PROTECTION OF CULTURAL RIGHTS UNDER THE INDIAN CONSTITUTION: AN ANALYSIS

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I. INTRODUCTION

Culture is fundamental to individual autonomy because it provides a conglomeration of interlocking practices which constitute the range of life options open to one who is socialized within them. Will Kymlicka defines cultural practices as foundational to personal autonomy. Understanding cultural narratives - language, education, religion, custom, myth, symbols, morals, ethics, history and manners - is a necessary precondition to making intelligent judgments about how to live our lives. Culture provides options through which we identify

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experiences as valuable. Without culture, individuals would be left to invent everything (including language) in their own lives and all aspects of conduct.[1]

India is a land of myriad ethnic, religious, caste and linguistic minorities affiliated to distinct belief systems, sub-cultures and regions. If one goes in deep down in understanding diverse aspects of Indian cultural and social ethos, one realizes that the Indian society comprises of an extremely differentiated structure with a huge diversity in its cultural ethos. Octavio Paz once likened India's civilization to "an enormous metaphysical boa" that slowly but surely and relentlessly digests foreign cultures, religions, ideologies, and beliefs. The idea is that Indian culture, at heart, never changes, and that in Indian civilization the past and the future submerge in the present. This dramatic view of India is confirmed in one way or another by many outside observers.[2] In the words of Granville Austin, "to venture into the territory called culture is exceedingly risky for someone not an Indian, the more so because it involves making generalities about complexities."[3]

The issue of cultural identities has not only been important but it also led to so many controversies. In fact, the cultural diversity in Indian was one of important factors which held up the progress of the country towards freedom and independence. Moreover, when long cherished goal of freedom was achieved, this came to us in the form of divided nation i.e. India and Pakistan.

Therefore, it becomes important that how the society in the post-independent India addressed to the issue of cultural identities of the minorities. In this paper, the author has tried to explore the answer of the following issues: How the concept of 'minorities' has been construed under the Indian Constitution? Does the Constitutional

framework protect the cultural rights of minorities?

II. Evolution of Cultural Rights in India

Granville Austin rightly described the Indian Constitution as "seamless web" woven by the Constituent Assembly into the Constitution for the nation having four strands: (a) protecting and enhancing national unity and integrity; (b) establishing the institutions and spirit of democracy; (c) fostering a social revolution to better the lot of the mass of Indians; and (d) culture, which is omnipresent, visible and invisible. He further explained the term 'culture' that it 'does not include the variety of grandeurs in art, music, dance, theatre, literature, and scripture for which the country is justly famous, but, instead, refers to certain traits, viewpoints, and ingrained experiences and attitudes that are integral to the citizens.[4] To understand the evolution of cultural rights under the Indian Constitution, it would be pertinent to have a glance over some of the pre-constitutional events which are important in shaping the cultural rights in post-constitutional India.

A. Cultural Right in Pre-constitutional Era

The Constitution-making process in India involved culmination of the freedom movement, concretization of the values, goals and institutions consciously developed in the course of generations of public life, and people's direct and indirect participation. The process started with the first non-official draft of the Constitution of India Bill, 1895 also known as Tilak Bill, in which it is stated that "No law shall be made unless for public benefit". In this Bill, the efforts were made to assert state sponsored free and compulsory education and various basic

rights to all citizens irrespective of religion.

Even though after the revolt of 1857, the British Parliament adopted the policy of non-interference in religious matter, but, at the same time, some historians claim the origin of the cleavage between the two communities, Hindus and Muslims. The British government realised the same and adopted the 'divide and rule policy' by officially propagating theory of two communities i.e., Hindus and Muslims by granting a separate electorate to the Muslims as a minority in the Indian Council Act of 1909. The grant of separate electorates to the Muslim led to similar demands by other communities and the Government of India was forced to grant similar rights to the Sikhs in 1919.

In fact, the recognition of the minorities by the British government was not in order to protect their cultural rights rather it was to protect their own interest of governance and to weaken the movement of freedom struggle. However, responsible opinions did not fail to recognize the same and pointed out the evil effects that such a policy would have. Gopal Krishna Gokhale said:

> *"The principle of recognizing races and creeds stands in no need of encouragement from government, as the division of interests caused by it has already been the bane of this country."*[5]

However, to undone the damage caused by the British policy and to regain the faith of minority community the Nehru Report, 1928 proposed:

> *"Certain safeguards and guarantees are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better*

secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the constitution."[6]

