since it had made its recommendation on reservation of seats in 1947 the condition has
changed and it was no longer appropriate in the context of free India to reserve seats for any religious minority. Although the addition of separate electorates was a right step and would remove much of the poison from the body politic the reservation of seats if allowed would lead to a certain degree of separation as between the various communities and to that extent was contrary to the conception of secular democratic state. It reported that the resolution for abolition of reservation adopted in its meeting held on May 11, 1949 was passed with an overwhelming majority; explaining the decision to the Assembly on May, 25, 1949, Patel said that the vast majority of minority communities, including Muslims had themselves realized the evil of such reservation in the part, and consequently the voting for the abolition of communal reservation was unanimous and only one member had voted against the proposal.  

The Advisory Committee therefore recommended that reservation for Muslims, Sikhs, Christians or any other religions community should be abolished and should be provided only for Scheduled Castes and Scheduled Tribes. When these recommendations were placed before the Assembly the majority of the speakers which included members of all the communities offered full support to the proposal to abolish reservations on religious ground. Jawaharlal Nehru was so much moved by the new change that he described the proposal as a “historic turn in our destiny”.  

1.12 Fundamental Rights and the Minorities

Among the fundamental rights three were directly concerned with the problem of minorities:

(a) Right to equality.
(b) Right to freedom of religion, and
(c) Cultural and educational rights
The first of these aimed at helping the minorities and backward sections or the population to move forward by legally placing them on the same footing as the rest of the population, the other two rights were intended to assure them that in matters of religion and culture they would be able to preserve their identity.

(a) Right to Equality

The right to equality before law contained three important provisions: prohibition of discrimination on grounds of religion, race, and caste etc., equality of opportunity in public services and abolition of untouchability.

The prohibition of discrimination had been provided both in the Nehru Committee report and in the Congress Resolution of Rights (1933), when the Fundamental Rights Sub-Committee suggested such a clause in its Draft Report on April 3, 1947 it was welcomed by all though its actual drafting passed through several stages. Certain improvements were suggested by the Minority Sub-Committee and then by the Advisory Committee a provision was added to safeguard the interest of 'women and children'. It was put forward by the Constituent Assembly for its consideration on April 29, 1947 and several amendments, most of which were of verbal nature, were moved by members. This draft Article was accepted by the Constituent Assembly on November 29, 1948 with a few changes and was embodied in the Constitution as Article 15. In report of equality of opportunity in public services, the draft article was accepted by the Constituent Assembly and was embodied in the constitution as Article 16. There was a general agreement among the members to abolish untouchability. K.M. Paniker pointed out that it applied to all forms of untouchability. It was accepted by the Constituent Assembly and was incorporated as Article 17 of the constitution.
(b) Freedom of Religion

Freedom of religion was accepted as fundamental right in the Nehru Committee Report and also in the Congress Resolution on Rights (1933). The framers of the Indian Constitution were unanimous in accepting this right; though there was a controversy regarding its nature and scope. Attempts were made at different stages of the Constitution making to arrive at a compromise between conflicting views, and therefore, concerned articles and clauses were drafted and re-drafted again and again.

Thus, in their endeavour to establish a secular state in India the makers of the India constitution granted to all its citizens as well as to other members residing in the state freedom to profess, practice and propagate religion of their choice with the promise that it would not stand in the way of social reform by the state. They did not accept the Constitutional validity of personal laws based on religion. They expressly abolish religious instruction from schools maintained by the state and restricted its scope in case of aided schools. By these provisions they hoped that every religious minority would have autonomy in religious sphere and would be able not only to profess and practice religion of its choice but also to propagate it subject to public order, morality and health.

(c) Cultural and Education Rights

By not accepting the demands for separate electorates and reservation of seats on religions considerations, the Constituent Assembly thus sought do away with any protective principle which could further damage the cause of national unity. But it also sought to reassure the minorities that their special interests which they cherished as fundamental to their life were safe under the constitution. This assurance, more particularly, concerned with cultural and educational interests of minorities which the Assembly sought to protect as justifiable rights.
The original draft of the Fundamental Rights which was submitted along with the report of the ‘Sub-Committee on Fundamental Rights’ to the Constituent Assembly did not contain any provision corresponding to Article 30 (1) of the Constitution. K.M. Munshi, K.T. Shah and Harman Singh prepared a draft in which the rights now contained in Article 30 (1) of the constitution, along with other rights was proposed to be considered on “national minorities...based on religion”. Sub-Committee on Minorities prepared an interim report which dealt from the point of view of minorities. The report recommended the following:

(1) All citizens are entitled to use their mother tongue and the script thereof, and to adopt, study or use any other languages and script of their choice.

(2) Minorities in every unit shall be adequately protected in respect of their languages and culture, and no government may enact any laws or regulations that may act oppressively or pre-judicially in this respect.

(3) No minority whether of religion, community or language shall be deprived of rights or discriminated against in regard to the admission into state education institutions, nor shall any religious instruction be compulsorily imposed on them.

(4) All minorities whether of religion, community or language shall be free in any unit to establish and administer education institutions of their choice and they shall be entitled to state aid in the same manner and measure as is given to similar state aided institutions.

(5) Notwithstanding any custom, law, decree or usage, presumption in term of deduction, no Hindu on grounds of caste, birth or denomination shall be precluded from entering an educational institution dedicated or intended for the use of the Hindu community or any section thereof.

(6) No disqualification shall arise on account of sex in respect of public services or professions or admission to educational institutions saves and except that this cannot prevent the establishment of separate educational institutions for boys and girls.
This interim-report was sent to be considered by the Advisory Committee. The committee debated on the scope of the protection of the interest of minority and most of them with slight modification were accepted. Ultimately, the Advisory Committee made the following recommendations:

(i) Minority in every unit shall be protected in respect of their languages, script and culture and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.

(ii) No minority whether based on religion, community or language shall be discriminated against in regard to admission into state education institutions, nor shall any religious instruction be compulsorily imposed on them.

(iii) (a) All minorities whether based on religion, community or languages shall be free in any unit to establish and administer educational institutions of their choice.

(iv) (b) The state shall not while providing state aid to schools discriminate against schools under the management of minorities whether based on religion, community or language.

The recommendations which provided safeguards for minorities came up before Constituent Assembly for acceptance. K.M. Munshi was of the view that sub-clause (2) "No minority based on religion, community or language shall be discriminated against in regard to admission into state educational institutions, nor shall any religious instruction be compulsorily imposed on them", should be sent back to the Advisory Committee for clarifying its scope in respect of state-aided institutions. Rest of the clause was adopted without any modification.

At the time of modification the Advisory Committee deleted the words "not shall any religious instruction be compulsorily imposed on them", for the reason that this was already incorporated in clause (16) of the Draft Constitution, which is now Article 28 of the Constitution. At the time of discussion or the report, in the Constituent Assembly K.M. Munshi pointed out that, the scheduled castes in the strict sense of the term, were not a minority.
When the whole clause came to be considered by the Drafting Committee in its meeting, it made certain modifications of a fundamental nature and drafted it as Article 23 with the general head of "Cultural and Educational Rights" in the following form:

(1) Any section of the citizens residing in the territory of India or any part thereof having distinct language, script and culture of its own shall have the rights to conserve the same.

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the state.

(a) All minorities whether based on religion, community or language shall have the rights to establish and administer educational institutions of their choice.

(b) The State shall not in granting aid to educational institutions discriminate against any educational institution on the ground that it is under the management of a minority, whether based on "Religion, Community or Language".

In the Draft Constitution the word minority was replaced by the words any section, from sub-clause (1) of, the recommendations. Due to such replacement a heated and prolonged controversy sparked on in the Assembly. Dr. Ambedkar in trying to set the controversy at rest explained the reason for substitution of the word 'Minority' by the words 'any section' as follows:

"....The term Minority was used therein not in the technical sense of the word minority” as we have accustomed to use it for the purpose of certain political safeguards...The word is used not merely to indicate the minority in technical sense of the word. It is also used to cover minorities which are not minorities in the technical sense but which are nonetheless minorities in the cultural and linguistic sense. For instance, for the purposes of this Article 23, if a certain
number of people from Madras came and settled in Bombay for certain purpose, they would be, although not a minority in the technical sense, cultural minorities. Similarly if a certain number of Maharashtrians went from Maharashtra and settled in Bengal, although they may not be minorities in the technical sense, they would be cultural and linguistic minorities in Bengal. The article intends to give protection in the matter of culture, language and script not only to a minority technically but also to a minority in the wider sense of the terms as I have explained just now. That is the reason why we dropped the word “minority” because we felt that the word might be interpreted in the narrow sense of the term when the intention of this house... was to use the word “minority” in much wider sense, so as to give cultural protection to those who are technically not minorities but minorities nonetheless.95

Thus it seems that the above exploration was designed to broaden the scope of earlier part of the draft Article 23 so as to include all such minorities who were technically not minorities but minorities nonetheless and left the later part of the draft Article 23 (1) (corresponding to the present Article 30) to remain confined which were minorities in the technical sense.

The Drafting Committee incorporated two more amendments of the substantial nature. By one the “language, script and culture” in clause (1) were replaced by the words “language, script or culture”. By other, it was sought to prohibit discrimination against any minority in the matter of admission by state-aided institutions as well as state-owned institutions.

After drafting the constitution, the draft Article 23 was presented for consideration before the Constituent Assembly. At this time a number of amendments were moved and Assembly witnessed a long debate on the question of sufficiency or adequacy or the scope of the rights, but after a prolonged debate only the amendments moved by B.R. Ambedkar himself and the two amendments moved by Thakurdas Bhargava and accepted by Ambedkar were adopted. All
other were rejected. With such amendments\textsuperscript{96} Article 23 of the Draft constitution was accepted by the Constituent Assembly.

Subsequently, at the revision stage, the Drafting Committee divided Article 23 into two separate Articles, i.e., Article 29 and Article 30 which are as follows:

Article 29 (1): Any section of citizens residing in the territory of Indian or any part thereof having a distinct language, script or culture or its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the Stare or receiving did out of state funds on grounds only of religion, race, caste language or any of them.

Article 30 (1): All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

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

Ultimately, the Constituent Assembly conceded certain rights relating to education, language and culture and they came to be incorporated as Articles 29 and 30. Thus these two articles sought to recognize and protect a right of religious and linguistic minorities to establish and administer educational institutions of their choice. By granting autonomy in culture and educational spheres, it was hoped that minorities would preserve their way of life and contribute in their own way to the prosperity and development of the country and towards its political unity.\textsuperscript{97}
1.13 The Change in the Assembly’s Attitude

A review of the two parallel developments of minority safeguards detailed out above shows that until the decision of partition had not become imminent, the member of the Constituent Assembly, a vast majority of whom represented the typical Congress ideology and attitude, had placed before them the tasks of securing agreement on a constitutional arrangement which could on the one hand, reassure the minorities that their interest and their distinctive characteristics would be secured in the future political set-up and, on the other hand, ensuring for themselves that extremist demands of minorities were not to be conceded beyond a certain point. Till that moment, the Congress had been extremely cautious in dealing with the question of protection of minority interest, lest a retrograde step might provide the Muslim League a pretext for refusing to join the Constituent Assembly and thus strengthening its argument which it had been using for half a century as a base for its political fight.

But the statement of June 3, 1947, providing for the partition of the country into two separate sovereign nations had the effect of changing the whole complexions of minority problem. The decision of partition and the great upheaval that was brought with it had the inevitable effect of materially alternating the situation both psychologically as well as strategically. Congress was no more in need of being extremely conciliatory, and was no more under extreme necessity to bring about ‘consensus’. The ‘remainder’ of the Muslim League which had by none entered the Assembly was a different party, it not in its own eyes, at any rate in the eyes of others.

A second major event that was much to affect the question of minority interests was the assassination of Mahatma Gandhi by a right-winger fanatic in January 1948. Both outside and inside the Assembly, the event created a feeling of revulsion towards the whole problem of religious minorities. At the Constituent Assembly’s meeting in April 1948, Nehru’s forceful advocacy for the adoption of
a resolution declaring a ban on engaging by any communal organization in any activities other than those essential for religious, social and educational needs of the community, his concern for the Draft Constitution containing "certain definite communal elements", and his plea for minimum possible reservation were not only a reflection of the growing mood of the Congress as well as many sections of the Assembly members against the inclusion of political safeguards in the Constitution for religious minorities.

Another event of some significance was the decision of the leaders of the Muslim League in early 1948 to disband the League and the refusal of some of the members of the party from provinces, such as Madras, to follow the decision. The Muslim League's break-up as a political party had the inevitable consequence of fragmenting the previously united, though small, Muslim group within the Constituent Assembly. The further consequence was that Muslim members lost their position as a political force and were no longer able to speak with unanimity in any future deliberation on the question of minority safeguards. Also, a considerable number of Muslims were gradually won over to the nationalist point of view and, barring a few who fought to the last, all the Muslim members themselves surrendered voluntarily their demands on reservation.

The problem of safeguards for minorities that had come to the forefront as a communal problem thus boiled down to lose its colour. The occurrence of events outside and the consequent change of attitudes inside the Assembly were the factors that greatly helped the Assembly in weeding out progressively the communal element from the minority problem.

What the Assembly ultimately secured for minorities must remain an event of great historical significance, for, apart from the above factors, the division of the country on the basis of religion and the declaration of an Islamic State in Pakistan were the immediate factors that supplied both argument and justification for denial of any kind of protective safeguards. At a time when religious fanaticism, reinforced by historical tradition and political rivalries, had rendered the country's
population thoroughly fragmented and agitated, the acceptance by the framers of the ideal of secularism to be a condition of political and social life of future India and acceptance with the same emphasis of the principle of protective provisions in such secular areas as education, language and culture, must remain a distinct and, indeed, a great achievement excelling many others in constitutionalism.\textsuperscript{103}

The debates in the Constituent Assembly that began in 1946 and concluded with the final draft of the Indian Constitution in October 1949 were conducted resulting in the partition. This is what; we are told of the Constituent Assembly debates and led to the inclusion, non-inclusion, specification and non-specification of crucial issues relating to the political safeguards for minorities.

Among the political safeguards included and then dropped was that of representation (not reservation) of all minorities in central administrative and provincial services, with the further stipulation of a special security officer at both the central and provincial levels to monitor and report on the status of minority presence in the services\textsuperscript{104}.

The whole debate in the Constituent Assembly on Article 23 of the Draft constitution which later assumed the shape of the present Article 29 and 30 revolved round many issues. The whole problems as far as this part of constitution in concerned that engaged considerable time and efforts of the framers was to achieve a consensus in a constitutional arrangement between the numerically dominant majority considered as such on the national scene and the minorities referred to above a solution which could give the minorities a feeling of security against discrimination, and security against interference with those characteristic which had divided them apart from the majority. And, it is too obvious to be noted that at no stage was any section of this majority ever treated as ‘minority’.

If these assumptions as accepted as truly reflecting the intention of those who drafted and incorporated these prevision in the constitutional document with a wishful hope that they were rendering a constitutional solution to the problem of
Indian minorities, it may be argued that where a minority is the historical or national context and its claim is based on religion it must be defined and ascertain in term of the population of the whole country irrespective of its being in numerical majority in any particular state and where a group is not a majority considered as such in the national context, but is still definable as ‘minority’ under Ambedkar’s stretched meaning of the term, it may be ascertained with reference to the population of the state concerned. The argument is correct, it is submitted, if the provision in the question are viewed against the historical prospective in which, they were adopted, and are construed to carry into effect the true spirit and intention of the constitution.\(^{105}\)

Dr. Ambedkar wrote about the rights of oppressed people and minorities “It is no use for the Depressed Classes to have a declaration of equal rights. There can be no doubt that the Depressed Classes will have to face the whole force of orthodox society, if they try to exercise the equal rights of citizenship. The Depressed Classes therefore feel that if these declarations of rights are not to be mere pious pronouncements but are to be realities of everyday life, they should be protected by adequate pains and penalties from interference in the enjoyment of these declared rights”.\(^{106}\)

NOTES AND REFERENCES


2 Dr. B. R. Ambedkar as a president of Federation told the Scheduled Castes that a constituent assembly was not needed, the 1935 Act would do. Speech to S. C. F., 6 May 1945. *Indian Annual Register (IAR)* 1946, Vol. I, - pp. 3214.


4 Granville Austin, no.1, p.3.


8 Muslim League Resolution of 6 June 1946, accepting the Mission Plan; *IAR* 1946, 1, 183.

9 Granville Austin, no.1, p.5.


11 Report of the Committee Appointed to Negotiate with the States Negotiating Committee, 28 April, 1947; Constituent Assembly, Reports of Committees, First Series, p.9.

12 The 1951 census figures for both Countries show India with 35 ½ million Muslims and Pakistan with 65 million.

13 The Experts Committee met in July and August 1946. Nehru was its Chairman.

14 Granville Austin, no. 1, p. 6.

15 Patel told in the Advisory Committee meeting of 21 April 1947 that the Assembly must Proceed on the basis of the Cabinet Mission Plan and that the Committee must make no decision that "will prevent the Muslim League from coming in". Proceeding of the meeting in B. Shiva Rao, *The Framing of India's Constitution: Select Documents* (New Delhi: The Indian Institute of Public Administration, 1967), Vol. 2.

16 The date of British withdrawal from India, so long indeterminate had been set June 1948 by Prime Minister Attlee in a speech in London on 20 February 1947. Lord Mountbatten convinced the British Government that British withdrawal should come even earlier. M.N. Roy, *India in Transition* (Bombay: Nachiketa Publication, 1971).

17 The Assembly had met in July 1947 and, on the basis of the June 3 Plan, had already begun to frame the Constitution in the light of Partition and the moved-up date of Independence.

18 Granville Austin, no. 1, p.9.
19 For details of the composition of the Assembly during the first session in December 1946, see Constitution Assembly Debates (CAD), Vol. II, p.267.


21 For details see K.B.Krishna, The Problem of Minorities in India or Communal representation in India (London: George Allen and Unwin Ltd. 1939); B.R. Ambedker, Pakistan or Partition of India (Bombay: Thacker and Co. 1945).

22 Syed S. Pirzada, Evolution of Pakistan (Lahore: APLD, 1963); R. Coupland, The Indian Problem (Bombay: OUP, 1944); Sunderlal, India in Bondage (Calcutta, R. Chatterji, 1928). Cited in Anwarul Yaqin, no. 20, p. 9.


27 Anwarul Yaqin, no. 2, p. 10.

28 For details see Grenville Austin, no. 1, pp.52-66.


30 For a description of these resolutions see, Chakrabarty and Bhattacharya, Congress in Evolution (Calcutta : The Book Co. Ltd.,1940).

31 See the report published as Constructional Proposals of the Sapru Committee (Calcutta: Padma Publications, 1945).

32 Anwarul Yaqin, no. 20, pp. 11-12.
33 See A.C. Banerji, no. 29, pp. 210-215.


35 Gwyer and Appadorai, no 10, p.XXXVI.

36 For detailed discussion on Communal Award see John Cumming, Political India (1832-1932), (London: OUP, 1932), pp.119-23.

37 For a discussion on communal electorates see, B. R. Ambedkar, Pakistan or Partition of India (Bombay: Thacker & Co. 1945).

38 See Gwyer and Appadorai, no. 10. Also See A.C. Banerji, no. 29, pp. 210-215.

39 B. Shiva Rao, no. 15, p. 743.

40 For details see Ralph H. Retzlaff, no. 20, p. 58.

41 For detail See A.C. Banerji, no. 29, pp. 150-151.

42 Gwyer and Appadorai, no. 10, p. 505.

43 To know the text of the proposals, see C. H. Philips, no. 34, P. 371.


45 For details see, V. P. Menon, The Transfer of Power in India (Calcutta: Orient Longmans Ltd. 1957); B. Shiva Rao, no. 15, Vol. 1, p. 258.


47 Granville Austin, no. 1, pp.9-13.


49 See CAD, vol.1, p.139.


51 For the general discussion on minorities see CAD, vols. 1, 7 and 11.

53 See M. Ananthasayanam Ayyangar, ibid, pp. 881-82.


55 On the subject of political safeguards for minorities, included in the first draft of the Constitution, he reportedly said in a legislative debate that the draft constitution had ‘certain definite communal elements’. “I hoped personally that the less reservation there is the better”. Quoted in Ralph Retzlaff, no. 20, p. 66.

56 CAD, vol ii, p. 312.

57 CAD, vol 5, p. 270.

58 CAD, vol 5, p. 246.

59 CAD, vol 5, p. 246.

60 Ralph Retzlaff, no. 20. 1963, p. 66.

61 For the argument of Farzana Shaikh on Hanna Pitkin’s distinction between substantive and descriptive notions of representation see Farzana Shaikh, Community and Consensus in Islam: Muslim Representation in Colonial India, 1860-1947 (Cambridge: CUP, 1989).

62 See B. Pocker Sahib Bahadur, CAD, vol 5, pp. 211-213.

63 See Ananthasayanam Ayyangar, CAD, vol 5, p. 216.

64 G. B. Pant, CAD, vol 5, p. 224.

65 Bhopinder Singh Man, CAD, vol. 6, p. 1249.


68 See Vallabhbhai Patel’ speech in the house, on the first minority report, CAD, vol 4, pp. 199-200.

69 CAD, vol 4, p. 272.

70 See Ananthasayanam Ayyangar, CAD, vol 9, p. 626.
71 See Krishna Chandra Sharma, CAD, vol 8, p. 516.

72 See Damodar Swarup Seth, CAD, vol 7, p. 679.

73 See, V. I. Muniswamy Pillay, CAD, vol 7, p. 689.

74 See Aziz Ahmad Khan, CAD, vol 9, p. 682.


83 For detail of the Advisory Committee, August 8, 1947, see B. Shiva Rao, Ibid, pp. 416-87.

84 CAD, Vol. 5, p. 212.

85 B. Shiva Rao, no. 15, p. 764.


90 B. Shiva Rao, no. 15, Vol. 2, pp. 50-51, 76, 82.


96 CAD, Vol. 7, pp. 924-927.


100 Ralph Retzlaff, no. 20, p. 67.


CHAPTER - II

THE CONCEPT OF MINORITY

There is no valid and definite yardstick to define the term ‘minority’ as such. Any item in lesser quantity will undoubtedly pinpoint the fact that the particular item is less in number or in quantum in comparison to the other items. But this fact does not entail in itself the extent to which the number or the quantum is less. The impact of all these aspects is greatly experienced in the arena of politics. In the absence of any fixed criterion regarding the number and the quantum, conflicts arise, which happen to become the very cause of the strife between the minority and the majority in due course. 

The term ‘national minority’ has been defined in the International Encyclopedia of Social Sciences. Here, this word is applicable for such group of the nationals who have been inhabitation in a particular place for a long time but another group of the nationals has snatched away the power from the formers’ hand. Normally, it is so that the minority group is now out of power, though that group is still inhabitation in the same place. The governance and the economy of that place are being controlled by majority which always tends to protect its own interests. There, the majority decides the political existence of the minority. For example, the minority do not have the right to cast their vote for the candidates contesting for the seats of Parliament or Legislative Assembly. Though, they have been given the choice to send one or two of their representatives thereto.

Such minority group did find an acceptable place on the basis of their language and their different race even among the people settled in the border areas. Prior to the First World War, minorities were used to be recognized on the basis of their worshipping method and the guarantee to protect them happened to be one of the provisions of all war treaties. During the Muslim rule in India Jaziya (special tax) was imposed on the non-Muslims. Likewise, till 1958 no Jew could become a member of the British House of Commons. In Pakistan and Islamic countries, a
non-Muslim can't become the President or the Prime Minister even today.\textsuperscript{3}

The term ‘minority’ defies exact definition because no matter enumeration is necessary but not sufficient for defining it. It is for this reason that the question of defining ‘minority’ has always been a hotly contested issue in international and domestic fora.\textsuperscript{4} However, one can describe, if not define, the term minority. Minorities are groups of people who are united through race, religion, language or culture of which their members are conscious and which forms the basis of a common identity and distinguishes them from others on this basis. Such groups are generally called minorities when they are less numerous than the other groups or when they occupy a subordinate economic, political or special position in the state, or both.\textsuperscript{5}

According to anthropologists after family minorities as natural social groupings is an ancient phenomenon. Integration in group is generally not biologically or genetically determined. It is a social phenomenon. Glazer and Moynihan define minority as a “group of society characterized by a distinct sense of difference owing to culture and descent- forms of social life that are capable of renewing and transforming themselves.”\textsuperscript{6}

In soviet literature “ethnoses” is a social phenomena and covered groupings, large and small. They are however, different from social classes because ethnic groups are essentially, though not exclusively, concerned with cultural matters' symbols, values and issues of self-definition whereas interest groups are organizations which are merely concerned with a common demand. According to Marxist approach minority discrimination is a function of class system. Hence, the rights of minorities are best protected through collective class rights rather than through so-called minority rights.\textsuperscript{7}

The criteria used to define, identify and distinguish minorities may vary from case to case, but generally they have to do with language, religion, territory, history, social and political organization, shared myths and feeling of identity and belonging that Anderson calls ‘imagined community.’\textsuperscript{8}
Minorities may come into existence either as a result of conquest and subjugation or breakup of a multinational empire or process of amalgamation or integration of ethnic groups or immigration or political, social and economic inequalities or combination of these various factors. In India minority environment is a combination of these various factors. Minority groups are not eternal they are dynamic social units that may emerge, metamorphose and dissolve over a period of time according to changing historical circumstances.\(^9\)

The term ‘minority’ is compound of the Latin word ‘miner’ and the suffix ‘ity’ meaning, inter-alia, “the smaller in a number of the two aggregates that together constitute a hole.” According to Webster it means, “a group characterized by a sense of separate identity and awareness of status apart from a usually larger group of which it forms or is held to from a part.”\(^10\) The Oxford English Dictionary defines minority as “the condition or fact of being smaller, inferior or subordinate”, or as “a number which is less than half the whole number.” The meaning and definitions just referred to contain a common criterion, namely, the statistical criterion. In 1736 the term was used in numerical sense to describe the relationship between larger and smaller groups/values. In 1788 the term was defined in political sense to denote the number of votes cast for a political party. Thus in its earlier usage the term was used both in qualitative or quantitative sense.\(^11\)

The whole concept of "minority" may be based either on primordial or instrumental point of view. Primordial point of view refers to identity and security which a person acquires from his attachment to race, religion, region, language and culture. This perception of identity and security, though natural, but is rooted in non-rational foundations of personality. Instrumental perspective refers to the exploitation of the identity factors by the vested interests which are used as a bargaining process for achieving desired results. As Brass define it, "ethnicity is the study of the process by which elites and counter elites within ethnic groups select aspects of the groups' culture attach new values and meaning to them and use them as symbol to mobilize the group to defend its interest and to compete with other groups."\(^12\) In most of the minority groups these two factors are
combined. Primordial factors are used to achieve cohesion in the groups and instrumental factors are used for bargaining purposes. For an aggregate of people mere sharing of common primordial perception is not enough in order to qualify for a minority group identity, there must also be an organization and mobilization in the group. Therefore, a minority group may be defined as a self-conscious mobilized group with its own feeling of identity, its own insular contacts, its own history and its separate institutions not shared with the rest of the community.\textsuperscript{13}

In a plural society mobilization within a minority group takes place generally under a perception of economic and social insecurity and in order to achieve a fair and equitable share in the scarce resources of the country the group mobilize itself using primordial markers. This leads to politicization of minority group. The degree of politicization is in direct proportion to the viability of social, economic and political system of the country. This makes any minority group both primordial and modern at the same time.\textsuperscript{14} Boundaries of a minority group are generally not fixed by space and time. Such boundaries change with a change in a purpose and need of mobilization. Groups often absorb, merge with other ethnic groups through a process of assimilation. Sometimes groups divide or sub-groups reject the wider entity and branch out on their own, through a process of differentiation.\textsuperscript{15}

As mentioned earlier the concept of minorities cannot be understood solely on the ground of enumeration alone. Three other features must also be taken into consideration. First, there must be certain identifiable ascribed special features which bind the group together and gives its members a sense of separate identity and it is also identified as such by the majority. Second, the group must feel that these special identity-constituting features could shape the political and social order of the society in which it exist. Thus the groups must be politically relevant and must believe and desire that it can play a role in the determination of general policies and programmes. Third, there must be a perception of disadvantage on the basis of special constitutive features of the group.

Besides preference and constitutive features objective and subjective criteria
may also be used to understand the concept of minority. Objective identification criteria of a minority group take into consideration:

1. Group must be numerically less as compared to majority;
2. Determination must be based on population of that state;
3. The group must have certain stable constitutive features like race, religion, language, or culture;
4. The group must be in a non-dominant position;
5. Members must be nationals of that country.

Subjective identification criteria for identifying minority refer to the will of the members of the group to preserve their constitutive features in relation to other members of the society.

The report of the Third Session of the Sub-Commission of the United Nations, in 1950, furnished the following definition: The term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious, or linguistic traditions or characteristics markedly different from those of the rest of the population.

Minority means a non-dominant group. This restricted meaning is afforded by the current usage which applies the term minority only to “a distinct ethnic group..., living within a state which is dominated by another nationality”. Thus minority signifies a group living “in a defensive position”, “although there are national minorities which actually constitute the ruling and privileged groups within a state”. These non-dominant groups in a population are not mentioned in its constitutions as the dominant groups. The members of the minority are not registered in the constitution of the country in which they live. In order not to be aliens; they must become citizens of this country. Further, to their citizenship they must add loyalty, complying with various laws and regulations, and contributing to the common welfare. The minority possesses constant-existing natural and cultural characteristics which are viewed by the majority “as the particular expression of its own individuality”. Moreover, the minority has the will to
preserve those characteristics or traditions of its own. This will constitute the subjective element to be combined with the aforesaid characteristics as the objective element.

As a matter of fact, economic, political, or social conditions have often caused people to settle in a country other than their own. As time goes by, they often become its naturalized citizens. As loyal citizens, they obey its laws and regulations. Compared with the original inhabitants, they are only a minor unit. They are referred to as an ethnic minority or non-dominant group. Usually, they have diverse customs, folkways, mores, taboos, and so forth, of their own, and intend to abide by them. These patterns as well as ethnic, linguistic, and religious traditions make up their patrimony which they want to guard jealously. It is evident that a too small number of individuals are not worth forming a minority in the sociological sense, as a few trees do not make a forest. The minority must include an adequate number of persons sufficient by themselves to develop significantly their traditions and characteristics and preserve their inherited ancestral estate. In other respects, if the settlers are only aliens, the situation is entirely different. Likewise, if, being citizens, the minority members plot blowing up the country, they are not entitled to enjoy the rights and liberties.

There are number of persons whom the concept of minority can cover. The writers attempting to define the term minority can be broadly divided into two categories. The first category brings to the factor of political allegiance. For example, Duparc says: "A minority is a group formed by certain nations of the State who differ from other nationals by offering a characteristic phenomenon: language or religion." Similarly, Brunet writes: "It is a group of individuals, citizens of the State under the sovereignty of which they live, but differing from the majority of the population as to race, language, or religion." This category of definitions makes the concept of minority depend on two factors: to be citizen of the state and to be different from the majority by race, language, or religion. If we just view the greatness of the number covered by the concept of minority, then the writers of this group bring to the fore the fact of being "citizen" of the state, in which these individuals live, as a necessary qualification.
The second category of writers extends the concept of minority not only to the "citizens" but to the inhabitants of the state as well. Balogh asserts that "as minorities must be considered such inhabitant who, by race, language, or religion, differs from the majority of the citizens." Sereni adds: Minorities in the sense of the treaties comprehend all the inhabitants of the state who differ from the majority of the population by race, language, or religion, and not only the citizens. According to these writers, we must include in the concept of minority not only the "ressortissants" of the state, as do the writers of the first category, but also all inhabitants in the territory of the obligatory state who differ from the majority of the population by race, language, or religion. The question of being "ressortissant" of the state does not count in the determination on the concept of minority, so that the country less and the foreigners can be minorities if they are the inhabitants of the state in question. According to Sereni, this concept corresponds exactly to the aim pursued by the regime of the protection of minorities. The treaties of minorities have the goal, on the one hand, to guarantee the application of certain general principles of government adopted by the modern states, and, on the other hand, to exclude the oppression of minorities incorporated in the state, in guaranteeing them equality with the "ressortissants" of the majority.

These are the two concepts of minorities, one broad and the other narrow. This question was the object of an examination on the part of the Permanent Court of International Justice at the time of a demand of consultative opinion relative to the acquisition of the Polish nationality. The court gave its opinion upon this question, according to which the factor 'person' must be interpreted in a broad sense in so far as the Polish treaty of minorities is concerned. Also, with regard to other treaties and declarations, the term minorities should be largely interpreted. The concept of minority must be such as to embrace not only the "Ressortissants" but also the inhabitants of the state who differ from the majority of the population of this state by race, language, or religion.

Thus there is no agreed, universal definition of 'minority'. The adoption of the United Nations Declaration on Minorities could be made possible only after a decision to let the term be undefined. A definition proposed by Francesco
Capotorti is understood to be the most widely cited definition of the term, wherein he defined minority as a group: "numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nation of the State - possesses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion, or language."^26

Almost same definition was submitted by Jules Deschenes, Sub Commission Member, to the Commission on Human Rights, which reads: "A group of citizens of a State, constituting a numerical minority and in non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."^27

2.1 Theoretical Formulations

Commonly a minority is understood in numerical terms. It refers to a group of individuals smaller in member as against the numerically dominant group in a population. But theorists go further than confining their definition of 'minority' to merely numerical-ratio criterion.^^

Thus, while considering 'minority' as numerically smaller group as against the majority in a definite area, some place emphasis upon certain characteristic commonly possessed by the members constituting the minority and, to them, these characteristics serves objective factors of distinction. In this sense the term is used to cover "racial, religious or linguistic sections of the population within a State which differ in these respects from the majority of the population."^28 Thus, according to these definitions, minority constitutes a collectivity which is united by certain common characteristics such as religion, language, race, culture or traditions, or a combination of these factors, and is numerically non-dominant in a population.

