Minority Rights in Education

Reflections on Article 30 of the Indian Constitution

The paper unfolds a disappointing picture of the rights promised to the minorities through Article 30 and their implementation. The debates in the constituent assembly imply a tolerant rather than an encouraging 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 the minorities assert their demands. As far as interpretation of Article 30 by the courts is concerned, one finds three trends. Firstly, the judgments are contextual, hence, many times, they are different, reflecting the personal convictions of the judges. This makes interpretation of the Article vague and subject to a constant struggle between the minorities and the state. Secondly, these judgments are more liberal with linguistic minorities than with the religious ones and, thirdly, they reflect a trend towards gradually reducing the scope of the Article, giving space to governmental regulations and control.

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Conflicting emotions and policies characterise contemporary societies. On one hand, one finds prevalence of homogenising forces of market economy while on the other, values of tolerance of differences and individual/collective freedom are advocated. The same language of democracy, equality, and social justice are used for promoting both, inclusion and exclusion of people in social categories. The ethos of citizenship is lost in minority-majority segregation. On reflection, the modern individualised societies are providing undue space to violent intolerance, self-centred consumerism and suspicion in an atmosphere of uncertainty and collapse of supporting social structures. In such circumstances, what is the significance of Article 30 and its promise of minority rights in education? Can the Constitution safeguard minority rights in an adverse social reality? Does market reality provide space for alternate cultures?

The paper attempts to explore these questions in the light of court judgments on the Article 30. Attempts would be made to locate changes in defining and allocating minority rights over the years.

Constitutional Rights on Education Provided to Minorities

The Constitution of India provides certain fundamental rights (Articles 15-17, 25 to 30) and directive principles (Articles 330-339 and 350) for the benefit of minorities in India. However, in this paper only Article 30 will be deliberated upon. For easy reference, the Article is stated below:

Article 30

> Right of minorities to establish and administer educational institutions:
> (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
> [(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]
> (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.

Importantly, these rights have safeguards against future manoeuvring. To quote Yaqin (1986:2-3)

> The rights are protected by a prohibition against their violation, and are backed by a promise of enforcement. They, being part of the Fundamental Rights, are invested with a sanctity and a status higher than that of the ordinary law and, consequently, every legal provision or executive action must conform to the mandates implied in them. The prohibition is contained in Article 13 which bars the state from making any law abridging or limiting any of these provisions and threatens to veto any law found inconsistent with. The injunction runs against the whole state which term under Article 12 is defined to include government and Parliament of India and the government and the legislature of each of the states and all local and other authorities. The term 'law' includes within its amplitude any ordinance, order, bye-law. Rule, regulation, notification, custom or usage having the force of law; and the prohibition binds all such instrumentalities within the state as have legal authority to formulate such law. The promise of enforcement is contained in Article 32 which, conferring practicability to the assertions contained in Article 13, declares that the right to move the Supreme Court by appropriate proceedings for the enforcement of Fundamental Rights is guaranteed and thus imposes a duty upon the highest court to afford protection against any violation and vests a corresponding right in the religious and linguistic minorities to seek remedy in case the rights are threatened with deprivation or infringement. A similar jurisdiction has been conferred upon the high courts under Article 226. The rights are made justifiable before the courts for double purpose of protecting them against arbitrary action of regulatory authorities wielding the force of state and against excesses of elected legislatures dominated by transient numerical majorities and often swayed by passions and prejudices.

The concern behind this solemn guarantee was to convince the minorities that their interests would be protected in the Indian

nation. This need was felt in the context of the heightened minority-majority awareness in the British period. The divide and rule policy of the British had alienated minorities. In addition, the identification of the Congress with the Hindu upper castes by a dominant stratum of the minority furthered the fear of subjugation in post-independence India among the same. In these circumstances, constitutional guarantee of rights was considered an effective means to dispel the fear and to convince the minorities of protection of their interests in the independent India. However, Partition and the assassination of Mahatma Gandhi were two moving forces that resulted in confining the rights of the minorities, especially the religious minorities, to socio-cultural fields like education and language.

As has been mentioned earlier, the rights promised in the Constitution are binding on the state and even the legislative assembly cannot modify these rights. Further, intrusion of any nature on these rights can be challenged in the court. However, the wording of Article 30 were kept vague, leaving much to the interpretation of the judiciary, giving space to accommodate changes in the political and value structures. To quote Yaqin (1986:45),

> While Article 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.

A look at the court cases reveals regular and frequent interpretation of these rights in both, the high court and the Supreme Court. A few relevant interpretations defining implications of the Article 30, are discussed in the following sections of the paper.

