(1974) 1 Supreme Court Cases 717

(Original Jurisdiction and from Gujarat High Court)

[BEFORE A. N. RAY, C. J. AND P. JAGANMOHAN REDDY, D. G. PALEKAR, H. R. KHANNA, K. K. MATHEW, M. H. BEG, S. N. DWIVEDI, Y. V. CHANDRACHUD AND A. ALAGIRISWAMI, JJ.]

THE AHMEDABAD ST. XAVIER'S COLLEGE SOCIETY AND ANOTHER .. Petitioners ;

Versus

STATE OF GUJARAT AND ANOTHER .. Respondents.

Writ Petitions Nos. 232 and 233 of 1973, decided on April 26, 1974

The first petitioner is a Society registered under the Societies Registration Act, 1860. The petitioner is running St. Xavier's College of Arts and Commerce in Ahmedabad. The said college was established in June 1955 by a religious denomination known as the Society of Jesus. The petitioner society was formed with the object of taking over the above mentioned college.

The petitioner society and the St. Xavier's College seek to provide higher education to Christian students. Children, however, of all classes and creeds provided they attain the qualifying academic standards are admitted to the St. Xavier's College. The College was an affiliated college under the Gujarat University Act, 1949.

The petitioners challenge Sections 33A, 40, 41, 51A and 52A of the Gujarat University Act, 1949 as amended by the Gujarat University (Amendment) Act, 1972 on the principal ground of violation of their fundamental rights under Article 30. Section 33A regarding constitution of Governing Body and Selection Committee, Sections 40 and 41 regarding conversion of affiliated colleges into constituent colleges and Sections 51A and 52A regarding dismissal, removal and termination of services of staff of college, and reference of disputes to arbitration should not apply, contended the petitioners, to them by virtue of their right to administer educational institutions of their choice.

Constitution of India — Article 30 — Scope and ambit of the rights of religious and linguistic minorities to establish and administer edncational institutions of their choice — Whether extends to establishing educational institutions only for conserving their language, script or cnlture — Whether Article 30(1) to be read subject to Article 29(1)

HELD :

Per Ray, C.J. and Palekar, J.

Articles 29 and 30 confer four distinct rights. First is the right of any section of the resident citizens to conserve its own language, script or culture as mentioned in Article 29(1). Second is the right of all religious and linguistic minorities to establish and administer educational institutions of their choice as mentioned in Article 30(1). Third is the right of an educational institution not to be discriminated against in the matter of State aid on the ground that it is under the management of a religious or linguistic minority as mentioned in Article 30(2). Fourth is the right of the citizen not to be denied admission into any State-maintained or State-aided educational institution on the ground of religion, caste, race or language, as mentioned in Article 29(2). (Para 5)

It will be wrong to read Article 30(1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. The reasons are these. First, Article 29 confers the fundamental right

on any section of the citizens which will include the majority section whereas Article 30(1) confers the right on all minorities. Second, Article 29(1) is concerned with language, script or culture, whereas Article 30(1) deals with minorities of the nation based on religion or language. Third, Article 29(1) is concerned with the right to conserve language, script or culture, whereas Article 30(1) deals with the right to establish and administer educational institutions of the minorities of their choice. Fourth, the conservation of language, script or culture under Article 29(1) may be by means wholly unconnected with educational institutions and similarly establishment and administration of educational institution 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 a language, script or culture. (Para 6)

The scope of Article 30 rests on linguistic or religious minorities and no other section of citizens of India has such a right. (Para 7)

The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality (Para 9)

It is, therefore, not at all possible to exclude secular education from Article 30. (Para 10)

Re The Kerala Education Bill 1957, 1959 SCR 995, relied on.

Rev. Father Proost v. State of Bihar, (1969) 2 SCR 73, relied on.

Per Jaganmohan Reddy and A. Alagiriswami, JJ.

The contentions on the scope and ambit of Articles 29(1) and 30(1) are not new but have been earlier urged before and decided by the Supreme Court in no uncertain terms. (Para 49)

Per Khanna, J.

A liberal, generous and sympathetic approach is reflected in the Constitution in the matter of the preservation of the right of minorities so far as their educational institutions are concerned. (Para 89)

The Catholic approach which led to the drafting of the provisions relating to minority rights should not be set at naught by narrow judicial interpretation. The minorities are as much children of the soil as the majority and the approach has been to ensure that nothing should be done as might deprive the minorities of a sense of belonging, of a feeling of security, of a consciousness of equality and of the awareness that the conservation of their religion, culture, language and script as also the protection of their educational institutions is a fundamental right enshrined in the Constitution. The same generous, liberal and sympathetic approach should weigh with the courts in construing Articles 29 and 30 as marked the deliberations of the Constitution-makers in drafting those articles and making them part of the fundamental rights. The safeguarding of the interest of the minorities amongst sections of population is as important as the protection of the interest amongst individuals of persons who are below the age of majority or are otherwise suffering from some kind of infirmity. (Para 89)

In order to invoke the benefit of Article 29(1), all that is essential is that a section of the citizens residing in the territory of India or any part thereof should have a distinct language, script or culture of its own. Once that is proved those citizens shall have the right to conserve their language, script or culture irrespective of the fact whether they are members of the majority community or minority community. (Para 73)

The right which has been conferred by Article 30(1) is on two types of minorities. Those minorities may be based either on religion or on language. The right conferred upon the said minorities is to establish and administer educational

institutions of their choice. The word "establish" indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. The words "of their choice" qualify the educational institutions and show that the educational institutions established and administered by the minorities need not be of some particular class; the minorities have the right and freedom to establish and administer such educational institutions as they choose. (Para 74)

Clause (1) of Article 29 and clause (1) of Article 30 deal with distinct matters, and it is not permissible to circumscribe or restrict the right conferred by clause (1) of Article 30 by reading in it any limitation imported from clause (1) of Article 29. (Para 96)

It is difficult to subscribe to the view that educational institutions mentioned in Article 30(1) are only those which are intended to conserve language, script or culture of the minority. Clause (1) of Article 30 also contains the words " of their choice". These words which qualify "educational institutions" show the vast discretion and option which the mionrities have in selecting the type of institutions which they want to establish. In case an educational institution is established by a minority to conserve its distinct language, script or culture, the right to establish and administer such institution would fall both under Article 29(1) as well as under Article 30(1). The minorities can, however, choose to establish an educational institution which is purely of a general secular character and is not designed to conserve their distinct language, script or culture. The right to establish and administer such an institution is guaranteed by Article 30(1) and the fact that such an institution does not conserve the distinct language, script or culture of a minority would not take it out of the ambit of Article 30(1). (Para 96)

Re The Kerala Education Bill 1957, 1959 SCR 995, 1052-53, relied on.

Rev. Father Proost v. State of Bihar, (1969) 2 SCR 73, 80, relied on.

Per Mathew and Chandrachud, JJ.

Article 29(1) confers on any section of citizens resident in the territory of India, the right to conserve its language, script or culture. It does not speak of any minority. religious or otherwise. Whereas Article 29(1) confers the right not only upon a minority as understood in its technical sense but also upon a section of the citizens resident in the territory of India which may not be a minority in its technical sense, the beneficiary of the right under Article 30 is a minority, either religious or linguistic. That is one distinction between Article 29(1) and Article 30(1). (Para 125)

The second distinction to be noted is that whereas Article 29(1) confers rights in respect of three subjects viz.. language, script or culture, Article 30(1) deals only with the right to establish and administer educational institutions. (Para 126)

It is true that under Article 29(1) a section of the citizens having a distinct language, script or culture, might establish an educational institution for conserving the same. But, under Article 30(1), the right conferred on the religious or linguistic minority is not only the right to establish an educational institution for the purpose of conserving its language, script or culture, but any educational institution of its choice. Whereas Article 29 does not deal with education as such, Article 30 deals only with the establishment and administration of educational institutions. It might be that in a given case, the two articles might overlap. (Para 126)

Article 29(1) cannot limit the width of Article 30(1). (Para 127)

The right guaranteed to a religious or linguistic minority under Article 30(1) is the right to establish any educational institution of its choice. (Para 127)

Re. The Kerala Education Bill 1957, 1959 SCR 995, 1053, relied on.

Rev. Father Proost v. State of Bihar, (1969) 2 SCR 73, relied on.

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, relied on.

Rt. Rev. Bishop S. K. Patro v. State of Bihar, (1970) 1 SCR 172 : (1969) 1 SCC 863, relied on.

D. A. V. College v. State of Punjab, 1971 Supp SCR 688 : (1971) 2 SCC 269, relied on.

Dipendra Nath v. State of Bihar, AIR 1962 Pat 101, approved.

Per Beg, J.

I am in entire agreement with the view that, although, Articles 29 and 30 may supplement each other so far as certain rights of minorities are concerned, yet, Article 29 of the Constitution does not, in any way, impose a limit on the kind or character of education which a minority may choose to impart through its institution to the children of its own members or to those of other who may choose to send their children to its schools. In other words, it has a right to impart a general secular education. (Para 197)

When a minority institution decides to enter this wider educational sphere of national education, it, by reason of this free choice itself, could be deemed to opt to adhere to the needs of the general pattern of such education in the country, at least whenever that choice is made in accordance with statutory provisions. Its choice to impart an education intended to give a secular orientation or character to its education necessary entails its assent to the imperative needs of the choice made by the State about the kind of "secular" education which promotes national integration or the elevating objectives set out in the preamble to our Constitution, and the best way of giving it. If it is part of a minority's rights to make such a choice it should also be part of its obligations, which necessarily follow from the choice, to adhere to the general pattern. (Para 197)

Per Dwivedi, J.

The scope of Article 30(1), as regards both the content of the right and the beneficiaries of the right, is wider than that of Articles 25 and 26. (Para 236)

Article 30(1) secures the right to a secular activity to a religious or linguistic minority. Such a minority may establish and administer institutions for imparting secular general education. (Para 237)

Article 29(1) gives security to an interest : Article 30(1) gives security to any activity. (Para 238)

The words 'of their choice' merely make patent what is latent in Article 30(1). Those words are not intended to enlarge the area of choice already implied in the right conferred by Article 30(1). (Para 241)

The right to establish an educational institution under Article 30(1) is not confined to the purposes specified in Article 29(1). (Para 242)

State of Bombay v. Bombay Education Society, (1955) 1 SCR 568, 578 & 582, relied on.

Re The Kerala Education Bill, 1957, 1959 SCR 995, 1047, 1052-53, relied on.

Rev. Father Proost v. State of Bihar, (1969) 2 SCR 73, 180, relied on.

D. A. V. College v. State of Punjab, 1971 Supp SCR 688, 695 : (1971) 2 SCC 269, relied on.

Constitution of India — Article 30(1) — Nature of right to administer and establish educational institutions — Whether absolute — Whether regulations not amounting to abridgment of the right can be imposed —Whether can be subjected to regulations made in the interest of society or State

HELD :

Per Ray, C.J. and Palekar, J.

The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. Second is the right to choose its teachers. Third is the right not to be compelled to refuse admission to students. Fourth is the right to use its properties and assets for the benefit of is own institution. (Para 19)

The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. (Para 20)

Re : The Kerala Education Bill 1957, 1959 SCR 995, relied on.

Rev. Father W. Proost v. State of Bihar, (1969) 2 SCR 73, relied on.

Rt. Rev. Bishop S. K. Patro v. State of Bihar, (1970) 1 SCR 172 : (1969) 1 SCC 863, relied on.

D. A. V. College v. State of Punjab, 1971 Supp SCR 688 : (1971) 2 SCC 269, relied on.

State of Kerala v. Very Rev. Mother Provincial, (1971) 1 SCR 734 : (1970) 2 SCC 417, relied on.

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, relied on.

Regulations which will serve the interests of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions. Regulations are, therefore, necessary to see that there are no divisive or disintegrating forces in administration. (Paras 31 and 32)

Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of and for the benefit of minority educational institutions concerned will affect the autonomy in administration. (Para 39)

Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration is day to day administration. The choice in the personnel of management is a part of the administration. (Para 41)

In the field of administration it is not reasonable to claim that minority institution will have complete autonomy. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institution. The right of a minority to administer its educational institution involves, as part of it, a correlative duty of good administration. (Para 47)

Per Khanna, J.

The right conferred by Article 30(1) is in absolute terms and is not subject to restrictions, as in the case of rights conferred by Article 19 of the Constitution. The right of the minorities to administer educational institutions does not, however, prevent the making of reasonable regulations in respect of those institutions. The regulations have necessarily to be made in the interest of the institution as a minority educational institution They have to be so designed as to make it an effective vehicle for imparting education. The right to administer educational institutions can plainly not include the right to maladminister. (Para 90)

The State can prescribe regulations to ensure the excellence of the institution. Prescription of standards for educational institutions does not militate against the

right of the minority to administer the institutions. Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institution, in matters educational. (Para 90)

State of Kerala v. Very Rev. Mother Provincial. (1971) 1 SCR 734 : (1970) 2 SCC 417, relied on.

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, relied on.

The right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others. (Para 90)

Regulations may well provide that the funds of the institution should be spent for the purpose of education or for the betterment of the institution and not for extraneous purposes. Regulations may also contain provisions to prevent the diversion of funds of institutions to the pockets of those incharge of management or their embezzlement in any other manner. Provisions for audit of the accounts of the institution would be permissible regulation. Regulations to prevent anti-national activities in educational institutions can be considered to be reasonable. (Para 91)

At the same time it has to be ensured that under the power of making regulations nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice. The right conferred by Article 30(1) is intended to be real and effective and not a mere pious and abstract sentiment; it is a promise of reality and not a teasing illusion. Such a right cannot be allowed to be whittled down by any measure masquerading as a regulation. (Para 92)

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, relied on.

Regulations made by the authority concerned should not impinge upon the right under Article 30(1). Balance has, therefore, to be kept between the two objectives, that of ensuring the standard or excellence of the institution and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations which embrace and reconcile the two objectives can be considered to be reasonable. (Para 94)

Hence it would be wrong to assume that an unrestricted right as in Article 30 postulates absence of regulations. Regulations can be prescribed in spite of the unrestricted nature of the right. The unrestricted nature of the right connotes freedom in the exercise of the right. Even the words "freedom" and "free" have certain limitations. (Para 95)

James v. The Commonwealth, (1936) AC 578, relied on.

Reynolds v. United States, 98 US 145 (1878), relied on.

Cantwell v. Connecticut, 310 US 296 (1940), relied on.

Adelaide Co. of Jehovah Witnesses Inc. v. The Commonwealth, (1943) 67 Comm LR 116, relied on.

Therefore the unrestricted nature of a right does not prevent the making of regulations relating to the enforcement of that right. (Para 95)

The argument that unless a law or regulation is wholly destructive or the right of minorities under Article 30(1), the same would not be liable to be struck down is untenable and runs counter to the plan language of Article 13. (Para 99)

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, 855-56, followed.
Re: The Kerala Education Bill 1957, (1959) SCR 995, 1065, explained.

A law which interferes with the minorities choice of a governing body or management council would be violative of the right guaranteed by Article 30(1). (Para 101)

Rt. Rev. Bishop S. K. Patro v. State of Bihar, (1969) 1 SCC 863, relied on.
State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417, relied on.
D. A. V. College v. State of Punjab, (1971) 2 SCC 269, relied on.

Also a law which interferes with a minority's choice of qualified teachers or its disciplinary control over teachers and other members of the staff of the institution is void as being violative of Article 30(1). (Para 103)

The right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. (Para 74)

The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied, such right of selection and appointment without infringing Article 30(1). (Para 103)

Rev. Father W. Proost v. State of Bihar, (1969) 2 SCR 73, relied on.
D. A. V. College v. State of Punjab, (1971) 2 SCC 269, relied on.

Provisions which are calculated to safeguard the interest of teachers would result in security of tenure and thus inevitably attract competent persons for the posts of teachers. Such a provision would also eliminate a potential cause of frustration amongst the teachers. Regulations made for this purpose should be considered to be in the interest of minority educational institutions and as such they would not violate Article 30(1). (Para 105)

Per Mathew and Chandrachud, JJ.

Because Article 30(1) is couched in absolute terms, it does not follow that the right guaranteed is not subject to regulatory laws which would not amount to its abridgment. It is a total misconception to say that because the right is couched in absolute terms, the exercise of the right cannot be regulated or that every regulation of that right would be an abridgment of the right. (Para 172)

Hudson Country Water & Co. v. McCarter, 209 US 349, 355, 357, relied on.
Commonwealth of Australia v. Bank of New South Wales, (1950) AC 235, 310, relied on.
Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, (1963) 1 SCR 491, relied on.

Even if an educational institution established by a religious or linguistic minority does not seek recognition, affiliation, or aid its activity can be regulated in various ways provided the regulations do not take away or abridge the guaranteed right. (Para 173)

If a legislature can impose any regulation which it thinks necessary to protect what in its view is in the interest of the State or society, the right under Article 30(1) will cease to be a fundamental right. To subject the right today to regulations dictated by the protean concept of state necessity as conceived by the majority would be to subvert the very purpose for which the right was given. (Para 174)

The question whether a particular regulation is calculated to advance the general public interest is of no consequence if it is not conducive to the interests of the minority community and those persons who resort to it. (Para 176)

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, 856-57, explained.

State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417, relied on.

So in every case, when the reasonableness of a regulation comes up for consideration before the court, the question to be asked and answered is whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation, namely, the excellence of the institution as a vehicle for general secular education to the minority community and to other persons who resort to it. (Para 176)

The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. (Para 182)

The fundamental right of a minority to administer educational institutions of its choice comprises within it the elementary right to conduct teaching, training and instruction in courses of studies in the institutions so established by teachers appointed by the minority. If this essential component of the right of administration is taken away from the minority and vested in the university, there can be no doubt that its right to administer the educational institution guaranteed under Article 30(1) is taken away. (Para 187)

Per Beg, J.

The essence of the right guaranteed by Article 30(1) of the Constitution is a free exercise of their choice by minority institutions of the pattern of education as well as of the administration of their educational institutions. Both, these, taken together, determine the kind of character of an educational institution which a minority has the right to choose. (Para 209)

Despite the "absoluteness" of the terms in which rights under Article 30(1) may be expressed, there is a power in the State to regulate their exercise. (Para 206)

Provision for an regulation by the State of the very conditions which secure to minority institutions the freedom to establish and administer its educational institution, is obviously, inevitable and undeniable. Existence of some power to lay down necessary conditions or pre-requisites for maintaining the right to establish and administer an institution itself in a sound state is inherent in the very existence of organised society which the State represents. (Para 207)

I find it very difficult to separate the objects and standards of teaching from a right to determine who should teach and what their qualifications should be. Moreover, if the "standards of education" are not part of management, it is difficult to see how they are exceptions to the principle of freedom of management from control. Again, if what is aimed at directly is to be distinguished from an indirect effect of it, the security of tenure of teachers and provision intended to ensure fair and equitable treatment for them by the management of any institution would also not be directly aimed at interference with its management. (Para 221)

The effect of an enactment upon the fundamental rights of a minority educational institution, as I have already tried to indicate above, depends upon the totality of actual provisions and, indeed, also upon the actual facts relating to a particular institution. (Para 228)

Even if Article 30(1) of the Constitution is held to confer absolute and unfettered rights of management upon minority institutions, subject only to absolutely minimal and negative controls in the interests of health and law and order, it could not be meant to exclude a greater degree of regulation and control

when a minority institution enters the wider sphere of general secular and non-denominational education, largely employs teachers who are not members of the particular minority concerned and when it derives large parts of its income from the fees paid by those who are not members of the particular minority in question. Such greater degree of control could be justified by the need to secure the interests of those who are affected by the management of the minority institution and the education it imparts but who are not members of the minority in management. In other words, the degree of reasonably permissible control must vary from situation to situation. (Para 232)

Per Dwivedi, J.

Absolute words do not confer absolute rights, for the generality of the words may have been cut down by the context and the scheme of the statute or the Constitution, as the case may be. (Para 253)

It is therefore wrong to read absolute or near-absolute right to establish and administer an educational institution by a religious or linguistic minority from the absolute words of Article 30(1). (Para 253)

State of W. B. v. Anwar Ali Sarkar, 1952 SCR 284, 295, relied on.

Charanjit Lal v. Union of India, 1950 SCR 869, 890, relied on.

Kathi Raning Rawat v. State of Saurashtra, 1952 SCR 435, 442, relied on.

Cantwel v. Connecticut, 310 US 296, 303-304, relied on.

W. S. A. Waynes: Legislative, Executive and Judicial Powers in Australia, 2nd Edn., p. 339, relied on.

Commonwealth of Australia v. Bank of New South Wales, 1950 AC 233, 311, relied on.

State of Punjab v. Ajaib Singh, 1953 SCR 254, 264, relied on.

A glance at the context and scheme of Part III of the Constitution would show that the Constitution-makers did not intend to confer absolute rights on a religious or linguistic minority to establish and administer educational institutions. (Para 254)

Articles 29(2), 15(4) and 28(3) place certain express limitations on the right in Article 30(1). There are also certain implied limitations on this right. The right should be read subject to those implied limitations. (Para 257)

Sri Venkataramana Devaru v. State of Mysore, 1958 SCR 895, 918, relied on.

Absolute rights are possible only in the moon. It is impossible for a member of a civilized community to have absolute rights. Some regulations of rights is necessary for due enjoyment by every member of the society of his own rights. (Para 261)

The right under Article 30(1) is also subject to regulation for the protection of various social interests such as health, morality, security of State, public order and the like, for the good of the people is the supreme law. (Para 262)

Far from implying state inaction, the general language of Article 30(1) is designed to give due flexibility to the legislatures and to the courts in adjusting the rights in Article 30(1) to the necessities of such case. (Para 264)

The extent of regulatory power may vary from class to class as well as within a class. (Para 267)

Plainly, no minority educational institution can be singled out for treatment different from one meted out to the majority educational institution. A regulation meeting out such a discriminatory treatment will be obnoxious to Article 30(1). (Para 268)

The test of valid regulation is its necessity. Any regulation which does not go beyond what is necessary for protecting the interests of the society (which includes the minorities also) or the rights of the individual members of the society

should be constitutional. It cannot be said that such a regulation takes away or abridges the rights conferred by Article 30(1). (Para 269)

No hard and fast rule can be prescribed for determining what is necessary. The question should be examined in the light of the impugned provisions and the facts and circumstances of each case. What is required is that the impugned law should seek to establish a reasonable balance between the right regulated and the social interest or the individual right protected. The court should balance in the scale and value of the right regulated and the value of the social interest or the individual right protected. While balancing these competing interests, the Court should give due weight to the legislative judgment. (Para 270)

It is incorrect to contend that a regulation in order to be constitutional, must always be shown to be calculated to improve the excellence of the minority educational institutions. (Para 271)

What is a real and effective exercise of the right will depend on how far the impugned regulation is necessary in the context of time, place and circumstances for safeguarding any competing social interest or any competing constitutional or legal right of an individual. (Para 274)

Re: The Kerala Education Bill 1957, 1959 SCR 995, relied on.