Others emphasize that the members constituting minority group have a feeling
of belonging to one common unit, a sense of blood relation or community which
distinguishes them from those belonging to the majority of the inhabitants. They
are “groups held together by ties of common descent, language or religious faith
and feeling themselves different in these respects from the majority of the
inhabitants of a given political entity”\textsuperscript{31}. A ‘consciousness’ of the difference with
the majority on the basis of certain common characteristic is, therefore, considered
as a distinguishing mark, and as such a subjective elements. However, national
consciousness alone, at least in some cases, may characterize minorities not
otherwise distinguishable from the rest of the population by objective
characteristics of language, race or culture, etc.\textsuperscript{32}

There are also those who define minority in term of relationship between the
dominant group and the minority. To them, it is much more important “to
understand the nature and the minority than it is to know the marks by the
possession of which people are identified as members of either”.\textsuperscript{33}

The definition which lay emphasis upon certain subjective factors such as
‘feeling’ or ‘consciousness’ provide a test which is too vague and uncertain, and
more psychological in nature than real. Every situation may not necessarily
involve the assumption that a group in order to deserve the title of minority must
be distinguishable from the majority by the presence of a feeling or consciousness
of its being different from the majority. A group distinguishable from others by the
possession of certain objective characteristic, such as language, may not have a
feeling or consciousness of its distinct status and may yet be counted as minority.
Moreover, ascertainment of any subjective factor would itself beg the existence of
some objective characteristic which serve as the basis of distinction and the
separation, and may in turn have served as the source of ‘feeling’ or
‘consciousness’. Similarly, the writers who cite certain objective characteristic
commonly possessed by the members constituting minority as the exclusive
foundations of minority status fail to recognize that objective factors alone may
not always be the determining mark of a minority. For, a group, not conscious of
its distinct status or separate group identity, may soon be assimilated with the
majority and thus may not be entitled to be called as minority. Those who regard
the factors of discrimination, prejudice and inferior treatment as the sole determinant of minority status and dismiss as irrelevant the numerical size of the group concerned need hardly be told that ‘minority’ is a relative term and must presuppose the existence of a numerical majority. Thus, for instance, the black population of South Africa or Rhodesia, though politically non-dominant and subjected to inferior treatment cannot be regarded as ‘minority’ as numerically it happens to be larger in size than the numerically smaller white population. Even the most acceptable of the definitions, the one given by the Human Rights Commission, is not beyond the reach of the argument. That definition appears to those confined to those non-dominant groups only which, apart from having certain objective characteristics which are distinctively their own, wish to preserve their separate identities and are not willing to be assimilated with the rest of the population. Based on the experienced of Europe where minorities like nationalities were largely minorities by will, anxious to preserve their distinctive character, and refusing to be assimilated with the rest of the population, the definition fails to include minorities which are not minorities by choice or will, but are minorities by force. The Negroes in the United States and the Scheduled Castes in India are examples in hand. They are not minorities by will, and are rather willing to assimilate with the majority but are forced to maintain their distinct status. Minority is seen, in this definition as a group apart, counter posed to the rest of the population, too much pre-occupied with itself and too much imbued with characteristic of separatism, inwardness and withdrawal - a picture to much overdrawn.34

2.2 Aims of Minority Groups

Louis Wirth proposes a classification of minority groups in terms of their ultimate objectives.35 A minority, according to him, may seek four aims:

1. A minority may have pluralistic aims- and it may seek to preserve their own identity and culture upon a basis of tolerance of differences and equality of opportunity. This is a sort of ‘federal association’.

2. A minority may have as its goal, assimilation and may seek ultimately to lose
its identity as a discrete group and to merge with the dominant group. This
type is total integration in which the political state 'ought' to be culturally
homogenous. The culture of the political dominant group must prevail in all
contexts. Minority values and minority customs are seen as threat cohesive
solidarity of society and must be eliminated.

3. A minority may have secessionist aims, to achieve, political as well as cultural
independence from the dominant group;

4. Finally, the aims of minority may be militant - it may not be interested in mere
toleration, assimilation or succession, but may set as its goal political
domination over the majority and other minorities in the society.36

A minority's position involves exclusion or assignment to a lower status in one
or more of four areas of life - economic, political, legal and social. That is, a
minority will be assigned to lower-ranking occupations or to lower-compensated
positions within each occupation, it will be prevented from exercising the full
political privileges held by majority citizens; it will not be given equal status with
the majority in the application of law or justice, or it will be partially or
completely excluded from both the formal and the informal associations found
among the majority. Not infrequently, the minority also voluntarily excluded itself
partially or completely from participation in these areas of life, partly as a means
of maintaining traditional cultural differences. Accompanying the objective
subordination and segregation of the minorities are usually to be found some
subjective attitudes of mutual hostility, although these may sometimes be publicly
denied and camouflaged. Majority minority relations invariably involve some
conflict, although this may take varied forms and operate on different levels.37

Minority groups have performed almost every type of function in almost all
types of social system. Minorities have played economic roles as specialist
bankers, traders or craftsmen. More often they have been manual laborers, whether
slave, serf or free. As revolutionary groups, they have acted as ideological leaders
in political life: sometimes their function has been to told the political balance;
more often they have been the subject of exploitation. Some, because they have
special skills, may be valued for their artistic contributions to social life and yet not be altogether socially acceptable to the rest of the society. Earlier it was noted that the role played by a minority group within a society varies with such factors as its size, its skill and its ideology, and also with the roles of the dominant and other groups in the society. The amount of wealth that the members of the group can accumulate and the political influence that they can exercise vary with the ways in which these factors arrange themselves. Factors such as these obviously work differently in different types of society, and even in the same type the balance is never likely to be identical in any two societies.\textsuperscript{38}

2.3 Sociological Criterion

Sociologists define the term ‘minority’ on the basis of certain characteristics which are commonly possessed by members constituting it. In this sense the term signifies such groups of people that are united by certain common features and which feel that they belong to one common unit. Such groups may be held together by ties of common descent, physical characteristics, traditions, customs, language or religious faith or a combination of these.\textsuperscript{39} In any case, therefore, there is a sense of akinness (related by blood), a sense of community or unity prevalent in the group or groups that distinguish them from the majority of the inhabitants of the area where such minorities function. It is this sense of blood relation within the group coupled with the consciousness of a different with the majority which may serve as the basis for various political or other claims.\textsuperscript{40} So apart from the statistical or numerical size there may be cases where language or religion alone or power distribution whether social or political - may if found as the real basis to ascertain the minority status of a particular group of people.

A more subtle definition is given by F.J. Brown and J.C. Roucek: Minorities are the individuals and groups that differ or are assumed to differ from their ‘dominant’ social group. The differences, although varying in degree, are distinguishing characteristics not only on term of race, religion, nationality and state allegiance but also in the composite cultural patterns. However, such differences in and of themselves are not sufficient to make a group a minority without the accompanying attitude of ‘dominance’ and ‘subservience’ consciously
accepted and tacitly assumed.\footnote{41}

J.A. Laponce defines a minority somewhat with a different emphasis thus: “A minority is a group of people, who, because of a common racial, religious or national heritage which singles them out from the politically 'dominant' group, fear that they may either be prevented from integrating themselves into the national community of their choice or be obliged to do so at the expense of their identity.”\footnote{42}

A classical definition of the term ‘minority’ is given by Professor L. Wirth. According to him, a minority is a group of people who, because of their physical or cultural characteristics, are singled out from others in the society in which they live for differential and unequal treatment and who, therefore, regard themselves as objects of collective discrimination. Further according to him, minority status carries with it an exclusion from full participation in the life of the society.\footnote{43}

There are two aspects of this definition which are worth noting. First, the minority group is marked out from the others in the society by virtue of its specific racial or cultural characteristics. Such characteristics are of a permanent nature so that one’s membership in a minority group is involuntary and, by and large, a person is born into such a group. The second important element in the definition of a minority group is that it being a minority group is derived from its subordinate relationship to some other dominant group. The dominant group, however, need not necessarily be the large one numerically, although in a democratic society in which numbers count in the acquisition of power, the numerically large group may also become the dominant group. The actual minority-dominant relationship is determined by variables of social, economic and political power which are unequally distributed between the two types of groups.\footnote{44}

Some scholars like A.M. Rose and C.B. Rose have rejected any purely numerical definition and have given special emphasis to the factor of opposition. According to them, the mere fact of being generally hated and being hated because of religious, racial or national background is what defines a minority group.\footnote{45} This element of differential treatment, which is emphasized by Wirth and Rose, does
not find any favor with R.A. Schemer horn according to whom “minorities are sub-groups within a culture which are distinguished from the dominant group by reason of differences in physiognomy, language, custom or culture patterns (including any combination of these factors). Such sub-groups are regarded as inherently different and not belonging to the dominant group: for this reason they are consciously or unconsciously excluded from full participation in the life of the culture.”

Thus, a mere glance over the above definitions will show that in spite of a difference of opinion among scholars it seems to be now settled that in the social sciences the term is not defined as a statistical concept of ‘less than 50%’. Instead the test of ‘dominant’ and ‘dominated’ groups to describe ‘majority’ and ‘minority’ respectively is adopted. So much stress is made on the concept of ‘dominant’ and ‘dominated’ that one definition even goes to the extent of saying that there can be no minority, even if there are distinguishing characteristics in term of race, religion etc., unless there is an accompanying attitude of ‘dominance’ and ‘subservience’ consciously accepted or tacitly assumed.

To conclude, it may be observed that no definition comes out to be comprehensive enough to cover all and varied situations, illustrates the difficulty experienced in assigning limits to the concept of ‘minority’. The purpose of above referred definitions is not to evaluate the relative merits of the formulations explained above. These are recalled merely to illustrate that the term minority is not always regarded as a statistical concept, that there exists a sharp disagreement in opinions among the formulators and that each definition has its relevance only in a given context.

2.4 Who is a Minority in India?

In the Indian context, beginning from the Constituent Assembly debates, the term 'minority' was to have wider connotation. In the assembly’s deliberations, the minorities question was regarded as encompassing the claims of three kinds of communities: religious minorities, backward castes and tribal. The claims for special treatment by these groups were on the basis of some disadvantages
suffered by them with respect to the rest of the population rather than their numerical status.\textsuperscript{50}

It was proposed by K.M Munshi, one of the members of the Drafting Committee, to have a narrow definition of the term 'minority' in order to exclude scheduled castes from its ambit.\textsuperscript{51} Ultimately, the draft constitution excluded religious minorities from the provisions of reservation in various walks of public life. British India, however, had included provision of reservation for religious minorities since 1909.

The very first question that arises in the interpretation of cultural and educational rights is to decide the meaning of the term minority because in order to bring a case under Article 29 and 30 of the Indian Constitution, a community has first to establish its character as linguistic, scriptural, cultural or religious minority. “All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice”. This is what clause (1) of Art. 30 in terms declare. The declaration vests in the courts a right to ascertain, as a preliminary step, if the group claiming the benefit of Art. 30 (1) is a group entitled to be called as 'minority', and also imposes a duty upon the claimant-group to prove an evidence that the educational institution in respect of which claim to establishment or administration is advanced is established or administered by a 'minority' definable in terms of Art. 30(1). What it means to say is that in any conflict where Art. 30(1) is sought to be made the basis of a claim to establishment or administration of an educational institution, the claim must be supportable on proof that the institution in question was established by a minority distinguishable from others by the characteristics of either religion or language or both. “Religion” and “language” being the criteria indicated in Art. 30, a precondition for the latter's applicability, the Constitution itself tends to confine the task of the courts to the ascertainment whether the group claiming the protection is a group identifiable by the characteristics of religion or language and is also numerically non-dominant.\textsuperscript{52}

The Indian Constitution uses the term minority/minorities only in four
Articles, namely, Articles 29(1), 30, 350A, and 350B. However, what is amazing is that the Constitution nowhere defines the term ‘minority’, nor does it identify the minority groups or prescribe a definite test for identifying the same. There may have been two reasons for this - the first, that the framers thought it proper to leave the issue open to be guided by the judiciary, from case to case, and the second, that the framers did not think it fit to enter into details as the matter had been discussed at such length before the Assembly that it was deemed as settled, who and what were minorities. They were not confronted with any theoretical problem of bringing the concept of minority within the confines of a definitional formulation. They were rendering a practical solution to a problem which was essentially political and had remained in the forefront of India's political scene for several decades before independence. While Art. 23 of the Draft Constitution, corresponding to the present Article 30, was being debated, doubts were indeed expressed in the Constituent Assembly over the advisability of leaving vague justifiable rights to undefined minorities. The Assembly chose to avoid any further elaboration and left it to the wisdom of the courts to supply this omission.

Thus it has been left for the courts to ascertain whether a group claiming protection is one identifiable by the characteristics of religion or language and is numerically non-dominant. The courts now, however, come out with various kinds of rulings, not answering the problem in a uniform way. Consequently the term ‘minority’ under Article 30 is still not clear in its meaning and import. It is, therefore, necessary to refer to the work of scholars in social sciences, judicial decisions and other relevant sources to understand what the term really stands for. This bring us to the formidable question as to what tests can be employed to distinguish a ‘minority’ from the ‘majority’.

The National Commission for Minorities Act, 1992 avoids defining the term minority. According to the Act, “minority” means a community notified as such by the Central Government. The Government of India has notified five communities, namely, Muslim, Sikhs, Christians, Buddhists and Zoroastrians as Minorities at the national level. As per census of 2001 the share of minority communities in the national population is as follows: Muslims - 13.4%, Christians
- 2.3%, Sikhs - 1.9%, Buddhists - 0.8% and Jains - 0.4%.  

The judicial opinion seems to have correctly appreciated that the benefit of Art. 30(1) is confined to only two types of minorities - religious and linguistic. It is this appreciation which led the Delhi High Court to affirm that “the only or the principal basis of a minority must be their adherence to one of the many religions . . . and that the other features of the minority are subordinate to the main feature, namely its separateness because of the religion”. By analogy a similar interpretation can be put to the words “based on language” also. That being so it can be said that for the purpose of Art. 30, a minority means a non-dominant collectivity distinguishable from the majority of the population by the objective factors of religion or language or a combination of both.

2.5 The Judicial Response

The question of what is a minority was posed in case of Ramani Kanta Bose v. Gauhati Municipality. The Supreme Court found when a Bill is passed by a State Legislature, which extends to the whole of the State, the term "minority" with reference to Article 30 (1) must be determined by reference to the entire population of the State.

The question who is a minority was posed, again, in the Kerala Education Bill case. The Supreme Court opined that while it was easy to say that a minority community meant a community which was numerically less than 50 per cent. The important question was, 50 per cent of what? Should it be of the entire population of India, or of a state, or a part thereof? It is possible that a community may be concentrated in a part of a state, so that it is in majority there through it may be in minority in the context of the whole of the state population. If a part of the state is to be taken, then the question is where to draw the line and what is the unit to be taken into consideration? Whether it should be a district, a sub division, a taluk, a town or a municipality or its wards? However, in the context of an Act of Legislature, which extends to the whole of the state, the Court held that minority must be determined by reference to the entire state, and any community, linguistic or religious, which is numerically more than fifty percent of the entire state.
population would be regarded as a minority for purposes of article 30(1).

The unanimous pronouncement of the Supreme Court in *D.A.V. College-Jullunder v. State of Punjab*, took in view the State of Punjab for determination of the issue whether Arya Samajists were a minority. The court held that Hindus in Punjab constitute a religious minority. Therefore, Arya Samajist in Punjab also constitutes a religious minority having their own distinct script. The Supreme Court said that the term minority must be determined in relation to the particular legislation which is sought to be impugned. Consequently, if it is a State law, then the minorities will be determined in relation to the population of the State. In this case the court categorically rejected the contention that the minority should be determined by reference to the entire population of India. It is, however, not clear from the judgments as to what would be the criteria if the question of defining the minority arises in relation to an impugned central law. Will it, then, be determined by reference to the entire population of India?

This view has again been reiterated by the Supreme Court in the *Guru Nanak University* case. In this case, the Court rejected the contentions raised by the state of Punjab that a religious linguistic minority should be a minority in relation to the entire population of India. Invoking the ruling in the Kerala education Bill case, the Court held that the minority has to be determined, in relation to a state law, only with respect to the population of the state. There is, however, one snag in this formulation. It is possible that the population in a state may be so fragmented in linguistic, religious or cultural groups that no group may constitute 50 per cent of the state population, and thus all groups may fall under the protection of articles 29 and 30 without there being a single majority community against which minorities needs to claim protection.

Again, in *Mother Provincial v. State of Kerala*, the Kerala High Court left the question open whether a minority within the meaning of article 30 “means a minority in the whole of India (which would mean that every linguistic group would be a minority even in its own linguistic state), or a minority in a particular state, or a minority in the area to which an unplugged statute applies”. The Court
definitely ruled out the last idea for, in that case, the legislature can defeat the
article by omitting the operation of the statute to areas where particular religious
or linguistic groups are in a majority. For a state Legislature, the relevant area
should be area over which the jurisdiction of the legislature extends.

In *S.K.Patro v. State of Bihar*, the Supreme Court has held that a minority
claiming privilege under article 30 should be a minority of persons residing in
India. Foreigners not residing in India do not fall within article 30. Residents in
India and forming the “well defined religious or linguistic minority” fall under the
protection of article 30. Further, while rights under article 29 can be claimed only
by Indian citizens, article 30 does not expressly refer to citizenship as a
qualification for the members of the minorities. The facts that funds have been
obtained from outside India for setting up and developing a school is no ground
for denying to it protection under article 30.

It has been argued that the proposition laid down by the court to determine
‘minority’ has many defects. The population of the state may be so fragmented in
linguistic, religious or cultural groups that no group may constitute 50 per cent of
the state population, and thus all groups may fall under the protection of Articles
29 and 30 without there being a single majority community against which
minorities may claim protection. Again, it might be that certain communities
which may be in majority in a particular state, like the Sikhs in Punjab or Muslims
in Jammu and Kashmir, or Christians in Nagaland, may be in minority in relation
to the entire population of India. Can they be in majority from one point of view
and in minority from the other? The problem becomes clear in the following
instance: there are a number of educational institutions set up by the Christian
minority, spread all over the country; applying the test formulated by the Supreme
Court, the educational institutions situated in Nagaland would not be entitled to
the protection of the Articles 29(1) and 30(1) but the same would have the
protection as minority in the state of Punjab.

In the minds of the vast majority of man the word ‘minority’ has an
arithmetical connotation. But the term ‘minority’ does not necessarily connote
numbers. In fact, to understand the term ‘minority’ only in terms of numbers, as a smaller part of a whole or less than 50 per cent of the total population, is wrong. Apart from common use, in a political and constitutional context ‘minority’ is not a numerical concept but means a “non-dominant” group in a state whether ‘cultural, religious or linguistic’. In the arithmetical sense of the term there could be, for instance, a minority of smokers as vegetarians, but no one thinks of them when one speaks of minority protection. In fact, there can be no minority, even if there are distinguishing characteristics, in term of culture religion etc. unless there is an accompanying attitude of dominance and subservience, consciously accepted or tacitly assumed. Thus in a society where groups coexist in peace and mutual harmony, devoid of any urge to dominate or sub serve each other, minority provisions have no place.  

So understood the term ‘majority’ and ‘minority’ are meant to describe "dominant and dominated" or "non-dominant" groups, respectively. A minority and dominated group is any group in society that remains at the bottom of the stratification system and is subjected to discriminatory practices by the majority and dominated group because of difference in culture, race, religion or sex. Specifically, minority groups "are categories of people that possess imperfect access to positions of equal power and to the corollary categories of prestige and privilege in the society." Such imperfect access is ensured by the power of the dominant group- a power that the subordinate group lacks.

Thus a numerical minority by capturing political and economic power in a state may become the majority or dominant group. This group belonging to a particular culture or religion may, by use of political and economic power, propagate and conserve its group interests at the cost of the interest of the other group or groups in the state, in spite of the fact that the latter group or groups constitute the numerical majority individually or in aggregate in the state. Such possibilities in a state give rise to provisions for the minorities in a state. The restriction of the term ‘minority’ in its arithmetical connotation only undermines the effect of such protective provisions.
Similarly, the main objective of articles 29 and 30 is that minorities based on culture, language, script or religion should not be compelled by circumstances to give up their language, script or culture. If a particular community is a minority on the national level but a majority in a particular state, such a community will on its own be able to conserve its language, script or culture as there would be no threat from within the State. The very basis of minority protection is that the political underdogs must be protected against interference of the majority in their cultural and linguistic development. If there is no such threat, there is no need for such protection.73

Pointing out the significance of Articles 30(2), Justice Krishna Iyer has expressed an identical view, when he says,

"The democratic [and secular] spirit of this provision is that the majority shall not use financial coercion on religious minorities through withholding the state aid. If such a community chooses to impart secular education, it must be subject to state regulation as other communities are."74

By now it should be obvious that the determination of the minority on the basis of less than 50 per cent of population is not viable. The constitution policy is to provide safeguards to real minorities against exploitation by the majority, and this idea has to be kept in mind in determining a minority. As rightly observed by K. Subbarao: "The minorities who deserve state protection are not the millions of people belonging to this religion or that religion or this linguistic group or that linguistic group, but . . . unhappy small casts and sects who belong to all religious or linguistic groups spread in different parts of the state"75

The expression ‘minority’ is a relative term and its meaning should depend upon the territorial limits of its operation and the objectives of the particular legislation. The deliberations at the Constituent Assembly reveal that the problem of defining the term arose there, and the Assembly was unable to formulate any definition of ‘minority’. It is, however, clear that the protection of Article 30 applies only to those religious and linguistic minorities which had claimed political rights separated from the majority community prior to the Constitution
such as the Sikhs, Muslims, Jains, Anglo-Indians and Christians. In addition, Article 30(1) does not confer on foreigners residing outside India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well established religious and linguistic minority.

In the particular circumstances of India, the words 'majorities' and 'minorities' may not mean exactly what they ordinarily do in other countries. In India, there are both powerful minorities and weak majorities in different parts of the country. There are contradictions in the assessment of majorities and minorities. Numerical majority is often equated with dominance, and the influence and authority that even small minorities wield in society and administration is frequently ignored. History, too, supports this view. In Madras, for instance, the Brahmins, are a dominant community though they number only three percent of the population and recently it was the 97 per cent non-Brahmin group who had to be helped through legislation. A similar situation existed in Maharashtra sometime back.

Justice Ruma Pal has taken divergent view on this count. In her opinion, the question whether a group is a minority or not must be determined in relation to the source and the territorial application of the particular legislation against which the protection is sought. Her whole reasoning may be abstracted as follows:

The term 'minority' literally means 'numerically less' in relation to the country as a whole or the state, or some other political or geographical boundary. Thus construed, the protection under Article 30 is sought against any measure, legislative or otherwise, which infringes the right granted under this article. Hitherto, the cases that have come for judicial intervention on this count involved impugning the state action, and, therefore, it was quite natural to hold the state boundary as the unit for determining minority status. She cogently argues.

Merely because persons having a distinct language, script or culture are residing within the political and geographical limits of a State within which they may be in a majority, would not take them out of the phrase, 'section of citizens
residing in the territory of India'.

All this implies is that 'minority' character need not be construed solely with reference to a state boundary. In an appropriate case, it may even bear a reference to the whole of India if it involved the consideration of a central statute.84

2.6 Kinds of Minorities

The relevant Articles relating to cultural and educational rights are Articles 29 and 30. Article 29(1) provides that “any Section of citizens residing in the territory of India or any part thereof, having a distinct language, script or culture of its own shall have the right to conserve the same.” Article 30(1) says that “all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.” It is clear from the language of the above two Articles that three categories of minorities has been recognized under the Constitution, these minorities are based on language, religion and culture.

Minorities based on language or religion is understandable and can be defined but it is very difficult to define the word ‘culture’. Culture is not a static phenomenon but it is a progressive and developing fact. Culture of a country or a community is much wider, larger and deeper, than its script or language. Culture is not a single item, either or area, language or script. It is vast ocean, including all the entirety of the heritage of the past of any community in the material as well as spiritual domain. It includes the arts, the learning, the science, the religion or belief and much else besides.85 Culture has been defined as a collective name for the material, social, religious and artistic achievements of human groups, including customs, traditions and behaviour patterns.

Since the word ‘culture’ has a very wide meaning and includes so many things, so if we examine minorities based on culture, there would be no end to it. Dr. S. Radha Krishnan remarked in this regard that "India is a symphony where there is, as in orchestra different instrument, each with its particular sonority, each with its special sound."86 So it is a vague and unsafe criterion to categories minorities on pattern of culture. The judgments of the Supreme Court disclose that
there are only two types of minorities which have been given protection under the Constitution of India; these are linguistic and religious minorities. An eminent sociologist, Dr. G.S. Ghurye, also supports this view: for the Constitution of India, minorities based on culture, race nationality are nonexistent and they being based only on language and religion and by implication of both in combination. 87

2.6.1 Linguistic Minorities

Humayun Kabir rightly remarked in his book, ‘Minorities in a Democracy’ that “Language groups are there, and it is no use trying to deny them. They will be there. Any attempt to suppress a language will, infect, create a violent revulsion and may be a cause for fissiparous tendencies."88

The framers of the Constitution were aware that this issue of language is a delicate matter. Rajendra Prasad, the first President of India, and President of the Constituent Assembly during the discussion on language pointed out:

“There is no other item in the whole constitution of the country which will be required to be implemented from day to day, from hour to hour, I might even say, from minute to minute, in actual practice... Therefore, when any member rises to speak on this language question, I would request him most earnestly to remember that he should not let fall in a single word or expression which might hurt or cause offence. Whatever has to be said should be said in moderate language so that it might appeal to reason and there should be no appeal to feelings or passion in a matter like this."89

To explain the term ‘linguistic minorities’ the Commissioner for Linguistic Minorities states: “Linguistic minorities are minorities residing in the territory of India or in any part thereof, having a distinct language or script of their own.”

The definition of the term ‘linguistic minorities’ came up for discussion before the Supreme Court and High Courts in some cases. For example, in D.A.V. College, Jullunder v. State of Punjab90 P. Jaganmohan Reddy, J., speaking for the Supreme Court observed:

“A linguistic minority for the purpose of Article 30(1) is one which must at
least have a separate spoken language. It is not necessary that language should also have a distinct script; there are in this country, some languages which have no script of their own, but nevertheless those sections of the people who speak that language will be a linguistic minority entitled to the protection of Article 30(1).”

In Jugal Kishore Kedia v. State of Assam, an interesting question arose whether the linguistic minority has to be determined only on the basis of the language spoken by the minority or in respect of any other language? Saikia, C.J., speaking for the Court, observed:

“A linguistic minority for the purpose of Article 30(1) is to be determined with reference to the language spoken by the community and not reference to any other language which the community wants its children to study.”

There are three basic problems faced by linguistic minority groups. First, the claim of the linguistic group that education is imparted to their children in their own mother tongues. Secondly, the use of minority language in the administration. Lastly, the problem of representation of the minorities in the State services. As regard the first problem, Article 350A was inserted by the Constitution (Seventh Amendment) Act, 1956, which provides, it shall be the endeavour of every state and every local authority within the State to provide adequate facilities for instruction in the mother-tongue at primary stage of education to children belonging to linguistic minority groups. Secondly, on the question of the use of minority language in the administration, Article 347 says that on a demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a state desire the use of any language spoken by them to be recognized by that state, direct that such language shall also be officially recognized throughout that State or any part thereof, for such purposes as he may specify. Lastly, as regards the problem of representation of the minorities in the State services, a policy has been adopted that language should not be a bar for this purpose and besides the use of state language; the candidates may be given a choice for using English or Hindi as medium of examination.
2.6.2 Religious Minorities

In India, the problem of religious minority is no less sensitive than that of the linguistic minority. The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death.95 There is nothing which is not religion. Not only in India but throughout the world, religion has played two distinct roles in society. On the one side, it had the effect of unifying large sections of people who would otherwise have remained fragmented into petty tribes. On the other, it has also caused severe division between man and man, group and group, nation and nation.96

The expression ‘minorities based on religion’ in Article 30(1) means, the principal basis of a minority must be their adherence to one of the many religions, and not a sect or a part of it and that the other features of the minority are subordinate to the main feature, its separateness because of its religion. For instance, Hinduism is a religion and Arye Samaj is only a sect of it. Islam is a religion and Shia or Sunnis are only sect of it. Christianity is a religion and Catholics or the Protestants are only a sect of it. V.S. Deshpande, J., in Arya Samaj Educational Trust, Delhi v. The Director Education, Delhi Administration observed:

“No Section or class of Hindus was ever referred to as a minority. In Article 30(1), therefore, the word ‘minority’ cannot apply to a class or a section of Hindus. However, some religious denominations have sought to have themselves judicially recognized as a separate religion, independent from Hinduism, so as to be entitled to be treated as minority for the purpose of the Constitutional protection secured under Article 30”.98

But the courts are not unanimous; they are rather shaky, in their approach while dealing with such claims. That bears testimony to the difficulties involved.

In Dipendra Nath v. State of Bihar,99 Brahma-Samaj has been held a minority based on religion. In Janki Prasad v. State,100 the claim of theosophical society has not been accepted. In M.C. Bandopadhyay v. State of West Bengal101
Ramkrishnaities have been held as minority based on religion, by the Calcutta High Court but the Supreme Court has rightly reversed the decision of the High Court.  

Several attempts have been made by the Arya Samaj to have it judicially recognized as a separate religion independent from Hinduism. Although the Supreme Court had not decided whether Arya Samaj was a distinct religious minority for the purpose of Art. 31(1) or a religious denomination for the purpose of Art. 26(1) (a) because it had held that Arya Samaj was a religious minority having a distinct script of its own which entitled it to claim the protection under Art. 30(1). This observation somewhat creates the impression, thus bringing an element of uncertainty, that the Supreme Court was prepared to treat Arya Samaj as a religious minority distinct from Hindus. On the one hand, the Delhi High Court in *Arya Samaj Educational Trust* case and *Gandhi H.U.M. Vidyalaya v. Director of Education* rejected the argument that Arya Samaj being a religious minority was entitled to protection of Art. 30(1). On the other hand, the Patna High Court, however, appears to have taken a different view of the position of Arya Samaj in *Arya Pratinidhi Sabha v. The State of Bihar*.  

To conclude, we can say that the Courts should strictly confine the benefit of Art. 30(1) to the well defined religious minorities which existed at the time of the framing of the constitution. Religious denominations ought not to be allowed to prevail as religions and should not be confounded as separate religion.  

From the above discussion what seems evident is that the judiciary has liberally interpreted the expression ‘religious minority’ to the extent that hardly any religious sect or denomination, however insignificant numerically and doctrinally, can be denied the right to establish and administer educational institutions of its own choice.  

In India, Hinduism is the religion of the majority, and Muslims, Christian, Sikhs, Parsees are major religious minorities. According to the Census of India (2001), the percentage of different important religious groups is as follows: Hindus 81.4%; Muslims 12.4%; Christians 2.3%; Sikhs 1.9%; Buddhists 0.8%;
Jains 0.4%; others 0.7%. Except Hindus all others are minorities in India. Now we shall study the position of these minority groups separately. 107.

2.6.2.1 Muslims

Before the partition of the country the Muslim community in India stood in the ratio of one to four of the whole population. In 2001 it is 13.4% of the total population of the country. Next only to Indonesia and Bangladesh, it has the largest Muslim population in the world. And no one can deny that in the Indian Union they are more than a protected minority; they are a significant community. In almost every State and Union territory of India they are in considerable number. In certain areas their proportion is larger than even national average, e.g. in Laccadive, Minicoy and Amindivi Island 94.37%; Jammu and Kashmir 65.85%; and in Assam, West Bengal, Kerala, Uttar Pradesh and Bihar they are 24.03%, 20.46%, 19.50% 15.48% and 13.48% respectively of their total population in the country. From this we observe that in India the Muslims are scattered throughout the length and breadth of the country. And in one Union territory and one State they are rather in majority. 108

2.6.2.2 Christians

The Christians constitute the third numerically important community in India. They are next only to the Muslims. They, forming only 2.3%, are in large numbers in the southern States of Kerala, Tamil Nadu and Andhra Pradesh. These three States together account for more than 60% of the country’s Christian population. The States and Union territories in which more than a fifth of the population is made up of Christians are Nagaland (66.76%), Meghalaya (46.98%), Goa, Daman and Diu (31.77%), Andaman and Nicobar Islands (26.35%), Manipur (26.03%) and Kerala (21.05%). 109 No doubt Christianity is a Western religion but the greater part of the community has been drawn from the lower strata of the Hindu community. And it is a fact that Christianity entered India before most of the Europeans had embraced this faith. St. Thomas came to India when many of the countries of Europe had not yet become Christian. 110 He was one of the 12 Apostles of Christ, who brought Christianity to India around A.D. 52.
2.6.2.3 Sikhs

Sikhism, as H.V. Hodson remarked, is a purified and protestant development of Hinduism. It is only 1.9% of the total population of the country and is in absolute majority only in Punjab; in all other States it is in minor fraction. Quite obviously the greatest concentration of the Sikhs, i.e. 78.62 per cent of the total Sikh population of the country, is in Punjab. The other States accounting for at least one per cent of the total Sikh population are the adjoining Haryana (6.29%), Rajasthan (1.33%), Delhi (7.16%) and Jammu and Kashmir (2.29%).

It is a religious and linguistic minority of India. Punjabi in Gurumukhi script is the language of the community. The Sikhs’ demand for a Punjabi Suba, which was primarily dressed up on the plea of the language, was conceded only in 1966 as a result of a relentless struggle by the community.

2.6.2.4 Parsis

Yet another microscopic religious minority is Parsis. They are so called because they originally came from Persia in about eighth century to avoid their compulsory conversion to Islam. The first wave of Parsi immigrants landed on the west coast of India in A.D. 706 in what is now the State of Gujarat. They took to the local language Gujarati, which they speak to this day. But although the Parsis continued to follow the teaching of Zarathustra in matter of religion, they became acclimatized to Indian culture in their manner of living. It is a racial and religious minority.

2.6.2.5 Anglo-Indians

There is still another small but important minority of India called Anglo-Indians. It is the only minority that possesses racial, religious and linguistic characteristics. What is an Anglo-Indian? The term ‘Anglo-Indian’ was officially adopted by the Government of India in 1911 it was used to describe persons of mixed descent. The Indian Constitution vides Art. 366(2) defines the Anglo-Indians as a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory
of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only.

It is clear from the definition that the term Anglo-Indian cannot be used for anyone whose father is Indian and mother, a European such a person is known simply an Indian. The religion of the community is Christianity and the mother-tongue is English. The community is concentrated mainly in big cities.

NOTES AND REFERENCES


7 *Ibid*, p. 56.


9 I. P. Massey, no. 4, p. 16.


11 General Assembly Resolution 637 (vii), cited in I. P. Massey, no. 4, p. 16.

14 Ibid, p. 18.
15 R. Stanvenhagen, no. 5, p. 59.
16 Art. 27, UN Covenant on Civil and Political Rights.
19 Ibid.
22 Henry K. Junckerstorff, no. 20, p. 32.
23 Ibid, p. 32.
24 Ibid, p. 32.
27 Ibid, p. 286.
29 Henry K. Junckerstorff, no. 20, p. 29.