Concept of Minority

'Minority' as a concept has not been adequately defined in the Indian Constitution. Although mentioning the cultural attributes of religion and language, the Constitution does not provide details on the geographical and numerical specification of the concept. Even the specifics of language and religion are not mentioned. In the constituent assembly debate on Article 23, B R Ambedkar (*Constituent Assembly Debates*, 1948-49: 922-923) said,

> 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 purposes of certain political safeguards, such as representation in the Legislature, representation in the Services and so on. The word is 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 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 purposes, they would be, although not a minority in the technical sense, cultural minorities.... 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.

As early as 1958, in 'In Re the Kerala Education Bill, 1957' (AIR 1958 SC 956) the Supreme Court suggested the technique of arithmetical tabulation of less than 50 per cent of population for identifying a minority. This population was to be determined in accordance to the applicability of the law in question. If an Act is applicable nationwide then the minority group would be decided on the national figures and in the case of the Act being applicable in a state, the minority group would be decided on the state figures. However, the recent case of T M A Pai Foundation and Ors vs State of Karnataka and Ors (October 2002; now onwards Pai case) has specified the geographical entity of state for consideration of the status of minority for Article 30. To quote from the judgment (*Judgments Today*, 2002(9) SC 2)

> Since reorganisation of the states in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the state and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered statewise.

One fails to understand how organisation of states on linguistic basis provides a base for consideration of the states as the basic unit for arithmetical calculation for determining religious minorities. Further, it is important to mention that the condition of having less than 50 per cent of the population in a state, distinguishable on religious or linguistic terms, does not entitle one to the rights automatically. In the words of Ambedkar (*Constituent Assembly Debates*, 1948-49: 923),

> I think another thing which has to be borne in mind in reading article 23 is that it does not impose any obligation or burden upon the State. It does not say that, when for instance the Madras people come to Bombay, the Bombay government shall be required by law to finance any project of giving education either in Tamil language or in Andhra language or any other language...The only limitation that is imposed by article 23 is that if there is a cultural minority which wants to preserve its language, its script and its culture, the State shall not by law impose upon it any other culture which may be either local or otherwise. Therefore this article really is to be read in a much wider sense and does not apply only to what I call the technical minorities as we use it in our Constitution.

Succinctly, it is left to the minority to establish its minority status in order to avail the benefits of the Article 30. The task is difficult especially because the concepts of 'religion' and 'language' have not been adequately defined in the article or the constituent assembly debates. Does the concept of language refer to the languages having adequately developed grammar and script or only script is sufficient to claim the status or is spoken language a condition enough to acquire the status of minority?

As far as language is concerned, the case of D A V College, Jullunder vs State of Punjab (AIR 1971 SC 1737) is considered important. In this case, the 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 that language should also have a distinct script for those who speak it.

As far as the concept of religion is concerned, can a sect claim the status of minority? Does the Article accept only major well recognised religions or emerging religions can also avail of the benefits? In the latter case, how can it be established that the religion is new and is not merely a sect?

A study of court cases reveals a continuous struggle between the State and minorities on these issues. For instance, Patna High Court announced Arya Samaj [Arya Pratinidhi Sabha vs State of Bihar (AIR 1958, Patna 359)], a minority distinct from the Hindus. However, in 1976, Delhi High Court decided against providing benefits of Article 30 to denominations and sects. To quote Desai (1996:34)

> The most significant case on this issue was decided by the Delhi High Court in 1976…It lays down the correct position in law namely

that 'minorities based on religion' in Article 30(1) mean only what we call in common parlance the various religious communities like Hindus, Muslims, Sikhs, Buddhists, Christians, Jains, etc, and cannot be meant to include religious denominations or sects.

One gets uncomfortable on such verdicts. Acceptance of only ascriptive and well-recognised units as religious units does not take into account new religious movements and claims of new emergent religious groups for minority rights. In 1962, Brahmo Samaj of Bihar made this claim, which was accepted by the High Court [Dipendra Nath Sarkar vs State of Bihar (AIR 1962 Patna 101)]. The court, however, did not accept such a claim in the cases of Chaudhari Janki Prasad (AIR 1974 PAT 187) and S P Mittal (AIR 1983 SC 1).

The ambiguous definition of religion has potential for controversy. Unfortunately, the bench comprising 11 judges in the Pai case did not deliberate upon this important issue; hence, leaving space for continued confusion at the levels of both, the state and the minorities.

Conditions for Establishing and Administering an Institution

Article 30(1) gives linguistic and religious minorities a fundamental right to establish and administer educational institutions of their choice. In the case of St Stephan's College (AIR 1992 SC 1630) it was stated,

> …the words "establish" and "administer" used in Article 30(1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution.

