

# RIGHTS OF RELIGIOUS MINORITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTION: LAW, EXTENT AND LIMITATIONS

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## Introduction

Protection of minorities is a worldwide concern almost in all the legal system of the world. Minorities are considered to be and are vulnerable groups facing atrocities and discrimination in numerous ways, which in fact goes against the very basic right to live a peaceful and right to live a life with dignity. The threat is constant in a system or a country or a state with the considerable presence of majority community.

Country like India which has adopted a secular approach in its Constitution, this issues or this concern is of immense importance. Moreover, Indian democratic set up is the involvement and participation of all the communities in the national life. There are six major religions in India prevalent from time immemorial and based on different philosophies. As per Government of India those major religions are: Hindu, Sikh, Jain, Buddhism, Christian and Muslim.<sup>1</sup>

Indian Constitution is unique in self which has adopted a secular approach where state is neither pro nor against any religion. State or legislature, through cannot even establish any new religion by law.<sup>2</sup> At the same time freedom of religion and of conscience<sup>3</sup> is granted to its citizens to practice and profess their own religion with reasonable restrictions<sup>4</sup>. At the same time state is allowed to restrict secular practices of any religion which exceeds

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<sup>1</sup> Census of India, Ministry of Home Affairs, Govt. of India: [http://censusindia.gov.in/Census\\_And\\_You/religion.aspx](http://censusindia.gov.in/Census_And_You/religion.aspx) (Last updated on February 4, 2014).

<sup>2</sup> Narayan v. State of Madras, AIR 1954 Mad 385 (para 6).

<sup>3</sup> Article 25 of Indian Constitution.

<sup>4</sup> Reasonable Restrictions under Article 25 (1), Article 25 (2) (a) & (b).

this limit or restriction<sup>5</sup>. So freedom of religion is confined only to essential practices of religion.<sup>6</sup> State's interference in the religious affairs is discouraged by the Indian Constitution and this is followed by several judicial precedents discouraging interference of State or state activities in the religion or essential religious practices which forms part of the same.

The real purpose and intendment of Article 25 of Indian Constitution is to guarantee especially to the religious minorities the freedom to profess. No doubt, the freedom guaranteed by Article 25 applies not merely to religious minorities but also to all persons. But in interpreting the scope and content of the guarantee contained in this Article, the court will always have to keep in mind the real purpose underlying the incorporation of the provision in the fundamental rights given in the Chapter III of the India Constitution.

### **Conceptual Framework of “Minority” under Indian Constitution**

The term “minority” in the context of Indian constitution or for the purpose of protection granted by the Indian constitution is to be construed or taken to mean as the group or community or religion which is in the minority by virtue of its number of population in a given area. “minority” term, in this context can be used in relation to two factors/things:<sup>7</sup>

- i.** Religious community
- ii.** Linguistic community

Article 30 to that effect uses the terms “linguistic” or “religious” minorities. It implies that the minority may either be linguistic or religious and that it does not have to be both: a religious minority as well as linguistic minority. It is sufficient of it is one or the other or both.

Protection is accorded to those groups who are in “minority”: religious or cultural. Neither it is defined nor any description provided for the same.

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<sup>5</sup> Commissioner, HRE v. Sri L. Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

<sup>6</sup> *Id.*

<sup>7</sup> Articles 29, 30 of the Indian Constitution.

The word “minority”, in the absence of special definition, it must be held that any community, religious or linguistic which is numerically less than fifty percent of the population of a State. Such criterion was given *In Re: The Kerala Education Bill, 1957*<sup>8</sup> wherein court has observed that the same can be determined in relation to population of the State. Supreme Court opined that while it is easy to say that minority means a community which is numerically less than 50 percent, the important question is 50 per cent of what? Should it be of the entire population of India, or of a State, a part thereof?<sup>9</sup> The Supreme Court did not however decide this point definitely. However it had come to be accepted that “minority” is to be determined only in relation to the particular legislation which is being challenged. Thus if a State law extending to the whole of a State is in question, the minority must be determined with reference to the entire State population. Further in *T.M.A. Pai Foundation v. State of Karnataka*<sup>10</sup> the same issues was debated as to: in order to determine the existence of a religious or linguistic minority in relation to Article 30, the State or the country as a whole is to be taken as the unit. Supreme Court opined that the test for determining ‘who are linguistic or religious minorities’ within the meaning of Article 30 would be one and the same either in relation to a State legislation or Central legislation.