Thereafter, during the negotiations between Indian leaders and the British government for drafting a new constitution, the important question before the parties was whether a provision relating to safeguard the interest of minorities should be included as a fundamental right or not?[7] The controversy ended with signing of Poona Pact in 1931, which provided for political reservation for the Depressed Classes rather than separate electorate for them as well as minorities.[8]

The result of all these negotiations and agreements culminated and reflected later on in the form of the Government of India Act, 1935. Under the Act of 1935, the process of communal electorate continued. The Council of States or the Upper House consisted of 260 members. British India had 156 seats and Indian states 104. Out of 156 representatives of British India, 150 were to be elected on communal basis. In the federal assembly, the allocation of seats to different classes and communities were introduced. Out of 250 representatives of the provinces, general seats including the *Harijans* were 105, Sikhs 6, Muslims 82, Anglo-Indian 4, Europeans 8, Indian Christians 8 etc. This composition of the House shows that the federal legislature also retained its communal character. This system encouraged communal outlook in British India.[9]

Thereafter, due to outbreak of the World War II, further development regarding the freedom as well as constitutional framework came to standstill. After the War, with the declaration of independence, the process of constitution for a free India started with the formation of constituent assembly. While framing the constitution,

the drafting committee discussed many issues including the protection of cultural right of minorities as a fundamental right. For instance, while moving the Objective Resolution, Jawaharlal Nehru in the Constituent Assembly on December 13, 1946, observed that in the Constitution drawn up for the future governance of India

> *"adequate safeguards shall be provided for minorities, backward and tribal areas and depressed and other backward classes."*

But at the same time, the framers of the Constitution were aware about the fact that during British period the communal policy was adopted as a tool to suppress the freedom struggle. However, in the post independent India, the same question of protecting the cultural right of the minorities has to be seen in a different perspective which should contribute to the unity and integrity of India in positive sense. This was a real challenge for the framers of the constitution, that how they can accommodate the cultural rights of minorities and at the same time promotes the sense of common citizenry among them. The following observation by Govind Ballabh Pant in the Constituent Assembly on January 24, 1947 reflects the same:

> *"The question of minorities everywhere looms large in constitutional discussions. Many a constitution has foundered on this rock. A satisfactory solution of questions pertaining to minorities will ensure the health, vitality and strength of the free State of India that will come into existence as a result of our discussions here. The question of minorities cannot possibly be overrated. It has been used so far for creating strife, distrust and cleavage between the different sections of the Indian Nation. Imperialism thrives on such strife. It is*

interested in fomenting such tendencies. So far, the minorities have been incited and have been influenced in a manner which has hampered the growth of cohesion and unity. But now it is necessary that a new chapter should start and we should all realize our responsibility. Unless the minorities are fully satisfied, we cannot make any progress: we cannot even maintain peace in an undisturbed manner."[10]

Finally, the framers of the Constitution accepted principles of secularism[11] as the cardinal value of constitutional democracy and a solution for addressing the apprehensions of minorities in independent India. Therefore, they took care to safeguard the interests of the minorities, to give them a sense of security, to protect them against any discrimination, and to help them to get integrated in the main stream of national life. With this in view, a number of provisions have been incorporated in the Constitution for safeguarding especially the social, economic and educational interests of minority groups. In addition, certain general constitutional provisions, e.g. Fundamental Rights, protect some of the rights of the minority groups.[12]

B. CULTURAL AND EDUCATIONAL RIGHTS OF MINORITIES UNDER THE CONSTITUTION OF INDIA

After independence, the drafters of the Constitution fulfilled a long cherished demand of all the people by guaranteeing them justifiable Fundamental Rights. Another objective of including these rights as Fundamental Rights was to give a sense of security and confidence among the people of a multi-religious, multi-cultural and multi-lingual society. Moreover, the underlying idea in entrenching Fundamental Rights was to take them out of the reach of transient political majority so that they may not be violated, tampered or interfered with by a

government which is dominated by majority community.

