T.M.A. Pai Foundation & Ors vs State Of Karnataka & Ors (With Other ... on 31 October, 2002

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Author: V.N. Khare

Bench: V. N. Khare

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           CASE NO.:
Writ Petition (civil)  317 of 1993

PETITIONER:
T.M.A. PAI FOUNDATION & ORS.

RESPONDENT:
STATE OF KARNATAKA & ORS (with other connected matters)

DATE OF JUDGMENT: 31/10/2002

BENCH:
V. N. KHARE.

JUDGMENT:
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J U D G M E N T V.N. KHARE, J.

It is interesting to note that Shri K.M. Munshi, one of the members of the Constituent Assembly while intervening in the debate in the Constituent Assembly with regard to the kind of religious education to be given in governmental aided institution stated thus:

> "if the proposed amendment is accepted, the matter has to be taken to Supreme Court and eleven worthy Judges have to decide whether the kind of education given is of a particular religion or in the nature of elementary philosophy of comparative religion. Then, after having decided that, the second point which the learned Judges will have to direct their attention to will be whether this elementary philosophy is calculated to broaden the minds of the pupils or to narrow their minds. Then they will have to decide upon the scope of every word, this being a justiciable right which

> has to be adjudicated upon by them. I have no doubt members of my profession will be very glad to throw considerable light on what is and is not a justiciable right of this nature (A Member: For a fee). Yes, for very good fee too." (See Constitutional Assembly Debates Official Report. Reprinted by Lok Sabha Secretariat) It may be noted that at the time when the Constituent Assembly was framing the Constitution of India the strength of Judges of Supreme Court was not contemplated as eleven Judges. It appears what Shri Munshi stated was prophetic or a mere co-incidence. Today eleven Judges of the Supreme Court have assembled to decide the question of rights of the minorities.
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> Question No. 1. What is the meaning and content of the expression of "minorities in Article 30 of the Constitution of India?
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> The first question that is required to be answered by this Bench is who is a minority. The expression "minority" has been derived from the Latin word "minor" and the suffix "ity" which means "small in number".

According to Encyclopaedia Britannica 'minorities' means "groups held together by ties of common descent, language or religious faith and feeling different in these respects from the majority of the inhabitants of a given political entity". J.A. Laponce in his book "The Protection to Minority"

> describes 'Minority' as a group of persons having different race, language or religion from that of majority of inhabitants. In the Year Book on Human Rights U.N. Publication 1950 ed. minority has been described as non dominant groups having different religion or linguistic traditions than the majority population.
>
> The expression minority has not been defined in the Constitution. As a matter of fact when Constitution was being drafted Shri T.T. Krishanamachari one of the members of the Constituent Assembly proposed an amendment which runs as under:
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> "That in Part XVI of the Constitution, for the word "minorities" where it occurs, the word "certain classes" be substituted".

We find that expression 'minorities' has been employed only at four places in the Constitution of India. Head note of Article 29 uses the word minorities. Then again the expressions Minorities or minority have been employed in head note of Article 30 and sub clauses (1) and (2) of Article

30. However, omission to define minorities in the Constitution does not mean that the employment of words 'minorities' or 'minority' in Article 30 is of less significance. At this stage it may be noted that the expression 'minorities' has been used in Article 30 in two senses - one based on religion and other on basis of language. However prior to coming into force of the Constitution the expression minority was understood in terms of a class based on religion having different electorates. When India attained freedom, the framers of the Constitution threw away the idea of having separate electorates based on religion and decided to have a system of joint electorates so that every

candidate in an election would have to seek support of all sections of the constituency. In turn special safeguards were provided to minorities and they were made part of Chapter III of the Constitution with a view to instill a sense of confidence and security to the minorities.

But the question arises what is the test to determine minority status based on religion or language of a group of persons residing in a State or Union Territory. Whether minority status of a given group of persons has to be determined in relation to the population of the whole of India or population of the State where the said group of persons is residing. When the Constitution of India was being framed it was decided that India would be Union of States and Constitution to be adopted would be of federal character. India is a country where many ethnic or religious and multi language people reside. Shri K.M. Munshi one of the members of Constituent Assembly in his Note and Draft Article on (Right to Religion and Cultural Freedom) referred to minorities as national minorities. The said draft Article VI (3) runs as under:

> "(3) Citizens belonging to national minorities in a State whether based on religion or language have equal rights with other citizens in forming, controlling and administering at their own expense; charitable, religious and social institutions, schools and other educational establishments with the free use of their language and practice of their religions."

Dr. B.R. Ambedkar while intervening in debate in regard to amendment to draft Article 23 which related to the rights of religious and linguistic minorities stated that "the term 'minority' was used therein not in the technical sense of the word minority as we have been accustomed to use it for purposes of certain political safeguards, such as representation in the legislature, representation in the services and so on". According to him , the word minority is used not merely to indicate, the minority in technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense but which are nonetheless minorities in the cultural and linguistic sense. Dr. Ambedkar cited following example which runs as under:

> "For instance, for the purposes of this Article 23, if a certain number of people from Madras came and settled in Bombay for certain purposes, they would be, although not a minority in the technical sense, cultural minorities. Similarly, if a certain number of Maharashtrians went from Maharashtra and settled in Bengal, although they may not be minorities in technical true sense, they would be cultural and linguistic minorities in Bengal.
>
> The Article intends to give protection in the matter of culture, language and script not only to a minority technically, but also to a minority in the wider sense of the term as I have explained just now. That is the reason why we dropped the word minority because we felt that the word might be interpreted in the narrow sense of the term when the intention of this House, when it passed article 18, was to use the word "minority" in a much wider sense, so as to give cultural protection to those who were technically not minorities but minorities nonetheless." (See Constitutional Assembly Debates Official Report reprinted by Lok Sabha Secretariat) The draft article and the

Constituent Assembly Debates in unambiguous terms show that minority status of a group of persons has to be determined on the basis of population of a State or Union Territory.

Further a perusal of Articles 350A and 350B which were inserted by the Constitution (7th Amendment) Act 1956 indicates that the status of linguistic minorities has to be determined as state-wise linguistic minorities/groups. Thus the intention of the framers of the Constitution and subsequent amendments in the Constitution indicate that protection was conferred not only to religious minorities but also to linguistic minorities on basis of their number in a State (unit) where they intend to establish an institution of their choice. It was not contemplated that status of linguistic minority has to be judged on basis of population of the entire country. If the status of linguistic minorities has to be determined on basis of the population of the country, the benefit of Article 30 has to be extended to those who are in majority in their own States.

