

‘Separate Domain’ of Minority Rights under Article 29 & 30 of the Constitution of India and its Judicial Interpretation

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Introduction

“In law a man is guilty when he violates the rights of others. In ethics he is guilty if he only thinks of doing so”. **Immanuel Kant**

India is a mosaic of diversity as it is a multi-cultural and pluralistic society. We take pride in our heritage, in our myriad religions, languages and ethnicities. At the time of independence, our aim was to achieve unity in diversity-to preserve these individual identities and yet to remain a united, secular nation. Keeping these lofty ideals in mind, the framers of our constitution set about drafting the supreme law of land, in the hope that it would be in consonance with these utopian ideals. Our founding fathers enshrined in the Constitution ideals that sought to ensure for all citizens of India the equal opportunity to develop, by securing for them social, economic and political justice; liberty of thought, expression, belief, faith and worship; and equality of status and opportunity.¹ These important principles form the bedrock of India’s pluralistic and democratic society. They are essential for establishing a society wherein people have the opportunity to enjoy the whole gamut of human rights within a cohesive and stable framework.

In order to achieve unity and integrity of the country and to allay any fears of the minority communities, Articles 29 and Article 30 were provided as protection against cultural hegemony of the dominant groups. Article 29(1) of the Constitution provides that any section of the citizens, residing in the territory of India or any part thereof, having a distinct language, script or culture of its own shall have the right to conserve the same.” Article 29(2) lays down that “no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of

¹ The Preamble to the Constitution of India.

religion, race, caste, language or any of them.” Article 30(1) enjoins that “all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice”, while Article 30(2) lays down that “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.”² Furthermore, Article 350-A establishes that “it shall be the endeavor of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education, to children belonging to linguistic minority groups.”³

The basic aim of these articles is not only to provide a better structure of education for the minorities, but also to help us achieve secularism in the true sense. Keeping in mind the socio-political and historical context, it would indeed be a grave error to term such affirmative provisions as being biased against the majority (as certain detractors and right wing political ideologues do); rather they should be viewed in the light of the original intent of the founding fathers as being an impetus or encouragement given to the minorities to raise their level.

The right to education has been articulated as a fundamental guarantee by the Supreme Court in the case of *Mohini Jain*.⁴ The Articles in question, when read in conjunction with this right (as articulated by the Supreme Court), widen their own import considerably, as against when read in isolation. And as has already been stated earlier, that it was the intent of the framers to afford to the minorities added impetus for availing opportunities in the field of education, so that they may level up to the majority, both economically and socially. Further more this in turn would also supplement in the way of achieving an egalitarian society as envisaged by the Constitution. It was also realized, that in terms of the means to be employed for the attainment of the aforementioned purposes, laying down provisions in the fundamental law of superior obligation itself, would be most apt.

² Bakshi P. M., “The Constitution of India”, (Delhi, Universal Law Publishing Company, 2005), at pp. 66-70.

³ *Supra* no. 2, at p. 289.

⁴ SCC Vol.3 p 666, 1992

What is a Minority?

The Constitution of India denotes minorities as religious and linguistic. Though the word minority has not been defined in the Constitution. The Motilal Nehru Report (1928) showed a prominent desire to afford protection to minorities, but did not define the expression. The Sapru Report (1945) also proposed, inter alia, a Minorities Commission but did not define Minority. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has defined minority as under:

- 1) The term 'minority' includes only those non-dominant groups of the 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;
- 2) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristics; and
- 3) Such minorities should be loyal to the state of which they are nationals.⁵

The National Commission for Minority Educational Institutions Act, 2004 as amended time and again in 2006 and 2010 (for short the 'Act') has been enacted to safeguard the educational rights of the minorities enshrined in Article 30(1) of the Constitution. The Act defines "minority" under Section 2 (f) as for the purpose of this Act, means a community notified as such by the Central Government. Furthermore, as regards the indicia to be prescribed for grant of minority status certificate, a reference to Section 2(g) of the Act has become inevitable as it defines a Minority Educational Institutions. Section 2 (g) is as under: - "Minority Educational Institution" means a college or an educational institution established and administered by a minority or minorities.

The National Commission for Minority Educational Institutions (NCMEI) was established, to begin with, through the promulgation of an Ordinance. The Department of

⁵ Supra 2 p68

Secondary and Higher Education, Ministry of HRD, Government of India, notified the National Commission for Minority Educational Institutions Ordinance 2004 (No. 6 of 2004) on 11th November 2004. Thereafter, on 16th November 2004, the Ministry of HRD issued the notification constituting the Commission, with its head quarters in Delhi. Specific Commission has been established for protecting and safeguarding the rights of minorities to establish and administer educational institutions of their choice. This Commission is a quasi-judicial body and has been endowed with the powers of a Civil Court. It is headed by a Chairman who has been a Judge of the Delhi High Court and two members to be nominated by Central Government. The Commission has 3 roles namely adjudicatory function, advisory function and recommendatory powers.⁶