The Constitution guarantees to the people certain basic human rights and freedoms as Fundamental Rights in Part III (Articles 12 to 35). These rights includes: right to equality[13], right to freedom[14], right against exploitation[15], right to freedom of religion[16], cultural and educational rights[17], saving of certain laws[18], right to constitutional remedies[19]. Further, to ensure an effective mechanism for the enforcement of these rights, Article 32[20], which is a Fundamental Right in itself, guarantees the right to move the Supreme Court for their enforcement. This is how Article 32 gives power to the Supreme Court to act as the protector, the guardian, and the interpreter of these rights or in other words as the "*sentinel on the qui vive*". The Constitution also provides a mechanism for the enforcement of Fundamental Rights at State level under Article 226[21] in which any person can approach the High Court. During emergency, these rights can be curtailed temporarily with an exception rights contained under Articles 20[22] and 21[23]. To quote Das C.J.:

> *"So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own. Throughout the ages endless inundations of men of diverse creeds, cultures and races – Aryans and non-Aryans, Dravidians and Chinese, Scythians, Huns, Pathans and Mughals – have come to this ancient land from distant region and climes. India has welcomed them all. They have met and gathered, given and taken and got mingled, merged and lost in one body. India's tradition has thus been epitomised in the following nobel lines:*

'None shall be turned away
From the shore of this vast sea of humanity
That is India'."[24]

Since, the focus of this paper is on cultural and educational rights of the minorities, I would like to explore the constitutional provisions for their protection. The question of cultural rights has been addressed in the Constitution primarily in the context of the rights of minorities. The Constitution grants minorities the right to preserve and develop their culture as well as to make institutional arrangements, for instance, by establishing educational institutions under Articles 29 and 30. As formulated in the Constitution, this right is in the nature of a restriction on the powers of the state. To understand the provisions under Sections 29 and 30, first of all, it is important to discuss the concept of 'minority' or in other words how the meaning of the term 'minority' is construed in India particular in relation to these provisions.

1. WHO IS MINORITY IN INDIA

'Minority' as a concept has not been defined in the Constitution of India. Article 30(1) uses the terms 'linguistic' or 'religious' minorities. The word 'or' means that a minority may either be linguistic or religious and that it does not have to be both - a religious minority as well as linguistic minority. Even the Constitution does not mention the specifics of language and religion. Even the constituent assembly while addressing[25] the issue relating to protection of cultural right of minorities kept the provision a little vague on the question of the definition of the 'minority'. The National Commission of Minorities Act, 1992 was enacted to constitute a national commission for addressing the concerns of minorities. The Act defines the term

under Section 2(iii): "'minority', for the purpose of this Act, means a community notified as such by the central Government."

Even after so many years since independence, there seem no serious efforts on the part of the political leadership due to lack of political will among the various political parties to define the same. The definition under the Act, 1992 reflects the same attitude of the political leadership which gives discretion to the government to define 'minority' which suits their political interests.[26] Because of this ambiguity and lack of consensus regarding the meaning of minority the issue has been reaching to the Courts from time to time in one form or another form.

Being the protector, guardian and interpreter of the Constitution, the Supreme Court replied to a relevant question, i.e., how to identify minorities to whom benefits of Articles 29 and 30 can be granted in *Re the Kerala Education Bill*[27]. The 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.

The above mentioned ruling has been reiterated by the Supreme Court in *D.A.V. College, Jullundhar v. State of Punjab*[28]. The court has ruled that a minority has to be determined in relation to the particular legislation which is sought to be impugned. If it is a State law, the minorities have to be determined in relation to the State population. The Hindus in Punjab constitute a religious minority [who are otherwise a majority community in India]. "They are therefore entitled to invoke the rights guaranteed under Article 29(1) because

they are a section of citizens having a distinct script and under Article 30(1) because of their being a religious minority". While defining the term 'linguistic minority', the Court held that it is one which must at least have a separate spoken language. It is not necessary that the language should have a distinct script for those who speak it.

However, the Delhi High Court in *A.S.E. Trust v. Director, Education, Delhi Adm.*[29], gave a dissenting judgement regarding considering the Hindus as minority community. The Court pointed out that if various sections and classes of the Hindus were to be regarded as 'minorities' under Article 30(1), then the Hindus would be divided into numerous sections and classes and cease to be a majority any longer. The sections of one religion cannot 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 the majority, namely, the Hindus.

The Supreme Court has approved its earlier decision of re Kerala Educational Bill, regarding formula to identify the 'minorities' in *T.M.A. Pai Foundation and Ors v. State of Karnataka and Ors*[30]. The Court has specified the geographical entity of state for consideration of the status of minority for Article 30. To quote from the judgment:

> *Article 30(1) deals with religious minorities and linguistic minorities. The opening words of Article 30(1) make it clear that religious and linguistic minorities have been put at par, insofar as that Article is concerned. Therefore, whatever the unit - whether a state or the whole of India - for determining a linguistic minority, it would be the same in relation to a religious minority. India is divided into different linguistic states. The states have been carved out on the basis of the*

language of the majority of persons of that region. For example, Andhra Pradesh was established on the basis of the language of that region viz., Telugu. "Linguistic minority" can, therefore, logically only be in relation to a particular State. If the determination of "linguistic minority" for the purpose of Article 30 is to be in relation to the whole of India, then within the State of Andhra Pradesh, Telugu speakers will have to be regarded as a "linguistic minority". This will clearly be contrary to the concept of linguistic states.