The question who are minorities arose for the first time in the case of Kerala Education Bill case 1959 SCR P.995 at 1047-50. In the said decision it was contended by the State of Kerala that in order to constitute a minority who may claim protection of Article 30 (1) persons or group of persons must numerically be minority in the particular region in which the educational institution in question is or is intended to be situated. Further according to State of Kerala, Anglo-Indians or Christians or Muslims of that locality taken as a unit, will not be a minority within the meaning of the Article and will not, therefore, be entitled to establish and maintain educational institutions of their choice in that locality, but if some of the members belonging to the Anglo Indian or Christians community happen to reside in another ward of the same municipality and their number be less than that of the members of other communities residing there, then those numbers of Anglo-Indian or Christians community will be a minority within the meaning of Article 30 and will be entitled to establish and maintain educational institution of their choice in that locality. Repelling the argument this Court held thus:-

"We need not however, on this occasion go further into the matter and enter upon a discussion and express a final opinion as to whether education being a State subject being item 11 of List II of the Seventh Schedule to the Constitution subject only to the provisions of entries 62, 63, 64 and 66 of List I and entry 25 of List III, the existence of a minority community should in all circumstances and for purposes of all laws of that State be determined on the basis of the population of the whole State or whether it should be determined on the State basis only when the validity of a law extending to the whole State is in question or whether it should be determined on the basis of the population of a particular locality when the law under attack applies only to that locality, for the Bill before us extends to the whole of the State of Kerala and consequently the minority must be determined by reference to the entire population of that State. By this test Christians, Muslims and Anglo-Indians will certainly be minorities in the State of Kerala."

In A.M. Patroni vs. E.C.Kesavan AIR 1965 Kerala, 75 it was held as this:

> "6. The contention of the petitioners is that they have an exclusive right to administer the institution under Art. 30 (1) of the Constitution and that the order of the Director of Public Instruction constitutes violation of that right. Clause (1) of Art.30 provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice; and clause (2) that the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. The word "minority" is not defined in the Constitution; and in the absence of any special definition we must hold that any community, religious or linguistic, which is numerically less than fifty per cent of the population of the State is entitled to the fundamental right guaranteed by the article."

The view that in a state where a group of persons having distinct language is numerically less than fifty per cent of population of that state are to be treated as linguistic minority was accepted by the Government of India and implemented while determining the minority status of persons or group of persons and the same is evident from the views expressed by Government of India before the Special Rapporteur of the U.N. Sub- Commission on Prevention of Discrimination and Protection of Minorities, when he was collecting information relating to the study on the concept of Minority and cope of the ICCPR 1966.

The Special Rapporteur in his report "Study on the Rights of Persons Belonging to Ethnic Religious and Linguistic Minorities" published by the Centre for Human Rights, Geneva states on the interpretation of the term "Minority" as thus:

> "For the purposes of the study, an ethnic, religious or linguistic minority is a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population."

In the said report, views of the Government of India which was based on decision of Kerala High Court in the case of A.M. Paatroni was referred to which runs as under:

> "(39) In India, the Kerala High Court, after observing that the Constitution granted specific rights to minorities, declared that "in the absence of any special definition we must hold that any community religious or linguistic, which is numerically less than 50% of the population of the State is entitled to the rights guaranteed by the Constitution".

However in the case of D.A.V.College vs. State of Punjab 1971 Suppl. S.C.R. p.688 at 697, an argument was raised that minority status of a person or group of persons either religious or linguistic is to be determined by taking into consideration the entire population of the country.

While dealing with the said argument this Court held as follow:

> "Though, there was a faint attempt to canvas the position that religious or linguistic minorities should be minorities in relation to the entire population of the country, in our view they are to be determined only in relation to the particular legislation which is sought to be impugned, namely that if it is the State legislature these minorities have to be determined in relation to the population of the State".

It may be noted that in the case of D.A.V.College (supra), this Court was dealing with the State legislation and in that context observed that if it is the state legislation, minority status has to be determined in relation to the population of the State. However, curiously enough, there is no discussion that if the particular legislation sought to be impugned is a central legislation, minority status has to be tested in relation to the population of the whole of the country. In the absence of any such discussion it cannot be inferred that if there is a central legislation, the minority status of a group of persons has to be determined in relation to the entire population of the country.

In the year 1976 by Fourty-Second Amendment Act, the Entries 11 and 25 of List II of Seventh Schedule relating to Education and Vocational and Technical Training Labour respectively were transferred to the Concurrent List as Entry No.25. In the Constitution of India as enacted Entries 11 and 25 of List II were as under:

> Entry 11 "Education including Universities subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III".
>
> Entry 25 "Vocational or Technical training of labour"
>
> By the Constitution (42nd Amendment) Act, 1976 Entry 25 of List III was substituted by the following entry viz:
>
> Entry 25 "Education including technical education, medical education and universities subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of Labour".

And Entry 11 of List II was omitted.

On 6.2.1997 when these matters came up before a Bench of seven Judges of this court, the Bench passed an order which runs as under:

> "In view of the 42nd Amendment to the Constitution placing with effect from 3.1.1977 the subject "Education in Entry 25 List III of the 7th Schedule to the Constitution and the quoted decisions of the Larger Benches of this Court being of the pre amendment era, the answer to the brooding question, as to who in the context constitutes a minority, has become one of the utmost significance and therefore, it is appropriate that these matters are placed before a Bench of at least 11 Hon'ble Judges for

determining the questions involved".

It is for the aforesaid reasons this question has been placed before this Bench.

In view of the referring order the question that arises for consideration is whether the transposition of the subject Education from List II to List III has brought change to the test for determining who are minorities for the purposes of Article 30 of the Constitution.

