

## MINORITY RIGHTS – THE JUDICIAL APPROACH

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### ABSTRACT

The persons who are inheritance of the rights under Article 30 of the Indian Constitution are minority. This right secures to religious and linguistic minorities a right to establish and administer educational institutions of their choice. Whenever, therefore, a group seeks its protection by challenging a law or executive action before a court, the foremost question that the court must dispose of a preliminary step is whether the group seeking protection is in fact a minority definable in terms of the article. The probe would require an enquiry into two questions, (i) What is a minority? (ii) How is minority to be ascertained in a given situation?

### KEYWORDS

Minority, Fundamental Right, Educational Institution, Linguistic Minority.

### INTRODUCTION

The Constitution does not define the term 'minority', nor does it lay down sufficient indicia to the test for determination of a group as minority. Confronted, perhaps, with the fact that the concept of minority, and its problem, were intercalate, the framers made no efforts to bring it within the confines of a formulation. Even in the face of doubts being expressed over the advisability of leaving vague justifiable rights to undefined minorities, the members of the Constituent Assembly made no attempt to define the term while article 23 of the Draft Constitution, corresponding to present articles 29 and 30, was being debated, and, presumably left it to the wisdom of the courts to supply the omission.

However, as the following would show, the opinions of the courts on the first question appear to be the result of a half hearted attempt, and, only indicate the futility of depending on them in any search for an answer to the second question.

### WHAT IS A MINORITY?

The word minority has not been defined in the Constitution. The Motilal Nehru Report (1928) showed a prominent desire to afford protection to minorities, but did not define the expression. The Sapru Report (1945) also proposed, inter alia, a Minorities Commission but did not define Minority.

**The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities** has defined minority as under:

- 1) The term 'minority' includes only those non-dominant groups of the population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;
- 2) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristics;
- 3) Such minorities should be loyal to the state of which they are nationals.

The initial courtroom attempt to answer the first question was made in **In re Education Bill, 1959 1 SCR 995** where the Supreme Court, through S.R. Das C.J., suggesting the techniques of arithmetic tabulation, held that the minority means a "community, which is numerically less than 50 percent" of the total population. This statistical criterion prevailed with the Kerala High Court also which, in **A.M.Patroni v. Kesavan AIR 1965 Ker 75**, defined minority to mean the same thing as it meant to the Supreme Court.

The 'definition' refers to group of individual who are particularly smaller as the majority in a defined area. It however does not indicate as to what factor of distinction, subjective or objective are to be taken as the test for distinguishing a group from the rest. In this sense the term used to cover "racial, religious or linguistic sections of the population within a State which differ in these respects from the majority of the population.

"Minority in other sense also means, a group constituting a minority group have a feeling of belonging to one common unit, a sense of akinness or community, which distinguishes from those belonging to the majority of the inhabitants. They are "group held together by ties of common descent, language or religious faith and feeling themselves different in these respects from the majority of the inhabitants of the given political entity."

A 'consciousness' of the difference with the majority on the basis of certain characteristics is, therefore, considered as a distinguishing mark, and as such a subjective element. thus, the

definition which lays emphasis upon certain subjective factors such as 'feeling' or 'consciousness' provide a test which is too vague and uncertain, and more psychological in nature than real. Every situation may not necessarily involve the assumption that the group in order to deserve the title of 'minority' must be distinguishable from the majority by the presence of the feeling or consciousness of its being different from the majority. A group distinguishable from others by the possession of certain objective characteristics, such as language, may not have a feeling or consciousness of its distinct status of being counting as minority. The most acceptable definitions, given by the Human Rights Commission, is not beyond the reach of argument. That definition appears to be confined to those non dominant groups only which, apart from having certain objective characteristics that are distinctively of their own, wish to preserve the distinctive identities and are not willing to be assimilated with the rest of the population.

Interpreting the words, "based on religion" in article 30, the Delhi High Court rightly pointed out that the words would mean that "the only or the principal basis of the 'minority' must be their adherence to one of the many religions and that the other features of the minority are subordinate to the main feature, namely, its separateness because of the religion." A similar interpretation can also be placed on the words 'based on language'. That being so, it can be concluded that for the purpose of article 30, a majority means a non dominant collectively distinguishable from the majority of population by the objective factors of religion or language or language or a combination of both.

