

# MAJORITIES' RIGHTS TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS

*Justice K. N. Goyal\**

## I. THE SPECTACLE OF HINDUS CLAIMING TO BE NON-HINDUS

The claim of the Ram Krishna Mission that it was a minority institution in as much as the religion followed by the Mission was different from Hinduism was rightly rejected by Supreme Court bench consisting of Justices Kuldeep Singh, Venkatachala and Sahir Ahmad in *Bramchari Sideshwar Shai v. State of West Bengal*.<sup>1</sup> The learned Judges, however, allowed the Mission to administer the college through its own governing body. They did not consider it to be in the interest of justice to accede to the prayer of the teachers' union who had moved the High Court for a writ of mandamus to compel the State Government to constitute a governing body for the college on the standard pattern prescribed for other colleges. The question whether a religious denomination has the right under Article 26(a) of the Constitution to establish and maintain institutions for general education also as distinguished from religious education was left open to be decided in a proper case where all the parties who might be concerned with it are afforded adequate opportunity to have their say in the matter.

Similar attempts have earlier been made by the Arya Samaj to seek protection of Article 30 as a minority by claiming that theirs was 'Vedic religion' which was distinct from Hinduism. Their contention was also rightly rejected by a Division Bench of the Delhi High Court consisting of Justices Deshpande and Pritam Singh Safeer.<sup>2</sup> The claims of Jains and Sikhs whose religions were held to be separate, even though they were governed by a common Hindu law, were however, upheld.

A similar claim by the Brahmo Samaj did succeed before a full Bench of the Patna High Court in *Dipendra Nath Sarkar v. State of Bihar*.<sup>3</sup> But Deshpande J (as he then was) of the Delhi High Court in the above noted case<sup>4</sup> has rightly drawn attention to the definition of "Hindu" in the Hindu Marriage Act and other like Acts under which Virashaiyas, Lingayats and followers of the Brahmo Samaj, Prathana Samaj or Arya Samaj have been described as Hindus by religion. It is a different matter that though Budhists, Sikhs and Jains follow different religions, as recognised in the Constitution as well as in the Hindu Code, they too follow the Hindu way of life, as pointed out in *Ganpat v. Returning Officer*<sup>5</sup> and *Pannalal v. Sitabai*,<sup>6</sup> and are governed by the same

personal law as Hindus. The Delhi decision, dissenting from the Patna decision on the Brahmo Samaj, and distinguishing the other decision on Arya Samaj, namely, *Arya Pratinidhi Sabha v. Bihar*,<sup>7</sup> is clearly right, as also in accord with the view expressed in *Sastri Yagnapurushadji v. Muldas Bhudardas*.<sup>8</sup> The Calcutta High Court has also upheld the claim of Jains as a minority religious community in *Sree Jain Shewtambara Terapanthi Vidyalaya v. State of West Bengal*.<sup>9</sup>

The fact that sections of the Hindu community like the Arya Samaj, the Brahmo Samaj and Shri Ramkrishna Mission should have been driven to make such untenable claims is indeed disquieting and has led people to talk of the divisive impact of Article 30. Even some Judges have given expression to such feelings. Justice Safeer for instance spoke in the above mentioned Delhi judgement of the need to guard against all kinds of disruption, and observed that :

The Constitution in origin is a secular constitution meant for all. Its directive principles indicate that the growth of a united nation in which all people may be living with satisfaction was the aim. It was not the aim to encourage fissiparous, dissipating anti-national tendencies. No nation can afford to submit itself to a process of disintegration.

## II. MUSLIMS AND CHRISTIANS AS MAJORITY COMMUNITIES AND HINDUS AS MINORITY

Let us therefore consider whether institutions run by majority communities are entitled to the same right that Article 30 confers on the minorities, or is it a mere privilege conferred on the latter which is not available to the "majorities". The plural number is advisedly used here. Taking the religious basis first, the Sikhs are the majority community in the State of Punjab. So are Muslims in the State of Jammu and Kashmir. Prior to division of Punjab, Sikhs were a minority throughout the State. If tomorrow Jammu is carved out as a separate State, Muslims will become a minority in Jammu, though today they are the majority community throughout Jammu and Kashmir. Let us now take the linguistic basis. Gujaratis are a minority in the city of Mumbai, and Maharashtrians are a minority in Ahmadabad. Prior to reorganisation of the Bombay State, Ahmedabad was part of it and Gujaratis were a minority there. Hindi-speaking sections of people called "*bhayias*" are a minority in Maharashtra. Marawaris and "Hindustanis", are a linguistic minority in Calcutta. But as soon as a "*bhaiya*" goes back from Mumbai to his home State of U.P. or Bihar, or a Marwari or "Hindustani" goes back from Calcutta to Rajasthan or U.P. he reverts to his status as a member of a majority community. A Tamilian or a Bengali while living in New Delhi is a member of a linguistic minority but as soon as he goes back to live in Tamil Nadu or West Bengal he

becomes a member of the majority community. All this follows from the Supreme Court decision in the two cases, *D.A.V. College, Bhatinda v. State of Punjab*,<sup>10</sup> and *D.A.V. College, Jullunder v. State of Punjab*,<sup>11</sup> decided the same day by the same Constitution Bench, holding that Arya Samajist Hindus (claiming Hindi in Devanagari as their language) were a religious as well as linguistic minority in the Sikh-majority State (having Punjabi in Gurmukhi as the State language).

Under Article 14 of the Constitution, the State is prohibited from denying to any person equality before the law or the equal protection of the laws. There is no doubt that some provisions such as in clauses (3) and (4) of Article 15 and clause (4) of Article 16 which permit discrimination in favour of women and socially and educationally backward classes of citizens, including members of Scheduled Castes and Scheduled Tribes, in regard to recruitment to public services or admission to educational institutions. This is permitted because of the need to make unequals equal and to bring about equality between different classes of citizens in the real sense. If there is a socially and educationally backward or otherwise deprived class of citizens its members may not be able to compete on equal terms with members of the relatively forward classes. Hence reservation was considered necessary in order to allow them proper representation in the public services and in the field of education.<sup>12</sup> Special representation has also been allowed in Legislatures for the members of Scheduled Castes and Scheduled Tribes. All this is by way of "affirmative action". Does the protection given to the minorities by Article 30 fall in the same class?

The question could not possibly be answered in the affirmative, for, as seen above, the same person who while living in one city is a member of a linguistic minority becomes a member of the linguistic majority on coming back to his fore fathers' land. Thus the label of "minority" and "majority" is not permanently affixed to a person who depends on his current abode and on the latest political boundaries pertaining to that abode. Surely a Tamilian or a Bengali while living in New Delhi does not become relatively backward compared to his kith and kin in his home State. It cannot therefore be contended with any justification that the minorities were favoured by way of affirmative action in order to make them equal to others who were better placed educationally. Indeed it is well known that the standard of Christian missionary educational institutions was by and large higher than the level of other institutions. Thanks to the dedication of Christian missionaries, aided generously by the British rulers, the educational as well as literacy average of Christians is also higher than that of Hindus.<sup>13</sup> Another religious minority, namely Parsis, are by all accounts far more advanced socially, educationally and economically than any other religious community in India. The religious

minorities of Sikhs and Jains are certainly not any more backward or forward as compared to Hindus generally. The facile assumption in *St. Stephens College v. University of Delhi*,<sup>14</sup> made in the context of preference to Christians in the matter of admissions to a Christian institution that minorities are "underprivileged" communities and that the principle underlying Article 16(4) is attracted in the matter is, with due respect, not based on any factual survey. The only circumstance cited in support of this conclusion was that if admissions were to be strictly on merit, not even ten percent seats could be secured by Christian candidates. Considering that the percentage of Christians in the total population of the country is much less, this can hardly be a matter of alarm. In any case, nobody pointed out to the Bench that the label of 'minority' applies not merely to the Muslims, Christians and Buddhists who are religious minorities in the country as a whole but also to Hindus as a religious minority in Jammu and Kashmir, Meghalaya and Punjab and migrant Hindus as linguistic minorities all over the country and to the advanced religious communities of Parsis, Jains and Sikhs. Besides, as will be presently seen, the protected minorities are not required to confine the admissions to their institutions to members of the minority community in order to earn the constitutional protection. Often, in minority institutions, the students belonging to the majority for outnumber those belonging to the minority concerned. It cannot therefore be said that it was proposed through Article 30 to raise the educational standard of the minorities in order to make them equal to others.