The initial courtroom attempt to answer the first question of defining minority was made in *Re: Kerala Education Bill* where the Supreme Court, through S.R. Das C.J., suggesting the techniques of arithmetic tabulation, held that the minority means a “community, which is numerically less than 50 percent” of the total population.⁷ This statistical criterion prevail with the Kerala High Court also which, in *A.M.Patroni v. Kesavan*, defined minority to mean the same thing as it meant to the Supreme Court. In the *Guru Nanak University case*, the Supreme Court rejected the contention of the state of Punjab that a religious or linguistic minority should be minority in relation to the entire population of India. The court has ruled that a minority has to be determined in relation to the particular legislation which is sought to be implemented. If it is a state law, the minorities have to be determined in relation to state the population.⁸ The court has pointed out if various sections and classes of Hindus were to be regarded as “minorities” under article 30(1), then the Hindus would be divided into numerous sections and classes and ceases to be majority any longer. The sections of one religion can not constitute religious minorities. The term “minority based on religion” should be restricted only to those religious minorities, e.g., Muslims, Christians, Jains, Buddhists, Sikhs, etc., which have kept their identity separate from majority, namely, the Hindus.⁹ In *TMA Pai foundation case* the eleven judge’s bench of the Supreme Court confirmed the position

⁶ <http://ncmei.gov.in/default.aspx> last visited on 30 Dec, 2014

⁷ Kerala education bill (in re :), AIR 1958 SC 956.

⁸ D.A.V. College v. State of Punjab, AIR1971sc1737,1742

⁹ A.S.E Trust v. Director, Education, Delhi administration, AIR 1976 Del 207

that minority status of a community is to be decided with reference to the state population.

The Supreme Court has ruled in *S.K. Patro v. State of Bihar*, that a minority claiming privilege under article 30 should be minority in person residing in India. Foreigners not residing in India do not fall within the scope of article.30.¹⁰

Constituent Assembly Debate

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, revolve round this issue: what rights could or should be conceded to minorities? The reference to minorities was a reference to none other than Indian minorities existing in India. The original draft of the fundamental rights submitted to the Constituent assembly on April 16, 1947 by the Sub-Committee on Fundamental Rights did not contain any provision corresponding to article 30(1) and did not even refer to the word minority. The letter submitted by K.M. Munshi to the Minorities Sub-Committee on the same date when, along with some other rights, the rights now forming part of article 30(1) was proposed, made a reference on the term “national minorities”. The Drafting committee, however, sought, to make a distinction between the rights of any section of the citizen to conserve its language, script or culture and the right of the minorities based on religion or language to establish and administer educational institutions of their choice and for this the committee omitted the word ‘minority’ in the earlier part of the draft article 23 corresponding to article 29, while it retained the word in the latter part of the draft article 23 which now forms part of the article 30(1).¹¹

B.R. Ambedkar sought to explain the reason for substitution in the Draft Constitution of the word minority by the words “any section” observing: It will be noted that the term minority was used therein not in the technical sense of the word ‘minority’ as we have been accustomed to use it for the purpose of certain political safeguards, such as representation in the Legislature, representation in the service and so on. The word is

¹⁰ AIR 1970 sc 259: (1969) 1 SCC 964

¹¹ Shukla “ Constituent Assembly Debate” p 890

used not merely to indicate the minority in the 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 culture and linguistic sense. 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 a much wider sense so as to give cultural protection to those who were technically not minorities but minorities nonetheless.¹²

Ambedkar’s explanation that the right was available not only to minorities in the ‘technical sense’ but also to minorities in the ‘wider sense’ has an obvious reference only to that part of Draft article 23 which now forms part of article 29(1) and not to that which is now clause (1) of article 30. His explanation, therefore, may be taken to be an attempt to broaden the scope of clause (1) of article 29 only so as to include within the term ‘minority’ other minority groups also, as contemplated and illustrated by him, and thus to confine article 30(1) to those minorities which he described as minorities in the technical sense, were politically recognized and the most prominent amongst them were represented in the Constituent Assembly also.

The whole problem, as far as this part of constitution is concerned, that engaged considerable time and efforts of the framers was to achieve a consensus on 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 characteristics 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 incorporate these provision 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

¹² Supra 12 pg 924

its claim is based on religion it must be defined and ascertain in terms 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 minority 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.