One gets surprised at this condition. Why does a minority have to establish an institution in order to administer it? Transfer of management in the private educational institutions is not a rare phenomenon in India. According to Desai, (1996:79)

> The logic behind this is rather incomprehensible. The only reason given for this interpretation is that the word 'and' and not the word 'or' is used between the words 'establish' and 'administer'.

To quote Desai again (1996:80)

> In my submission the word 'and' used in Article 30(1) of the Constitution should have been interpreted in a disjunctive and not in a conjunctive sense. There is need to adopt 'purposive' rather than 'literal' interpretation of the Constitution…The rationale behind Article 30(1) is to give protection to minorities to run educational institution of their choice. Why should it matter that the educational institution presently run by the minority for the benefit of the minority was established, may be a century back, by persons not belonging to a minority community?... The intent of the Article seems to be that not only does a minority have the right to run an existing institution but also to establish educational institutions and vice versa. This appears to be the only logic consistent with the historical background of minority rights. Be that as it may, the settled position in law is that a minority cannot administer an institution which it has not established.

At least in the case of A M Patroni (AIR 1974 KER 197) the court is in agreement with Desai,

> …even if an institution previously run by some other organisation is subsequently taken over by a minority community and run by it, it must be held that it was established by that minority community.

One wonders why this facilitating and liberal approach has not been popular with the court. The conjunctive approach has put many institutions for the minorities in the general category thus depriving them to avail of the benefits of the Article. Example can be given of Aligarh Muslim University. Further, the word 'establish' in relation to the Article 30(1) has been interpreted as, 'to bring into existence' (AIR 1968 SC 663). But what exactly does this mean? Does this mean that the minority community should take initiative to start the institution? Or, that the name and the management should reflect the minority orientation? Or, that the institution should be established for benefit of the minority community only? In State of Kerala vs Mother Provincial (AIR 1970 SC 2082), Supreme Court made the following interpretation,

> The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds.

However, mere establishment by a person from a minority community does not entitle the institute to the minority status. To quote from the case of Rajershi Memorial Basic Training School (AIR 1973 Kerala 88),

> The mere fact that the school was founded by a person belonging to a particular religious persuasion is not at all conclusive on this matter. The institution must be shown to be one established…by or on behalf of the particular minority community.

In the case of Fr Mathew Munthiri Chinthyil Vicar, St Mary's Church Anikkampoil vs State of Kerala, the court held that the governmental master plan, which prescribes permissible number of schools in a locality, has to be followed while selecting a location for establishing a minority educational institution. The High Court of Kerala (AIR 1978 KER 227) rejected petition for establishing a new school on the same ground. It stated,

> An extreme position entitling the minority to ask, and to be given, the educational institutions, wherever it wants to establish, at any moment when the cry is raised, is not the scope and the content of Art 30. Regulation of the right in time as well as in space, must be permissible.

Desai states (1996:87-88),

> The Court rejected the Petition but held that in weighing the needs of the locality, the authority was bound to consider the requirements of the minority communities in establishing educational institutions of their choice.

In this context, it is interesting to note that in the cases of Socio Legal Advancement Society vs State of Karnataka (AIR 1989 KER 217) and Mark Netto vs Government of Kerala (AIR 1979 SC 83) courts took a different view. In these cases it was stated that a minority community could not be stopped from establishing an educational institution.

Education of Their Choice

Preservation of culture, as such, is not a necessary condition either for acquiring the status of minority or for claiming rights under Article 30. In Re the Kerala Education Bill 1957 (AIR 1958 SC 959) chief justice S R Das stated,

> The key to the understanding of the true meaning and implication of the article under consideration are the words "of their own choice". It is said that the dominant word is "choice" and the

content of that article is as wide as the choice of the particular minority community may make it.

To quote him again (AIR 1958 SC 979),

> 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 will make them fit..., educational institutions of their choice will necessarily include institutions imparting general secular education also.

This view is confirmed in the case of St Xavier's College vs State of Gujarat (AIR 1974 SC 1389) by a bench of nine court judges. However, in the All Saint's High School (AIR 1980 SC 1043), the court laid down broad principles 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 Article 30 of the Constitution.

Minorities have been given a right to select medium of instruction (AIR 1954 SC 561) for their educational institutions. The D A V College, Chandigarh (AIR 1971 SC 1746) made standpoint of the court 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 the citizens. Such a course will trespass on the rights of those Sections of the citizens which have a distinct language or script and which they have a right to conserve through educational institutions of their own.