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, relied on.

The right under Article 30(1) forms part of a complex and inter-dependent group of diverse social interests. There cannot be a perpetually fixed adjustment of the right and those social interests. They would need adjustment and readjustment from time to time and in varying circumstances. (Para 280)

Curriculum and syllabus is a vital part of the administration of an educational institution. (Para 272)

State of Kerala v. Very Rev. Mother Provincial, (1971) 1 SCR 734, dissented.

Constitution of India — Article 30(1) — Right of recognition or affiliation if part of the fundamental right under Article 30(1) — Whether affiliation can be denied — Affiliation on terms involving abridgment of the right of minorities whether offends Article 30(1) — Whether affiliation only a statntory concept obtainable by fulfilment of conditions prescribed therefor by a statute — Whether affiliation of institution imparting religious instructions derogatory of the secular character of our State

HELD:

Per Ray, C.J. and Palekar, J.

Any law which provides for affiliation on terms which will involve abridgment of the right of linguistic and religious minorities to administer and establish educational institutions of their choice will offend Article 30(1). (Para 14)

Affiliation mainly pertains to the academic and educational character of the institution. Therefore, measures which will regulate the courses of study, the qualifications and appointment of teachers, the conditions of employment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all comprised in matters germane to affiliation of minority institutions. These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institutions under Article 30. (Para 18)

State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417, relied on.

Per Jaganmohau Reddy and Alagiriswami, JJ.

The meaningful exercise of the right under Article 30(1) would and must necessarily involve recognition of the secular education imparted by the minority

institutions without which the right will be a mere husk. The Supreme Court has so far consistently struck down all attempts to make affiliation or recognition on terms tantamount to surrender of the rights under Article 30(1) as abridging or taking away those rights. Again as without affiliation there can be no meaningful exercise of the right under Article 30(1), the affiliation to be given should be consistent with that right, nor can it indirectly try to achieve what it cannot directly do. (Para 56)

The right under Article 30 cannot be exercised in vacuo. Nor would it be right to refer to affiliation or recognition as privileges granted by the State. (Para 56)

Re: The Kerala Education Bill, 1957, 1959 SCR 995, relied on.

D. A. V. College v. State of Punjab, (1971) 2 SCC 269, relied on.

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, relied on.

There is a right to get recognition or affiliation where it is possible in India for minority institutions to preserve their language, script and culture. (Para 58)

If the educational institutions of a minority find it inconvenient or impossible to secure such a recognition or affiliation even outside the State in which they are established, then in such circumstances, education including University education being a State subject and the legislative power of the State also being subject to Article 29(1) and Article 30(1) minorities able to establish an educational institution can insist on recognition, where affiliation is not provided for by the University Acts, to the educational qualifications awarded by them, whether degrees, diplomas or other certificates, which conform to the educational standards prescribed by the State for the recognition of such degrees, diplomas and other certificates. (Para 59)

Re: The Kerala Education Bill, 1957, 1959 SCR 995, explained and distinguished.

States Reorganisation Report, Part IV, Para 5, relied on.

Per Khanna, J.

The Indian Constitution contains articles which are designed not only to prevent disabilities of the minorities but also create positive rights for them. Article 30(1) is one such article. (Para 93)

West Virginia State Board of Education v. Barnetta, 319 US 624, referred to.

Robertson and Rosetanni v. Queen, 1963 SCR 651 (Canada) : DLR 2d 485, referred to.

If a request is made for the affiliation or recognition of an educational institution, it is implicit in the request that the educational institution would abide by the regulations which are made by the authority granting affiliation or recognition. The said authority can always prescribe regulations and insist that they should be complied with before it would grant affiliation or recognition to an educational institution. To deny the power of making regulations to the authority concerned would result in robbing the concept of affiliation or recognition of its real essence. (Para 94)

It is, therefore, permissible for the authority concerned to prescribe regulations which must be complied with before an institution can seek and retain affiliation and recognition. (Para 94)

It is not, however, permissible to prescribe conditions for recognition or affiliation which have the effect of impairing the right of the minority to establish and administer their educational institutions. It is not permissible to exact from the minorities in lieu of the recognition or affiliation of their institutions a price which would entail the abridgment or extinguishment of the right under Article 30(1). (Para 98)

An educational institution can hardly serve any purpose or be of any practical utility unless it is affiliated to a University or is otherwise recognized like other

educational institutions. The right conferred by Article 30 is a real and meaningful right. It is neither an abstract right nor is it to be exercised in vacuum. Article 30(1) was intended to have a real significance and it is not permissible to construe it in such a manner as would rob it of that significance. (Para 98)

Re: The Kerala Education Bill, 1957, 1959 SCR 995, relied on.

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, relied on.

Per Mathew and Chandrachud, JJ.

It is difficult to see how affiliation of an educational institution imparting religious instruction in addition to secular education to pupils as visualised in Article 28(3) would derogate from the secular character of the State. Our Constitution has not erected a rigid wall of separation between Church and State. There are provisions in the Constitution which make one hesitate to characterize our State as secular. Secularism in the context of our Constitution means only an attitude of live and let live developing into the attitude of live and help live. (Paras 139 and 140)

Donald Eugene Smith: "India as a Secular State", pp. 361, referred to.

Justice Jackson in McCollum v. Board of Education, 333 US 203, referred to.

Dr. Radhakrishnan: Recovery of Faith, p. 202, referred to.

Dr. Radhakrishanan's Foreword to Dr. S. Abid Husain's: The National Culture of India, p. vii, referred to.

Hoarace M. Kallen: Secularism is the Will of God, pp. 11-13, referred to.

Pierce v. Society of Sisters of Holy Names, 268 US 510, 535, referred to.

Brown v. Board of Education, 349 US 294, referred to.

Report of the Committee on 'Model Act for Universities', Chapter V: 'Colleges and Students' Welfare, p. 28, referred to.

Without recognition or affiliation, there can be no real or meaningful exercise of the right to establish and administer educational institutions under Article 30(1). (Para 149)

Re: The Kerala Education Bill, 1957, 1959 SCR 995, 1067-68, 856, 709, relied on.

A condition may be invalidated on the ground that denying a benefit or privilege because of the exercise of a right in effect penalizes its exercise. (Para 167)

A condition may be invalidated on yet another ground: precluding from participation in the enjoyment of a privilege or benefit those who wish to retain their rights would seem an unreasonable classification violative of Article 14. (Para 169)

American Communications Assoc. v. Douds, 339 US 382, 417, referred to.

To avoid invalidation of a condition on any of these grounds, it would seem necessary to show that the granting of the benefit or privilege places the recipient in a position which gives the State or the University a legitimate interest in regulating his rights. It appears that there are two legitimate interests which may justify such regulation. First is the interest in ensuring that the benefit or facility given or granted, namely, recognition or affiliation is maintained for the purpose intended, in order to protect the effectiveness of the benefit or the facility itself. Second, social interests must be protected against those whose capacity for inflicting harm is increased by possession of the benefit or facility. (Para 170)

"Unconstitutional Conditions", 73 Harv Law Rev 1595, referred to.

The normal desire to enjoy privileges like affiliation or recognition without which the educational institutions established by the minority for imparting secular education will not effectively serve the purpose for which they were established, cannot be made an instrument of suppression of the right guaranteed. (Para 171)

Recognition or affiliation creates an interest in the university to ensure that the educational institution is maintained for the purpose intended and any regulation which will subserve or advance that purpose will be reasonable and no educational institution established and administered by a religious or linguistic minority can claim recognition or affiliation without submitting to those regulations. That is the price of recognition or affiliation; but this does not mean that it should submit to a regulation stipulating for surrender of a right or freedom guaranteed by the Constitution, which is unrelated to the purpose of recognition or affiliation. (Para 176)

No educational institution established by a religious or linguistic minority can claim total immunity from regulations by the legislature or the university if it wants affiliation or recognition; but the character of the permissible regulations must depend upon their purpose. Such regulations will be permissible if they are relevant to the purpose of securing or promoting the object of recognition or affiliation. (Para 176)

Per Beg, J.

If the object of an enactment is to compel a minority Institution, even indirectly, to give up the exercise of its fundamental rights, the provisions which have this effect will be void or inoperative against the minority Institution. The price of affiliation cannot be a total abandonment of the right to establish and administer a minority institution conferred by Article 30(1) of the Constitution. (Para 199)

Right of affiliation is a statutory and not a fundamental right. (Para 204)

If a minority institution has the option of avoiding the statutory restrictions altogether, if it abandons, with it, the benefits of a statutory right, it is difficult to see how the absoluteness of the right under Article 30(1) of the Constitution is taken away or abridged. All that happens is that the statute exacts a price in general interest for conferring its benefits. (Para 209)

It is open to the minority institution concerned to free itself from any statutory control or fetters if freedom from them is considered by it to be essential for the full exercise of its fundamental rights under Article 30(1) of the Constitution. This article, meant to serve as a shield of minority educational institutions against the invasion of certain rights protected by it and declared fundamental so that they are not discriminated against, cannot be converted by them into a weapon to exact unjustifiable preferential or discriminatory treatment for minority institutions so as to obtain the benefits but to reject the obligations of statutory rights. It is only when the terms of the statute necessarily compel a minority institution to abandon the core of its fundamental rights under Article 30(1) that it could amount to taking away or abridgment of a fundamental right within the meaning of Article 13(2) of the Constitution. It is only then that the principle could apply that what cannot be done directly cannot be achieved by indirect means. (Para 209)

If the price to be paid for aid or recognition is a fetter upon the exercise of a fundamental right, the very essence or core of the fundamental right being an exercise of choice, what is reasonable or not must, necessarily, depend upon the total effect of all the provisions considered together and not of particular provisions viewed in isolation from the rest. (Para 216)

Rev. Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837, explained.

Re The Kerala Education Bill, 1957, 1959 SCR 995, referred to.

Rev. Father W. Proost v. State of Bihar, (1969) 2 SCR 73, distinguished.

State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417, distinguished.

Rt. Rev. Bishop S. K. Patro v. State of Bihar, (1969) 1 SCC 863, distinguished.

D. A. V. College v. State of Punjab, (1971) 2 SCC 269, referred to.

D. A. V. College, Bhatinda v. State of Punjab, (1971) 2 SCC 261, referred to.

It may be that Article 30(1) of the Constitution enables a minority to contend that, in order to secure an equal protection of law, the State should make some statutory provision so that minority institutions may obtain recognition or teach for degrees recognised by the State without sacrificing any part of its rights of management guaranteed by Article 30(1) of the Constitution. No claim for an order directing the State to make such alternative provision for the petitioning minority institution was made before the Court. What was really claimed was that the minority institution must get affiliation on terms other than those prescribed for majority managed institutions when the statute in question has no provisions for affiliation on any such special alternative terms for minority colleges. The impugned provisions applicable to affiliated colleges, whether majority or minority managed, apart from Sections 5, 40 and 41 which are separable, are contained in Sections 20, 33A, 51A and 52A of the Act. If it is held that affiliation is open to a minority institution on some other terms not found in the statutory provisions at all, it would really amount to nothing short of legislation which is really not the function of the Court. (Para 225)

Per Dwivedi, J.

Evidently, there is no express grant of the right of affiliation in Article 30(1). It is also not necessarily implied in Article 30(1). (Para 244)

As our State is secular in character, affiliation of an institution imparting religious instruction or teaching only theology of a particular religious minority may not comport with the secular character of the State. As Article 30(1) does not grant the right of affiliation to such an institution, it cannot confer that right on an institution imparting secular general education. The content of the right under Article 30(1) must be the same for both kinds of institutions. (Para 244)

Re The Kerala Education Bill, 1957, 1959 SCR 995, 1076-77, 63, relied on.

Since the State cannot directly take away or abridge a right conferred under Article 30(1), the State cannot also indirectly take away or abridge that right by subjecting the grant of affiliation to conditions which would entail the forbidden result. (Para 246)

Re The Kerala Education Bill, 1957, 1959 SCR 995, 1063-64, relied on.

As Article 30(1) does not grant the right of affiliation, the State is not under an obligation to have an affiliating university. It is open to a State to establish only a teaching university. (Para 247)

Constitution of India — Article 30 — Whether the right can be waived — Whether future generations can be bound by voluntary surrender of the rights by the present generation

HELD :

Per Mathew and Chandrachud, JJ.

It is doubtful whether the fundamental right under Article 30(1) can be bartered away or surrendered by any voluntary act or that it can be waived. By a voluntary act of affiliation of an educational institution established and administered by a religious minority the past members of the community cannot surrender the right of the future members of that community. The future members of the community do not derive the right under Article 30(1) by succession or inheritance. (Para 162)

Per Beg, J.

It will be carrying the doctrine of imputed knowledge and consent too far to say that minority institution opting for a statutory right must be deemed to have signed a blank cheque to assent to any and every conceivable amendment of any kind whatsoever in future as the price to be paid by it of its choice. No one could be deemed to assent to what is not before him at all. Moreover,

can a minority, even by its assent, be barred from the exercise of a fundamental right? It may be that the bar may be only a conditional one so that it could be removed by the institution concerned whenever it is prepared to pay the price of its removal by giving up certain advantages which are not parts of its fundamental right. Such a conditional bar may be construed only as a permissible regulatory restriction. (Para 200)

Universities — Gujarat University Act, 1949 (Bombay Act 50 of 1949) as amended by Gujarat Act (6 of 1973) — Sections 33A, 40, 41, 51A and 52A — Vires and constitutionality of — Whether infringe Article 30(1) and hence inapplicable to institution established and administered by linguistic and religious minorities — Whether Ordinances 120D, 120E, 120F and 120G r/w Section 55(4) also nnconstitntional — Whether Court should wait till statutes and ordinauces are made under the impugned sections before striking them down

HELD:

Per Ray, C.J. and Palekar, J.

The provisions contained in Section 33A(1)(a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed. These provisions in Section 33A(1)(a) cannot therefore apply to minority institutions. The provisions contained in Section 33A (1)(b) also cannot apply to minority institutions. (Paras 41 and 42)

State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417, relied on.

Sections 40 and 41 of the Act hang together and Section 40 of the Act cannot have any compulsory application to minority institutions so that Section 41 of the Act cannot equally have any compulsory application to minority institutions. (Para 39)

The provision contained in Section 51A, clause (b) of the Act cannot be said to be a permissive regulatory measure in as much as it confers arbitrary power on the Vice-Chancellor to take away the right of administration of the minority institutions. Section 51A of the Act cannot, therefore, apply to minority institutions. (Para 43)

The provisions contained in Section 52A of the Act also cannot in so far as it displaces the domestic jurisdiction of the governing body apply to minority institutions. (Para 44)

The provisions contained in Sections 40, 41, 33A(1)(c), 33A(1)(b), 51A and 52A cannot be applied to minority institutions. These provisions violate the fundamental rights of the minority institutions. (Para 45)

Per Jagannohan Reddy and Alagiriswami, JJ.

Sections 40, 41, 33A(1)(a), 33A(1)(b), 51A and 52A of the Act violate the fundamental rights of minorities and cannot, therefore, apply to the institutions established and administered by them. (Para 50)

Per Khanna, J.

If any statutory provision is found to be violative of Article 30(1) of the Constitution, the fact that it has been enacted in pursuance of the recommendation of an expert body would not prevent the Court from striking down that provision. (Para 110)

State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417, relied on.

Section 33A which provides for a new governing body for the management of the college and also for selection committee as well as the constitution thereof contravenes Article 30(1). (Para 102)

State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417, relied on.

Rt. Rev. Bishop S. K. Patro v. State of Bihar, (1969) 1 SCC 863, relied on.

A provision which makes it imperative that teaching in under-graduate courses can be conducted only by the University and can be imparted only by the teachers of University plainly violates the rights of minorities to establish and administer their educational institutions. Sections 40 and 41 are also violative of Article 30(1). (Paras 108 and 110)

Clause (a) of sub-sections (1) and (2) of Section 51A of the impugned Act which make provision for giving a reasonable opportunity of showing cause against a penalty to be proposed on a member of the staff of an educational institution would be valid. Clause (b) of those sub-sections which gives a power to be Vice-Chancellor and officer of the University authorised by him to veto the action of the managing body of an educational institution in awarding punishment to a member of the staff, interferes with the disciplinary control of the managing body over its teachers and makes a serious inroad on the right of the managing body to administer an educational institution. Clause (b) of each of the two sub-sections of Section 51A should, therefore, be held to be violative of Article 30(1) so far as minority educational institutions are concerned. (Para 106)

There is nothing objectionable to selecting the method of arbitration for settling major disputes connected with conditions of service of staff of educational institutions. It may indeed be a desideratum. What is objectionable is the giving of the power to the Vice-Chancellor to nominate the Umpire. Normally in such disputes there would be hardly any agreement between the arbitrator nominated by the governing body of the institution and the one nominated by the concerned member of the staff. The result would be that the power would vest for all intents and purposes in the nominee of the Vice-Chancellor to decide all disputes between the governing body and the member of the staff connected with the latter's conditions of service. This must cause an inroad in the right of the governing body to administer the institution. Section 52A should, therefore, be held to be violative of Article 30(1) so far as minority educational institutions are concerned. (Para 107)

If the conversion of affiliated colleges of the minorities into constituent colleges contravenes Article 30(1), the fact that such conversion is in pursuance of a scheme which permits the grant of autonomy to an individual college would not prevent the striking down of the impugned provision. (Para 113)

The abridgment of the right of the minorities to establish and administer educational institutions of their choice is writ large on the face of the impugned provisions. The fact that no statutes or ordinance have been framed in pursuance of the impugned provisions would consequently be hardly of much significance in determining the constitutional validity of the impugned provisions. It would not, therefore, be a correct approach to wait till statutes are framed violating the right under Article 30(1). (Para 112)

Trustees of the Roman Catholic Separate Schools for Ottawa v. Ottawa Corporation, (1917) AC 76, relied on.

D. A. V. College v. State of Punjab, (1971) 2 SCC 269, relied on.

Per Mathew and Chandrachud, JJ.

The requirement that the college should have a governing body including persons other than those who constitute the governing body of the Society of Jesus has the effect of divesting that body of its exclusive right to manage the educational institution. The effect of the provision is that the religious minority virtually loses its right to administer the institution it has founded. (Para 181)

So the provisions of sub-sections (1)(a) and (1)(b) of Section 33A abridge the right of the religious minority to administer educational institutions of their choice. (Para 181)

Kerala v. Mother Provincial, (1970) 2 SCC 417, relied on.

Rev. Father W. Proost v. State of Bihar, (1969) 2 SCR 73, 77-78, relied on.

Rt. Rev. Bishop S. K. Patro v. State of Bihar, (1969) 1 SCC 863, relied on.

On plain wording of Section 40 it is clear that the governing body of the religious minority will be deprived of the most vital function which appertains to its right to administer the college, namely, the teaching, training and instructions in the courses of studies, in respect of which the university is competent to hold examination. (Para 187)

If Section 40 is ultra vires Article 30(1), Section 41 which in the present scheme of legislation is dependent upon Section 40 cannot survive and therefore it is unnecessary to express any view upon the constitutionality of its provisions. (Para 189)

A blanket power without any guideline to disapprove the action of the management would certainly encroach upon the right of the management to dismiss or terminate the services of a teacher after an enquiry. While the provisions of sub-clauses (1)(a) and (2)(b) of Section 51A are valid, sub-clauses (1)(b) and (2)(b) of Section 51A are violative of the right under Article 30 of the religious minority in question here. (Para 192)

Section 52A subserves no purpose and it will needlessly interfere with the day-to-day management of the institution. Any and every petty dispute raised by a member of the teaching or non-teaching staff will have to be referred to arbitration if it seems to touch the service conditions. Arbitrations, not imparting education, will become the business of educational institutions. This section is bad in its application to minorities. (Para 184)

Re The Kerala Education Bill, 1957, 1959 SCR 995, not approved.

D. A. V. College v. State of Punjab. (1971) 2 SCC 269, relied on.

Per Beg, J.

In as much as Section 5 of the Act has a compulsive effect by denying to the petitioning college the option to keep out of the statute altogether, it would be inoperative against it. (Para 201)

Section 41(1) would have the compelling effect of making it automatically a constituent unit of the University, and must therefore, be held to be inoperative against the petitioning college as it cannot affect the fundamental righs guaranteed by Article 30(1) of the Constitution. Provisions of Section 40 and the remaining provisions of Section 41 of the Act are all parts of the same compulsive scheme or mechanism which is struck by Article 30(1). (Para 202)

If the petitioning college, which has applied for the status of an autonomous College under Section 38B of the Act as amended in 1972, is provided with an avenue of escape by the amended provisions themselves, it seems quite unnecessary to consider the impact of Section 20, Section 33A and Sections 51A and 52A of the Act. It is only if the petitioning college fails in its attempt to become an autonomous college that the question of the impact of Sections 20, 33A, 51A and 52A could arise. (Paras 205 and 206)

Section 20 of the Act, which deals with the powers of the Executive Council of the Gujarat University, does not directly or indirectly touch a minority institutions' rights under Article 30(1) of the Constitution merely because the Executive Council may take decisions which may have that effect. It is only when specific decisions and actions said to have that effect are brought before the Courts that their validity, in purported exercise of powers conferred by Section 20 of the Act, could be determined because the section itself gives a general power not specifically directed against minority institutions. (Para 210)

Under Section 33A the mere presence of the representatives of the Vice-Chancellor, the Teachers, the Members of the non-teaching staff, and the students

of the College would not impinge upon the right to administer. Such a "sprinkling" is more likely to help to make that administration more effective and acceptable to everyone affected by it. A minority institution can still have its majority on the governing body.