It may be remembered that various entries in three lists of the Seventh Schedule are not powers of legislation but field of legislation. These entries are mere legislative heads and demarcate the area over which the appropriate legislatures are empowered to enact law. The power to legislate is given to the appropriate legislature by Article 246 and other articles. Article 245 provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for whole or any part of the State. Under Article 246 Parliament has exclusive power to make law with respect to any of the matters enumerated in List I in the Seventh Schedule. Further under clause (2) of Article 246 Parliament and subject to clause (1) the legislature of any State are empowered to make law with respect to any of the matters enumerated in List III Seventh Schedule and under clause (3) of Article 246, the legislature of any State is empowered to enact law with respect to any of the matters enumerated in List II in the Seventh Schedule subject to clauses (1) and (2). From the aforesaid provisions it is clear that it is Article 246 and other Articles which either empower Parliament or State Legislature to enact law and not the Entries finding place in three Lists of Seventh Schedule. Thus the function of entries in three lists of the Seventh Schedule is to demarcate the area over which the appropriate legislatures can enact laws but do not confer power either on Parliament or State Legislatures to enact laws. It may be remembered, by transfer of Entries, the character of entries is not lost or destroyed. In this view of the matter by transfer of contents of entry 11 of List II to List III as entry 25 has not denuded the power of State Legislature to enact law on the subject 'Education' but has also conferred power on Parliament to enact law on the subject "Education". Article 30 confers fundamental right to linguistic and religious minorities to establish and administer educational institutions of their choice. The test who are linguistic or religious minorities within the meaning of Article 30 would be one and the same either in relation to a State legislation or Central legislation. There cannot be two tests one in relation to Central legislation and other in relation to State legislation. Therefore, the meaning assigned to linguistic or religious minorities would not be different when the subject "Education" has been transferred to the Concurrent List from the State List. The test who are linguistic or religious minorities as settled in Kerala Education Bill's case continues to hold good even after the subject "Education" was transposed into Entry 25 List III of Seventh Schedule by the 42nd Amendment Act. If we give different meaning to the expression "minority" occurring in Article 30 in relation to a central legislation, the very purpose for which protection has been given to minority would disappear. The matter can be examined from another angle. It is not disputed that there can be only one test for determining minority status of either linguistic or religious minority. It is, therefore, not permissible to argue that the test to determine the status of linguistic minority would be different than the religious minorities. If it is not so, each linguistic State would claim protection of Article 30 in its own State in relation to a central legislation which was not the intention of framers of the Constitution nor the same is borne out from

language of Article 30. I am, therefore, of the view that the test for determining who are the minority, either linguistic or religious, has to be determined independently of which is the law, Central or State.

In view of what has been stated above, my conclusion on the question who are minorities either religious or linguistic within the meaning of Article 30 is as follows:

> The person or persons establishing an educational institution who belong to either religious or linguistic group who are less than fifty per cent of total population of the state in which educational institutional is established would be linguistic or religious minorities.
>
> Conflict between ARTICLE 29(2) AND ARTICLE 30(1) whether Article 30(1) is subject to Article 29(2). What are the contents of Art.30(1)?
>
> The issue in hand is full of complexities and an answer is not simple. Under Article 30(1), linguistic or religious minorities' fundamental rights to establish and administer educational institution of their choice have been protected. Such institutions are of three categories. First category of institutions are the institutions which neither take government aid nor are recognised by the State or by the University. Second category of institutions are those which do not take financial assistance from the government but seek recognition either from the State or the University or bodies recognised by the government for that purpose and the third category of institutions which seek both government aid as well as recognition from the State or the University.
>
> Here, I am concerned with the third category of minority institutions and my answer to the question is confined to the said category of minority educational institutions.
>
> It is urged on behalf of the minority institutions that Article 30(1) confers an absolute right on linguistic or religious minorities to establish and administer educational institutions of their choice. According to them, the expression 'choice' indicates that one of the purposes of establishing educational institutions is to give secular education to the children of minority communities and, therefore, such institutions are not precluded from denying admission to members of non-minority communities on grounds only of religion, race, caste, language or any of them. In nutshell, the argument is that Article 30(1) is not subject to Article 29(2). Whereas, the argument of learned Solicitor General and other learned counsel is that any minority institution receiving government aid is bound by the mandate of Article 29(2) and such a minority institution cannot discriminate between the minority and majority while admitting students in such institutions. According to them, Article 30(1) does not confer an absolute right on the institutions set up by the linguistic or religious minorities receiving government aid and such institutions cannot extend preference to the members of their own community in the matter of admission of students in the

institutions.

The question, therefore, arises whether minority institutions receiving government aid are subject to provisions of Article 29(2).

Learned counsel for the parties has pressed into service various rules of constructions for interpreting Article 29(2) and Article 30(1) in their own way. No doubt, various rules of construction laid down by the courts have been of considerable assistance as they are based on human experience. The precedents show that by taking assistance from rule of interpretations, the courts have solved many problems. We, therefore, propose to take assistance of judicial decisions as well as settled rules of interpretation while interpreting Articles 29(2) and 30(1) of the Constitution.

After the Constitution of India came into force, Articles 29 and 30 came up for interpretation before various High Courts and the Apex Court. There appears to be no unanimity amongst the judicial decisions rendered by the courts as regards the extent of right conferred by Article 30(1). One line of decisions is that minority institutions receiving government aid are bound by constitutional mandate enshrined in article 29(2). The second line of decisions is that minority institutions receiving government aid while admitting students from their own communities in the institutions established by them are free to admit students from other communities belonging to majority, and such admission of students in the institution do not destroy the minority character of the institution. The third line of decisions is that under Article 30(1) fundamental right declared in terms is absolute although it was not decided whether Article 30(1) is subject to Article 29(2) or not. However, the view in the said decisions is that the right conferred under Article 30(1) is an absolute right. The fourth line of decision is that there can be no communal reservation for admission in Govt. or government aided institutions. The aforesaid categories of decisions shall hereinafter be referred to as first, second, third and fourth category of decisions.

The first decision in first category of decisions of this Court is The State of Bombay vs. Bombay Education Society & Ors. 1955 (1) SCR

568. In this case, a Society consisting of members of Anglo-Indian community whose mother tongue was English set up an institution in the then State of Bombay. The State of Bombay in the year 1955 issued an Order that no school shall admit to class where English is used as a medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English namely, Anglo-Indians and citizens of non-

Asiatic descent. One of the members of the Christian community sought admission in the school on the premise that his mother tongue was English. He was refused admission in view of the aforesaid Government Order, as the student was neither an Anglo-Indian whose mother tongue was English nor a citizen of non-Asiatic descent. This was challenged by means of a petition under Article 226

before the Bombay High Court and the Govt. order was struck down. On appeal to the Apex Court, this Court held thus:

> "Article 29(1) gives protection to any section of the citizens having a distinct language, script or culture by guaranteeing their right to conserve the same. Article 30(1) secures to all minorities whether based on religion or language, the right to establish and administer educational institutions of their choice. Now, suppose the State maintains an educational institution to help conserving the distinct language, script or culture of a section of the citizens or makes grants-in-aid of an educational institution established by a minority community based on religion or language to conserve their distinct language, script or culture who can claim the protection of Article 29(2) in the matter of admission into any such institution.? Surely, the citizens of the very section whose language, script or culture is sought to be conserved by the institution or the citizen who belonged to the minority group which has established and is administering the institution, do not need any protection against themselves and therefore, Article 29(2) is not designed for the protection of this section or this minority. Nor do we see any reason to limit article 29(2) to citizens belonging to a minority group other than the section or the minorities referred to in article 29(1) or article 30(1), for the citizens, who do not belong to any minority group, may quite conceivably need this protection just as much as the citizens of such other minority groups. If it is urged that the citizens of the majority group are amply protected by article 15 and do not require the protection of article 29(2), then there are several obvious answers to that argument. The language of article 29(2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15 protects all citizens against the State whereas the protection of article 29(2) extents against the State or any body who denies the right conferred by it. Further article 15 protects all citizens against discrimination generally, but article 29(2) is a protection against a particular species of wrong namely denial of admission into educational institutions of the specified kind. In the next place article 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29(2) confers a special right on citizens for admission into educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination.
>
> (emphasis supplied) In Re Kerala Education Bill, 1957 1959 SCR 995, it was held thus:

> "Under cl. (1)of Article 29 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 has the right to conserve the same. It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Art. 30(1) which has hereinbefore been quoted in full. This right, however, is subject to cl. 2 of Art. 29 which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

(emphasis supplied) After holding that Article 30(1) is subject to clause (2) of Article 29, this Court further held thus:

> "There is no such limitation in Art. 30(1) and to accept this limitation will necessarily involve the addition of the words "for their own community"

in the Article which is ordinarily not permissible according to well established rules of interpretation. Nor is it reasonable to assume that the purpose of Art. 29(2) was to deprive minority educational institutions of the aid they receive from the State. To say that an institution which receives aid on account of its being a minority educational institution must not refuse to admit any member of any other community only on the grounds therein mentioned and then to say that as soon as such institution admits such an outsider it will cease to be a minority institution is tantamount to saying that minority institutions will not, as minority institutions, be entitled to any aid. The real import of Art. 29(2) and Art. 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non- member into it the minority institution does not shed its character and cease to be a minority institution."

(emphasis supplied) In D.A.V. College etc. vs. Punjab State & Ors.1971 (suppl.) S.C.R. p.688 it was held thus:

> "A reading of these two Articles together would lead us to conclude that a religious or linguistic minority has a right to establish and administer educational institutions of its choice for effectively conserving its distinctive language, script or culture, which right however is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards. This right is further subject to clause (2) of Article 29 which provides that no citizen shall be denied admission into any educational institution which is maintained by the State or receives aid out of State funds. on grounds only of religion, race, caste, language or any of them. While this is so these two articles are not inter-linked nor does it permit of their being always read together."

In St. Stephen's College vs. University of Delhi 1992 (1) SCC 558, Shetty J. speaking for the majority held that Article 29(2) applies to minority as well as non-minority institutions.

From the decisions referred to above, the principles that emerge are these:

> (1) Article 29(2) confers right on the citizens for admission into educational institution maintained or aided by the State without discrimination. To limit this right only to citizens belonging to minority group will be to provide double protection for such citizens and to hold that citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for maintenance of which they make contribution by way of taxes. There is no reason for such discrimination;
>
> (2) Article 30(1) is subject to Article 29(2); and (3) the real import of Articles 29(2) and 30(1) is that they clearly contemplate minority institutions with the sprinkling of the outsiders admitted into it and by admitting the non-

minority into it, the minority institutions do not shed its character and cease to be minority institutions.

The first decision in the second category of cases is in Fev. Father W. Proost & Ors. vs. The State of Bihar & Ors. 1969 (2) SCR 73. It was held therein that the right of minority to establish educational institutions of their choice under Article 30(1) is not so limited as not to admit members of other communities. Such minority institutions while admitting members from their own community are free to admit members of non-minority communities. The expression 'choice' includes to admit members from other communities. In the State of Kerala etc. vs. Very Rev. Mother Provincial etc. 1971(1) SCR 734, it was held that it is permissible that a minority institution while admitting students from its community may also admit students from majority community. Admission of such non- minority students would bring income and the institution need not be turned away to enjoy the protection.

The legal principle that emerges from the aforesaid decisions is that a minority institution while admitting members from its own community is free to admit students from non-minority community also.

The first decision in the third category of cases is Rev. Sidhajbhai Sabhai & Ors. vs. State of Bombay & Anr. 1963 (3) SCR 837. In the said decision, although the question as to whether Article 30(1) is subject to Article 29(2) was not considered, yet it was held that under Article 30(1) fundamental right declared in terms absolute. It was also held that unlike fundamental freedoms guaranteed under Article 19 it is not subject to reasonable restrictions. It is intended to be a real right for the protection of minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and not to be whittled down by so-called regulatory measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole.

In Rt. Rev. Magr. Mark Netto vs. Government of Kerala & Ors. - 1979 (1) SCR 609, a question arose whether Regional Deputy Director of Public Instructions can refuse permission to a minority institution to admit girl students. This Court while held that refusal to grant permission was violative of Article 30(1).

The legal principles that emerges from the aforesaid category of decisions are these:

> (1) that article 30(1) is absolute in terms and the said right cannot be whittled by down regulatory measures conceived in the interest not of minority institutions but of public or the nation as a whole; and (2) the power of refusal to admit a girl student in a boy's minority institution is violative of Article 30(1).

The fourth category of cases is the decision in the State of Madras vs. Srimathi Champakam Dorairajan etc. 1951 SCR 525 wherein it was held thus:

> "This Court in the context of communal reservation of seats in medical colleges run by the government was of the view that the intention of the Constitution was not to introduce communal consideration in matters of admission into any educational institution maintained by the State or receiving aid out of State funds. However, it may be noted that this case was in relation to an institution referred to in Article 30(1) but has been cited for the purpose that there cannot be communal reservation in the educational institution receiving aid out of State funds."

(emphasis supplied) From the aforesaid four categories of decisions, it appears that there is not a single decision of this Court where it has been held that Article 30(1) is not subject to Article 29(2). On the contrary there are bulk of decisions of this Court holding that minority institution cannot refuse admission of members of non-minority community and Article 30(1) is subject to Article 29(2). If I go by precedent, it must be held that Article 30(1) is subject to Article 29(2). However, learned counsel for minority institutions strongly relied upon the decision in the case of Rev. Sidhajbai (supra) and argued that once Article 30(1) is fundamental right declared absolute in terms, it cannot be subjected to Article 29(2). Since this Bench is of eleven Judges and decisions of this Court holding that Article 30(1) is subject to Article 29(2) are by lesser number of Judges I shall examine the question independently.

One of the known methods to interpret a provision of an enactment or the Constitution is to look into the historical facts or any document preceding the legislation.

Earlier, to interpret a provision of the enactment or the Constitution on the basis of historical facts or any document preceding the legislation was very much frowned upon, but by passage of time, such injunction has been relaxed.