However, "the State can provide for the study of the State language as compulsory second language" [Desai 1996:206].

It is important to note in this context that even the aided educational institutions established by the religious minorities cannot impart religious education unless such provision is made in the trust deed of the institution. Unaided or partially aided minority institutions are free to impart religious instructions to the students.

Scope for Government Control

Administration of an institution requires constant interaction among the management of the institution and the government. As the interests of the two are different, this generates many conflicting situations. Some of the contested issues are mentioned in the Pai case (*Judgments Today*, 2002(9) SC 15), where

> …it was submitted that the state should not have a right to interfere or lay down conditions with regard to the administration of… institutions. In particular, objection was taken to the nominations by the state on the governing bodies of the private institutions, as well as to provisions with regard to the manner of admitting students, the fixing of the fee structure and recruitment of teachers through state channels.

Varied interpretation of Article 30, especially with reference to Articles 29, is yet another cause of the tension between the Government and the educational institutions. The state's suspicion of the minorities especially the religious ones; evidence of misuse of provisions of Article 30; and the desire of the minorities to avail of their Constitutional rights, especially in a state regulated education system are yet some more reasons for the same.

Minority educational institutions, in general, are educational bodies operative in the formal educational system of India. Hence, the rules and regulations prescribed for private institutions by the state, are applicable to the minority institutions unless otherwise stated. It is also important to note that these rules and regulations cover almost every aspect of the educational institutions especially of those, which avail benefits of government recognition/aid or are affiliated to universities.

Minority educational institutions have a right to government recognition/aid or even affiliation to an university. According to Justice Das, "...to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30(1)" (AIR 1958 SC 985). He says, "Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Article 30(1) cannot be efficiently exercised" (ibid). In the case of St Xavier's College vs State of Gujarat (AIR 1974 SC 1395), it has been stated that "the establishment of a minority institution is not only ineffective but also unreal unless such institution is affiliated to a University for the 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 and establish educational institutions of their choice will offend Article 30(1)".

Article 30 covers rights to recognition and affiliation, which includes rights to receive financial aid from the state; to select management bodies, staff, and students; and, to select content of education. But, a look at the judicial decision reveals that these rights are not absolute in nature. Justice Reddy J (AIR 1974 SC 1407) summarises the position,

> 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 the right to seek recognition to their degrees and diplomas and ask for aid where aid is given to other educational institutions giving a like education on the basis of the excellence achieved by them. The state is bound to give recognition to their qualifications and to the institutions and they cannot be discriminated except on the ground of want of excellence in their educational standards so far as recognition of degrees or educational qualifications is concerned and want of efficient management so far as aid is concerned.

The case of St Xavier's College specifies the scope of control over the minority educational institutions (AIR 1974 SC 1389). According to chief justice Ray, the government can regulate course of the study, qualification and appointment of teachers, conditions of employment of teachers, health and hygiene of students, facilities for libraries and laboratories. The court also talked about the need of such measures as would bring about uniformity, efficiency and excellence in educational matters.

Further to the conditions of merit, excellence and uniformity, the court states "The right to administer cannot obviously include the right to maladminister" (AIR 1958 SC 982).

Although agreeing with the court judgments in principle and acknowledging the need to keep a minimum check on the educational institutions for providing quality education to the beneficiaries, one cautions that concepts like uniformity, maladministration and excellence provide undue space for governmental control over the minority education institutions. For instance, the Supreme Court in the case of Sidhrajbhai vs State of Gujarat stated, "Regulations made in the true interest of efficiency of

institution, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institutions, in matters educational" (AIR 1963 SC 540-41). Chief Justice Hidayatullah (AIR 1970 SC 2082) adds,

> ... 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 the institutions may seek to teach...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.

Control over the minority educational institutions is practised 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 interests 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 authorities should be well specified and should be such as not to overshadow the powers of the managing committee. To quote from the case of All Saints High School vs Government of AP (AIR 1980 SC 1043),

> It is, therefore, open to the government or the university to frame rules and regulations governing the conditions of service of teachers 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 victimised...But while setting up such an 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 very 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 committees constituted by them.
> ....the authority concerned must be provided with proper guidelines under the restricted field which they have to cover...In some cases, the outside authorities enjoy absolute powers in taking decisions regarding the minority institutions without hearing them and these orders are binding on the institution. Such a course of 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 the setting up of an Arbitration Tribunal is also not permissible because Ray C J pointed out in AIR 1974 SC 1389 that such a course of action introduces an arena of litigation and would involve the institution in unending litigation, thus impairing educational efficiency of the institution…