### **CONSTITUENT ASSEMBLY DEBATE**

The original draft of the fundamental rights submitted to the Constituent assembly on April 16, 1947 by the Sub Committee on Fundamental Rights did not contain any provision corresponding to article 30(1) and did not even refer to the word minority. The letter submitted by K.M. Munshi to the Minorities Sub Committee on the same date when, along with some other rights, the rights now forming part of article 30(1) was proposed, made a reference on the term "national minorities". The Drafting committee, however, sought, to make a distinction between the rights of any section of the citizen to conserve its language, script or culture and the right of the minorities based on religion or language to establish and administer educational institutions of their choice and for this the committee omitted the word 'minority' in the earlier part of the draft article 23 corresponding to article 29, while it retained the word in the latter part of the draft article 23 which now forms part of the article 30(1).

**Ambedkar sought to explain the reason the reason for substitution in the Draft Constitution of the word minority by the words "any section" observing:**

'Minority' in much wider sense so as to give cultural protection to those who were technically not minorities but minorities nonetheless. Ambedkar's explanation that the right was available not only to minorities in the 'technical sense' but also to minorities in the 'wider sense' has an obvious reference only to that part of Draft article 23 which now forms part of article 29(1) and not to that which is now clause (1) of article 30. His expiation, therefore, may be taken to be an attempt to broaden the scope of clause (1) of article 29 only so as to include within the term 'minority' other minority groups also, as contemplated and illustrated by him, and thus to confine article 30(1) to those minorities which he described as minorities in the technical sense, were politically recognized and the most prominent amongst them were represented in the Constituent Assembly also.

The whole problem, as far as this part of constitution is concerned, that engaged considerable time and efforts of the framers was to achieve a consensus an a constitutional arrangement, between the numerically dominant majority considered as such on the national scene and the minorities referred to above a solution which could give the minorities a feeling of security against discrimination, and security against interference with those characteristics which had divided them apart from the majority.

If these assumptions as accepted as truly reflecting the intention of those who drafted and incorporate these provision in the constitutional document, with a wishful hope that they were rendering a constitutional solution to the problem of Indian minorities, it may be argued that where a minority is the historical or national context and its claim is based on religion it must be defined and ascertain in terms of the population of the whole country, irrespective of its being in numerical majority in any particular state; and, where a group in not a minority considered as such in the national context, but is still definable as 'minority' under Ambedkar's stretched meaning of the term, it may be ascertained with reference to the population of the state concerned. The argument is correct, it is submitted, if the provision in the question are viewed against the historical prospective in which they were adopted, and are construed to carry into effect the true spirit and intention of the constitution

**PROTECTION OF INTEREST OF MINORITIES**

Article 29 of the Constitution of India defines the protection of interest of minorities:

- 1) Any section of the citizen residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have right to conserve the same.
- 2) No citizen shall be denied admission into any educational institution maintained by the State receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

### **Clause (1)**

Clause (1) gives protection to every section of the citizens having distinct language, script or culture by guaranteeing their right to conserve the same. If such section desires to preserve their own language and culture, the state would not stand in their way. A minority community can effectively conserve its language, script or culture by and through educational institutions and therefore necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by article 30(1). But article 29(1), neither controls the scope of article 30(1) nor is controlled by that article. The scope of the two is different. Article 29(1) is not confined to minorities but extends to all sections of citizens. Similarly article 30(1) is not confined to those minorities, which have 'distinct language, script or culture' but extends to all religious and linguistic minorities. Further, article 30(1) gives only the right to establish and administer educational institutions of minorities' choice while article 29(1) gives a very general right 'to conserve' the language, script or culture. Thus, the right under article 30(1) need not be exercised for conserving language, script or culture.

### **Clause (2)**

Clause (2) relates to admission into educational institutions, which are maintained or aided by state funds. No citizen shall be denied admission in such institutions on grounds only of religion, race, caste, language or any of them. Article 15 prohibits discrimination against citizen on ground of religion, etc. but the scope of two articles is different. Firstly, article 15(1) protects all citizens against the state where as the protection of article 29(2) extends to the state or anybody who denies the right conferred by it.

Secondly, 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 maintained or aided by the state. Finally, the specific grounds on which discrimination is prohibited are not the same in two articles. 'Place of birth' and 'sex' do not occur in article 29(2), while 'language' is not mentioned in article 15.

The right to admission into an educational institution is a right, which is an individual citizen, has as a citizen and not as a member of a community or class of citizen. Hence a school run by a minority, if it is aided by state funds, cannot refuse admission to children belonging to other communities. But the minority community may reserve up to 50 percent of the seats for the members of its own community in an educational institution established and administered by it even if the institution is getting aid from the State. The state, however, cannot direct minority educational institutions to restrict admission to the members of their own communities. Article 29(2), however, does not confer a legal right on the members belonging to other communities to freely profess, practice and propagate their religion within the precincts of a college run by a minority community. Article 29(2) cannot be invoked where refusal of admission to a student is on the ground of his not possessing requisite qualifications or where a student is expelled from an institution for acts of indiscipline.