### III. THE KERALA EDUCATION BILL CASE

Article 30 first came up for interpretation before a seven judge Constitution Bench constituted to consider the reference made by the President under Article 143 in *re Kerala Education Bill* sponsored by the Communist Government of the State which was stoutly opposed by the Christians and Muslims.<sup>15</sup> Chief Justice S.R. Das delivered the majority opinion. He spoke for six judges, the sole dissent by Justice Venkatarama Aiyar being confined to the question whether minority institutions were entitled also to recognition and State aid as part of the right guaranteed by Article 30(1). Chief Justice Das held, *inter alia* :

(a) An institution, in order to be entitled to the protection, need not deny admission to members of other communities.

(b) It is not necessary that an institution run by a religious minority should impart only religious education or that one run by a linguistic minority should teach language only. Institutions imparting general secular education are equally protected. The minority has a right to give a thorough, good general education.

(c) Grant of aid or recognition to such institutions cannot be made dependent on their submitting to such stringent conditions as amount to



surrendering their right to administer them. However the right to administer does not include the right to maladminister, and to ensure that there is no maladministration reasonable regulations can be made.

(d) Regulations prescribing the qualifications for teachers were held reasonable. Those relating to protection and security of teachers and to reservations in favour of backward classes which covered Government Schools and aided schools alike, were "perilously near violating that right", but "at present advised" were held to be permissible regulations.<sup>16</sup> However, provisions centralising recruitment of teachers through the State Public Service Commission and taking over the collection of fees *etc.* were held to be destructive of the rights of minorities to manage the institutions. So far as institutions which sought only recognition and not aid, even the provisions abolishing fees for primary schools were held impermissible. If fees are to be abolished in pursuance of the directive principle in Article 45, the State should compensate the institution for the loss of fees.<sup>17</sup>

(e) Clauses of the Bill which authorised the taking over of management in the event of specified failings, in effect, annihilated the minorities' right to administer educational institutions of their choice.<sup>18</sup>

#### IV. EDUCATIONAL INSTITUTIONS AS CHARITABLE INSTITUTIONS

*Sidhajibhai v. State of Gujarat*,<sup>19</sup> was a unanimous decision of a six-judge Constitution Bench. The petitioners again were Christian missionaries who were running numerous primary schools and also a training college for teachers which fed those schools. The State Government ordered that 80% of the seats in that training college should be reserved for teachers deputed by the Government. The managements were also directed to provide hostel accommodation for them. Directions regarding observance of holidays were also issued. On the refusal of the management its grant was stopped. This was challenged by the management. Shah J. (as he then was), speaking for the Court, expressed the tentative view that under Article 26(a) every religious denomination had a right to establish and maintain institutions for religious and charitable purposes, "and in a larger sense an educational institution may be regarded as charitable". The learned Judge added that it was not necessary to decide this question as Article 30(1) itself was squarely attracted. There was hardly any need for hesitation in expressing this view and in basing this decisions on *Bramchari supra*, on Article 26(a) as well. As pointed out by Seervai,<sup>20</sup> "In India as in England the advancement of education is also a recognised head of charity; therefore, educational institutions would be covered by the words 'charitable institutions' in Article 26(a)". In *Unnikrishnan v. State of A.P.*,<sup>21</sup> the Court held that the right under Article 30(1) and (2) was infringed by the severe restriction on the right of the private training colleges

to admit students of their choice and by holding out a threat to withdraw recognition and to refuse to pay grant in the event of non-compliance. Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the right which is guaranteed : they secure the proper functioning of the institution in matters educational. Though the objective of training of teachers of schools of local bodies may be in the public interest, the same could not be permitted to be achieved at the cost of the institutions. The regulations which may lawfully be imposed as a condition of receiving grant or recognition, it was held, "must satisfy a dual test, the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it".<sup>22</sup>

#### *A. Appointments and Disciplinary Powers*

In *Rev. Father W. Proost v. State of Bihar*,<sup>23</sup> the petitioners were a Christian mission who were running St. Xavier's College, Ranchi. Two parents of students of that college also joined as petitioners. They complained against a new Act under which a University Service Commission was established. Every appointment, dismissal, removal, termination of service or reduction in rank of a teacher of an affiliated college was required to be made by the governing body of the college on the recommendations of this Commission and subject to the approval of the University. The Constitution Bench, speaking through Hidayatullah C.J., held, following the earlier decisions noticed above, that this provision was destructive of the right of management. The institution was held entitled to the protection of an exemption clause under which, in case of a minority institution only 'approval' of the Commission and the University was required and not 'recommendation' of the Commission. In other words, recruitment was to be made by the institution itself and not by the Commission for it. The provision requiring 'approval' was apparently not challenged.

#### *B. Constitution of Governing Body*

In *Rt. Rev. Bishop S.K. Patro v. Bihar*,<sup>24</sup> it was held by another Constitution Bench that the State authorities could not direct a Christian mission to constitute its governing body in a specified manner. The earlier decisions were followed, and it was added : "The fact that funds were obtained from the U.K. for assisting in setting up and developing the school or that the management of the institution was carried on by some persons who may not have been born in India is not a ground for denying the protection of article."

### *C. A Gratuitous Obiter Dictum*

In *State of Kerala v. Very Rev. Mother Provincial*,<sup>25</sup> also called the *second Kerala case*, a six-judge bench again spoke through Hidayatullah C.J. In this case a large number of writ petitions were filed by Christian missions, but two were filed by the majority community also against certain provisions of the University Act. The Act provided for constitution of statutory governing bodies according to a standard pattern in supersession of the existing private bodies (Sections 48 and 49). The proposed statutory bodies were not answerable to the founders in the matter of administration of the institution. Even the community was to have no hand in the administration. Teachers were not to be dismissed, removed or reduced or suspended for a period exceeding 15 days without the previous sanction of the Vice-Chancellor. The order was to be further appealable to the Syndicate (Section 56). A teacher was not to be disqualified for continuing as such merely on the ground that he has been elected a member of the Assembly or of Parliament or of a local authority, and such member of the Assembly or of Parliament shall be on leave during the period in which the House concerned was in session. This enables political parties, observed the Court, "to come into the picture of the administration of minority institution which may not like this interference. When this is complied with the choice of nominated members left to Government and the University, it is clear that there is much room for interference by persons other than those in whom the founding community would have confidence". Section 63, "to crown all these", even enabled Government to supersede the management and entrust it to the University for a period not exceeding two years.

Mr. Mohan Kumarmangalam, appearing for the Kerala Government, tried to defend the provisions by referring to the Education Commission<sup>26</sup> which had made certain suggestions regarding the conditions of service of the teachers of colleges. The Court agreed that the provisions may have been made *bonafide*, but held that "even if salutary, cannot stand" as they "affect the administration of these institutions and rob the founders of that right which the Constitution desires to be theirs".<sup>27</sup>

The Kerala High Court had held that the provisions were also offensive to Article 19(1)(f) both in respect of majority as well as minority institutions. The High Court did strike down the provisions in Section 63 (which, as seen above, related to temporary supersession of the management) in relation to the majority community too as ultra vires of Article 31(2). The Hindu institutions also took the plea of discrimination, invoking Article 14. The learned Chief Justice at first expressed a tentative inclination to reject the plea based on Article 14 by observing that the claim of the majority community institutions to equality with minority communities in the matter of the establishment and administration of their institutions leads to the consideration whether the

equality clause can at all give protection, when the Constitution itself classifies the minority communities into a separate entity for special protection which is denied to the majority community. This is not a case of giving some benefits to minority communities which in reason must also go to the majority community institutions but a special kind of protection for which the Constitution singles out the minority communities. It may be respectfully submitted here that there is in fact nothing in the Constitution to support the words which is *denied* to the majority community. The mere fact there is special mention of the minorities, and there is silence about the rights of the majority communities should not necessarily, without more, lead to the conclusion that the intention was to deny the right to the majority communities. It is unfortunate that such a summarily dismissive view should have been expressed as a casual obiter dictum on a sensitive and important issue which, though expressly raised, was not even allowed to be fully argued because of the concession made by the State. We may let it rest at that, for the learned Chief Justice was quick to clarify: "The question, however, does not fall within our purview as the State, at the hearing announced that it was not intended to enforce the provisions of the law relating to administration against the majority institutions only, if they could not be enforced against the minority institutions". Again, however, at later stage of proceedings Mr. Mohan Kumarmangalam stated that he had instructions to say that any provision held inapplicable to minority institutions would not be enforced against the majority institutions also. Hence it relieves us of the task of considering the matter under Article 19(1)(f) not only in respect of minority institutions but in respect of majority institutions also. The provisions of Section 63 *affect both kinds of institutions alike and must be declared ultra vires in respect of both.*<sup>28</sup>