In this context, it is pertinent to share a case of Bombay university discussed by Gursahani in 1989 in 'Practical Training Series of Lectures organised by the Maharashtra State Bar Council for Jr Advocates at Government Law College' (cf Bombay University File number 118). He pointed out that Section 42 A(i) of the Bombay University Act 1974, permits the state government to constitute in consultation with the Bombay university, one or more college tribunals for adjudication of disputes or differences between the employees and the management of any college or recognised institution. Section 42 B of the Act considers decisions of such tribunals as final and not appealable. Gursahani states that minority educational institutions had challenged the validity of the Constitution of the college tribunal and had submitted that Section 42 B(1) of the Bombay University Act violate Article 30(1). Likewise, high schools managed by the minority institutions had challenged the constitution of school tribunal which is constituted under 8(1) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act 1977 and the Maharashtra of Private Schools (Conditions of Service) Rules 1981. The statute for appointment of officers of the college tribunals by the state in consultation with the university of Bombay was also challenged. A division bench of the Bombay High Court consisting of Justice P B Sawant and Justice G H Guttal deliberated on the issues and gave their judgment on June 29, 1987. They held that minority educational institutions and their staff would be governed by the provisions of the University Act 1974, under Section 42, and would be amenable to the jurisdiction of the college and school tribunals. They, however, said that the state government should appoint the presiding officer in consultation with the high court and not the Bombay university.

Drawing attention to the differences in the court opinion, Singh (Singh P, nd) shares,

> ...in Lily Kurien [Lily Kurien vs Sr Lewina (1979) 2 SC 124] a provision enabling an aggrieved member of the staff of a college to make an appeal to the vice-chancellor against an order of suspension and other penalties was held to be violative of Article 30(1). Again, in All Saints High School [All Saints High School, Hyderabad vs Government of Andhra Pradesh (1980) 2 SC 478] a provision contained in Andhra Pradesh Private Educational Institutions Control Act 1975 requiring prior approval of the competent authority of all orders of dismissal, removal or reduction in rank passed against a teacher by the management of college was held to be inapplicable to a minority institution. Chandrachud, C J and Fazal Ali J found that the unqualified power given to an outside authority constituted an interference with the minority's right to administer their education institutions...But Kailasam J disagreed and upheld all these provisions as promotive of excellence in the administration of a minority institution by preventing the abuse of power.

Concepts like excellence, maladministration and uniformity result in subjective interpretation of the Article, influencing decisions of the court. Differences in the decisions, even when contextually relevant, make the provisions under Article 30 ambiguous, making related issues a bone of contention among the minorities and the state.

Earlier, these provisions were considered applicable only on the aided educational institutions but the Pai case (*Judgments Today*, 2002(9) SC 7-8) extended their scope to include even the unaided educational institutions.

> …in the case of unaided institutions the regulatory measures of control should be minimal. Conditions of recognition and affiliation to an university or board have to be complied with. Managements should have freedom with regard to day-to-day management including appointment of teaching and non teaching staff and administrative control over them. Rational procedure for selection of teaching staff and for taking disciplinary action should be evolved. Appropriate tribunals should be constituted for redressing the grievances of employees of aided and unaided institutions. It is open to the state or the controlling authority to prescribe the minimum qualifications, experience and other conditions for being

appointed as teacher or principle. Regulations can be framed governing service conditions for teachers and other staff for whom aid is provided by state without interfering with the overall administrative control of the management over the staff. Fees to be charged by the unaided institutions cannot be regulated but no institution should charge capitation fee...the principle that there should be no capitation fee or profiteering is correct.

Relation between Articles 30 and 29

In general, courts in India put Articles 29(2) and 30 together. This affects the implementation of the provisions of Article 30. For easy reference Article 29 is quoted below:

Article 29 – Protection of interests of minorities:

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

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

A careful reading reveals an intrinsic difference between the two Articles. Whereas Article 30 provides exclusive right to establish and administer educational institutions to the linguistic and religious minorities, Article 29(2) provides indiscriminate right to admission in government-ssponsored and administered educational institutions to the citizens of India.

In the case of St. Xavier's College vs State of Gujarat (AIR 1974 SC 1389), a bench of nine judges was called to determine the interrelationship between Articles 29 and 30. All the nine judges were unanimous in their opinion that Articles 29(1) and 30(1) deal with distinct matters and may be considered supplementing each other so far as certain cultural rights of minorities are concerned. However, the relation between clause (1) of Article 30 and clause (2) of Article 29 is paradoxical generating confusions like; can minority education institutions deny admission to any student on the basis of religion or language? Whether in admission to minority education institutions, preferences can be given to minority students, overruling the criteria of merit?