If a greater degree of interference with the right to administer or manage an institution can be held to be permissible as a logical consequence of the exercise of an option of a minority for an institution governed by a statute, with all its benefits as well as disadvantages, provisions of Section 51A do not constitute an unreasonable encroachment on the essence of rights of a minority institution protected by Article 30(1) of the Constitution an infringement of the special minority rights under Article 30(1) of the Constitution when the institution opts for a statutory right which necessarily involves statutory restrictions. (Para 212)

Re The Kerala Education Bill, 1957, 1959 SCR 995, 1062, 1019, 1052 and 1053, relied on.

Apart from Sections 5, 40 and 41 of the Act, which directly and unreasonably impinge upon the rights of the petitioning minority managed college, protected by Article 30(1) of the Constitution, the other provisions do not have that effect. On the situation under consideration the minority institution affected by the enactment has, upon the claims put forward on its behalf, a means of escape from the impugned provisions other than Sections 5, 40 and 41 of the Act by resorting to Section 38B of the Act. (Para 232)

Until its application for an autonomous status is rejected, the petitioner could not reasonably complain that the other provisions of the Act, apart from Sections 5, 40 and 41 of the Act will be used against it. For this reason also, it is unnecessary, at least at this stage, to make a declaration about the effect of Sections 20 and 33A and 51A upon the fundamental rights of the petitioner protected by Article 30(1) of the Constitution. (Para 226)

Per Dwivedi, J.

Section 33(1)(a) is obnoxious to Article 30(1). (Para 286)

No opinion expressed on Section 33A(1)(b) as the challenge to it was abandoned by the petitioner. (Para 287)

Sections 40 and 41 are valid. (Paras 288 to 292)

The power of approval by the Vice-Chancellor is necessary in the interest of the security of service of the teaching and non-teaching staff. Security of service is necessary to promote efficiency and honest discharge of duty. It is calculated to improve the institution in the long run. The members of the teaching and non-teaching staff cannot ordinarily afford to go to courts for redress of their grievances. Section 51A provides a cheaper and more expeditious remedy to them for the redress of their grievances. The impugned provision is identical to Section 33, Industrial Disputes Act which this Court has held to be valid. (Para 300)

Section 51A was not placed before the Court in the earlier cases. As the power of approval is confined to checking the abuse of the right to fire employees it does not offend Article 30(1). (Para 303)

Constitution of India — Article 25 to 30 — Nature and object of

HELD:

Per Khanna, J.

The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy. As long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not only an act of breach of faith, it would be constitutionally impermissible and liable to be struck down by the courts. Although the words

secular state are not expressly mentioned in the Constitution, there can be no doubt that our Constitution-makers wanted establishment of such a state. Secularism is neither anti-God, nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the state and ensure that no one shall be discriminated against on the ground of religion. To allay all apprehensions of interference by. the legislature and the executive in matters of religion, the rights mentioned in Articles 25 to 30 were made a part of the fundamental rights and religious freedom contained in those articles was guaranteed by the Constitution. (Para 75)

Constitution of India — Articles 29, 30 and 14 — Special rights to minorities and the equality clause

HELD :

Per Jaganmohan Reddy and Alagiriswami, JJ.

Equality of treatment of minority and majority or equality before law precludes discrimination. (Para 55)

Whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations.....It is easy to imagine cases in which equality of treatment of the majority and of the minority whose situation and requirements are different, would result in inequality..... The equality between members of the majority and of the minority must be effective, genuine equality. (Para 55)

Minority School in Albania case (1935), Permanent Court of International Justice publications, Series A/B No. 64, p. 19.

Per Khanna, J.

The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence. (Para 77)

Special rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing to the minorities autonomy in the matter of the administration of those institutions. The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true, genuine equality, an equality not merely in theory but also in fact. (Para 77)

Adelaide Co. of Jehovah Witnesses Inc. v. The Commonwealth, (1943) 67 Comm LR 116, relied on.

Minority Schools in Albania case, relied on.

Per Mathew and Chandrachud, JJ.

The problem of the minorities is not really a problem of the establishment of equality because if taken literally, such equality would mean absolute identical treatment of both the minorities and the majorities. This would result only in equality in law but inequality in fact. (Para 132)

So though it may sound paradoxical but it is nevertheless true that minorities can be protected not only if they have equality but also, in certain circumstances, differential treatment. (Para 133)

Juridical equality postulates that religious minority should have a guaranteed right to establish and administer its own educational institutions where it can impart secular education in a religious atmosphere. (Para 144)

Whatever spiritual mission of promoting unity the government may have, it is conditioned by its primal duty of promoting justice, respecting guaranteed rights and ensuring equality of difference. (Para 147)

A condition may be invalidated on the ground that denying a benefit or privilege because of the exercise of a right in effect penalize its exercise. (Para 167)

Constitution of India — Article 13(2) and Article 19(2) to (6) — Direct and indirect abridgment

HELD :

Per Mathew and Chandrachud, JJ.

Measure which are directed at other forms or activities but which have a secondary or indirect or incidental effect upon the right do not generally abridge a right unless the content of the right is regulated. (Para 173)

In every case, the court must undertake to define and give content to the word 'abridge" in Article 13(2). The question to be asked and answered is whether the particular measure is regulatory or whether it crosses the zone of permissible regulation and enters the forbidden territory of restrictions or abridgment. (Para 173)

Per Beg, J.

Even if the intention to affect a fundamental right is not manifest from the express terms of statutory provisions, the provisions may be vitiated if that is their necessary consequence or effect. (Para 199)

A mere incidental regulation of or restriction upon the exercise of a fundamental right intended to secure and actually ensuring its more effective enjoyment or taking away of the fundamental right at all or to have that effect. It would not really take away or abridge the fundamental rights even though it regulates their exercise. If on the other hand, a law necessarily has the compelling effect of a substantial abridgement or taking away of the fundamental right from a minority institution, it would not be saved simply because it does not say so but produces that effect indirectly. For the purposes of applying Article 13(2) of the Constitution one has to look at the total effect of statutory provisions and not merely intention behind them. (Para 208)

Re The Kerala Education Bill, 1957, 1959 SCR 995, relied on.

Practice and Procedure —Intervener taking plea not taken by petitioner — Held that since notices were issued to minority institutions to appear as a special consideration their new plea is permitted

HELD :

Per Ray, C.J. and Palekar, J.

The settled practice of the Supreme Court is that an intervener is not to raise contentions which are not urged by the petitioners. In view of the fact that notices were given to minority institutions to appear and those institutions appeared and made their submissions a special consideration arises here for expressing the views on a provision not challenged by the petitioners. (Para 42)

Constitution of India — Articles 143 and 141 — Binding natnre of opinions expressed in a reference under Article 143

HELD :

Per Jaganmohan Reddy and Alagiriswami, JJ.

The report which may be made to the President in a reference under Article 143 is not binding on the Supreme Court in any subsequent matter wherein in a concrete case the infringement of the rights under any analogous provision may be called in question, though it is entitled to great weight. (Para 51)

Under Article 143 the Supreme Court expresses its opinion if it so chooses and in some cases it might even decline to express its opinion. (Para 51)

In some cases the opinion may be based on certain stated contingencies or on some assumed or hypothetical situations whereas in a concrete case coming before the Supreme Court by way of an appeal under Article 133, or by special

leave under Article 136 or by petition under Article 32, the law declared by it by virtue of Article 141 is binding on all courts within the territory of India. (Para 51)

In Re Levy of Estate Duty, 1944 FCR 317, relied on.

Re The Kerala Education Bill 1957, 1959 SCR 995, referred to.

In so far as the decisions later to the Kerala Education Bill reference lay down different or contrary principles, they are the law laid down by the Supreme Court. (Para 52)

State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417, referred to.

D. A. V. College v. State of Punjab, (1971) 2 SCC 269, referred to.

Per Khanna, J.

The opinion expressed by the Supreme Court under Article 143 in **Re Kerala Edncation Bill** was of an advisory character and though great weight should be attached to it because of its persuasive value, the said opinion cannot override the opinion subsequently expressed by the Supreme Court in the contested cases. It is the law declared by the Court in the subsequent contested cases which would have a binding effect. The words "as at present advised" as well as the preceding sentence indicate that the view expressed by the Supreme Court in **Re Kerala Edncation Bill** in this respect was hesitant and tentative and not a final view in the matter. (Para 109)

Re Levy of Estate Duty, (1944) 6 FCR 317, relied on.

Attorney General for Ontario v. Attorney-General for Canada, (1912) AC 571, relied on.

Constitutional Doctrines — Doctrine of "unconstitutional condition" — Nature of — Development in the United States — Application of the context of fundamental rights

HELD:

Per Mathew and Chandrachnd, JJ.

The doctrine of "unconstitutional condition" means any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right. (Para 158)

The major requirement of the doctrine is that the person complaining of the condition must demonstrate that it is unreasonable in the special sense that it takes away or abridges the exercise of a right protected by an explicit provision of the Constitution. (Para 158)

McAuliffe v. New Bedford, 155 Mass 216, referred to.

Davis v. Massachusetts, 167 US 43, referred to.

Pullman Co. v. Adams, 189 US 420, referred to.

Western Union Co. v. Kansas, 216 US 1, referred to.

Thomas Reas Powell: 16 Columbia Law Rev. 29, at 110-111, referred to.

Western Union Tel. Co. v. Foster, 247 US 105, 114, referred to.

Insurance Co. v. Morse, 20 Wall 445, 447 (US 1874), referred to.

Maurice H. Merril "Unconstitutional Conditions", 77 University of Pennsylvania Law Rev., pp. 879, 880, referred to.

81 Harv. Law. Rev. 1439, referred.

Though the state may have privileges within its control which it may withhold, it cannot use a grant of those privileges to secure a valid consent to acts which, if imposed upon the grantee in invitum would be beyond its constitutional power. (Para 159)

Frost and Frost Trucking Co. v. Railroad Comm., 271 US 583, relied on.

Re The Kerala Education Bill 1957, 1959 SCR 995, 1063, referred to.

The most significant characteristic of the power to impose a condition in the area of constitutional rights is the relevancy of the condition to the attainment of the objective involved in the grant of the privilege or benefit. (Para 166)

A condition may be invalidated on the ground that denying a benefit or privilege because of the exercise of a right in effect penalizes its exercise. (Para 167)

A condition may be invalidated on yet another ground: precluding from participation in the enjoyment of a privilege or benefit those who wish to retain their rights would seem an unreasonable classification violative of Article 14. (Para 169)

Frost & Frost Trucking Co. v. Railroad Comm. 271 US 583, referred to.

"Judicial Acquiescence in the Forfeiture of Constitutional Rights through Expansion of the Conditioned Privilege Doctrine", 28 Indiana Law Journal, 520, 525, referred to.

American Communications Assoc. v. Douds, 339 US 382, 417, referred to.

"Unconstitutional Conditions and Constitutional Rights", 35 Columbia Law Review, 321, 357, referred to.

Steinberg v. United States, 163 F. Supp. 590, 592, referred to.

Sherbert v. Verner, 374 US 398, 404-405, referred to.

Wieman v. Undergaff, 344 US 183, 191, 192, referred to.

Hannegan v. Esquire Inc., 327 US 146, 155, 156, referred to.

Speiser v. Randall, 357 US 513, 518-9, referred to.

Infringement of a fundamental right is nonetheless infringement because accomplished through the conditioning of a privilege. If a legislature attaches to a public benefit or privilege an addendum, which in no rational way advances the purposes of the scheme of benefits but does restrain the exercise of a fundamental right, the restraint can draw no constitutional strength whatsoever from its being attached to benefit or privilege, but must be measured as though it were a wholly separate enactment. (Para 171)

Per Beg, J.

If the object of an enactment is to compel a minority Institution, even indirectly, to give up the exercise of its fundamental rights, the provisions which have this effect will be void or inoperative against the minority institution. (Para 199)

Petitions allowed M/2008/C

submissions made on behalf of the Petitioners by I. M. Nanavati

Submissions limited to Article 30 of the Constitution and its impact on the impugned provisions of:

(i) Sections 40 and 41 — Conversion of affiliated colleges into constituent colleges;

(ii) Section 33A regarding constitution of Governing Body and Selection Committee; and

(iii) Sections 51A and 52A regarding dismissal, removal and termination of services of staff of college, and reference of dispute to arbitration, respectively.

1. The character and scope and the width and amplitude of Article 30 is different from Article 29(1).

2. Article 29(1) confers the right on "section of citizens" having a distinct

language, script or culture, while Article 30(1) confers the right only upon a language, script or culture, while Article 30(1) confers the right upon a minority.

3. Article 29(1) is a right which is limited to conserve language, script or culture, while Article 30(1) is an absolute right to establish educational institutions of their choice by the minorities and those educational institutions need not be for the object of preserving any distinct language, script or culture of the minorities concerned.

4. The right under Article 29(1) can be exercised by any section of citizens, be they may belong to minority or not, and the right can be exercised not only for establishment of educational institutions but also in diverse manner for conserving their language, script or culture, such as propagation of their language, script or culture, carrying on agitation in that behalf, publishing magazines and periodicals, exhibitions and cultural shows, etc.

5. The right under Article 30 can be exercised by a minority residing in India irrespective of the fact whether such minorities are citizens or not.

6. If the right conferred by Article 30(1) is an absolute right conferred on the minority to establish educational institutions of their choice, no interference can be made with the exercise of such rights by any legislation or executive action. However, only such regulatory measures which are regulative of the educational character of the institution as a minority institution are permissible.

7. Denial of recognition or refusal to give grant would indirectly encroach upon or destroy such right conferred by Article 30(1) and make such a fundamental right a teasing illusion.

8. Sections 40 and 41 as amended by the Gujarat University (Amendment) Act, 1972 strikes at the very root of administering educational instructions of their choice by the petitioners by converting their affiliated college into a constituent college and deprives the petitioners of their fundamental right to administer their St. Xavier's College.

9. Section 33A inserted by the Amending Act interferes with the right of management and therefore impeaches upon the fundamental right guaranteed by Article 30(1).

10. Section 33A negatives the right to select Principal and teachers which rights are essential to effectively exercise the fundamental right conferred by Article 30(1), and the impugned provision is, therefore, ultra vires.

11. Section 51A denies the right to terminate the services of or dismiss a teacher or member of the non-teaching staff and directly impinges upon the fundamental right guaranteed by Article 30(1).

12. Section 52A inserted by the Amending Act compels the arbitration of any dispute relating to conditions of service to be raised by the member of teaching or non-teaching staff and interferes with the administration of the minority institution and therefore ultra vires Article 30(1).

Submissions on behalf of the Interveners by N. A. Palkhivala

The content of the right to "administer" educational institutions:

The word "administer" is a word of very wide import. The other key words in Article 30(1) are "of their choice".

The categories of what is comprehended within the concept of "administration" are beyond enumeration. It is clear however — and that has been the consensus of judicial opinion throughout the history of our Constitution — that the minorities' right to administer must necessarily include the following:—

(i) the right to choose its managing or governing body;

(ii) the right to choose its teachers;

(iii) the right not to be compelled to refuse admission to students; and

(iv) the right to use its properties and assets for the benefit of its own institution.

The crucial question is — how far can the State pass regulatory laws without encroaching upon the fundamental right under Article 30(1). The correct position has been summarised in State of Kerala v. Mother Provincial (1970) 2 SCC 417. Regulatory laws are permissible up to the point where

(a) they do not in substance interfere with the right of administration but leave the management free of control and permit the minority to mould the institution as it thinks fit, and

(b) they do not destroy the essence of the element of "choice".

The minorities' right to administer educational institutions of their choice is not a right which can be exercised in vacuo. The right would be denuded of all its content if the educational institutions were denied affiliation for the reason that the management wanted to exercise its fundamental right under Article 30(1). A University has no power to prescribe as a condition of affiliation that the minority should surrender its fundamental right to administer the institution of its choice. Thus while the right to affiliation is not a fundamental right, it is necessarily implicit in Article 30(1) that affiliation cannot be denied because of a refusal to give up that fundamental right.

Other Submissions on behalf of the Interveners

1. The term 'educational institutions' in Article 30(1) and (2) has the same meaning as in Article 28(1), (2) and (3), and Article 29(2) of the Constitution. The term is used in a wider sense and includes 'educational institutions' imparting general education. It is not used in limited sense, confined only to 'educational institution' imparting religious education only or 'educational institutions' established to conserve language, script or culture of the minority concerned.

The language used in Article 26(a) supports this submission. The rights conferred on the linguistic and religious minorities under Article 30(1) are independent of the rights under Article 29(1) conferred on a section of the citizens, whether belonging to majority or minority.

2. The right of linguistic and religious minorities under Article 30(1) is absolute. No hard and fast rules can be laid as to the extent of permissible regulatory measures. Each case has to be decided on its own peculiar facts and the impact of the impugned regulatory measure on the right of the Minorities to establish and administer 'educational institutions' of their choice. The regulations must be conceived in the interest of the minority educational institutions, and not of the public or the nation as a whole.

3. The doctrine of 'Stare decisis' has full application in this case. There are no compelling or substantial reasons to reconsider series of almost unanimous decisions of this Court on construction of Articles 29 and 30 of the Constitution.

(1965) 2 SCR 908 at 921, 922.

4. The meaning given to the word "minorities" in Article 30 by some decisions of this Court, e.g., (1959) SCR 995 and (1971) 2 SCC 269 is erroneous and requires to be corrected. A minority must be determined in relation to the country as a whole and not by sub-dividing it into States. The Constitution does not permit the country to be split up into divisions and sub-divisions for the purpose of determining minorities.

5. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of and for the benefit of minority educational institutions concerned are impermissible.

6. There is a fundamental distinction between a restriction on the right of administration and a regulation prescribing the manner of administration.

7. The right to administer means the right to effectively manage and conduct the affairs of the institution. It postulates autonomy in administration.

8. The right of administration inter alia consists of:

(a) The right to conduct and manage the affairs of the institution through a committee or body of persons in whom the founders or the institution have faith and confidence and who have full autonomy in that sphere subject to permissible regulatory measures.

(b) The right to impart education through one's own teachers who have been selected and appointed having regard not merely to their academic qualifications but their compatability with the ideals, aims, and aspirations and traditions of the institution. Educational institutions do not want a teacher who is brilliant but is cantankerous or quarrelsome or believes in the policy of confrontation or who is antipathetic to the creed and beliefs and practices of the religious minority administering the educational institution.

(c) The right to admit students of their choice subject to reasonable regulations about academic qualifications.

(d) The right to select and appoint one's own teachers and Principal subject to reasonable regulation re. academic qualifications.

(e) The right to enforce discipline by exercising control and supervision over teachers and exercising power of punishment over them in case of misconduct.

(f) Prescribing syllabi, curricula, conditions regarding health and hygiene of students and other such regulations are permissible, because they do not directly impinge on the right of administration.

9. Any act or measure which prevents the effective and real exercise of a fundamental right amounts to violation of that right. Therefore, to insist upon affiliation on terms and conditions which restrict the right of administration is violative of Article 30(1).

10. It is the creation of power that is subject to objection and not its exercise. Reasonable manner of administration of statutes is irrelevant in considering its constitutionality.

11. The historical genesis and constitutional background must at all times be remembered in construing Article 30. The solemn pledge given to the minorities should not be whittled down on grounds of so-called inconvenience or chaos.

The Judgments of the Court were delivered by

RAY, C.J. (*on behalf of himself and Palekar, J.*)—The question for consideration is whether the minorities based on religion or language have the right to establish and administer educational institutions for imparting general secular education within the meaning of Article 30 of the Constitution.

2. The minority institutions which are in truth and reality educational institutions where education in its various aspects is imparted claim protection of Article 30.

3. This raises the question at the threshold whether Articles 30(1) and 29(1) of the Constitution are mutually exclusive.

4. Articles 29 and 30 of the Constitution are grouped under the heading "Culture and educational rights". Article 29(1) deals with right

of any section of the citizens residing in India to preserve their language, script or culture. Article 30(1) provides that all religious and linguistic minorities have the right to establish and administer educational institutions of their choice. Article 29(2) prohibits discrimination in matters of admission into educational institutions of the types mentioned therein on grounds only of religion, race, caste, language or any of them. Article 30(2) prevents States from making any discrimination against any educational institution in granting aid on the ground that it is managed by a religious or linguistic minority.

5. Articles 29 and 30 confer four distinct rights. First is the right of any section of the resident citizens to conserve its own language, script or culture as mentioned in Article 29(1). Second is the right of all religious and linguistic minorities to establish and administer educational institutions of their choice as mentioned in Article 30(1). Third is the right of an educational institution not to be discriminated against in the matter of State aid on the ground that it is under the management of a religious or linguistic minority as mentioned in Article 30(2). Fourth is the right of the citizen not to be denied admission into any State maintained or State aided educational institution on the ground of religion, caste, race or language, as mentioned in Article 29(2).

6. It will be wrong to read Article 30(1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. The reasons are these. First, Article 29 confers the fundamental right on any section of the citizens which will include the majority section whereas Article 30(1) confers the right on all minorities. Second, Article 29(1) is concerned with language, script or culture, whereas Article 30(1) deals with minorities of the nation based on religion or language. Third, Article 29(1) is concerned with the right to conserve language, script or culture, whereas Article 30(1) deals with the right to establish and administer educational institutions of the minorities of their choice. Fourth, the conservation of language, script or culture under Article 29(1) may be by means wholly unconnected with educational institutions and similarly establishment and administration of 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 a language, script or culture.

7. If the scope of Article 30(1) is to establish and administer educational institutions to conserve language, script or culture of minorities, it will render Article 30 redundant. If rights under Articles 29(1) and 30(1) are the same then the consequence will be that any section of citizens not necessarily linguistic or religious minorities will have the right to establish and administer educational institutions of their choice. The scope of Article 30 rests on linguistic or religious minorities and no other section of citizens of India has such a right.