Relation between Article 29 & Article 30

The Supreme Court while interpreting the scope of article 29 and 30 of the Constitution in *re, Kerala education bill* held that the right to establish and maintain educational institution of their own choice is necessary concomitant to the right of minority to conserve their distinctive language, script and culture through educational institution. The right under article 30(1) is subjected to clause (2) of article 29 which provides that no citizen shall be denied admission into educational institution maintained by the state or receiving the aid out of the state fund, on the grounds only of religion, race, caste, language or any of them.¹³ The court, after reviewing its earlier decisions, held in case of *St. Xavier's College v. State of Gujarat* that article 29(1) and 30(1) deal with distinct matters and may be considered supplementing each other so far as certain cultural rights are concerned. Article 30(1) covers institution imparting general secular education. The object of article 30 is to enable children of minorities to go out in the world fully equipped.¹⁴

If Article 29 and 30 are grouped together it will be wrong to restrict the rights of minority to establish and administer educational institution concerned with language script and culture of the minorities. The reasons are: Firstly, article 29 confers the fundamental rights on any section of the citizen which will include the majority also where as article 30(1) confers all rights on all minorities. Secondly, article 29(1) is

¹³ D.E D.J, "The Constitution of India" (Hyderabad, Published by Asia Law House, Edition 2002, vol.1) p1102

¹⁴ AIR, 1974 SC1389

concerned with language, script or culture, whereas article 30(1) deals with minorities based on religion or language. Thirdly, article 29(1) is concern with the right to conserve language, script or culture, whereas article 30(1) deals with right to establish and administer educational institutions of the minorities of their choice. Fourthly, the conservation of language, script or culture under article 29(1) may be by means wholly unconnected with educational institutions, and similarly establishment and administer educational institutions by a minority under article 30(1) may be unconnected with any motive to conserve language, script or culture. A minority may administer an institution for religious education, which is wholly unconnected with any question of conserving language, script or culture. It may be that article 29(1) and article 30(1) overlap, but the former cannot limit the width of the latter. The scope of article 30 rest on the fact that right to establish and administer educational institution of their own choice is guaranteed only to linguistic or religious minorities, and no other section of citizens has such a right. Further article 30(1) gives the right to linguistic minorities irrespective of their religion. It is, therefore, not at all possible to exclude secular education from article 30.¹⁵

Right to establish Educational Institution

Article 30(1) guarantees to all minorities based on religion or language the right to establish and administer educational institution of their own choice. The word “establish” means to bring into existence. It does not necessarily connote construction of the institution by the minority.¹⁶ In *A.M Patroni v. Asst. Educational Officer* where a school previously run by some other organization, was taken over by the church, which re-organized and managed it to cater to and in conformity with the school as established by Roman Catholics. The school was held to have been established by the Roman Catholics for the purpose of article 30(1).¹⁷

The right to establish under article 30(1) means the right to establish real institution which will effectively serve the need of their community and the scholars who

¹⁵ Economic and Political weekly June 11,2005 p 2431

¹⁶ Kumar, Professor Narendera, “constitutional Law of India” (Delhi, Published by Pioneer Publications, Edition, 1997) p270

¹⁷ *A.M Patroni v. Asst Educational Officer*, AIR 1974 ker.197

resort to them.¹⁸ The minority is not required to seek prior permission for the establishment of an educational institution.¹⁹ Article 30(1) does not require that the whole community must have been involved in the establishment of the educational institution. It might be established even by a philanthropic individual with his own means in the interest of the minority community, it would be entitled to the protection of article 30(1). However the mere fact that the school was founded by a person belonging to particular religion did not make it a minority institution.²⁰ Again, where funds, were obtained from abroad for assisting in setting up and developing a school, which was established by a minority in India, or that the management as is carried on at times by some persons who are not born in India, cannot be a ground to deny to the school the protection of article 30(1).²¹ Likewise, the fact that the school was successively having a non Christian headmaster does not lead to conclusion that it was not established by the Christians.

Right to administer educational institution

The word “administer” and “establish” for the purpose of article 30(1) have to be read conjunctively. Therefore, a minority can claim a right to administer an educational institution only if it has been established by it not otherwise.²² Article 30(1) postulate that the religious community will have the right to establish and administer educational institution of their own choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. The right to administer has been given to the minority, so that it can mould the institution as it thinks fit, and in accordance with its ideas of how the interest of the community in general, and institution in particular, will be served best. For the purpose of article.30 (1) even a single philanthropic individual from the community concerned can found the institution with its own means.²³

¹⁸ Re Kerela education bill, AIR 1958 SC956

¹⁹ Socio Literati Advancement Society Bangalore v. State of Karnataka, AIR 1979 Karn.217

²⁰ Supra 17 p271

²¹ Bishop S.K Patro v. State of Bihar, AIR1970SC 259

²² Jain M.P “ Indian Constitutional Law” (Nagpur, Published by Wadhwa and Company, Edition 2003) p1435

²³ Manager, St. Thomas U.P School, Kerela v. Commr. And Secy. To General Education Deptt., AIR 2002 SC 756

The Supreme Court observed in *Azeez Basha v. Union of India* “that the minority will have the right to administer educational institutions of their own choice provided they have established them, but not otherwise.”²⁴ Article 30 cannot be read to mean that even if the educational institution has been established by somebody else, any religious minority would have right to administer it because, for some reason or for, it might have been administering it before the constitution came into force.²⁵