In *Bal Patil v. Union of India*<sup>11</sup>, it was observed that the “minority” for the purpose of Indian Constitution can be identified as group of people or community who were seen as deserving protection from likely deprivation of their religious, cultural and educational rights by other communities who happen to be in majority and likely to gain political power in a democratic form of government based on religion.

Religious minority would mean that the only or the principal basis of a minority must be their adherence to one of the many religious and not a sect or a part of the religion and that the other features of the minority are

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<sup>8</sup> AIR 1958 SC 956.

<sup>9</sup> M.P. JAIN, *Indian Constitutional Law*, (6<sup>th</sup> ed.), 1764 (2010).

<sup>10</sup> (2002) 8 SCC 481.

<sup>11</sup> (2005) 6 SCC 690.

subordinate to the main feature, namely, its separateness because of its religion. A linguistic minority for the purpose of protection granted under Indian Constitution is one which must at least have a separate spoken language. It is not necessary that the language should also have a distinct script for those who speak it to be a linguistic minority.

E.g., an Anglo-Indian community is well known minority community in India based on religion as well as language and has been recognized as such by the Supreme Court of India in *State of Bombay v. Bombay Education Society*<sup>12</sup>.

### **Protection of Minorities: Perspective of Indian Constitution**

Article 29<sup>13</sup> of Indian Constitution in general and Article 30<sup>14</sup> in particular, aims at securing interest of minorities by providing them of certain privileges as a part of Fundamental rights under Chapter III of India Constitution. Their identity, culture, script, customs, religion and language has been considered by securing, protecting and providing certain benefits or privileges

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<sup>12</sup> AIR 1954 SC 561.

<sup>13</sup> **Article 29. Protection of interests of minorities:**

(1) 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.

(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.

<sup>14</sup> **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.

1 (1A) In making any law providing for the compulsory acquisition of any property of any 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.

pertaining thereto. The same can be seen in Article 30 which grants them special permission to establish and administer their own educational institution of their choice. This is basically for dual purposes:

- i. To secure their interest through: language, religion, culture and identity, and
- ii. To empower their children to participate in main stream of the society through education and learning in educational institution of their choice.

But that does not mean they can misuse the said privilege or special right for the purposes not covered as the objectives behind or under Article 29 and 30 of the Constitution and also for anything which can violate the clause of equality as per Article 14 of the Indian Constitution. In further of it, drafters of Indian Constitution has made precaution to avoid misuse of the same by inserting restriction on the rights of minorities under clause (2) of Article 29 which runs as:

“No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of the State funds on grounds only of religion, race, caste, language or any of them.” It guarantees the rights of a citizen as an individual irrespective of the community to which he belongs.”

### **Establishment and Administration of Educational Institutions: Law, Extent and Limitations**

The right of minorities to establish and administer educational institutions of their choice under Article 30(1) and Article 29(1) can be claimed by an institution only if it is established by a religious or linguistic minority. The guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution but applies also to those established before.<sup>15</sup> The right to establish and maintain educational institutions according to the choice of a minority community is a necessary concomitant to the right to under Article 29 of the Indian Constitution. The right guaranteed under Article 30(1) is twofold:

- i. To establish and
- ii. To administer educational institution of their own

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<sup>15</sup> S.K. Patra v. State of Bihar, AIR 1970 Pat 101 (para 6).

choice.

These words indicate that the extent of the right is to be determined not with reference to any concept of State necessity and general social interest but with reference to the educational institutions themselves, that is with reference to the goal of making the institutions effective vehicles of education for the minority community or other persons who resort to them.