39 Encyclopaedia Britannica, 15, 564; Collier’s Encyclopaedia, 13, 1963; 224.

40 Encyclopaedia Britannica, 15, 564 cited in Bhrigu Nath Pandey, no. 10, p. 44.

41 Bhrigu Nath Pandey, no. 10, p. 45.


44 Manju Subhash, no. 36, pp. 2-3.


51 *Ibid*.


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55  Anwarul Yaqin, no. 52, pp. 44-45.
56  Bhrigu Nath Pandey, no. 10, p. 43.
58  Office of the Registrar General & Census Commissioner, Census Data 2001-
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60  AIR, 1951, Assam 163.
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63  P. Singh, “Academic and Administrative Freedom of Minority Institutions in
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76  Arya Samaj Education Trust v. the Director of Education, Delhi,
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78 Manju Subhash, no. 36, pp. 1-17.
85 CAD Vol. 7, p. 896.
89 CAD Vol. 9, p. 1312.
90 AIR 1971, SC 1737.
91 AIR 1972, SC 1742.
92 AIR 1988, Gau 8.
93 M. P. Jain, no. 67, p. 44.
94 Bhrigu Nath Pandey, no. 10, p. 56.
95 CAD Vol. 7, p. 781.
97 AIR 1976, Delhi, 207.
98 AIR 1976, Delhi, 207.
99 AIR 1963, Pat. 54.
100 AIR 1974, Pat. 187.
101 90 CWN, 306.
104 AIR 1976, Delhi, 207.
105 AIR 1977, Delhi 240.
108 These population statistics are based on the report of the Census of India 2001, Office of the Registrar General & Census Commissioner, Religion Composition, New Delhi-110011, India.
110 Times of India, New Delhi, 9 December, 1955.
113 Kamlesh Kumar Wadhwa, no111, p. 15.
CHAPTER - III

RIGHT TO ESTABLISH EDUCATIONAL INSTITUTION

The right of the minorities under Article 30 (1) to ‘establish and administer educational institutions of their choice’ guaranteed three main rights:

1. The right to establish educational institutions;
2. The right to administer educational institutions; and
3. The right to determine the nature of their educational institutions at their own choice.

In Bouvier’s Law Dictionary, Third Edition, vol. 1, it is stated that the word ‘establish’ occurs frequently in the Constitution of the United States and is used in different meanings such as,

1. To settle firmly, to fix alterably, as to establish justice;
2. To make or form, as to establish a uniform rule of naturalization;
3. To found, to create, to regulate, at the Congress shall have power to establish post offices;
4. To found, recognize, confirm or admit as, the congress shall make no law respecting an establishment of religion;
5. To create, to ratify or conform, as, we the people, etc., do ordain and establish this Constitution.

After quoting the above meanings of the word ‘establish’ in Azeez Basha v. Union of India,¹ the Supreme Court said:

“Thus it cannot be said that the only meaning of the word ‘establish’ is to found in the sense in which an educational institution is founded and we shall have to see in
what sense the word has been used in our Constitution in this Article. In the Oxford
English Dictionary, Third Edition, the word ‘establish’ has a number of meanings:
ratify, confirm, settle, to found, to create. Here again founding is not the only
meaning of the word ‘establish’ and it includes creation also. In the Webster’s Third
New International Dictionary the word establish has been given a number of
meanings, namely, to found or base squarely, to make firm or it stable, to bring into
existence, create or make, start, originate. It will be seen that here also founding is not
the only meaning and the word also means to bring into existence."

The Supreme Court, then, went on to add that for the purpose of Article 30 (1)
the word ‘establish’ means ‘to bring into existence’ and so the right given by this
Article to the minority is to bring into existence an educational institutions, and if
they do so, to administer it.

Article (30) gives protection only to those educational institutions which are
established by the minorities. No other institutions can claim this right. To administer
an educational institution, it is necessary that such institution should be established by
these minority groups who claim protection. Whether an educational institution is
established by them or not is subject matter of proof and of judicial reviews. As
observed by the Supreme Court in S.P. Mittal v. Union of India ²- “The benefit of
Article 30(1) can be claimed by the community only on proving that it is a religious
or linguistic minority and that the institution was established by it.”

The Courts have tried to solve this problem on the basis of facts and
circumstances of each case. In every dispute where the protection of Art.30 is sought
to be made available, the court must be satisfied that the institution in respect of
which the claim to protection is advanced was in fact established by the minority. The
nature of proof or the quantum of evidence is, however, a matter for the court’s
discretion and satisfaction. Thus while an affidavit is sometimes accepted to be the
proof of the fact of establishment, in some cases the court have gone into the long
history of the establishment and development of the institution concerned for the purpose of ascertaining whether the same was in fact established by the minority concerned.3

3.1 Presumption in favour of Establishment

In some cases the courts have presumed that the institution in question had been established by a minority. They have accepted without any scrutiny the version of the claimant for the protection under Art. 30, and have made no attempt to go into the question of sufficiency or otherwise of the proof. The court have found even a brief statement indicating the fact of establishment to be sufficient for a presumption that the institution in question had been established by the minority concerned.4

In case of State of Bombay v. Bombay Education Society,5 the Supreme Court noted that the Bombay Education Society, which was a joint stock Company incorporated under the Indian Companies Act, 1913, and which represented the Anglo-Indian community whose mother tongue was English, had established the school in question, the Barnes High School in Nasik District in Bombay in 1924, and since then had been running the same. The Patna High Court in Arya Pratinidhi Sabha v. State of Bihar6 relied on the affidavit by the Sabha in support of its petition. The affidavit stated that the Arya Pratinidhi Sabha which was an organization of persons professing the Arya Samaj faith, had established several schools including a school for boys and another for girls at Mithapur, and had collected funds from amongst the members of the Arya Samaj as well as from the general public. The schools also received grants-in-aid from the state Government and, as regards the buildings, grant-in-aid were also made by the Patna Administration Committee. The High Court did not make any enquiry about the correctness of the statement and the proceeded to determine the main issues in contention on the presumption that the schools in question were established by the Arya Pratinidhi Sabha.
The proof supplied by the petitioners in *Methodist Boys Higher Secondary School v. Director of Public Instruction* \(^7\) consisted of an affidavit which the Andhra High Court apparently noted with approval thus: The Methodist Christians of Hyderabad or Telengana were a minority in the State of Andhra Pradesh. The Methodist Boys’ Multipurpose Higher Secondary school was established by South Indian Annual Conference of 1921 for the spiritual and secular benefits of the Methodist Christians of Hyderabad Episcopal area. The School was established with the funds of the Methodist church at a cost of about 18 lakhs of rupees out of which about two lakhs were granted by the Government towards capital investment. The Court proceeded to decide the matters in issue on the obvious assumption that the school as contended by the petitioners was established by the minority belonging to the Methodist Christians in Hyderabad. Similarly, in *Sidhrajbhai v. State of Bombay* \(^8\) the Supreme Court appears to have accepted as true the fact that the petitioners professed Christian faith, belonged to the United Church of Northern India and were members of a society called Gujarat and Kathiawar Presbyterian Joint Board which maintained forty two primary schools and a training college for the benefit of the Christian community. On the presumption that the Training College was established by the Christian minority the Court held that an order requiring the College to reserve 80% of the seats for Government nominees was violation of Art. 30.

In *Aldo Maria Patroni v. E.C. Kesavan* \(^9\) the Kerala High Court found the brief history, submitted before it, of the St. Joseph’s High School, Calicut, to be sufficient for a presumption that the school had been established in the late seventies or early eighties of the last century and had been catering to the educational needs of the Anglo-Indian community, but in 1936 had taken the steps towards Indianisation in view of bringing the benefits of Catholic education within the reach of Indian Catholic in the Diocese of Calicut. The Court found that “although the foundations of the school were somewhat lost in the remote past as to prevent us from affirming with much certainty its earliest recognizable outlines, nevertheless as for as can be
ascertained, it seems to be certain that it began at first as a Parish School. . . in about the year 1796. The School was superseded in 1861 by one conducted by the Christian Brothers”. The Court further found that the school later on in 1883 passed into the hands of the Jesuit Fathers of the Calicut Mission and after a long time came to be managed by the Roman Catholic Diocese of Calicut, and thus concluded that the School was established by a linguistic minority.

Similarly, the claim of the petitioners in G.D.F. College v. University of Agra that Gandhi Faize-Am College was established by the Muslim minority found implied acceptance with the Allahabad High Court as well as with the Supreme Court when the case came up in appeal before it. In the same way, the averment by petitioner that the C.N.L. Training School for men and women and B.L. Training College for Women were established by the Diocese of Madhya Kerala which was a part of the Church of South India, was accepted by the Kerala High Court in K.O. Verkey v. State of Kerala without any investigation into the correctness or other-wise of the claim of establishment. In W. Proost v. State of Bihar the Supreme Court observed without referring to any details in the averment that the St. Xavier’s College at Ranchi was established by the Jesuits of Ranchi. In the D.A.V. College cases the Supreme Court made a presumption in favour of the D.A.V. College being established in the Punjab by Arya Samaj. Neither the Supreme Court in State of Kerala v. Mother Provincial nor the Kerala High Court in Mother Provincial v. State of Kerala, against whose judgment the Supreme court was called upon to decide appeals, went into question of proof of establishment of certain educational institutions whose principal weapon of attack was Art.30(1) both at the High Court stage as well as in appeal before the Supreme Court. The Kerala High Court in Benedict Mar Gregorios v. State of Kerala, Mark Netto v. Govt. of Kerala as well as in St. Mary’s Church v. State of Kerala merely noted a brief statement in the averment that the institutions concerned were established and being run by the minorities.

In these cases the opposite party had raised no objection as to the fact of establishment, and thus possibly arose no occasion for the courts to insist upon the proof of establishment. Though the proof of establishment consistently and emphatically held by the courts to be a condition precedent for the application and exercise of the rights under Art.30, the attitude of the courts in the above cases seems to have been determined by the attitude of the opposite party which allowed whatever proof was submitted to go unquestioned.

### 3.2 Proof of Establishment

In the other category cases where the opposite parties to the cases have specifically challenged the claims to establishment which in turn have led the courts to weigh the merits of the claim in the light of the proof supplied.

Thus as early as 1951 the Assam High Court in *Ramani Kanta v. Gauhati University* rejected the contention of the petitioner that Bholanath College at Dhubri in Assam was established by a minority on the ground that there was no statement in the petition to the effect that it was established as a minority institution. The mere statement in the affidavit that the College was “to all intents and purposes a minority college” was found by the High Court to be insufficient to justify the claim. The Court appeared to accept the objection made in the counter-affidavit filed by the respondent, the Gauhati University, that at the time of the establishment of the College it was not even mentioned that it was to be managed by any minority; on the contrary donations were asked for on the understanding that the College would be for
the benefit of all the communities irrespective of their language or religion and in fact were collected from non-Bengali communities which included Assamese, Marwaris, Tribals and others. The Court found that even the name of the College did not suggest that it was founded for the benefit of Bangalies, a linguistic minority in Assam. It further found that the constitution of the Governing Body, as stated in the petition itself, was such that two members of it were to represent the donors which included non-Bengalis also, three members were to be co-opted from amongst the guardians of the students and one member was to represent the Marwary community. Again, the petition failed to state that there was any provision in the constitution of the Bholanath College that it was a college established for any linguistic minority. The Court accordingly concluded that in the absence of sufficient proof the institution could not be regarded as the one established by a linguistic minority and without the fulfillment of the condition of establishment a right to administer the same could not be conceded.27

The Patna High Court had to determine a similar issue in Dipendra Nath v. State of Bihar28 where the respondent questioned the claim of the Brahmo Samaj that the Samaj had established the Bankipur Balika Vidyalaya and being a religious minority had the right under Art.30(1) to administer the same. The main attack of the respondent, the State of Bihar, was that the Samaj never gave financial help to the Vidyalaya out of its funds and in support of this reliance was placed on an audit report. The petitioner, while conceding that though no contribution was made out of the Samaj fund, claimed that the Vidyalaya was established with subscriptions mostly raised by the members of the Samaj and were also collected from the general public. Chhoudhary J., speaking for the court, observed that the claim of the Samaj could not be negatived on the ground that the Samaj did not make any contribution to the school in question out of its own fund. It was found that the events starting from the inception of the school showed that it was established by the Samaj. The Court found that both the history of the Vidyalaya as well as the constitution adopted for the
Vidyalaya showed that it was established by and on behalf of the Samaj. It found that in about 1930 the Samaj conceived the idea of starting a Girl’s School and formed a provisional committee for drawing up a scheme at a meeting of the Executive Committee of the Samaj in October 1930. The scheme was drawn and approved at the General Meeting of the Samaj in November, 1930. It was resolved that the school be named as the Bankipur Balika Vidyalaya; and a Managing Committee for the year 1931 was also appointed. The Vidyalaya came into being in December 1930 as a primary school which later became a High School in 1944. The Court further found that the Samaj also adopted a constitution in 1944 which incorporated detailed provision for the governance of the school. These facts being based on records submitted by the petitioners the Court found no difficulty in accepting them to be sufficient proof of establishment.

The Supreme Court in the Azeez Basha case trace the history of the foundation of the Aligarh Muslim University and scrutinize at length the provisions of the Aligarh Muslim University Act, 1920, to ascertain if the University was in fact established by the Muslim minority. Contentions were raised on behalf of the petitioners that the Aligarh Muslim University was established by Muslim minority and, therefore, the Muslim had a right to administer it under Art.30(1). The challenge was mainly directed to certain amendments made in the Aligarh Muslim University Act, 1920, by the amending Act of 1965 and also of 1951. The Supreme Court sought assistance both from the history of the establishment of the University as well as the provisions of the Act of 1920 for taming its conclusion that the University was not established by the Muslim but was the creation of the Act of 1920.

It was to be seen from this that the two earlier societies, one of which was connected with the M.A.O. College and the other had been formed for collecting funds for the establishment to the University at Aligarh, were dissolved and their properties and right and also of the Muslim University Foundation Committee, which presumably collected funds for the proposed University were transferred and vested.
in the University established by the 1920-Act. These provisions will show that the three previous bodies legally came to an end every thing that they were possessed of was vested in the University.\(^{31}\)

Although the Court admitted that the nucleus of the Aligarh Muslim University was the Mohammadan Anglo-Oriental College which was till 1920 a teaching institution, it held that the conversion of that college into the University was not by the Muslim minority but it took place by virtue of the Act of 1920 which was passed by the then Central Legislature.\(^{32}\)

It was after the University Grants Commission Act, 1965, that no private individual could grant a degree in India and that the Muslim minority could established a university before the Constitution came into force, the degrees conferred by such a university were not bound to be recognized by the Government. And without recognition of degrees the establishment would have been meaningless.

The Court of the University would consist only of Muslim could not be a persuasive force for the Court. It observed that the provision did not necessarily mean that the administration of the University was vested or intended to be vested in the Muslim minority. The important provisions show that the final power was in the hand of Governor-General-in-Council.\(^{33}\)

The Supreme Court in the *Azeez Basha* case found the “proof” to be an insufficient justification for the claim that the Aligarh Muslim University owed its establishment to the Muslim minority and as such it was entitled to administer the same by virtue of the right secured to every religious minority under Art.30(1).\(^{34}\)

As a result of representations from various Muslim Organizations, university teachers and students, and persistent demand both inside and outside Parliament for the restoration of basis characters of the university, the University Act, 1920 was amended in 1972 and again in 1981, making substantial changes in the 1920 Act. The
word ‘establish’ was omitted from the preamble of the Act so as to whittle down the
effect of Azeez Basha case in relation to Aligarh Muslim University.\textsuperscript{35}

Two years after the Azeez Basha decision, the Supreme Court was again called
upon to determine the sufficiency of the proof supplied in support of a claim to
establishment of an institution which had come into existence more than 100 years
ago. This time it was Church Missionary Society Higher Secondary School,
Bhagalpur the question of whose acceptance as a minority institution was the main
issue before the Supreme Court. The case was \textit{S.K. Patro vs. State of Bihar}\textsuperscript{36}
which was an appeal against a decision of Patna High Court in \textit{S.K. Patro vs. State of
Bihar}\textsuperscript{37}. As the manner in which the High Court dealt with the evidence adduced and
the inference which it drew from that evidence for its judgment found disapproval
with the Supreme Court, a reference to the judicial process adopted by the High Court
may not be irrelevant here. The petitioners stated before the High Court that the
Church Missionary Society Secondary School at Bhagalpur was established in 1854
as a Primary School at Champanagar in Bihar. In 1887 it was raised to a High School.
The property where the school was run was purchased by the Church Missionary
Trust Association, a company registered and incorporated in England in 1885 from an
Indian Proprietor. They further stated that the school had been controlled and
managed by the Church Missionary Society of London through a Managing
Committee which had Christian character. As per special arrangements with the
Government, the key posts of the president and the secretary had always been in the
hands of the Society. The Principal of the School had all along been a Christian and
had acted as a representative of the Church and the school had been financed and
maintained by the Church. It was further stated that in 1957 the Church Missionary
Society, London, passed a resolution by which, while claiming to have founded and
supported certain Christian schools situated in the Bhagalpur Diocese in the State of
Bihar and claiming to have held the position of proprietor and founder of these
schools, wished to hand over the responsibilities to the Church of India and to appoint
the Diocese, at whose head was the Bishop of Bhagalpur, to be the proprietor of these schools with full authority, though the Diocesan Trust Association or other appropriate domestic organization, to direct their policy and carry on all negotiations with Government. The petitioners further stated that from time to time the authorities of the Education Department on inspection of the school had noted in the Visitors Book that it was a Mission School, that regular scripture classes were held in the school and the lessons on the life and teaching of Jesus Christ were taught and examinations were held in the subject for all student as was apparent from the examination programs and the annual returns and the Church Missionary Gleaners of 1905, 1911, 1914, that every morning Lord’s Prayers were held from prescribed Church books, and that meeting of the Managing Committee of the school were always preceded and followed by prayers from the “Book of Common Prayer”. They, therefore, asserted that the C.M.S. School being a Christian minority institution, the order issued by the Education Department on May 22, 1967 requiring the School to reconstitute the Managing Committee of the School was against Art.30(1) and as such was not binding.

The High Court proceeded to negative the claim that the C.M.S. School was established by the Christian minority. On appeal, the Supreme Court reversed the judgment of the High Court observed that there was on record sufficient evidence about establishment in 1854 of the Lower Primary School at Bhagalpur. Although substantial assistance was obtained from the Church Missionary Society, London, but on that basis it could not be said that the school was not established by the local Christians with their own efforts and was not an institution established by a minority. It was unnecessary to go into the question whether all the persons who took part in establishing the School in 1854 were Indian citizens. It noted that prior to the commencement of the Constitution there was no settled concept of Indian citizenship and it could not be said that Christian Missionaries who had settled in India and the local Christians residents of Bhagalpur did not form a minority community. Noting
the difference in the phraseology used in Art.29 and 30 the Supreme Court emphasized that though Art.29 could be claimed only by Indian citizens, there was no such condition in Art.30.\textsuperscript{38}

In \textit{State of Kerala v. Manager Corporate Management of Schools of the Diocese of Palai},\textsuperscript{39} a Division Bench of the High Court had held that these rules were inapplicable on minority educational institutions. The counter-affidavit denied the claim that the school was established by a minority. The sole ground of contest was that the application for sanction for the establishment was made by one K.P. Pathrose in his individual capacity in 1953-54 and the sanction for opening the school was granted only on that basis, and this fact could be testified from the register of applications for the year 1953-54 which contained the entries of application of K.P. Patrose. It was also said that to the knowledge of the education department no community had after the establishment of the school claimed any interest in the school. The High Court stated that for entitlements to the right under Art.30 it must be proved by satisfactory evidence that the institution concerned was established by minority. It observed that “the mere fact that the school was founded by a person belonging to a particular religious persuasion is not at all conclusive. The institution must be shown to be one established and administered by or on behalf of the particular minority community”.\textsuperscript{40} The Court found that the name given to the school was also of some significance because it had been named after a former Maharaja of Cochin, which showed that the school was intended for the general benefit of all the citizens. It also found lacking any evidence to show that the local Church or the Christian community was in any manner associated with the founding of the school or its day to day subsequent administration. Nor was it made out that any activity was carried on in the institution which was intended to promote the object of conserving the religion or culture of the particular minority.

The \textit{Arya Pratinidhi Sabha} case presented a different story. In that case the petitioners asserted in the averment that the Musaddi Lal Arya Kanya Uchter
Madhyamic Vidyalaya was established by the persons professing Arya Samaj faith who were a religious minority in the State of Bihar. It was said that the school was established in 1957 at Mokamah in a building constructed on a land belonging to the Arya Smaj. The object of the school was the propagation of Vedic literature and Dharma apart from modern education to girls of the locality on the lines and ideals of Swami Dayanand, the founder of Arya Samaj. It was further said that the school building was constructed with the funds collected by the persons professing the Arya Samaj faith as well as the contribution of the local people. These assertions were sought to be negative on behalf of the State of Bihar on an entirely different version in the counter-affidavit. It was said that in 1962 the education department sanctioned recurring and non-recurring grants for the establishment of a State subsidized Girls Higher Secondary School. In 1963 the Managing Committee of the proposed Musaddi Lal Arya Kanya Higher Secondary School passed a resolution to hand over the building of the school to the Government for establishing a State Subsidized Girls Secondary School on the condition that the school would be named as "Musaddi Lal Arya Kanya State Subsidized Higher Secondary School". The Committee further resolved that except changing the name of Government could take all necessary action for the management of the School. Therefore the entire management of the School was handed over to the Government with a provision that the managing committee would be governed by the rules framed by the Government and the Arya Samaj will have no control over it. It was also contended that the School was established by the local people and that its properties did not belong to the Arya Samaj. It was also denied that the teaching was imparted in according with the Vedic culture and religion or that Havan or Vedic prayers were offered in the school. But the main contention of the respondents was that the school was not established in 1957 but in 1961 and for which they relied on a letter written by the Secretary of the School to the Secretary, Board of Secondary Education, Bihar the material part of which was as follows:
The public of Mokamah felt extreme necessity for a High School for female education since long. Though there are three schools running in the different parts of the town where some of the people do not desire to get admitted their girls for education . . . meant for boys’ education. Seeing the long felt desire of the public a proposed High School has been started at Mokamah for female education since the year 1961."

Relying on this letter and referring to the above contents the Patna High Court reached the following conclusion:

“It is, therefore, evident that this school was started at Mokamah for female education in the year 1961 . . . It is not possible to accept that the school was established by the Samaj.”

The Court also referred to the resolution of the Management Committee, by which the Management of the School had allowed the School to convert into a State Subsidized School on the condition that the name of the School would not be changed, for its conclusion that the managers of the School were mainly interested in naming the school and had decided to make the school a State Subsidized School which for all practical purposes was a constituent School of the Government. The Court emphasized that donations were raised from general public of the locality and amongst them the Arya Samaj was also one of the contributors. The contribution from others were also important factor which helped in arriving at the conclusion that the Arya Samaj had not established the School. Regarding one such donor the Court observed:

“There is yet another important feature and circumstances indicative of the character of the School and that is the donation of Rs.5, 400, from the Notified Area Committee, Mokamah. . . . In this view of the matter and on these facts it cannot be said that the Samaj . . . had established the School, although the Samaj like many
other donors may have been very enthusiastic element in the establishment of the institution.\footnote{44}

In \textit{A.M. Patroni v. Asstt. Education Officer},\footnote{45} the first question to be determined by the Kerela High Court was whether St. Peter's U.P. School, Tellicherry, was an institution established by the Roman Catholic. Certain facts about the establishment the institution were admitted by the respondents, namely, that the School was established in 1891, that the school was situated within the compound of St. Peter's Church, that it bore the name of the Patron of the Church. But the respondents took the stand that the School was neither established by the Catholic Diocese of Calicut nor was it being administrated by it. The petitioners stated that until 1923 the area where the School was situated was part of the Catholic Diocese of Mangalore. In 1923 when this diocese was bifurcated into the Catholic Diocese of Mangalore and the Catholic Diocese of Calicut, the Church and the school established by Catholic Diocese of Calicut were passed on to the Catholic Diocese of Calicut. They said that the school accordingly belonged to the Roman Catholics now forming the Catholic Dioces of Calicut. The respondents' argument was that this school was established by the Basel German Mission under the name "Basel Garman Fisher Village School" which the High Court rejected on the basis of the evidence to the contrary contained in several documents supplied by the petitioners. Another point raised by the respondents was that the fact that the School was having successively a non-Christian as the Headmaster gave strength to the inference that the School was not established by the Christian community. They took recourse to the observations of the same Court in \textit{A.M. Patroni v. E.C. Kesavan}\footnote{46} where the Court had emphasized the importance of the post of headmaster. But the High Court in the instant case rejected this argument also saying that in the earlier case this was only one of the circumstance relied on to show that the continuous holding of the post of the headmaster by Christians was a fact which strengthened the proof that the institution in question was established and administered by the Christians. It was an additional proof, but the
absence of that would not lead to the inference that the School was not established and administered by the Roman Catholics. The Court concluded:

“For establishment, it is not necessary that the school must be constructed by the community. Even if the school previously run by some other organization is taken over or transferred to the Church and the Church recognizes and manages the school to cater to and in conformity with the ideals of the Roman Catholics it can be safely concluded that the school has been established by the Roman Catholics.”

In *A.M. Patroni v. E.C.Kesavan* the Kerala High Court had gone a step further in accepting St. Joseph’s Boys High School, Calicut as an institution established by the Catholic minority. The petitioners had stated before the Court that the School dated back to the late seventies and early eighties of the last century. The School was opened to cater to the educational needs of the Anglo-Indian community only, but in 1936 decision had been taken to extend through the School the benefits of Catholic education to the Indian Catholic also in the Diocese of Calicut. The petitioners themselves admitted that the foundation of the School were somewhat lost in the remote past as to prevent them from affirming with such certainty its recognizable outlines. However, they claimed that as far as possible they could ascertain that the School at first began as a Parish School and was opened in about the year 1876. The School was superseded in 1861 by one conducted by the Christian Brothers. In 1833 the management of the School passed into the hands of Jesuit Fathers of Calicut Mission. It became a High School in 1908 and continued to be governed by the Code of European School till 1948 when new pattern of Indian education was introduced. The High Court accepting the above facts to be true made the finding that for more than eighty years the management of the School had been in the hand of the Jesuit Fathers of Calicut Mission, and as such the School was a minority institution.

In *Panna Lal v. Magadh University* also the main question that came up for determination by the Patna High Court was whether Rameshwardas Pannalal
Mahavidyalaya, Patna, was established by the Rajasthani Community who claim to be a distinct linguistic minority in Bihar. The petitioners stated that the residents of Patna city belonging to Rajasthani origin held a Priti Sammelan at the residence of petitioner No.1 which discussed the need of a girl’s college. Petitioner No.1 was requested to take step for raising funds for the establishment of the proposed college for which a committee consisting of three persons including petitioner No.1 and No.2 was constituted. At another meeting petitioner No.1 submitted a list of twenty three donors who had each contributed Rs.25000 each. After the affiliation of the college with the Magadh University a Governing Body was constituted which included two members nominated by the Magadh University as donor-members in the category of Rs.25000, an M.L.C. as legislature-member, one member as University representative, one member as Government representative, petitioner No. 1 in the category of donors of Rs. 1000. Later, an educationist was also included. The petitioners stated that they took keen interest in the establishment and administration of the college and never hesitated in conforming to the requirements of the Magadh University statutes and the Act. They also claimed that they had a fair representation on the Governing Body of the College and they adopted, for the administration of the college, rules applicable to the affiliated colleges without ever surrendering their right of administration. They said that their right was infringed when an order was issued in 1974 appointing an ad hoc committee. The main question for decision before the Patna High Court whether this college was established by the linguistic minority. Several factors weighed with the Court in forming its opinion that the college was not established by a minority. It observed that in the writ application it was stated that the ‘citizen’ of Patna city suffered for long for want of a good educational institution. That had reference to ‘citizens in general’ and not a section i.e. the Rajasthanis or Marwaris. The idea was, therefore, to establish a college for girl’s education generally. Again, the petitioners were not categorical, at the time of the fund was to be confined and kept within the Rajasthanis as it was raised by a general invitation to the public. It was decided to name the institution after the name of the father of
petitioner No. 1 and that “showed that the institution was named after an individual and not after a particular section or community. The intention was not manifest that it was being established for or after community”. Moreover those who inaugurated the function of establishment of the college or those who presided over or gave vote of thanks were all non-Rajasthanis. The first Governing Body, constituted before the affiliation, included at least three non-Rajasthanis, included at least three Rajasthanis out of a total of eight members. This clearly showed that the concept of exclusiveness in the matter of administration was absent from the constitution of the first Governing Body itself. Moreover, the Court observed that the application for affiliation mentioned nowhere that the college was exclusively meant to be administered by the Rajasthan community. It pointed out that after the affiliation a regular Governing Body was constituted in accordance with the statutes of the Magadh University and this body continued to administer the college during 1970 to 74. The court made the finding that what the petitioners were concerned with was a ‘fair representation’ on the Governing Body and that for all intents and purpose the college came to be governed by a Governing Body as was provided for any affiliated college in accordance with the Magadh University statutes. It insisted that if the college had been established by the minority community as the petitioner claimed “the intention should have been expressed in the application for affiliation itself. . . Having not done so and having accepted the rules and statutes of the Magadh University Governing the constitution of the Governing Body, the petitioners cannot now be allowed to turn round and say that the college was established by a minority community”. The Court also emphasized that out of thirty one persons who had made donations for founding the college only three had come to file the writ application and they did not even say that they had come so in any representative capacity, and that it was difficult to know what was the intention of the whole body of thirty one persons who had made donations for the establishment of the college. The Court found itself unaware of the intention of the donors who had not joined hands with the petitioners in filing the writ petition. The Court took the view:
“In this case from the very beginning the member of the college decided to allow it to be governed by the Statutes of Magadh University and by a Governing Body composed of a cross-section of the people of Patna city. They decided not to manage and administer the college as a minority institution and on that basis obtained the benefits occurring under the Magadh University Act and its Statutes. The case being worse on facts than the one cited above, naturally, the protection under Article 30 of the Constitution cannot be available to the petitioners.”

In Deccan Model Education Society, Bangalore v. State of Karnataka and another, certified copy of the Memorandum of Association or the petitioner Society was made available to the Court. According to the certificate issued by the Registrar of Societies in Karnataka, Bangalore the object of the society was:

1. To run educational institutions like Nursery, Primary and High School in Bangalore.
2. To introduce, adopt and follow such plans as are conducive to the moral growth of Christian children of school going age in Bangalore.
3. To carry on such other cultural activities for the benefit of the Christians in Bangalore to help the poor and jobless Christian ladies.

In the list of Managing Committee members who were seven in number, it was seen that they were all Christians. Referring to the aforesaid facts, M.P. Chandrakanaraj, Urs, J. held that:

“Therefore one has to come to the conclusion on the facts of this case that the petitioner is a minority institution and therefore entitled to assert its fundamental rights under Article 30(1) of the Constitution.”

To be recognized as a minority school there must be something related to the objects of Article 30(1) of the Constitution, as was held in A.P. Christians Medical Educational Society v. Government of Andhra Pradesh. In this case a society,
styling itself as the Andhra Pradesh Christian Medical Educational Society, was recognized on August 31, 1984. The first of the objectives mentioned in the memorandum of association of the society was to establish, manage and maintain educational and other institutions and impart education and training at all stage, primary secondary, collegiate, post graduate and doctoral as a Christian Minorities Educational Institution'. Another object was 'to promote, establish, manage and maintain Medical Colleges, Engineering colleges, Pharmacy colleges, Commerce, Literature, Arts, Sciences and Management colleges and colleges in other subjects and to promote allied activities for diffusion of useful knowledge and training. Other objects were also mentioned in the Memorandum of Association.

The society approached Indian Council of Medical Education State Government and Osmania University for permission and affiliation. On the refusal of Andhra Pradesh Government and Osmania University and grant affiliation and permission to the Society to start a medical college, the society filed a writ petition in the High Court of Andhra Pradesh seeking a writ to quash the refusal of permission by the Government of Andhra Pradesh and to direct the Government to grant permission and the university to grant affiliation. The claim for the issue of the writ was based on the fundamental right guaranteed by Article 30(1) of the Constitution. The writ petition was dismissed by the High Court by a speaking order on the ground that there were no circumstances to justify compelling the Government to grant permission to the society to start a new medical college in view of the restriction placed by an expert body like a Medical Council of India that no further medical college should be started. The society had filled ban appeal by a special leave of the court under Article 136 of the Constitution.

It was contented by the society in the Supreme Court that any minority, even a single individual belonging to a minority, could found a minority institution and had the right so to do under the constitution and neither the Government nor the University could deny that society's right to establish a minority institution. They
may impose regulatory measures the interest of uniformity, efficiency and excellence of education. Justice O. Chinnappa Ready speaking for the Court said;

"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 of profess, practice and propagate religion to religious minorities and the rights to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic to establish and administer educational institutions of their choice. These institutions must be educational institutions of minorities in truth and reality and not mere marks phantoms they may be institutions intended to give the children of the minorities the best general and professional education, to make them complete men women of the country and to enable them to go out in to the world fully prepared and equipped. They may be institutions where special provision is made to the advantage and for the advancement of the minority children. They may be institutions where the parents of the children of the minority community may expect that education in accordance with the basic tenets of their religion would be imparted by or under the guidance of teachers, learned and stripped in the faith. They may be institutions where the parents expect their children to grow in a pervasive atmosphere which is in harmony with their religion or is imperative is that their must exist some real-positive index to enable the institution to be identified as an educational institution of the minorities."^54

Their Lordship also observed;

"The right guaranteed by Article 30(1) gives the minority the full liberty to establish educational institutions of its own choice. If the minority community express its choice and opts to join the scheme of national educational policy, it must naturally abide by the terms of that policy unless the terms require the surrender of the right under Article 30(1)"^55
The question whether the petitioner trust registered in Tamil Nadu, could apply for permission to start an educational institution in another state for the benefit of minority communities came up before the Supreme Court in *Vellore Educational Trust v. Andhra Pradesh*. The respondent had refused permission to the Tamil minority’s trust registered in Vellore, Tamil Nadu, to start an engineering college in Andhra on the ground that the government policy was not to grant permission to start new engineering colleges. The High Court did not interfere but the Supreme Court found that the respondent had, subsequent to the rejection of the trust’s application, allowed the starting of two engineering colleges. The Court also found no substance in the respondent’s plea that the trust was registered in Tamil Nadu. So, the Court set aside the application afresh under the law.