In *S.P Mittal v. Union of India*, the Supreme Court has stated: “In order to claim benefit of article 30(1), the community must show :(a) that it is religious/linguistic minority. (b) That institution was established by it. Without satisfying these two conditions it can not claim the guaranteed right to administer it.”²⁶ In *Andhra Pradesh Christian Medical Association v. Government of Andhra Pradesh*, the Supreme Court has asserted that the government, the university and ultimately the court can go behind the claim that the institution in question is a minority institution and “to investigate and satisfy itself whether the claim is well founded or ill-founded”, the government, the university and ultimately the court “have the undoubted right to pierce the minority veil” and “discover whether there is lurking behind it no minority at all and in any case no minority institution”.²⁷

The right to administer may be said to consist of the following rights:

- i. To choose its managing or governing body;
- ii. To choose its teachers; and headmaster/principal.
- iii. Not to be compelled to refuse admission to students;
- iv. To use its properties and assets for the benefit of the institution;
- v. To select its own medium of instruction;²⁸ hence, a legislation which would penalize by disaffiliation from the university any institution which uses a

²⁴ *Azeez Basha V. Union of India*, AIR 1968 SC 662

²⁵ *Supra* 23 p1435

²⁶ *Ibid* 1436

²⁷ *Andhra Pradesh Christian Medical Association v. Government of Andhra Pradesh*. AIR 1986 SC 1490

²⁸ *Basu Durga Das “ Shorter Constitution of India”* (New Delhi, Published by Wadhwa and Company, edition 13th) p350

language as the medium of instruction other than the one prescribed by it, offends against article 30(1).²⁹

Limits of the Right to Administer

Though article 30 itself does not put any limitation upon the right of a minority to administer its educational institution, this right is not absolute but must be subject to reasonable regulation for the benefit of the institution as the vehicle of education for the minority community, consistent with the national interest such as-

- i. To maintain the educational character and standard of such institution ,e.g., to lay down qualifications or conditions of service to secure appointment of good teachers, to ensure interests of students; to maintain a fair standard of teaching;
- ii. To ensure orderly, efficient and sound administration and to prevent maladministration, and to secure its proper functioning as an educational institution; to ensure that its funds are spent for the betterment of education and not for extraneous purposes.
- iii. To prevent anti-national activity;
- iv. To enforce the general laws of land, applicable to all persons, e.g., taxation, sanitation, social welfare, economic regulations, public order, morality.
- v. To prescribe syllabus, curriculum of study and regulate the appointment of teachers.
- vi. To ensure efficiency and discipline of the institution.³⁰

Education of Their Choice

The right of the minority institution under article 30(1) is not confined to teaching a particular religion or language in the institution established by them. Preservation of culture, as such, is not necessary condition either for acquiring the status of minority or for claiming rights under article 30. In *re Kerala education bill case* chief justice SR Das stated the key to the understanding of the true meaning and implication of the article 30

²⁹ D.A.V College v. State of Punjab, AIR 1971 SC1737

³⁰ Supra²⁹ p351

are the words “of their own choice”. It is said that the dominant word is “choice” and the content of that article is wide as the choice of particular minority community may make it. Further he said that there is no limitation placed on the subjects to be taught in such minority institutions. The 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 public service ; educational institutions of their own choice will necessarily include imparting of the secular education also.³¹ The Supreme Court has further explained in *W. Proost v State of Bihar*³² that the width of article 30(1) cannot be cut down by introducing in it consideration on which article 29(1) is based. The latter article is general protection which is given to the minorities to conserve their language, script and culture. The former is a special right to the minorities to establish educational institution of their own choice and these educational institutions need not be up with the sole objective to conserve language, script or culture of the minority community. The minority community can establish and manage educational institution of their own choice which may impart secular education.³³ This view is confirmed in the case of *St Xavier’s College v. State of Gujarat*. However, in the All Saints high school, the court laid down broad principle for determining syllabus. it states “where a minority institution is affiliated to a university the fact that it is enjoined to adopt the courses of study or the syllabi or the nature of books prescribed and the holding of examination to test the ability of the students of the institution concerned does not violate the freedom contained in the article 30 of the constitution.”³⁴

Minorities have also given a right to select medium of instruction for their educational institution for their educational institution. The right of a minority to establish and administer educational institution of its choice also carries with it the right to impart instruction in its institution to its children in its own language and the state cannot force thee minority institution to adopt the language prescribed by them as a

³¹ Supra 16 p 2432

³² *W. Proost v. State of Bihar*, AIR 1969 SC 465

³³ Supra 14 pg 1009

³⁴ *St. Xavier’s College V. State of Gujarat* , AIR 1974 SC 1389

medium of instruction.³⁵ In *D.A.V. College v. State of Punjab*³⁶ Supreme Court made it clear, neither the university nor the state can provide for imparting education in a medium of instruction in a language and script which stifles the language and script of any section of any citizens. Such a course will trespass on the rights of those sections of citizen which have distinct language and script and which they have right to conserve through educational institution of their own. However the state can provide for the study of the state language as a compulsory second language.