8. The right to establish and administer educational institutions of their choice has been conferred on religious and linguistic minorities so that the majority who can always have their rights by having proper legislation do not pass a legislation prohibiting minorities to establish and administer educational institutions of their choice. If the scope of Article 30(1) is made an extension of the right under Article 29(1) as the right to establish and administer educational institutions for giving religious instruction or for imparting education in their religious teachings or tenets, the fundamental right of minorities to establish and administer educational institutions of their choice will be taken away.

9. Every section of the public, the majority as well as minority has rights in respect of religion as contemplated in Articles 25 and 26 and rights in respect of language, script, culture as contemplated in Article 29. The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality.

10. In *Re The Kerala Education Bill,* 1957,[1] this Court said that Article 30(1) covers institutions imparting general secular education. The object of Article 30 is to enable children of minorities to go out in the world fully equipped. All persons whether in the majority or in the minority have the right under Article 25 freely to profess, practise and propagate religion. Any section of citizens which includes the majority as well as the minority shall have under Article 29 the right to conserve their distinct language, script or culture. That is why the minorities are given a specific right in respect of educational institutions under Article 30. Article 30(1) gives the right to linguistic minorities as well where no question of religion arises. It is, therefore, not at all possible to exclude secular education from Article 30. Since the *Kerala Education Bill case* (supra) in 1959 this Court has consistently held that general secular education is covered by Article 30.

11. This Court in *Rev. Father W. Proost* v. *State of Bihar,*[2] considered the question whether the protection guaranteed under Article 30(1) is a corollary to the right guaranteed under Article 29(1). A contention was advanced that protection to minorities in Article 29(1) was only a right to conserve a distinct language, script or culture of its own, and, therefore, the educational institutions which imparted general education did not qualify for protection of Article 30. This Court said that the width of Article 30 could not be cut down by introducing any consideration on which Article 29(1) is based. Article 29(1) is a general protection given to sections of citizens to conserve their language, script or culture. Article 30 is a special right to minorities to establish educational institutions of their choice. This Court said that the two Articles create two separate rights though it is possible that the rights might meet in a given case.

1. 1959 SCR 995 : AIR 1958 SC 956 : 1959 SCJ 321.
2. (1969) 2 SCR 73 : AIR : 1969 SC 465 : (1969) 1 SCJ 700.

12. The real reason embodied in Article 30(1) of the Constitution is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general education to make them complete men and women of the country. The minorities are given this protection under Article 30 in order to preserve and strengthen the integrity and unity of the country. The sphere of general secular education is intended to develop the commonness of boys and girls of our country. This is in the true spirit of liberty, equality and fraternity through the medium of education. If religious or linguistic minorities are not given protection under Article 30 to establish and administer educational institutions of their choice, they will feel isolated and separate. General secular education will open doors of perception and act as the natural light of mind for our countrymen to live in the whole.

13. The second question which arises for consideration is whether religious and linguistic minorities who have the right to establish and administer educational institutions of their choice, have a fundamental right to affiliation. It is contended on behalf of the petitioners that the right to establish educational institutions of their choice will be without any meaning if affiliation is denied. The respondents pose the question whether educational institutions established and administered by minorities for imparting general secular education have a fundamental right to be affiliated to a statutory University on terms of management different from those applicable to other affiliated colleges.

14. The consistent view of this Court has been that there is no fundamental right of a minority institution to affiliation. An explanation has been put upon that statement of law. It is that affiliation must be a real and meaningful exercise for minority institutions in the matter of imparting general secular education. Any law which provides for affiliation on terms which will involve abridgement of the right of linguistic and religious minorities to administer and establish educational institutions of their choice will offend Article 30(1). The educational institutions set up by minorities will be robbed of their utility if boys and girls cannot be trained in such institutions for University degrees. Minorities will virtually lose their right to equip their children for ordinary careers if affiliation be on terms which would make them surrender and lose their rights to establish and administer educational institutions of their choice under Article 30. The primary purpose of affiliation is that the students reading in the minority institutions will have qualifications in the shape of degrees necessary for a useful career in life. The establishment of a minority institution is not only ineffective but also unreal unless such institution is affiliated to a University for the purpose of conferment of degrees on students.

15. Affiliation to a University really consists of two parts. One part relates to syllabi, curricula, courses of instruction, the qualifications of teachers, library, laboratories, conditions regarding health and hygiene

of students. This part relates to establishment of educational institutions. The second part consists of terms and conditions regarding management of institutions. It relates to administration of educational institutions.

16. With regard to affiliation a minority institution must follow the statutory measures regulating educational standards and efficiency, the prescribed courses of study, courses of instruction and the principles regarding the qualification of teachers, educational qualifications for entry of students into educational institutions etc.

17. When a minority institution applies to a University to be affiliated, it expresses its choice to participate in the system of general education and courses of instruction prescribed by that University. Affiliation is regulating courses of instruction in institutions for the purpose of co-ordinating and harmonising the standards of education. With regard to affiliation to a University, the minority and non-minority institutions must agree in the pattern and standards of education. Regulatory measures of affiliation enable the minority institutions to share the same courses of instruction and the same degrees with the non-minority institutions.

18. This Court in *State of Kerala* v. *Very Rev. Mother Provincial, etc.*[3] explained the necessity and importance of regulatory measures of system and standard of education in the interest of the country and the people. When a minority institution applies for affiliation, it agrees to follow the uniform courses of study. Affiliation is regulating the educational character and content of the minority institutions. These regulations are not only reasonable in the interest of general secular education but also conduce to the improvement in the stature and strength of the minority institutions. All institutions of general secular education whether established by the minorities or the non-minorities must impart to the students education not only for their intellectual attainment but also for pursuit of careers. Affiliation of minority institutions is intended to ensure the growth and excellence of their children and other students in the academic field. Affiliation mainly pertains to the academic and educational character of the institution. Therefore, measures which will regulate the courses of study, the qualifications and appointment of teachers, the conditions of employment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all comprised in matters germane to affiliation of minority institutions. These regulatory measures for affiliation are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institutions under Article 30.

19. The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected

3. (1971) 1 SCR 734 : (1970) 2 SCC 417.

by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution.

20. The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. Das, C. J., in the *Kerala Education Bill case* (supra) summed up in one sentence the true meaning of the right to administer by saying that the right to administer is not the right to mal-administer.

21. On behalf of the petitioners, it is said that the right to administer means autonomy in administration. Emphasis is placed on the minority's claim to mould the institution as it thinks fit. It is said that the regulatory measures should not restrict the right of administration but facilitate the same through the instrumentality of the management of the minority institution. It is said that the management of the minority institution should not be displaced because that will amount to violation of the right to administer.

22. The *Kerala Education Bill case* (supra) upheld certain regulatory provisions as to administration of minority institution not to infringe the right to administer. The manager of an aided school was to be appointed subject to the approval of such officer as the Government might authorise. The Government prescribed the qualifications for appointment as teachers. The Public Service Commission selected candidates for appointment as teachers. The conditions of service were to be the same as in Government schools. No teacher was to be dismissed, removed or reduced in rank or suspended without the previous sanction of the officer authorised by the Government in this behalf.

23. The *Kerala Education Bill case* (supra) did not uphold the validity of Clauses 14 and 15 in the Kerala Education Bill, 1957. These clauses authorised the Government to take over any aided school under certain circumstances. This Court found that those clauses amounted to expropriation of the schools. The schools were recognised on condition that they submitted to those clauses. Such submission amounted to surrender of the right under Article 30.

24. This Court in *Rev. Father W. Proost case* (supra) held that Section 48-A of the Bihar Universities Act which came into force from March 1, 1962 completely took away the autonomy of the governing body of St. Xavier's College established by the Jesuits of Ranchi. Section 48-A of the said Act provided inter alia that appointments, dismissals,

removals, termination of service by the governing body of the College were to be made on the recommendation of the University Service Commission and subject to the approval of the University. There were other provisions in that section, viz., that the Commission would recommend to the governing body names of persons in order of preference and in no case could the governing body appoint a person who was not recommended by the University Service Commission.

25. In *Rt. Rev. Bishop S. K. Patro* v. *State of Bihar*,[4] the State of Bihar requested the Church Missionary Society School, Bhagalpur to constitute a managing committee of the school in accordance with an order of the State. This Court held that the State authorities could not require the school to constitute a managing committee in accordance with their order.

26. In *D. A. V. College* v. *State of Punjab*,[5] Clause 17 of the impugned statute in that case which provided that the staff initially appointed shall be approved by the Vice-Chancellor and subsequent changes would be reported to the University for the Vice-Chancellor's approval was found to interfere with the right of management.

27. This Court in *State of Kerala* v. *Very Rev. Mother Provincial case* (supra) found Sections 48 and 49 of the Kerala University Act of 1969 to be infraction of Article 30. Those sections were found by this Court to have the effect of displacing the administration of the college and giving it to a distinct corporate body which was in no way answerable to the institution. The minority community was found to lose the right to administer the institution it founded. The governing body contemplated in those sections was to administer the colleges in accordance with the provisions of the Act, statutes, ordinances, regulations, bye-laws and orders made thereunder. The powers and functions of the governing body, the removal of the members and the procedure to be followed by it were all to be prescribed by the statutes. These provisions amounted to vesting the management and administration of the institution in the hands of bodies with mandates from the University.

28. These rulings of this Court indicate how and when there is taking away or abridgment of the right of administration of minority institutions in regard to choice of the governing body, appointment of teachers and in the right to administer.

29. The decision of this Court in *Rev. Sidhajbhai Sabhai* v. *State of Bombay*,[6] illustrates as to how the right of the minority institution is violated by the State order requiring the minority institution to reserve under orders of Government 80 per cent of the seats on threat of withholding grant-in-aid for non-compliance with the order. This Court in *Kerala Education Bill case* (supra) said that the State cannot do indirectly what it cannot do directly. Withholding aid on terms which demand the

4. (1970) 1 SCR 172 : (1969) 1 SCC 863.
5. 1971 Supp SCR 688 : (1971) 2 SCC 269.
6. (1963) 3 SCR 837 : AIR 1963 SC 540.

surrender of the right of the minority to administer the institution is an infringement of the right under Article 30.

30. Educational institutions are temples of learning. The virtues of human intelligence are mastered and harmonised by education. Where there is complete harmony between the teacher and the taught, where the teacher imparts and the student receives, where there is complete dedication of the teacher and the taught in learning, where there is discipline between the teacher and the taught, where both are worshippers of learning, no discord or challenge will arise. An educational institution runs smoothly when the teacher and the taught are engaged in the common ideal of pursuit of knowledge. It is, therefore, manifest that the appointment of teachers is an important part in educational institutions. The qualifications and the character of the teachers are really important. The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclectism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character.

31. Regulations which will serve the interests of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions.

32. Education should be a great cohesive force in developing integrity of the nation. Education develops the ethos of the nation. Regulations are, therefore, necessary to see that there are no divisive or disintegrating forces in administration.

33. Three sets of regulations are impeached as violative of Article 30. The first set consists of Sections 40 and 41 of the Gujarat University Act, 1949 as amended, referred to, as the Act. The second set consists of Section 33A(1)(*a*). The third set consists of Sections 51A and 52A.

34. Section 40 of the Act enacts that teaching and training shall be conducted by the university and shall be imparted by teachers of the university. Teachers of the university may be appointed or recognised by the university for imparting instructions on its behalf. As soon as the Court which is one of the authorities of the university determines that the teaching and training shall be conducted by the university the provisions of Section 41 of the Act come into force.

35. Section 41 of the Act consists of four sub-sections. The first

sub-section states that all colleges within the university area which are admitted to the privileges of the university under sub-section (3) of Section 5 of the Act and all colleges which may hereafter be affiliated to the university shall be constituent colleges of the university. It is true that no determination has yet been made by the court of the university under Section 40 of the Act but the power exists. The power may be used in relation to minority institution. Once that is done the minority institutions will immediately become constituent colleges. The real implication of Section 40 of the Act is that teaching and training shall be conducted by the university. The word "conduct" clearly indicates that the university is a teaching university. Under Section 40 of the Act the university takes over teaching of under-graduate classes.

36. Section 41 of the Act is a corollary to Section 40 of the Act. Section 41 of the Act does not stand independent of Section 40 of the Act. Once an affiliated college becomes a constituent college within the meaning of Section 41 of the Act pursuant to a declaration under Section 40 of the Act it becomes integrated to the university. A constituent college does not retain its former individual character any longer. The minority character of the college is lost. Minority institutions become part and parcel of the university. The result is that Section 40 of the Act cannot have any compulsory application to minority institutions because it will take away their fundamental right to administer the educational institutions of their choice.

37. Section 41 of the Act contains four sub-sections. The first sub-section broadly states that all colleges within the University area shall be the constituent colleges of the university. The second sub-section states that all institutions within the university area shall be the constituent institutions of the university. The third sub-section states that no educational institution situate within the university area shall, save with the consent of the university, and the sanction of the State Government be associated in any way with or seek admission to any privilege of any other university established by law. The fourth sub-section states that the relations of the constituent colleges and constituent, recognised or approved institutions within the university area shall be governed by the statutes to be made in that behalf and such statutes shall provide in particular for the exercise by the university of the powers enumerated therein in respect of constituent degree colleges and constituent recognised institutions.

38. Section 41(4)(ii) of the Act confers power on the university to approve the appointment of the teachers made by colleges. Section 41(4)(iii) of the Act requires colleges to contribute teachers for teaching on behalf of the university. Section 41(4)(iv) of the Act confers power on the university to co-ordinate and regulate the facilities provided and expenditure incurred by colleges and institutions in regard to libraries, laboratories and other equipments for teaching and research. Section 41(4)(v) confers power on the university to require colleges and institutions when necessary to confine the enrolment of students in certain

subjects. Section 41(4)(vi) confers power on the university to levy contributions from colleges and institutions and to make grants to them.

39. In view of our conclusion that Sections 40 and 41 of the Act hang together and that Section 40 of the Act cannot have any compulsory application to minority institutions, it follows that Section 41 of the Act cannot equally have any compulsory application to minority institutions. It is not necessary to express any opinion on the provisions contained in Section 41 of the Act as to whether such provisions can be applied to minority institutions affiliated to a universiy irrespective of the conversion of affiliated colleges into constituent colleges.

40. The provisions contained in Section 33A(1)(*a*) of the Act state that every college shall be under the management of a governing body which shall include amongst its members, a representative of the university nominated by the Vice-Chancellor and representatives of teachers, non-teaching staff and students of the college. These provisions are challenged on the ground that this amounts to invasion of the fundamental right of administration. It is said that the governing body of the college is a part of its administration and therefore that administration should not be touched. The right to administer is the right to conduct and manage the affairs of the institution. This right is exercised through a body of persons in whom the founders of the institution have faith and confidence and who have full autonomy in that sphere. The right to administer is subject to permissible regulatory measures. Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the educational institutions and without displacing the management. If the administration has to be improved it should be done through the agency or instrumentality of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of and for the benefit of minority educational institutions concerned will affect the autonomy in administration.

41. Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration is day to day administration. The choice in the personnel of management is a part of the administration. The university will always have a right to see that there is no mal-administration. If there is mal-administration. the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students. In *State of Kerala* v. *Very Rev. Mother Provincial, etc.* (supra) this Court said that if the administration goes to a body in the selection of whom the founders have no say, the administration would

be displaced. This Court also said that situations might be conceived when they might have a preponderating voice. That would also effect the autonomy in administration. The provisions contained in Section 33A(1)(*a*) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed. These provisions in Section 33A(1)(*a*) cannot therefore apply to minority institutions.

42. The provisions contained in Section 33A(1)(*b*) of the Act were not challenged by the petitioners. The interveners challenged those provisions. The settled practice of this Court is that an intervener is not to raise contentions which are not urged by the petitioners. In view of the fact that notices were given to minority institutions to appear and those institutions appeared and made their submissions a special consideration arises here for expressing the views on Section 33A(1)(*b*) of the Act. The provisions contained in Section 33A(1)(*b*) of the Act are that for the recruitment of the Principal and the members of the teaching staff of a college there is a selection committee of the college which shall consist, in the case of the recruitment of a Principal, of a representative of the university nominated by the Vice-Chancellor and, in the case of recruitment of a member of the teaching staff of the college, of a representative of the university nominated by the Vice-Chancellor and the Head of the Department if any for subjects taught by such persons. The contention of the interveners with regard to these provisions is that there is no indication and guidance in the Act as to what types of persons could be nominated as the representative. It was suggested that such matters should not be left to unlimited power as to choice. The provisions contained in Section 33A(1)(*b*) cannot therefore apply to minority institutions.

43. The third set of provisions impeached by the petitioners consists of Sections 51A and 52A. Section 51A states that no member of the teaching, other academic and non-teaching staff of an affiliated college shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges and given a reasonable opportunity of being heard and until (*a*) he has been given a reasonable opportunity of making representation on any such penalty proposed to be inflicted on him; and (*b*) the penalty to be inflicted on him is approved by the Vice-Chancellor or any other officer of the university authorised by the Vice-Chancellor in this behalf. Objection is taken by the petitioners to the approval of penalty by the Vice-Chancellor or any other officer of the university authorised by him. First, it is said that a blanket power is given to the Vice-Chancellor without any guidance. Second, it is said that the words "any other officer of the university authorised by him" also confer power on the Vice-Chancellor to authorise any one and no guidelines are to be found there. In short, unlimited and undefined power is conferred on the Vice-Chancellor. The approval by the Vice-Chancellor may be intended to be a check on the adminis-

tration. The provision contained in Section 51A, clause (*b*) of the Act cannot be said to be a permissive regulatory measure inasmuch as it confers arbitrary power on the Vice-Chancellor to take away the right of administration of the minority institutions. Section 51A of the Act cannot, therefore, apply to minority institutions.

44. The provisions contained in Section 52A of the Act contemplate reference of any dispute between the governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college which is connected with the conditions of service of such member to a Tribunal of Arbitration consisting of one member nominated by the governing body of the college, one member nominated by the member concerned and an Umpire appointed by the Vice-Chancellor. These references to arbitration will introduce an area of litigious controversy inside the educational institution. The atmosphere of the institution will be vitiated by such proceedings. The governing body has its own disciplinary authority. The governing body has its domestic jurisdiction. This jurisdiction will be displaced. A new jurisdiction will be created in administration. The provisions contained in Section 52A of the Act cannot, therefore, apply to minority institutions.

45. For these reasons the provisions contained in Sections 40, 41, 33A(1)(*a*), 33A(1)(*b*), 51A and 52A cannot be applied to minority institutions. These provisions violate the fundamental rights of the minority institutions.

46. The ultimate goal of a minority institution too imparting general secular education is advancement of learning. This Court has consistently held that it is not only permissible but also desirable to regulate everything in educational and academic matters for achieving excellence and uniformity in standards of education.

47. In the field of administration it is not reasonable to claim that minority institutions will have complete autonomy. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institution. The right of a minority to administer its educational institution involves, as part of it, a correlative duty of good administration.

48. The teachers and the taught form a world of their own where everybody is a votary of learning. They should not be made to know any distinction. Their harmony rests on dedicated and disciplined pursuit of learning. The areas of administration of minorities should be adjusted to concentrate on making learning most excellent. That is possible only when all institutions follow the motto that the institutions are places for worship of learning by the students and the teachers together irrespective of any denomination and distinction.

JAGANMOHAN REDDY, J. (*for himself and Alagiriswami, J.*) (*concurring*)—This larger Bench has been constituted to consider the scope of the fundamental rights under Article 30(1), the inter-relationship of those rights with the rights under Article 29(1), the scope of the regulatory powers of the State vis-a-vis the rights under Article 30(1), and in the light of the view taken on the several aspects aforesaid to consider the validity of certain impugned provisions of the amended Gujarat University Act, 1949 — hereinafter referred to as 'the Act'. The contentions raised before us on the scope and ambit of Articles 29(1) and 30(1) are not new but have been earlier urged before and decided by this Court. The attempt on behalf of the State of Gujarat has been to once again raise the same crucial issues which go to the root of the rights conferred on the minorities to establish educational institutions of their choice and whether the State could treat the majority and minority educational institutions equally, an issue upon which this Court has pronounced in no uncertain terms on earlier occasions.

50. We agree with the judgment of Hon'ble the Chief Justice just pronounced and with his conclusions that Sections 40, 41, 33A(1)(*a*), 33A(1)(*b*), 51A and 52A of the Act violate the fundamental rights of minorities and cannot, therefore, apply to the institutions established and administered by them. We would not ordinarily have found it necessary to write a separate opinion when the same thing has to be said as has been said so tersely by him, but in trying to re-state what has already been said, the impression is sometimes created that something new is being stated or some departure from the principles already adumbrated is being made. In order to avoid giving scope to any such contention being raised, we would merely refer to some earlier provisions already held to violate the fundamental rights of minorities guaranteed under Article 30(1) which are analogous to the impugned provisions which, in the view this Court has already taken, can be held to be violative in their application to the minority educational institutions. The reason for this separate opinion, however, is not so much to point out the invalidity of the impugned provisions which Hon'ble the Chief Justice has held to be inapplicable to the minority institutions but to examine the question as to what extent the right conferred by Article 30(1) would include within it the right of the minorities to claim affiliation for or recognition to educational institutions established by them.

51. The right of a linguistic or religious minority to administer educational institutions of their choice, though couched in absolute terms has been held by this Court to be subject to regulatory measures which the State might impose for furthering the excellence of the standards of education. The scope and ambit of the rights under Articles 29(1) and 30(1) were first considered and analysed by this Court while giving its advice on the Presidential Reference under Article 143 of the Constitution in *Re The Kerala Education Bill*, 1957 (supra). The report which was made to the President in that Reference, it is true, is not binding on this Court in any subsequent matter wherein in a concrete case the in-

fringement of the rights under any analogous provision may be called in question, though it is entitled to great weight. Under Article 143 this Court expresses its opinion if it so chooses and in some cases it might even decline to express its opinion, vide *In Re Levy of Estate Duty,*[7] cited with approval by Das, C.J. in *In re The Kerala Education Bill,* 1957. In some cases the opinion may be based on certain stated contingencies or on some assumed or hypothetical situations whereas in a concrete case coming before this Court by way of an appeal under Article 133, or by special leave under Article 136 or by a petition under Article 32, the law declared by it by virtue of Article 141 is binding on all courts within the territory of India. Nonetheless the exposition of the various facets of the rights under Article 29(1) and Article 30(1) by Das, C.J. speaking for the majority, with the utmost clarity, great perspicuity and wisdom has been the text from which this Court has drawn its sustenance in its subsequent decisions. To the extent that this Court has applied these principles to concrete cases there can be no question of there being any conflict with what has been observed by Das, C.J. The decisions rendered on analogous provisions as those that are under challenge in this case would *prima facie* govern these cases, unless this larger Bench chooses to differ from them.