In *re Kerala Educational Bill*, 1957 it was argued by the State of Kerala that the protection guaranteed by Claus (1) of Article 30 extends only to educational institutions established “after the commencement of the Constitution”. Dealing with the contention, S.R. Das, C.J. held that,

“We do not think that the protection and privilege of Article 30(1) extends only to the educational institutions established after the date our constitution came into operation or which may hereafter be established. On this hypothesis the educational institutions established by one or more members of any of these communities prior to the commencement of the Constitution would not be entitled to the benefits of Article 30(!). The fallacy of this argument becomes discernible as soon as we direct our attention to Article 19(1) (g) which, clearly enough applies alike to a business, occupation or profession already started and carried on after the commencement of the Constitution. 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. I 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 cover the right to maintain pre-Constitution religious institutions." Justice Khanna observed: "Article 30(1) of the Constitution made no distinction between the minority institutions existing from before the Constitution or established thereafter and protected both."^58

In *Arya Samaj Shillong v. State of Meghalaya*,^59 the Guhati High Court has held that the Arya Samaj Hindi Kanya Vidyalaya School in Meghalaya is a minority institution and therefore the state has not power to change the constitution of the Managing Committee of the school. Arya Samaj in Meghalaya is both linguistic as well as religious minority. It has a distinct entity. Hence it was held that the notification directing the school to follow instructions the change of the constitution of Managing Committee was unconstitutional and invalid.

In the case of *T.M.A. Pai foundation v. State of Karnataka*,^60 a question was raised, "Is there a fundamental right to set up educational institutions and if so, under which provision?"

The answering of the court was: "With regard to the establishment of educational institutions, three articles of the constitution come into play; Article 19(1)(g) gives the right to all the citizens to practice any profession or to carry on any occupation, trade or business; this right is subject to restrictions 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 right on all citizen and religious denomination to establish and maintain educational institution. There was no serious dispute that the majority community as well as the linguistic and religious minority would have a under Article 19(1)(g) and 26 to establish educational institutions. In addition, Article 30(1), in no uncertain terms, gives the
right to the religious and linguistic minorities to establish and administer educational institution of their choice.”

In the case of *P.A Inamdar v. State of Maharashtra*, the question was raised, can there be an enquiry to identify the person or persons who have really establish the institution? With regard of this question, the Supreme Court has taken the proposition of Pai Foundation. What would happen if a minority belonging to a particular state establishes an educational institution in that state and administers it but for the benefit of members belonging to that minority domiciled in the neighboring State where the community is in majority? Would it not be a fraud on the constitution? In *St Stephen’s*, Their Lordships had ruled that Article 30(1) is protective measure only for the benefit of religious and linguistic minorities and “no ill-fit or camouflaged institution should get away with the constitutional protection.” The question need not detained us for long it stands answered in no uncertain term in Pai Foundation. Emphasizing the need for preserving its minority character so as to enjoy the privilege of protection under Article 30(1), it is necessary that the objective of establishing the institution was not defeated.

In weighing the sufficiency or inadequacy of the proof of establishment, the following factors, singly or in combination with each other have, in the main, determined the attitude of the courts. The factors are; name of the institution, persons involved in the establishment, sources of funds, subjection to legal provisions, expression of intention.

What particular factor has received what emphasis in the court’s estimation appears to have depended upon the circumstance of each case, upon the nature of the facts in dispute and of course, upon the court’s own discretion. But it is notable at the outset that in requiring proof of establishment a lavish use of discretion has resulted in opinions which not only fail to achieve other. The failure to evolve jurisprudence on such an important aspect of minority right as the kind and quantum of proof needed in
support of a claim to establishment explains the reason why the courts have failed, at any rate in some cases, to enforce the commitment of the constitution.

3.3 Name of the institution

The name of the institution may convey the intention of those who found or ‘establish’ it, though by no means it may be stated as a general rule. What, however, may somewhat be generalized is the fact that where an institution is named after a particular community, it does convey the idea of the institution being established by or for that community. On the other hand, where an institution is not so named, or named after an individual, or an organization, or an entity, the same idea may or may not be inferable, and the attending circumstances would perhaps be the main determination in this situation. But the judicial opinion on this aspect is neither uniform nor do they seek to state a definite proposition, nor are beyond the reach of argument.

Thus in the Ramani Kanta case the petitioners failed in their claim that the Bholanath College in Assam was established by the Bengalis, one of the ground of rejection of the claim by the Assam High Court being that the name of the college did not convey the idea of its being founded “for the benefit of Bengalis” in Assam. The same factor became one of the ground for the Kerala High Court in the Rajershi case for refusing to accept the contention of the petitioners that Rajershi Memorial Basic Training School was established by the Christian minority in Kerala as in its view the School was named after a former Maharaja of Cochin which showed that that the School was established “for the general benefit of all the citizens”, and as such was not entitled to claim the benefit of Art. 30.

But the view that if an institution is named after an individual, it is a sure indication that the institution was established for the benefit of ‘all the people’ is neither supportable on other judicial authorities nor does it state a rational
proposition. For, if the name of the institution convey the intention of ‘exclusiveness’, the case like the *Azeez Basha* and the *Arya Pratinidhi Sabha* would have been decided differently. In the former case the Supreme Court, in the presence of other circumstances on which it relied for its decision, did not give even a casual attention to the name of the institution in question, Aligarh Muslim University, which otherwise seems to convey the intention that at the time of its establishment the main beneficiary contemplated was the ‘Muslim’ community. The Court did not find itself attracted by the word ‘Muslim’ as conveying the intention of those whose efforts had brought the institution into being.

In the latter case, the *Arya Pratinidhi Sabha* case, the Patna High Court did pay no consideration to the name of the School- the Musaddi Lal Arya Kanya Vidyalaya- while forming its opinion that allowing the school to be governed by the Government Rules and by accepting the help of the Government for making the school a State Subsidised School the managers of the School had decided to hand over the management to the Government and had thus displayed the impression that the school had not been established by or for the Arya Samajis in Bihar. The Court even found no substance in the resolution of the Managing Committee which, while allowing the school to have the status and benefit of a State Subsidised School, had insisted, as a condition precedent, on retaining the name of the school, and even went to the extent of using the same resolution against the petitioners saying that the petitioners were interested only in retaining the name of the institution and had deliberately allowed the same to be controlled by the Government. The name of the institution contained the name of an individual as well as the words ‘Arya Kanya. The latter obviously referred to the girl-folk belonging to the Arya Samaj, and should have been taken by the Court as expressing the intention of the founders of the School.

In fact both the ‘denial’ on the part of the courts in *Azeez Basha and Arya Pratinidhi Sabha* cases as well as the ‘reliance’ on the part of the courts in *Rajershi, Ramani Kanta and Panna Lal* cases leave room for criticism. For, if the name of an
institution incorporating the name of the community concerned is dismissed as an unreliable indication of the intention behind the establishment, a name lacking any such incorporation must also not to rely upon as indicative of a contrary intention.

3.4 Persons involved in the establishment

The right “to establish” under Art. 30(1) is regarded a collective right available to a collectivity entitled to be designated as “minority” is a non-issue, and there seems to be no disagreement among the judicial opinions. Where institutions have been established by individuals and the courts have, of necessity, had to address themselves to the question: In what capacity had the claimant/claimants established the institution in question—representative of individual? In the absence of any clear cut distinction between the two, the courts have used different scales, leading them sometimes to different and even logically unjustifiable conclusions.

The Kerala High Court in the Rajershi case denied the protection of Art. 30 on the basis, as it stated, that the institution in question owed its establishment to an individual. The application for sanction for the establishment of the institution was made by one K.P. Pathrose in this individual capacity, that the sanction was granted only on the basis of (a fact testifiable from the register of applications maintained by the education department) and that to be knowledge of the education department no community had after the establishment of the institution claimed any interest in the institution. The Patna High Court in the Panna Lal case drew closer to this observation when it insisted that if the college in question had been established by the minority community, the Rajasthanis in Bihar, “the intention should have been expressed in the application, for affiliation itself”.

But then they raise certain issues to which they disclose no clues. Some of the issues that the judgments raise may be stated thus: Should the application be made in the name of the community? Should several members jointly file an application?
Under what kind of authorization an individual may be regarded as acting in a ‘representative capacity’? If a philanthropic individual wishes to serve his community through an educational institution, is he bound to express such intention in the presence of other circumstances? If immediately after bringing into being an institution other members of the community take interest, contribute funds, and expand the institution, would such institution still not be regarded to have been established by a minority?

Nor is any light thrown on such issues by the Patna High Court in *Arya Pratinidhi Sabha* case decided the same year as the *Rajershi* case. One of the grounds of rejection by the High Court of the claim that the Arya samaj had established the Arya Kanya Mahavidyalaya was a letter written by the Secretary of the School to the education department which had stated that the school had been established in difference to the “long felt desire of the public” to have an institution for female education.

Three years after this decision, the same High Court in *Panna Lal* case followed exactly the same approach, as the Court had followed earlier, in turning down the petitioner’s contention that the college in question was established by the Rajasthanis in Bihar, a linguistic minority. The Court took such factors into account as that the writ application had stated that the ‘citizens’ of Patna city had suffered for long for want of a good educational institution, and such frivolous factors as that those who had inaugurated the function of establishment of the college or those who had presided over or had passed vote of thanks were all non-Rajasthanis. “The petitioners cannot be allowed to turn round and say that the college was established by a minority community”, implying that the petitioners had established the institution in their individual capacity. 71

Supreme Court was in fact confirming a Full Bench decision of the Kerala High Court rendered the same year in *Mother Provincial v. State of Kerala* 72 where the
High Court, referring to private Christian Colleges in some of the districts of Kerala, had to make a declaration that they are institutions established and administered by religious heads like Bishops or Heads of religious orders of the Roman Catholic and other Christian Churches for, and on behalf of the particular religious minority concerned. The persons who establish the institutions and who administer them are themselves members of a religious minority of this country and act only as representatives of that minority.

This observation tends to create the impression that only the ‘heads’ can act in a ‘representative’ capacity, through by accepting that ‘membership’ to a particular minority group gives the individual the status of a ‘representative’, the observation has the effect also of narrowing down the distinction between a ‘representative’ capacity and an ‘individual’ capacity.

The Kerala High Court speak of the same thing: Right conceded to minority community belongs to and can be exercised by any member of the community or association or body of individuals. The following propositions thus seem to be well established:

1. That the right to establish belong to minority but can be exercised by any member thereof;
2. That an individual member of a minority can establish an institution for or on behalf of a minority;
3. That an individual assumes the status of a representative of a minority by the fact of his membership to it;
4. That participation of other members of the minority in the process of establishment is not essential for inferring a positive intention;
5. That participation of outsiders in the process of establishment is an irrelevant consideration for inferring a negative intention.
3.5 Sources of Funds

Collection of funds has sometimes received consideration by the courts while determining the fact of establishment. It has served as a factor helping the courts in their conclusions while weighing the evidence supplied or seeking to infer the probable intention behind the establishment. Funds for the establishment of an institution may have been provided exclusively by the members of the minority or a part of the funds may have been collected from other sources also. The courts are not unanimous. Nor do those which provide answer in the affirmative display a uniformity of approach in placing emphasis upon the fact of collection of funds.

The Supreme Court in the *Azeez Basha* case while declaring the Aligarh Muslim University an institution not established by the Muslim minority took care to note that donations for the establishment of the University were also collected from persons who were not the members of the Muslim minority. It ignored the more important fact that an initial sum of Rs.30 Lakhs was collected by the Muslim University Foundation Committee, formed by the Muslims, which acted under the guidance of the Muslim University Association, formed by the Muslims, with the object of establishing a Muslim University though some money was donated by non-Muslims as well. It nowhere is a condition under Art. 30(1) that all the sums required for the establishment of an institution must come exclusively from the minority concerned. If all the funds are collected by the members (or a member) of the minority from the members of the minority it does provide an additional evidence of the fact of establishment. But if the contributions by non-members are taken by the courts as evidence of a contrary intention it amounts to nothing else than reading into Art. 30(1) a limitation which in fact must remain non-existent.

The Supreme Court, however, soon had to depart from this narrow view of Art. 30, which the *Azeez Basha* Court appeared inclined to take, and in the *S.K.Patro* case emphasized that the fact that the funds were obtained from the United Kingdom
for assisting in setting up and developing what was known as the Church Missionary Society School was not a ground for denying the protection of Art. 30(1). If the character of minority institutions is not affected by the participation of other communities in the benefits which such institutions may bring, there can obviously be no objection if the other communities help establish such institutions by extending cooperation including assistance through contributions.

In the Ramani Kanta case the Assam High Court made the finding that the donations for the Bholanath College were collected from non-Bengalis also which showed as additional evidence that the institution was not established exclusively by the Bengali minority. The Patna High Court in the second Dipendra Nath case did just the opposite of it in refusing to accept the argument of the State of Bihar that the Brahmo Samaj claimed to have established the Bankipur Balika Vidhyalaya had never given any financial help to the school out of its fund, a fact conceded by the petitioner. The Patna Court emphasized that as the events starting from the inception of the school showed that it was established by the Samaj, the claim of the Samaj could not be negative on the ground that it made no contribution to the school in question out of its funds, and accepting as sufficient the claim of the Samaj that the school was established with subscriptions collected from the members of the Samaj as well as from the general public. Collection of funds from the general public was so important for the same High Court in Panna Lal’s case that it became a potential ground for the rejection of the claim of the petitioners that R.M. Mahila Vidhyalaya was established by the Rajasthani community in Bihar, where in fact several surrounding circumstances tended to favour the petitioner’s claim to establishment.

Thus the educational institutions, which were established by the funds collected from outside the country or at that time they were administered by such persons who were not Indian citizen, can also get the protection of Art.30(1).
3.6 Subjection to Legal Provisions

What some of the decisions tend to convey is the interesting preposition that an institution may lose its character as a minority institution if by some external process or by some act or omission on the part of its managers the institution comes to be governed by legal provisions, thus giving rise to a presumption that the institution was not established with the unshaken intention of making it an exclusive minority institution.

In the *Arya Pratinidhi Sabha* case decided in 1973 where the Patna High Court had adopted while determining the question whether Musaddi Lal Arya Kanya Vidhyalaya was established by the persons professing the Arya Samaj faith. Turning down of the claim of the petitioners by the Court was mainly conditioned by the fact that the petitioners had allowed the school to be treated as a State determined the constitution, functions and powers of the managing committee. In the Court’s assessment these factors were sufficient enough to allow the conclusion that the school which was converted into a Government Subsidised School, could not be said to have been established by the Samaj and that being so naturally the protection under Art.30 was not available to the Arya Samaj.

Back to 1968, Azeez Basha case presented somewhat an analogous situation. There also what appears to be the major ground of reliance by the Supreme Court for its decision was the subjection of the Mohammadan Anglo Oriental College to the provisions of the Act of 1920 while being converted into the Aligarh Muslim University. The Court also accepted the position that M.A.O. College was the nucleus of what came to be known as the Aligarh Muslim University. What, however, led the court to deny the protection of Art.30(1) were, along with some other considerations, certain provisions of the Act of 1920 which had the effect, in the court’s view, of vesting the control and management of the affairs of the University
somewhere else than in the Muslim Minority. These were, in the main, Sections 3, 4, 13, 14, 24, 30 and 32.

These provisions, in the Court's opinion had not only the effect of transferring the powers and control over management from the M.A.O. College to the Aligarh Muslim University but had also the effect of vesting the ultimate control in the Lord Rector (which meant the Governor, the members of the Executive Council and some nominated members). The difference between the M.A.O. Colleges and the Aligarh Muslim University was the difference between and the institution which was unable to grant its own degrees and an institution which could do so. As the degrees would be of no use unless they were recognized by the Government and as the recognition depended upon the will of the Government and that this will was always expressed through some law, the M.A.O. Colleges could not have got its status changed to a University, entitled to grant its own degrees, unless through the intervention of some law.

This was the kind of reasoning which came to the Court's help in informing its judgment that then Aligarh Muslim University owed its establishment to a law enacted by the British legislature and not to the Muslims who had established the Mohammadan Anglo-Oriental College. The M.A.O. College thus lost its character as a 'minority' institution due mainly to its subjection to certain rules while its status was being raised to a university.

Judicial opinions seem to favour the view that 'exclusiveness' in the matter of governing body is the essence of the right 'to administer under Art.30 (1). Thus except in Gandhi Faiz-e-am College Shajhanpur v. Agra University, Where the Supreme Court by a majority opinion held as constitutional a provision requiring the minority to include on its managing Committee the principal and the senior most member of the teaching staff and in Punjab University v. Khalsa College where a rule requiring a teacher representative to be on the Managing Committee giving rise
to a possibility of a non-Sikh being included in the Managing Committee, was not regarded by the Punjab and Hariyana High Court as violating Art. 30(1), in all other cases the courts have disallowed any attempt from any external agency to force, through rules, the minority institutions to include outsiders on its governing body. St. Xavier College v. State of Gujarat, D.A.V. College Jullhunder v. State of Punjab, S.K. Patro v. State of Bihar, State of Kerala v. Mother Provincial, Hari manderji v. Magadh University are the cases in point.

_Panna Lal_ and _Arya Pratinidhi Sabha_ cases can then be regarded as laying down the rule that a minority will not have the protection of Art. 30 (1) if by a deliberate act of its own it allow the management of the institutions to slip into the hands of others either subjecting the managing body to rules which require managing body to include ‘outsiders’ or by allowing other to be included in the managing body with an intention to run the institution not as a ‘minority institution’.

But then it raises the question: what if a minority while intending to run the institution as a minority institution voluntarily includes on its managing body a member or two who do not belong to the minority? Even if some person or persons not belonging to the minority are inducted into the managing body by the minority either as a matter of gesture of goodwill towards other communities or because some outsiders had contributed heavily to help establish the institution- how does this fact have the effect of changing the character of the institution itself? If the minority has the right to establish an institution of its choice and under that choice it can establish the institution not only for the benefit of the minority but also for others and if for the purpose of establishment of the institution it can obtain funds from members of other communities, why cannot it have the right to manage with others? It is true that the essence of the right to administer lies in the freedom to determine the composition of the managing body and that no rules can be allowed to affect that choice, but there is always a distinction between a managing body which is compelled to include outsiders and a managing body, the constitution of which is determined by
the minority. What if the minority exercises its choice in a manner as to include some outsiders also with the intention, at the same time, to maintain the institution as a minority institution and for the purpose for which it was established? These are some of the questions for which the cases decided so far do not have a ready answer.

_Arya Pratinidhi Sabha, Panna Lal ana Azeez Basha_ cases also raise the important constitutional question: Can the fundamental right under Art. 30(1) be waived? On somewhat similar reasoning had proceeded the Supreme Court in the _Azeez Basha_ case. After declaring ‘to bring into existence’ as the only sense in which the world ‘establish’ was used in Art.30(1) the court took upon the task of narrating the process by which the Aligarh Muslim University was brought into existence. It stated that as there was nothing to prevent the Muslims in 1920 to establish a University and as there was nothing to prevent the Government from not recognizing the degrees of such a University, the Muslims were under compulsion to come to the Government to bring into existence a University whose degrees would be recognized by the letter. And as the Government had to come to the legislature for a law under which such a University could be established and as the law, the Act of 1920, was the creation of the legislature the Aligarh Muslim University had to be recognized as brought into existence by none else than the legislature sitting in the year 1920.

The question is whether the Muslims were competent to establish a University in 1920. Seervai does not accept as correct the view of the Supreme Court, in the _Azeez Basha_ case, sought to be based on _St. David's College vs. Ministry of Education_,86 namely that the only distinguishing feature between a University and an ordinary institution was the power to grant degrees could not have been recognized, quoting a passage from the same case, _St. David's_, and relying on the statement of law in Halsbury. Seervai concludes that the essential feature of a University was its incorporation by the sovereign power, and express his opinion thus; The only manner in which a community could establish a University was by invoking the exercise of
sovereign power which might either take the form of a charter or on Act of the legislature, and this Muslims community did.\textsuperscript{87}

It is a well established fact, based on record, that the British Government had supported the establishment of the M.A.O. College and, knowingly well its denominational character, had all along assisted financially,\textsuperscript{88} and had not only supported the idea of establishment of a Muslim University, it had done every thing possible in the direction.\textsuperscript{89} The Governor- General’s words which he uttered at the meeting of the Governor General’s legislative council in which the bill was o finally passed into the Aligarh Muslim University Act 1920, speak well how the Government viewed the establishment of the University and with what intention it was established:

“I should like to add my congratulations to the Muslim community on the passage of the Bill. I have come here especially this morning to preside in order that I might add my good wishes and congratulations to those which have already been uttered in this Council.”\textsuperscript{90}

But even if the Act of 1920 had the effect of converting a minority institution into a state institution, and that no right ‘to establish and administer’ existed as a ‘fundamental right’ in the year 1920 when the Aligarh Muslim University Act was passed, the Act continued to be in force till after the commencement of the constitution which recognized such a right as a fundamental right vested in all minorities in this country. The correct course, therefore, for Court was to test the provisions of the Act of 1920 on the scale of Art.30 (1) and 13(1). If Art. 30(1) conferred upon all Indian minorities a right to establish and minister educational institutions of their choice, Art.13 (1) declared unreservedly all laws exciting at the commencement of the constitution as unconstitutional if inconsistent with Any fundamental right. Was the Act of 1920 then inconsistent with the provision of the constitution incorporated in Art.30 (1)?
This remains an undeniable truth that the provision of the Act of 1920, including the provision under Section 23 by virtue of which University court had been enjoying the status of a ‘supreme governing body’, continued to exist uninterruptedly till the constitution came into force in 1950. The Aligarh Muslim University thus continued to be governed throughout the period of 30 years by a Supreme Governing body, the court, which was composed exclusively of Muslims and which at no stage had admitted to its membership any person other than a Muslim. It then requires no logical deduction to say that on the date of the commencement of the constitution in 1950 the Aligarh Muslim University was being governed exclusively by Muslims. It was only in 1951 that the provision requiring that only the Muslims could be the members of the court was deleted by an amendment of the Act of 1920.

Soon the question of waiver directly came up for consideration before the Supreme Court in *Basheshar Nath v Commissioner of Income Tax* where SR Das C.J. Bhagwati, SK Das, Kapoor and Subba Rao JJ. recorded their separate opinions. The two Questions that arose for decision were: (1) whether a settlement under S.8A of the Taxation of Income Tax Act, 1947 made after the Commencement of the Constitution, was constitutionally valid and (2) whether the petitioner could be said to have waived the fundamental right incorporated under Art 14. Das, CJ and Kapur J took the view that there could be no waiver of the fundamental right founded on Art. 14, their opinion was that Art. 14 was founded on a sound public policy, its language was the language of command and it imposed an obligation on the state of which no person, by his act or conduct, could relieve it. They did not consider the question whether any other fundamental right could be waived as that question was not strictly necessary for the decision of the case in hand. Bhagwati and Subba Rao JJ. held that there could be no waiver not only of the fundamental right enshrined in Art.14 but also of any other fundamental right guaranteed under the constitution.

It was also held that Art. 13(2) was in terms a constitutional mandate to the state in respect of all the fundamental right and no citizen could by waiver of any one of
them relieve the state of the solemn obligation that lay on it. They referred to, with approval the opinion of Mahajan C.J. (who delivered the majority judgment) in *Behram Khursheed v. State of Bombay* wherein he had said that fundamental rights were not put in the Constitution merely for individual benefit but had been incorporated as a matter of public policy and the doctrine of waiver had no application to them.

Thus out of four Judges who continued the majority, two judges clearly held that no fundamental right could be waived. The tone and temper of the judgment of the other two judges, who wished to confine their opinion to Art. 14 only, as no question no waiver with regard to other rights was raised, clearly indicate that they inclined to held a similar view had the question been directly raised.

In *K.O. Verkey v. state of Kerala* the Kerala High Court through Mathew J. spoke more unequivocally on the inapplicability of the doctrine of waiver on fundamental rights: The fundamental right under Art.30 is that of a plurality of persons as a unit, or if I may say so, of a community of persons necessarily fluctuating and waiver means the voluntary relinquishment of a known right. It may be difficult to infer a waiver from the conduct of the members of a fluctuating body. Can the present members of a minority community barter away the right under Art.30 so as to blind the future members of it as a unit? In other words, can the conduct of the present generation affect the fundamental right of the community in the future? The fundamental right is of the living generation. The dead cannot waive the right of the living generation unless their succession. I doubt whether the future members of a minority community as a unit, derive the fundamental right under Art.30 from its dead members by succession or by inheritance.

The observation made in the above cases, the judicial opinion on the applicability the doctrine of waiver in this country seems to be quite well established. In the *Arya Pratinidhi Sabha* case a plea against the application of this doctrine was
specifically rejected by the Patna High Court. In Panna Lal’s case though no plea for its application or rejection was made, the petitioners lost their claim to establishment mainly due to the subjection to the institution of Magadh University rules and thus had to waive their right to manage the institution. In the Azeez Basha case the application of the provisions of the Amending Act of 1951 had the effect of compelling the minority to waive the claim to management, though the Court assigned the different reasons for its rejection of the claim. If the decision of the question of waiver in the case referred to above are regarded as stating the correct law, the Arya Pratinidhi Sabha, Panna Lal and Azeez Basha cases must be regarded to have been decided on a wrong assumption of law.

3.7 Expression of Intention

The factors mentioned above have served only as aids, and in cases where the claim as to establishment of an educational institution is sought to be countered by the opposite party the real object of the courts has of necessity been to ascertain the true intention behind the establishment. For this, they have taken into account the circumstances in which an institution had come into being and also other factors the assistance of which could possibly help the courts reach the right conclusion.

Disagreement among the judicial opinions is thus a natural consequence of absence of fixed principles and the presence of complex problems. The absence of any fixed formula has not only led to a wide divergence in opinions, the courts in their enthusiasm to find out the require intention have sometimes left behind the mandate of Art. 30 as well as the principles otherwise well established judicially and must govern such situation also.

Thus the courts are hardly unanimous on the question: Whose intention should be the determining factor? Should it be of those who ‘Found’ was not the meaning acceptable to the Azeez Basha case as the correct substitute for the word ‘establish’ as
used in Art.30(1). In the Mother Provincial case pointedly declared that “the intention must be to found an institution for the benefit of a minority community”.  

Similarly, the same divergence in opinion is visible on the question: How the intention should be expressed? In most of the cases where the claim to establishment has been challenged it had made no difference for the courts whether it was specifically and clearly stated by the founders that the institution was established by a minority and was intended to be maintained as such. Hari Manderji v. Magadh University, Patroni v. Asst. Education Officers, S.k Patro v. State of Bihar, State of Kerala v. Mother Provincial, Arya Pratinidhi Sabha v. State of Bihar, and Dipendra Nath v. State of Bihar were decided on the assumption that the intention of the founders must not have been anything else than to establish a institution primarily for the benefit of the minority. The courts in these cases made no attempt to find out if the intention to establish was expressed by those who established the institution. Ramani Kanta, Azeez Basha, Arya Pratinidhi Sabha, Rajershi and Panna Lal seem to have been decided unfavourable because those who had founded their respective institutions had failed to express their intention in so many case.

Unanimity is also not achieved on the question: What intention should be expressed? The Kerala High Court in Rajershi Memorial Basic Training School v. State of Kerala case sought to infer a negative intention from the fact that it was not made out that “any activity is carried on in the institution which is intended to promote the object of conserving the religion or culture of the particular minority’ or that it was intended for the general benefit of all the citizens of locality”.  

Nowhere the difference in opinion, mainly due to a misplaced emphasis, is more visible than on the question: Where the intention should be expressed? It is more visible in Azeez Basha case.
1. That in 1870 Sir Syed Ahmad Khan thought that the backwardness of the Muslim Community was due to their neglect of modern education;

2. That Sir Syed Ahmad Khan conceived the idea of imparting liberal education to Muslim in literature and science.

3. That with this object in view Sir Syed Ahmad Khan organized a Committee to devise ways and means for the educational regeneration of Muslims;

4. That in 1872 the Mohammadan Anglo-Oriental College funds committee started collecting funds to realize the goal that Sir Syed Ahmad Khan realized.

5. That in consequence of the activities of the committee a school was opened in 1873.

6. That in 1876 the school becomes a High School.

7. That the school becomes the Mohammadan Anglo-Oriental College in 1877.

8. That then M.A.O. College was a flourishing institution by the time Sir Syed Ahmad Khan died in 1898;

9. That the idea of establishing a Muslim University gathered strength from year to year at the turn of the century;

10. That by 1911 some funds were collected and a Muslim University Association was established for the purpose of establishing a teaching University at Aligarh;

11. That the Muslim University Association collected large funds, including a sum of Rs.30 Lakhs which was collected for the University Fulfillment of a conduction by the Government of India;

12. That the Mohammadan Anglo-Oriental College was made the basis of the Aligarh Muslim University;

13. That all properties and funds belonging to the M.A.O. College were made over to the Aligarh Muslim University.

These were the facts of history which the Court had accepted as true.

If the history of the Muslims University, as set out, and also approved by the court as stating the correct state of affairs, reflects any intention on the part of the
It was unmistakably an intention to establish a Muslim University. It then becomes difficult to appreciate the court’s conclusion that the Act of 1920 did not intend to establish a Muslim institution unless it is also accepted that the establishment of the Aligarh Muslim University was the result of a misunderstanding between the Muslims and the then legislature— the former wanted to establish a Muslim institution and the latter wanted something else.

The right question inviting the attention of the court was: what was the intention of the founders in converting the Mohammadan Anglo Oriental College into a Muslim University? Was not the answer readily available in the Court’s own findings?

1. That ‘M.A.O. Colleges and the Muslim University Association and the Muslim University Foundation committee were established by the Muslim minority.104

2. That ‘those who were in-charge of the M.A.O. College, the Muslim University Association and the Muslim University Foundation Committee were keen to bring into existence a University at Aligarh’”

3. That “the 1920 Act was passed as a result of the efforts of the Muslim minority.

4. That the nucleus of the Aligarh Muslim University was the M.A.O. College.

By this process, the result achieved was that the Aligarh Muslim University was declared by the court to have been “established” by the central legislature and not by those who had ‘founded’ the Mohammadan Anglo-Oriental College its nucleus.105

3.8 Objects of Establishment

The objects may either be limited to conservation of language, script or culture, for which a minority may established an educational institution under Art.30(1). The
object related to Art. 29 may be as varied as possibly they can be. The controversy as to which of the two propositions states the correct connotation of Art. 30(1) has engaged considerable judicial attention. The first proposition is based on a reading of the language of Art. 29(1) and 30(1) together, and also the subheading and the marginal notes under which the two articles are placed-conveying thus the impression that Art. 30(1) is complementary to Art. 29(1). The second proposition is based on the assumption that Art. 30(1) stands independently of 29(1) and that the words “of their choice” occurring in that article, if given their natural meaning, leave no room for limiting the scope of Art. 30(1) by any consideration on which Art. 29(1) is based.

3.8.1 The Relevance of Article 29(1)

The first occasion on which these prepositions were brought into consideration was a reference made by the President under Art. 143 for obtaining opinion of the Supreme Court on certain provisions of Kerala Education Bill, 1957. Describing the scope of Art. 30(1), S. R. Das C.J. In re Kerala Education Bill, speaking for the Court, laid great stress upon the ‘choice’ available to minorities to determine for themselves the kind of institutions they want to establish, and observed:

“...What the article says and means is that the religious and the linguistic minorities should have the right to establish educational institutions of their choice. There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as well make them fit.... educational institutions of their choice will necessarily include institutions imparting general secular education also.”

These observations hardly leave any doubt that the court found itself convinced that the objects for which minorities can establish educational institutions cannot be
limited to mere conservation of language, script or culture, a right made available to “any section of citizen” under Art.29(1).

The observation become a ground of contention for the Attorney-General in *W. Proost v. state of Bihar* 108 where he argued that as the protection to minorities in Art.29 (1) was only a right to conserve a distinct language, script or culture of its own, the St. Xavier’s College at Ranchi did not qualify for the protection of Art.30 (1) because the college was not founded to conserve them. Relying on the Kerala Education Bill opinion, he argued that the observation of Das C.J. suggested that the Supreme Court was reading the two Articles together. Hidayatullah C.J. speaking for the Court rejected the plea and said: “In our opinion the width of Article 30(1) cannot be cut down by introducing in it considerations on which Article 29(1) is based”. 109 Distinguishing the two Articles, as to their respective scope, he observed: “The latter article is a general protection which is given to minorities to conserve their language, script or culture. The former 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.”110

This view found further conformation in *St. Xaviers College v. State of Gujrat*111 where a bench of nine Supreme Court judges was called upon to determine, inter alia, the inter-relationship of Art.30(1) and 29(1). Ray C.J. on behalf of himself and Palekar J., disapproved of any suggestion seeking to read the two articles together to mean that one article was concomitant to the other, and emphasized: “It will be wrong to read Article 30(1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities.”112 Beg J. also took the view that: “Article 29 of the constitution does not, in any way, impose a limit on the kind or character of education which a minority may choose to impart through its institutions to the children of its own members or to those of others who may choose to send their children to its schools.”113
Thus all the judges who spoke on the relationship between Art.29(1) and 30(1) were in complete agreement on the point that the two articles address themselves to different groups of persons and guarantee different rights.

In *M.M. Ali Khan v. Magadh University*,\(^{114}\) to negative the petitioners’ contention that Mirza Galib College, Gaya was a minority institution, one of the respondents took the plea that as the application filed by the college for obtaining affiliation had stated that several subjects like Hindi, English, Bengali, principle Hindi and Principle Bengali were to be taught, the college could not be regarded as an institution established with the exclusive object of conserving language, culture, and religion of that particular community. But the argument met with ready rejection by the Patna High Court which, relying upon the clear pronouncement of the Supreme Court in *W. Proost v. state of Bihar*,\(^ {115}\) held that the scope of Art. 30(1) could not be limited by what is the subject-matter of the right under Art.29(1).

The above decisions suggest is that “any section of citizens” referred to in Art. 29(1) and religious and linguistic minorities referred to in Art.30(1) is not identical groups of persons. Similarly, the right to conserve language, script or culture guaranteed in Art.29 (1) and the right to establish and administer educational institutions secured under Art. 30 (1) are not identical rights,\(^ {116}\) though, as Hidayatullah C.J. Had rightly pointed out in *W. Proost* case,\(^ {117}\) they may meet in a given case.

What logically follows from the decisions reviewed is that a religious or linguistic minority may establish an educational institution with the sole-object of giving a general ‘secular’ education wholly unconnected with any thing like conservation of language, script or culture. The decisions reviewed above leave hardly any doubt that the language employed in Articles 29(1) and 30(1) makes these Articles different from each other as to their object and scope and that the language of one article cannot be read as limiting the scope of the other. A reading of the two
Articles shows that the right to conservation of language, script or culture is available to any ‘section of citizens’ which term includes a ‘minority’.  