Then the two cases, one of *D.A.V. College Bhatinda*,<sup>29</sup> and the other of *D.A.V. College Jullunder*<sup>30</sup> were decided on the same day by the same Constitution Bench. Apart from the finding (already noted) that Hindus were a minority in Punjab within the meaning of Article 30(1), it was held that a minority institution could not be compelled to adopt the language of the majority as the sole medium of instruction or to seek affiliation from another University which carried on its instruction and examinations only in majority language, nor could it be obliged to have a governing body according to a pattern imposed by the statute, including representatives of the University and the Principal<sup>31</sup> or to comply with requirements relating to service and conduct of teachers as laid down by the University.

#### V. THEORETICAL BASIS OF THE PROTECTION

A nine Judge Bench, the largest so far on the subject was constituted in *Ahmadabad St. Xaviers Society v. State of Gujarat*.<sup>32</sup> It seems to have been constituted, as stated by Seervai, because of the criticism of decisions on

Article 30(1) voiced by ex-Chief Justice Dr. P.B. Gajendragadkar in his *Tagore Law Lecture* on "Indian Parliament and Fundamental Rights" and *Jawaharlal Nehru Memorial Lecture* on "Philosophy of National Integration". The Gujarat Act in question had sought to convert all affiliated colleges into constituent colleges of the University, with the result that teaching would be taken over by the University and the institutions would lose their individual character. Several judgments were delivered in the case, and they need to be analysed. In the leading judgment, Ray C.J. (for self and Palekar J.) observed that permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of management of the educational institution and *without displacing the management*. The choice in the personnel of management is a part of the administration. As a result of new elements in the shape of representatives of different types, namely, a nominee of the Vice-Chancellor and representatives of teachers, non-teaching staff and students of the college, it was said, "the calm waters of an institution will not only be disturbed but also mixed". The provision conferring power on the Vice-Chancellor or an officer authorised by him to approve or disapprove any penal action proposed by the management against a teacher or non-teaching employee, was held to be impermissible in as much as it confers arbitrary power on the Vice-Chancellor to take away the right of administration. Another provision under which any dispute between the management and a teacher or other employee of an affiliated college was to be referred to a tribunal of arbitration, comprising a representative each of the two parties and an umpire nominated by the Vice-Chancellor was also disapproved. These references to arbitration will introduce an area of litigious controversy inside the educational institution. The atmosphere of the institution will be vitiated by such proceedings.

#### *A. Genuine Equality, But No Pampering*

Jaganmohan Reddy J (for self and Alagiriswami J.), in a concurring judgment, observed that *equality of treatment of minority and majority or equality before law precluded discrimination*. According to the *Advisory Opinion of the Permanent Court of International Justice on Minority Schools in Albania* (April 6, 1935) :

'Whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations.... It is easy to imagine cases in which equality of treatment of the majority and of the minority whose situation and requirements are different, would result in inequality. The equality between the members of the majority and of the minority must be effective, genuine equality'.



Khanna J. and Mathew J. in their concurring opinions also referred the report of the Albanian case cited above. In fact the measure challenge in that case was abolition of all private schools. The Government had tried to justify it on the ground that the measure applied to the majority as well as the minority. It was the minority alone which had challenged the measure, and it was in that context that the Court had further observed, as quoted by Khanna J. that the object of the protection was to enable the minorities to preserve the characteristics which distinguish them from the majority, and satisfying their special needs. In order to attain that object, two things were regarded as particularly necessary. The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

The observations of the International Court in Albanian case regarding the need for differential treatment in favour of the minorities to enable them to preserve their basic distinguishing characteristics and racial peculiarities and traditions are, as rightly pointed out by Dwivedi J. in para 284 of the report, really irrelevant in the context of the Indian Constitution which by Article 29(1) separately guarantees to all sections of citizens the right to conserve their "distinct language, script or culture", apart from the rights to freedom of religion guaranteed by Articles 25, 26, 27 and 28 and the basic right to equality guaranteed by Article 14. The Supreme Court has also consistently taken the view, right from the *Kerala Education Bill* (*supra*) onwards, that while Article 29(1) is, in the words of Hidayatullah C.J., in *Rev. Father Proost* (*supra*), "a general protection which is given to minorities to conserve their language, script or culture", Article 30(1) is "a special right to establish educational institutions of their choice. This choice is not limited to institutions seeking to conserve language, script or culture and the choice is not taken away if the minority community having established the educational institution of its choice also admits members of other communities. This is a circumstance irrelevant for the application of Article 30 (1) since no such limitation is expressed and none can be implied. The two articles create two separate rights, although it is possible that they may meet in a given case". The learned Chief Justice has referred to "minorities" only while dealing with Article 29(1) also, but that is merely because the passage was discussing only minority rights.

Khanna J. further observed, with reference to Article 30(1), that 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 interest of the community in general and the institution in particular will be best served. These provisions were made so that *none might have the feeling*



*that any section of the population consisted of first-class citizens and the other of second-class citizens.* Sardar Patel's declaration in the Constituent Assembly on February 27, 1947, that it was to show the falsity and hollowness of the claim of the British Government that they alone could protect the minorities and to prove "that nobody can be more interested than us in India in the protection of our minorities that we had made such provisions" was also quoted. The rights, in the word of Khanna J., were made a part of the fundamental rights and thus placed on a secure pedestal and withdrawn from the vicissitudes of political controversy. They flowed from the secular character of the Constitution to *ensure that no one shall be discriminated against on the ground of religion.*<sup>33</sup> The same principle was extended to language as it "has a close relationship with culture. The idea of giving some special rights to minorities is *not to have a kind of privileged or pampered section of the population* but to give to minorities a sense of security and a feeling of confidence."<sup>34</sup> The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the idea of equality may not be reduced to a more abstract idea but should become a living reality. *The majority in a system of adult franchise hardly needs any protection. It can look after itself and protect its interests.* Any measure wanted by the majority can without much difficulty be brought on the statute book because the majority can get that done by giving such a mandate to the elected representatives.<sup>35</sup> It may be submitted that the theory that the majority's rights do not need any protection is no longer accepted after what the Nazis were able to do to the people as a whole, not merely to the Jewish minority, because the Weimar Constitution did not provide for judicial review. It was in recognition of this hard reality in regard to the disastrous effects of the positivist doctrines that the U.N. Declaration of Human Rights was adopted and our Constitution makers also enacted Part III of the Constitution.<sup>36</sup> Virtually the entire part (Fundamental Rights) protects members of the main religious majority community to the same extent as it protects members of various minority communities. It is only the marginal note of Article 29 that incorrectly refers to minorities, as the article actually refers to all sections of citizens alike, and Article 30 that makes special provision for minorities. So the observation that the majority community does not need any protection is too sweeping to commend acceptance. But more of it later. First let us complete the survey.

Reliance was also placed by Khanna J. on an observation of Chief Justice Latham in a 1943 decision relating to *Jehova's Witnesses* that the provision in the Australian Constitution guaranteeing free exercise of any religion was really a provision required for the protection of minorities, and in particular, of "unpopular minorities" as "the religion of the majority of the people can look after itself." This reliance on Latham C.J.'s was, with respect, again meaningless in the Indian context where the Constitution expressly confers

freedom of religion on the majority community as well, vide Article 25(1).