In His Holiness Kesavananda Bharati Sripadagalvaru etc. vs. State of Kerala & Anr. Etc. 1973(4) SCC 225, it was held that the Constituent Assembly debates although not conclusive, yet the intention of framers of the Constitution in enacting provisions of the Constitution can throw light in ascertaining

the intention behind such provision.

In R. S. Nayak vs. A. R. Antulay - AIR 1984 SC 684 at page 686, it was held thus:

> "Reports of the Committee which preceded the enactment of a legislation, reports of Joint Parliament Committee, report of a commission set up for collecting information leading to the enactment are permissible external aids to construction. If the basic purpose underlying construction of legislation is to ascertain the real intention of the Parliament, why should the aids which Parliament availed of such as report of a Special Committee preceding the enactment, existing state of Law, the environment necessitating enactment of legislation, and the object sought to be achieved, be denied to Court whose function is primarily to give effect to the real intention of the Parliament in enacting the legislation. Such denial would deprive the Court of a substantial and illuminating aid to construction.
>
> The modern approach has to a considerable extent eroded the exclusionary rule even in England."

Thus, the accepted view appears to be that the report of the Constituent Assembly debates can legitimately be taken into consideration for construction of the provisions of the Act or the Constitution. In that view of the matter, it is necessary to look into the Constituent Assembly debates which led to enacting Articles 29 and 30 of the Constitution.

The genesis of the provisions of Articles 29 and 30 needs to be looked into in their two historical stages to focus them in their true perspective. The first stage relates to pre-partition deliberations in the Committees and Constituent Assembly and the second stage after the partition of the country. On 27th of February, 1947, several Committees were formed for the purpose of drafting Constitution of India and on the same day, the Advisory Committee appointed a Sub-Committee on minorities with a view to submit its report with regard to the rights of the minorities. Before the Fundamental Rights Sub-Committee, Shri K.M. Munshi one of its members wanted certain rights for minorities being incorporated in the fundamental rights. He was advised by the Fundamental Rights Committee that the said report regarding rights of minorities may be placed before the Minority Sub- Committee. On April 16, 1947, Shri K.M. Munshi circulated a letter to the members of the Sub-Committee on minorities recommending that certain fundamental rights of minorities be incorporated in the Constitution. The recommendations contained in the said letter run as under:

> "l. All citizens are entitled to the use of their mother tongue and the script thereof and to adopt, study or use any other language and script of his choice.
>
> 2. Citizens belonging to national minorities in a State whether based on religion or language have equal rights with other citizens in forming, controlling and administering at their own expense, charitable, religious and social institutions, schools and other educational establishments with the free use of their language and practice of their religion.

(emphasis supplied)

3. Religious instruction shall not be compulsory for a member of a community which does not profess such religion.

4. It shall be the duty of every unit to provide in the public educational system in towns and districts in which a considerable proportion of citizens of other than the language of the unit are residents, adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such citizens through the medium of their own language.

Nothing in this clause shall be deemed to prevent the unit from making the teaching of the national language in the variant and script of the choice of the pupil obligatory in the schools.

5. No legislation providing state aid for schools shall discriminate against schools under the management of minorities whether based on religion or language.

6. (a) Notwithstanding any custom or usage or prescription, all Hindus without any distinction of caste or denomination shall have the right of access to and worship in all public Hindu temples, choultries, dharmasalas, bathing ghats, and other religious places.

(b) Rules of personal purity and conduct prescribed for admission to and worship in these religious places shall in no way discriminate against or impose any disability on any person on the ground that he belongs to impure or inferior caste or menial class."

One of the reasons for recommendation of the aforesaid rights was the Polish Treaty forming part of Poland's Constitution which was a reaction to an attempt in Europe and elsewhere to prevent minorities from using or studying their own language. The aforesaid recommendations were then placed before the Minority Sub-Committee. The Minority Sub-Committee submitted its report amongst other subjects on cultural, educational and fundamental rights of minorities which may be incorporated at the appropriate places in the Constitution of India. The recommendations of the said Sub-Committee were these:

(i) All citizens are entitled to use their mother tongue and the script thereof, and to adopt, study or use any other language and script of their choice;

(ii) Minorities in every unit shall be adequately protected in respect of their language and culture, and no government may enact any laws or regulations that may act oppressively or prejudicially in this respect;

(iii) No minority whether of religion, community or language shall be deprived of its rights or discriminated against in regard to the admission into State educational

institutions, nor shall any religious instruction be compulsorily imposed on them;

(iv) All minorities whether of religion, community or language shall be free in any unit to establish and administer educational institutions of their choice, and they shall be entitled to State aid in the same manner and measure as is given to similar Stateaided institutions;

(v) Notwithstanding any custom, law, decree or usage, presumption or terms of dedication, no Hindu on grounds of caste, birth or denomination shall be precluded from entering in educational institutions dedicated or intended for the use of the Hindu community or any section thereof;

(vi) No disqualification shall arise on account of sex in respect of public services or professions or admission to educational institutions save and except that this shall not prevent the establishment of separate educational institutions for boys and girls."

Initially, Shri G.B. Pant was of the view that these minority rights should be made to form part of unjusticiable Directive Principles, but on intervention of Shri K.M. Munshi those minority rights were included in the fundamental rights chapter. On 22nd April, 1947, the report of Minority Sub-Committee was placed before the Advisory Committee. The Advisory Committee, inter alia, recommended that Clause 16 which corresponds to Article 28 of the Constitution should be re-drafted as follows:

"All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion subject to public order, morality or health, and to the other provisions of this chapter."

The Advisory Committee then considered the recommendations of the Sub-Committee and it was resolved to insert the following clauses among the justiciable fundamental rights:

" (1) Minorities in every unit shall be protected in respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect;

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission into State educational institutions, nor shall any religious instruction be compulsorily imposed on them;

(3) (a) All minorities whether based on religion, community or language shall be free in any unit to establish and administer educational institutions of their choice;

(b) The State shall not while providing Sate aid to schools discriminate against schools under the management of minorities whether based on religion, community or language."

This became Clause 18.

The recommendations of the Advisory Committee were then placed before the Constituent Assembly which met on 1st May, 1947. When Clause 18 was moved by Shri Sardar Vallabhbhai Patel for adoption by the House, several members were of the view that Clause 18 may be referred back to the Advisory Committee for reconsideration in the light of discussion that took place on that day. However, Shri K.M. Munshi another member of the Constituent Assembly suggested that only sub-clause (2) of Clause 18 be referred back to the Advisory Committee for reconsideration. Ultimately, the amendment moved by Shri K.M. Munshi was adopted and sub-clause (2) of Clause 18 was referred back to the Advisory Committee for reconsideration. Thereafter Clause 18(1) and Clause 18(3) were accepted without any amendment.