In *Islamic Academy of Education*[31] case and *P.A. Inamdar* case, the petitioner's seeked certain clarification on certain matter other than the meaning of the term 'minorities' which remained unsolved by the Supreme Court in the *T.M.A. Pai* case. Therefore, it can be concluded till the Parliament define the term in a statutory manner, the interpretation given by the Supreme Court on the meaning of term 'minority' will remain final verdict under Article 141[32] of the Constitution. In fact, the apex court on number of occasion interpreted the term 'minority' in a very wider manner and tried to strike a balance between the cultural rights of the minorities on the one hand and societal welfare on the other.

2. PROTECTION OF INTEREST OF MINORITIES

Article 29 Protection of Interest 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.

In order to invoke Article 29(1), all that is essential is that a section of the citizens, residing in India should have a distinct language, script or culture of its own. If so, they will have the right "to conserve the same". In *Jagdev Singh v. Pratap Singh33*, the Supreme Court has emphasized that Article 29(1) includes the right "to agitate for the protection of the language". It further held that an appeal by a candidate to vote, refrain from voting, for a person on the ground of language and making promise to work for the conservation of the electorate's language does not amount to a corrupt practice. The right conferred upon the citizens to conserve their language, etc., is made absolute by the Constitution.

A legal provision requiring the Guru Nanak University to promote studies and research in Punjabi language and literature, and to undertake measures for the development of Punjabi language, literature and culture was challenged in *D.A.V. College, Jullundhar v. State of Punjab34*, as infringement of Article 29(1). The Supreme Court has emphasized that the purpose and object of the linguistic States, which have now come to stay in India, is to provide, greater facility for the development of the people of the area educationally, socially and culturally in the regional language. The concerned State or University has every right to provide for the education of the majority in the regional medium. The provision in question cannot, therefore, be read as requiring the minority institutions affiliated to the Guru Nanak University to teach in the Punjabi language, or in any way impeding their right to conserve their language, script and culture. If the University makes provision for an academic and philosophy study and research of the life and teachings of saint, it

cannot be said that the affiliated colleges are being required to compulsorily study his life and teachings.[35]

Whereas the benefit of Article 29(2) is not confined only to minority groups but extends to all citizens whether belonging to majority or minority groups in the matter of admission to the educational institutions maintained or aided by the State. Article 29(2) is broad and unqualified.

The question of application of Article 29(2) arose for the first time in *State of Madras v. Champakam*[36]. The Communal Government Order (G.O.) of the State of Madras allotted seats in medical and engineering colleges in the State proportionately to the several communities, *viz*., non-Brahmin Hindus, Backward Hindus, Brahmins, *Harijans*, Anglo-Indians[37], Christians and Muslims. A Brahmin candidate who could not be admitted to an engineering college challenged the G.O. as being inconsistent with Article 29(2). The Supreme Court held that the classification in the G.O. was based on religion, race and caste which was inconsistent with Article 29(2). The only reason for denial of admission to him was that he was a Brahmin and not a non-Brahmin.

In *State of Bombay v. Bombay Educational Society38*, the Supreme Court struck down an order of the Bombay Government banning admission of those whose language was not English into schools having English as a medium of instruction because it denied admission solely on the ground of language. The order, the Court said, would not be valid, even if the object for making it was the promotion or advancement of national language.

As a result of the above mentioned verdict of the Supreme Court, the Parliament had to amend the Constitution. Article 15(4)[39] was added by the First Amendment of the Constitution to ensure

advancement of the socially and educationally backward classes of citizens, or of the Schedule Castes[40] and Schedule Tribes[41]. So, the Fundamental Right guaranteed by Article 29(2) is abridged to some extent by Article 15(4) under which seats may be reserved in an educational institution for certain sections of the Indian citizens.

3. RIGHT OF A MINORITY TO ESTABLISH EDUCATIONAL INSTITUTION

> ***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.* [42]
>
> *[(1-A) 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.*

As it was observed that Article 29 protects language, script or culture of minorities and it is Article 30 which reveals the mechanism by virtue of which these rights can be protected.

Article 30 gives right to minority as such, however, even an individual member of the minority can establish and administer a minority educational institution as defined by the Supreme Court in *St.*

Thomas case. The right is meant to benefit the minority by protecting and promoting its interests. 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 is some manner the interests of the minority community by promoting its religious tenets, philosophy, culture, language or literature. 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.