In the case of Ashu Gupta (AIR 1987 P& H 227), the court held that unaided minority institutions have complete freedom to select their students. It held that all minority institutions not receiving aid from the government 'are wholly out of the ambit of Article 29(2)'. In the case of Sidhrajbhai vs State of Gujarat (AIR 1963 SC 540), the court held that in government aided minority institutions, government can neither nominate students nor reserve seats for backward classes. In the case of Sheetansu Srivastava (AIR 1989 ALL 117) 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.

The case of St Stephan's College (AIR 1992 SC 1654) decided by a bench of five judges of the Supreme Court is a landmark case as far as relation between Article 29(2) and Article 30(1) is concerned. Tackling the issue of admission the court stated,

> In the instant case also the impugned directives of the university to select students on the uniform basis of marks secured in the qualifying examinations would deny the right of St Stephan's College to admit students belonging to Christian community. It has been the experience of the college as seen from the chart of selection produced in the case that unless some concession is provided to Christian students they will have no chance of getting into the college. If they are thrown into competition with the generality of students belonging to other communities, they cannot even be brought within the zone of consideration for the interview. Even after giving concession to a certain extent, only a tiny number of minority applicants would gain admission. This is beyond the pale of controversy.

However, keeping in view the ever-increasing communal atmosphere of the nation, the court, in the same case (AIR 1992 SC 1659), advocated the theory of melting pot and attempted to strike a balance between the two Articles. It stated,

> In the nation building with secular character sectarian schools or colleges; segregated faculties or universities for imparting general secular education are undesirable and they may undermine secular democracy. They would be inconsistent with the central concept of secularism and equality embedded in the Constitution. Every educational institution irrespective of the community to which it belongs is a 'melting pot' in our national life. The students and teachers are the critical ingredients. It is there they develope respect for, and tolerance of, the cultures and beliefs of others. It is essential therefore, that there should be proper mix of students of different communities in all educational institutions.

It further states (AIR 1992 SC 1663)

> In the light of all these principles and factors, and in view of the importance which the Constitution attaches to protective measures to minorities under Article 30 (1), the minority aided educational institutions are entitled to prefer their community candidates to maintain the minority character of ther institutions subject to, of course, in conformity with the university standard. The State may regulate the intake in this category with due regard to the need of the community in the area which the institution is intended to serve. But in no case such intake shall exceed 50 per cent of the annual admission. The minority institutions shall make available at least 50 per cent of the annual admission to members of communities other then the minority community. The admission of other community candidates shall be done purely on the basis of merit.

Desai (1996:192-3) has recorded his reservation on the judgment. He feels that "the Supreme Court has adopted a pragmatic rather then a Constitutional approach". Further, "Neither in the Constitution, nor in the voluminous debates of the Constituent Assembly nor in any of the early decisions of the Supreme Court, is there any whisper about the 'melting pot' theory or anything akin to it. The 'melting pot' theory is not about what the law says but what the Judges believe the law should have said. Supreme Court itself has time and again observed that judgments cannot be based on such theories". According to him,

> It was called upon to decide whether Article 29(2) overrides Article 30(1) or not...It was required to answer whether a minority institution was permitted to exclusively run for the benefit of its own community or not. If the answer was in the negative, the conclusion should have been that there could be no preference at all to students of minority community and the entire admission has to be by merit. If the answer was in the affirmative, the conclusion should have been that the minority institutions can run exclusively for the benefit of its own community and thus reserve 100 per cent seats for the members of its own community.

The Pai case (*Judgments Today*, 2002(9) SC 3) also holds a position somewhat similar to that of the St Stephan case.

> …admission to unaided institutions cannot be regulated by the state or the university except for providing the qualifications and minimum conditions of eligibility. So long as the admissions to such institutions are on a transparent basis and merit is adequately taken care of, there can be no interference. A minority institution

does not cease to be so the moment grants in aid are received. Such an aided institution would be entitled to have the right of admission belonging to the minority group but would be required to admit a reasonable extent of non minority students. State government can notify such percentages for admission for non-minorities. Ratio laid down in St Stephan's College vs University of Delhi (*Judgments Today*, 1991 (4) SC 548) is correct but rigid percentage cannot be stipulated. The authorities can stipulate reasonable percentage in accordance to the type of institution, population and educational needs of the minorities.