### **Nature, Scope, Extent and Limitation on the Right under Article 30(1)**

No doubt that Article 30 can be construed to preserve and protect religious freedom, autonomy and its individuality, but there is no fundamental right under which an institution can claim either aid or affiliation as a matter right. It is permitted for the State or University, as the case may be, to lay down reasonable conditions to maintain the excellence of standard of education but in the garb of doing so, refusal to grant affiliation cannot made pretext for destroying individuality and personality of the said institution. But regulatory measures which are designed towards the achievement of the goal cannot be said to be violative of Article 30(1).<sup>16</sup>

Following are some important facets<sup>17</sup> of 'right to establish and administer educational institution of their own choice' which one must keep in view, in order to know the nature and scope above mentioned right recognized under Article 30(1):

#### **i. "Management of Affairs"**

The right to administer institutions of minority's choice enshrined in Article 30 (1) means "management of affairs" of the institution. This power as mentioned above is subject to the regulatory power of the state or university<sup>18</sup> as the case may be. So the right conferred on the religious or linguistic minorities to administer educational institutions of their choice

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<sup>16</sup> Frank Anthony P.S.E. Association v. Union of India, AIR 1987 SC 311.

<sup>17</sup> H.K. SAHARAY, THE CONSTITUTION OF INDIA-AN ANALYTICAL APPROACH, 389, 390 (4<sup>th</sup>ed.) (2012).

<sup>18</sup> *Id.*

is not an absolute right. This right is not free from regulation. Just as a regulatory measure are necessary for maintaining the educational character and content of minority institutions, similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration.

## **ii. Educational Institution**

Words “educational institution” is of very wide import and would include a University also and as such it may be construed that a religious minority can even establish a university under Article 30(1).<sup>19</sup>

## **iii. Establish and Administer**

The words “establish and administer” must be read conjunctively with the words “establish and maintain”. *Azeez Basha v. Union of India*<sup>20</sup> can be cited in this context to throw light on these words. The Aligarh University when it came into existence in 1920 was established by the Central Legislature by the 1920 Act. It may be that the 1920 Act was passed as a result of the efforts of the Muslim minority. But that does not mean that the Aligarh University when it came into being under the 1920 Act was established by the Muslim minority.

## **iv. Administration**

The word “administration” in the context of Article 30(1) means “management of affairs” of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served.

## **v. Minority Institutions**

All laws made by the State to regulate the administration of educational institution and grant of aid will apply to minority educational institution also. But if any such regulations interfere with the overall

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<sup>19</sup> *Azeez Basha v. Union of India*, AIR 1968 SC 662 (para 21).

<sup>20</sup> AIR 1968 SC 662 (para 25).

administrative control by the management over the staff, or dilutes, in any manner, the right to establish and administer educational institutions, to that extent, will be inapplicable to minority institutions.

General principles as to establishment and administration of minority educational institution:<sup>21</sup>

**i.** The right of minorities to establish and administer educational institution of their choice has the following elements:

- a)** To choose its governing body in whom the Founders of the institution have faith and confidence;
- b)** To appoint teaching staff and also non-teaching staff and to take action if there is dereliction of duty on their part;
- c)** To admit eligible students of their choice and to set up a reasonable fee structure;
- d)** To use its properties and assets for the benefit of the institution.

**ii.** The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority.

**iii.** The right to establish and administer educational institutions is not absolute. Nor does it include the right to mal-administer. Regulations made by the State concerning generally the welfare of students and teachers, regulation laying down eligibility criteria and qualifications for appointment as also conditions of service of employees, regulations to prevent exploitation or oppression of employees and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not interfere with the right under Article 30(1) of the Constitution.

**iv.** Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the

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<sup>21</sup> *Supra* note 18 at pp. 395, 396.



freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

v. Extension of the aid by the State does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilization of aid without diluting or abridging the right under Article 30(1) of the Constitution.

### **Regulations: How Far Justified?**

After analysis of these propositions of law one can reiterate the principle of law laid down by the Hon'ble Supreme Court of India<sup>22</sup> that: "the right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right."

Regulations which do not affect the substance of the guaranteed rights, but ensure the excellence of the institution and its proper functioning in matters educational, are permissible. Regulations could be made to maintain educational character and standard of institution. From the point of view of regulation, minority educational institutions can be placed into two categories:

1. Institutions receiving aid from the state; and
2. Institutions not getting aid from the state.

When any regulatory measure is charged upon, it would be obligatory for the court to find out as to whether the provisions in fact secure a reasonable balance between ensuring a standard of excellence of the institution and of preserving the right of minority to administer the institution as a minority institution.<sup>23</sup> Further in the case of *Frank Anthony Public School Employees' Association v. Union of India*<sup>24</sup> Supreme Court of India further thrown light on the scope of the right and extent of limitation or restriction thereupon in following words:

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<sup>22</sup> In Re: The Kerala Education Bill, AIR 1958 SC 956.