In *re Kerala Education Bill43*, the Supreme Court has observed:

> *"Article 30(1) gives certain rights not only to religious minorities but also to linguistic minorities ....the right conferred on such minorities is to establish educational institution of their choice. It does not say that minorities based on religion should establish educational institutions for teaching religion only, or that linguistic minorities should have to right to establish educational institutions for teaching their language only. .... In other words, the Article leaves it to their choice to establish such educational institutions as will serve their religion, language or culture and also the purpose of giving a thorough good general education to their children."*

The material factor to attract Article 30(1) is the 'establishment' of the institution by the 'minority' concerned. As the Supreme Court has observed in *Azeez Basha*[44]: "Article 30(1) postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to

administer that ... The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise."

In the case of *St Stephan's College*,[45] the Court further observed:

> *"...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."*

In *Yogendra Nath Singh v. State of Uttar Pradesh*, looking into the antecedent history of institution rights from its inception, the Allahabad High Court concluded that the institution was not established as a minority institution, and therefore, it could not be granted minority status even though presently it was being managed by the minority community. Under Article 30(1), the requirements of establishment and management have to be read conjunctively.[46]

The Supreme Court in *St. Thomas case* widened the scope of the provision by stating 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 the institution in particular, will be best served. For purposes of Article 30(1), even a single philanthropic individual from the concerned minority can found the institution with his own means.[47] Even preservation of culture, as such, is not a necessary condition either for acquiring the status of minority or for claiming rights under Article 30. But the Supreme Court emphasized that the object of Article 30(1) is not to allow bogies to be raised by pretenders. The

institution must be an educational institution of minority in truth and reality and not mere masked phantoms.[48]

The Supreme Court has thus tried to restrict the misuse of the benefits granted to the minorities. People make false claims that an institution is a minority educational institution because such an institution carries with it a good deal of privileges and protection which are not available to a non-minority educational institution. 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.[49]

Another question rose before the Supreme Court for a good number of times was regarding the term 'of their choice' used in Article 30(1). In *Re the Kerala Education Bill*,[50] 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. 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."*

The fundamental freedom under Article 30(1) is *prime facie* absolute

in nature as it is not made subject to any reasonable restrictions. This means that all minorities, linguistic or religious, have by Article 30(1) right to establish and administer educational institution of their choice and "any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void."[51] However, this does not mean that the state can impose no regulations on the minority institutions. As early as 1958, in the famous *re Kerala Education Bill*, the Supreme Court has observed: "The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right."

Even though the minorities have fundamental right to establish and administer the educational institution but one has to admit that administration of an institution also 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. By its interpretative process over the years, the Supreme Court has given a wide sweep to the protection conferred on the minority educational institutions under Article 30(1) as well as permitted some regulation thereof by the concerned government in the interest the institution concerned.

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 more so of 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.[52]

The case of *St Xavier's College*[53] specifies the scope of control

over the minority educational institutions. 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."[54]

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 with 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.[55]

In a landmark decision in *T.M.A. Pai Foundation*[56], an eleven Judge Constitution Bench of the Supreme Court held that state governments and universities cannot regulate the admission policy of unaided educational institutions run by linguistic and religious minorities, but state governments and universities can specify academic qualifications for students and make rules and regulations for maintaining academic qualifications for students and rules and regulations for maintaining academic standards. They have the right to

admit students 'of their choice', but subject to an objective and rational procedure of selection and compliance of conditions if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeship and scholarship. Admissions, the court said, should be on the basis of merit and be conducted in a transparent manner. To quote:

> *"...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."*

However, earlier, these provisions were considered applicable only on the aided minority educational institutions but the *Pai case* extended their scope to include even the unaided minority educational

institutions. The Court further held that minority educational institution does not lose its minority character simply because it receives aid from the government, but at the same time made it clear that they would have to admit non-minority students whose constitutional rights under Article 29(2) are not to be infringed like on grounds only of religion, race, caste, language or any of them.

The Court also overruled partly the decision in St. Stephen's case where it had held that the minority educational institutions were free to reserve seats up to 50 per cent for minority students. The Court has now empowered the States to fix *quotas* for minority students taking into account the type of institution, population and educational needs of the minorities.