The unmistakable conclusion that can be drawn out of this explanation is that the Constituent Assembly was very clear not only on the persons of inherence of the rights under Articles 29(1) and 30(1), but also that the objects and scope of two articles were different from each other. If the right of establishment and administration of educational institutions under Art.30 (1) is regarded as being limited to conservation of language, script or culture, Art. 30(1) would obviously become redundant as the right to the conservation of language, script or culture, under Art. 29(1) is itself wide enough to include within its scope a right to establish educational institutions for carrying this object into effect. Jegdev Singh v. Pratap Singh is an example in hand where the Supreme Court has held that Art.29 (1) includes the right “to agitate for the protection of the language”, and that make of promises by a candidate to work for conservation of the electorate’s language does not amount to a corrupt practice in term of S. 123(3) of the representation of the people Act, 1951 which makes an appeal by a candidate to vote or refrain from voting for a person on the ground of language a corrupt practice.

The decisions reviewed also demonstrate an emphatic assertion, with the exception of course of the Azeez Basha case, that Art.30 (1) cannot be read to imply a condition that an institution, in order to be entitled to its benefits as a minority institution, must confine its own benefits to the member of the minority alone. Neither the scope of the word ‘choice’ occurring in Art.30 (1) admits of any such limitation, nor indeed can a minority close the doors of its institutions to non-minority students without bringing itself face to face with clause (2) of Art. 29 which prohibits aided institutions from denying admission on grounds of religion, race, caste, or language.
All the case laws except Azeez Basha\textsuperscript{121} shows that a person or persons belonging to minority community if established an educational institution definitely the administration power of the institution goes to the hand of the minority for the benefit of the minority community. The name of the institution, the persons involved in the establishment, the source of fund, the subjection of an institution to legal provisions, expression of the intention, nature of the claim as to whether it was a mere clock or presentation and the real motive was business adventure have, singly or in combination with each other, served as positive index proving the claim of establishment.\textsuperscript{122} The Courts have used such a wide discretion in placing emphasis on the factors for determining the adequacy of the proof, they have, consequently, failed to achieve uniformity in approach.

The absence of any fixed formulae and the consequent use of wide discretion have led the courts to arrive at conclusion which are not always rational. Nowhere is this more eminently visible than in the Azeez Basha decision which, as has been brought out, was wrongly decided. It must also be said that the Azeez Basha decision is the lone example to cite where that catholicity which permeates through the whole lot of judicial decisions is quite conspicuously missing. The decision in that case exemplifies how a court of law can create history by denying a fact born of known history. It shows how a court can deny constitutional protection to an educational institution which existed on this soil for no less a period than 95 years.

The decision has not only uprooted the foundations of a historical fact it has also the effect of preventing minorities from securing a University for objects like preservation of language or culture or promotion of special studies. There is no reason why the language of Art. 30(1), which allowed linguistic and religious, minorities to establish and administer educational institutions of their choice, be so read as to exclude the possibility of establishment of a University by a minority. In view of Sections 22 to 25 of the University Grants unless the Parliament or a State legislature enacts a law for establishment of a University, but, so long as the Azeez Basha
decision stands, once the legislature comes on the scene any institution incorporated as a ‘University’ would ceases to be a minority institution as then it would be regarded an as institution ‘brought into existence’ by law.

NOTES AND REFERENCES

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2 AIR 1983 SC 1.
4 Ibid.
5 AIR 1954 SC 561.
6 AIR 1958 Pat.359.
7 LLJ 1968. vol. 2 Andhra 496.
8 (1963) 3 SCR 837.
9 AIR 1965 Kerala 75.
10 AIR 1968 Allahabad 188.
11 G. D. F. College Shahjahanpur v. Agra University, AIR 1975 SC 1821.
12 AIR 1969 Kerala 191.
14 AIR 1971 SC 1731; AIR 1971 SC 1737.
15 AIR 1970 SC 2079.
16 AIR 1970 Ker. 196.
18 AIR 1977 Ker.58.
20 AIR 1967 Pat.148.
21 AIR 1969 Pat. BLJR 343.
22 AIR 1971 Mad. 40.
23 AIR 1976 Mad. 214.
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25 AIR 1951 Assam 163.
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28 AIR 1963 Patna 54.
29 Azeez Basha v. Union of India (1968) 1 S.C.R. 833.
30 Aligarh Muslim University (Amendment) Act, 1965 and Aligarh Muslim (Amendment) Act, 1951 respectively.
31 Aligarh Muslim University Act, No.XL of 1920, at 839-40.
32 Aligarh Muslim University Act, No.XL of 1920, at 850.
33 Aligarh Muslim University Act, No.XL of 1920, at 843-44.
34 Anwarul Yaqin, no. 3, pp.75-90.
36 AIR 1970 SC 259.
37 AIR 1969 Pat. 394.
38 AIR 1970 SC 259.
40 AIR 1973 Kerala 88.
41 AIR 1973 Patna 101.
42 AIR 1973 Patna 106.
43 AIR 1973 Patna 106.
44 AIR 1958 SC 956.
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46 AIR 1965 Ker. 75.
47 AIR 1974 Ker. 200.
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52 AIR 1984 Kant.207.
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57 AIR 1958 at pp. 977-78.
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66 Ramani Kanta v. Gauhati University, AIR 1951, Assam 163.
68 Azeez Basha v. Union of India (1968) 1 S.C.R. 833.
70 Panna Lal v. Magadh University, AIR 1976, Pat. 82.
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75 Dipendra Nath Sarkar v. State of Bihar, AIR 1963 Pat. 54.
76 Hari Manderji v. Magadh University, AIR 1977 Pat. 12.
77 AIR 1975 SC 1821.
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79 AIR 1974 SC 1389.
80 AIR 1971 SC1737.
81 AIR 1970 SC259.
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83 AIR 1977 Pat.148.
86 (1951) 1 All E.R. 559.
90 Gazette of India, September in 1920, part vi, p.1190.
91 (1955) 1 S.C.R. 528.
92 (1955) 1 S.C.R 613.
93 AIR 1969 Ker. 191.
94 AIR 1969 Ker. 195-96.
95 AIR 1970 SC 2082.
96 AIR 1977 Pat. 12.
97 AIR 1974 Ker. 197.
98 AIR 1970 SC 259.
100 AIR 1958 Pat. 359.
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102 AIR 1973, Kerala 88.
105 Anwarul Yaqin , no. 3, pp. 128-145.
106 In re Kerala Education Bill, AIR 1958 SC 956.
107 In re Kerala Education Bill, AIR 1958 SC 979.
111 AIR 1974 SC 1389.
112 AIR 1974 SC 1394.
113 AIR 1974 SC 1447.
114 AIR 1974 Pat. 341.
118 Anwarul Yaqin, no. 3, pp. 160-161.
119 AIR 1965 SC 183.
120 Anwarul Yaqin, no. 3, pp. 162-163.
121 AIR 1968 SC 662.
122 Bhrigu Nath Pandey, no. 35, p. 110.
CHAPTER - IV

RIGHT TO ADMINISTER EDUCATIONAL INSTITUTIONS

In one word right to administer means managing, maintaining, molding, organizing, planning after the affairs of the institution. In a very general sense right to administer of a minority educational institution indicates the power to appoint teaching and non-teaching staff, admissions of the students and deciding the medium of instruction etc. The fundamental freedom under Art.30 (1) is prima facie absolute in nature as it is not made subject to any reasonable restrictions. This means that all minorities, linguistic or religious, have by Art.30 (1) right to establish and administer educational institutions of their own choice and “any law or executive direction which seeks to infringe the substance of that right under Art.30 (1) would to that extent be void.”

In Kerala Education Bill case, Justice S. R. Das explained the scope of administration as follows:

“The right to administer cannot include the right to maladminister. The minority cannot surly 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.”

The Supreme Court in St. Xavier's college v. State of Gujarat considered that the right conferred by Article 30(1) is not an absolute right and is not free from regulation and that just as regulatory measures are necessary for maintaining the educational character and content of minority institutions. These are necessary also for ensuring orderly, efficient and sound administration of the school in the matter of maintaining discipline, health, morality etc. Chief justice Ray, speaking
for himself and Justice Palekar said: “Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more affective exercise of the right for the benefit of the institutions and without displacing the management. If the administration has to be improved, it should be done through the agency or instrumentality of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interest of and for the benefit of minority educational institutions concerned will affect the autonomy in administration.”

The approach is nothing but reiteration of the opinion of justice Shah in the Sidhraj Bhai case. It would be seen that the interest of a minority institution are well protected by Article 30(1) itself the right to administer educational institutions of their choice. The minorities are free to administer their institution in a manner so as to make it an effective vehicle for achieving their aims and objectives, e.g., to impart general and secular education as well as to conserve their language and religion.

Thus the state may legitimately insist that reasonable restrictions be prescribed to ensure the excellence of the institution before giving aid or recognition. In the opinion of Justice S. R. Das there is also an indication of taking into account ‘public interest’ or ‘national interest’ as he upheld some of the impugned clauses as permissible regulations because these were “designed to give protection and security to the ill- paid teachers who are engaged in rendering service to the national and protect the backward classes.” But in Sidhraj Bhai v. State of Gujarat7 Shah J. stated that “The right [under Article 30(1)] is intended to be effective and is not intended to be whittled down by so called regulative measures conceived in the interest not of the minority educational institutions but of the public or nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justified 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."

In *State of Kerala v. Mother Provincial*, Chief Justice Hidayatullah adopted a somewhat midway approach between the two earlier decisions in the *Kerala Education Bill* case and the *Sidhraj Bhai* case. He said: “... The standards of education are not a part of management as such. These standards concern the body politic and are dictated by consideration of advancement of his country and its people. Therefore, if universities establish the syllabi for examinations, they must be followed, subject however, to special subject whom the institutions may seek to teach, and to certain extent tile state may also regulate condition of employments of teachers and the health and hygiene of students. Such regulations do riot bear directly upon management as such, although they may indirectly affect it. Yet the right of the state of regulate education, educational standards and allied be allowed to fall below the standards and excellence expected of educational institutions or under the guide of exclusive right of management to decline to follow the general pattern. While the management must be left to them they may be compelled to keep in step with others”.

It is submitted that the above observations of Chief Justice Hidayatullah are rather vague generalization and fail to lay down any definite guidelines to determine the difference between permitted regulations for educational standards and the guarantee of freedom of control. His Lordship himself admits in the passage quoted above that the regulation ‘may indirectly affect’ the right. It would be wrong to suggest that the management of the minority institution is meant only to appoint teachers and disburse their salary. It is also the duty of the management to see that standards of education are maintained by their institution, whether it is in connection with the efficiency of the staff, teaching standards, or general health and hygiene of the teachers and the students relating to games, sports and other extra-curricular activities in the institution.
In that case, the impugned provisions dealt with the composition of the governing body for private colleges not under corporate management and of the managing council for private colleges. Sections 48 and 49 of the Kerala University Act, 1969 required the corporate managements to constitute a managing council, and required the other institutions not under corporate management to constitute a governing body. The governing body was to consist of eleven members out of which not more than six to be nominated by the corporate management. The Supreme Court held after the election of these two bodies the founders or the community could obviously have no hand in the administration of the institution. The Court found that the two bodies are vested with the complete administration of institutions and that they are not answerable to the founders in the matters of administration. The Court found these provisions so much objectionable that it outrightly rejected the argument of the State that even in the presence of these provisions the managing council and the governing body had the controlling voice in the management. The Court also rejected the other argument that the defect, if any, must be found in the statutes, ordinance, regulations, bye-laws and orders of the university and not in the provisions of the Act itself.

Hidayatullah C.J., speaking for the Court assigned the reasons for rejecting the arguments: “The Constitution contemplates the administration to be in the hands of the particular community. However desirable it might be to associate nominated members of the kind mentioned in Sections 48 and 49 with other members of the governing body or the managing council, it is obvious that their voice must play a considerable part in management. Situations might be conceived when they may have a preponderating voice. In any event the administration goes to a distinct corporate body which is in no way answerable to the...management.” The Court held that by force of the two sections the minority community would lose the right to administer an institution which it had founded.

The report of the Education Commission were also brought to the notice of the Court in which the Commission had made suggestions regarding the
conditions of service of teaching staff in the universities and the colleges and standards of teaching etc., and it was pointed out that what was done by the Kerala University Act, was to implement these suggestions. Chief Justice Hidayatullah recognizing the desirability of implementation of these suggestions and made the following observation: “We have no doubt that the provisions of the Act were made bonafide and is in the interest of the education but unfortunately they do affect the administration of these institutions and rob the founders of their right which the Constitution desires should be theirs. The provisions even if salutary cannot stand in the face of the constitutional guarantee...”

In *S. Azeez Basha v. Union of India* it was contended that, “... Even though the religious minority may not have established the education, it will have the right to administer it, if by some process it had been administering the same before the constitution came into force”. K. N. Wanchoo, C .J. rejected the contention and held, “We are not prepared to accept this argument. The article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but 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 other, it might have been administering it before the Constitution came into force. The words “establish and administer” in the Article 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.”

The *re Kerala Education Bill, 1957* case was also referred to in support of the argument that the minority can administer an educational institution even though it might not have established it. On a reading of that decision, the court came of the conclusion that even though the minority did not establish the institution it had the right to maintain it. But the Article 30(1) only conferred the rights on minority after the constitution came into force. It is in respect of the latter contention that the observation of the Supreme Court in *re Kerala Education bill*
case should be read. In support of this view they also referred to the case of *Dargah Committee, Ajmer v. Syed Hussain Ali* which while dealing with Article 26 (a) and (b) of the constitution had held that even if it be assumed that a certain religious institution was established by a minority community it may lose the right to administer it in certain circumstances. They referred to the following observation of the Dargah Committee, Ajmer case: "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."

From the passage cited above, it is apparent that even the institutions established by a minority can be given up or the right to administer is relinquished or validity surrendered if so, the right to administer would be irretrievably lost. The facts leading to the passing of the Aligarh Muslim University Act and its establishment clearly indicate, said Wanchool, C. J., "That the minority community had validly surrendered its right to administer the institution which was in existence prior to the establishment of University and had also transferred its assets and liabilities and thereafter had no rights over them."^15

There is no limitation on the subject to be taught in such institution, and they are not debarred from giving general education as well in such institution. It is not necessary for the protection of Art.30 (1) that the majority of pupils belonging to the institution must belong to the religion of minority in question. Thus nature and purpose of the institution is entirely left to the discretion of the community.\(^16\) This view was upheld by the Supreme Court in *State of Bombay v. Bombay Education Society.*\(^17\) Das C.J. observed: "There is no Limitation placed on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as well make them fit for entering the public services, educational institutions of their choice will necessary include institutions
imparting general secular education also. In other words, the Article leaves it to their choice to establish such educational institution as well serve both purpose, mainly the purpose of conserving their religion, language or culture, and also the purpose of giving a through good general education to their children.

The result of the above discussion is that the term ‘administer’ under Article 30(1) means ‘to manage the affairs of the educational institution’ belonging to the minority and that this right of minority does not include the right to mal-administer. It can also be stated that the right to administration includes right to have a fine choice to mould the institution to better serve interest of the minority community. The right has not been held to be absolute in nature and provisions made in the interest of minority educational institutions would be regarded as permissible regulation. However, the Courts are not clear as to the limits of control.

4.1 Medium of Instruction

All educational experts are uniformly of the opinion that pupils should begin their schooling through the medium of their mother tongue. There is great reason and justice behind this. If the tender minds of the children are subject to an alien medium the learning process becomes unnatural. It inflicts a cruel strain on the children which makes the entire transaction mechanical. Besides, the educational process becomes artificial and tortuous. The basic knowledge can easily be garnered through the mother tongue. Keeping this philosophy in mind, a conference of the state ministers of education passed a resolution recommending for introduction of mother tongue as the medium of instruction at the primary-school stage and that where there were no fewer than forty students of a linguistic minority in a school, or ten students in a class, the state should provide facility for imparting instruction to these student by appointing a teacher in that school for that purpose.
Article 29 (1) admits that the minorities have right to conserve their distinct language or script but it does not specify the means of conserving such right. Establishment of educational institution is, undoubtedly, one of the most effective means of conservation of language and script. Article 30(1) which provided minorities the right to establish and administer educational institutions of their ‘choice’. Their ‘choice’, therefore, must necessarily include a choice to determine the language of instruction in such institutions.

The issue of medium of instruction becomes a political question after the Report of the State Reorganization Commission recommending the reorganization of States on the basis of language and the change that followed. The question of medium of instruction arose in number of cases in the backdrop of the policy of states to promote the advancement of State’s official language. The following are the two main questions under head:

(1) Whether the states can validity legislate on medium of instruction under Entry 25 of List iii or is the Parliament alone competent to enact a law on this subject?
(2) Whether and to what extent the minority educational institutions can be required to follow such regulations?

Both these issues came up for consideration before the Supreme Court in a number of cases.

In State of Bombay v. Bombay Education Society, the Supreme Court held: “Where ... A minority like the Anglo Indian community, which is based, inter-alia, on religion and language has the fundamental right to conserve its language, script and culture under Art. 29 (1) and has the right to establish and administer educational institutions of their choice under Article 30 (1) surely them there must be implicit in such fundamental right, the right to impart instruction in their own institutions to children of their own community in their own language...”
In *Usha Mehta v. State of Maharashtra*\(^2\), a policy decision made by Maharashtra State Government whereby Marathi language was made compulsory throughout the schools in that State. As a result, the English Medium Schools run by Gujarati linguistic minorities were compelled to teach four languages (Hindi, English, Marathi and mother tongue Gujarati) as against the accepted 'three-language formula'. Constitutional validity of the imposition of Marathi language as a compulsory study in schools run by linguistic minorities was the main matter for judgment in this case.

Petitioners contested that the imposition of compulsory Marathi was in violation of the fundamental right of the linguistic minority to establish an educational institution of 'their choice' under Article 30(1) of the Constitution, that the 'choice' is meant to achieve not only the purpose of conserving the minority's mother tongue, language etc. but also giving their children a good general education; that the minority, in furtherance of their fundamental right under Article 29(1) read with Article 30(1) of the Constitution has a choice to teach the other subjects (Maths, Science etc.) through such medium mother tongue, Hindi or English as commends to it and correspondingly a 'negative choice' not to teach such subjects in any such medium that does not commend to its perception of good general education. The petitioner argued that the imposition of regional language was violation of the minority right to conserve its own language, script and culture.

The State of Maharashtra maintained that the imposition of Marathi language or asking the schools to follow particular syllabi is a matter of State policy. The considered policy decision of the State is based on the recommendations of the Education Commission, the National Education Policy, the expert opinion of several educationalists and the need to spread its regional language. The imposition of Marathi language is not against the fundamental rights of the citizens, on the contrary the larger welfare of student community has been kept as the paramount consideration that there is no bar to establish a non-Marathi
regional language medium school in Maharashtra but Marathi language has also to be taught in such schools. All the States have switched over to making their regional language as the compulsory language of study since 1968; that the education policies of 1968 and 1986 has been instrumental in the process of national integration and the students belonging to different linguistic minority groups will be better equipped to get themselves assimilated in the culture and life of people of Maharashtra.

The Court in several cases elaborately considered the limit of minority rights under Article 30. The right under Article 30(1) is not so absolute as to prevent the Government from making any regulation whatsoever. It is difficult to accept the proposition advanced by the Petitioners that minority character would only be protected by learning Gujarati as a First or Second language. There is enough opportunity, in the impugned school syllabi, for students in English medium school run by Gujarati minority group to offer Gujarati language as a composite subject. Therefore, it cannot rule that the impugned policy will result in destroying the minority character of the Gujarati community in Maharashtra. For the foregoing reasons Court held that the impugned policy decisions is not violation of the linguistic minority rights guaranteed under Art.29 and 30 or any other provisions of the Constitution. Hence this petition stands dismissed. 22

The question of state power to prescribe medium of instruction also came up before the Gujarat High Court in Srikrishna v. Gujarat University acting under 1961 the Gujarat University acting under status 207, 208 and 209, purported to have been enacted under Sec. 4(27) and Sec. 38 (a) of the Gujarat University Act, 1949 sought to impose Gujarati or Hindi as an exclusive medium of instruction for institutions affiliated to it. In effect the affiliated college was prohibited to use English as a medium of instruction. The court held that the Gujarat University was not competent to prohibit affiliated college from deciding to impart education in a language of its own choice.
Another example to impose a language on the minority institutions came up consideration in *D.A.V. College v. State of Punjab.* The D.A.V. College trust Society, an association of Arya Samajis which is linguistic minority in Punjab challenged the constitutional validity of S.4 (2) of the Punjabi University Act 1961 and circulars issued there under dated 15.6.1970 prescribing Gurumukhi script as a sole medium of instruction and examination on the ground that it violated the previsions of Art.30 (1). Replying to the question that no minority had the right to tell the University to conduct its examinations in the language or script which the minority had adopted for its own institutions, Reddy J. Observed:

"The state must ... harmonies its power to prescribe the medium of instruction with the rights of the religious or linguistic minority or any section of citizens to have the medium of instruction an script of their own choice by either providing also for instruction in the media of these minorities or if there are other University which allow such colleges to be affiliated where the medium of instruction is that which is adopted by the minority institutions, to allow them the choice to be affiliated to them."

In the case of *English Medium Student Parents Association v. State of Karnataka,* the court held the State can impose reasonable regulations on the institutions covering Article 30 for protecting the larger interest of the State and the nation. The 'choice' that could be exercised by the minority community or group is subject to such reasonable regulations imposed by the State. While imposing regulations, the State shall be cautious not to destroy the minority character of institutions. While imposing regulations, the State shall be constrains not to destroy the minority character of institutions. The regulation in this case imposed by the State of Maharashtara upon the linguistic minority right is to make Marathi language a compulsory course in school syllabi. Here the court was of view that the regulation imposed by the state was reasonable because a proper understanding of Marathi language is necessary for easy carrying out the day to
day affairs to the people living in the State of Maharashtra and also proper carrying out of the daily administration.

All the discussion shows that the power of fixing the medium of instruction is in the hand of the minority institution and it is a part and parcel to their ‘choice’. But in the case of English Medium student Parents Asim says that State can make reasonable regulation for the purpose of proper understanding of the day to day affair.

Though Art 29 (1), which allows minorities to conserve their distinct language or script, does not specify the ‘means’ of conservations, it cannot be the disputable proposition that establishment of educational institutions is one of the most effective means of conservation of language and script. Art. 30(1) which, in terms allows minorities to establish and administer educational institutions leaves it to “their choice” to determine the kind or character of educational institutions. Their “choice”, therefore, must necessarily include a choice to determine the language of instruction in such institutions.

Though under Art. 29 minorities enjoy the right to adopt its own language as the medium of education, the language of Art. 30 (1) does not seem to be susceptible to such a limitation, and would appear to leave with the minority the choice to adopt its own distinct language. Minorities have a constitutional right to determine for their institutions, the medium of their own choice.

The factual situations enabled the courts to delineate the scope of the right of minorities to determine the language of instruction and examination for their own institutions and the extant of the powers of the State to regulate medium of instruction in educational institutions. In Sri Krishna v. Gujarat University, the factual context in which the litigation arose was that the Bombay legislature enacted the University Act in 1949 for establishing a teaching-cum-affiliating university. In 1961 the Gujarat University acting under statutes sought to impose Gujarati or Hindi as the exclusive medium of instruction for institutions affiliated
to it. These statutes were challenged in a petition before the Gujarat High Court by the father of Srikant who was a student of St. Xavier’s college, Ahmedabad, affiliated to the Gujarat University. The college provided teaching in courses of study prescribed by the University for intermediate Arts Examination and for that purpose held simultaneously two classes, one having English as the medium, and the other in Gujarati. Srikant, after having passed the first year Arts class through the medium of Gujarati in 1961 sought admission to the class preparing for intermediate Arts Examination through the medium of English. The college expressed its inability to permit him to seek sanction from the University, which the later denied. He was, however, allowed to keep English as medium of instruction but not for examination, and thus was compelled to attend inter Arts class in which Gujarati was the medium of instruction.

The Gujarat High Court expressed the view that the right to determine the medium of instruction was a necessary part of the rights secured to minorities under Arts.29 (1) and 30 (1). The court held that neither the State Legislature nor the Gujarat University had the competence under the Constitution to prohibit St. Xaviers College from deciding to instruct its pupils in a language of its own choice by directing it to adopt Gujarati or any other language or languages as medium of instruction in place of English which the college, being a Christian minority institution, had adopted as its medium of instruction.

In St. Xavier’s College v. State of Gujarat,29 the observation, though made with regard to recognition and affiliation of minority institutions, are quite pertinent. Visualizing a situation in which there was a law in existence providing for recognition of affiliation, Reddi J. provided the answer in the following words:

The only purpose that the fundamental right under Article 30 (1) would serve would in that case be that minorities may establish their institutions, lay down their own syllabi, provide instructions in the subjects of their choice, conduct examinations and award degrees or diplomas. Such institutions have right to seek
recognition to their degrees and diplomas ... The State is bound to give recognition to their qualifications and to the institutions. ... 

Difficulties have arisen only where a state has sought to prescribe a language as the exclusive medium of instruction. With the reorganisation of the States on linguistic basis, the States have shown a tendency to prescribe the regional language as the sole medium for teaching, with the obvious object to promote regional language. In the *Gujarat University* case what the university had done was to make an attempt to leave the students taking admission to certain classes with no option but to receive instruction and write examination in the Gujarati language. In the D.A.V. College case also the university had sought to impose Punjabi as the exclusive medium for students taking admission to pre-University class.

The decisions considered above show that no language can be prescribed as the sole medium of instruction and to determine for itself the language of instruction and examination. What this brings forth is the proposition that a minority has an ‘absolute’ right to determine the medium of its own choice. The proposition that seems to be firmly established is that the right under Art.30 (1) like other rights are not absolute, and can be regulated. In *Mother provincial v. state of Kerala* the Supreme Court specifically held that ‘Standards of Education’ are not part of management (of minority institutions) and, as such can be regulated. This principle, courts have adopted as a matter of ‘judicial policy’ and have often had to reiterate to press the point.

Therefore, the proposition that a minority has an absolute right to determine the medium of its choice would seem to form an exception to the general rule that standards of education can be regulated. Or, alternatively, it may be said, that the choice remains intact so long as its exercise does not adversely affect standards of education.
In *Hindi Hitrakshak Samiti v. Union of India*, the question before the Supreme Court was whether non-holding of entrance examination (Pre-medical test) in any particular language amounted to violation of clause (2) of Article 29? The three judge’s bench consisting of Sabyasachi Mukharji C.J., K.N.Singh and M.M.Punchhi, J.J, answered the question in negative and held that: “It is difficult to accept that in not holding entrance examination in any particular language be it Hindi or regional language, amounts to denial of admission on the ground of language. Every educational institution has right to determine or set out its method of education and conditions of examination and studies provided these do not directly or indirectly have any casual connection with violation of the fundamental rights guaranteed by the Constitution. It may be that Hindi or other regional languages are more appropriate medium of imparting education to very many and it may be appropriate and proper to hold the examinations, entrance or otherwise, in any particular regional or Hindi language, or it may be that Hindi or other regional language because of development of that language, is not yet appropriate medium to transmute or test the knowledge or capacity that could be had in medical and dental disciplines. It is a matter of formulation of policy by the State or educational authorities in-charge of any particular situation.”

In *General Secretary Linguistic Minorities Protection v. Karnataka* the Karnataka High Court was confronted with one delicate question. The petitioners challenged the validity of the respondent’s order prescribing Kannada as the first language in Secondary Schools and a compulsory subject in non Kannada primary school and for pupils whose mother tongue was not Kannada. The order required the student in secondary schools to opt for the study of two other languages from the languages specified by it, one of which was Kannada. It thus, permitted students whose mother tongue was Kannada to offer Kannada as an optional language also. It provided for 15 grace marks in the paper on Kannada for 10 years students whose mother tongue was not Kannada.
The majority option of Rama Jois, J., with Balkrishna, J., dissenting, contains a wealth of well-documented material on the need for and the importance of imparting education to a child at the primary level in mother tongue. He said: “Development and language go hand in hand, one does not proceed or follow the other.... Educational development is central to economic, culture and political development.”

Rama Jois, J., Further pointed out that the mandatory Art. 350A, which directed the state to provide adequate facilities for instruction in the mother tongue at the primary level, recognized the unanimous opinions of experts that children whose mother tongue was a language other than the official language were not similarly situated. So the impugned order in so far as it made study of Kannada by the linguistic minorities at the primary level compulsory was irrational and arbitrary and so violated of Article 14. The court said further that as the state was not entitled to decide “As to the language in which the children should have their primary education” It was not constitutionally competent to say that the linguistic minority schools “must add to the general pattern of syllabus the regional/official language as an additional subject. So it found that the impugned order violated Articles 29 and 30 also.

In regard to the validity of the order relating to the first language the court found that the Supreme Court had subordinated the state’s police power to determine the medium of instruction to, inter alia, Article 29(1) and 30 and held that administrative and financial difficulties permitting imparting of instruction in college in the language of a minority would not permit infringement of minority rights. It accordingly, held that the regulations making Kannada the sole first language violated Articles 14, 29 and 30. It clarified that the multilingual Karnataka State could make the study of Kannada compulsory from the senior primary class and as one of the three languages in the high school. Against the decision of the Karnataka High Court the state of Karnataka appealed to the
Supreme Court. Justice Mohan confirmed the well-considered judgment of the High Court.

On the basis of cases discussed above it can be stated that while the choice of minority institution to determine medium of instruction is implicit in Art. 29(1) and 30(1) and had the status of a fundamental right, the State’s power to regulate medium of instruction must not come into conflict with this right. The choice of minority institution to decide for itself the medium of instruction cannot be restricted on extraneous considerations, however laudable. It is also recognized that no language can be prescribed as the sole medium of instruction if that is not the language of the minority concerned. A university cannot compulsorily affiliate a minority institution and impose upon it a medium which is not its own. At the same time no minority can claim that the affiliating university should conduct teaching and examination in a language which the minority has a right to adopt.

4.2 Admission in Minority Institutions

The admission policy is a matter which is considered very much within the realm of the administration of a minority educational institution. The issue of admissions to the minority educational institutions has raised two main questions: firstly whether admissions in such institutions be considered as part of the right to administer conferred under article 30(1), and secondly whether state can regulate admissions in such institutions and if yes then to what extent?

In St. Stephen’s College v. University of Delhi exempting Stephens College from the uniform admission procedure applicable to all affiliated and constituent colleges of the University of Delhi at the undergraduate level, the court held that admission of students is an important facet of administration. It can be regulated but only to the extent that the regulation is conducive to the welfare of the minority institution or for the betterment of those who resort to it. The court held that denial to St. Stephen’s College the power to supplement its admission procedure by interview and to compel it to make admission exclusively on the
basis of marks obtained in the qualifying examination would be against the right of the minority educational institutions under Art.30 (1).

In the above case the Supreme Court clearly laid down the law regarding the admission to minority educational institutions. In the light of all the relevant principles and factors and in view of the importance which the constitution attaches to protective measures of minorities under Article 30(1), the court decided that there have to be two categories for annual admissions in a minority educational institution:

(a) Category- I, (50% seats) for candidate belonging to the minority community which has established and administers the institution.

(b) Category- II, (remaining 50%) for all candidates to be filled purely on the basis of merit.

According to the mandatory direction of the Supreme Court, in the 50% Category - II admissions in a minority educational institution there can be no reservation or weightage for any class of admission-seekers, here the admission are to be based purely on merit. The decision ruled out any reservation for SC/ST candidates in Category- II.

In *T.M.A. Pai Foundation* the Court observed that admission of students to unaided minority educational institution cannot be regulated by the concerned State or University, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards. The Court observed that “The right to admit students being an essential facet of the right to administer educational institution of their choice, as contemplated under Article 30 of the Constitution, the State government or the University may not be entitled to interfere with that right . . . A minority institution does not cease to be so, the moment aid is received by the institution. An aided minority educational institution would be entitled to have the right of admission of students of belonging to the minority group and at the same time, would be required to admit
a reasonable extent of non-minority students. So that the rights under Article 30(1) are not substantially impaired and further the citizen's right under Article 29(2) is not infringed . . . it can also be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission. As regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of common entrance test held by the State agency followed by counseling wherever it exists. . . A minority institution may have its own procedure and method of admission as well as selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not tantamount to mal-administration. . . While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State qua non-minority students."

The court also emphasized that the admission procedure must be transparent and fair and the merit gets the priority.

Earlier in Lilly Kurian case,\textsuperscript{42} strong arguments were put forward before the Supreme Court in which it was pleaded that reconciliation of minority rights in education with other social and educational objectives was inevitably necessary and this involved the judicial task of balancing the guaranteed rights under Art.30 (1) with social, national or educational values. Argument was furthered by saying that if the State had any role to play in the system of general education, its power should not be confined merely to the laying down of a prescribed standards of education for minority educational institutions but should also extend to all necessary measures to secure an orderly, efficient and sound administration of such institutions.\textsuperscript{43}

Referring with approval to the test laid down in Sidhrajbhai\textsuperscript{44} case, namely, that regulation must be reasonable as well as must be conducive to making the institution an effective vehicle of education for the minority community, Sen J.
Speaking on behalf of the Court rejected the above plea and held: “Art. 30 (1) is not a charter of maladministration; regulation, so that the right to administer may be better exercised for the benefit of the institution is permissible; but the moment one goes beyond that and imposes, what is in truth, nor a mere regulation but an impairment of the right to administer, the Article comes into play and the interference cannot be justified by the pleading the interests of the general public; the interests justifying interference can only be the interest of the minority concerned”.^45

_Lilly Kurian_ case clearly indicates that no restriction on a minority institution can be acceptable unless the restriction is in the interest of the minority institution itself and shows that the courts have not detracted from the path laid in _Sidhrajbhai_ case. _Gandhi Faiz-e-am College_ case is perhaps the only example wherein, judging from the test laid down in _Sidhrajbhai_ case, an ‘unreasonable restriction’ was upheld by the court. But there too, Krishna Iyer J. had to fall back upon the ratio of the _Sidhrajbhai_ case and had to bring in his usual selective diction to drive home that the restriction was nothing but a regulation in the interest of the institution itself, and thus ‘reasonable’.^47

Many disputes have arisen in the context of holding common entrance test for admission to professional colleges. In this regard the in _Islamic Academy_ case the Court held that in minority educational institutions the management could select students of their quota, either on the basis of the common entrance tests to be conducted by an association of all colleges of a particular type in that State e.g. medical engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The opinion of choosing between either of these tests must be for exercised before issuing of prospectus and after intimation to the concerned authority and the committee set up hereinafter. If any professional colleges choose not to admit from the common entrance test conducted by the association then the college must necessarily admit from the common entrance test conducted by the state. After
holding the common entrance test and declaration of result the merit list will immediately be placed on the notice board of all colleges which have chosen to admit as per the test. A copy of merit list will also be forthwith sent to the concerned authority and the Committee. Selection of students must then be strictly on basis of merit as per that merit list. Of course, as indicated earlier, minority will be entitled to fill up their quota with their own students on basis of inter-se merit amongst those students. The list of student admitted along with the rank number obtained by the student, the fees collected and all such particulars and details as may be required by the concerned authority or the committee must be submitted to them forthwith. The question paper and the answer papers must be preserved for such period as the concerned authority or Committee may indicate. If it is found that any student has been admitted dehors merit, penalty can be imposed on that institute and in appropriate cases recognition affiliation may also be withdrawn.