Khanna, J. also spoke of the need of the Courts to adopt the same catholic, generous, liberal, sympathetic approach which "marked the deliberations of the Constitution makers in drafting those articles" (Articles 29 and 30), so that "the minorities feel secure and *are not subject to any discrimination or suppression*".<sup>37</sup>

While endorsing the views expressed in earlier rulings on what regulations would be permissible or not, Khanna J. added that it would also be permissible to make regulations (a) for ensuring regular payment of salaries before a particular date of the month, (b) for preventing diversion of funds of the institution and audit of accounts, (c) for prohibiting anti-national activities and providing that its employees should not have been guilty of such activities.<sup>38</sup>

Mathew J. (for self and Chandrachud J. as he then was) also gave a concurring judgment. He made it clear that they were not concerned in the case with the question whether the guarantee extended to establishing and maintaining a military academy or a police training school.<sup>39</sup> He also quoted the following passage from the recommendation by the Sub-Commission in its report to the Commission on Human Rights :

"Protection of minorities is the protection of non-dominant groups, which while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population".<sup>40</sup>

It has already been pointed out earlier while discussing the references to the Albanian case in the judgments that our Constitution, by Article 29(1), has given a separate guarantee regarding language, script and culture and as held by the Court, that is an irrelevant consideration so far as the interpretation of Article 30(1) is concerned. But our judges, howsoever distinguished, usually find it difficult to resist the temptation to quote from foreign sources to fortify their reasoning even where our own Constitution and the ruling of our apex Court are crystal clear. Such references often have the effect of confounding the issue rather than adding any clarity to it. The learned judge had prefaced the quotation with the remark that it was "necessary in the interest of clarity of thought" the sub-Commission's recommendation and the Albanian opinion led him to jump, without further ado, to the conclusion that "minorities can be protected not only if they have equality but also, in certain circumstances, differential treatment". With the utmost respect, the passages cited being not attracted to the Indian context, the conclusion so drawn from them can only be said to be *non-sequitur*. In any case the rights of the majority communities were not under consideration in the case, and the observation cannot be construed

to have any adverse impact on those rights.<sup>41</sup>

Mathew J. went on to add that the Constitution makers granted this right in order "to give the parents in those communities an opportunity to educate their children in institutions having an atmosphere which is congenial to their religion". "The sheer omission of religion from curriculum" (of State schools) "is itself a pressure against religion".<sup>42</sup> It is perhaps possible to secularise subjects such as mathematics, physics or chemistry, but as Justice Jackson said in *McCullum v. Board of Education*,<sup>43</sup> 'music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.... Even such a science as biology raises the issue between evolution and creation as an explanation of our presence on this planet, the State cannot insist that the children belonging to the religious minority community should be educated in State-maintained educational institutions or in educational institutions conducted by the majority.... The parents have the right to determine to which school or college their children should be sent for education. The parental right in education is the very pivotal point of a democratic system. If aid from the State could be made conditional on surrender of constitutional rights, then, the learned Judge pointed out, the State could curb all fundamental rights through the power of purse.'<sup>44</sup>

It is hardly surprising that with such extreme views of Mathew J. was reduced to being the sole dissenter in *Gandhi Faiz-e-Am v. Agra University*,<sup>45</sup> decided less than a year later.

Beg J. (as he then was), expressed strong reservations on several aspects. He was willing to support the State's power to regulate such institutions in a greater measure than was accepted in *Sidhajbhai*, or in *Very Rev. Mother Provincial*.

Dwivedi J. partly dissented only on the question of affiliation. He demonstrated the illusoriness of the absoluteness claimed for the right under Article 30(1) by pointing out that it was in any case qualified by Articles 15(4), 29(2) and 28(3). He expressed the view that the right could not "be so exercised as to violate a citizen's legal or constitutional rights. Thus the management cannot punish a member of the teaching or non-teaching staff or a student for legitimate exercise of his freedom of speech and expression or of forming associations or unions".<sup>46</sup> He described the argument of imparting secular general education in a religious atmosphere as "over-accentuated" which overlooked the aspect that the students do not belong only to the minorities. They belong also to the notion whose "first concern" should be secular general education.<sup>47</sup> The extent of regulatory power may vary according to the class of institutions as well as within a class. A classification suggested was (1)

according to whether the education imparted is religious, cultural or linguistic instruction or secular general education or mixed, (2) according to grant of aid and recognition, (3) according to whether primary, secondary or higher education is imparted, (4) whether it is a military academy or marine engineering in which the State is vitally interested.<sup>48</sup> Again the teaching staff and property may be subject to greater regulation than the composition of the managing body. "*Plainly, no minority educational institution can be singled out for treatment different from one meted out to the majority educational institution. A regulation meting out such a discriminatory treatment will be obnoxious to Article 39(1)*".<sup>49</sup> He did not agree with the majority view in this case and also the view expressed in earlier cases that the regulations can only be conceived in the interest of the institution.<sup>50</sup> He was not prepared to go to the extent Hidayatullah C.J. went in *Very Rev Mother Provincial*, in treating the ideas of the founders or their nominees "of how the interests of the community in general and the institution in particular will be best served" as sacrosanct.<sup>51</sup>

Dwivedi J. was also prepared to hold as valid, the restriction placed on the management's right to punish a teacher without the approval of the Vice-Chancellor.<sup>52</sup> And also the provision relating to reference of disputes with employees to a tribunal of arbitration as it was intended to check the abuse of power of administration by the managing body.

### *B. The Uncared For and Apathetic Majority*

It is noteworthy before parting with this case that this nine-judge large bench was constituted to review all previous decisions on Article 30(1), and therefore notices were sent to the Attorney General, the Union of India and to the Advocate General of every State. Public notice was also issued to the minority institutions to enter appearance, if so advised. The All India University Teachers Association was also permitted to intervene. The entire controversy was thus between minority institution on the one hand and the Central and State governments (who wanted power of regulation in greater measure than allowed in earlier decisions) and the teachers (who too supported the Governments as the regulations which placed curbs on powers of managements in service matters suited them) on the other. No public notice was considered necessary for majority institutions, nor did any such institution come forward on its own as an intervener.

It is indeed sad to find that except in the *second Kerala case*, in which because of the undertaking of the State Government not to enforce against the majority institutions any provision which could not be applied to minority institutions also, the point remained unargued, the majority institutions have instead of boldly and squarely raising the plea of discrimination thought it

expedient to resort to the demeaning subterfuge of claiming that they were not Hindus either and therefore should be allowed the same privilege as accorded to the minorities. Were they deterred by the off-the-cuff loud thinking of Hidayatullah C.J. in the said case? Or is it also a case of minorities (including even jurists like Seervai) being always very vigilant about protection of their rights in contrast to the supine complacency of the majority? One cannot help recalling in this context a historical parallel. Dr. R.C. Srivastava's thesis on the Development of Judicial System in India from 1833 to 1858 (which carries a highly laudatory foreword from Mr. M.C. Setalvad) thus mentions that when it was proposed by the East India Company to replace Persian, a legacy of the Moghul rule, by local vernaculars, some English civilians such as Shore (Commissioner of Sagar and Narbada division), W.F. Dick (Judge of the Sadar Court of N.W.P.) and A. Ross (President of the Legislative Council) were in favour of Hindi in Devanagari script. Act No. 29 of 1837 was then passed authorising the Governor-General to dispense with any Regulation that enjoined the use of the Persian language in judicial or revenue proceedings and to prescribe the use of such other language and characters as he deemed fit. On July 5, 1839, the Bengal Government adopted a Resolution which enjoined upon all judicial authorities the use of Nagari characters in districts where Urdu was the dialect. There upon 150 Muslims of Bihar and 106 Muslims of Tirhut submitted separate petitions saying that introduction of Hindi was a threat to their religion. The petitioners reminded the Government of their role as protectors of the Muslims faith. The Government of India succumbed to this pressure and on 13th January, 1840 forbade the use of Nagari characters by any judicial officer before obtaining the special sanction of the Government. This made Nagari disappear from the scene in the Hindustani speaking provinces. Significantly none from the majority community raised a little finger against the withdrawal of Nagari within six months of its introduction and it abjectly acquiesced in the continued imposition of the Persian script on them even long after the replacement of Moghul rule by British rule, indeed right up to 15th August, 1947. Similar indolence has been exhibited by the majority during the last forty years about the right of equality in regard to establishment and administration of educational institutions with the minorities.

### *C. Teachers More Vigilant*

While the majority managements have helplessly submitted to the discrimination, the teachers and their organisations have always fought for their rights, often successfully.