The Advisory Committee re-considered Clause 18(2) and recommended that Clause 18(2) be retained after deleting the words "nor shall any religious instruction be compulsorily imposed on them" as the said provision was already covered by Clause 16. Thus, sub-clause (2) was placed before the House on 30th August, 1947 for being adopted along with the recommendation of the Advisory Committee. When the matter was taken up, Mrs Purnima Banerji proposed the following amendments that after the word 'State' the words 'and State-aided' be inserted. While proposing the said amendment, Mrs. Banerji stated thus:

> "The purpose of the amendment is that no minority, whether based on community or religion shall be discriminated against in regard to the admission into State-aided and State educational institutions. Many of the provinces, e.g. U.P., have passed resolutions laying down that no educational institution will forbid the entry of any members of any community merely on the ground that they happened to belong to a particular community even if that institution is maintained by a donor who has specified that that institution should only cater for members of his particular community. If that institution seeks State aid, it must allow members of other communities to enter into it. In the olden days, in the Anglo-Indian schools (it was laid down that, though those schools would be given to Indians. In the latest report adopted by this House it is laid down at 40 per cent. I suggest Sir, that if this clause is included without the amendment in the Fundamental Rights, it will be a step backward and many provinces who have taken a step forward will have to retrace their steps. We have many institutions conducted by very philanthropic people, who have left large sums of money at their disposal. While we welcome such donations, when a principle has been laid down that, if any institution receives State aid, it cannot discriminate or refuse admission to members of other communities, then it should be follow. We know, Sir, that many a Province has got provincial feelings. If this provision is included as a fundamental right, I suggest it will be highly detrimental. The Honourable Mover has not told us what was the reason why he specifically excluded State-aided institutions from this clause. If he had explained it, probably the House would have been convinced. I hope that all the educationists and other members of this House will support my amendment".

(emphasis supplied) The amendment proposed by Mrs. Banerji was supported by Pandit Hirday Nath Kunzru and other members. However, on intervention of Shri Vallabhbhai Patel, the following Clause 18(2) as proposed by the Advisory Committee was adopted:

> "18 (2). No minority whether based on religion, community or language shall be discriminated against in regard to the admission into state educational institutions."

After clause 18 (2) was adopted by the Constituent Assembly, the same was referred to the Constitution Drafting Committee of which Dr. B.R. Ambedkar was the Chairman. The Drafting Committee while drafting clause 18 deleted the word 'minority' from clause 18(1) and the same was substituted by the words 'any section of the citizens". However, rest of the clause as adopted by the Constituent Assembly was retained. Clause 18 (1), (2) and (3) (a) & (b) were transposed in Article 23 of the Draft Constitution of India. Article 23 of the Draft Constitution of India runs as under:

> Cultural and Educational Rights " 23. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same.

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the State.

(3) (a) All minorities whether based on religion, community or language shall have the right to establish and administer educational institutions of their choice.

(b) 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, community or language".

On 8.12.1948, the aforesaid draft Article 23 was placed before the Constituent Assembly. When draft Article 23 was taken up for debate, Shri M. Ananthasayanam Ayyangar stated that for the words "no minority"

> occurring in clause 2 of draft Article 23, the words " no citizen or minority"

be substituted. He stated thus:

> "I want that all citizens should have the right to enter any public educational institution. This ought not to be confined to minorities. That is the object with which I have moved this amendment."

It is at that stage, Shri Thakur Dass Bhargava moved amendment No. 26 to amendment No. 687. According to him, for amendment No. 687 of the List of amendment, the following be substituted:

> "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."

He further stated thus:

> "Sir, I find there are three points of difference between this amendment and the provisions of the section which it seeks to amend. The first is to put in the words 'no citizen' for the words 'no minority'. Secondly that not only the institutions which are maintained by the State will be included in it, but also such institutions as are receiving aid out of state funds. Thirdly, we have, instead of the words " religion, community or language", the words, "religion, race, caste, language or any of them."

Now, Sir, it so happens that the words "no minority" seek to differentiate the minority from the majority, whereas you would be pleased to see that in the Chapter the words of the heading are "cultural and educational rights", so that the minority rights as such should not find any place under this section. Now if we read clause (2) it would appear as if the minority had been given certain definite rights in this clause, whereas the national interest requires that no majority also should be discriminated against in this matter. Unfortunately, there is in some matters a tendency that the minorities as such posses and are given certain special rights which are denied to the majority. It was the habit of our English masters that they wanted to create discriminations of this sort between the minority and the majority. Sometimes the minority said they were discriminated against and on other occasions the majority felt the same thing. This amendment brings the majority and the minority on an equal status.

In educational matters, I cannot understand, from the national point of view, how any discrimination can be justified in favour of a minority or a majority. Therefore, what this amendment seeks to do is that the majority and the minority are brought on the same level. There will be no discrimination between any member of the minority or majority in so far as admission to educational institutions are concerned. So I should say that this is a charter of the liberties for the student-world of the minority and the majority communities equally.

Now, Sir, the word "community" is sought to be removed from this provision because "community" has no meaning. If it is a fact that the existence of a community is determined by some common characteristic and all communities are covered by the words religion or language, then "community" as such has no basis. So the word "community" is meaningless and the words substituted are "race or caste". So this provision is so broadened that on the score of caste, race, language or religion no discrimination can be allowed.

My submission is that considering the matter from all the standpoints, this amendment is one which should be accepted unanimously by this House".

After Dr. B.R. Ambedkar gave clarification as to why the words "no minority" were deleted and its place "no section of the citizen" were substituted in clause (1) of Draft Article 23. Amendment as

proposed by Shri Thakur Dass Bhargava was put to motion and the same was adopted. Thus the word 'minority' was deleted and the same was substituted by the word 'citizen' and for the words "religion, community or language", the words "religion, race, caste, language or any of them" were substituted. Thus, Article 23 was split into two Articles - Article 23 containing clause (1) and clause (2) of Article 23 and sub-clauses (a) and (b) of clause (3) of Article 23 was numbered as Article 23-A. Subsequently Articles 23 and 23-A became Articles 29 and 30, respectively. Thus, Article 23, as amended, became part of the Constitution on 9th December, 1948.