In the case of P. A. Inamdar the observation of the court is that six months prior to the commencement of academic year, the Government would fix the percentage of students to be admitted by minority (religious/linguistic) professional college (other than engineering), taking into account the local needs of the State, the region as well as the minority. It would be a huge and cumbersome exercise in practice, to fix a percentage for each one of the institutions separately and it would be a pragmatic approach to have a fixed percentage for all the minority institution which is fair and reasonable. A practical approach to the problem would require a very definite percentage to be fixed for the minority institution, say 50% so that even if candidate of their choice, belonging to the minority institutions, are only 25% they would still have the right to select non minority students to make up 50% of course, from CET held by the Government.

The Punjab and Haryana High Court has ruled that the students have no right under Article 29 (2) to be admitted to an aided and recognized minority educational institution on merits alone. Only on the four grounds mentioned in
Article 29(2), admission cannot be denied.\footnote{52} In another case the Bombay High Court held that the right of the minorities under Article 30(1) was not subject to any reasonable restriction and, therefore held that restrictions and prescribing that a certain percentage of students belonging to the SCs or STs had to be admitted even by the non-government polytechnics could not be made applicable to the minority institutions.\footnote{53} The above decisions of the Courts imply that the choice available to a minority institution to admit students of its own choice cannot be restricted.

The extent to which the state can interfere in the matter of admission in a minority education institution was discussed by the Supreme Court in Sidhrajibhai v. State of Gujarat. In this case the petitioners who were Christian minority and running Training College for teachers challenged the order of the Govt. by which all private training colleges were required to reserve 80 per cent of the seats for government nominees. The Govt. also threatened that noncompliance to its order will lead to withdrawal of grant and recognition. Agreeing to the contention of the petitioners the Court held that “The order made by the Government of Bombay made serious inroads into the right of the society to administer the training colleges.” The Court also found the order not conceived in the interest of the college.

This question was also discussed by the Kerala High Court in K.O.Varkey v. State of Kerala\footnote{54} in which the validity of rules 6, 7 and 8 of the Kerala Education Rules, 1959 was in question. Under these rules only 20 per cent of the seats were left for selection by manager and selection of 80 per cent of the seats was to be made by other agencies. The petitioner challenged the enforcement of these rules on the ground that these restrictions interfered with the matter of admission of students of their choice, and therefore, violated the guarantee under Article 30 (1).

It is interesting to note the courts observations made in regard to the waving of the right under Article 30. It was contended by the respondent in this case that
the fundamental right had been waved by its non assertion by the minority in that they submitted to the enforcement of the rules in the past without protest. The Court said that “The fundamental right under Article 30 is that of a plurality of persons as a community of persons necessarily fluctuating and waiver means the voluntary relinquishment of a known right. It may be difficult to infer waiver from the conduct of the members of a fluctuating body. Can the present members of a minority community barter away the right under Article 30 so as to bind the future members of it as a unit? The fundamental right is of the living generation.\textsuperscript{55}

The courts have asserted and reiterated that Art. 30 (1) of the Constitution of India cannot be read to imply a condition that an institution, in order to have the status of a ‘minority institution’ must keep its doors open to the members of the minority alone. Art. 30(1) implies no limitation whatever the minority institutions to restrict their ‘choice’ of admission to the members alone.\textsuperscript{56}

Admitting non-member, however, does not shed its minority character. A question, however, arises as to whether the right of the minority educational institutions to admit the students of their choice also implies a freedom not to admit and can they confine admissions in their institutions to their own members only? If answer to this is yes than it must bring the minority institution face to face with the prohibition incorporated in Cl. (2) of Art.29, which seeks to prevent educational institutions receiving aid out of State funds from denying admission to any citizen on ground of religion, race, caste or language. If the answer is in negative, it must beg the question, what then is true scope underlying Art.30 (1)?

The courts seem to have read too much in Art.29 (2) and have taken little pains to ascertain the true object underlying the both Art.29 (2) and 30 (1) for bringing about a rational synthesis between the two. The Supreme Court in the Kerala Opinion\textsuperscript{57} specifically held that Art. 30(1) was subject to Art.29 (2). It may though appear surprising, but is interestingly true that the framers never intended Art.29 (2) to act as restrain upon the content of the right under Art.30(1).
Originally, the present Art.29 (1) was part of an integrated scheme devised to protect educational interest of religious and linguistic minorities. The simple object of what now constitutes Art. 29 (2) was to protect minorities from being discriminated against in regard to admission into state educational institutions. Explaining the scope of draft clause 18(2), KM Munshi said that the scope of this clause is only restricted to this, that where the State has got an educational institution of its own, no minority shall be discriminated against. Similarly Patel said that this a simple non-discriminatory clause against the minorities in the matter of admission to schools maintained by the State.

It was only when the draft article 23 came up before the Assembly that a dramatic change took place in this position. Pandit Thakurdas Bhargawa suddenly came forward with an amendment to redraft article 23 to read “No citizen shall be denied admission into any educational institution maintained wholly by the State or receiving aid out of State funds on grounds only of religion, race, cast, language or any of them”. Assembly accepted the Bhargawa’s amendment substituting the word ‘minority, by the word ‘citizen’ without realizing the outcome in the form the apparent conflict between what now in Art.29 (2) and Art.30 (1). The real intention of the framers in fact was to extend the benefit of non-discrimination clause to other groups as well without sacrificing the real object and not to restrict the scope of Art.30 (1).

The wide scope admitted to Art. 30 (1) would perhaps leave for the courts, in any future controversy, little option but to forge a harmonious synthesis between Art 30 (1) and Art.29 (2), by giving the latter a restricted scope. In some situation the operation to Art.29 (2) may nullify the very object for which Art.30 (1) was enacted. For example in *Arogiasami* where the Madras High Court noted that one of the results of the Government order regulating procedure for admission in aided schools was that the student belonging to the Roman Catholic minority, representing less than ten per cent of the total population, were thrown into a competition with the general students and thus had little chances for admission.
into the minority institutions. In such situations as this, thus, a minority being smaller numerically may not be able to admit its own student if it is obligated, under compulsions of Art.29 (2), to admit students strictly according to merit.

On such situations, the analogy of Devadason and Balaji cases may well be extended. The Supreme Court in Devdaesan held: “A Proviso or an exception cannot be interpreted as to nullify or destroy the main provision”. Balaji case was decided; a year earlier, on the reasoning that it would be unreasonable to assume that in enacting Art.15 (4) the constitution intended to provide that the other fundamental rights were to be completely ignored. A unanimous Supreme Court, in that case, construed Art.15 (4) (which in terms is similar to Art.16 (4) restrictively and even drew a line beyond which its operation cannot go. If an ‘exception’ is given a restricted meaning for enabling the ‘general rule’ to have its full play as has been done in the case of Arts.15 and 16, it is possible that the courts may, in an appropriate controversy, interpret Art.29 (2) narrowly so as to keep intact the wide scope they have admitted to the language of Art.30 (1).

4.3 Appointment of Teachers

The selection and appointment of staff for running educational institution is an essential part of the “right to administer” under Art.30 (1). The position that a Principal/ Head Master or other teachers occupy in the setup of an educational institution is of great importance. It is almost wholly these functionaries on whom depends the tone and temper of the institution. On them depends the establishment and continuity of its traditions and reputation, the maintenance discipline, and the efficiency of its teaching and training. On their outlook, efficiency and cooperation depends the success or failure of the objects of establishment of the institution. It is regarded as pre-eminently a function of the administration. As K.K. Methew, J. has observed supporting the majority view in Ahemedabad St. Xaviers College case.
"It is upon the principal and teachers of a college that the tone and temper of
an educational institution depend. On them would depend its reputation, the
maintenance of discipline and its efficiency in teaching. The right to choose the
principal and to have the teaching conducted by teachers appointed by the
management after an overall assessment of their outlook and philosophy is
perhaps the most important facet of the right to administer an educational
institution. So long as the persons chosen have the qualifications prescribed by the
University, the choice must be left to the management. That is part of the
fundamental right of the minorities to administer the educational institution
established by them."

In this case two sets of provisions of the Gujarat University Act, 1973, had the
effect of interference with the right of Christian minority institution to have the
teachers of their own choice for instruction. Section 40 and 41 together provided
that if the Gujarat University so decided and the State Government issued the
necessary notification, all instruction, teaching and training in under-graduate
course would, in the constituent colleges, be imparted by the teachers of the
University. The result was that once these provisions become operative the
minority colleges would not be entitled to impart education through their own
teachers, which indirectly affected their choice to appoint and have teachers of
their own liking. But more direct interference with this choice came from Section
33-A (1) (b) which the interveners challenged as violative of Art.30 (1). The
Section provided for a selection provided for a selection committee for recruitment
of the Principle and members of the teaching staff of a college.

Mathew J. observed that we can perceive no reason why a representative of
the University nominated by the Vice- Chancellor should be on the Selection
Committee for recruiting the principal or for the insistence of the head of the
department besides the representative of the University being on the Selection
Committee requiring the members of the teaching staff. So long as the person
chosen have the qualification prescribed by the University, the choice must be left
to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them.\textsuperscript{68}

Therefore, the position taken by the Supreme Court is that while a University can prescribe qualifications for the academic staff, the actual selection of teachers must remain in the hands of the administration of the institution and dilution of the right of the management infringes Art.30 (1). Accordingly, a condition that any appointment of a teacher in a college will be subject to the approval of the Vice-Chancellor has been held invalid under Art.30 (1).\textsuperscript{69}

The attention of the Supreme Court was drawn to a legal provision which required the managing committee of an educational institution to appoint teachers in the school with the concurrence of the School Service Board. The Supreme Court held the provision to be valid.\textsuperscript{70} The Court pointed out that as regards the consent of the School Service Board to the appointment of teachers, the Act itself clarifies that the Board while considering the question of granting approval to the appointment of a teacher would ascertain if the appointment was in accordance with the rules laying down qualifications, and the manner of making appointments continues to vest in the managing committee of the minority school and the Board has no further power to interfere with the right of the managing committee of a minority school. This provision was simply aimed to ensure that only qualified teachers are appointed in the school and not to interfere with the right of the management of minority educational institution to appoint teachers.

In another case a legal provision requiring the selection of the teachers of all affiliated colleges including those established by the minorities to be made by the University Service Commission was held to interfere with the rights of the petitioners.\textsuperscript{71} Similarly a rule conferred on the University Syndicate the power to veto the selection of the principal or other teachers made by a college was held non-applicable to minority institutions.\textsuperscript{72} In this case subsections (1), (2) and (3) of section 53 of the Kerala University Act, 1969, sought to regulate the appointment
of principal in private colleges was challenged. It provided that appointment to such post would be made by the managing body from among the teachers of the college, an outsider being appointed only if there was no suitable person in the college. It further provided that the appointment would be made subject to approval of the Syndicate. The Supreme Court found such provisions as violative of Art.30 (1). The Court used the following words to express its attitude:

"Administration means management of the affairs of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right." 73

The board of management of a school established and managed by the Jesuits appointed a junior teacher, a Jesuit, as the Head Master of the school in preference to the senior-most teacher who was not a Jesuit. The director of Education reversed the appointment and upheld the claim of the senior teacher. This decision of the Director of Education was challenged in the High Court by the management as violative of Article 30(1) of the constitution. The Court quashed the Director's order and upheld the appointment made by the management saying that the post of the head Master in a school is of pivotal importance and the right to select him is the most important facet of the right to administer the school and this right of the management could not be restricted except to the extent of prescribing requisite qualifications and experience for the post. A rule requiring that the senior-most teacher must be promoted to the Head Master's post cannot be binding on minority schools. 74

The courts have consistently insisted that the management of a minority institution is entitled to select a person of its choice for such a post subject to qualification and experience as may be prescribed. In A.M. Patroni v. Asstt.
Rules 44 and 45 of the Kerala Education Rules were challenged as violation of right guaranteed under Art.30 (1). Rule 44 provided that ordinarily a headmaster must be appointed by promotion of the senior most teachers and Rule 45 was an exception to that in the case of upper primary schools. In order that exception could apply, the teacher who was sought to be appointed as the headmaster must be a graduate with at least five years teaching experience and must have put in service equal to one-third of the service put in by the senior most teachers. The Court observed that even if an institution was protected under Art.30 (1), the state could make laws regulating the appointment of teachers in the interest of the institution. It, however, insisted that the regulation must be limited to the qualifications that a teacher must possess and to the experience which he should have. Rules 44 and 45 do not relate to these two requirements.

In the *Mother Provincial* case, namely, that there could be no objection to the appointment of the principal or any other member of the staff being subject to the approval by some authority of the University so long as disapproval could be only on the ground that the person had not the requisite qualification, and that if the disapproval was not only to be on some stated grounds but was to be left entirely to the will and pleasure of the appointing authority, that would be to deprive the educational institution of its power of appointment and would offend Art.30 (1). Proceeding on the assumption that the choice of the minority in matters of selection and appointment of teachers should be unfettered, the High Court found Section 57 (2) to be a permissible regulation. Section 57(2) required the appointments of principals to be made by promotion from among the teachers of the college or by direct recruitment.

In *Benedict Mar Gregorios v. State of Kerala*, a full bench of the Court gave a qualified approval to section 2(27) read with Section 57(9), saying:
...we would pass Section 2(27) read with Section 57(9) of the Act subject to the limitation that the University is bound to grant approval once a teacher appointed is found to possess the requisite qualifications prescribed for appointment and that any arbitrary or unwarranted refusal or approval to an appointment would violate the provisions of Article 30(1).™

The Supreme Court in Board of Secondary Education & Teachers Training v. Jt. Director of Public Instruction has again upheld the right of the management of a minority institution to appoint the Headmaster of its choice.® The court was of the view that “the management's right to choose a qualified person as the Headmaster of the school is well insulated by the protective cover of Article 30 (1) of the Constitution and it cannot be chiseled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post; and that any such statutory or executive feat would be violative of the fundamental right enshrined in Article 30(1) and would therefore be void.” This Court further observed that if the management of the school is not given the wide freedom to choose the person for holding the key-post of Principal subject, of course, to the restriction regarding qualifications to be prescribed by the State, the right to administer the School would get much diminished.

The Madhya Pradesh High Court in Islamia Karimia Society v. Devi Vishwavidyalaya® held that the impugned statute framed under the Indore University Act, 1963, to provide that the Kulpati or his nominee should be the Chairmen of the Selection Committee for non-government educational institutions, was repugnant to Article 30 as construed in St. Xaviers. The High Court, however, upheld the other provisions of the impugned statute providing that a nominee of the management of the college, the principal of the college and two experts nominated by the Kulpati should be the other members of the Selection Committee. Following a number of Supreme Court cases, it pointed out the nomination of experts by the Kulpati for the Selection of teachers was conducive to the maintenance of high standards of education.
An interesting case relating to the appointment of head of a college is the M.M. John case\textsuperscript{82} in which sub-sections (1) to (3) of Section 53 of the Kerala University Act, 1969 in other amended from amended after they were declared ultra virus of Article 30 (1) by the Supreme Court in the Mother Provincial case, came up for review before the Kerala High Court. The amended sub-section (1) provided that principals of private colleges shall possesses such qualifications as may be prescribed by regulations. Sub-section (2) read as follows:

“A vacancy in the post of principal shall be filled up by the educational agency or the corporate management, as the case may be, by the appointment of a person possessing the prescribed qualifications, from among the teachers of the colleges, as the case may be. If no such person is available, the educational agency or corporate management as the case may be shall recruit a qualified person after due advertisement as may be specified in the statutes.”

While striking down the amended sub-sections (1), (2) and (3) of section 53, the Court observed that in the guise of prescribing qualifications by regulations, by providing that a vacancy in the post of principal shall be filled up by appointment of a person possessing the prescribed qualification from among the teachers of the college was the obstruction to the right of the management to choose the best person for the post of principal.

In Rev. Br. A Thomas v. Inspector of Schools\textsuperscript{83}, the Madras high Court found it to be an unreasonable interference to tell the minority institution that it could not employ a more highly qualified teacher in the interest of better standards of education. The Court admitted that the Government was competent to prescribe the minimum qualifications, but beyond that the exercise of any control over the power of appointment of a minority institution would amount to an uncalled for restriction not permitted by Art.30 (1).

In the most recent case T.M.A.Pai Foundation v. State of Karnataka\textsuperscript{84}, the Supreme Court held that “In such professional unaided institutions, the
Management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/University subject to adoption of a rational procedure of selection".

A review of the above decisions would show that consistency in judicial approach is hardly anywhere more solidly founded than on the question of scope of autonomy enjoyable by minority institutions in matters that pertain to selection of staff. The courts seem to be unwilling to concede any other power to the State than a power to prescribe minimum qualification for persons to be appointed by such institutions. They are unwilling to accept even such a condition which requires that a principal should be appointed from among the existing teachers of the institution. Nor are they willing to allow even one person from outside to sit on the selection committee for appointment of personnel of the institution. Thus, between the right of minorities to choose teachers and other staff of their own choice and the claim of the State to regulate such appointments so as to maintain academic standards the formula that the courts have evolved is that the State can prescribe professional qualifications and experience and the minority institutions are left with the freedom to choose personnel.85

The lone exception, if it can be regarded so, to the general rule of 'non-interference' which the courts have jealously guarded in the past, was the view expressed by S.R. Das C.J. in re Kerala Education Bill86 on clause 11 of the Kerala Education Bill, 1957. That clause empowered the State Public Service Commission to select candidates for appointment as teachers in aided institution. Strong objections were made to this clause on the ground that minority institution could not appoint a teacher at all except out of a penal to be prepared by the Public Service commission, which apart from taking up such duties, could not be qualified at all to select teachers who would be acceptable to religious minorities.

Referring to Clause 11 (along with Cl. 12, conditions of service of teachers) Das C.J. observed: These are, no doubt, serious inroads on the right of
administration and appear perilously near violating that right. But considering that, those provisions are applicable to all educational institutions and that the impugned parts of cls. 9, 11 and 12 are designed to give protection and security to the ill paid teachers who are engaged in rendering service to the nation and protect the backward classes, we are prepared, as at present advised, to treat these clauses 9, 11(2) and 12(4) as permissible regulations which the State may impose on the minorities as a condition for granting aid to their educational institutions.\textsuperscript{87} The Supreme Court, however, in subsequent cases found such provisions to be violative Art.30 (1). In fact in an unbroken line of decisions the courts have disallowed every attempt to interfere with minority’s choice in matters of selection and appointment.

NOTES AND REFERENCES

3 AIR 1958 SC 982-83.
4 AIR 1974 SC 1389.
5 AIR 1974 SC 1399.
6 AIR 1958 SC 983-84.
7 AIR 1963 SC 540.
8 AIR 1963 SC 547.
9 AIR 1970 SC 2082.
10 AIR 1970 SC 2085-86.
11 AIR 1968 at 670.
12 AIR 1968 at 670.
13 AIR 1958 SC 956.
17 AIR 1954 SC 561.
18 Bhrigu Nath Pandey, no. 15, p. 147.
19 (1954) ISCR 568
22 Ibid.
23 AIR 1964 Guj. 88.
24 AIR 1971 SC 1731.
25 AIR 1971 SC 1735.
28 AIR 1962 Guj. 88.
29 AIR 1974 SC 1389.
31 AIR 1970 SC 2079.
35 AIR 1990 SC 853.
36 AIR 1989 Kant. 226.
37 AIR 1989 Kant. 234-35.
38 AIR 1989 Kant. 226.
39 AIR 1994 SC 1702.
40 AIR 1992 SC 1630.
42 AIR 1979 SC 52.
43 AIR 1979 SC 57-58.
44 AIR 1963 SC 540
45 AIR 1979 SC 61.
46 AIR 1979 SC 61.
47 AIR 1975 SC 1828.
49 AIR 2003 SC 3724 at pp.3744-3745.
52 Gurpreet Singh v. Punjab University, AIR 1983 P. & H. 70
54 AIR 1969 Kerala 191.
56 Anwarul Yaqin, no. 34, p. 227.
57 AIR 1958 SC 956.
60 CAD, Vol. vii, p. 895.
61 Director v. Arogiasami, AIR 1971 Mad. 440.
64 (1964) 4 S.C.R. 695.
66 Anwarul Yaqin, no. 34, p. 243.
68 AIR 1974 SC 1389.
73 AIR 1970 SC 2082.
74 *Aldo Maria Patroni v. E.C. Kesawan*, AIR 1965 Ker. 75.
75 AIR 1974 Ker. 197.
76 AIR 1974 P. 201.
77 AIR 1970 SC 2079.
78 1977 KLT 458.
79 1977 KLT 469.
81 AIR 1988 MP 200.
82 AIR 1975 Kerala 265.
83 AIR 1976 Mad. 214.
84 AIR 2003 SC 335.
85 Anwarul Yaqin, no. 34, pp. 291-304.
86 AIR 1958 SC 956.
87 AIR 1958 SC 983.
CHAPTER - V

REGULATORY MEASURES

5.1 General Principles

The fundamental right of the minorities under Art. 30(1) of the Constitution, though couched in absolute terms, is subject to regulatory power of the State. The decisions on the scope and applicability of Art.30 (1) seem to have long settled that as no right can be absolute, Art.30, being no exception, cannot have its operation as an unbridled license, and can have its effectiveness only within specified limits. However, the extent to which the State can regulate the affairs of the minority educational institutions is a controversial issue. The judiciary has consistently recognized that reasonable restrictions can be imposed in the interest of the minority educational institutions.

The courts in general have admitted a very broad interpretation for the word “choice” occurring in Art.30 (1). This choice includes, as they have held, a number of ‘rights’ such as to get recognition and affiliation, in some situations to receive financial aid from the State, to select medium of instruction, to select staff, and the to determine the kind and character of the institution etc. Though none of these rights is expressly made available to minorities, yet they are recognized by the courts as essential for a meaningful exercise of the principle right— the right to establish and administer educational institutions. The courts, however, have also expressed and reiterated that ‘standards’ of education are not part of the right to establish and administer and as such can be regulated.

The Courts have recognized and emphasized that regulations can be imposed in all such matters that go to ensure excellence of the institutions, and have left enough room for regulatory authorities to prevent deterioration in standards. The courts have done so despite the fact that no where under Art. 30 (1) such regulation is stipulated. Regulations may be made either by legislation or by executive order. Such regulation are permissible only in so far as they do not
restrict the right of administration of the minority community but facilitate and ensure better and more effective exercise of that right for the benefit of the institutions.² Regulations should not be in such a manner that offends the very spirit of Art.30 (1).

In Sidhrajbhai v. State of Gujarat³ the government of Gujarat had issued an order requiring the private teacher’s training Colleges to reserve eighty percent of the seats in training Colleges for the government deputed candidates. The Supreme Court struck down the order on the ground that though the order satisfied the test of public interest, i.e. increasing the number of trained teachers in state institution, it did not satisfy the other test, i.e. the regulation must be of educational character in the interest of minority. The court observed:

“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. Regulations which may lawfully be imposed either by legislative or executive action must satisfy a dual test the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.” Shah J., representing the Court laid down a test for determining the validity of a regulatory measure. He stated that the right of the state to regulate must satisfy a dual test: that the regulation must be reasonable; and regulation is of educational character of the institution and is conducive to making the institution an effective vehicle of education.

The Supreme Court also specified the possible ‘subjects’ of regulations: regulations made in true interests of efficiency of institution, discipline, health, sanitation, morality, and public order etc. The court stated that such regulations are not restrictions on the substance of the right which is guaranteed, they in fact secure the proper functioning of the institutions in educational matters.

In the Mother Provincial case⁴, the Supreme Court, while referring to the Sidhrajbhai case and tending to follow the line the latter had drawn, came out
more frankly on the question, how much of the right to administer was unassailable as a being constitutionally protected and what part of it could be regulated through constitutionally permissible measures. Hidayatullah C.J. observed that administration means ‘management of the affairs’ of the institution and this management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. He noted that no part of this management can be taken away.\textsuperscript{5}

To this general rule of non-interference, the learned Chief Justice admitted the following exception: “There is, however, an exception to this and it is that the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if universities establish the syllabi for examinations they must be followed, subject however to special subjects which institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others.”\textsuperscript{6}

In \textit{St. Xaviers College}\textsuperscript{7} case Roy C.J. viewed that the government can regulate course of the study, qualifications and appointments of teachers, conditions of employment of teachers, health and hygiene of students, facilities for libraries and laboratories. He also talked about the need of such measures as would bring about uniformity, efficiency and excellence in educational matters. He emphasized that such measures would help orderly, efficient and sound administration. Mathew J. accepted the position that minority institutions are subject to the general laws of
the land but insisted that no regulation can be permissible which is not calculated to subserve the interest of the institution itself.

The *Faiz-e-Am College* decision gave a narrower construction than the all earlier decisions of the court on the question of the scope of the regulation. Krishna Iayer J. speaking for the majority noted: “All the learned Judges who are party to St. Xaviers... And all the earlier ruling has negative the untouchable absoluteness urged by the managements. Equally fallacious is the simplistic submission that Art. 30 are disturbed only when the right is destroyed, not when it is damaged. St. Xaviers has dispelled doubts in this behalf: abridgement of the constitutional right is as obnoxious as annihilation. To cripple is to kill. He opined that regulation which restricts is bad; but regulation which facilitates is good. To draw the delicate line between what is permissible and which is not learned Judge observed:

“A benignly regulated liberty which neither abridges nor exaggerates autonomy but promotes better performance is the right construction of the constitutional provision. Such an approach enables the fundamental right meaningfully to fulfill its tryst with the minorities’ destiny in a plural policy. He said that to regulate, be it noted, is not to restrict, but to facilitate effective exercise of the very right. The constitutional estate of the minorities should not be encroached upon neither allowed to be neglected nor mal-administered.”

The *Mark Netto* and *Lily Kurian* cases have only added to the validity of the test. In *Mark Netto* case, the Supreme Court did not allow a restriction on a minority institution even as the restriction was supposedly made in the interest of another minority institution. The consideration that conditioned the decision in this case was thus none else than what the test in the *Sidhrajbhai* case required. In *Lilly Kurian* case, the Supreme Court quoted the *Sidhrajbhai* test with affirmation, and used words which only help keep the test alive as a living force: “Protection of the minorities is an article of faith... and the interference cannot be justified by pleading the interests of the general public; the interest justifying interference can only be the interests of the minority concerned.” What the above observation
insists upon is that ‘public interest’ cannot be a test for judging the
constitutionality of a regulation.

The D.A.V. College\(^{14}\) decision, by declaring an order unconstitutional which
sought to impose Punjabi as the medium of instruction on a minority institution
which was not the language of the minority itself, did nothing but to reject the
‘public interest’ test. For, Punjabi being the language of the majority of inhabitants
in Punjab, imposition of Punjabi as the language of instruction was nothing but a
regulation, the object of which was to serve ‘public interest’.

Regulatory conditions for recognition, affiliation or aid may be held
permissible, and yet they may not have been designed to make the minority
institution as an excellent vehicle of education but for the sole purpose of
maintaining ‘uniformity’ in standards- which is nothing else than a regulation in
the public interest. All this apart, considerations, for judging whether a regulation
seeks to sub serve the interest of the institution itself, may vary from case to case
and from judge to judge. Krishna Iyer and Gupta JJ., who formed the majority, in
Gandhi Faiz-e-Am College case broke away from the line of decisions so well
established till 1975, by allowing a regulation which imposed two persons from
outside of the managing body of the minority institution against its will, and yet
emphasized that the regulation was in the interest of the minority institution itself.
Only a year earlier, in the St. Xavier’s College case, a majority of seven judges had
taken the position that the composition of a managing body could not be disturbed
by inducting outsiders into it.\(^{15}\)

In Bihar S.M.E. Board v. M.H.A. College\(^{16}\) the respondents had challenged the
constitutional validity of Section 7(2) on Bihar State Madarsa Education Board
Act, 1982 as violative of Art.30 (1) of Constitution as it interfered with their right
of management of institutions. The Act provided for the constitution of an
autonomous Board, for development and supervision of Madarasa Education in
the State of Bihar. The Act confers power on the Board to provide the constitution
and dissolution of Management Committee of Madarasa. The Court held that
Section 7 (2) (n) of the Act which provided for dissolution of Managing
Committee of a Madarasa was violative of Art.30 (1) of the Constitution. The State has, under the guise of its regulatory power, no power to completely take over the management of a minority institution.

S.B. Sinha J in Islamic Academy\textsuperscript{17} held that Article 30 (1) of the Constitution does not confer an absolute right. The exercise of such right is subject to permissible state regulations with an eye on preventing mal-administration. Broadly stated there are “permissible regulations” and “impermissible regulations.”\textsuperscript{18}

Some of the permissible regulations/restrictions governing enjoyment of Art.30 (1) of the Constitution are:

(i) Guidelines for the efficiency and excellence of educational standards.\textsuperscript{19}
(ii) Regulation ensuring the security of the services of the teachers or other employees.
(iii) Introduction of an outside authority or controlling voice in the matter of service conditions of employees.\textsuperscript{20}
(iv) Framing Rules and Regulations governing the conditions of service of teachers and employees and their pay and allowances.\textsuperscript{21}
(v) Appointing a high official with authority and guidance to oversee that Rules regarding conditions of service are not violated, but, however such an authority should not be given blanket, un canalised and arbitrary powers.\textsuperscript{22}
(vi) Prescribing courses of study or syllabi or the nature of books.
(vii) Regulations in the interest of efficiency of instruction, discipline, health sanitation, morality, public order and the like.

In P.A. Inamdar v/s State of Maharashtra,\textsuperscript{23} the court observed that once an educational institution is granted aid or aspires for recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition. Merely because an educational institution belongs to minority it cannot ask for aid or recognition though running in unhealthy surroundings, without any competent teachers and which does not maintain even a fair standard of teaching or which teaches matters subversive to the welfare of the scholars. Therefore, the State may prescribe
reasonable regulations to ensure the excellence of the educational institutions to be granted aid or to be recognized. However, in the name of laying down conditions for aid or recognition the State cannot directly or indirectly defeat the very protection conferred by Article 30(1) on the minority to establish and administer educational institutions. S.B. Sinha, J. in his opinion in *Islamic Academy*\(^{24}\) held that the considerations for granting recognition to a minority educational institution and casting accompanying regulation would be similar as applicable to a non-minority institution subject to two overriding considerations: (i) the recognition is not denied solely on the ground of the educational institution being one belonging to minority, and (ii) the regulation is neither aimed at nor has the effect of depriving the institution of its minority status."

An analysis of decided cases shows that the extent of regulatory power of the state has always been subject matter of controversy because the nature of regulation differs from one case to another and no general standard test can be laid down for determining the extent of states power to regulate educational institutions of the minorities. Any generalization cannot be exhaustive because there is no similarity of issues that come before the court.\(^{25}\) However, what seems to be well established that a regulatory measure must be reasonable and must also be regulative of the educational character of the institution as a minority institution and must be conducive to making the institution as an effective vehicle of education. A regulation in order to be valid must not interfere with autonomy and independence in matters of management and it must not deprive the institution of its minority character. The interest of the minority and not the public interest or national interest should be crucial in determining the constitutionality of a regulation.

### 5.2 Affiliation and Recognition

Recognition and affiliation are very powerful instruments in the hands of State or University to control minority educational institutions. When a minority institution seeks recognition from the State, it expresses it choice to participate in the system of general education and expresses its intention to adopt for itself the
courses of instruction prescribed for other institutions. Recognition is a facility
which the State grants to an educational institution for enabling the students in
such institution to sit for an examination certificates to degrees. The student of an
unrecognized educational institution cannot obtain the recognized certificates or
degrees, cannot be eligible for higher education and, in the existing system where
jobs are generally linked with educational degrees, cannot be eligible for entering
the public services. And affiliation to a university is sought to enable the students
of minority educational institutions to sit for examination conducted by a
university. Minorities have thus an interest in recognition and affiliation of their
institutions as without this their educational institutions cannot fulfill the real
objects of their ‘choice’ and cannot effectively exercise the rights available to
them under Art.30 (1).

But if recognition and affiliation create an interest in minorities, these also
create an interest in the recognizing or affiliating authorities, the interest being that
the institutions seeking recognition or affiliation satisfy conditions set by them for
according recognition or affiliation. But as the conditions set by them of,
alternatively, in the absence of existence of any such conditions, the option
otherwise open to minority institutions, are not always such as to enable them to
effectively exercise their rights under Art.30 (1). Conflicts do arise and have often
been brought up before the courts for their solutions.  

Question concerning giving of grants, according affiliation or recognition, to
educational institutions run by the minorities have often been raised before the
courts. Such questions are of great significance to these institutions. An
educational institution cannot possibly hope to survive today without government
grants, nor can it confer degrees without affiliation to a university. Although
minorities establish institutions with a view to educate their language in an
atmosphere congenial to the conservation of their language or culture, yet that is
not their only aim. They also desire that their students are well equipped for useful
careers in life. The students of unrecognized institution can neither get admission
in institutions of higher learning nor can they enter service. By its interpretative
process over the years, the Supreme Court has given a wide sweep to the protection conferred on minority educational institution by Article 30.

Observing on the object of affiliation, Hidayatullah, C.J., in State of Kerala v. Very Rey Mother Provincial, pointed out that affiliation is regulating educational character and content of the minority institution. The affiliated institutions agree to follow the uniform courses of study. Affiliation of minority institution ensures the growth and excellence of their children and other students in the academic field. The regulatory measures for affiliation are to ensure uniformity, efficiency, and excellence in the educational courses and do not violate any fundamental right of the minority institution guaranteed under Article 30.

In the “Managing Board of the Milli Talimi Mission, Bihar, Ranchi and others v. the State of Bihar and others,” S. Murtaza Fazal Ali, A. Varadarajan and Sabyasachi Mukharji, J.J., were of the opinion that affiliation cannot be refused to a minority educational institution “on purely illusory grounds”. Their Lordship were of the opinion that, “Thus the position is that the State has refused to grant affiliation on purely illusory grounds which do not exist and failed to consider the recommendation of the Education Commissioner which was made after full inspection for grant of affiliation. In other words the affiliation was refused without giving any sufficient reason and such a refusal contravenes the provisions of Article 30 of the Constitution. Where this court should step into strike down the Government action which is violative of Article 30 of the Constitution...” There also cannot be a “mechanical rejection without proper application of mind” of an application for recognition/affiliation made by a minority educational institution.