To overcome the conflict with article 15 as well as article 29 the Constitution (First Amendment) Act, 1951, added clause (4) to article 15 to the effect that nothing in article 15 and article 29(2) shall prevent state from making any special provision for the advancement of any socially and educationally backward classes of citizen or for the schedule caste and the schedule tribes. The state is empowered to reserve seats in state colleges for socially and educationally backward classes of citizen or for SC and ST.

### **RIGHTS OF MINORITY TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS**

Article 30 of the Constitution of India defines Rights of Minority to Establish and Administer Educational Institutions:

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

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution establish and administered by a minority, referred in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

- 2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

## Clause (1)

Clause (1) gives rights to all minorities based on religion or language the right to establish and administer educational institution of their own choice. Article 29 and 30 are grouped together it will wrong to restrict the rights of minority to establish and administer educational institution concerned with language script and culture of the minorities. The reasons are:

Firstly, article 29 confers the fundamental rights on any section of the citizen which will include the majority also where as article 30(1) confers all rights on all minorities.

Secondly, article 29(1) is concerned with language, script or culture, whereas article 30(1) deals with minorities based on religion or language.

Thirdly, article 29(1) is concern with the right to conserve language, script or culture, whereas article 30(1) deals with right to establish and administer educational institutions of the minorities of their choice.

Fourthly, the conservation of language, script or culture under article 29(1) may be by means wholly unconnected with educational institutions, and similarly establishment and administer educational institutions by a minority under article 30(1) may be unconnected with any motive to conserve language, script or culture.

A minority may administer an institution for religious education, which is wholly unconnected with any question of conserving language, script or culture. It may be that article 29(1) and article 30(1) overlap, but the former cannot limit the width of the latter. The scope of article 30 rests on the fact that right to establish and administer educational institution of their own choice is guaranteed only to linguistic or religious minorities, and no other section of citizens has such a right. Further article 30(1) gives the right to linguistic minorities irrespective of their religion. It is, therefore, not at all possible to exclude secular education from article 30.

A community, which is minority in specific area of the State though a majority in the state as a whole, would not be treated as minority for the purpose of this article. A minority could not also be determined in relation to entire population of the country. If it was a state law, the minorities must be recognized in relation of that state. But the fact that the expression minority an article 30(1) is used to distinct from 'Any section of citizen' in article 29(1) lends support to the view that article 30(1) deals with national minorities or minorities recognized in the context of entire nation.

In that case, however, article 30(1) would become inapplicable to the national majority even if it is a minority in any particular state, e.g., Hindus in Punjab or Jammu and Kashmir.

'The minority under article 30 must necessarily mean those who form a distinct and identifiable group of citizen in India'. Article 30(1) does not confer upon foreigners not residents in India the right to set up educational institutions of their choice. The right conferred on minorities is to establish educational institutions of their choice. It does not say that minority based on religion should establish educational institutions for teaching of their own language alone. The article leave it to their choice to establish such educational institutions as will serve both the purpose, namely, the purpose of conserving their religion, language, or culture, and also the purpose of giving a thorough general education to their children. Minorities are, however, not entitled to have educational institutions exclusively for their benefit.

In **D. A. V. College v. State of Punjab, AIR 1975 SCR 688**, it was observed that, a linguistic minority for the purpose of art. 30(1) is one which must at least have a separate spoken language. It is not necessary that that language should also have a distinct script for those who speak it to be a linguistic minority. Religious or linguistic minorities should 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

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Clause (2)

Clause (2) is only a phase of non discrimination clause of the constitution and does not derogate provisions made in clause (1). The clause is expressed in negative terms: the state is therefore enjoined not to discriminate in granting aid to educational institutions on the ground that the management of the institutions is in the hands of minority, religious or linguistic. The clause does not mean that the state is competent otherwise to discriminate so as to impose restrictions upon the substance of rights to establish and administer educational institutions by minorities.



The rights established by article 30 (1) is intended to be a real right for the protection of the minorities in the matter of setting up of education institution of their choice. Kerala Education Bill Case The article first came up for interpretation before a seven judge Constitution Bench constituted to consider the reference made by the President under article 143 in **In re Kerala Education Bill** sponsored by the Communist Government of the state which was stoutly opposed by Christians and Muslims. 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).