The deliberations of the Constituent Assembly show that initially Shri K.M. Munshi recommended that citizens belonging to national minority in the State whether based on religion or language have equal rights with other citizens in setting up and administering at their own expense charitable, religious and social institutions, schools and other educational establishments with the free use of their language and practice of their religion for being incorporated in the proposed Constitution of India. This was with a view that the members of the majority community who are more in number may not at any point of time take away the rights of minorities to establish and administer educational institution of their choice. It was very much clear that there was a clear intention that the rights given to minorities under Article 30(1) were to be exercised by them if the institution established is administered at their own cost and expense. It is for that reason we find that no educational institution either minority or majority has any common law right or fundamental right to receive financial assistance from the government. Non-discriminatory clause (2) of Article 30 only provides that the State while giving grant-in-aid to the educational institutions shall not discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. The subsequent deliberations of the Constituent Assembly further shows that there was thinking in the minds of the framers of the Constitution that equality and secularism be given paramount importance while enacting Article 30(1). It is evident that amendment proposed by Shri Thakur Dass Bhargava which is now Article 29(2) was a conscious decision taken with due deliberations. The Constituent Assembly was of the view that originally clause (2) of draft Article 23 sought to distinguish the minority from majority, whereas in the chapter the words are 'cultural and educational rights' and as such the word 'minority' ought not to have found place in that Article. The reason for omission of words in clause (2) of draft Article 23 was that minorities were earlier given certain rights under that clause where national interest required that no member of majority also should be discriminated against in educational matters. It also shows that by the aforesaid amendment discrimination between minority and majority was done away with and the amendment has brought the minority and majority in equal footing. The debate also shows what was originally proposed either in clause 18(2) or Art. 23(2). The debate further shows that the post partition stage members of the Constituent Assembly intended to broaden the scope of clause (2) of draft Article 23 and never wanted to confine the rights only to the minorities. The views of the members of the Constituent Assembly were that if any institution takes aid from the government for establishing and administering educational institutions it cannot discriminate while admitting students on the ground of religion, race and caste. It may be seen that by accepting the amendment proposed by Shri Thakur Dass Bhargava, the scope of Article 29(2) was broadened inasmuch as the interest of minority - either religious or linguistic was secured and, therefore, the intention of the framers of the Constitution for enacting clause (2) of Article 29(2) was that once a minority institution takes government aid, it becomes subject to clause (2) of Article 29.

It was then urged that if the intention of the framers of the Constitution was to make Article 30(1) subject to Article 29(2), the appropriate place where it should have found place was Article 30(1) itself rather than in Article 29 and, therefore, Article 29(2) cannot be treated as an exception to article 30(1). There is no merit in the contention. It is earlier noticed that clause (18) when was placed before the Constituent Assembly contained the provisions of Article 29(1)(2) and 30(1)(2) and all were numbered as clause 18(1) (2) (3)(a) (b). Again when clause (18) was transposed in draft Article 23, Article 29(1)(2) and Article 30(1)(2) both were together in draft Article 23. Shri Thakur Dass Bhargava's amendment which was accepted was in relation to clause (2) of Article 23 which ultimately has become Article 29(2). It is for that reason Article 29(2) finds place in Article 29.

It was also urged that if the framers of the Constitution intended to carve out an exception to Article 30(1), they could have used the words "subject to the provisions contained in article 29(2)" in the beginning of Article 30(1) or could have used the expression "notwithstanding" in the beginning of article 29(2) and in absence of such words it cannot be held that Article 29(2) is an exception to Article 30(1). Reference in this regard was made to Articles 25 and 26 which contained qualifying words. In fact, the structural argument was based on the absence of qualifying words either in Article 29(2) or 30(1). This argument based on structure of Articles 29(2) and 30(1) has no merit. In fact, it overlooks that the intention of the framers of the Constitution was to confer rights consistent with the other members of society and to promote rather than imperil national interest. It may be noted that there is a difference in the language of Articles 25 and 26. The qualifying words of Article 25 are "subject to public order, morality and health and to the other provisions of this part". The opening words of Article 26 are "subject to public order, morality and health". The absence of words "to the other provisions of this part" as occurring in Article 25 in Art.26 does not mean that Article 26 is over and above other rights conferred in Part-III of the Constitution. In The Durgah Committee, Ajmer & Anr. vs. Syed Hussain Ali & Ors. 1962(1) SCR 383 and Tilkayat Shri Govindlalji Maharaj vs. The State of Rajasthan & Ors. 1964(1) SCR 561, it has been held that Article 26 is subject to Article 25 irrespective of the fact that the words " subject to other provisions of this part" occurring in Article 25 is absent in Article 26. For these reasons, it must be held that even if there are no qualifying expressions "subject to other provisions of this part" and "notwithstanding anything" either in Article 30(1) or Article 29(2), Article 30(1) is subject to Article 29(2) of the Constitution.

There is another factor which shows that Article 30(1) is subject to Article 29(2). If Article 29(2) is meant for the benefit of minority, there was no sense in using the word 'caste' in article 29(2). The word 'caste' is unheard of in religious minority communities and, therefore, Article 29(2) was never intended by the framers of the Constitution to confer any exclusive rights to the minorities.

Although Article 30(1) strictly may not be subject to reasonable restrictions, it cannot be disputed that Article 30(1) is subject to Article 28(3) and also general laws and the laws made in the interests of national security, public order, morality and the like governing such institutions will have to be necessarily read into Article 30(1). In that view of the matter the decision by this Court in Rev. Sidhajbhai (supra) that under Article 30(1) fundamental right conferred on minorities is in terms absolute is not borne out of that Article. It, therefore, cannot be held that the fundamental right guaranteed under Article 30(1) is absolute in terms. Thus, looking into the precedents, historical fact

and Constituent Assembly debates and also interpreting Articles 29(2) and 30(1) contextually and textually, the irrestible conclusion is that Article 30(1) is subject to Article 29(2) of the Constitution.

The question then arises for what purpose the celebrated Article 30(1) has been incorporated in the Constitution if the linguistic or religious minorities who establish educational institutions cannot admit their own students or are precluded from admitting members of their own communities in their own institution. It is urged that the rights under Article 30(1) conferred on the minorities was in return to minorities for giving up demand for separate electorate system in the country. It is also urged that an assurance was given to the minorities that they would have a fundamental right to establish and administer educational institution of their choice and in case the minority cannot admit their own students or members of their own community it would be breach of the assurance given to the minorities. There is no denial of the fact that in a democracy the rights and interests of minorities have to be protected. In the year 1919, President Wilson stated that nothing is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities. Lord Acton emphasized that the most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities. It is also not disputed that in the field of international law in respect of minorities it is an accepted view that the minorities on account of their non dominance are in a vulnerable position in the society and in addition to the guarantee of non-discrimination available to all the citizens, require special and preferential treatment in their own institutions. The Sub- Committee in its report to the Commission on Human Rights reported thus:

> "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. The protection applies equally to individuals belonging to such groups and wishing the same protection. It follows that differential treatment of such groups or of individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole."