After the decision of the *Pai* Foundation case, it was observed that the principles laid down by the Court were so broadly formulated that it gave enough scope to apply those principles in different ways by various High Courts. As a result, the Supreme Court has taken up the some unanswered/conflicting issues in *P.A. Inamdar v. State of Maharashtra*[57]. The Court held that the private unaided professional institutions (minority and non-minority) cannot be forced to accept reservation policy of the State. This would amount to nationalisation of seats. 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 forced by the State to make admissions on the basis of reservation policy to less meritorious candidates. Unaided institutions can have their own admissions provided it is fair, transparent and non-exploitative and based on merit. The Court observed that

> *"The employment of expressions 'right to establish and administer' and 'educational institution of their choice' in*

Article 30(1) gives the right a very wide amplitude. Therefore, a minority educational institution has a right to admit students of its own choice, it can, as a matter of its own freewill, admit students of non-minority community. However, non-minority students cannot be forced upon it. The only restriction on the freewill of the minority educational institution admitting students belonging to non-minority community is, as spelt out by Article 30 itself, that the manner and number of such admissions should not be violative of the minority character of the institution."

The Court further observed that

"The right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(g). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the Founding Fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1) is intended to instil confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection

from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law making. However, merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measure because the right to administer does not include the right to mal-administer. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid."

To nullify the effect of the *Pai* case and the *Inamdar* case, the Parliament by the Constitution (Ninety-third Amendment) Act, 2005 inserted a clause in Article 15 as Article 15(5). This clause says, "nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste or the Scheduled Tribes insofar as such special provision relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30". This amendment enables the

State to make provision for reservation for the above categories of classes in admission to private educational institutions. The amendment, however, keeps the minority educational institutions out of its purview.

III. NATIONAL COMMISSION FOR MINORITIES

Besides the Constitutional safeguards, the Government of India appointed a Minorities Commission in 1978 under an administrative resolution to safeguard the interests of the religious and linguistic minorities, to preserve the country's secular traditions, to promote national integration and remove any feeling of inequality and discrimination amongst these sections of the people. The Commission was charged with the function of evaluating the various safeguards provided in the Constitution for the protection of the minorities and in the laws passed by Parliament and the State Legislature.

In course of time, the Commission suggested that its position be strengthened by conferring on it statutory powers of enquiry under the Commissions of Inquiry Act, 1952. The Commission also suggested that it be given a constitutional status so that it could function more effectively. Accordingly, Parliament enacted the *National Commission for Minorities Act*, 1992, to establish the National Commission for Minorities on a statutory basis.[58] It is interested to note down that functions of the old as well new Commission are same, and the only difference is that the new Commission is a statutory body with more powers.

1. The Commission shall perform all or any of the following functions under section 9, namely:-

a. evaluate the progress of the development of Minorities under

the Union and States.

b. monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures.

c. make recommendations for the effective implementation of safeguards for the protection of the interests of Minorities by the Central Government or the State Governments.

d. look into specific complaints regarding deprivation of rights and safeguards of the Minorities and take up such matters with the appropriate authorities.

e. cause studies to be undertaken into problems arising out of any discrimination against Minorities and recommend measures for their removal.

f. conduct studies, research and analysis on the issues relating to socio-economic and educational development of Minorities.

g. suggest appropriate measures in respect of any Minority to be undertaken by the Central Government or the State Governments.

h. make periodical or special reports to the Central Government on any matter pertaining to Minorities and in particular the difficulties confronted by them.

i. any other matter which may be referred to it by the Central Government.

2. The Central Government shall cause the recommendations referred to in clause (c) of sub-section (1) to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

3. Where any recommendation referred to in clause (c) of sub-

section (1) or any part thereof is such with which any State Government is concerned, the Commission shall forward a copy of such recommendation or part to such State Government who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendation or part.

4. The Commission shall, while performing any of the functions mentioned in sub-clauses (a), (b) and (d) of sub-section (1), have all the powers of a civil court trying a suit and, in particular, in respect of the following matters, namely:-

a. summoning and enforcing the attendance of any person from any part of India and examining him on oath.

b. requiring the discovery and production of any document.

c. receiving evidence of affidavits.

d. requisitioning any public record or copy thereof from any court or office.

e. issuing commissions for the examination of witnesses and documents; and any other matter which may be prescribed.

IV. CONCLUSION

The safeguards to protect the cultural and educational interests of the minorities were inserted in the Constitution to give special sense of security to the minorities i.e., broadly speaking, Muslim, Sikhs, Indian Christian, Jain, Buddhists, Anglo-Indians. This is to maintain the integrity of nation because of its long standing ethos, its rich cultural values and tolerance. To achieve the above mentioned objectives the founding fathers of the Constitution adopted a secular approach as an

ideology for the nation building. It seems that the drafters did not define the term 'minority' because of their strong feelings that ultimate goal is to bring them in the mainstream of the nation while keeping the cultural values intact and safe and at the same time they must not feel insecure after some time in the country. Moreover the Constitution does not give this right on the basis of different religious thoughts or less numerical strength or lack of health, wealth, education, power, because that would lead to an endless claim by different groups resulting in conflicts. That would sow seeds of multi-nationalism in India.