The view expressed in *St. Xaviers College*, that it is not permissible to provide that any penal order against an employee will be subject to the previous approval of the Vice-Chancellor was followed in *Lily Kurian v. Lewina*,<sup>53</sup> by a Constitution Bench headed by Chandrachud C.J. which held that such an



appellate power vested in an outside authority like the vice-Chancellor to directly to interfere with the disciplinary control exercisable by the managing body. The statute had since constituted an Appellate Tribunal instead of the Vice-Chancellor. The question of its validity was however not considered. Again, in *All Saints High School v. Government of A.P.*,<sup>54</sup> the provisions of Section 3(1) and (2) which laid down that no major penalty or termination shall be effective without prior approval of the competent authority was held invalid even though it was subject to the rider that approval shall be granted if the authority is satisfied that there are adequate and reasonable grounds for it. In the same case, another provision which placed a time limit of two months (extendable by another two months) for completion of the inquiry against a teacher beyond which an order of suspension will not be effective was however held to be valid. Chandrachud C.J. was not prepared to concede even to minority managements the absolute right to hire and fire its teachers. Provisions of Sections 4 and 5 providing for appeal against an order of punishment passed by the management were also struck down. The requirement in Section 6 of prior approval for any retrenchment of a teacher was upheld. So also the requirement that the salary of a teacher shall be paid by a certain day of a month. The Chief Justice took the middle course, Fazal Ali J. was for maximum rights for the management, while Kailasam J. was for maximum powers for the regulating authority. It was thus a majority judgment. In *Frank Anthony Public School Employees' Association v. Union of India*,<sup>55</sup> it was similarly held that reasonable provisions for security of tenure to teachers and also for laying down their pay scales, allowances, etc. were not only permissible under Article 30(1), but exemption of even unaided minority schools from general provisions in that behalf was discriminatory and hit by Article 14. It was further held that if appeal against penalty imposed on a teacher was provided to a district judge, as distinguished from the University or other regulatory authority, the same would also be valid, and its denial to teachers of such institutions discriminatory. A provision under which the management's order of suspension of teacher could not continue beyond a period of fifteen days without the approval of the Director was also held to be salutary, hence applicable to minority institutions as well. It was however, emphasised that approval to such suspension should not be withheld except on good and adequate grounds. In *Bihar State Madarsa Education Board v. Anjuman Ahle-Hadees*,<sup>56</sup> two provisions were struck down. One required the managing committee to include not only teachers but also representatives of the Board and of guardians besides co-opted members; the other vested in the Board "control" over the services of teachers and also required the management to seek the Board's prior approval before a penal order was passed. The Bench declined to "read down" the provisions. Similarly in *Bihar State Madarsa Education Board v. Madarass Hanfia*,<sup>57</sup> the power conferred on the Board to dissolve the managing commit-

tee of an aided and recognised institution was held violative of Article 30(1). However the Court disapproved of the view expressed by the High Court that the Chairman or majority of the members of the statutory board should necessarily belong to the minority community.

#### VI. STEPHEN'S CASE : A WRONG ASSUMPTION OF BACKWARDNESS

The minority institutions have, however lost several battles against their teachers. The *Frank Anthony* ruling in regard to the Director's approval for an order of suspension was unsuccessfully assailed as contrary to *Y. Theclamma v. Union of India*,<sup>58</sup> *All Bihar Christian Schools Association v. State of Bihar*,<sup>59</sup> *Manohar Harries Walters v. Basel Mission Higher Education Centre*.<sup>60</sup> K.N. Singh J. in the *All Bihar Christian Schools* case has indeed been at pains to stretch the regulatory powers of the State to their maximum, in the process, "distinguishing" all previous decisions seemingly to decide the contrary. On the other hand, the Constitution Bench (headed by Kania J. as he then was and speaking through Shetty J. with Kasliwal J. dissenting) has, in *St. Stephen's College v. University of Delhi*,<sup>61</sup> bent over backwards in conceding the claim of the two government aided Christian institutions to make admissions according to their sweet will, (specifically, on the basis of 100 percent interview marks from out of candidates selected preliminarily on the basis of their secondary school marks, the number of candidates interviewed being about five times the number of seats) in total disregard of the norms fixed by the University and giving preference to students of their own community. The Court placed a limit of fifty percent on reservation of seats for them, applying in the process decisions under Article 16(4). By a process of reasoning which, with the utmost respect, is rather confusing, mixing up unrelated concepts, they side tracked Article 29(2) and 'distinguished' earlier decisions on the subject such as *D.A.V. College*<sup>62</sup> and *Kerala Bill*.<sup>63</sup> Cases relating to reservation in favour of backward classes of citizens were relied on and the minorities were assumed to be "the underprivileged". Emphasis was placed on the minorities right in their own educational institution and following Mathew J. in *St. Xavier's*, the parents' right to have their children educated in institutions having an atmosphere congenial to their own religion. Preference to Christians in admissions was defended as being not solely on the basis of religion but to prefer their community candidates in their educational institutions a rather baffling distinction which could be made only by a court which must be right because it is final.

The Supreme Court has further conceded to the minority managements the power to give indirect preference to candidates of their community in appointments to the posts of Principal and Vice-Principal by requiring that the candidates should fulfil over and above the qualifications laid down by the University or a Board, some additional lingual qualification and thereby

excluding other candidates from the field of choice. In *Virendra Nath Gupta v. Delhi Administration*,<sup>64</sup> it was so decided in favour of a linguistic (Malayalam) minority institution, and in the *Karamat Girls College of Lucknow* case the same principle was applied even in the case of a secular education institution run by a religious minority (Muslim) which prescribed Urdu as an additional qualification for the post of Principal. The latter case assumes without any discussion that minority institutions do have such a right.<sup>65</sup>

#### VIII. STATE CONTROL ON MINORITIES TECHNICAL INSTITUTIONS

The right of Government or a University to prescribe suitable conditions relating to facilities for students and staff, excellence of standards and even limits on capitation fee to be fulfilled before even a minority could claim recognition for an institution, in particular one conducting professional courses, such as a teachers' training college,<sup>66</sup> or a medical, engineering, pharmacy, nursing, etc.,<sup>67</sup> has been consistently upheld by the Court. In *Milli Talimi Mission v. State of Bihar*,<sup>68</sup> there was a blanket ban on private colleges for teachers' training except for minorities, and the appellant's application was rejected on the ground of inadequacy of facilities. The Court (per Fazal Ali J.) held *on facts* that the decision of the authorities was unreasonable, but Mukharji J. as he then was, did not agree that it was coloured by any anti-minority bias.

Likewise the Court has religiously upheld the right of parents to get their children educated in the medium of their choice, vide *State of Bombay v. Bombay Education Society*,<sup>69</sup> (per Constitution Bench, headed by Mahajan C.J.), and the two *D.A.V. College cases*, though the Courts have conceded to the State the power to implement the three-language policy so that over and above the language of the pupils' choice of the regional and national languages could also be taught.<sup>70</sup>

#### VIII. ONE MINORITY OPPOSING ANOTHER'S SCHOOL

In *Mark Netto v. State of Kerala*,<sup>71</sup> the Christian community was running a boys school. It was denied permission to admit girls to the school on the ground that there was already a girls school run by the Muslim community in the neighbourhood. The Muslims also objected to a co-educational institution. The grounds for refusal of permission were held unsound and the refusal of permission was held violative of the Christians' right under Article 30(1). The Christian community had a right to have schools of their choice for teaching their girls if they did not think it in their interest to send them to the Muslim girls school. The rule under which the permission had been denied was held inapplicable to minority schools. It was not considered necessary to strike down the rule in its application to all.