Conclusion

The paper unfolds a disappointing picture of the rights promised to the minorities through Article 30 and their implementation. The debates in the constituent assembly imply a tolerant rather than an encouraging 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 the minorities assert their demands. It should not be taken to indicate that the national leaders were not in favour of providing safeguards to the minorities for cultural preservation and secular development, but perhaps the historically developed social distance among certain communities and partition of the nation had made them weary of assertive minorities, especially when the history had proven that such assertion might obstruct the process of nation building. This explains restrictions on political rights of the minorities and confinement of the fundamental rights to social and cultural spheres. Even the wording of the Article was kept vague in order to facilitate regular interpretation of the rights by the courts of India, taking into account the historical and spatial requirements of the nation and equations between the minority and the majority – a responsibility, which the courts of India are fulfilling at regular intervals.

As far as interpretation of Article 30 by the courts is concerned, one finds three trends. Firstly, the judgments are contextual, hence, many times, are different, reflecting the personal convictions of the judges. This makes interpretation of the Article vague and subject to a constant struggle between the minorities and the state. Secondly, these judgments are more liberal with linguistic minorities than with the religious ones and, thirdly, they reflect a trend towards gradually reducing the scope of the Article, giving space to the governmental regulations and control. Example can be given of conjunctive use of the terms 'establish' with 'administration'. Such an approach, it is needless to state, 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 St Stephan and the Pai cases, judges are influenced by 'melting pot' theory working towards building uniformity in the practices and laws.

Putting Articles 29(2) and 30(1) together further reduces benefits promised to the minorities through Article 30. The conjunctive use of the two articles has resulted in quota fixing in the seats for the students from the community in the minority education institutions. This approach is surprising especially when one realises that the wording of Article 29(2) makes it essentially a fundamental right provided to individuals, hence, not having much scope for quota fixing. Opinion of this nature has been expressed more than once in the court judgments, the recent example being the opinion of Justice Ruma Pal (*Judgments Today*, 2002(9) SC 5-6) in the Pai case. The need for a cosmopolitan atmosphere in minority education institution is the stated reason for juxtaposing the two articles. Another reason might be to access the community resources for the benefit of non-minority citizens.

One agrees in principle with the court judgments that admission should not be denied to any individual if s/he meets the eligibility criteria set by the institution. Nevertheless, the rigid fixing of a ratio of 50:50 frustrates the spirit of Article 30, as it affects the enrolment of the members from the minority community in the institution especially in the professional courses, where demand is towards the higher side. The provision is to the disadvantage of the minority community, especially of those members of the community, who come from a backward socio-economic and educational background and may have neither the resources to buy a seat in a general institution nor the required merit to compete with the general population. It is a proven fact that students from affluent families, in general, have better school education and the benefit of professional coaching facilities. These students have a higher possibility to secure merit positions in the common entrance test and free seats in the professional courses. In the Pai case the rigid ratio of 50:50 has been rejected, however, the 'authorities' have been given power to settle the ratio in accordance to the educational need of the area. Such a non-specific judgment, one feels, would accentuate conflict between the government and the minorities.

A close study of court cases and personal interviews with the management of a few minority institutions revealed that these institutions face many legal and administrative constraints. Struggle commences with the need to prove one's minority status, which may not always be granted as especially seen in the cases of emerging religious groups. Further, the institutions have to abide by the master plan prepared by the government. The systems of 'government recognition' and 'aid' directly bind the minority education institutions to government regulations. These regulations range from curriculum setting to disciplinary actions and cover areas like fees, number of students, salaries of the staff, eligibility criteria of the staff and quality of activities (including teaching) undertaken by the institutions. In particular, almost all important committees of the minority educational institutions have government nominees. The recent judgment in the Pai case has expanded governmental control to the unaided educational institutions also.

Drawing from Jain (1991), Desai (1996) and the judgment delivered in the Pai case (*Judgments Today*, 2002(9) SC 8-9), one can conclude that in practice, the minority education institutions enjoy very few concessions, which are mentioned below: (1) Minorities have a right to administer admission of the students. However, the practice has to accommodate provisions of Article 29(2). (2) Reservation policy need not be implemented either in admissions or in the appointment of the staff. (3) The management is not bound to admit students nominated by the government. (4) The minority educational institutions need not follow the government procedure for appointing the principal and at least three teachers. However, eligibility criteria set by the government has to be followed and the department of education has to be informed of the names of these four employees. *The Times of India* (May 31, 2004) reports that while deliberating on the petition of Brahmo Samaj Education Society, the SC held that the government cannot restrict the right of the management of the private educational institutions to select its academic staff, even if the college is an aided college. (5) Even in the event of gross malpractice, the management cannot be taken over. (6) In case of any dispute between the management and the staff, the state

can intervene in the minority education institutions. Even tribunals can be constituted for adjudication of dispute between the employees and the management. However, the presiding officer of the tribunal is to be selected by the high court and has to be a judicial officer of the rank of district judge. (7) The management has much wider power in the constitution of the managing committee.