The consistent view of the Supreme Court has been that there is no fundamental right of a minority institution to affiliation or recognition. But the judiciary has also recognized that for a real and meaningful exercise of the right by the minorities to establish and administer educational institutions of their choice, recognition by the state or affiliation to a university is a must. In the absence of it the educational institutions would be robbed of their utility as the students of their...
institutions could not be trained for University degrees or compete for government jobs.

However, the educational institutions established by the minorities cannot compel the State to recognize them if they fail to follow the statutory measures regulating educational standards and efficiency, the prescribed courses of study and instructions, the principles regarding the qualifications for the entry of students into educational institutions etc. Nor can the State discriminate against the minority institutions, or can provide by law for on such terms which would result in the abridgement or surrender of their fundamental rights.31

The question which often arises for consideration is whether right to recognition or affiliation is a part of the right guaranteed under Article 30(1). Consistency in judicial approach seems to be quite well pronounced in this regard. The courts have held that recognition or affiliation is not a fundamental right. However, it has been observed that recognition or affiliation cannot be granted or refused on conditions which have the effect to deprive minorities of their rights under Article 30(1). The analysis of the cases will show that the Courts are conscious that in the absence of such right the establishment of a minority institution is not only ineffective but also unreal for the purpose of conferment of degrees on students.

In Kerala Education Bill,32 Das C.J. speaking for the observed: “There is no doubt, no such thing as fundamental right to recognition by the state but to deny recognition the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of educational institutions of their choice is in truth and in effective to deprive them of their rights under Article 30 (1).” He further noted: “Without recognition, therefore the educational institution established or to be established by the minority communities cannot fulfill the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised.” In another case,33 Ray C.J. speaking on behalf of himself and Palikar J. used the following words: “The consistent view of this court has been that there is no fundamental right of minority institution to affiliation . . . Any
law which provides for affiliation on terms which will involve abridgement of the
right of linguistic and religious minorities to administer and establish educational
institutions of their choice will offend Art.30 (1).

The requisites to get affiliation and grant in aid are related to such matter as
syllabi, curriculum, courses, minimum qualifications of teachers, their age of
superannuation, literary, condition concerning sanitary, health and hygiene of
students etc. The underlying purpose of such condition is to promote educational
standards and uniformity and help the institutions concerned achieve efficiency
and excellence and are imposed not only in the interest of general secular
education but also are conducive to the improvement of minority institutions
themselves. Regulatory measures are necessary to maintain the educational
character and content of minority institutions.

Decision of the Supreme Court in *D.A.V. College Bhatinda v. State of Punjab,* where the question for decision was whether the Punjabi University could
compulsorily affiliate minority institutions and prescribe for them a language as
the exclusive medium of instruction and examination which was not their own,
provided the answer in the negative. The Supreme Court advised the State, in no
ambiguous terms, to harmonies its power to prescribe the medium of instruction
with the rights of minority institution by either providing also for instruction in the
media of minorities or if there are other Universities which allow such Colleges to
be affiliated where the medium of instruction is that which is adopted by the
minority institutions, to allow them the choice to be affiliated with them.

Realising perhaps that such Universities might not be available within that
particular State, the Supreme Court itself suggested the option: "When the country
has been recognized and formed into linguistic States, it may be the natural
outcome of the policy to allow colleges established by linguistic and religious
minorities giving instruction in the medium of language adopted by the
Universities in other states to affiliate them ..." These observations suggest that
no compulsory affiliation can be insisted upon which offend the rights guaranteed
under Art.30 (1) if, as the Court held, compulsory affiliation is bad, it would, of
necessity, leave the minorities free to have their institutions affiliated to a University in some other State. This obviously presupposes that minorities have a ‘right’ to get recognition or affiliation where it is possible.

Sidhrajbhai v. State of Bombay\textsuperscript{38} provided an opportunity to the Supreme Court to determine the question whether threats of withdrawal of recognition already given to an institution could be used to compel a minority educational institution to admit nominees of Government into it. In this case the petitioners were Christian religious minority. The society of which they were members maintained several educational institutions, including a training College for training teachers to be observed in the primary schools conducted by the society. In 1955 the Government of Bombay issued an order saying that in non-Government training colleges, 80% seats would be reserved for teachers nominated by the Government. When the said training Colleges expressed its inability to comply with the order, the Educational Inspector directed the College not to admit private candidates without obtaining specific permission, failing which severe disciplinary action, such as withdrawal of recognition, would be taken.

Shah J., speaking for the court, noted that right of the minority college to admit students of its choice was severely restricted and the enforcement of restriction was sought to be secured by holding out a threat to withdraw recognition. He observed that serious inroads were made upon the right vested in the society to administer the training college. He stated that the right under Article 30 cannot be whittled down by so called regulative measures. He held that regulations which may lawfully be imposed either by legislative or executive action as a condition of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution.\textsuperscript{39} These observations were made when he had already admitted that: Regulations made in the true interest of efficiency of instructions, discipline, health, sanitation, morality public order and the like may undoubtedly be imposed. Such regulations are not restrictions....; they secure the proper functioning of the institution, in matters educational.\textsuperscript{40}
Socio-Literati Advancement Society v. State of Karnataka is a typical example of refusal to recognize a minority institution. The petitioner-society was an association formed by Malayalam speaking people of Karnataka, a linguistic minority. This society submitted an application to the Additional Director of Education on 25.6 1978 for according recognition to its Teachers Training institute. It undertook to adhere to the standards prescribed by the Department of Education and to abide by all the rules prescribed for teacher training schools. It was asserted that the Additional Director of Education was convinced of the desire and needs of the Society and said that it was competent to start the Institute. On his verbal assurance that the necessary recognition would be given, the Society started the classes from 1.7.1978. On 25.7.1978, the Department issued a notification stating that no recognition was accorded to the institute. The Society stated that a representation had been made on 24.7.1978 reiterating its request for recognition which it had earlier made. By a letter of 24.7.1978, the Additional Director intimated that there were more number of Training institutes in the State than required and that the policy of the Government, was not to permit any more training institutes. The Society took the plea that even on 31.8.1978 recognition was accorded to one Venkatesha Education Society to start a teacher training institute. It contented that the refusal of recognition was on irrelevant and non-existent grounds. On behalf of the State it was contended that the State has the power to decide whether there is a need to establish a particular institution and the recognition was refused in order to prevent unhealthy competition amongst the various teachers training institutes.

The Karnataka High Court held as unconstitutional Rule 7 of the Uniform Grant-in-Aid Code which laid down the procedure for starting and recognition of teachers training institutions. Chandra Kantharaj Urs J. observed that since recognition was accorded to another training institute in the very same year in which the petitioner-Society applied for recognition, this not only amounted to unequal treatment but also showed that no such policy as contented by the State in fact existed. The Court declared Rule 7 as a mere formality where such institutions are concerned and the rule has to be read down to yield place to constitutional guarantee. It held: “As already noticed in the decided cases of the
Supreme Court even reasonable restriction cannot be imposed on a minority institution except to the extant of maintaining general educational standards, health and hygiene of the students, much less deny them the right to start the school and the institution itself."  

In *St. John's Teachers Training Institute v. State of Tamil Nadu* the appellant challenged the validity of the recognition rules made by the Government under the T.N. Minority Schools (Recognition and Payments of Grants) Rules, 1977 as amended by the Order of 1991 on the ground that they were violative of Articles 30(1) and 14 of the Constitution. They were running Teachers Training Institution in the State of Tamil Nadu. The Government had refused to recognize these institutes on the ground that they had failed to satisfy the conditions for grant of recognition as provided in the Government order. The Recognition Rules provided for the extent of land sizes of classrooms, cost of library with 10,000 books, number of bathrooms furniture and laboratory equipments, teaching appliances, sports, games, music equipments, play grounds, minimum qualifications for teaching and non-teaching staffs, hostel, staff quarters etc. The High Court reviewed the whole case law on the point and dismissed the writ petition holding that these conditions were regulatory in nature and framed with a view to promoting excellence of educational standard and ensuring security of the service of teachers and other employees of the institutions. The minority institutions must be fully equipped with educational excellence to keep in step with other institutions. The Supreme Court agreed with the reasoning and conclusions of the High Court and dismissed the special leave petition.

In *P.A. Inamdar v. State of Maharashtra*, the Supreme Court held that Affiliation or recognition by the State or the Board or the university competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing maladministration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and
the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a prerequisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated.\textsuperscript{46}

Thus, the above analysis shows that although right to recognition or affiliation is not expressly recognized by Art.30 (1) the courts are conscious that in the absence of such a right the options otherwise open to minority institutions may not be such as to enable them to effectively exercise their right under Art.30 (1). The assumption has made them convinced that, in certain situation at least, without recognition or affiliation there can be no meaningful exercise of the right to establish and administer under Art.30, and that recognition or affiliation can be given only on conditions that do not render that Article illusory. They have also not failed to emphasise that what the State cannot achieve directly, cannot also achieve by employing indirect methods, which means that such regulatory conditions cannot be imposed as adversely affect the ‘minority’ character of the institution or, are made on consideration which are not conducive to the making of the institution as an efficient and excellent vehicle of education. However, what specific factors would exactly distinguish an unconstitutional restriction from a permissible regulation would depend upon the nature of the situation presented before the court.\textsuperscript{47}

From this proposition it is very clear that the State or Board is competent enough to give affiliation or recognition to a minority institution. The board of the State has no power to deny the affiliation or recognition on the ground that the institution is solely and exclusively a minority institution. However, there must be some regulation for the betterment of the institution and maintaining the academic standard of the institution. It can be said there cannot be any interference by this authority in the day to day management of the institution.\textsuperscript{48}
5.3 Disciplinary Control over Staff

Minority institutions employ a large number of persons to perform institutional and other administrative duties. Maintenance of discipline, order, and excellence in academic standards depends to a very great extant upon a qualified, efficient and disciplined teaching and administrative staff. It thus apparently seems that minority institutions, like any other employer, have a right to select staff of their own choice and preference and to take action against them either to enforce an orderly conduct or to enforce the terms of the contract of service. This right involves prescribing qualifications for appointment of staff, prescribing the manner of their selection, laying down the conditions of service, enforcing discipline among them, compelling performance of duties and taking action against those found recalcitrant.

On the other hand, the exercise of these rights involves very valuable rights that must belong to teachers and members of non-teaching staff. Assurance of reasonable conditions of service and security of job are important in any system of employment and ensure to a very great extant efficiency of service. It is too obvious to be noted that if the service conditions are good and a fair procedure is followed in the matter of disciplinary action, this must necessary result in security of tenure, attract competent and qualified staff and must ultimately improve the excellence and efficiency of the educational institutions. To prevent abuse of power by the managements of minority institutions it seems therefore, necessary that the State must have some kind of regulatory power so as to safeguard the interests of those employed in such institutions and to ultimately maintain a minimum level in academic standards.

In re Kerala Education Bill provided the first opportunity to the Supreme Court to express its view over the right of minority institutions to take disciplinary action against their staff. The Court was called upon to express its opinion on the constitutional propriety of the enactment by the Kerala legislature of Clauses 12(4) which provided that “no teacher in aided schools be dismissed, removed, reduced in rank of suspended by the manager without the previous sanction of the
authorized officer”. S. R. Das C.J., speaking for the court, felt himself persuaded by considerations of expediency to allow clause 12(4) as permissible. However, the learned judge also held that power of dismissal, removal reduction in rank or suspension is an index of the right of management and that is taken away by Cl. 12 (4).50

In *Mother Provincial*51 the validity of section 56(2) and (4) of the Kerala University Act, 1969 was challenged which provided that no teacher of private college would be dismissed, removed or reduced in rank by the governing body or managing council without the previous sanction of the Vice-Chancellor. It further provided that no such teacher would be placed under suspension for a continuous period exceeding fifteen days without such previous sanction. It was also provided that a teacher against whom disciplinary action was taken would have a right of appeal to the Syndicate and the Syndicate would have power to order reinstatement of the teacher in cases of wrongful removal or dismissal and to order such other remedial measure as deemed fit. Thus these clauses conferred ultimate powers on the University and the syndicate in disciplinary matters in respect of teachers. A constitution bench, speaking through HidayatuUah C.J. held these provisions as taking away the power of disciplinary action and as such not permitted by Art.30 (1).52

In *St. Xavier’s College v. State of Gujarat*,53 S. 51-A (1) (a) of the Gujrat University Act, 1949 was under question. The said provision provided that no member of teaching or non-teaching staff of an affiliated college shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed or the charges against him and given a reasonable opportunity of being heard and until he has been given a reasonable opportunity of making representation on any such penalty. Clause (b) of this section provided that no such penalty should be inflicted unless it is approved by the Vice-Chancellor or any other officer appointed by him.

The Supreme Court found the provisions requiring the management to afford opportunity of hearing and representation as being merely ‘regulatory’, but took
serious note of the provision which conferred upon the Vice-Chancellor a power of approval of disciplinary action. Khanna J. shared the view with the majority that the power of approval was in the nature of a veto over disciplinary control by the educational institutions and was a blanket power; but added a little more: no guidelines are laid down and it is not provided that the approval is to be withheld only in case the dismissal, removal, reduction in rank or termination in service is mala fide or by way of victimization or other similar cause.\(^{54}\) Mathew J., with whom Chandrachud J. Agreed, allowed the provision which required the management to follow a procedure before an action could be taken against a teacher but held as unconditional the provisions which required approval of the action by an outside agency. The learned Judge found the genesis of the power of disciplinary control on the basis of the relationship between the management and its staff.\(^{55}\) Thus the court sought to strike a balance between the claim of the minority institution to exercise disciplinary control over its staff and the right of the State to regulate such control so as to minimize the chances of its abuse.

*Lilly Kurian v. St. Levina*\(^{26}\) raised a somewhat different kind of problem before the Supreme Court. The facts, as stated, were that one Smt. Lilly Kurian was appointed as Principal of the St. Joseph’s Training College for Women, Ernakulam in the year 1957. The Colleges belonged to the Roman Catholic Church, was affiliated to the University of Kerala, and was being managed by a Managing Board. On October 30, 1969, an incident took place between the principal, the appellant in this case, and a lecturer of the College. On a compliment by the latter, the Managing Board initiated disciplinary proceedings against the appellant and appointed an Enquiry Officer. The appellant took the stand that the Managing Board had no competence to initiate any disciplinary action and accordingly did not participate in the proceedings. The Enquiry Officer, in his report held the appellant guilty of misconduct. The Managing Board dismissed the appellant from service and directed her to hand over charge to one St. Levina. The appellant filed an appeal before the Vice-Chancellor of Kerala University.

Against the order of dismissal, the vice-Chancellor by his order stayed the operation of the order of dismissal. Thereafter the Managing Board placed the
The Vice-Chancellor by an order of October 19, 1970 held that the orders for dismissal and suspension were against the principles of natural justice and accordingly directed the Management to allow her to act as Principal.

The High Court came to the conclusion that the Vice-Chancellor had no such power and the provision did not attract Art. 30 (1). Making appeal against this judgment before the Supreme Court, the appellant put forward strong arguments in favor of the plea that a provision of appeal against suspension or dismissal not hit Article 30(1). Testing Ordinance 33(4) against this principal, Sen J. held:

"The conferral of a right of appeal to an outside authority like the Vice-Chancellor under ordinance 33(4) takes away the disciplinary power of a minority educational authority. The Vice-Chancellor has the power to veto its disciplinary control. There is a clear interference with the disciplinary power of the minority institution. The state may ‘regulate’ the exercise of the right of administration but it has no power to impose any ‘restriction’ which is destructive of the right itself".

St. Joseph's Training College v. University Appellate Tribunal is another important decision of the Kerala High Court. The case is important for two reasons: First, it reviewed the whole corpus of decisional law, and had to even overrule its earlier full-bench decision in Benedict Mar Gregorios v. State of Kerala, second, it lays down the proposition that even if an appellate power is vested in a quasi-judicial authority like an appellate tribunal, it might still suffer from the vice of interference with management’s choice to exercise disciplinary control over its staff.

Sub Section (7) of S. 60 of Kerala University Act of 1969 laid down that any teacher aggrieved by an order passed in any disciplinary proceedings could appeal to the Appellate Tribunal and the Tribunal could, after giving parties an opportunity of being heard, and after such further enquiry as might be necessary, pass such order as it deemed fit. Under S. 65 the government was given power to constitute for the purpose of the Act an Appellate Tribunal consisting of a judicial
officer below the rank of a District judge nominated by the Chancellor in consultation with the High Court. S. 61 provided that disputes between the management and a teacher of private colleges relating to conditions of service pending at the commencement of the Act were to be decided by the Tribunal. The question, therefore, before the Kerala High Court was whether Sections 60 (7) and 61 were constitutionally valid in relation to educational institutions established and administered by religious minorities.

The court found that S. 60 (7) conferred an unguided power upon the tribunal. No guidelines were laid down as to the grounds on which and circumstances in which the tribunal could interfere with an order passed by the management in a disciplinary proceeding. It also did not specify any limitation as to the nature of the orders against which appeal would lie. The court felt that the jurisdiction of the Tribunal thus goes beyond that of scrutinizing whether the disciplinary proceeding has been conducted in conformity with the procedure laid down in sub-section (6) as well as the principles of natural justice, or it is an action taken malafide or vindictively as a measure of victimisation etc. The Appellate Tribunal is thus vested with a blanket power to interfere with every order passed by the management in disciplinary matters. Thus the disciplinary power over the teachers is effectively transferred from the management to the Appellate Tribunal, thereby substantially taking away the autonomy of the management in regard to a most vital facet of administration of the educational institution.

In forming such a view the Court did not hesitate even to over-rule its earlier full bench decision in Benedict Mar Gregorios v. State of Kerala which had upheld a provision in S.57 (9) of the Kerala University Act of 1974 which required approval of appointments by the University and a provisions in S.57 (10) which provided for a right of appeal to the Appellate Tribunal by any person aggrieved by any appointment.

An issue of identical nature arose before the Goa J.C.’s Court in Monte de Guirim Educational Society v. Union of India. The question before the Court was whether the Proviso the Rule 74(2) of the Goa, Daman and Diu Grant-in-Aid Code
was violative of Art.30 (1). Rule 74 (2) provided that the services of a permanent employee could be terminated by the Management without assigning any reason on giving compensation. It further provided that an employee whose services were intended to be terminated must be given 12 months’ salary if he had been in services of the institution for 10 years or more, and 6 months’ salary must be given to the employee of less than 10 years’ service. The proviso said that no employee should be removed under this Rule without the prior approval of the Deputy Director of Education.

The Court found that the conferral on the Deputy Director contained in the proviso was not only an encroachment on the minority institution’s right to enforce discipline in its administrative affairs but was also an uncanalised and unguided power as no restrictions were placed on its exercise. It further pointed out that the grounds on which the Deputy Director could interfere with the administrative action taken under sub-rule (2) of Rule 74 by the minority institution were unchartered. The Court accordingly held that the power conferred upon the Deputy Director was inapplicable to minority institutions.

In *All Saints High School v. Govt. of A.P.* Section 3 to 7 of the Andhra Pradesh Recognized Private Educational Institutions Control Act, 1975 was the subject matter of dispute before a bench of three judges, Chandrachud C.J., Murtaza Fazal Ali J. and Kaliasam J. S. 3(1) of the Act required private educational institutions in Andhra Pradesh to obtain prior approval, from the competent authority, to any action intended to be taken against a teacher in the form of dismissal, removal, reduction in rank or any other kind of termination of service. S 3 (2) left it to the discretion of the competent authority to approve the proposal for action. By a majority of 2:1 the Supreme Court declared S.3 (1) and (2) as constitutionally inapplicable to minority institution. Chandrachud C.J. took the position that a power such as the one contained in S. 3 (1) and (2) requiring prior approval of the competent authority to an order of dismissal or removal etc. may not by itself be violative of Art.30 (1) if the object of such provision was to ensure compliance with the principle of natural justice. But he expressed his inability to read down S. 3 so as to limit its operation to these or similar
considerations. The further impediment with which the power under S. 3 suffered was that there were no rules framed by the government indicating the situations in which the power was to be exercised and that in participates the operation of the Section would limit to a certain class of cases only.

Fazal Ali J. took a more serious view of the Act as a whole and regarded some of its provisions as a 'thoughtless' interference with right of management of minority institutions. He declared S.3 (1) & (2) as inapplicable to minority institutions and assigned the following reasons: First, if the State wanted to regulate the conditions of service of teachers it should have taken care to make proper rules giving sufficient powers to the management specifying the manner in which it was to act, second, the induction of an outside authority over the head of the institution and making its decision final and binding on the institution was a blatant interference with the administrative autonomy of the institution. Third, while giving approval the competent authority was not required to ascertain the view of the governing body so as to know their view-point and the reasons why action had been taken against a particular teacher. Fourth, the competent authority was not given any guidelines for exercise of his discretion and the power in respect of approval of the action could be exercised on purely subjective satisfaction. The learned judge made it clear that they would not have the same objection had the power been a guided power and worded in a negative form: “So as to provide that the sanctioning authority was bound to give approval to any action taken by the institution against its teachers unless it was, after hearing the teacher and the management of the institution, satisfied that the order passed by the institution or the action taken by it was in violation of the principles of natural justice, against the statutory provision of law or tainted with factual or legal malice ...”

It may be taken as a judicial proposition that the conferment of a power of appeal or approval is not, by itself, unconstitutional, and that only such conferment is impermissible which allows a power of appeal and approval with an outside authority without any limitation or guidelines. But then, viewed from the point of view of minority institutions, even if a power is confined to cases of
‘victimisation’ or ‘mala fide’ or other ‘similar cause’ or non-compliance of procedural requirements, or is defined and limited to specific terms, the very conferment of such power seems to be a restriction of right under Art.30 (1). Right of approval or appeal, coupled with a power to disallow a disciplinary action, means hardly anything else than vesting a right in an external authority to exercise final control over the management’s right to take disciplinary action. Disciplinary control, being the most vital part of the right to administer is necessarily taken away once a power to disallow an action is vested somewhere else. The right of a minority to administer its institution according to its own choice must necessarily include a choice to select staff as well as a choice to decide for itself as to suitability of a teacher to be retained in its institution in accordance with its own ideas and ideals about the standards of conduct to be followed by the members of its staff.

The courts, however, seem to be in a dilemma. On the one hand they are bound by the letter and spirit of Art.30 (1). On the other hand, they do not seem to leave aside the truth that disciplinary control with the management involves very valuable rights that belong to the staff-members. It is because of this they have expressed their willingness to give their approval to a well-guided power conferred upon an external agency to see that Art. 30(1) does not become a tool of oppression in the hands of the management. This stand of the courts may well meet both the ends- the constitutional obligation to protect what is secured to minorities under Art.30 (1) and the social necessity to protect the staff in minority institutions.

In *W. Proost v. State of Bihar*, the validity of Section 48-A of the Bihar State Universities (University of Bihar, Bhagalpur and Ranchi) Act, 1960, was challenged by the authorities of St. Xavier’ College which was managed by the Christian minority. The impugned section 48-A provided for the establishment of a University Service commission for affiliated colleges not belonging to the State Government and it was laid there-under that the appointments, dismissals, removals, termination of service or reduction in rank of teachers of the affiliated colleges were to be made on the recommendation of the University Service
Commission. Chief Justice Hidayatullah (on behalf of himself and justices’ shah, Ramaswani and Grover) delivering the judgment, held for Section 48-A: “This provision completely takes away the autonomy of the Governing Body of the College and virtually vests the control of the colleges in the University Commission.”

In *Mrs. Y Theclamma v. Union of India* 68, The short point involved in this petition (under Article 32 of the Constitution) was whether linguistic minority educational institutions like the Andhra Education Society were governed by subsection (4) of section 8 of the Delhi School Education Act, 1973. Section 8(4) reads as follows: “where the managing committee of a recognized private school intends to suspend any of its employees, such intention shall be communicated to the director and no such suspension shall be made except with the prior approval of the Director”. It was, however, provided that the managing committee may suspend an employee with immediate effect and without the prior approval of the Director if it is satisfied that such immediate suspension is necessary by reason of the gross misconduct, within the meaning of the Code of Conduct prescribed under section 9 of the employee. But it was clarified that no such immediate suspension shall remain in force for more than a period of fifteen days from the date of suspension unless it has been communicated to the Director and approved by him before the expiry of the said period.

While upholding the above provisions the Court observed that although disciplinary control over the teachers of a minority educational institution is with the management, regulations can be made for ensuring proper conditions of service for the teachers and also for ensuring a fair procedure in the matter of disciplinary action. In the opinion of the court the provision contained in subsection (4) of Section 8 of the Act is designed to afford some measure of protection to the teachers of such institutions without interfering with the Managements' right to take disciplinary action. It, however, provided that in a case where the management charged the employee with gross misconduct, the Director is bound to accord his approval to the suspension. The court observed that in such cases the endeavour of the court has been to strike a balance between the
constitutional obligation to protect what is secured to the minorities under Article 30(1) with (sic and) the social necessity to protect the members of the staff against arbitrariness and victimisation.

In *Osmania University Teacher's Association v. State of Andhra Pradesh*[^69], also, the Supreme Court had reiterated the same view. In *Manohar Harries Walters v. Basel Mission High Education Centre*[^70] the supreme court relied heavily on *Frank Anthony, Theclamma, All Bihar School Association and Osmania University* cases and held that the right guaranteed to minority institutions by Article 30 (1) of the constitution is not invaded merely because a Tribunal constituted under an Act to hear appeals against the order of dismissal, removal or reduction in rank of an employee in the service of a minority institution.

In *T.M.A. Pai Foundation,*[^71] the court held that state is also under an obligation to protect the interest of teaching and non-teaching staff. The teachers who are working in the school should be governed by proper service conditions for teachers and staff receiving aid of the state and the teachers or staff for which no aid is being provided is the same. Prerequisite to attract good teachers is to have good service conditions.

Regarding the allegations of misconduct and disciplinary action the court affirmed that:[^72] where allegations of misconduct are made, it is imperative that a disciplinary enquiry is conducted, and that a decision is taken. In the case of a private institution, the relationship between the Management and the employees is contractual in nature. A teacher if the contract so provides, can be proceeded against and appropriate disciplinary action can be taken, if the misconduct of the teacher is proved. The court held that considering the nature of the duties and keeping the principle of natural justice in mind for the purposes of establishing misconduct and taking action thereon, it is imperative that a fair domestic enquiry is conducted. It is only on the basis of the result of the disciplinary enquiry that the management will be entitled to take appropriate action. The court did not see any reason why the Management of private unaided educational institutions should...
seek the consent or approval of any governmental authority before taking any such action. In the ordinary relationship of master and servant, governed by the terms of a contract of employment, anyone who is guilty of breach of the terms can be proceeded against and appropriately relief can be sought. Normally, the aggrieved party would approach a court of law and seek redress. In the case of educational institutions, however, the court was of the opinion that requiring a teacher or a member of the staff to go to a civil court for the purpose of seeking redress is not in the interest of general education.

The court further noted that the disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs. It suggested setting up of an Educational Tribunal for each district in a State, to enable the aggrieved teacher to file an appeal, unless there already exists such an educational tribunal in a State -- the object being that the teacher should not suffer through the substantial costs that arise because of the location of the tribunal. Till a specialized tribunal is set up, the court observed, the right of filing the appeal would lie before the District Judge or Additional District Judge as notified by the government. It will not be necessary for the institution to get prior permission or ex post facto approval of a governmental authority while taking disciplinary action against a teacher or any other employee. The court held that the State Government shall determine, in consultation with the High Court, the judicial forum in which an aggrieved teacher can file an appeal against the decision of the management concerning disciplinary action or termination of service.

An analysis of the above cases clearly establishes that the courts are convinced that the right to exercise disciplinary control over staff belong to the institutions and cannot be vested in any external authority. In their opinion the basis of the right to take disciplinary action emanates not only from the right to administer guaranteed under Article 30 but also from the contractual relationship of employer and employee that exists between the management and its staff. It is because of that they have held that disciplinary action cannot be made subject to approval by any outside authority. They are also not prepared to hand over an
appellate power to any agency external to the institution even though such authority happens to be a quasi judicial authority. The courts, however, have insisted on holding an enquiry before any action is taken against the staff and have the institutions to follow a fair procedure while taking disciplinary action.

5.4 Fees Regulation

In *Islamic Academy v. State of Karnataka*, the fees structure of unaided institution has been well discussed by the Supreme Court. The Court held that there can be no fixing fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be used for the betterment and growth of that educational institution. It has been categorically laid down that the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc. The surplus/profit that can be generated must be only for the benefit/use of the educational institution.

As, at present, there are statutes/regulations which govern the fixation of fees and as this Court has not yet considered the validity of those statutes/regulations, the court direct that in order to give effect to the judgment in *T.M.A Pai* case the respective State Governments/concerned authority shall set up, in each state, a committee headed by a retired High Court Judge who shall be nominated by the Chief-Justice of that State. The other member, who shall be nominated by the judge, should be a Chartered Accountant of repute. A representative of the Medical Council of India (in short “MCI”) or the All India Council for Technical Education (in short “AICTE”), depending on the type of institution, shall also be a member. The Secretary of the State Government in
charge of Medical Education or Technical Education, as the case may be, shall be a member and Secretary of the Committee. The Committee should be free to nominate/co-opt another independent person of repute, so that the total number of member of the Committee shall not exceed five. Each educational Institute must place before this Committee, well in advance of the academic year, its proposed fee structure. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations, the same would amount to charging of capitation fee. The Governments/appropriate authorities should consider framing appropriate regulations, if not already framed where under if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalized and also face the prospect of losing its recognition/affiliation.

The court held that an educational institution can only charge prescribed fees for one semester/year. If an institution feels that any particular student may leave in midstream then, at the highest, it may require that student to give a bond/bank guarantee that the balance fees for the whole course would be received by the institute even if the student left in midstream. If any educational institution has collected fees in advance, only the fees of that semester/year can be used by the institution. The balance fees must be kept invested in fixed deposits in a nationalized bank. As and when fees fall due for a semester/year only the fees falling due for the semester year can be withdraw by the institution. The rest must continue to remain deposited till such time that they fail due. At the end of the course the interest earned on these deposits must be paid to the student from whom the fees were collected in advance.75

The fee structure, thus, in relation to each and every college must be determined separately keeping in view several factors, including facilities
available, infrastructure made available, the age of the institution, investment made, future plan for expansion and betterment of the educational standard etc.

While fixing the fee structure the Committee shall also take into consideration, inter alia, the salary or remuneration paid to the members of the faculty and other staff, the investment made by them, the infrastructure provided and plan for future development of the institution as also expansion of the educational institution. Future planning or improvement of facilities may be provided for. An institution may want to invest in an expensive device (for medical colleges) or a powerful computer (for technical college). These factors are also required to be taken care of. The State must evolve a detailed procedure for constitution and smooth functioning of the Committee.

Fees once fixed should not ordinarily be changed for a period of three years, unless there exists an extraordinary reason. The proposed fees, before indication in the prospectus issued for admission, have to be approved by the concerned authority/body set up. No institution should charge any fee beyond the amount fixed and the fee charged shall be deposited in a nationalized bank.

The question whether in exercise of its regulatory powers, the State can prohibit the collection (or charging) of fees in minority educational institutions on the ground that the Directive Principle of State Policy contained in Article 45 requires it to endeavour to provide for free and compulsory education for all children until they complete the age of 14 year was considered by the Supreme Courts in the Kerala Education Bill case. In this case, Justice Das realized that the imposition of any restriction against the collection of fees in an educational institution as a condition for its recognition would in effect make it impossible for it to carry on and therefore held that such a restriction would be violative of Article 30(1). However, he was not prepared to go as real in Article 30(1) a fundamental right to recognition.

As regards collection any fees higher than what is charged in the Governmental institutions for similar courses by the private aided institutions the Supreme Court in the capitation fee case Unni Krishna J.P. v. State of A.P. said:
"The aided educational institutions have to abide by all the rules and regulations as may be framed by the Government and/or recognition/affiliation authorities in the matters of recruitment of teachers and staff, their conditions of service, syllabus, standard of teaching and so on... They shall not be entitled to charge any fees higher than what is charged in governmental institutions for similar courses. These are and shall be understood to be conditions of grant of aid. The reason is simple: public funds, when given as grant and not as a loan-carry the public character wherever they go, public funds cannot be donated for private purposes. The element of public character necessarily means a fair conduct in all respects consistent with the constitutional mandate of Arts 14 and 15."

In nutshell it can be said that the unaided institution cannot charge fee for their profit and charging of fees is also subject to limitation. A committee headed by Chief Justice can fix the proposed fees structure in accordance with the infrastructure, age of the institution, investment made and the future plan etc. of the institution.

### 5.5 State Aid to Minority Educational Institutions

The Constitution sought to secure two rights to minority educational institutions with respect to financial aid from the State: (1) A right, under the express provisions of Art. 337, which entitled Anglo-Indian educational institutions to continue to receive, as a matter of Constitutional right, the same special financial grants to which they were entitled before 1948; (2), A right under the express provision of Art. 30(2) which prohibits the State, while granting aid to minority educational institutions, from discriminating against any educational institution on the ground that it is under the management of a minority whether based on religion or language.

Art.337 reserved to Anglo-Indian educational institutions a right to get special financial grants from the State for a period of ten years after the commencement of the Constitution. What Art.337 did was to protect such financial grants which the Anglo-Indian institutions were getting before Independence. Such grants were initially protected for a period of three years.
Thereafter, during each succeeding year, such grants could be reduced by ten per cent as compared to the preceding three years. The result was that ten years after the commencement of the Constitution, such grants, to the extent to which they were a special privilege to the Anglo-Indian community, were to cease. Thus, the concession under Art.337 is no more available to Anglo-Indian institutions now. The institutions entitled to receive special grants under Art.337 were under an obligation to make available 40 per cent of the annual admissions to other communities.