## IX DOUBLE STANDARDS IN JUDICIAL REVIEW

Let us contrast the various strongly expressed views in the above cases about rights of minority communities, rights of students of such communities and of their parents and of the managing bodies of their institutions with the approach in *Katra Education Society v. State of U.P.*<sup>72</sup> In U.P. the Intermediate Education Act was amended in 1958 with a view to conferring very wide powers on authorities *vis-a-vis* the managements. A statutory scheme of Administration provided for a uniform pattern of governing bodies. The Principal and two teachers selected by rotation according to seniority are ex-officio members. The Scheme has to be approved by the Director. On the Director's adverse report Government may appoint an Authorised Controller for the institution. If the management defaults in complying with any direction of the Controller then even the property and assets of the institution can be taken over by Government. For appointment of teachers a selection committee is provided for. It was also provided that the selection committee shall send its recommendations to the Deputy Director who may reject the same. Then another selection may be made by the Committee. If it is again rejected then the Director (in the case of Principal) or Deputy Director (in the case of any other teacher) may himself make the final selection and appointment. Conditions of probation, confirmation, punishment of teachers and their transfer from one institution to another are all prescribed by regulations. Prior approval of the inspector is required for any order of punishment. These provisions were challenged by a society running a girls school.

The power of the authorities in regard to appointment of teachers was upheld in a couple of reference (in para 9 of the report) as it was held to be implicit that it would be exercised in the interests of the students and of the institution and for serving the cause of education and could not be said to be uncontrolled, hence it was not hit by Article 14. Similar powers have since been held in the *Proost v. State of Bihar*,<sup>73</sup> to be destructive of the right of management, hence not permissible as a regulatory power.

The power to appoint an Authorised Controller was likewise upheld as "disciplinary and enacted for securing the best interests of the students", as "the State in a democratic set up is vitally interested in securing a healthy system of imparting education for its coming generation of citizens." Such a power, it has since been held in the *first Kerala case*<sup>74</sup> annihilated the concerned community's right to administer an educational institution of its choice. In *St. Xaviers*,<sup>75</sup> Ray C.J. emphasised that the regulatory power should be so exercised as not to displace the management. In majority of cases emphasis has been laid on the need to free the management from such 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. Since the termination of the Second World War there was a marked increase in the number of private schools and there were many complaints against the management of those schools, and discontentment among the teachers was rife. Hence these salutary provisions had been made on the recommendations of a Committee appointed by the State Government.

The exemption in favour of Anglo-Indian schools was assailed as discriminatory but the contention was rejected on the ground that the writ petition did not lay any factual basis for the plea. It was pointed out that the number of students appearing from the Anglo-Indian schools is very small, that no adverse reports were received against the management of such institutions. For want of a full averment to assail the classification their lordships did not propose to deal with the question in this appeal.

Emboldened by this crucial endorsement of their action in State Government has since made further amendments from time to time and also enacted the U.P. High School and Intermediate Colleges Teachers and Employees Payment of Salaries Act, 1971. The effect of all these measures is further to extend the control of the authorities as against the managements. While originally only a few Anglo-Indian institutions were exempted, now in view of various pronouncements of the Supreme Court all minority institutions covered by Article 30(1) stand exempted. Similar is the position with regard to degree colleges. Now all selections of teachers have been centralised and the managements are required to make appointments according to the decisions of a statutory Commission. Provisions regarding appointment of Authorised Controllers have been enacted in relation to colleges affiliated to every University.

Now one need not controvert the factual data adduced by Government, namely, that "many" private institutions were not well managed, and the 'very small number' of Anglo-Indian institutions were relatively better managed. There was no doubt that some very good Christian mission schools are continuing since British times. But can we generalise on that basis that every "minority" institution in U.P., whether old or newly established, which means every institution run by Muslims, Jains, Buddhists, Sikhs and by such Hindus as have immigrated from non-Hindi States like West Bengal, Punjab, Maharashtra, Gujarat, Tamil Nadu, etc. or displaced from Pakistan, should all be presumed to be well managed. Again, the mere fact that "many" institutions run by the Hindi-speaking Hindus were badly managed cannot lead to the general presumption that an institution will require greater control merely because it is established by the majority community. To make any such generalisation will amount to the worst possible, communal and linguistic



discrimination. Indeed, the basis of discrimination which was canvassed in *Katra Education Society* is no longer relevant to the issue now under consideration, for how well or badly an institution is managed cannot possibly be presumed to depend on the community (in terms of religion or language) of the owners or managers. It may even be pointed out that as exemption in favour of Anglo Indian schools had not been sought to be justified by the Government on the ground of Article 30(1) but solely on the ground of absence of complaints about management, the classification should have been struck down as it was ex-facie communal : one cannot generalise about quality of management on the ground of "Anglo-Indian" and the rest. The very fact that complaints were only against "many" did not "all" non-Anglo-Indian schools should be enough to show that the classification was communal and not on the merits of the institutions, and no other factual averments need have been considered necessary for the plea of discrimination.

#### X. CLASSIFICATION SHOULD BE RATIONAL, NOT COMMUNAL

The State or the Courts have no right to presume that every institution of a majority community is run by crooks or imbeciles and that all such institutions can be properly administered only through State authorities. It is true that many managements are corrupt, and effective measures must be taken to ensure that they are not allowed to misappropriate or dissipate the assets of the institutions or to indulge in nepotism or discrimination in the matter of appointment of teachers, admission of students, etc. But complaints are not confined to managements of majority institutions only. Excepting very few select old Christian missionary institutions like St. Stephens, Loreto, etc., most minority institutions also (including even Christian institutions) are not immune from similar complaints including very often complaints from teachers, parents and other members of their own community. Conversely, there may be excellently managed institution established by members of majority community also, say those by the Ramkrishna Mission, Bharatiya Vidya Bhawan, Birla Educational Trust, etc. So whatever regulation and control be needed it should be objectively decided in relation to each individual case, and not on covertly communal (whether based on religion or language) grounds. Any classification should thus be primarily on the bases as rationally suggested by Dwivedi J. in *St. Xaviers*, and secondly on the basis of ratings (as in the case of, say, debentures, or hotels etc.) with reference to availability of facilities, past performance, reputation, credibility, standard of teachers, infrastructure, etc., judged by a high powered autonomous body, not on the grounds of its being established by minority or the majority.

#### XI. EXCESSIVE CONTROLS PROVE COUNTERPRODUCTIVE

In the *Katra* case, the extensive controls and displacement of manage-

ments were justified as needed for "securing a healthy system of imparting education for its coming generation of citizens" in which "the State in a democratic set up is vitally interested". Is the State not equally interested in a healthy system for the coming generation of citizens from the minority community? When we come to minorities, we talk, instead, of the sanctity of the wishes of the founder or his nominees (the *Second Kerala case*), the right of parents to determine to which school or college their children should be sent for education, this right being "the very pivotal point of a democratic system," the inequity of the State insisting that the children should be educated in a State controlled institution. Parents of the majority community seeking to assert this right are driven to claim their right to get their children educated in Christian mission schools in preference to State controlled ones, on the assumption that English is the choice of medium of instruction in these schools.<sup>76</sup>

In U.P., statutory approval of authorities was required before any teacher was punished or suspended, and it was not even provided that such approval would not be withheld except for adequate and reasonable grounds, while in *All Saints High School*,<sup>77</sup> such a power even when so conditioned was struck down. In *St. Xaviers* such a power was held to be arbitrary. In *Katra*, much was made of the report of a committee set up by the State Government for justifying the controls, while in the *Second Kerala case* even reliance on the Radhakrishnan Commission report was held to be irrelevant.

In *St. Xaviers*, it was considered undesirable that educational institutions should be exposed to "litigious controversy" as the same will vitiate the atmosphere of the institution. The U.P. statute has brought about a virtual litigation explosion and we find even lawyers and law reports specialising in education cases. In the *second Kerala case* the Court disapproved the provision for legislators or corporators continuing as teachers as this could lead to political interference. In U.P. and other States having a bicameral legislature, teachers got elected to the Legislative Council not only from the teachers' constituency but also, being the only organised, and numerous group of graduates, from the graduates' constituency. Since the fourth general elections (1967), many States have had unstable Governments and the party in power is often in a minority in the Upper House. A ministry with a precarious majority in the Lower House cannot afford to lose every day in the Upper House. Apart from legislative powers, every House of Legislature has so many other powers. Members can make things hot for the Government and its officials through points of order, questions, motions, notices, committees and assertion of "privileges". So the ministry has to keep the solid block of teacher M.L.C.'s happy, and thus the latter enjoy a lot of clout with ministers as well as officials of the Education Department. The constitution of the Board also includes elected representatives of teachers. The result is that the apprehensions

expressed in the *second Kerala case* about political interference and in *St. Xavier's* about litigation vitiating the atmosphere in minority institutions have come very much true in regard to majority institutions. Powers vested in the officers of the Education Department for regulating the schools and colleges are in practice exercised at the dictation of leaders of teachers associations. The remedy (of excessive State control) has thus proved worse than the disease (of mismanagement). The only redeeming feature of these laws so far is that some of the regulations do not yet apply to unaided recognised institutions or to institutions affiliated to the Anglo-Indian body namely Indian Council of School Education, even though the institution is run by members of the majority community. In consequence many educationists belonging to the majority community choose to forgo Government aid altogether and seek affiliation to I.C.S.E. and make up for aid by charging heavy fee from students. Most of the merit positions in the Board examinations go to these private unaided schools. Even the poor people choose to pay fee in hundreds of rupees per month for getting their children educated in these schools rather than sending them to Government-aided and controlled schools where the fees are abysmally low. Could such a result be viewed with equanimity by the courts or by educationists? K. Ramaswamy J. in *Maharashtra Board of Education v. K.S. Gandhi*,<sup>78</sup> in this context quoted with approval a passage from a judgment of P.A. Choudhary J. (of Andhra Pradesh High Court) in which falling standards of discipline and education have been commented on.