52. In respect of certain provisions of the Kerala Education Bill, namely, Clauses 9, 11(2) and 12(4), Das, C.J. stated : (SCR p. 1064).

"These are, no doubt, serious inroads on the right of administration and appear perilously near violating that right. But considering that those provisions are applicable to all educational institutions and that the impugned parts of Clauses 9, 11 and 12 are designed to give protection and security to the ill-paid teachers who are engaged in rendering service to the nation and protect the backward classes, we are prepared, as at present advised, to treat these Clauses 9, 11(2) and 12(4) as permissible regulations which the State may impose on the minorities as a condition for granting aid to their educational institutions."

It was also observed therein that Clauses 7, 10, 11(1), 12(1), (2), (3) and (5) may easily be regarded as reasonable regulations or conditions for the grant of aid. But some of the provisions analogous to Clauses 11, 12(1), (2), (3) and (5) have been held invalid by this Court when they were challenged as offending fundamental rights of minority institutions. In the *State of Kerala* v. *Very Rev. Mother Provincial* (supra) sub-sections (1), (2) and (9) of Section 53 of the Kerala University Act, 1969, were held to be invalid. These provisions are similar in terms and effect as Clause 11 of the Kerala Education Bill, 1957. Similarly, sub-sections (2) and (4) of Section 56 of the Kerala University Act being similar in terms and effect to sub-clauses (1), (2) and (3) of Clause 12 of the Kerala Education Bill, 1957, which were held to be reasonable and sub-clause (4) of that clause which was considered to be perilously near to violating the fundamental rights in that case, were held to be invalid as they fall with Sections 48 and 49 of the Kerala Education Act. A similar provision in the Statutes of the Guru Nanak University Act, namely, Statute 17 making a provision similar to sub-

7. 1944 FCR 317.

clauses (1), (2) and (3) of Clause 12 of the Kerala Education Bill was held invalid in *D. A. V. College etc.* v. *State of Punjab & Ors.* (supra) sub-sections (4) and (6) of Section 63 of the Kerala University Act, 1969, which provide for similar contingencies as those provided in Section 52A of the impugned provisions of the Act dealing with the disputes between the governing body and any member of the teaching staff or other academic and non-teaching staff of minority institutions was held to be invalid in *Mother Provincial case.* The provisions of the impugned Sections 33A(1)(*a*) and (*b*) and 51A of the Act are similar in nature to the provisions of Sections 53, 56, 48 and 49 of the Kerala University Act. Statute 2(1)(*a*) of the Guru Nanak University Act also corresponds to Sections 48 and 49 of the Kerala University Act and is similar in nature to Section 33A of the Act. These have been held to be invalid in their application to minority educational institutions in the *D. A. V. College case.* Needless to say, in so far as these decisions lay down a principle slightly different from or even contrary to the opinion on the Kerala Education Bill, they are the law laid down by this Court.

53. The impugned provisions, namely, Sections 40, 41, 33A(1)(*a*), 33A(1)(*b*), 51A and 52A have already been given in the judgment of the Hon'ble Chief Justice. These may be compared with the provisions of the Kerala Education Bill, the Kerala University Act and the Statutes of the Guru Nanak University Act, which have been juxtaposed for an easy appreciation of the nature of the provisions which have been held void by the cases referred to above :

Kerala Education Bill	**Kerala University Act**	**Guru Nanak University Statutes**
Clause 11—Appointment of teachers in Government and aided schools.—(1) The Public Service Commission shall, as empowered by this Act, select candidates for appointment as teachers in Government and aided schools. Before the 31st May of each year, the Public Service Commission shall select candidates with due regard to the probable number of vacancies of teachers that may arise in the course of the year. The candidates shall be selected for each district separately and the list of candidates so selected shall be published in the Gazette. Teachers of aided schools shall be appointed by the manager only from the candidates so selected for the district in which the school is located, provided that the manager may, for sufficient reason, with the permission of the Public Service Commission, appoint teachers selected for any other district. Appointment of teachers in	*Section 53—Appointment of teachers in private colleges.*—(1) Posts of principal of private colleges shall be selection posts. (2) Appointment to the post of principal in a private college shall be made by the governing body or managing council, as the case may be, from among teachers of the college or of all the colleges, as the case may be or if there is no suitable person in such college or colleges, from other persons. (9) Any teacher aggrieved by an appointment under subsection (7) may within sixty days from the date of the appointment, appeal to the Syndicate, and the decision of the Syndicate thereon shall be final.	

Government schools shall also be made from the list of candidates so published.

(2) In selecting candidates under sub-section (1), the Public Service Commission shall have regard to the provisions made by the Government under clause (4) of Article 16 of the Constitution.

Clause 12—Conditions of service of aided school teachers.—(1) The conditions of service relating to pensions, provident fund, insurance and age of retirement applicable to teachers of Government schools shall apply to teachers of aided schools—

(*i*) who are appointed under Section 11 after the commencement of this section; and

(*ii*) who have been appointed before the commencement of this section, but who have expressed in writing their willingness to be governed by such conditions, within one year from such commencement.

(3) The Government shall extend to the teachers of aided schools who have been appointed before the commencement of this section and who have not expressed their willingness under clause (*ii*) of sub-section (2) within the time specified therefor the conditions of service relating to pension, provident fund, insurance and age of retirement applicable to teachers of Government schools with such modifications as the Government may deem fit.

(4) No teacher of an aided school shall be dismissed, removed, reduced in rank or suspended by the manager without the previous sanction of the officer authorised by the Government in this behalf.

(5) Subject to the provisions of sub-sections (1), (2), (3) and (4), the conditions of service of teachers of aided schools shall be such as may be prescribed.

Section 56—Conditions of service of teachers of private colleges.—(1) The conditions of service of teachers of private colleges, including conditions relating to pay, pension provident fund, gratuity, insurance and age of retirement shall be such as may be prescribed by the Statutes.

(2) No teacher of private college shall be dismissed, removed, or reduced in rank by the Governing body or managing council without the previous sanction of the Vice-Chancellor or placed under suspension by the Governing Body or Managing council for a continuous period exceeding fifteen days without such previous sanction.

(4) A teacher against whom disciplinary action is taken shall have a right of appeal to the Syndicate, and the Syndicate shall have power to order reinstatement of the teacher in case of wrongful removal or dismissal and to order such other remedial measures as it deems fit, and the governing body or managing council, as the case may be, shall comply with the order.

Statute 17.—The staff initially appointed shall be approved by the Vice-Chancellor. All subsequent changes shall be reported to the University for Vice-Chancellor's approval. In the case of training institutions the teachers, pupil ratio shall not be less than 1 : 12. Non-Government Colleges shall comply with the requirements laid down in the Ordinance governing service and conduct of teachers in non-Government Colleges as may be framed by the University.

Section 48—Governing body for private college not under corporate management.—(1) The educational agency of a private college, other than a private college under a corporate management, shall constitute in accordance with the provisions of the statutes a governing body consisting of following members, namely—

(*a*) the principal of the private college;

(*b*) the manager of the private college;

(*c*) a person nominated by the University in accordance with the provisions in that behalf contained in the statutes.

(*d*) a person nominated by the Government;

(*e*) a person elected in accordance with such procedure as may be prescribed by the Statutes from among themselves by the permanent teachers of the private college; and

(*f*) not more than six persons nominated by the educational agency.

(2) The governing body shall be a body corporate having perpetual succession and a common seal.

(3) The manager of the private college shall be the Chairman of the Governing body.

(4) A member of the governing body shall hold office for a period of four years from the date of its constitution.

(5) It shall be the duty of the governing body to administer the private college in accordance with the provisions of this Act and the Statutes, Ordinances, Regulations, Rules, bye-laws, and orders made thereunder.

Statute 2(1).—A College applying for admission to the privileges of the University shall send a letter of application to the Registrar and shall satisfy the Senate—

(*a*) That the College shall have a regularly constituted governing body consisting of not more than 20 persons approved by the Senate and including, among others, 2 representatives of the University and the Principal of college ex officio.

Provided that the said condition shall not apply in the case of College maintained by Government which shall however have an advisory Committee consisting of among others the principal of the College (Ex officio) and two representatives of the University.

(6) The powers and functions of the governing body, the removal of members thereof and the procedure to be followed by it, including the delegation of its powers, shall be prescribed by the Statutes.

(7) Notwithstanding anything contained in sub-section (6), decisions of the governing body shall be taken at meetings on the basis of simple majority of the members present and voting.

Section 49—Managing council for private colleges under corporate management.—(1)(*a*) one principal by rotation in such manner as may be prescribed by the Statutes;

(*b*) the manager of the private college;

(*c*) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes;

(*d*) a person nominated by the Government;

(*e*) two persons elected in accordance with such procedure as may be prescribed by the Statutes from among themselves by the permanent teachers of all the private colleges; and

(*f*) not more than fifteen persons nominated by the educational agency.

(2) The managing council shall be a body corporate having perpetual succession and a common seal.

(3) The manager of the private colleges shall be the chairman of the managing council.

(4) A member of the managing council shall hold office for a period of four years from the date of its constitution.

(5) It shall be the duty of the managing council to administer all the private colleges under the corporate management in accordance with the provisions of this Act

and the Statutes, Ordinances, Regulations, Bye-laws and orders made thereunder.

(6) The powers and functions of the managing council, the removal of members thereof and the procedure to be followed by it, including the delegation of its powers, shall be prescribed by the Statutes.

(7) Notwithstanding anything contained in sub-section (6), decisions of the managing council shall be taken at meetings on the basis of simple majority of the members present and voting.

Section 63—Power to regulate the management of private colleges.—(4) If the governing body or managing council, as the case may be, disapproves any decisions taken by the University in connection with the management of the private college the matters shall be referred by the governing body or managing council, as the case may be, to the Government, within one month of the date of receipt of the report under sub-section (3) who shall thereupon pass such order thereon as they think fit and communicate the same to the governing body or managing council and also to the University.

(6) The manager appointed under sub-section (1) of Section 50 shall be bound to give effect to the decisions of the University and if at any time, it appears to the University that the manager is not carrying out its decisions, it may, for reasons to be recorded in writing and after giving the manager an opportunity heard, by order remove him from office and appoint another person to be the manager after consulting the educational agency.

54. In spite of the consistent and categorical decisions which have held invalid certain provisions of the University Acts of some of the States as interfering with the fundamental rights of management of minority institutions inherent in the right to establish educational institutions of their choice under Article 30(1), the State of Gujarat has incorporated similar analogous provisions to those that have been declared invalid by this Court. No doubt education is a State subject, but in the exercise

of that right any transgression of the fundamental right guaranteed to the minorities will have its impact beyond the borders of that State and the minorities in the rest of the country will feel apprehensive of their rights being invaded in a similar manner by other States. A kind of instability in the body politic will be created by action of a State which will be construed as a deliberate attempt to transgress the rights of the minorities where similar earlier attempts were successfully challenged and the the offending provisions held invalid.

55. The Central Government to which notice was given probably realising the sensitive nature of the issue did not put forward any contentions contrary to those that have already been considered and decided by this Court, though we had the advantage of the personal views of the Attorney-General on some of the aspects of those rights. Equality of treatment of minority and majority or equality before law precludes discrimination. According to Advisory opinion of the Permanent Court of International Justice on *Minority Schools in Albania* (April 6, 1935), Publications of the Court, series A/B No. 64, p. 19 :

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

We are of opinion that this view is a sound one and the contentions advanced on behalf of some of the respondents in support of the validity of the impugned provisions cannot be accepted.

56. In so far as the right of affiliation or recognition is concerned, no doubt, the observations of Das, C. J., in *Re. The Kerala Education Bill case* (supra) seem to negative any such right under Article 30(1). He said at p. 1067 :

> " There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30(1)."

These observations appear to us to be somewhat at variance with certain other observations. But if these observations are carefully scrutinised, they can be reconciled and harmonised. Das, C. J., had observed earlier at pp. 1066-1067 that :

> " The minorities, quite understandably, regard it as essential that the education of their children should be in accordance with the teachings of their religion and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture..... They also desire that scholars of their educational institutions should go out in the world well and sufficiently equipped with the qualifications necessary for a useful career in life. But according to the Education Code now in operation to which

it is permissible to refer for ascertaining the effect of the impugned provisions on existing state of affairs the scholars of unrecognised schools are not permitted to avail themselves of the opportunities for higher education in the University and are not eligible for entering the public services. Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions."

The right under Article 30 cannot be exercised *in vacuo*. Nor would it be right to refer to affiliation or recognition as privileges granted by the State. In a democratic system of Government with emphasis on education and enlightenment of its citizens, there must be elements which give protection to them. The meaningful exercise of the right under Article 30(1) would and must necessarily involve recognition of the secular education imparted by the minority institutions without which the right will be a mere husk. This Court has so far consistently struck down all attempts to make affiliation or recognition on terms tantamount to surrender of its rights under Article 30(1) as abridging or taking away those rights. Again as without affiliation there can be no meaningful exercise of the right under Article 30(1), the affiliation to be given should be consistent with that right, nor can it indirectly try to achieve what it cannot directly do. See *Kerala Education Bill case*[8] ; *Rev. Sidhajbhai Sabhai & Others* v. *State of Bombay and Another*[9] and *D. A. V. College Case*.[10]

57. If the right of recognition is not a fundamental right, the logical result of this postulate would be that the State need not recognise except on general terms open to all institutions. But if the recognition by a State is limited in so far as minority institutions are concerned, in that under the guise of exercising this power, the State cannot prescribe conditions which will make an inroad and take away the right guaranteed under Article 30(1), then there is no meaning in saying that the right to recognise vis-a-vis minority institutions is not a fundamental right. This is one conclusion that can possibly be derived from the above observations of Das, C.J. The second conclusion which is possible is that these observations will have to be confined to the provisions of law regarding the validity of which the opinion of the Court was sought. In that case, the Bill had provided for giving recognition to schools for preparing students for the examinations conducted by the Board, and in so providing it had imposed conditions which the Court construed as tantamount to the minority institutions being required to surrender or denying them the right under Article 30(1). The Court was not concerned with a law which did not deal with the question of affiliation or recognition at all or where the teaching was confined only to State managed and maintained schools. The observations of Das, C. J. cannot therefore, strictly

8. *Supra* f.n. 1 pp. 1059, 1063, 1067 and 1068.
9. *Supra* f.n. 6 p. 856.
10. *Supra* f.n. 5 p. 709.

speaking, apply to this fact situation. When it is so read, they cannot be held to have laid down that the State must provide for giving recognition at least to the minority institutions or accord recognition subject to such conditions as would in truth and in effect will not amount to an infringement of their right under Article 30(1). In other words, where the law does not provide for giving recognition or affiliation to any educational institution irrespective of whether it is a majority or a minority institution, can the minority institution claim recognition on the ground that without recognition or affiliation the educational institution established by them cannot fulfil the real objects of their choice and the minorities cannot effectively exercise their rights under Article 30(1)? If the logical answer flowing from the observations is that it cannot, then the question would arise as to what is the purpose which clause (1) of Article 30 serves? The only purpose that the fundamental right under Article 30(1) would serve would in that case be that minorities may establish their institutions, lay down their own syllabi, provide instructions in the subjects of their choice, conduct examinations and award degrees or diplomas. Such institutions have the right to seek recognition to their degrees and diplomas and ask for aid where aid is given to other educational institutions giving a like education on the basis of the excellence achieved by them. The State is bound to give recognition to their qualifications and to the institutions and they cannot be discriminated except on the ground of want of excellence in their educational standards so far as recognition of degrees or educational qualifications is concerned and want of efficient management so far as aid is concerned.

58. In the *D. A. V. College case* (supra) the compulsory affiliation of minority educational institutions to the University which had prescribed a medium of instruction other than the language of the minority a via media was suggested, having regard to the formation of the linguistic States throughout India, that no compulsory affiliation can be insisted upon which offends the right guaranteed under Articles 29(1) and 30(1). If, as was held, compulsory affiliation is bad, it will leave them free to get affiliated to a University in that linguistic State which provides facility for the language and script of the minorities. This pre-supposes that there is a right to get recognition or affiliation where it is possible in India for minority institutions to preserve their language, script and culture.

59. We may in this connection refer to a unanimous resolution of Parliament dated September 19, 1956, on the safeguards proposed for the linguistic minorities, vide Part IV of the State Reorganisation Report, recommending that the concerned States should provide necessary facilities to safeguard minority rights by amending their University Statutes. The fifth paragraph of the memorandum as approved by Parliament states :

"5. **Affiliation of schools and colleges using minority languages.**—Connected with the proposals contained in the preceding paragraphs is the question of the affiliation of educational institutions located in the new or reorganised States to appropriate Universities or Boards of Education. It is of course desirable that

every effort should be made to evolve arrangements whereby educational institutions like schools and colleges can be affiliated, in respect of courses of study in the mother-tongue, to Universities and other authorities which are situated in the same State. However, it may not always be possible to make such arrangements; and having regard to the number of institutions of this kind, it may sometime be convenient, both from the point of view of the Universities or the educational authorities concerned, and from the point of view of the institutions themselves, that they should be permitted to seek affiliation to appropriate bodies located outside the State. This may be regarded in fact as a necessary corollary to the provisions contained in Article 30 of the Constitution, which gives to the minorities the right to establish and administer educational institutions of their choice."

But what would happen if the educational institutions of a minority find it inconvenient or impossible to secure such a recognition or affiliation even outside the State in which they are established? In such circumstances, education including University education being a State subject and the legislative power of the State also being subject to Article 29(1) and Article 30(1), minorities able to establish an educational institution can insist on recognition, where affiliation is not provided for by the University Acts, to the educational qualifications awarded by them, whether degrees, diplomas or other certificates, which conform to the educational standards prescribed by the State for the recognition of such degrees, diplomas and other certificates.

KHANNA, J. (*Concurring*)—What is the scope and ambit of the rights of minorities, whether based on religion or language, to establish and administer educational institutions of their choice under clause (1) of Article 30 of the Constitution is the question which arises for consideration in this writ petition filed by the Ahmedabad St. Xavier's College Society and another under Article 32 of the Constitution. The respondents impleaded in the petition are the State of Gujarat and the Gujarat University.

61. The first petitioner (hereinafter referred to as the petitioner) is a Society registered under the Societies Registration Act, 1860 (Act 21 of 1860) and a Trust under the Bombay Public Trusts Act, 1950 (Act 29 of 1950). The petitioner is running St. Xavier's College of Arts and Commerce in Ahmedabad. The said college was established in June 1955 by a religious denomination known as the Society of Jesus, a religious order of Catholic priests and brothers. The petitioner society was formed with the object of taking over the above mentioned college.

62. The petitioner society and the St. Xavier's College seek to provide higher education to Christian students. Children, however, of all classes and creeds provided they attain the qualifying academic standards are admitted to the St. Xavier's College.

63. Before the bifurcation of the erstwhile State of Bombay into State of Maharashtra and State of Gujarat, the Bombay State legislature passed the Gujarat University Act, 1949 (hereinafter referred to as the principal Act). The object of the Act was to establish and incorporate a teaching and affiliated university. St. Xavier's College was accorded

affiliation under Section 33 of the principal Act on or about June 1955. Section 2 of the principal Act contained definitions. We may set out the relevant definitions :

"(1) 'Affiliated College' means a college affiliated under Section 5 or 33.

(2) 'College' means a degree college or an intermediate college.

(2A) 'Constituent College' means a University college or affiliated college made constituent under Section 41.

(3) 'Degree College' means an affiliated college which is authorized to submit its students to an examination qualifying for any degree of the University.

(8) 'Recognized Institution' means an institution for research or specialized studies other than an affiliated college and recognized as such by the University.

(12) 'Teachers' means professors, readers, lecturers and such other persons imparting instruction in the University, an affiliated college or a recognized institution as may be declared to be teachers by the Statutes.

(13) 'Teachers of the University' means teacher appointed or recognized by the University for imparting instruction on its behalf.

(15A) 'University College' means a college which the University may establish or maintain under this Act or a college transferred to the University and maintained by it.

(16) 'University Department' means any college, post-graduate or research institution or department maintained by the University."

Section 39 of the principal Act provided that within the University area, all post-graduate instruction, teaching and training shall be conducted by the University or by such affiliated colleges or institutions and in such subjects as may be prescribed by the Statutes. According to Section 40 of the Act, within a period of three years from the date on which Section 3 (which dealt with the incorporation of the University) comes into force, the Senate shall determine that all instructions teaching and training beyond the stage of Intermediate Examinations shall, within the area of the City of Ahmedabad and such other contiguous area as the Senate may determine, be conducted by the University and shall be imparted by the teachers of the University. The Senate shall then communicate its decision to the State Government which Government may, after making such inquiry as it thinks fit, by notification in the Official Gazette declare that the provisions of Section 41 would come into force on such date as may be specified in the notification. Section 40 was amended by Bombay Act 30 of 1954, as a result of which the words "three years" were substituted by the words "seven years". The effect of that amendment was that the Senate could take its decision under Section 40 of the Act within seven years from the date on which Section 3 came into force. Section 41 of the principal Act dealt with constituent colleges and institutions. The provisions of this section would be dealt with at length hereafter. Suffice it to say at present that sub-section (2) of that section provided that all institutions within the Ahmedabad area would be constituent institutions of the University. No educational institution situate within the Ahmedabad area, it was specified, would save with the consent of the University and the sanction of the State Government, be associated in any way with, or seek admission to any privileges of, any other University established by law. Sub-section (4) of Section 41 dealt with the relations of the

constituent colleges and the constituent institutions within the Ahmedabad area and provided that the same would be governed by the Statutes to be made in this behalf. The matters in respect of which the Statutes were to make provisions in particular regarding the relations of the constituent colleges and recognized institutions were also specified.