<sup>23</sup> *Managing Committee St. John Inter College v. Girdhari Singh*, AIR 2001 SC 1891.

<sup>24</sup> AIR 1987 SC 311.

“The extent of the right under Article 30(1) is to be determined, not with reference to any concept of state necessity and general societal interest but with reference to educational institution themselves, that is, with reference to the goal of making the institutions effective vehicles of education for the minority community or other persons who resort to them. It follows that regulatory measure which is designed towards achievement of the goal of making the minority educational institutions effective instruments for imparting the education cannot be considered to impinge upon the rights guaranteed by Article 30(1) of the Constitution. The question in each case is whether the particular measure is, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of the management in substantial measure.”

Similarly, Supreme Court in *St. Stephen's College v. University of Delhi*<sup>25</sup> made mixed observations as to right, its purpose and restriction thereupon in following words which further signifies the importance of restriction on the right so guaranteed under Article 30(1):

“...[T]here must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. Article 30(1) is protective measure only for the benefit of religious and linguistic minorities and it is essential to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection.”

There are many such an areas in relation minority rights pertaining to establishment of educational institution and administration thereof, in which judiciary has taken a vigilant approach on the ubiquitous minority educational institutes diverting the purpose for which it got protection. Those are:

1. Government grants and recognition and conditions of grants and recognition;
2. Structure of or composition of managing bodies;
3. Appointment of teachers;
4. Disciplinary action against the staff;

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<sup>25</sup> AIR 1992 SC 1630.

5. Admission of students;
6. Medium of instructions;
7. Fees etc.

In several such cases Supreme Court came heavily on the rights so granted by defining the nature, scope and extent of the same as discussed above. Some of them are prominent to be mentioned about in this connection. For example, *T.M.A. Pai Foundation v. State of Karnataka*<sup>26</sup>, Supreme Court of India indicated a greater regulation of aided and unaided minority institutions particularly in the matter of admissions and fees of professional colleges. This actually has led a spate of litigation, of which many cases came up to the Supreme Court. The issues were considered in connection with professional institutions in *Islamic Academy of Education v. State of Karnataka*<sup>27</sup>, and *P.A. Inamdar v. State of Maharashtra*<sup>28</sup>, which ultimately ascertained certain norms<sup>29</sup> pertaining to this right and its regulation.

## Conclusion

Although Article 30(1) is labeled as one of the fundamental rights under chapter III of Indian Constitution it has to be read subject to the regulatory power of the state. Regulations which do not affect the substance of the guaranteed rights, but ensure the excellence of the institution and its proper functioning in several matters pertaining to or as a part or as an incidental to 'right to establish and administer educational institute of their own choice' and as discussed above right to administer cannot encompass the right to mal-administer.

Judiciary has been active in this area by expanding the wide sweep of 'right to establish and administer educational institute of their own choice' by its interpretative tool at the same time of putting heavy but reasonable regulations on the exercise of the right which ultimately ensures that minority educational institutions

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<sup>26</sup> (2002) 8 SCC 481 at p. 582.

<sup>27</sup> (2003) 6 SCC 697 at p. 730.

<sup>28</sup> (2005) 6 SCC 537 at p. 602.

<sup>29</sup> *Supra* note 10, at pp.1367, 1368.

are not meant for their exclusive benefit or any kind of profit oriented mechanism.

Time has also come to think of globalization and rapid changes in the educational sector and as such minority institutions ought to keep pace with such changes and developments. A minority institution may impart general secular education; it need not confine itself only to the teaching of minority language, culture or religion. But to be treated as a minority institution, it must be shown that it serves or promotes in some manner the interests of the minority community by promoting its religious tenets, philosophy, culture, language and literature. Further there should be a nexus between the institution and the particular minority to which it claims to belong. A considerable section of the minority must be benefited by the institution.