Now right to education has been accepted as a fundamental right,<sup>79</sup> per Constitution Bench headed by Sharma C.J. as it flows directly from the right to life (Article 21). It has further been held in the same case that education is a charitable activity. In *Bharat Sevachran Sangh v. State of Gujarat*,<sup>80</sup> a Bench consisting of E.S. Venkataramiah and Rangnath Mishra JJ. (as they then were) had held that a Gujarat statute empowering the Government to take over an educational institution for a period not exceeding five years had been "introduced in the interest of the general public and did not in any way affect prejudicially the fundamental rights of the management guaranteed under Article 19(1)(g) of the Constitution. The decision was distinguished in *Unnikrishnan* on the ground that it was not specified whether the "right" of the management was a profession, occupation, trade or business. The Court was not in favour of commercialisation of education and hence not prepared to accept it as a right to carry on trade or business. Teaching was a 'profession' but running a school was not practising a profession. As their lordship could not find a reason for not holding it to be an 'occupation' either, perhaps it is, they decided the case on the assumption that a person or body of persons did have a right to establish an educational institution. On the right to seek aid,

recognition or affiliation, the following passage from *St. Stephen's College*, was quoted with approval :

"The educational institutions are not business houses. They do not generate wealth. They cannot survive without public funds or private aid. It is not possible to have educational institutions without State aid. This was also the view expressed by Das C.J. in *Kerala Education Bill 1957* case".

Jeevan Reddy J. recognised :

... "the hard reality" that "private educational institutions are a necessity in the present context. It is not possible to do without them because the Governments are in no position to meet the demand.... Private educational institutions - including minority educational institutions - too have a role to play". Further, "no private educational institution can survive or subsist without recognition and/or affiliation.... Since the recognising/affiliating authority is the State, it is under an obligation to impose such conditions as part of its duty enjoined upon it by Article 14 of the Constitution".

## XII. MAJORITY RIGHTS FLOW FROM ARTICLE 14, 15, 19(1)(2), 21 AND 26(A)

Thus while it is true that it is only the minorities whose right to establish and administer educational institutions is mentioned in Article 30(1), it does not follow that the same is *denied* to the majority communities. It was considered necessary to make a special mention of the right of minorities by way of extra assurance to them. It is not correct to say that minorities were considered backward and needed special concessions through Article 30(1) to bring them up. The object was to make it clear that they will not be discriminated against. It was not intended to pamper them as favoured communities. It should follow therefore from Article 14 and 15 that the majority communities have a right to similar treatment at the hands of the State in the matter of recognition, affiliation, government-aid or non-displacement of management in respect of educational institutions established by majority communities as accorded to minority institutions. Of course, conditions can and ought to be imposed in regard to aid, affiliation and recognition in order to ensure proper standards of teaching, but the same have to be uniformly onerous and cannot be so drastic as to involve surrender by the community or the founders or the management of its right to establish and administer the institution.

The thesis that "the majority in a system of adult franchise hardly needs any protection; it can look after itself and protect its interests; any measure wanted by the majority can without much difficulty be brought on the statute

book because the majority can get that done by giving a mandate to the elected representatives; it is only the minorities who need protection" is with the utmost respect to the distinguished Justice Khanna in *St. Xavier's*, too naive to commend acceptance. It is coloured by a romantic view, of democracy as a government of the people, by the people, for the people - a view which he must have given up while later delivering his famous dissent in *A.D.M. Jabalpur v. Shiv Kant Shukla*.<sup>81</sup> Modern parliamentary democracies are run on a party system which in India in the post Mandal era is built largely on the basis of caste and communal combinations. Governments are returned to power not on the basis of issues or mandates. Managements of educational institution do not form a vote bank while their teachers do. The main religious majority, namely Hindus, are not a homogeneous monolith. It is a very much divided society. There are caste and sub-caste divisions, and the Supreme Court's deference to the legislative and executive wisdom on Articles 16(4) and 15(4) has not made things easier. Electoral arithmetic has led to all sorts of permutations and combinations. In some States, it is Muslim O.B.C. and S.C. combinations which are in power and the so-called forward sections of the majority community are at the receiving end. In another State the Dravidians (who traditionally disowned Hindu gods and goddesses) are dominant. In a couple of States the professedly atheistic Marxists are in power with the support of the minorities. In J & K likewise, the majority of Muslims are Sunnis, and there are sometimes clashes with Shias, as is the case in Pakistan too. In that Islamic country, the Government has even asserted the right to declare Ahmediyas as non-Muslims. In Punjab too, fundamentalist Sikhs have already declared Nirankaris to be non-Sikhs, and one hears from time to time of moves to deprive non-Keshadhari Sikhs of the right to vote at elections to the statutory Shiromani Gurudwara Prabandhak Committee. Thus one group of Sikhs in power may discriminate against educational institutions run by another group. Sometimes the Hindu-dominated parties enter into an alliance with the ruling Sikh group. Apart from these democratic realities, if the proposition of Khanna J. be taken to its logical conclusion, then there should be no need for any justifiable fundamental rights at all so far as citizens belonging to the majority community are concerned in today's set up the minorities' interests are well looked after by the legislatures and the executive and do not stand much in need of judicial protection. Hence it is expected of courts to say boldly that what is conceded for the minorities is also the due of the majority by virtue of Articles 14 and 15(1).

One may add that this is not a case of personal law reform which has been carried out in relation to communities (Hindus, Sikhs, Jains and Buddhists) which were ready to accept it and not in relation to Muslims who were opposed to it. The problem here has no religious or emotional overtones, but is simply one of restoring judicial consistency to interpretation of the regulatory powers



of the State.

Apart from Articles 14 and 15(1), this right to establish and administer educational institutions also flows, as seen above, from Article 19(1)(g) and 26(a), which make no distinction between majority and minority communities. The right of students to education, as a fundamental right under Article 21, also implies that they as well as their parents have right to choice of institution in which they would like the former to be educated. Every community has a right to found and administer educational and other charitable institutions and to run them according to its perceptions of what is best for the community and for the institution, subject of course to uniformly applicable State regulations without distinction of religion or language, minority or majority.

The only consequence of this will be that provisions relating to displacing of managements through statutory Schemes of Administration or through take-over of institutions and appointment of authorised controllers and also those divesting the managements of the powers of appointment and discipline pertaining to teachers will have to be treated as unconstitutional in so far as they relate to majority institutions too, to the same extent as they have been treated *vis-a-vis* minority institutions. And it will not be such a bad thing from the educational angle either. The ground reality is that just as nationalisation of many private industries on ground of mismanagement by industrialists has proved counter-productive, so also has the taking over of the management of educational institutions. The cause for interference in each case was the acts of mismanagement and dissipation on the part of private mill-owners or school/college managers. But the bureaucrats displacing them have, by and large, not felt any commitment to the industry/institution at all and have succumbed to political pressures, with the result that things have only worsened instead of improving. That is why they are now being re-privatised. It is only through de-politicisation of control over the institutions that the managements can be better and more evenly disciplined. Deprivation of management of their powers in regard to appointment and discipline of teachers has likewise led to a steep fall in discipline and standards. Many teachers do not care to listen even to their Principal or Head of Department, what to say of the management. Absenteeism, indulgence in private tuitions and running of coaching schools are the order of the day. So withdrawal of such strangulatory provisions can only lead to improving things rather than the contrary. Of course regulatory provisions to the same extent - no more, no less, as have been accepted to be necessary for the protection of teachers of minority institutions would in any case continue in relation to teachers of majority institutions also. The trend the world over is now for less and less of Government. If maladministration can be prevented in the case of minority institutions without emasculating the management, the same should be possible for majority institutions too. All

institutions irrespective of any discrimination or distinction should be places of worship or learning for students.