64. The Senate of Gujarat University did not take any decision mentioned in Section 40 within the stipulated period of seven years. The said period expired on November 22, 1957. The colleges affiliated to the Gujarat University accordingly continued to be affiliated colleges after that date. On September 28, 1971 the senate passed a resolution that all instructions, teaching and training beyond the stage of intermediate examination in the city of Ahmedabad be conducted by the University and imparted by the teachers of the University. The Registrar of the University was directed to communicate the decision of the Senate to the State Government. The petitioners and some others then filed petitions under Article 226 of the Constitution in the Gujarat High Court on the ground that the powers of the Senate and the State Government under Section 40 of the principal Act had got exhausted on November 22, 1957 when the period of seven years from the commencement of the principal Act had expired. In the alternative, it was stated by the petitioners that the provisions of Sections 40 and 41 were violative of Articles 14, 19, 26, 29 and 30 of the Constitution. In view of the pendency of these petitions, the State Government did not act upon the impugned resolution passed by the Senate on September 28, 1971.

65. The Gujarat University (Amendment) Act, 1972 (Act No. 6 of 1973) (hereinafter referred to as the amending Act) was thereafter passed by the Gujarat legislature. The amending Act came into force on March 12, 1973. It substituted the word "Court" for the word "Senate" and the words "Executive Council" for the word "Syndicate". The Gujarat University Act as amended by the amending Act may for the sake of convenience be described as the amended Act. Sections 33A, 39, 40, 41, 51A and 52A of the amended Act as under :

"33A. (1) Every college (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement')—

(a) shall be under the management of a governing body which shall include amongst its members the Principal of the college, a representative of the University nominated by the Vice-Chancellor, and three representatives of the teachers of the college and at least one representative each of the members of the non-teaching staff and the students of the college, to be elected respectively from amongst such teachers, members of the non-teaching staff and students ; and

(b) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include—

(1) in the case of recruitment of the Principal, a representative of the University nominated by the Vice-Chancellor, and

(2) in the case of recruitment of a member of the teaching staff of the

college, a representative of the University nominated by the Vice-Chancellor and the Head of the Department, if any, concerned with the subject to be taught by such member.

(2) Every college referred to in sub-section (1) shall,—

(a) within a period of six months after such commencement, constitute or reconstitute its governing body in conformity with sub-section (1), and

(b) as and when occasion first arises after such commencement, for recruitment of the Principal and teachers of the college, constitute or reconstitute its selection committee so as to be in conformity with sub-section (1).

(3) The provisions of sub-section (1) shall be deemed to be a condition of affiliation of every college referred to in sub-section (1).

39. Within the University area, all post-graduate instruction, teaching and training shall be conducted by the University or by such affiliated colleges or institutions and in such subjects as may be prescribed by the Statutes.

40. (1) The Court may determine that all instructions, teaching and training in courses of studies in respect of which the University is competent to hold examinations shall within the University area be conducted by the University and shall be imparted by the teachers of the University and the Court shall communicate its decision to the State Government.

(2) On receipt of the communication under sub-section (1), the State Government may, after making such inquiry as it thinks fit, by notification in the Official Gazette declare that the provisions of Section 41 shall come into force on such date as may be specified in the notification.

41. (1) All colleges within the University area which are admitted to the privileges of the University under sub-section (3) of Section 5 and all colleges within the said area which may hereafter be affiliated to the University shall be constituent colleges of the University.

(2) All institutions within the University area recognised under Sections 35 and 63 or approved under Section 35-A shall be the constituent institutions of the University.

(3) No educational institution situate within the University area shall, save with the consent of the University and the sanction of the State Government, be associated in any way with, or seek admission to any privileges of, any other University established by law.

(4) The relations of the constituent colleges and constituent, recognized or approved institutions within the University area shall be governed by the Statutes to be made in that behalf, and such Statutes shall provide in particular for the exercise by the University of the following powers in respect of the constituent degree colleges and constituent recognized institutions—

(i) to lay down minimum educational qualifications for the different classes of teachers and tutorial staff employed by such colleges and institutions and the conditions of their service;

(ii) to approve the appointments of the teachers made by such colleges and institutions;

(iii) to require each such college and institution to contribute a prescribed quota of recognized teachers in any subject for teaching on behalf of the University;

(iv) to co-ordinate and regulate the facilities provided and expenditure incurred by such colleges and institutions in regard to libraries, laboratories and other equipments for teaching and research;

(v) to require such colleges and institutions, when necessary, to confine the enrolment of students to certain subjects;

(vi) to levy contributions from such colleges; and institutions and make grants to them; and

(vii) to require satisfactory arrangements for tutorial and similar other work in such colleges and institutions and to inspect such arrangements from time to time:

Provided that a constituent degree college or a constituent recognized institution shall supplement such teaching by tutorial or other instruction teaching or training in a manner to be prescribed by the Regulation to be made by the Academic Council.

(5) Subject to the provisions of the Statutes the Board of University Teaching and Research shall organize and co-ordinate the instruction, teaching and training within the University area.

51A. (1) No member of the teaching, other academic and non-teaching staff of an affiliated college and recognized or approved institution shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and until—

(a) he has been given a reasonable opportunity of making representation on any such penalty proposed to be inflicted on him, and

(b) the penalty to be inflicted on him is approved by the Vice-Chancellor or any other officer of the University authorised by the Vice-Chancellor in this behalf.

(2) No termination of service of such member not amounting to his dismissal or removal falling under sub-section (1) shall be valid unless—

(a) he has been given a reasonable opportunity of showing cause against the proposed termination, and

(b) such termination is approved by the Vice-Chancellor or any officer of the University authorised by the Vice-Chancellor in this behalf:

Provided that nothing in this sub-section shall apply to any person who is appointed for a temporary period only.

52A. (1) Any dispute between the governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college or recognized or approved institution which is connected with the conditions of service of such member, shall, on a request of the governing body, or of the member concerned be referred to a Tribunal of Arbitration consisting of one nominated by the governing body of the college or, as the case may be, member of the recognized or approved institution, one member nominated by the member concerned and an Umpire appointed by the Vice-Chancellor.

(2) The provisions of Section 52 shall, thereupon mutatis mutandis apply to such request and the decision that may be given by such Tribunal."

66. A meeting of the University Senate was convened for March 27, 28 and 29, 1973 wherein resolutions were proposed to be moved as items Nos. 144 and 145 of the agenda that all instructions, teaching and training in courses of studies in respect of which the University was competent to hold examinations be conducted by the University and be imparted by the teachers of the University. The petitioners thereupon filed the present petition under Article 32 of the Constitution. According to the petitioners, the St. Xavier's College Ahmedabad is an educational

institution established by a minority and the provisions of Sections 40 and 41 of the amended Act are violative of the fundamental rights of the petitioners guaranteed under Articles 14, 19, 26, 29, 30 and 31 of the Constitution. The petitioners have also questioned the competence of the Gujarat legislature to pass the amending Act. The three main reliefs sought by the petitioners are :

"(1) That Sections 40 and 41 of the Gujarat University Act, 1949 (Bombay Act No. L of 1949) as amended by the Gujarat University (Amendment) Act, 1972 (Gujarat Act No. 6 of 1973) are ultra vires the legislative powers of the State Legislature and/or are violative of Articles 14, 19(1)(a)(f) and (g), 26, 29, 30 and 31 of the Constitution of India ;

(2) That Sections 51A and 52A as inserted in the Gujarat University Act, 1949 (Bombay Act No. L of 1949) as amended by the Gujarat University (Amendment) Act, 1972 (Gujarat Act No. 6 of 1973) are ultra vires Article 14, 19(1)(a)(f) and (g), 26, 29 and 30 of the Constitution of India, and Ordinances 120D, 120E, 120F and 120G of the Ordinances framed by the Gujarat University under the Gujarat University Act, 1949 and saved by sub-section (4) of Section 55 of the Gujarat University (Amendment) Act, 1972 are ultra vires Articles 14, 19(1)(f) and (g), 26, 29 and 30 of the Constitution of India ;

(3) That Section 33A inserted in the Gujarat University Act, 1949 (Bombay Act No. L of 1949) as amended by the Gujarat University (Amendment) Act, 1972 (Gujarat Act No. 6 of 1973) read with Section 20 (Clause XXXIX) as inserted in the Gujarat University Act, 1949 by the Gujarat University Amendment Act, 1972 are ultra vires Articles 14, 19(1)(f) and (g), 26, 29 and 30 of the Constitution of India."

Prayer was also made by the petitioners for restraining the University from considering or passing the resolutions at items Nos. 144 and 145 of the agenda in the meeting proposed to be held on March 27, 28 and 29, 1973. When the petition came up for preliminary hearing on March 27, 1973 this Court made an order that the University might pass the resolutions in question on March 27, 28 and 29, 1973 but should not implement the same. The following resolution was passed by the Senate in the meeting held on March 27 and 28, 1973 :

"It is hereby resolved that all instructions, teaching and training in courses of studies in respect of which the University is competent to hold examinations shall within the University area be conducted by the University and shall be imparted by the teachers of the University."

67. In view of the stay order of this Court, the above resolution has not been implemented.

68. The petition has been resisted by the two respondents, and the affidavits of the Under Secretary to the Government of Gujarat and the Registrar of the University have been filed in opposition to the petition.

69. When the petition came up for hearing on November 12, 1973, the Court referred the petition to a larger Bench. It was directed that notice of the matter be issued to the Advocates-General of the States, Attorney-General of India as well as the Union of India. Public notice was also issued to the minority institutions to enter appearance, if so

advised. The All India University Teachers Association was also granted permission for being heard in the matter.

70. Lengthy arguments have thereafter been addressed before us on behalf of the petitioners, the respondents as well as others who have been allowed to intervene. The arguments have, however, been confined to the question as to whether the impugned provisions violate Article 30 of the Constitution. No arguments were heard on the point as to whether the impugned provisions are liable to be struck down on other grounds.

71. We may now refer to some of the relevant provisions of the Constitution to which reference has been made. According to clause (1) of Article 25, subject to public order, morality and health and to the other provisions of Part III, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. Article 26 gives a right, subject to public order, morality and health, to every religious denomination or any section thereof (*a*) to establish and maintain institutions for religious and charitable purposes; (*b*) to manage its own affairs in matters of religion; (*c*) to own and acquire movable and immovable property; and (*d*) to administer such property in accordance with law. Articles 28, 29 and 30 contain provisions for educational institutions and read as under:

"28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

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

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

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

(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."

72. Article 28 forbids, subject to the exception contained in clause (2), the imparting of religious instructions in any educational institution wholly maintained out of State funds. The article also contains provision against compulsion for persons attending an educational institution, recognized by the State or receiving aid out of State funds, to take part in any religious instruction that may be imparted in such

institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto.

73. Although the marginal note of Article 29 mentions protection of minority rights, the rights actually conferred by that article are not restricted merely to the minorities. According to clause (1) of that article, any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. In order to invoke the benefit of this clause, all that is essential is that a section of the citizens residing in the territory of India or any part thereof should have a distinct language, script or culture of its own. Once that is proved those citizens shall have the right to conserve their language, script or culture irrespective of the fact whether they are members of the majority community or minority community. Clause (2) of Article 29 forbids the denial of admission to citizens 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.

74. Clause (1) of Article 30 gives right to all minorities, whether based on religion or language, to establish and administer educational institutions of their choice. Analysing that clause it would follow that the right which has been conferred by the clause is on two types of minorities. Those minorities may be based either on religion or on language. The right conferred upon the said minorities is to establish and administer educational institutions of their choice. The word "establish" indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. The words "of their choice" qualify the educational institutions and show that the educational institutions established and administered by the minorities need not be of some particular class ; the minorities have the right and freedom to establish and administer such educational institutions as they choose. Clause (2) of Article 30 prevents the State from making discrimination in the matter of grant of aid to any educational institution on the ground that the institution is under the management of a minority, whether based on religion or language.

75. Before we deal with the contentions advanced before us and the scope and ambit of Article 30 of the Constitution, it may be pertinent to refer to the historical background. India is the second-most populous country of the world. The people inhabiting this vast land profess different religions and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic innate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark

on the Indian polity and India today represents a synthesis of them all. The closing years of the British rule were marked by communal riots and dissensions. There was also a feeling of distrust and the demand was made by a section of the Muslims for a separate homeland. This ultimately resulted in the partition of the country. Those who led the fight for independence in India always laid great stress on communal amity and accord. They wanted the establishment of a secular State wherein people belonging to the different religions should all have a feeling of equality and non-discrimination. Demand had also been made before the partition by sections of people belonging to the minorities for reservation of seats and separate electorates. In order to bring about integration and fusion of the different sections of the population, the framers of the Constitution did away with separate electorates and introduced the system of joint electorates, so that every candidate in an election should have to look for support of all sections of the citizens. Special safeguards were guaranteed for the minorities and they were made a part of the fundamental rights with a view to instil a sense of confidence and security in the minorities. Those provisions were a kind of a Charter of rights for the minorities so that none might have the feeling that any section of the population consisted of first-class citizens and the others of second-class citizens. The result was that minorities gave up their claims for reservation of seats. Sardar Patel, who was the Chairman of the Advisory Committee dealing with the question of minorities, said in the course of his speech delivered on February 27, 1947 :

> "This Committee forms one of the most vital parts of the Constituent Assembly and one of the most difficult tasks that has to be done by us is the work of this committee. Often you must have heard in various debates in British Parliament that have been held on this question recently and before when it has been claimed on behalf of the British Government that they have a special responsibility — a special obligation — for protection of the interests of the minorities. They claim to have more special interest than we have. It is for us to prove that it is a bogus claim, a false claim, and that nobody can be more interested than us in India in the protection of our minorities. Our mission is to satisfy every interest and safeguard the interests of all the minorities to their satisfaction." (B. Shiva Rao : **The Framing of India's Constitution : Select Docnments,** Vol. II, p. 66.)

It is in the context of that background that we should view the provisions of the Constitution contained in Articles 25 to 30. The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy. These provisions enshrined a befitting pledge to the minorities in the Constitution of the country whose greatest son had laid down his life for the protection of the minorities. As long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not only an act of breach of faith, it would be constitutionally impermissible and liable to be struck down by the courts. Although the words secular State are not expressly mentioned in the Constitution, there can be no doubt that our Constitution-makers wanted establishment of such a state. The provisions of the Constitution were designed accordingly. There is

no mysticism in the secular character of the state. Secularism is neither anti-God, nor pro-God ; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion. The Constitution at the same time expressly guarantees freedom of conscience and the right freely to profess, practise and propagate religion. The Constitution-makers were conscious of the deep attachment the vast masses of our country had towards religion, the sway it had on their minds and the significant role it played in their lives. To allay all apprehensions of interference by the Legislature and the executive in matters of religion, the rights mentioned in Articles 25 to 30 were made a part of the fundamental rights and religious freedom contained in those articles was guaranteed by the Constitution.

76. As in the case of religion so in the case of language, the importance of the matter and the sensitivity of the people on this issue was taken note of by the Constitution-makers. Language has a close relationship with culture. According to the *Royal Commission* on *Bilingualism and Biculturalism* (1965), the vitality of the language is an essential condition for the preservation of a culture and an attempt to provide for cultural equality is primarily an attempt to make provisions for linguistic equality (quoted on page 590 of *Canadian Constitutional Law in a Modern Perspective* by J. Noel Lyon and Ronald G. Atkey).

77. The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence. The great leaders of India since time immemorial had preached the doctrine of tolerance and catholicity of outlook. Those noble ideas were enshrined in the Constitution. Special rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing to the minorities autonomy in the matter of the administration of those institutions. The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true, genuine equality, an equality not merely in theory but also in fact. The majority in a system of adult franchise hardly needs any protection. It can look after itself and protect its interests. Any measure wanted by the majority can without much difficulty be brought on the statute book because the majority can get that done by giving such a mandate to the elected representatives. It is only the minorities who need protection, and Article 30, besides some other articles, is intended to afford and guarantee that protection. It may be apposite in this context to refer to the observations made by Latham, C.J. in *Adelaide Co. of Jehovah's Witnesses Inc.* v. *The Commonwealth*[11] while dealing with Section 116 of the Commonwealth of Australia (Constitution) Act which provides inter alia that the Commonwealth shall not

11. (1943) 67 Comm LR 116.

make any law for prohibiting the free exercise of any religion. Said the learned Chief Justice :

". . . . it should not be forgotten that such a provision as Section 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities."

78. It would in the above context be also pertinent to refer to the observations of the majority of the Permanent Court of International Justice in a matter relating to the minority schools in Albania. On October 2, 1921 Albania, subsequent to her admission into the League of Nations, signed a Declaration relating to the position of minorities in Albania. The first paragraph of Article 4 of that Declaration ran as follows :

"All Albanian nationals shall be equal before the law, and shall enjoy the same civil and political rights without distinction as to race, language or religion."

Article 5 of the Declaration was in the following words :

"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."

In 1933 the Albania National Assembly modified Articles 206 and 207 of the Albanian Constitution which permitted the setting up of private schools. Henceforth those articles provided as follows :

"The instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed."

79. Following upon the above change in the articles of the Constitution, a number of petitions were presented to the Council of the League stating that the new provisions of the Constitution were contrary to the Declaration. In January 1935 the Council of the League adopted a Resolution requesting the Permanent Court of International Justice to give an Opinion on the question :

"whether, regard being had to the above-mentioned Declaration of October 2, 1921, as a whole, the Albanian Government is justified in its plea that, as the abolition of private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with the letter and the spirit of the stipulation".

It was held by 8 votes to 3 that the plea of the Albanian Government that, as the abolition of private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with the letter and spirit of the stipulations laid down in Article 5, first paragraph, of the Declaration of October 2, 1921, is not well founded. In the above context the Court observed :

" 1. The Object of Minorities Treaties. — 'The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in

a State, the population of which differs from them in race, language or religion the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuring special needs.

In order to attain that object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are 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."

It was further observed :

" 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.

It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact ; treatment of this description would run counter to the first sentence of paragraph 1 of Article 5. The equality between members of the majority and of the minority must be an effective, genuine equality ; that is the meaning of this provision."

The Court referred to Article 5 of the Declaration and observed :

" This sentence of the paragraph being linked to the first by the words 'in particular', it is natural to conclude that it envisages a particularly important illustration of the application of the principle of identical treatment in law and in fact that is stipulated in the first sentence of the paragraph. For the institutions mentioned in the second sentence are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State."

80. It would be appropriate to refer at this stage to the cases wherein this Court has dealt with the impact of Article 30 on the educational institutions established by the minorities. The first case[12] was a reference made by the President under Article 143(1) of the Constitution for obtaining the opinion of this Court upon certain questions relating to the constitutional validity of the provisions of the Kerala Education Bill which had been passed by the Kerala Legislative Assembly and had been reserved by the Governor for the consideration of the President. Four questions were referred to the Court, out of which we are at present concerned with question No. 2 which was as under :

" Do sub-clause (5) of Clause 3, sub-clause (3) of Clause 8 and Clauses 9

12. *Re The Kerala Education Bill, 1957, supra* f.n. 1.

to 13 of Kerala Education Bill, or any provisions thereof, offend clause (1) of Article 30 of the Constitution in any particulars or to any extent?"

81. Clause 3(5) of the Bill made the recognition of new schools subject to other provisions of the Bill and the rules framed by the Government under Clause 36. Clause 15 authorised the Government to acquire any category of schools. Clause 8(3) made it obligatory on all aided schools to hand over the fees to the Government. Clauses 9 to 13 made provisions for the regulation and management of schools, payment of salary to the teachers and the terms and conditions of their appointment. The Bench which heard the reference consisted of 7 Judges. Six members of the Bench speaking through Das, C. J. answered question No. 2 in the following words :

"**Question No. 2:** (i) Yes, so far as Anglo-Indian educational institutions entitled to grant under Article 337 are concerned. (ii) As regards other minorities not entitled to grant as of right under any express provision of the Constitution, but are in receipt of aid or desire such aid and also as regards Anglo-Indian educational institutions in so far as they are receiving aid in excess of what are due to them under Article 337, Clauses 8(3), and 9 to 13 do not offend Article 30(1) but Clause 3(5) in so far as it makes such educational institutions subject to Clauses 14 and 15 do offend Article 30(1). (iii) Clause 7 (except sub-clauses (1) and (3) which applies only to aided schools), Clause 10 in so far as they apply to recognized schools to be established after the said Bill comes into force do not offend Article 30(1) but Clause 3(5) in so far as it makes the new schools established after the commencement of the Bill subject to Clause 20 does offend Article 30(1)."

It was held that :

"Article 30(1) of the Constitution made no distinction between minority institutions existing from before the Constitution or established thereafter and protected both. It did not require that a minority institution should be confined to the members of the community to which it belonged and a minority institutions could not cease to be so by admitting a non-member to it.

Nor did Article 30(1) in any way limit the subjects to be taught in a minority institution, and its crucial words 'of their own choice', clearly indicated that the ambit of the rights it conferred was determinable by the nature of the institutions that the minority communities chose to establish and the three categories into which such institutions could thus be classified were (1) those that sought neither aid nor recognition from the State, (2) those that sought aid, and (3) those that sought recognition but not aid. The impugned Bill was concerned only with institutions of the second and third categories."

It was further held :

"The right of the minorities to administer their educational institutions under Article 30(1), was not inconsistent with the right of the State to insist on proper safeguards against maladministration by imposing reasonable regulations as conditions precedent to the grant of aid. That did not, however, mean that State Legislature could, in the exercise of its powers of legislation under Articles 245 and 246 of the Constitution, override the fundamental rights by employing indirect methods, for what it had no power to do directly, it could not do indirectly."

Dealing with the question of State recognition of the minority institutions, the Court held :

"While it was undoubtedly true that there could be no fundamental right to State recognition, denial of recognition except on such terms as virtually amounted

to a surrender of the right to administer the institution, must, in substance and effect infringe Article 30(1) of the Constitution."