(cited in St. Xavier's College,(1974)1 SCC 717 at798) The aforesaid report was accepted by the Permanent Court of International Justice in a case relating to minority school in Albania which arose out of the fact that Albania signed a Declaration relating to the position of minorities in the State. Article 4 of the Declaration provided that all Albanian nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as the race, language or religion. Article 5 further provided that all Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future charitable, religious and social institutions, schools and other educational establishments with the right to use their own language and to exercise their religion freely therein. Subsequently, the Albanian Constitution was amended and a provision was made for compulsory primary education for all Albanian nationals in State schools and all private schools were to be closed. The question arose before the Permanent Court of International Justice as to

whether Albanian Government was right to abolish the private schools run by the Albanian minorities. The Court was of the view that the object of Declaration was to ensure that nationals belonging to the racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the State. The second was to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements were indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being a minority. The Court was of the further view that "there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law. Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations." (St. Xavier's Colleges case - 1974 (1) SCC 717 (per Khanna, Mathew , JJ.).

Article 27 of the International Covenant on Civil and Political Rights 1966 (ICCPR) guarantees minority rights in the following terms:

> "In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religions or to use their own language."

Prof. Francesco Capotorti in his celebrated study on the Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities stated as follows:

> "Article 27 of the Covenant must, therefore, be placed in its proper context. To enable the objectives of this article to be achieved, it is essential that States should adopt legislative and administrative measures. It is hard to imagine how the culture and language of a group can be conserved without, for example, a special adaptation of the educational system of the country. The right accorded to members of minorities would quite obviously be purely theoretical unless adequate cultural institutions were established. This applies equally in the linguistic field, and even where the religion of a minority is concerned a purely passive attitude on the part of the State would not answer the purposes of article

27. However, whatever the country, groups with sufficient resources to carry out tasks of this magnitude are rare, if not non-existent. Only the effective exercise of the rights set forth in article 27 can guarantee observance of the principle of the real, and not only formal, equality of persons belonging to minority groups. The implementation of these rights calls for active and sustained intervention by States. A passive attitude on the part of the latter would render such rights inoperative."

The Human Rights Committee functioning under the Optional Protocol of ICCPR in its General Comment adopted by the Committee on 06th April, 1994 stated thus:

> "The Committee points out that Article 27 establishes and recognizes a right, which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant."

From the aforesaid report it is clear that in certain circumstances rights conferred to minority groups are distinct from and additional to, all the other rights which as an individuals are entitled to enjoy under the covenant. The political thinkers have recognised the importance of minority rights as well as for ensuring such rights. According to them the rights conferred on linguistic or religious minorities are not in the nature of privilege or concession, but their entitlement flows from the doctrine of equality, which is the real de facto equality. Equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations. Where there is a plurality in a society, the object of law should be not to split the minority group which makes up the society, but to find out political, social and legal means of preventing them from falling apart and so destroying the society of which they are members. The attempt should be made to assimilate the minorities with majority. It is a matter of common knowledge that in some of the democratic countries where minority rights were not protected, those democracies acquired status of theocratic States.

In India, the framers of the Constitution of India with a view to instill a sense of confidence and security in the mind of minority have conferred rights to them under the Constitution. One of such rights is embodied in Art.30 of the Constitution. Under Art.30 the minorities either linguistic or religious have right to establish and administer educational institutions of their choice. However, under the Constitution every citizen is equal before law, either he may belong to minority group or minority community. But right conferred on minority under Article 30(1) would serve no purpose when they cannot admit students of their own community in their own institutions. In order to make Article 30(1) workable and meaningful, such rights must be interpreted in the manner in which they serve the minorities as well as the mandate contained in Article 29(2). Thus, where minorities are found to have established and administering their own educational institutions, the doctrine of the real de facto equality has to be applied. The doctrine of the real de facto equality envisages giving a preferential treatment to members of minorities in the matter of admission in their own institutions. On application of doctrine of the real de facto equality in such a situation not only Art.30(1) would be workable and meaningful, but it would also serve the mandate contained in Art.29(2). Thus, while maintaining the rule of non-discrimination envisaged by Art. 29(2), the minorities should have also right to give preference to the students of their own community in the matter of admission in their own institution. Otherwise, there would be no meaningful purpose of Art. 30(1) in the Constitution. True, the receipt of State aid makes it obligatory on the minority educational institution to keep the institution open to non-minority students without discrimination on the specified grounds. But, to hold that the receipt of State aid completely disentitles the management of minority educational institutions from admitting students of their community to any extent will be to denude the essence of Art. 30 of the Constitution. It is, therefore, necessary that minority be given preferential rights to admit students of their own community in their own institutions in a reasonable measure otherwise there would be no meaningful purpose of Art.30 in the Constitution.

Article 337 of the Constitution provides that grants or government aid has to be given to the Anglo-Indian institution provided they admit 40% of members from other community. Taking the clue from Article 337 and spirit behind Art.30(1) it appears appropriate that minority educational institutions be given preferential rights in the matter of admission of children of their community in their own institutions while admitting students of non- minorities which, advisedly, may be upto 50% based on inter se merits of such students. However, it would be subject to assessment of the actual requirement of the minorities, the types of the institutions and the courses of education for which admission is being sought for and other relevant factors.

Before concluding the matter, it is necessary to deal with few more aspects which relate to the regulatory measures taken by the government with regard to government aided minority institutions. In that connection, the State must see that the regulatory measures of control of such institutions should be minimum and there should not be interference in the internal or day-to-day working of the management. However, the State would be justified in enforcing the standard of education in such institutions. In case of minority professional institutions, it can also be stipulated that passing of common entrance test held by the State agency is necessary to seek admission. It is for the reason that the products of such professional institutions are not only going to serve the minorities but also to majority community. So far as the redressal of grievances of staff and teachers of minority institutions are concerned, a mechanism has to be evolved. Past experience shows that setting up a Tribunal for particular class of employees is neither expedient nor conducive to the interest of such employee. In that view of the matter, each District Judge which includes the Addl. District Judge of the respective district be designated as Tribunal for redressal of the grievances of the employee and staff of such institutions.

Another question that arises in this connection as to on what grounds the staff and teachers, if aggrieved, can challenge the arbitrary decisions of the management. One of the learned senior counsel suggested that such decisions be tested on the grounds available under the labour laws. However, seeing the nature of the minority institutions the grounds available under labour laws are too wide and it would be appropriate if adverse decisions of the Management are tested on grounds of breach of principles of natural justice and fair play or any regulation made in that respect.

Subject to what have been stated above, I concur with the judgment of Hon'ble the Chief Justice.