C. J. 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 religious minority should impart only religious education or that one run by the linguistic minority should teach language only. Institution imparting general secular education is equally protected. The minority has a right to give "a thorough, good general education".
- c) Grant of aid or recognition to such institution cannot be made dependent on their submitting to such stringent conditions as amount to surrendering their right to administer to them. However the right to administer does not include the right to misadministration reasonable regulations can be made.
- d) Regulation prescribing the qualifications for teachers was held reasonable. Those relating to protection and security of teachers and to reservation in favor 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. Provision centralizing recruitment of teachers through State Public Service Commission and taking over the collection of fees etc. were held to be destructive of rights of minorities to manage the institutions. Clauses of the Bill, which authorized the taking over of management in the event of specified failings, in effect, annihilated the minorities' right to administer educational institutions of their choice.

**MINORITY RIGHTS FLOW FROM ARTICLES 14, 15, 19(1) (2), 21, & 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(i) it does not follow the same is denied to the majority communities. It was considered necessary like a special mentioned for the right of minorities by way of extra assurance to it is not correct to say that minorities were considered backward and needed concessions though article 30(i) to bring them up. The object was to make that they will not be discriminated against. It was not intended to pamper as favoured communities. It should follow therefore from articles 14 and 15 majority communities have right to similar treatment at the hands of the in the matter of recognition affiliation government aid or non displacement management in respect of educational institutions established by majority as accorded to minority institutions of course condition can and to be imposed in regard to aid, affiliation and recognition in order to ensure standard of teaching but the same have to be uniformly onerous and not be so drastic as to involve surrender by the community or founder or management of its right to establish and administer the institution.

Modern parliamentary democracy are run on a party system which in India the more so in the post mandal is built largely on the basis of caste and communal combination Government are returned to power not on the basis of issues or mandates. Managements functional institutions do not for a vote bank while their teachers do them. Religions majority namely Hindus are not a homogeneous monolith. It is a much divided society. There are caste and sub caste division and the same court defence to the legislative and executive wisdom on article has no made things easier electoral arithmetic has led to all sorts of and combination.

Apart from articles 15 and 15(I) this right to establish and administer educational institutions also flows as seen above from articles 19(i) (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 the right to choice of institutions in which they would like the former to be educated. Every community has a right to found and administer educational and other charitable institutional and to run them according subject perceptions of what is best of the community and for the institution subject of perceptions of what is best for the community and for the distinction for religion or language minority or majority.

The cause for interference in each case was the acts of mismanagement and dissipation on the party of private mil 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.

Deprivation of management of their power in regard to appointment and discipline of teachers has likewise led to a steep fall in discipline and standard. 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. Of course regulatory provision to the same extent not more noels as have been accepted to be necessary for the protection of teacher of minority institutions would in any case continue in relation to teachers of majority institutions also. The trend the work over is now for less and less of government. If misadministration can be prevented in the case of minority institutions without emasculating the management the same should be minority institution too. As per Ray C.J. in St. Xavier's and per Jag Mohan Reddy J. all institution irrespective of any denominational distinction should be places of workshop of learning for students.

### CONCLUSION

The courts, however, seem to have been persuaded by practical compulsion rather than be swayed away by a feeling of faithfulness to the spirit. Their course of opinion seems to have been determined by some of the followings:

- i. That provisions in question seeks to protect minorities against state action, which term includes laws and also under them, executive actions.
- ii. That ours being a federal democratic system, political and legislative processes operate not only from the national center of power but also from the states.
- iii. That these states are autonomous in their respective legislative spheres and laws are passed by majority votes.
- iv. That minorities, considered as much on the national level, do constitute numerical majority in some states.
- v. That these majorities may, by their laws, deny the protection to the non-dominant group which the Constitution so emphatically seeks to secure.
- vi. That these majorities may, by their numerically strength, overshadowed the distinct shadow the distinct characteristics and individuality of the non-dominant groups, and the latter may have to live under a psychological fear of being discriminated and overwhelmed.
- vii. That it was this fear in some sections of some minorities at least, which had pervaded the politics the politics of pre-partition India, and that it was on this premise that minority rights were demanded and conceded in Constitution Assembly.

- viii. That it is this fear, which still continues to be the core component of the minority component.
- ix. That the assurance to protection for minorities can tell its true meaning only when a non--dominant group in a state is define and ascertain as 'minority' where the law in question is a state law, eve though the group happens to be a part of the 'majority', considered a majority in the context of the whole country.
- x. That the same reason that became the basis for article 29 and 30 to find a place in the category of justiciable Fundamental Rights must be valid in this situation also.