Reservation of seats in favour of students of minority community

Does the right to establish and administer a minority institution of their own choice extend to or includes the right to reserve seats for the students of minority community in a state funded or aided institution? The matter first came before the Supreme Court in the case of *Sheetansu Srivastava v Principal, Allahabad Agriculture Institute*,³⁷ where the institute denied admission to the general student even though they secured high percentage of marks in the competitive admission test held by the institute due to admission policy of reservation of 50 per cent of seats for the church sponsored students from Uttar Pradesh and all over the country and the reservation of the sets was challenged. The court held that such denial of admission to the students who were higher in merit in the competitive test held for admission on the basis of the admission policy of the institution is liable to be quashed being violative of article 29(2) of the constitution. The court reasoned that a minority may have religious right to impart education so as to maintain its identity and culture but no religion preaches separatism. There can be no reason in the claim that the government aided institutions should be permitted to confine its educational activities to the student of their own community. Therefore both on general approach and constitutional prohibition under article 29(2) the reservation policy of the institution cannot stand.³⁸

³⁵ Supra 14 p 1110

³⁶ *D.A.V college v State of Punjab* AIR 1971 SC 1731

³⁷ *Sheetanu Srivastava v Principal, Allahabad Agricultural Institute*, AIR 1989 all 123

³⁸ Supra 14 p1091

In *St. Stephen's College v University of Delhi*,³⁹ the Supreme Court had held that even a minority institution receiving aid from state funds was entitled to accord preference to or reserve seats for candidates belonging to its own community on the basis of religion or language. However, the court allowed such institutions to admit students of its own community to the extent of 50 per cent of the annual intake and insisted that such differential treatment must be in conformity with the university's standards. The court held that differential treatment of students in the admission process did not violate Article 29(2) or Article 14 (equality before law) and it was essential to maintain the minority character of the institution.⁴⁰ The Supreme Court further explained in *T.M.A. Pai Foundation v. State of Kerala*,⁴¹ that while the minority educational institutions were permitted to draw students belonging to that minority to the extent of 50 percent seats even by going down the merit list, the minority community students, must be admitted on the basis of inter se merit determined on the basis of common entrance test as is adopted for selecting students belonging to general categories.⁴²

Reservation by government in aided minority educational institutions violates article 30(1)

Art. 30 is simply a special group right, which cannot be subjected to the rigors of the State's welfare measures for other sections of society that have no relation with enhancing the concerned Minority Educational Institutions educational standards or efficiency or the minority's educational needs. Any reservation mandated by any external agency in any Minority educational institute for non-minority students, is impermissible, as it cannot be justified as a regulation promoting the Minority educational institutes's educational standards or efficiency.⁴³ The voluntary receipt of aid by a Minority

³⁹ *St. Stephens College v. University of Delhi*, AIR 1992 SC1630

⁴⁰ *Supra* 17 p 275

⁴¹ *T.M.A Pai Foundation v. State of Karnataka*, (2002) 8 SCC481, 580

⁴² *Supra* 13 p275

⁴³ *Govt. of Tamil Nadu v. G. Arogiasamy*, AIR 1971 Mad. 440; *A. Thomas v. Deputy Inspector of Schools*, AIR 1976 Mad. 214.

Educational Institution does not deprive it of its minority status and character.⁴⁴ In *Sidhrajhai v. State of Gujarat*, the petitioners were the management of the Mary memorial training college at Ahmedabad, established by Christian minority. The Gujarat government issued an order reserving 80 percent seats in the training colleges for the nominees of the government. The order further provided that refusal to admit the candidates nominated by the government would result in withholding recognition and the stoppage of grants-in-aid to such institution. The Supreme Court held the order violative of the fundamental right of the minority guaranteed under article 30(1). The court said that state regulation should be reasonable. These, in order to be valid, must be regulative of educational character and conducive in making the institution an effective vehicle of education for minority community.⁴⁵ In the case of *Sheetansu Srivastava* the court held that neither the government could direct a minority institution to admit particular students nor a minority institution could deny admission to students on the basis of their not belonging to the minority community.⁴⁶

The Supreme Court delivered an unanimous judgment in the case of *P.A. Inamdar v. State of Maharashtra* declaring that neither the policy of reservation can be enforced by the state nor any quota or percentage of admission can be carved out to be appropriated by the state in a minority or non-minority unaided educational institution.⁴⁷

Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost.