Venkatarama Aiyar, J. in his minority opinion held that Article 30(1) of the Constitution did not in terms confer a right on the minority institutions to State recognition, nor, properly construed, could it do so by implication, for such an implication, if raised, would be contrary to the express provisions of Article 45 of the Constitution. Article 30(1) was primarily intended to protect such minority institutions as imparted purely religious education and to hold that the State was bound thereunder to recognize them would be tantamount not only to rendering Article 45 wholly infructuous but also to nullifying the basic concept of the Constitution itself, namely, its secular character.

82. *Rev. Sidhajbhai Sabhai & Ors.* v. *State of Bombay & Anr.* (supra) was the next case in which this Court went into the question of the right of minorities to establish and administer educational institutions. The petitioners in that case professed the Christian faith and belonged to the United Church of Northern India. They were members of a society which maintained educational institutions primarily for the benefit of the Christian Community. The society conducted forty-two primary schools and a Training College for teachers. The teachers trained in the college were absorbed in the primary schools conducted by the society and those not absorbed were employed by other Christian Mission Schools conducted by the United Church of Northern India. The cost of maintaining the training college and the primary schools was met out of donations received from the Irish Presbyterian Mission, fee from scholars and grant-in-aid from the State Government. On May 28, 1955, the Government of Bombay issued an order that from the academic year 1955-56, 80 per cent of the seats in the training colleges for teachers in non-Government training colleges should be reserved for teachers nominated by the Government. The Principal of the Training College was thereafter asked by the Educational Inspector not to admit without specific permission of the Education Department private students in excess of 20 per cent of the total strength in each class. It was also mentioned by the Educational Inspector that the refusal to admit Government nominated teachers was irregular and against Government policy. Warning was administered to the petitioners that disregard of the Government orders would result in the stoppage of grant. The petitioners thereupon approached this Court under Article 32 of the Constitution on the allegation that the directions issued to them were violative of Article 30(1) and other provisions of the Constitution. It was held by a Bench of six judges speaking through Shah, J. (as he then was) that the rules for recognition of private training institutions, in so far as they related to reservation of seats therein under orders of Government and directions given pursuant thereto regarding reservation of 80 per cent of the seats and the threat to withhold grant-in-aid and recognition of the college, infringed the fundamental freedom under Article 30(1).

83. *Rev. Father W. Proost & Ors.* v. *The State of Bihar & Ors.* (supra) was the next case wherein this Court dealt with the protection

afforded by Article 30(1) to educational institutions established by the minorities. The case related to the St. Xavier's College Ranchi which had been established by the Jesuits of Ranchi and was affiliated to Patna University. The object of founding the College, inter alia, was to give Catholic youth a full course of moral and liberal education, by imparting a thorough religious instruction and by maintaining a Catholic atmosphere in the Institution. However, the College was open to non-Catholics and all non-Catholic students received a course of moral science. The Bihar Legislature by an amending Act introduced Section 48-A in the Bihar Universities Act with effect from March 1, 1962. The said section related to the establishment of a University Service Commission for affiliated colleges not belonging to the State Government. According to Clause 6 of that section, subject to the approval of the University, appointments, dismissals, removals, termination of service or reduction in rank of teachers of an affiliated college not belonging to the State Government shall be made by the governing body of the college on the recommendation of the Commission. Clause 11 of that section inter alia provided that the Commission shall be consulted by the governing body of a college in all disciplinary matters affecting a teacher of the college and no memorials or petitions relating to such matters shall be disposed of nor shall any action be taken against, or any punishment imposed on, a teacher of the college otherwise than in conformity with the finding of the Commission. The petitioners approached this Court under Article 32 of the Constitution and contended that the St. Xavier's College Ranchi was founded by Christian minority and they had a right to administer it. According to the petitioners, Section 48-A deprived them of the right under Article 30 inasmuch as its provisions required inter alia that appointments, dismissals, reduction in rank, etc., of the staff must be made by the governing body on the recommendation of the University Service Commission for affiliated colleges ; in no case could the governing body appoint person not recommended by the Commission ; the Commission had to be consulted in all disciplinary matters and any punishment imposed on a teacher could be only in accordance with the findings of the Commission. Subsequent to the introduction of Section 48-A, in view of differences arising between the University and the college, the University withdrew the affiliation of the college. While the petition was pending, Section 48-B was inserted into the Bihar Universities Act whereby it was provided that the governing body of affiliated colleges established by a minority based on religion or language would be entitled to make appointments, dismissals, termination of service or reduction in rank of teachers or take other disciplinary measures subject only to the approval of the Commission and the Syndicate of the University. While allowing the petition filed by the petitioners, it was held by a Constitution Bench of this Court speaking through Hidayatullah, C.J. that the protection claimed by the petitioners clearly flowed from the words of Article 30(1) of the Constitution. It was further held that the width of Article 30(1) could not be cut down by introducing in it considerations on which Article 29(1) was based.

84. *Rt. Rev. Bishop S. K. Patro & Ors.* v. *State of Bihar & Ors.*

(supra) was the next case wherein this Court dealt with a claim based on Article 30(1) of the Constitution. The case related to a school founded in 1954 at Bhagalpur. The school was being managed by the National Christian Council of India. Two persons were elected as the President and Secretary of the school and their election was approved by the President of the Board of Secondary Education. The order of the President of the Board of Secondary Education was set aside by the Secretary to the Government, Education Department by order dated May 22, 1967. On June 21, 1967 the Regional Deputy Director of Education, Bhagalpur addressed a letter to the Secretary, Church Missionary Society School, Bhagalpur inviting his attention to the order dated May 22, 1967 and requesting him to take steps to constitute a Managing Committee of the School in accordance with that order. A petition was then filed in the High Court of Patna by four petitioners for restraining the State of Bihar and its officers from interfering with the right of the petitioners to administer and manage the affairs of the school. The High Court dismissed the petition on the ground that the school was not an educational institution established by a minority. The aforesaid petitioners then came up in appeal to this Court. Petitions under Article 32 of the Constitution were also filed by other petitioners in this Court. This Court held that the school in question was an educational institution established by a religious minority. On the above finding the Court speaking through Shah, J. (as he then was) held that the order passed by the educational authorities requiring the Secretary of the School to take steps to constitute a Managing Committee in accordance with the order dated May 22, 1967 was invalid.

85. Question of the protection of Article 30(1) next arose in the case of *State of Kerala, etc.* v. *Very Rev. Mother Provincial* (supra). This case related to the Kerala University Act, 1969. The said Act was passed to reorganise the University of Kerala with a view to establish a teaching, residential and affiliating University for the southern districts of the State of Kerala. Some of its provisions affected private colleges, particularly those founded by minority communities in the State. The constitutional validity of those provisions was challenged by members of the minority communities in writ petitions filed in the High Court. Sections 48 and 49 of the Act dealt with governing body for private colleges not under corporate management and with managing council for private colleges under corporate management. In either case the educational agency of a private college was required to set up a governing body for a private college or a managing council for private colleges under one corporate management. The sections provided for the composition of the two bodies so as to include Principals and Managers of the private colleges, nominees of the University and Government, as well as elected representatives of teachers. Sub-section (2) provided that the new bodies would be bodies corporate having perpetual succession and a common seal. Sub-section (4) provided that the members would hold office for four years. Sub-section (5) of each section cast a duty on the new governing body or the managing council to administer the private college or colleges in accordance with the provisions of the

Act. Sub-section (6) of each section laid down that the powers and functions of the new bodies, the removal of members thereof and the procedure to be followed by them, would be prescribed by statutes. The petitioners challenged the provisions of those two sections as also sub-sections (1), (2), (3) and (9) of Section 53 which conferred on the Syndicate of the University the power to veto the decisions of the governing council and a right of appeal to any person aggrieved by their action. Likewise, the petitioners challenged Section 56, which conferred ultimate powers on the University and the Syndicate in disciplinary matters in respect of teachers, Section 58, which removed membership of the Legislative Assembly as a disqualification for teachers and Section 63(1), which provided that whenever Government was satisfied that a grave situation had arisen in the working of a private college, it could inter alia appoint the University to manage the affairs of such private college for a temporary period. The High Court on petitions filed by the petitioners declared some of the provisions of the Act to be invalid. On appeal this Court speaking through Hidayatullah C.J. held that the High Court was right in holding that sub-sections (2) and (4) of Sections 48 and 49 were ultra vires Article 30(1). Sub-section (6) of each of those two sections was also held to be ultra vires. The High Court, it was further held, was also right in declaring that sub-sections (1), (2), and (9) of Section 53, sub-sections (2) and (4) of Section 56, were ultra vires as they fell within Sections 48 and 49 ; that Section 58 (in so far as it removed disqualification which the founders might not like to agree to), and Section 63 were ultra vires Article 30(1) in respect of the minority institutions.

86. The last two cases wherein this Court considered the impact of Article 30 on minority institutions were *D. A. V. College, Bathinda, etc.* v. *State of Punjab & Ors.*[13] and *D. A. V. College etc.* v. *State of Punjab & Ors.* (supra). Judgments in both these cases were pronounced on May 5, 1971. Jaganmohan Reddy, J. spoke for the Court in these two cases. The petitioners in the case of D. A. V. College Bathinda were educational institutions founded by the D.A.V. College Trust and Society. It was an association of Arya Samajis. The institutions were before the reorganization of the State of Punjab affiliated to the Punjab University. The Punjabi University was constituted in 1961. After the reorganisation of Punjab, the Punjab Government under Section 5 of the Act specified the areas in which the Punjabi University exercised its power and notified the date for the purpose of the section. The effect of the notification was that the petitioners were deemed to be associated with and admitted to the privileges of the Punjabi University and ceased to be associated in any way with the Punjab University. Thereafter by circular dated June 15, 1970 the University declared that Punjabi would be the sole medium of instruction and examination for the pre-University even for science groups, with effect from the academic year 1970-71. On October 7, 1970 a modification was made allowing English as an alternative medium of examination. It was, how-

13. (1971) Supp SCR 677 : (1971) 2 SCC 261.

ever, mentioned that qualifying in the elementary Punjabi papers would be obligatory for the students offering English medium. Petitions were thereafter filed in this Court under Article 32 of the Constitution on the ground that the University had no power to make Punjabi as the sole medium of instruction. It was held by this Court that the circular of June 15, 1970 as amended by the circulars of July 2, 1970 and October 7, 1970 was invalid and ultra vires the powers vested in the University. The Court further held that the petitioners were institutions maintained by a religious minority and as such the directive for the exclusive use of the Punjabi language in the Gurmukhi script as the medium for instruction and for examination in all colleges directly infringed the petitioners' right to conserve their script and administer their institutions. The relaxation made subsequently in the earlier directives of the University, it was observed, made little difference because the concession did not benefit students with Hindi as the medium and Devnagri as the script. The right of the minorities to establish and administer educational institutions of their choice, it was further held, included the right to have a choice of the medium of instruction also. That would be the result of reading Article 30(1) with Article 29(1). No inconvenience or difficulties, administrative or financial, could justify the infringement of guaranteed rights.

87. The other case, *D.A.V. College* v. *State of Punjab* (supra) arose out of writ petitions filed by the various colleges managed and administered by the D. A. V. College Trust and Managing Society. These colleges were before the Punjab Reorganization Act affiliated to the Punjab University. As a result of notification issued under Section 5 of the Guru Nanak University (Amritsar) Act (Act 21 of 1969) those colleges, which were in the specified areas, ceased to be affiliated to the Punjab University and were to be associated and admitted to the privileges of the Guru Nanak University. By Clause 2(1)(*a*) of the statutes framed under the Act the colleges were required to have a regularly constituted governing body consisting of not more than 20 persons approved by the Senate. It was also provided that the governing body would include two representatives of the University and the Principal of the College. Under Clause 1(3) if these requirements were not complied with, the affiliation was liable to be withdrawn. Under Clause 17 the staff initially appointed had to be approved by the Vice-Chancellor and all subsequent changes were also to be reported to the University for Vice-Chancellor's approval. Clause 18 required non-Government colleges to comply with the requirements laid down in the ordinances governing service and conduct of teachers in non-Government colleges as might be framed by the University. This Court held that Arya Samaj was a part of the Hindu religious minority in the State of Punjab and that Arya Samajis had a distinct script of their own, namely, Devnagri. Arya Samajis were held entitled to invoke the right guaranteed by Article 29(1) because they were a section of citizens having a distinct script; they were also entitled to invoke Article 30(1) because they were a religious minority. Clauses 2(1)(*a*) and 17 of Chapter V of the statutes were struck down by the Court as offending Article 30(1) because they

interfered with the right of the religious minority to administer their educational institutions. Clause 18 was held not to suffer from the same vice as Clause 17.

88. I have given above the gist of the different decisions of this Court dealing with Articles 29 and 30. Having done that, we should now consider the principle which should be adopted in construing those articles.

89. A liberal, generous and sympathetic approach is reflected in the Constitution in the matter of the preservation of the right of minorities so far as their educational institutions are concerned. Although attempts have been made in the past to whittle down the rights of the minorities in this respect, the vigilant sections of the minorities have resisted such attempts. Disputes have consequently arisen and come up before this Court for determining whether the impugned measures violate the provisions of the Constitution embodied in Articles 29 and 30. This Court has consistently upheld the rights of the minorities embodied in those articles and has ensured that the ambit and scope of the minority rights is not narrowed down. The broad approach has been to see that nothing is done to impair the rights of the minorities in the matter of their educational institutions and that the width and scope of the provisions of the Constitution dealing with those rights are not circumscribed. The principle which can be discerned in the various decisions of this Court is that the catholic approach which led to the drafting of the provisions relating to minority rights should not be set at naught by narrow judicial interpretation. The minorities are as much children of the soil as the majority and the approach has been to ensure that nothing should be done as might deprive the minorities of a sense of belonging, of a feeling of security, of a consciousness of equality and of the awareness that the conservation of their religion, culture, language and script as also the protection of their educational institutions is a fundamental right enshrined in the Constitution. The same generous, liberal and sympathetic approach should weigh with the courts in construing Articles 29 and 30 as marked the deliberations of the Constitution-makers in drafting those articles and making them part of the fundamental rights. The safeguarding of the interest of the minorities amongst sections of population is as important as the protection of the interest amongst individuals of persons who are below the age of majority or are otherwise suffering from some kind of infirmity. The Constitution and the laws made by civilized nations, therefore, generally contain provisions for the protection of those interests. It can, indeed, be said to be an index of the level of civilization and catholicity of a nation as to how far their minorities feel secure and are not subject to any discrimination or suppression.

90. We may now deal with the scope and ambit of the right guaranteed by clause (1) of Article 30. The clause confers a right on all minorities, whether they are based on religion or language, to establish and administer educational institutions of their choice. The right con-

ferred by the clause is in absolute terms and is not subject to restrictions, as in the case of rights conferred by Article 19 of the Constitution. The right of the minorities to administer educational institutions does not, however, prevent the making of reasonable regulations in respect of those institutions. The regulations have necessarily to be made in the interest of the institution as a minority educational institution. They have to be so designed as to make it an effective vehicle for imparting education. The right to administer educational institutions can plainly not include the right to maladminister. Regulations can be made to prevent the housing of an educational institution in unhealthy surroundings as also to prevent the setting up or continuation of an educational institution without qualified teachers. The State can prescribe regulations to ensure the excellence of the institution. Prescription of standards for educational institutions does not militate against the right of the minority to administer the institutions. Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed : they secure the proper functioning of the institution, in matters educational [*see* observations of Shah, J. in *Rev. Sidhajbhai Sabhai* '(supra) p. 850]. Further as observed by Hidyatullah, C. J. in the case of *Very Rev. Mother Provincial* (supra) the standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if universities establish syllabi for examinations they must be followed, subject however to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management. to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others.

91. It is, in my opinion, permissible to make regulations for ensuring the regular payment of salaries before a particular date of the month. Regulations may well provide that the funds of the institution should be spent for the purposes of education or for the betterment of the institution and not for extraneous purposes. Regulations may also contain provisions to prevent the diversion of funds of institutions to the pockets of those incharge of management or their embezzlement in any other manner. Provisions for audit of the accounts of the institution would be permissible regulation. Likewise, regulations may provide that no anti-national activity would be permitted in the educational institutions and that those employed as members of the staff should not have been guilty of any activities against the national interest. Minorities are as much part of the nation as the majority, and anything that impinges upon national interest must necessarily in its ultimate operation

affect the interests of all those who inhabit this vast land irrespective of the fact whether they belong to the majority or minority sections of the population. It is, therefore, as much in the interest of minorities as that of the majority to ensure that the protection afforded to minority institutions is not used as a cloak for doing something which is subversive of national interests. Regulations to prevent anti-national activities in educational institutions can, therefore, be considered to be reasonable.

92. A regulation which is designed to prevent maladministration of an educational institution cannot be said to offend clause (1) of Article 30. At the same time it has to be ensured that under the power of making regulations nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice. The right conferred by Article 30(1) is intended to be real and effective and not a mere pious and abstract sentiment ; it is a promise of reality and not a teasing illusion. Such a right cannot be allowed to be whittled down by any measure masquerading as a regulation. As observed by this Court in the case of *Rev. Sidhajbhai Sabhai* (supra), regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as minority institution effective as an educational institution. Such regulation must satisfy a dual test — the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.

93. It has been said in the context of the American Constitution and the Canadian Bill of Rights that the constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma (*see* dissenting opinion of Frankfurter, J., in *West Virginia State Board of Education* v. *Barnette*,[14] as well as the judgment of Ritchie, J., speaking for the majority of Canadian Supreme Court in *Robertson & Rosetanni* v. *Queen*)[15]. As a broad proposition not much exception can be taken to the above dictum and it may provide a workable yardstick in a large number of cases. Difficulty, however arises in cases which are in the twilight region. Provisions for prevention of disabilities do not, no doubt, create positive privileges, the two aspects are sometimes so intermixed that the danger is that one may not while denying what appears to be a privilege impinge upon a provision which is designed to prevent a disability and thus set at naught the guarantee of the Constitution. Apart from that whatever might be the position

14. 319 US 624.

15. 1963 SCR 651 (Canada) : 1964 DLR 2d 485.

in USA and Canada, so far as our Constitution is concerned it contains articles which are designed not only to prevent disabilities of the minorities but also create positive rights for them. Article 30(1) belongs to that category.

94. If a request is made for the affiliation or recognition of an educational institution, it is implicit in the request that the educational institution would abide by the regulations which are made by the authority granting affiliation or recognition. The said authority can always prescribe regulations and insist that they should be complied with before it would grant affiliation or recognition to an educational institution. To deny the power of making regulations to the authority concerned would result in robbing the concept of affiliation or recognition of its real essence. No institution can claim affiliation or recognition until it conforms to a certain standard. The fact that the institution is of the prescribed standard indeed inheres in the very concept of affiliation or recognition. It is, therefore, permissible for the authority concerned to prescribe regulations which must be complied with before an institution can seek and retain affiliation and recognition. Question then arises whether there is any limitation on the prescription of regulations for minority educational institutions. So far as this aspect is concerned, the authority prescribing the regulations must bear in mind that the Constitution has guaranteed a fundamental right to the minorities for establishing and administering their educational institutions. Regulations made by the authority concerned should not impinge upon that right. Balance has, therefore, to be kept between the two objectives, that of ensuring the standard of excellence of the institution and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations which embrace and reconcile the two objectives can be considered to be reasonable.

95. It has not been disputed on behalf of the petitioners that if the State or other statutory authorities make reasonable regulations for educational institutions, those regulations would not violate the right of a minority to administer educational institutions. We agree with the stand taken by the petitioners in this respect. It would be wrong to assume that an unrestricted right as in Article 30 postulates absence of regulations. Regulations can be prescribed in spite of the unrestricted nature of the right. The unrestricted nature of the right connotes freedom in the exercise of the right. Even the words "freedom" and "free' have certain limitations. In *James* v. *The Commonwealth,*[16] the Privy Council dealt with the meaning of the words "absolutely free" in Section 92 of the Constitution of Australia. It was said :

> " 'Free' *in itself is vague and indeterminate. It must take its colour from* the context. Compare for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech ; *it* means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth ; it means freedom governed by law, ..."

16. (1936) AC 578.

The First Amendment of the American Constitution provides inter alia that the Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof. Dealing with that Amendment, the US Supreme Court held in the case of *Reynolds* v. *United States,*[17] that Amendment did not deprive the Congress of the power to punish actions which were in violation of social duties or subversive of good order. The contention advanced on behalf of the appellant in that case that polygamy was a part of his religious belief and the Act of the Congress prohibiting polygamy violated his free exercise of religion was repelled. In the case of *Cantwell* v. *Connecticut,*[18] Roberts, J., speaking for the US Supreme Court observed in respect of the First Amendment :

> "Thus the Amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection."

Similar view was expressed by Latham, C.J., in the case of *Adelaide Company of Jehovah's Witnesses Inc.* (supra) while dealing with Section 116 of the Australian Constitution when he said that "obligation to obey the laws which apply generally to the community is not regarded as inconsistent with freedom". It would, therefore, follow that the unrestricted nature of a right does not prevent the making of regulations relating to the enforcement of that right.

96. Question has been posed during the course of arguments whether the educational institutions referred to in clause (1) of Article 30 must only be those institutions which have been established with a view to conserve language, script or culture of a minority. To put it in other words, the question is whether clause (1) of Article 30 is subject to the provisions of clause (1) of Article 29. In this respect I am of the view that clause (1) of Article 29 and clause (1) of Article 30 deal with distinct matters, and it is not permissible to circumscribe or restrict the right conferred by clause (1) of Article 30 by reading in it any limitation imported from clause (1) of Article 29. Article 29(1) confers a right on any section of citizens having a distinct language, script or culture of its own to conserve the same. It is not necessary, as mentioned earlier, for invoking this clause that the section of citizens should constitute a minority. As against that, the right conferred by Article 30(1) is only upon minorities which are based either on religion or language. The right conferred by Aritcle 29(1) is for the conservation of language, script or culture, while that guaranteed by Article 30(1) is for the establishment and administration of educational institutions of the choice of minorities. Had it been the intention of the Constitution-makers that the educational institutions which can be established and administered by minorities should be only those for conservation of their language, script or culture, they would not have failed to use words to that effect in Article 30(1). In the absence of those words, it is difficult to subscribe to the view that educational institutions mentioned in Article 30(1)

17. 98 US 145 (1878). 18. 310 US 296 (1940).

are only those which are intended to conserve language, script or culture of the minority. Clause (1) of Article 30 also contains the words "of their choice". These words which qualify "educational institutions" show the vast discretion and option which the minorities have in selecting the type of institutions which they want to establish. In case an educational institution is established by a minority to conserve its distinct language, script or culture, the right to establish and administer such institution would fall both under Article 29(1) as well as under Article 30(1). The minorities can, however, choose to establish an educational institution which is purely of a general secural character and is not designed to conserve their distinct language, script or culture. The right to establish and administer such an institution is guaranteed by Article 30(1) and the fact that such an institution does not conserve the distinct language, script or culture of a minority would not take it out of the ambit of Article 30(1).