Besides providing the above mentioned safeguards, the Constitution in Part IV A imposes certain fundamental duties under Article 51 'A' on every citizen of India. One of the fundamental duties is "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistics and regional or sectional diversities; to renounce practices derogatory to the dignity of women."

The role played by the Supreme Court is commendable the way it protected and promoted the spirit of the drafters on the one hand and interest of the minorities regarding their cultural and educational rights on the other. The Apex Court has extended the scope of these rights to the widest extent when it pronounced that, even a single philanthropic individual from the concerned minority can establish and administer an educational institution with his own means for the purposes of Article 30(1). However, at the same time, the Supreme Court emphasized that the object of Article 30(1) is not to allow bogies to be raised by pretenders. The institution must be an educational institution of minority in truth and reality and not mere masked phantoms. To fulfil the objectives of the Articles 29 and 30,

the Apex Court has given them maximum liberty to run their business and whatever restriction were laid down in various verdicts are only regulatory measures to maintain the academic standards and to prevent maladministration.

To conclude, I would like to quote the observation of Justice H.R. Khanna made in *St. Xavier's* case[59]:

> *"India is the most populous country of the world. The people inhabiting this vast land profess different religious and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the Nation the golden thread of a basic innate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark on Indian polity and India today represents a synthesis of them all. Our mission is to satisfy every interest and safeguard the interest of all the Minorities to their satisfaction."* ❖

NOTES:

1. William K. Barth, 2008, "Cultural Rights: A Necessary Corrective to the Nation State", in Francioni and Scheinin (eds), *Cultural Rights*, Leiden: Martinus Nijhoff Publishers, pp. 79-90 at 81.

2. Jan Nijman, 2001, Untitled - Book Review, *Annals of the Association of American Geographers*, Vol. 91, No. 1, March, pp. 225-228.

3. Granville Austin, 1999, *Working a Democratic Constitution: The Indian Experience*, New Delhi: Oxford University Press, p. 637.

4. Id.,

5. B. Shiva Rao, 1968, *The Framing of India's Constitution - A Study*, New Delhi: IIPA.

6. T.L. Venkatarama Aiyar, 1970, *The Evolution of the Indian Constitution*, Bombay: University of Bombay, p. 90.

7. In 1931, during the Second Round Table Conference, the British Prime Minister Ramsay MacDonald declared that he is in favour of including fundamental rights in the new Constitution of India with a view to safeguarding the interests of the minorities. To fulfil the same, in 1932, he accorded representation through separate electorates to minorities like Muslims, Europeans, Sikhs, Indian Christians and Anglo-Indians. In fact, later on, the concept of minorities was so expanded as to include even the prosperous European commercial and mercantile community in India as needing separate representation in the Legislatures.

8. Under the "Poona Pact" the separate electorates were abolished but the depressed classes got a large number of seats; and the members of the depressed classes were to enrol themselves in the general electoral roll. They were to form an electoral college which would in the first instance elect four candidates for each seat in a "primary election". These four would be the candidates for the general election and the poll for the general election would be extended to all the voters in the general constituency – both the depressed classes and others. For further details also

see: Gwyer and Appadorai, *Speeches and Documents on the Indian Constitution*, 1921-47, Vol. I, pp. 261-6.

9. S.G. Mishra, 2008, *Democracy in India*, Sanbun Publishers, p. 171.

10. B. Shiva Rao, 1968, at 746.

11. The concept of secularism, though not expressly stated in the Constitution at the stage of its making, was nevertheless, deeply embedded in the constitutional philosophy. Reference may be made in this connection to Arts 25-28, 29-30, to Articles 14, 15 and 16 as well as to Articles 44 and 51 A. However, in 1976, through the 42nd Amendment of the Constitution, the concept of secularism was made explicit by amending the Preamble. The Supreme Court in *M. Ismail Faruqi v. Union of India* AIR 1995 SC 604 observed that "the concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution".