⁴⁴ Supra 42 p581

⁴⁵ Supra 17 p 274

⁴⁶ Supra 38 p 1091

⁴⁷ P.A Inamdaar v. State of Mahrashtrara 2005 Indlaw SC 463

Right to recognition and affiliation

Art. 30(1) includes within its scope the right to claim affiliation for and/or recognition of Minority educational institutions. The Supreme Court in *re Kerala education bill* held that true import of article 30(1) would mean the right to establish effective educational institution which may serve the real need of the minorities and the scholars who resort to them. Article 30(1) will have its complete effect when the institution established by the minorities are given recognition and affiliation without which the institution cannot play their effective role and the right conferred on the minorities under the said article would be denude of much of its efficacy. Thus the recognition of the institution established by minority is as important as any other institution.⁴⁸ The Supreme Court later observed in the case of *Managing Board M.T.M v State of Bihar* that there is no fundamental right to recognition by the state but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of educational institute of their choice in its truth and in effect to deprive the minority of their right under article 30(1) of the constitution. To have an institution recognized as minority institution the sponsor must establish that the institution in question has been established by minority community and such institution is not just a commercial venture but a minority institution in form and spirit.⁴⁹

In the case of *St Xavier's College v State of Gujarat* Supreme Court has stated that “the establishment of a minority institution is not only ineffective but also unreal unless such institution is affiliated to a university for purpose of conferment of degrees on students. In the absence of recognition, Minority educational institutions cannot effectively achieve their chosen object of imparting general secular education, which, under Art.30 (1), they are entitled to do.” The establishment of a minority institution is not only ineffective but also unreal unless such institution is affiliated to a university for purpose of conferment of degrees on students”. However any law which provides for affiliation on terms which will involve abridgement of the right of linguistic and religious minorities to administer

⁴⁸ Supra 14 p 1112

⁴⁹ Supra 23 p 1441

and establish educational institution of their own choice will offend article 30(1). The Supreme Court has held that compulsory affiliation of Minority educational institutions to a University is violative of Art. 30(1) and it was observed that these Minority educational institutions were free to get themselves affiliated to another University, which presupposes that there is a right to recognition or affiliation. In fact, it has been held that Art. 30 by its very nature imply that where affiliation is asked for, the university concerned cannot refuse the same without sufficient reason.⁵⁰ Finally, in *T.M.A Pai*, Quadri, J. held the right to receive recognition to be a necessary concomitant to the right of minorities under Art. 30(1).⁵¹ Thus, it is clear that the right to establish Minority educational institutions ‘of their choice’ must, therefore, mean the right to establish institutions which effectively serves the needs of their community, and thus include the fundamental right to affiliation.

Minority educational institutions have right to government recognition and even affiliation to any university. According to Justice Das “ *to deny recognition to educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational of their own choice is in truth and in effect to deprive them of their rights under article 30(1).*” Without recognition the educational institutions established or to be established cannot fulfill the real objects of their choice and the rights under article 30(1) cannot be effectively exercised. However in granting affiliation, it is open to a university to impose reasonable conditions upon a minority institution for maintaining the requisite educational standard and efficiency, e.g., as to-

- i. Qualification of teachers to be appointed in the institution;
- ii. Conditions of service, e.g., the age of superannuation of teachers;
- iii. Qualification for entry of students;
- iv. Courses of study;

⁵⁰.Supra 37 p 1737

⁵¹ Supra 42 p 581

- v. Hygiene and physical training of students.⁵²

But such terms and conditions will be violative of article 30(1) if they are likely to oblige the minority to surrender its right to establish and administer educational institution of their own choice, or to render it unreal or ineffective. Thus, the power to affiliate cannot be used by the university -

- i. To Interfere with the day-to-day administration of the institution; or the right of management belonging to the minority community;
- ii. To Interfere with aims, ideals and objects to be achieved by the institution;
- iii. To Require that all appointments or dismissal by the governing body must be subject to the approval of the university; or subject to the undefined and unlimited power of appeal of the vice-chancellor;
- iv. To constitute or reconstitute or suspend the governing body; or to require its approval for constitution of that body.
- v. To prescribe that the teaching in the institution shall be conducted by the university itself and that the affiliated shall be part and parcel of the university;
- vi. To place the administration in a body in the selection of which the founders have no say;
- vii. To displace the domestic jurisdiction of the governing body in settling disputes between members of the teaching staff and refer it to tribunal;
- viii. To provide for compulsory affiliation, so as to impose on a minority institution a script or medium of instruction other than its own.⁵³

No discrimination in granting aid to minority educational institution

Article 30 (2) says that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the

⁵² Supra 29 p357

⁵³ Supra 29 p 358

management of a minority, whether based on religion or language. There is no constitutional right to receive state aid outside article 337, but if the state does in fact grant aid to educational institutions, it cannot impose such conditions upon the right to receive such aid as would virtually deprive the members of a religious or linguistic community of their right under article 30(1). It cannot be held that the right under article 30(1) is available only as long as the community is in position to run the institution with its own resources and that if they seek state aid, they must submit to any terms which the state may impose. While the state has right to impose reasonable conditions, it cannot impose such conditions as will substantially deprive the minority of its right guaranteed by article 30(1). Surrender of fundamental rights cannot be exacted as the price of aid doled out by the state. Thus, the state cannot prescribe that if an institution, including one entitled to protection of article 30(1), seeks to receive state aid, it must submit to the condition that the state may take over the management of the institution or acquire it, under certain contingencies,-for such condition would completely destroy the right of the community to administer the institution.⁵⁴