One special feature of such grants was that it was not open to the State to put any other pre-conditions for receiving such grants. This was recognized by the Supreme Court in *State of Bombay v. Bombay Education Society.* There the State of Bombay issued an order directing that no primary or secondary school shall admit to a class where English was used as the medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which was English, namely, Anglo-Indians and citizens of non-Asiatic descent. The Barnes High School, which was a recognized Anglo-Indian school and had been imparting education through the medium of English since its inception in 1925, took the plea that one of the consequences of the order was that the school was prevented from admitting students whose mother tongue was not English. The Supreme Court noted that the Constitution had imposed upon Anglo-Indian institutions, as a condition of receiving special grants, the duty that at least 40 per cent of the annual admission therein must be made available to members of other communities. It observed that if the order was applied to the Barnes school it amounted to preventing the school from performing its constitutional obligations, and thus exposed it to the risk of losing the special grant. The Court held that the order amounted to a further condition that was Art 337 itself had imposed upon Anglo-Indian institutions, which was not permissible under the Constitution. Thus the Supreme Court did not allow the imposition of any other conditions on the right of Anglo-Indian educational institutions that which Art.337 itself imposed upon them while protecting the financial grants to which they were entitled before 1948.
Art.30 (2) imposes an obligation upon the State not to discriminate against a minority institution in matter of financial aid which the State may choose to make available to educational institutions. What Cl. (2) provides is not a positive right to claim aid from the State; it only provides security against differential treatment in matters of distributions of financial grants. The provision does not imply that an educational institution belonging to a minority is entitled to ask for aid from the State. It is true that in modern times it is impossible to run an educational institution imparting general secular education without some kind of financial assistance from the State, and it is also true, as S.R. Das C.J. recognized in the *Kerala Opinion*, that Art.30(2) postulates educational institutions receiving aid out of State funds. But the clause does no more than impose an obligation upon the State to maintain equality of treatment in matter of financial assistance to educational institutions. What the clause means to say is that the conditions under which grants-in-aid should be available to minority institutions must be the same as for all other educational institutions.

In *Sidhrajbhai v. State of Bombay* where Shah J., dealing with the scope of clause (1) of Art.30, said: Clause (2) is only a phase of the non-discrimination clause of the Constitution and does not derogate from the provisions made in Cl. (1). The clause is moulded in terms negative; the State is thereby enjoined not to discriminate in granting aid to educational institutions on the ground that the management of the institution is in the hands of a minority, religious or linguistic, but the form is not susceptible of the inference that the State is competent otherwise to discriminate so as to impose restrictions upon the substance of the right to establish and administer educational institutions by minorities, religious or linguistic.

The operation of Art.30 (2) comes into picture only when a minority institution seeks aid from the State and the same is denied on the mere ground that the institution is under the management of a minority. The Constitution prohibits religious instruction only in institutions wholly maintained out of State funds. But it does not purport to prohibit any community from providing religious instructions on institutions maintained by that community out of its own funds.
Art. 30(2), therefore, has obviously no applicability in a situation where a minority institution, meets its expenses out of the funds of the minority and does not seek any aid from the State. Minority institutions seeking aid from the State may fall under two categories: (1) Institutions imparting general secular education, and (2) Denominational institutions imparting secular education according to the standards set by the State and also imparting religious education according to the tenets of the particular faith. The prohibition against discrimination under Art.30 (2) must necessarily apply with regard to both the type of institutions.

The application of the non-discrimination clause incorporated under Art.30 (2) is confined only to one situation where the grant is denied to a minority institution or is sanctioned on an unequal basis. It does not have its application in a situation like the one that arose in Jose Collian v. Director of Public Instruction. The petitioner in this case was a Roman Catholic and was running a school in a particular locality. He challenged an order of the Kerala Government, according sanction to another person to run a similar school in the same locality, as being in violation of Art.30(2). The main grievance of the petitioner was that as a consequence of the sanction granted to the other person and the opening of a similar school in the locality, he was unable to get for his school enough pupils to earn from the Government. The Kerala High Court rejected the plea and held: "... We are completely at a loss to see how the establishment of another school in the same locality interference with the petitioner's right to run his school and if the result thereof is that the petitioner cannot get enough pupils to earn a grant surely it cannot be said that the State is discriminating against him on the ground of his community."

In the Kerala references, one of the questions that the Supreme Court considered was whether in order to obtain aid from State funds a minority educational institution could be submitted to certain conditions laid down in Cls. 3,5,6,7,8,9,10,12,14,15 and 20 of the Kerala Education Bill. Cl.5 required aided institutions to submit annual statements. By Cl.6 the assets of the aided institutions were frozen and could not be dealt with except with prior permission of the Government. Under Cl.7 the manager were to be appointed by the authorized
officer. Under Cl.8, all fees etc. were required to be made over to the Government. By Cl.9 the Government was responsible for payment of salaries to teachers and non-teaching staff. Under Cl.10, the Government was authorized to prescribe qualification of teachers. Under Cl.11, the aided institutions were under obligation to appoint teachers out of a panel settled by the Public Service Commission. Under Cl.12, the aided institutions could not take disciplinary action against staff except with previous sanction of the authorized officer. Cl.14 and 15 authorised the Government to take over management in certain cases. Cl.20 sought to prevent aided schools from charging any fees for tuition in the primary classes.

It was argued on behalf of minority institutions that these clauses imposed such conditions that they were compelled to surrender their fundamental right to establish and administer educational institutions as a price of aid doled out by the state. Counsels representing minority institutions contended that not only that 28(3), 29(2) and 30(2) contemplated the grant of aid to educational institutions established by minorities but also relied on Article 41 and 46 which as Directive Principles make it the duty of the State to aid educational institutions and to promote educational institutions of minorities and other weaker sections of society. The Constitution contemplated not only institutions which are wholly maintained by the State but also institutions receiving aid out of State funds. The argument was if granting of aid is a government function, it must be discharged in a reasonable way and without infringing fundamental rights of minorities.

In State of Kerala v. Mother Provincial,\textsuperscript{92} sub-section (1), (2) and (9) of Section 53 of the Kerala University Act, 1969 were held as violative of the right under Art.30 (1). These were in fact similar in terms and effect as Cl. 11 of the Kerala Education Bill 1957. Similarly, sub-section (2) and (4) of Section 56 of the Kerala University Act which were similar in terms and effect to sub-clause (1), (2), (3) and (4) of Clause 12 of the Kerala Education Bill came to be held invalid in the Mother Provincial case. In D.A.V. College v. State of Punjab,\textsuperscript{93} Statue 17 which incorporated a provision similar to sub-clauses (1), (2) and (3) of Clause 12, was declared as invalid.
In *All Saints High School v. The Government of Andhra Pradesh* T.S. Kailasam, J., reaffirmed the views that the Constitution did not confer any right on the institution to get any aid. His Lordship held that, "It is open to the State to prescribe relevant conditions and insist on their being fulfilled before any institution becomes entitled to aid. No institution which fails to conform to the requirements thus validly prescribed would be entitled to any aid."^95

The Supreme Court in *Unni Krishnan, J.P. v. State of A.P.*^96, a Constitution Bench had to consider the right of private educational institutions to collect capitation fee from the students. It was held in that case that right to higher education and in particular professional courses are not a fundamental right flowing from Art.21 of the Constitution. While considering that question the Court made the following relevant observations: "Per B.P. Jeeven Reddy, J.: A citizen of this country may have a right to establish an educational institution but no citizen, person or institution has a right much less a fundamental right to affiliation or recognition or to grant-in-aid from the State. The recognition and/or affiliation shall be given by the State subject only to the conditions set out in, and only accordance with the scheme contained in part-iii of this judgment."^97

Thus apart from a right to receive financial aid available to Anglo-Indian educational institutions for a limited period, and a right available to all minority institutions not to be discriminated against in matters of financial grants, minority institutions are not given any right, fundamental or otherwise, to receive any grant from the state. Further there can hardly be any disagreement on the point that the State while granting aid can prescribe conditions. But this hardly means that the State is free to impose any conditions at its sweet will. The validity of the conditions would be decided from case to case on the touchstone of the fundamental rights guaranteed by the Constitution.^98
NOTES AND REFERENCES


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18. AIR 1963 SC 540.


20. AIR 1980 SC 1042.


27. AIR 1970 SC 2079.
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36 AIR 1971 SC 1731.
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45 (2005)6 SCC 537 at 600.
47 Anwarul Yaqin, no. 1, pp. 194-195.
49 AIR 1958 SC 956.
50 AIR 1958 SC 956.
51 AIR 1970 SC 2079.
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63 AIR 1980 Goa 1.
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68 AIR 1987 SC 1210.
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70 AIR 1991 SC 2230.
79 In Re Kerala Education Bill, AIR 1958 SC 956.
80 AIR 1993 SC 2178.
81 AIR 1993 SC 2242.
82 S.K. Jahangir Ali, no. 46., p. 85.
83 Anwarul Yaqin, no. 1, p. 199.
84 AIR 1954 SC 561.
85 AIR 1954 SC 569.
87 (1963) 3 S.C.R. 837.
89 AIR 1959 Kerala 331.
90 AIR 1959 Kerala 332.
91 AIR 1958 SC 956.
92 AIR 1970 SC 2079.
93 AIR 1971 SC 1737.
94 AIR 1980 SC 1042.
95 AIR 1958 SC 956.
96 AIR 1954 SC 561.
97 AIR 1954 SC 1075.
98 Bhrigu Nath Pandey, no. 31, pp.210-213.
CONCLUSION

The spirit and judicial perception in which the Courts have construed the cultural and educational rights of the minorities have been summarized by Shetty, J. in *St. Stephens*:

"India is very much a Nation in the making. There are linkages and connections in the multilayered mix up. There are concerns and considerations underlying the provisions relating the minority rights. There are shared understandings and expectations of the founding fathers. The constitutional construction without such concern and consideration and without such shared and understanding and expectations is bound to be inadequate. "We must never forget" said Chief Justice Marshall "that it is a Constitution we are expounding", an instrument "framed for ages to come and . . . designed to approach immortality as nearly as human institutions can approach."’

The founding fathers tried to satisfy the hope, aspiration and desire of the minority by safeguarding them cultural and educational rights. At the Fifth Session of the Constituent Assembly of India, the Chairman (The Honorable Dr. Rajendra Prasad) assured the minorities that:

"To all the minorities in India we give the assurance that they will receive fair and just treatment and there will be no discrimination in any form against them. The religion, their culture and their language are safe and they will enjoy all the right and privileges of citizenship, and will be expected in their turn to render to loyalty to the country in which they live and its constitution. To all we give the assurance that it will be our endeavor to end poverty and squalor and its companions, hunger and disease to abolish distinction and exploitation and to ensure decent condition of living."

The framers of our Constitution were well aware of the development taking place in and around the country and though it necessary to provide protection to the rights of the minority was submitted by the Chairman Advisory Committee on
Minorities to the President of the Constituent Assembly of India on August 8, 1947 and was placed for consideration before the Constituent Assembly on August 27, 1947. Emphasizing the importance of giving protection to minorities, the report in conclusion says:

"We wish to make it clear, however, that our general approach to the whole problem of minorities is that the State should be so run that they should stop feeling oppressed by the mere fact that they are minorities and that, on the contrary, they should feel that they have as honourable a part to play in the national life as any other section of the community. In particular, we think it is a fundamental duty of the State to take special steps to bring up those minorities which are backward to the level of the general community."

It is interesting to note that until the decision of partition had not become imminent, the member of the Constituent Assembly had placed before them the tasks of securing agreement on a constitutional arrangement which could on the one hand, reassure the minorities that their interest and their distinctive characteristics would be secured in the future political set-up and, on the other hand, ensuring for themselves that extremist demands of minorities were not to be conceded beyond a certain point. But the statement of June 3, 1947, providing for the partition of the country into two separate sovereign nations had the effect of changing the whole complexions of minority problem. The decision of partition and the great upheaval that was brought with it had the inevitable effect of materially alternating the situation both psychologically as well as strategically. Congress was no more in need of being extremely conciliatory, and was no more under extreme necessity to bring about 'consensus'. The problem of safeguards for minorities that had come to the forefront as a communal problem thus boiled down to lose its colour. The occurrence of events outside and the consequent change of attitudes inside the Assembly were the factors that greatly helped the Assembly in weeding out progressively the communal element from the minority problem.

By not accepting the demands for separate electorates and reservation of seats on religions considerations, the Constituent Assembly thus sought do away
with any protective principle which could further damage the cause of national
unity. But it also sought to reassure the minorities that their special interests which
they cherished as fundamental to their life were safe under the constitution. This
assurance, more particularly, concerned with cultural and educational interests of
minorities which the Assembly sought to protect as justifiable rights.

Ultimately, the Constituent Assembly conceded certain rights relating to
education, language and culture and they came to be incorporated as Articles 29
and 30. Thus these two articles sought to recognize and protect a right of religious
and linguistic minorities to establish and administer educational institutions of
their choice. By granting autonomy in culture and educational spheres, it was
hoped that minorities would preserve their way of life and contribute in their own
way to the prosperity and development of the country and towards its political
unity.

The establishment and administration of educational institutions and cultural
centers are undoubtedly effective means of preservation of culture and linguistic
characteristic of minorities. Therefore, special care seems to have been taken by
the framers to put substance in the right to establish and administer educational
institutions including institutions for imparting general education through the
language of administering minority. It is not limited to the institutions established
after the commencement of the Constitution, but extends also to the administration
and running of the old established institution.  

The term ‘minority’ defies exact definition and the question of defining
‘minority’ has always been a hotly contested issue in international and domestic
fora. Usually Minorities are recognized as groups of people who are united
through race, religion, language or culture of which their members are conscious
and which forms the basis of a common identity and distinguishes them from
others on this basis. Such groups are generally called minorities when they are less
numerous than the other groups or when they occupy a subordinate economic,
political or special position in the state, or both. The criteria used to define,
identify and distinguish minorities may vary from case to case, but generally they
have to do with language, religion, territory, history, social and political organization, shared myths and feeling of identity and belonging.

Commonly a minority is understood in numerical terms. It refers to a group of individuals smaller in member as against the numerically dominant group in a population. But theorists go further than confining their definition of 'minority' to merely numerical-ratio criterion. As mentioned earlier the concept of minorities cannot be understood solely on the ground of enumeration alone. Three other features must also be taken into consideration. First, there must be certain identifiable ascribed special features which bind the group together and gives its members a sense of separate identity and it is also identified as such by the majority. Second, the group must feel that these special identity-constituting features could shape the political and social order of the society in which it exist. Thus the groups must be politically relevant and must believe and desire that it can play a role in the determination of general policies and programmes. Third, there must be a perception of disadvantage on the basis of special constitutive features of the group.

In the Indian context, beginning from the Constituent Assembly debates, the term 'minority' was to have wider connotation. In the assembly’s deliberations, the minorities question was regarded as encompassing the claims of three kinds of communities: religious minorities, backward castes and tribal. The claims for special treatment by these groups were on the basis of some disadvantages suffered by them with respect to the rest of the population rather than their numerical status.

The Indian Constitution uses the term minority/minorities only in four Articles, namely, Articles 29(1), 30, 350A, and 350B. However, what is amazing is that the Constitution nowhere defines the term ‘minority’, nor does it identify the minority groups or prescribe a definite test for identifying the same. There may have been two reasons for this - the first, that the framers thought it proper to leave the issue open to be guided by the judiciary, from case to case, and the second, that the framers did not think it fit to enter into details as the matter had been
discussed at such length before the Assembly that it was deemed as settled, who and what were minorities. They were not confronted with any theoretical problem of bringing the concept of minority within the confines of a definitional formulation. They were rendering a practical solution to a problem which was essentially political and had remained in the forefront of India's political scene for several decades before independence. While Art. 23 of the Draft Constitution, corresponding to the present Article 30, was being debated, doubts were indeed expressed in the Constituent Assembly over the advisability of leaving vague justifiable rights to undefined minorities. The Assembly chose to avoid any further elaboration and left it to the wisdom of the courts to supply this omission.

The judicial opinion seems to have correctly appreciated that the benefit of Art. 30(1) is confined to only two types of minorities - religious and linguistic. It is this appreciation which led the Delhi High Court to affirm that “the only or the principal basis of a minority must be their adherence to one of the many religions. . . and that the other features of the minority are subordinate to the main feature, namely its separateness because of the religion.” By analogy a similar interpretation can be put to the words “based on language” also. That being so it can be said that for the purpose of Art. 30, a minority means a non-dominant collectivity distinguishable from the majority of the population by the objective factors of religion or language or a combination of both.

The expression ‘minority’ is a relative term and its meaning should depend upon the territorial limits of its operation and the objectives of the particular legislation. The deliberations at the Constituent Assembly reveal that the problem of defining the term arose there, and the Assembly was unable to formulate any definition of ‘minority’. It is, however, clear that the protection of Article 30 applies only to those religious and linguistic minorities which had claimed political rights separated from the majority community prior to the Constitution such as the Sikhs, Muslims, Jains, Anglo-Indians and Christians.

The right of the minorities under Article 30 (1) to ‘establish and administer educational institutions of their choice’ guaranteed three main rights:
1. The right to establish educational institutions;
2. The right to administer educational institutions; and
3. The right to determine the nature of their educational institutions at their own choice.

Article (30) gives protection only to those educational institutions which are established by the minorities. No other institutions can claim this right. To administer an educational institution, it is necessary that such institution should be established by these minority groups who claim protection. Whether an educational institution is established by them or not is subject matter of proof and of judicial reviews. As observed by the Supreme Court in *S.P. Mittal v. Union of India* 10, "The benefit of Article 30(1) can be claimed by the community only on proving that it is a religious or linguistic minority and that the institution was established by it."

The Courts have tried to solve this problem on the basis of facts and circumstances of each case. In every dispute where the protection of Art.30 is sought to be made available, the court must be satisfied that the institution in respect of which the claim to protection is advanced was in fact established by the minority. The nature of proof or the quantum of evidence is, however, a matter for the court’s discretion and satisfaction. Thus while an affidavit is sometimes accepted to be the proof of the fact of establishment, in some cases the court have gone into the long history of the establishment and development of the institution concerned for the purpose of ascertaining whether the same was in fact established by the minority concerned.11

In weighing the sufficiency or inadequacy of the proof of establishment, the following factors, singly or in combination with each other have, in the main, determined the attitude of the courts. The factors are; name of the institution, persons involved in the establishment, sources of funds, subjection to legal provisions, expression of intention. What particular factor has received what emphasis in the court’s estimation appears to have depended upon the circumstance of each case, upon the nature of the facts in dispute and of course,
upon the court’s own discretion. But it is notable at the outset that in requiring proof of establishment a lavish use of discretion has resulted in opinions which not only fail to achieve other. The failure to evolve jurisprudence on such an important aspect of minority right as the kind and quantum of proof needed in support of a claim to establishment explains the reason why the courts have failed, at any rate in some cases, to enforce the commitment of the constitution.

The absence of any fixed formulae and the consequent use of wide discretion have led the courts to arrive at conclusion which are not always rational. Nowhere is this more eminently visible than in the Azeez Basha decision which, as has been brought out, was wrongly decided. It must also be said that the Azeez Basha decision is the lone example to cite where that catholicity which permeates through the whole lot of judicial decisions is quite conspicuously missing. The decision in that case exemplifies how a court of law can create history by denying a fact born of known history. It shows how a court can deny constitutional protection to an educational institution which existed on this soil for no less a period than 95 years.

The next vital part of minority rights in education is the right to administer educational institutions. In one word right to administer means managing, maintaining, molding, organizing, planning after the affairs of the institution. In a very general sense right to administer of a minority educational institution indicates the power to appoint teaching and non-teaching staff, admissions of the students and deciding the medium of instruction etc. It can also be stated that the right to administration includes right to have a fine choice to mould the institution to better serve interest of the minority community.

The right to administer, however, cannot include the right to mal-administer. The minority cannot surly 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. Thus the state may legitimately insist that reasonable restrictions be
prescribed to ensure the excellence of the institution before giving aid or recognition.

The right conferred by Article 30(1) is not an absolute right and is not free from regulation and that just as regulatory measures are necessary for maintaining the educational character and content of minority institutions. These are necessary also for ensuring orderly, efficient and sound administration of the school in the matter of maintaining discipline, health, morality etc. Chief justice Ray, speaking for himself and Justice Palekar in St. Xavier’s college v. State of Gujarat said: “Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more affective exercise of the right for the benefit of the institutions and without displacing the management.

There is no limitation on the subject to be taught in such institution, and they are not debarred from giving general education as well in such institution. It is not necessary for the protection of Art.30 (1) that the majority of pupils belonging to the institution must belong to the religion of minority in question. Thus nature and purpose of the institution is entirely left to the discretion of the community. This view was upheld by the Supreme Court in State of Bombay v. Bombay Education Society.12 Das C.J. observed: “There is no Limitation placed on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as well make them fit for entering the public services, educational institutions of their choice will necessary include institutions imparting general secular education also. In other words, the Article leaves it to their choice to establish such educational institution as well serve both purpose, mainly the purpose of conserving their religion, language or culture, and also the purpose of giving a through good general education to their children.”

All educational experts are uniformly of the opinion that pupils should begin their schooling through the medium of their mother tongue. There is great reason and justice behind this. If the tender minds of the children are subject to an alien
medium the learning process becomes unnatural. It inflicts a cruel strain on the children which makes the entire transaction mechanical. Besides, the educational process becomes artificial and tortuous. The basic knowledge can easily be garnered through the mother tongue. Keeping this philosophy in mind, a conference of the state ministers of education passed a resolution recommending for introduction of mother tongue as the medium of instruction at the primary-school stage and that where there were no fewer than forty students of a linguistic minority in a school, or ten students in a class, the state should provide facility for imparting instruction to these students by appointing a teacher in that school for that purpose.

One important concomitant of minorities’ right to administer educational institution is to decide the medium of instruction for their institutions. Article 30(1) which provided minorities the right to establish and administer educational institutions of their ‘choice’. Their ‘choice’, therefore, must necessarily include a choice to determine the language of instruction in such institutions. Further Article 29 (1) admits that the minorities have right to conserve their distinct language or script but it does not specify the means of conserving such right. Establishment of educational institution is, undoubtedly, one of the most effective means of conservation of language and script. The Gujarat High Court in *Sri Krishna v. Gujarat University* expressed the view that the right to determine the medium of instruction was a necessary part of the rights secured to minorities under Arts.29 (1) and 30 (1). The court held that neither the State Legislature nor the Gujarat University had the competence under the Constitution to prohibit St. Xaviers College from deciding to instruct its pupils in a language of its own choice.

Minorities have not faced much difficulty in exercising their right to determine the medium of instruction for their institutions except where a state has sought to prescribe a language as the exclusive medium of instruction. With the reorganisation of the States on linguistic basis, the States have shown a tendency to prescribe the regional language as the sole medium for teaching, with the obvious object to promote regional language. In the *Gujarat University* case what the university had done was to make an attempt to leave the students taking
admission to certain classes with no option but to receive instruction and write examination in the Gujarati language. In the D.A.V. College case also the university had sought to impose Punjabi as the exclusive medium for students taking admission to pre-University class.

Thus the choice of minority institution to determine medium of instruction is implicit in Art. 29(1) and 30(1) and had the status of a fundamental right, the State’s power to regulate medium of instruction must not come into conflict with this right. The choice of minority institution to decide for itself the medium of instruction cannot be restricted on extraneous considerations, however laudable. It is also recognized that no language can be prescribed as the sole medium of instruction if that is not the language of the minority concerned. A university cannot compulsorily affiliate a minority institution and impose upon it a medium which is not its own. At the same time no minority can claim that the affiliating university should conduct teaching and examination in a language which the minority has a right to adopt.

In D.A.V. College v. State of Punjab Reddy J. rightly observed that The state must harmonise its power to prescribe the medium of instruction with the rights of the religious or linguistic minority or any section of citizens to have the medium of instruction an script of their own choice by either providing also for instruction in the media of these minorities or if there are other University which allow such colleges to be affiliated where the medium of instruction is that which is adopted by the minority institutions, to allow them the choice to be affiliated to them.

The admission policy is another important matter which is considered very much within the realm of the administration of a minority educational institution. The issue of admissions to the minority educational institutions has raised two main questions: firstly whether admissions in such institutions be considered as part of the right to administer conferred under article 30(1), and secondly whether state can regulate admissions in such institutions and if yes then to what extent?

In St. Stephen’s College v. University of Delhi the Supreme Court held that admission of students is an important facet of administration. It can be regulated
but only to the extent that the regulation is conducive to the welfare of the minority institution or for the betterment of those who resort to it. In this case the Supreme Court clearly laid down the law regarding the admission to minority educational institutions. In the light of all the relevant principles and factors and in view of the importance which the constitution attaches to protective measures of minorities under Article 30(1), the court decided that there have to be two categories for annual admissions in a minority educational institution: (a) Category- I, (50% seats) for candidate belonging to the minority community which has established and administers the institution; (b) Category- II, (remaining 50%) for all candidates to be filled purely on the basis of merit. According to the Supreme Court, in the 50% Category - II admissions in a minority educational institution there can be no reservation or weightage for any class of admission-seekers, here the admission are to be based purely on merit. The decision ruled out any reservation for SC/ST candidates in Category- II.

The courts have also asserted and reiterated that Art.30 (1) of the Constitution of India cannot be read to imply a condition that an institution, in order to have the status of a ‘minority institution’ must keep its doors open to the members of the minority alone. Art. 30(1) implies no limitation whatever the minority institutions to restrict their ‘choice’ of admission to the members alone. Admitting non-member does not shed its minority character.

The selection and appointment of staff for running educational institution is also an essential part of the “right to administer” under Art.30 (1). The position that a Principal/ Head Master or other teachers occupy in the setup of an educational institution is of great importance. It is almost wholly these functionaries on whom depends the tone and temper of the institution. On them depends the establishment and continuity of its traditions and reputation, the maintenance discipline, and the efficiency of its teaching and training. On their outlook, efficiency and cooperation depends the success or failure of the objects of establishment of the institution. It is regarded as pre-eminently a function of the administration.
The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them.

The position taken by the Supreme Court in this regard is that while a University can prescribe qualifications for the academic staff, the actual selection of teachers must remain in the hands of the administration of the institution and dilution of the right of the management infringes Art. 30 (1). In *A.M. Patoni v. Asstt. Education Officer* the Court observed that even if an institution was protected under Art. 30 (1), the state could make laws regulating the appointment of teachers in the interest of the institution. It, however, insisted that the regulation must be limited to the qualifications that a teacher must possess and to the experience which he should have.

The Supreme Court in *Board of Secondary Education & Teachers Training v. Jt. Director of Public Instruction* again reiterated that the management's right to choose a qualified person as the Headmaster of the school is well insulated by the protective cover of Article 30 (1) of the Constitution and it cannot be chiseled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post; and that any such statutory or executive feat would be violative of the fundamental right enshrined in Article 30(1) and would therefore be void. The Court further observed that if the management of the school is not given the wide freedom to choose the person for holding the key-post of Principal subject, of course, to the restriction regarding qualifications to be prescribed by the State, the right to administer the School would get much diminished.

Thus a review of the above decisions would show that consistency in judicial approach is hardly anywhere more solidly founded that on the question of scope of
autonomy enjoyable by minority institutions in matters that pertain to selection of staff. The courts seem to be unwilling to concede any other power to the State than a power to prescribe minimum qualifications for persons to be appointed by such institutions. They are unwilling to accept even such a condition which requires that a principal should be appointed from among the existing teachers of the institution. Nor are they willing to allow even one person from outside to sit on the selection committee for appointment of personnel of the institution. Thus, between the right of minorities to choose teachers and other staff of their own choice and the claim of the State to regulate such appointments so as to maintain academic standards, the formula that the courts have evolved is that the State can prescribe professional qualifications and experience and the minority institutions are left with the freedom to choose personnel.

Maintenance of discipline, order, and excellence in academic standards depends to a very great extent upon a qualified, efficient and disciplined teaching and administrative staff. It thus apparently seems that minority institutions, like any other employer, have a right to select staff of their own choice and preference and to take action against them either to enforce an orderly conduct or to enforce the terms of the contract of service. This right involves prescribing qualifications for appointment of staff, prescribing the manner of their selection, laying down the conditions of service, enforcing discipline among them, compelling performance of duties and taking action against those found recalcitrant. The State, however, must have some kind of regulatory power so as to safeguard the interests of those employed in such institutions and to ultimately maintain a minimum level in academic standards. This is also necessary to prevent abuse of power by the managements of minority institutions. The state is also under an obligation to protect the interest of teaching and non-teaching staff. The teachers who are working in the school should be governed by proper service conditions for teachers and staff receiving aid of the state and the teachers or staff for which no aid is being provided is the same. Prerequisite to attract good teachers is to have good service conditions.
The courts, however, seem to be in a dilemma. On the one hand they are bound by the letter and spirit of Art.30 (1). On the other hand, they do not seem to leave aside the truth that disciplinary control with the management involves very valuable rights that belong to the staff-members. It is because of this they have expressed their willingness to give their approval to a well-guided power conferred upon an external agency to see that Art. 30(1) does not become a tool of oppression in the hands of the management. This stand of the courts may well meet both the ends- the constitutional obligation to protect what is secured to minorities under Art.30 (1) and the social necessity to protect the staff in minority institutions.

An analysis of the case law clearly establishes that the courts are convinced that the right to exercise disciplinary control over staff belong to the institutions and cannot be vested in any external authority. In their opinion the basis of the right to take disciplinary action emanates not only from the right to administer guaranteed under Article 30 but also from the contractual relationship of employer and employee that exists between the management and its staff. It is because of that they have held that disciplinary action cannot be made subject to approval by any outside authority. They are also not prepared to hand over an appellate power to any agency external to the institution even though such authority happens to be a quasi judicial authority. The courts, however, have insisted on holding an enquiry before any action is taken against the staff and have the institutions to follow a fair procedure while taking disciplinary action.

The minority educational institutions do not enjoy any fundamental right under Article 30(1) to receive grant in aid from the State. Art.30 (2) only imposes an obligation upon the State not to discriminate against a minority institution in matter of financial aid which the State may choose to make available to educational institutions. What Cl. (2) provides is not a positive right to claim aid from the State; it only provides security against differential treatment in matters of distributions of financial grants. The provision does not imply that an educational institution belonging to a minority is entitled to ask for aid from the State. The application of the non-discrimination clause incorporated under Art.30 (2) is
confined only to one situation where the grant is denied to a minority institution or is sanctioned on an unequal basis. Further there can hardly be any disagreement on the point that the State while granting aid can prescribe conditions. But this hardly means that the State is free to impose any conditions at its sweet will. The validity of the conditions would be decided from case to case on the touchstone of the fundamental rights guaranteed by the Constitution.

Recognition and affiliation are very powerful instruments in the hands of State or University to control minority educational institutions. Recognition is a facility which the State grants to an educational institution for enabling the students in such institution to sit for an examination certificates to degrees. The student of an unrecognized educational institution cannot obtain the recognized certificates or degrees, cannot be eligible for higher education and, in the existing system where jobs are generally linked with educational degrees, cannot be eligible for entering the public services. And affiliation to a university is sought to enable the students of minority educational institutions to sit for examination conducted by a university. Minorities have thus an interest in recognition and affiliation of their institutions as without this their educational institutions cannot fulfill the real objects of their ‘choice’ and cannot effectively exercise the rights available to them under Art.30(1).

The consistent view of the Supreme Court has been that there is no fundamental right of a minority institution to affiliation or recognition. But the judiciary has also recognized that for a real and meaningful exercise of the right by the minorities to establish and administer educational institutions of their choice, recognition by the state or affiliation to a university is a must. In the absence of it the educational institutions would be robbed of their utility as the students of their institutions could not be trained for University degrees or compete for government jobs. The courts have observed that recognition or affiliation cannot be granted or refused on conditions which have the effect to deprive minorities of their rights under Article 30(1). The analysis of the cases shows that the Courts are conscious that in the absence of such right the establishment of a minority institution is not
only ineffective but also unreal for the purpose of conferment of degrees on students.

However, the educational institutions established by the minorities cannot compel the State to recognize them if they fail to follow the statutory measures regulating educational standards and efficiency, the prescribed courses of study and instructions, the principles regarding the qualifications for the entry of students into educational institutions etc. Nor can the State discriminate against the minority institutions, or can provide by law for on such terms which would result in the abridgement or surrender of their fundamental rights.

In the end it is important to emphasize that the right of the minorities under Art. 30(1) of the Constitution, though couched in absolute terms, is subject to regulatory power of the State. The decisions on the scope and applicability of Art.30 (1) seem to have long settled that as no right can be absolute, Art.30, being no exception, cannot have its operation as an unbridled license, and can have its effectiveness only within specified limits. However, the extent to which the State can regulate the affairs of the minority educational institutions is a controversial issue. The judiciary has consistently recognized that reasonable restrictions can be imposed in the interest of the minority educational institutions.

The Courts have recognized and emphasized that regulations can be imposed in all such matters that go to ensure excellence of the institutions. The courts have done so despite the fact that no where under Art. 30 (1) such regulation is stipulated. Regulations may be made either by legislation or by executive order. Such regulation are permissible only in so far as they do not restrict the right of administration of the minority community but facilitate and ensure better and more effective exercise of that right for the benefit of the institutions. Regulations should not be in such a manner that offends the very sprit of Art.30 (1). Regulations which may lawfully be imposed either by legislative or executive action must satisfy a dual test : that the regulation must be reasonable; and regulation is of educational character of the institution and is conducive to making the institution an effective vehicle of education.
In *Faiz-e-Am College* case Krishna J. held that it is not only erroneous to believe in the untouchable absoluteness of Art. 30, equally fallacious is the simplistic submission that Art. 30 are disturbed only when the right is destroyed, not when it is damaged. Abridgement of the constitutional right is as obnoxious as annihilation. To cripple is to kill. He opined that regulation which restricts is bad; but regulation which facilitates is good. To draw the delicate line between what is permissible and which is not learned Judge observed: “A benignly regulated liberty which neither abridges nor exaggerates autonomy but promotes better performance is the right construction of the constitutional provision. Such an approach enables the fundamental right meaningfully to fulfill its tryst with the minorities’ destiny in a plural policy. He said that to regulate, be it noted, is not to restrict, but to facilitate effective exercise of the very right. The constitutional estate of the minorities should not be encroached upon neither allowed to be neglected nor mal-administered”.

An analysis of decided cases shows that the extent of regulatory power of the state has always been subject matter of controversy because the nature of regulation differs from one case to another and no general standard test can be laid down for determining the extent of states power to regulate educational institutions of the minorities. Any generalization cannot be exhaustive because there is no similarity of issues that come before the court. However, what seems to be well established that a regulatory measure must be reasonable and must also be regulative of the educational character of the institution as a minority institution and must be conducive to making the institution as an effective vehicle of education. A regulation in order to be valid must not interfere with autonomy and independence in matters of management and it must not deprive the institution of its minority character. The interest of the minority and not the public interest or national interest should be crucial in determining the constitutionality of a regulation.
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1. (1992) 1. SCC 558 at 611.


9. Arya Samaj Education Trust v. the Director of Education, Delhi, Administration, AIR 1976, Delhi 207.


15. Anwarul Yaqin, no. 11, p. 227.


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