12. M.P. Jain, 2006, *Indian Constitutional Law*, Nagpur: Wadhwa and Company, p. 1397.

13. Articles 14 to 18 of the Constitution of India.

14. Articles 19 to 22 of the Constitution of India.

15. Articles 23 and 24 of the Constitution of India.

16. Articles 25 to 28 of the Constitution of India.

17. Articles 29 and 30 of the Constitution of India.

18. Articles 31-A to 31-D of the Constitution of India.

19. Articles 32 to 35 of the Constitution of India.

20. **Article 32 Remedies for enforcement of rights conferred by this Part:**

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this PArticle

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may be law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

21. **Article 226 Power of High Courts to issue certain writs:**

(1) Notwithstanding anything in Article 32, every High Court shall have the power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.]

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without –

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

22. **Article 20 Protection in respect of conviction for offences:**

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

23. **Article 21 Protection of life and personal liberty:** No person shall be deprived of his life or personal liberty except according to procedure established by law.

24. *Infra* note 27.

25. 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. See: Ranu Jain, 2005, "Minority Right in Education: Reflections on Article 30 of Indian Constitution", *Economic and Political Weekly*, Vol. 40, No. 24, (June 11-17, 2005), 2430-2437 at 2436.

26. For long time the political parties have been using 'miniorities' as a vote bank in electoral democracy. For further details see: Ghanshyam Shah, 2004, *Caste and Democratic Politics in India*, London: Anthem South Asian Studies. Achin

Vanaik, 1997, *The Furies of the Indian Communalism: Religion, Modernity and Secularization*, London: Verso.

27. AIR 1958 SC 956.

28. AIR 1971 SC 1737.

29. AIR 1976 Del 207.

30. (2002) 8 SCALE 1.

31. *Islamic Academy of Education v. State of Karnataka*, AIR 2003 SC 3724.

32. Article 141 **Law declared by Supreme Court to be binding on all courts:** The law declared by the Supreme Court shall be binding on all courts within the territory of India.

33. AIR 1965 SC 183.

34. AIR 1971 SC 1737.

35. *Ibid*., at 1745.

36. AIR 1951 SC 226.

37. Anglo-Indians constitute a religious, social, as well as a linguistic minority. An Anglo-Indian, according to Article 366(2), is a person whose father, or any of whose other male progenitors in the male line, is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only.

38. AIR 1954 SC 561.

39. Article 15(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

40. The Scheduled Castes are not, strictly speaking, a racial, linguistic or religious minority. They are part and parcel of Hindu society. They are the depressed sections of the Hindus who have suffered for long under social handicaps and thus need special protection and help for the amelioration of their social, economic and political conditions. They are known as untouchables or *Harijans* and constitute nearly 15% of the Indian population. They usually engage themselves in the so-called dirty jobs like tanning and skinning of hides, manufacture of leather goods, sweeping of streets, scavenging etc. The Constitution does not specify the castes or the tribes which are to be called as Scheduled Castes or the Scheduled

Tribes. Under Article 366(24) read with Article 341, the President enjoys the power to list these castes and tribes and to notify the same.

41. The Scheduled Tribes also knows as aborigines, are those backward sections of the Indian population who still observe their tribal ways, their own peculiar customs and cultural norms. The tribal people have remained backward because of the fact that they live in inaccessible forests and hilly regions and have thus been cut off from the main currents of national life.

42. Inserted by the *Constitution (Forty-Fourth Amendment) Act*, 1978, Section 4.

43. *Supra* note 27.

44. *S. Azeez Basha v. Union of India*, AIR 1968 SC 662 at 669-670.

45. AIR 1992 SC 1630

46. AIR 1999 All 356.

47. *Manager, St. Thomas U.P. School, Kerala v. Commr. And Secy to General Education Dept*., AIR 2002 SC 756.

48. M.P. Jain, 2006, at 1227.

49. Ranu Jain, 2005, "Minority Right in Education: Reflections on Article 30 of Indian Constitution", *Economic and Political Weekly*, Vol. 40, No. 24, (June 11-17), 2430-2437 at 2437.

50. AIR 1958 SC 959.

51. M.P. Jain, 2006, at 1230.

52. Ranu Jain, 2005, at 2433.

53. *St Xavier's College vs State of Gujarat* AIR 1974 SC 1389

54. *Supra* note 27.

55. Ranu Jain, 2005, at 2434.

56. *T.M.A. Pai Foundation and Ors v. State of Karnataka and Ors* (2002) 8 SCALE 1.

57. AIR 2005 SC 3724.

58. Please visit for various reports of the Commission at *http://ncm.nic.in/*

59. *Ahmedabad St. Xavier's College v. State of Gujarat*, AIR 1974 SC 1389.