Power of government to regulate minority run educational institution

Administration of an institution requires constant interaction among the management of the institution and the government. As the interest of two is different, this generates many conflicting situations. The government has the power to regulate minority run educational institution. The right conferred on the religious and linguistic minorities to administer educational institutions of their own choice is not an absolute right. As Justice Reddy J says “ *the only purpose that the fundamental right under article 30(1) would serve in that case be that minorities may establish their own institutions, lay down their own syllabi, provide instructions in the subject of their choice conduct examinations and award degrees or diplomas*”.⁵⁵ Thus right under article 30(1) is not free from regulation. Just as regulation are necessary for maintaining educational character and content of minority

⁵⁴ Supra 29 p355

⁵⁵ Supra 16 p2433

institution similarly regulatory measures are necessary for ensuring orderly , efficient and sound administration. The Supreme Court stated in re Kerela education bill that the fundamental right given to all minorities under article 30(1) to establish and administer educational institutions of their own choice does not militate against the claim of the state to insist that in granting aid the state may not prescribe reasonable regulations to ensure the excellence of the institutions.⁵⁶ Further in case of *Sidhrajbhai v. State of Gujarat*⁵⁷ Supreme Court invalidated the regulation which directed teachers training college maintained by the minority community to reserve 80 percent of seats in the college for the nominees of the district and municipal board teachers. The regulation also directed that, if the college does not comply with this regulation, the state would withhold or withdraw the grant-in-aid and recognition given to the college. The court said that regulation can be made to prevent the housing of the educational institution in unhealthy surrounding or for preventing setting up and continuation of an institute without qualified teachers. Thus regulation made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may be imposed.

The case of *St Xavier's college* specifies the scope of control over the minority institutions. According to Chief Justice Ray, the government can regulate course of the study, qualification and appointment of teachers, health and hygiene of students, facilities for libraries and laboratories. The court also talked of such measures as would bring about uniformity, efficiency and excellence in educational matters. Further to the conditions of merit, excellency and uniformity, the court states "*the right to administer cannot obviously include right to maladminister.*"⁵⁸

In *St Stephens College v. University of Delhi* a question arose before the Supreme Court whether the state could impose regulatory measures on the institutions run by the minority community which provides admission by conducting interview but not solely on the marks obtained in the qualifying examination? In the present case, the state imposed restrictions on the college management compelling it to make admission exclusively on the basis of marks obtained in the qualifying examination. But the management, in

⁵⁶ Supra 8 p956

⁵⁷ Sidrajbhai v. State of Gujarat, AIR 1963 SC540

⁵⁸ Supra 16 p 2433

addition to marks obtained by the students, also conducted interview for making admission to the college. The Supreme Court observed that, the denial of power to St Stephens College to conduct interviews to select candidate for admission would be violative of the rights of the minority community guaranteed under article 30(1) of the Constitution. The court held that, any regulatory measures imposed by the state on the minority should be beneficial to the institution or for the betterment of those who join such institutions.⁵⁹

Control over the minority educational institute is practiced not only for ensuring academic standards, but also for safeguarding interest of the employees. While the management of the minority educational institution has right to take disciplinary action against its employees in accordance to the service rules of the institution, the state is entitled to take regulatory measures to ensure security of the services and the interest of the academic and non-academic staff of the institution. Outside authorities like, the vice-chancellor and his/her nominee can be introduced in the administrative bodies of the institution, however, the role of such as not to overshadow the powers of the managing committee.

It is, therefore, open to the government or the university to frame rules and regulations governing the conditions of service of teaching in order to secure their tenure of service and to appoint a high authority armed with sufficient guidance to see that the said rules are not violated or that members of the staff are not arbitrarily treated or innocently victimized, but while setting up such authority care must be taken to see that the said authority is not given blanket and uncanalised and arbitrary powers so as to act at their own sweet will, ignoring the spirit and objective of the institution. It would be better if the authority concerned associates the members of the governing body or its nominee in its deliberation so as to instill confidence in the founders of the institution or the community constituted by them. The authority concerned must be providing with proper guidelines under the restricted field which they have to cover. In some cases the outside authority enjoy absolute powers in taking the decisions regarding the minority institution without hearing them and these orders are binding on the institution. Such a course of