All the above mentioned advantages are administrative in nature. Significantly, the study conducted in Mumbai [Jain 1992] showed that operating in the common political economy, minorities do not remain in a position to practice qualitatively different pedagogy, however relevant it may be to the cultural development of the community. More specifically, in a political economy where degrees remain linked to jobs and where the institutions are dependent upon the government resources for survival, it becomes essential to follow common pedagogy recognised by the state as it ensures jobs for the students as well as their admissions in the institutions offering higher studies. Such assurances provide credibility to the institution, which furthers its demand among the students. Jain (1992) studied two educational institutions and observed that the academic standard of the institutions was not sacrificed for their minority character. Institutions were found not to compromise on merit while admitting students. Admission of the community members, who could not pay fees, was also found to be resisted.

One finds that the market requirements have ensured secular and mainstream education in the minority education institutions with spaces for extraordinary community oriented education reduced to conducting of a few extra curricular courses and programmes. This is most conspicuous in case of linguistic minorities reinstating their language with more marketable languages like English, Hindi or the regional language of the area. Deliberations in a seminar on ethnic initiatives in education conducted in the Tata Institute of Social Sciences in the year 2000 revealed that the market compulsions are making minorities subscribe to English as the medium of instruction with a provision for special classes to teach their community language to only those, who are still interested in learning the language.

In such circumstances one understands the suspicion with which the government looks at the assertion of the minorities for benefits of Article 30. The assertion is not seen as leading towards promotion of culture and education among the minorities but as surpassing prescribed rules and regulations. Desai (1996:108) has mentioned misuse of the benefits extended by the Article 30. He states,

> Due to the benefits which may be derived by claiming minority status, a number of unworthy claimants have been scampering for this status. For instance, in 1993, the Bombay High Court, on a technicality, held that in Minority Degree Colleges affiliated to University of Bombay reservation in posts was not permissible. Within two months about 30 colleges applied for minority status in order to avoid reservation.

One cannot deny that, many times, minority education institutions appear to pursue the rights promised in the Article 30 not for benefits of the minority community but for exceeding governmental requirements like the one mentioned above. However, this makes one wonder more on the rigid and domineering governmental rules than on the complaint that the benefits of the Article is not reaching the intended beneficiaries. The study conducted by Jain (1991) shows that the minority education institutions use the insights and commitment of the insiders to locate and deal with the problems confronting the community. Both the institutions studied by Jain had culture specific atmosphere which facilitated easy learning and encouraged hesitant parents to enroll their children to these institutions. The institutions were found to cater to the need of the community, making education functional and relevant for the community. They had culture specific atmosphere that encouraged education of girls and of children from ethnocentric background. These institutions were also found to conduct vocational or skill enhancing education. Mention should also be made of personal efforts of the authorities of the institution to attract community members to the school and education per se. One feels that the Article 30 provides an important space to the minorities to mould their educational environment in accordance to their requirements and should be encouraged as it helps the state in dealing with culture-specific forces behind educational backwardness.

Jain (1991) discussed certain fears shared by the government officials explaining their resistance towards minority education institutions. They felt that, (1) Capacity to monitor admission of students and teachers gives scope to indulge in in-group reinforcing strategies. (2) These institutions have potential to create and foster communal atmosphere. (3) Dominance of a specific group in an institution increases social gap among communities. It fosters contacts and inter dependency among the members of the community. This obstructs exposure of the members to alternate cultures and value structures, hindering the process of building cosmopolitan atmosphere in the institution. (4) Possible presence of ethnocentric and negative stereotypes for certain communities even among a few members of the staff can inculcate negative feelings among the students for other communities. (5) These institutions provide a possible base for mass mobilisation and thus, remain vulnerable to the fundamentalist pressures.

Although acknowledging the merit of the above arguments against minority institutions, one would like to state that these fears are rooted in the structure of Indian society and cannot be directed towards the minority institutions alone. For instance, one finds pre-eminence of community-based managements in the private institutions of India, which results in dominance of a specific community in the institution, thus, creating space for surfacing of all the above mentioned fears irrespective of the institution belonging to minority or majority community.

One feels that the minority education institutions bring in community resources and commitment to furthering the cause of education – a requirement that the Indian state cannot afford to ignore. One feels that instead of treating every minority educational endeavour with suspicion, the need is to encourage them. However, in the present political atmosphere in the country, care should be taken to check influence of fundamentalist forces in institutions, whether established by the minority or majority community. EPW

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