Last, but not the least, the Supreme Court has itself made it clear that it cannot, countenance, in the words of Khanna J., endorsed by Krishna Iyer J., any privileged or pampered section of the population. It only wants to ensure that the minorities are not discriminated against. But in effect the judicial application of double standards in dealing with majority and minority institutions has brought about the very situation which the learned judges have decried and disclaimed. This can only lead to heart-burning between majorities and minorities giving rise to the "feeling that a section of population consisted of first-class citizens and the other of second class citizens" (again in the words of Khanna J.). As observed by Pandian J, in *Raghunathrao v. Union of India*,<sup>82</sup> "fraternity", in the preamble to the Constitution, means a common brotherhood of all Indians. For bringing this about, quoting Dr. Ambedkar, the learned Judge added that "disruptive forces of regionalism, communalism and linguism have to be discouraged; for preservation of the unity and integrity of India every citizen should be made to feel that he is Indian first irrespective of other basis. In this view any measure at bringing about equality should be welcome".

#### NOTES AND REFERENCES

- \* Retired Judge, Allahabad High Court, ex-Lokayukta U.P., former Member, Law Commission of India.
- 1. (1995) 4 SCC 646.
- 2. *Arya Samaj Education Trust v. Director of Education*, AIR 1976 Del 207.
- 3. AIR 1962 Pat 101.
- 4. *Id.*, paras 19, 21 and 29.
- 5. (1975) 1 SCC 589, para 11.
- 6. AIR 1953 Nag 70.
- 7. AIR 1958 Pat 359.
- 8. AIR 1966 SC 1119.
- 9. AIR 1982 Cal 101.
- 10. (1971) 2 SCC 261.
- 11. (1971) 2 SCC 269.
- 12. It is a different matter that this salutary principle is now being abused by politicians who, with the meek acquiescence of the Supreme Court (severely criticised by noted jurists like Palkhivala and Seervai; also see the dissenting judgments of Thommen, Kuldeep Singh and R.M. Sahai JJ. in the *Indra Sawhney* case, 1992 Supp-3 SCC 217), have already succeeded in equating castes and sub-castes with "classess" within the meaning of Articles 15 and 16, thus perpetuating and strengthening the pernicious caste system, and are now merrily going about promising to annoint as "backward" every other group whether based on caste or religion that becomes politically important enough as a vote-bank to wrest the nomenclature and even clamouring for the removal of the judicially

imposed ceiling of fifty percent and for extension of reservation to the private sector and to the higher judiciary and the armed forces.

13. NATIONAL SAMPLE SURVEY, 43rd Round, 1987-88 (for both males and females).
14. (1992) 1 SCC 558.
15. AIR 1958 SC 956.
16. *Id.*, para 31. In subsequent decisions, similar provisions were held to be violative of Article 30(1), vide Khanna J. in *Ahmadabad St. Xaviers College v. Gujarat* (1974) 1 SCC 717 (para 109). But still later decisions, at the instance of teachers of minority institutions, have, even while paying lip service to the binding ruling in *St. Xaviers*, considerably watered down its impact, as will be discussed later.
17. *Id.*, para 33.
18. *Id.*, para 44.
19. AIR 1963 SC 540.
20. H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 2, Ed. IV, 1993 at 1302.
21. (1993) 1 SCC 645 at para 10.
22. *Id.*, para 15.
23. AIR 1969 SC 465.
24. AIR 1970 SC 259.
25. AIR 1970 SC 2079; (1970) 2 SCC 417.
26. According to Khanna J. in *Ahmadabad St. Xavier's College, infra* n. 32 at para 110 of SCC, this was a reference to the Radhakrishnan Commission which had in 1948-49 recommended, *inter alia*, that constituent colleges should be preferred to affiliated colleges. Khanna J. pointed out that the subsequent reports of the KOTHARI COMMISSION (1965-66) and the DONGERKERY COMMISSION (1972) had not made any such observation, and that in any case if a provision is violative of Article 30(1), the fact that it has been enacted in pursuance of the recommendations of an expert body would not prevent the Court from striking it down.
27. *Supra* n. 25, para 18 of SCC.
28. *Id.*, para 19.
29. (1971) 2 SCC 261.
30. (1971) 2 SCC 269.
31. The requirement to induct the Principal and one Head of Department (by rotation every year, in order of seniority) in the managing committee was, however, upheld by the majority (Krishna Iyer and A.C. Gupta JJ.) in *Gandhi Faiz-e-Am College v. Agra University*, (1975) 2 SCC 283, distinguishing *D.A.V. College* on the ground that in the latter case the requirements were much more onerous, namely, (a) a limit to the strength of the governing body; (b) the approval of the Senate to its constitution, and (c) the inclusion of two representatives of the University, besides the Principal. Krishna Iyer J. pointed out in *Gandhi Faiz* that *Very Rev. Mother Provincial, supra* and *Ahmadabad St. Xaviers College, infra* n. 32, were similarly distinguishable. Mathew J. however dissented.
32. AIR 1974 SC 1389; (1974) 1 SCC 717.
33. *Ibid.*

34. Krishna Iyer J. in *Gandhi Faiz-e-Am College v. University of Agra*, (1975) 2 SCC 283 (para 12) laid special stress on this "sometimes ill-remembered" passage and also on Khanna J's several other observations to be noticed hereinafter. Chinnappa Reddy J, delivering judgment for a division bench consisting of himself and G.L. Oza J. in *Frank Anthony Public Schools Employees Association v. Union of India*, (1986) 4 SCC 707 (para 11) also drew attention to this passage from Khanna J.
35. *Supra* n. 32.
36. *Keshavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.
37. *Id.*, para 89.
38. *Id.*, para 91.
39. *Id.*, para 128.
40. *Id.*, para 131.
41. *Id.*, paras 131 and 133.
42. *Id.*, paras 135 and 136.
43. 333 US 203.
44. *Supra* n. 36 paras 138, 142 and 150 to 171.
45. (1975) 2 SCC 283.
46. *Id.*, para 259.
47. *Id.*, para 263.
48. *Id.*, paras 266 and 267.
49. *Id.*, para 268.
50. *Id.*, para 271.
51. *Id.*, para 280.
52. *Id.*, paras 294 to 301.
53. AIR 1979 SC 52.
54. AIR 1980 SC 1042.
55. AIR 1987 SC 311.
56. 1994 Supp 2 SCC 509.
57. (1990) 1 SCC 428.
58. (1987) SCC 516.
59. (1988) SCC 206.
60. (1992) Supp 2 SCC 301.
61. (1992) 1 SCC 558.
62. *Supra* n. 30.
63. *Supra* n. 15.
64. AIR 1990 SC 1148.
65. AIR 1990 SC 1381.
66. (1993) 3 SCC 895.
67. (1993) 1 SCC 645; (1994) 2 SCC 734; AIR 1986 SC 1490; (1991) 3 SCC 87.

68. (1984) 4 SCC 500.
69. AIR 1954 SC 561.
70. (1994) 1 SCC 550; (1990) 2 SCC 352.
71. AIR 1979 SC 83.
72. AIR 1954 SC 1307.
73. *Supra* n. 23.
74. AIR 1958 SC 956.
75. *Supra* n. 32. See also, (1990) 1 SCC 128; AIR 1970 SC 2079; AIR 1987 Cal 232 where similar observations were made by the Courts.
76. AIR 1954 SC 561.
77. AIR 1980 SC 1042.
78. (1991) 2 SCC 916.
79. *Supra* n. 21.
80. (1986) 4 SCC 51.
81. AIR 1976 SC 1207.
82. (1994) Supp. SCC 191, para 109.