⁵⁹ Supreme Court Journal 2002 vol.1 p38

action is not constitutionally permissible so far as minority institution is concerned because it directly interferes with the administrative autonomy of the institution. A provision for an appeal or revision against the order of the authority by the aggrieved member of the staff alone or setting up of an arbitration tribunal is also not permissible because such course of action introduces an arena of litigation and would involve the institution in unending litigation , thus impairing educational efficiency of the institution.⁶⁰

Unaided minority educational institutions have maximum autonomy in matters of ‘administration’

The unaided minority institutions have more autonomy than the aided minority educational institutions. The Supreme Court stated in *Ashu Gupta v. State of Punjab*⁶¹ that unaided minority educational institutions particular, have complete freedom to select their students. It held that all minority institutions not receiving the aid from government “are wholly out of Art. 29 (2)’s ambit”. Thus, the State cannot interfere, and can only make regulations for maintaining educational standards. Later Supreme Court in *T.M.A Pai Foundation* case further explained that in case of unaided minority educational institutions the regulatory measures of control should be minimal. An unaided institution must have greater autonomy than an aided institution. It must have autonomy in such matters as appointment of staff, taking disciplinary action against a staff member, admission of students, charging of fees etc. but it is open to the state to prescribe the minimum qualifications, experience and other conditions for being appointed as teacher or principle. Fees to be charged by the unaided institutions can not be regulated but no institution should charge capitation fee or profiteering is correct.⁶²

In *Islamic academy of education and another v State of Karnataka* Supreme Court observed that unaided and minority unaided institutions are entitled to fix their own fee

⁶⁰ Supra 16 p 2436

⁶¹ *Ashu Gupta v. State of Punjab*, AIR 1987 P&H 227

⁶² Supra 23 p 1462

structure. There can be no fixing of a rigid fee structure by the government. Each institution 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 student.

The Supreme Court observed in *P. A Inamdar v State of Maharashtra* that So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, there is not much of difference between non-minority and minority unaided educational institutions. The state cannot insist on private and minority unaided educational institutions which do not receive any aid from state to implement states policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit. Merely because the resources of the state in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be enforced by the state to make admission available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, and non-exploitative and based on merit.

Conclusion

The educational right given to religious and linguistic minorities under article 30 of the constitution is not well defined. For a concept to be operative it entails an attempt at definition. One can speculate that by merely stating the term “minority” in the constitution the framers expected its conception to be sort of self-explanatory. But with the passage of time, the changing social milieu and the varied contexts requiring its application have rendered a semblance of constancy in its conception imperative. The constitutional ambiguity in this regard has given leeway for judicial vacillation, which has further confused the general populace with regards its cognition. The constitution’s silence in this respect is ironical for definition has to be the condition priori for a conception to be beneficial in practice.

The Supreme Court of India on the other hand attempted to define the word “minority” as a “community, which is numerically less than 50 percent” of the total population. The court further said that a minority has to be determined in relation to the particular legislation which is sought to be implemented. If it is a state law, the minorities have to be determined in relation to state the population. The debates in the constituent assembly imply a tolerant approach of the state towards the minorities. This explains the stand of the constitution-makers not to provide the promised fundamental rights automatically but to make minorities assert their demands. Even the wording of the article was kept vague in order to facilitate regular interpretation by the courts, taking into account the historical and spatial requirements of the nation and equation between the minority and majority-responsibility, which the courts are fulfilling at regular interval. Although this would justify non definition in the constitution, one has to remember that the judiciary’s role generally follows the implementation or execution process and therefore a constitutional exposition of the concept would better serve practical purposes. And it would also limit judicial tinkering thereby according the concept a much needed consonance in principle and practice. Status quo on the other hand would encourage what has come to be known as ‘judicial populism’.

As far as interpretation of article 30 by the courts is concerned three trends can be noticed. Firstly, the judgments are contextual, hence, many times are different, reflecting the personal convictions of the judges. This makes the interpretation of the article vague and subject to constant struggle between the minorities and state. Secondly these judgments are more liberal with the linguistic minorities than with religious ones and, thirdly, they reflect a trend towards gradually reducing the scope of article, giving space to the governmental regulation and control. Example can be given of conjunctive use of the term “establish” with “administration”. Such an approach has deprived many minority communities the benefit of the rights due to them. Yet another example can be given of the use of concepts like “maladministration” and “excellence”. As can be seen in both, the Stephen and the Pai cases, judges are influenced by “melting pot” theory working towards building uniformity in the practice and laws. Further putting together article 29(2) and 30(1) reduces the benefits promised to the minorities through article 30. It is true that article 29(1) and article 30(1) overlap, but the former cannot limit the width of the latter. The scope of article 30 rests on the fact that right to establish and administer educational institution of their own choice is guaranteed only to linguistic or religious minorities, and no other section of citizens has such a right.

We can thus conclude that it is appropriate time for the parliament to define the term “minority” and the scope of article 30 so that time and again the right granted to minorities under article 30 to establish and administer educational should not be put to the tests of judicial interpretations.

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