97. I am fortified in the above conclusion by the observations of Das, C.J. in *Re Kerala Education Bill* (supra) and Hidayatullah, C.J. in the case of *Rev. Father Proost* (supra). Das, C.J. observed : (SCR pp. 1052-53)

"The right conferred on such minorities is to establish educational institutions of their choice. It does not say that minorities based on religion should establish educational institutions for teaching religion only, or that linguistic minorities should have the right to establish educational institutions for teaching their language only. What the Article says and means is that the religious and the linguistic minorities should have the right to establish educational institutions of their choice. There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice will necessarily include institutions imparting general secular education also."

Hidayatullah, C.J. expressed somewhat similar view in the following words : (SCR p. 80 GH)

"In our opinion, the width of Article 30(1) cannot be cut down by introducing in it considerations on which Article 29(1) is based. The latter article is a general protection which is given to minorities to conserve their language, script or culture. The former is a special right to establish educational institutions of their choice. This choice is not limited to institutions seeking to conserve language, script or culture and the choice is not taken away if the minority community having established an educational institution of its choice also admits members of other communities. That is a circumstance irrelevant for the application of Article 30(1) since no such limitation is expressed and none can be implied. The two articles create two separate rights, although it is possible that they may meet in a given case."

98. It has been argued on behalf of the respondents that there is no fundamental right to affiliation or recognition and that a minority educational institution seeking affiliation or recognition must conform to the conditions which are prescribed for recognition or affiliation. So far as this aspect is concerned, I am of the view that it is permissible for the State to prescribe reasonable regulations like the one to which I have

referred earlier and make it a condition precedent to the according of recognition or affiliation to a minority institution. It is not, however, permissible to prescribe conditions for recognition or affiliation which have the effect of impairing the right of the minority to establish and administer their educational institutions. Affiliation and recognition are, no doubt, not mentioned in Article 30(1), the position all the same remains that refusal to recognize or affiliate minority institutions unless they (the minorities) surrender the right to administer those institutions would have the effect of rendering the right guaranteed by Article 30(1) to be wholly illusory and indeed a teasing illusion. It is, in our opinion, not permissible to exact from the minorities in lieu of the recognition or affiliation of their institutions a price which would entail the abridgement or extinguishment of the right under Article 30(1). An educational institution can hardly serve any purpose or be of any practical utility unless it is affiliated to a University or is otherwise recognized like other educational institutions. The right conferred by Article 30 is a real and meaningful right. It is neither an abstract right nor is it to be exercised in vacuum. Article 30(1) was intended to have a real significance and it is not permissible to construe it in such a manner as would rob it of that significance. It may be appropriate in this context to refer to the observations of Das, C.J. in the case of *Re Kerala Education Bill* (supra) on pages 1067-68 :

> " Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Article 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30(1). We repeat that the legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law."

Similar view was expressed in the case of *Rev. Sidhajbhai Sabhai* (supra) wherein it was observed : (SCR p. 846)

> " The Government also holds examinations for granting certificates to successful candidates as trained primary teachers, and scholars receiving training in recognized institutions alone are entitled to appear at the examination. Manifestly, in the absence or recognition by the Government training in the College will have little practical utility. The College is a non-profit making institution and depends primarily upon donations and Government grant for meeting its expenses. Without such grant, it would be extremely difficult if not impossible for the institution to function."

What is said above with regard to aid or recognition applied equally to affiliation of a college to the University because but for such affiliation the student will not be able to obtain a University degree which is recognized as a passport to several professions and future employment in public services.

99. Argument has been advanced on behalf of the respondents that unless a law or regulation is wholly destructive of the right of minorities under Article 30(1), the same would not be liable to be struck down. This argument is untenable and runs counter to the plain language of Article 13. According to that Article, a law would be void even if it merely abridges a fundamental right guaranteed by Part III and does not wholly take away that right. The argument that a law or regulation could not be deemed to be unreasonable unless it was totally destructive of the right of the minority to administer educational institutions was expressly negatived by this Court in the case of *Rev. Sidhajbhai Sabhai* (supra). After referring to the case of *Re Kerala Education Bill* (supra) this Court observed in the case of *Rev. Sidhajbhai Sabhai*: (SCR pp. 855-56)

> "The Court did not, however, lay down any test of reasonableness of the regulation. The Court did not decide that public or national interest was the sole measure or test of reasonableness; it also did not decide that a regulation would be deemed unreasonable only if it was totally destructive of the right of the minority to administer educational institution. No general principle on which reasonableness or otherwise of a regulation may be tested was sought to be laid down by the Court. The **Kerala Education Bill case,** therefore, is not an authority for the proposition submitted by the Additional Solicitor General that all regulative measures which are not destructive or annihilative of the character of the institution established by the minority, provided the regulations are in the national interest or public interest, are valid."

100. It is, no doubt, true that on page 1065 of the case of *Re Kerala Education Bill,* Das, C.J. while dealing with Clauses 14 and 15 of the Bill observed that the provisions of those clauses might be totally destructive of the rights under Article 30(1). These observations were intended to describe the effect of those clauses. There is, however, nothing in those observations to indicate that this Court would have upheld those clauses if those clauses had abridged or partially destroyed the right under Article 30(1) and not totally destroyed that right.

101. In the light of the above principles, it can be stated that law which interferes with the minorities choice of a governing body or management council would be violative of the right guaranteed by Article 30(1). This view has been consistently taken by this Court in the cases of *Rt. Rev. Bishop S. K. Patro, Mother Provincial* and *D. A. V. College* (affiliated to the Guru Nanak University) (supra).

102. Section 33-A which provides for a new governing body for the management of the college and also for selection committees as well as the constitution thereof would consequently have to be quashed so far as the minority educational institutions are concerned because of the contravention of Article 30(1). The provisions of this section have been reproduced earlier and are similar to those of Section 48 of the Kerala University Act, sub-sections (2), (4), (5) and (6) of which were held by this Court in the case of *Mother Provincial* (supra) to be violative of Article 30(1). In the case of *Rt. Rev. Bishop S. K. Patro,* this Court declared invalid the order passed by the educational authorities requiring the Secretary of the Church Missionary Society Higher Secondary

School to take steps to constitute a managing committee in accordance with the order of the educational authorities. Section 33-A is also similar to Statute 2(1)(*a*) which was framed under the Guru Nanak University (Amritsar) Act. Statute 2(1)(*a*) was as under:

"2(1) A College applying for admission to the privileges of the University shall send a letter of application to the Registrar and shall satisfy the Senate:—

(a) that the College shall have a regularly constituted governing body consisting of not more than 20 persons approved by the Senate and including, among others, 2 representatives of the University and the Principal of the College Ex officio:

Provided that the said condition shall not apply in the case of Colleges maintained by Government which shall however have an advisory Committee consisting of among others the Principal of the College (Ex. officio) and two representatives of the University."

The above statute was struck down by this Court in the second *D. A. V. College case.*

103. Another conclusion which follows from what has been discussed above is that a law which interferes with a minority's choice of qualified teachers or its disciplinary control over teachers and other members of the staff of the institution is void as being violative of Article 30(1). It is, of course, permissible for the State and its educational authorities to prescribe the qualifications of teachers, but once the teachers possessing the requisite qualifications are selected by the minorities for their educational institutions, the State would have no right to veto the selection of those teachers. The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Article 30(1). In the case of *Rev. Father W. Proost* (supra), this Court while dealing with Section 48-A of the Bihar Universities Act, observed that the said provision completely took away the autonomy of the governing body of the college and virtually vested the control of the college in the University Service Commission. The petitioners in that case were, therefore, held entitled to the protection of Article 30(1) of the Constitution. The provisions of that section have been referred to earlier. According to the section, subject to the approval of University appointment, dismissals, removals, termination of service or reduction in rank of teachers of an affiliated college not belonging to the State Government would have to be made by the governing body of the college on the recommendation of the University Service Commission. The section further provided that the said Commission would be consulted by the governing body of a college in all disciplinary matters affecting teachers of the college and no action would be taken against or any punishment imposed upon a teacher of a college otherwise than in conformity with the findings of the Commission.

104. In the case of D. A. V. College which was affiliated to the Guru Nanak University, Statute 17 framed under the Guru Nanak University (Amritsar) Act inter alia provided that the staff initially

appointed shall be approved by the Vice-Chancellor and that all subsequent changes shall be reported to the University for Vice-Chancellor's approval. This Court held that Statute 17 interfered with the right of management of the petitioner colleges and, as such, offended Article 30(1).

105. Although disciplinary control over the teachers of a minority educational institution would be with the governing council, regulations, in my opinion, can be made for ensuring proper conditions of service of the teachers and for securing a fair procedure in the matter of disciplinary action against the teachers. Such provisions which are calculated to safeguard the interest of teachers would result in security of tenure and thus inevitably attract competent persons for the posts of teachers. Such a provision would also eliminate a potential cause of frustration amongst the teachers. Regulations made for this purpose should be considered to be in the interest of minority educational institutions and as such they would not violate Article 30(1).

106. Clause (*a*) of sub-sections (1) and (2) of Section 51A of the impugned Act which make provision for giving a reasonable opportunity of showing cause against a penalty to be proposed on a member of the staff of an educational institution would consequently be held to be valid. Clause (*b*) of those sub-sections which gives a power to the Vice-Chancellor and officer of the University authorised by him to veto the action of the managing body of an educational institution in awarding punishment to a member of the staff, in my opinion, interferes with the disciplinary control of the managing body over its teachers. It is significant that the power of approval conferred by clause (*b*) in each of the two sub-sections of Section 51A on the Vice-Chancellor or other officer authorised by him is a blanket power. No guidelines are laid down for the exercise of that power and it is not provided that the approval is to be withheld only in case the dismissal, removal, reduction in rank or termination of service is mala fide or by way of victimization or other similar cause. The conferment of such blanket power on the Vice-Chancellor or other officer authorised by him for vetoing the disciplinary action of the managing body of an educational institution makes a serious inroad on the right of the managing body to administer an educational institution. Clause (*b*) of each of the two sub-sections of Section 51A should, therefore, be held to be violative of Article 30(1) so far as minority educational institutions are concerned.

107. Section 52A of the Act relates to the reference of disputes between a governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college or recognized or approved institution connected with the conditions of service of such member to a Tribunal of Arbitration, consisting of one nominated by the governing body of the college or, as the case may be, of the recognized or approved institution, one member nominated by the member of the staff involved in the dispute and an Umpire appointed by the Vice-Chancellor. Section 52A is widely worded, and as it stands it would cover within its ambit every dispute connected with the conditions of service of a member of the staff of an educational institution, however, trivial or

insignificant it may be, which may arise between the governing body of a college and a member of the staff. The effect of this section would be that the managing committee of an educational institution would be embroiled by its employees in a series of arbitration proceedings. The provisions of Section 52A would thus act as a spoke in the wheel of effective administration of an educational institution. It may also be stated that there is nothing objectionable to selecting the method of arbitration for settling major disputes connected with conditions of service of staff of educational institutions. It may indeed be a desideratum. What is objectionable, apart from what has been mentioned above, is the giving of the power to the Vice-Chancellor to nominate the Umpire. Normally in such disputes there would be hardly any agreement between the arbitrator nominated by the governing body of the institution and the one nominated by the concerned member of the staff. The result would be that the power would vest for all intents and purposes in the nominee of the Vice-Chancellor to decide all disputes between the governing body and the member of the staff connected with the latter's conditions of service. The governing body would thus be hardly in a position to take any effective disciplinary action against a member of the staff. This must cause an inroad in the right of the governing body to administer the institution. Section 52A should, therefore, be held to be violative of Article 30(1) so far as minority educational institutions are concerned.

108. In view of what has been mentioned above, Sections 40 and 41 of the Act would also have to be struck down so far as the minority colleges are concerned as being violative of Article 30(1). The effect of Sections 40 and 41 is that in case the University so determines and the State Government issues the necessary notification under sub-section (2) of Section 40, all instructions, teaching and training in under-graduate courses shall within the University area be conducted by the University and shall be imparted by the teachers of the University. The result would be that except in matters mentioned in the proviso to sub-section (4) of Section 41 no instructions, teaching and training in under-graduate courses of study, which has hithertofore been conducted by the affiliated colleges, would be conducted by those colleges, because the same would have to be conducted by the University and would have to be imparted by the teachers of the University. The affiliated colleges would also as a result of the above become constituent colleges. A provision which makes it imperative that teaching in under-graduate courses can be conducted only by the University and can be imparted only by the teachers of the University plainly violates the rights of minorities to establish and administer their educational institutions. Such a provision must consequently be held qua minority institutions to result in contravention of Article 30(1). I would, therefore, strike down Section 40 so far as minority educational institutions are concerned as being violative of Article 30(1). Further, once Section 40 is held to be unconstitutional so far as minority educational institutions are concerned, the same vice would afflict Section 41 because Section 41 can operate only if Section 40 survives the attack and is held to be not violative of Article 30(1). I

would, therefore, hold Sections 40 and 41 to be void in respect of minority educational institutions.

109. It has been argued on behalf of the respondents that in the case of *Re Kerala Education Bill* (supra) this Court upheld Clauses 11 and 12. Clause 11 made it obligatory for all aided schools to select teachers from a panel of candidates selected for each district by the Public Service Commission. Clause 12 related to the conditions of service of aided teachers. According to sub-clause (4) of Clause 12, no teacher of an aided school could be dismissed, removed or reduced in rank or suspended by the manager without the previous sanction of the authorzied officer. Das, C. J., observed that the above provisions were serious inroads on the right of administration and appeared perilously near violating that right. All the same, he observed that this Court "as at present advised" was prepared to treat those regulations as permissible regulations. I have already mentioned above that in subsequent cases this Court held similar provisions to be violative of Article 30(1) in the case of minority institutions. The opinion expressed by this Court in *Re Kerala Education Bill* (supra) was of an advisory character and though great weight should be attached to it because of its persuasive value, the said opinion cannot override the opinion subsequently expressed by this Court in contested cases. It is the law declared by this Court in the subsequent contested cases which would have a binding effect. The words "as at present advised" as well as the preceding sentence indicate that the view expressed by this Court in *Re Kerala Education Bill* in this respect was hesitant and tentative and not a final view in the matter. It has been pointed out that in *Re Levy of Estate Duty,*[19] Spens, C.J., referred to an observation made in the case of *Attorney-General for Ontario* v. *Attorney-General for Canada,*[20] that the advisory opinion of the Court would have no more effect than the opinion of the law officers. I need not dilate upon this aspect of the matter because I am of the opinion that the view expressed by this Court in subsequent cases referred to above by applying the general principles laid down in the *Re Kerala Education Bill* is correct and calls for no interference.

110. Reference has been made on behalf of the respondents to the recommendation of Dr. Radhakrishnan Commission made in 1948-49 wherein preference was shown for constituent colleges. So far as this aspect is concerned, I may observe that if any statutory provision is found to be violative of Article 30(1) of the Constitution, the fact that it has been enacted in pursuance of the recommendation of an expert body would not prevent the Court from striking down that provision. It may also be mentioned that in the case of *Mother Provincial* (supra) reliance was placed upon the report of the Education Commission. This Court in that context remarked that that fact as well as the fact that the provisions were salutary could not stand in the face of the constitutional guarantee. Reference to the said report was, therefore, considered to

19. (1944) 6 FCR 317: AIR 1944 FC 73: (1944) 2 Mad LJ 234.
20. 1912 AC 571.

be not necessary. I may further mention that subsequent to the report of Dr. Radhakrishnan Commission, three other bodies submitted their reports. One of the reports was given by Kothari Committee in 1965. The other was the report of the Education Commission presided over by Dr. Kothari in 1966. The third was the report of Dongerkery Commission submitted in 1972. There was no reference to the conversion of affiliated colleges into constituent colleges in any of these three reports. No observation was also made in any of the reports that the provisions of Article 30(1) and the construction placed upon that had in any way stood in the way of raising the standards of education or improving the excellence of educational institutions. It may also be mentioned that the concept of constituent colleges is not a rigid concept and can vary from university to university. The concept of constituent colleges which is visualized in the impugned provisions of Sections 40 and 41 of the Act contemplates that the imparting of teaching at the under-graduate level in the prescribed course of studies shall be only by the teachers of the University. The minority colleges as such would not be entitled to impart education in courses of study through their own teachers. Sections 40 and 41 would, therefore, be, as already mentioned violative of Article 30(1).

111. In a matter like this, one may perhaps have also to take into account the accepted norms for the imparting of education. So far as post-graduate teaching is concerned, the general pattern which prevails and has been accepted so far is that the education is imparted by the University. As against that, the mode for under-graduate teaching has been that it is imparted by the individual colleges. A very large number of colleges, including minority colleges, have been established and are in existence for the purpose of imparting under-graduate education. The impugned provisions are calculated to do away with the present system and in the process they impinge upon the rights of minorities under Article 30(1). It would not be a correct approach to the problem to hold that because the imparting of post-graduate teaching by the Universities has been accepted without objection, the same rule should also hold good for the under-graduate teaching and the same should not be impermissible. Such a process of extension, in my opinion, is not very helpful. If it is permissible for the State to prevent the imparting of education by colleges at under-graduate level because such a course has been accepted at post-graduate level, there would be no reason why this principle be not extended further to the school education. The process of extension can thus totally annihilate the right guaranteed by Article 30(1).

112. It has also been argued on behalf of the respondents that we should not strike down the impugned sections but should wait till statutes or ordinances are made in pursuance of those sections. In this respect I am of the view that since the impugned sections confer the power to frame statutes or regulations violative of the fundamental right under Article 30(1), the very provisions of the Act conferring such power are void so far as minority institutions are concerned. The

abridgement of the right of the minorities to establish and administer educational institutions of their choice is writ large on the face of the impugned provisions. The fact that no statutes or ordinances have been framed in pursuance of the impugned provisions would consequently be hardly of much significance in determining the constitutional validity of the impugned provisions. It would not, therefore, be a correct approach to wait till statutes are framed violating the right under Article 30(1). No rules or statutes or ordinances framed under the provisions of the Act can take away the constitutional infirmity of those provisions. It is, as observed by the Judicial Committee in the case of *Trustees of the Roman Catholic Separate Schools for Ottawa* v. *Ottawa Corporation & Ors.*,[21] the creation of the power and not its exercise that is subject to objection and the objection would not be removed even though the powers conferred were never exercised at all. Similar view was expressed in the case of *Re Kerala Education Bill* (supra) wherein Das, C.J. while dealing with Clause 3(5) read with Clause 20 observed : (SCR p. 1069)

> "It is true that Clause 36(2)(c) empowers the Government to make rules providing for the grant of recognition to private schools and we are asked to suspend our opinion until the said Bill comes into force and rules are actually made. But no rule to be framed under Clause 36(2)(c) can nullify the constitutional infirmity of Clause 3(5) read with Clause 20 which is calculated to infringe the fundamental rights of minority communities in respect of recognized schools to be established after the commencement of the said Bill."

113. Reference has also been made on behalf of the respondents to the provision of Chapter VIA containing Sections 38B to 38E which has been inserted by the amending Act. These provisions relate to autonomous colleges, autonomous institutions and autonomous University departments. According to Section 38B, the University authorities may allow an affiliated college, a University college, a recognized institution or a University department to enjoy autonomy in the matter of admissions of students, prescribing the courses of studies, imparting instructions and training, holding of examinations and the powers to make necessary rules for the purpose in case the University authorities are satisfied that the standard of education in such college, institution or department is so developed that it would be in the interest of education to allow the college, institution or department to enjoy autonomy. It is urged that the provision for the conversion of affiliated colleges into constituent colleges is part of a scheme which covers within its ambit autonomous colleges on the one end and constituent colleges on the other. This circumstance, in my opinion, is hardly of any significance. If the conversion of affiliated colleges of the minorities into constituent colleges contravenes Article 30(1), the fact that such conversion is in pursuance of a scheme which permits the grant of autonomy to an individual college would not prevent the striking down of the impugned provision.

114. As a result of the above, I hold that Section 33A, Section 40, Section 41 and Section 52A of the Gujarat University Act, 1949 as amended by the Gujarat University (Amendment) Act, 1972 are violative

21. 1917 AC 76.

of Article 30(1) and as such are void in respect of minority educational institutions. As regards Section 51A of the Act, I uphold the validity of clause (*a*) of sub-sections (1) and (2) of that section. Clause (*b*) of each of those two sub-sections is violative of Article 30(1) and as such is void so far as minority educational institutions are concerned.

MATHEW, J. (*on behalf of himself and Chandrachud, J.*) (*concurring*)—We agree respectfully with the conclusion of the learned Chief Justice, but we propose to state our reasons separately.

116. The first question that arises for consideration in writ petition No. 232/1973 is whether Article 30(1) of the Constitution confers on the religious and linguistic minorities, only the right to establish and administer educational institutions for conserving their language, script or culture, or, whether the scope of the guarantee under that article is wide enough to enable them to establish and administer any other educational institutions of their choice.

117. Article 30(1) reads :

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

118. The respondents submitted that Article 29(1) which provides that "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same" should determine the scope of Article 30(1). They say that when Article 30(1) talks of the right of religious or linguistic minorities to establish and administer educational institutions of their choice, that can only mean educational institutions for conserving their language, script or culture, or, at the most, educational institutions for imparting general secular education in order to conserve their language, script or culture and not institutions for imparting general secular education divorced from the above purposes.

119. In *In re The Kerala Education Bill,* 1957 (supra) Das, C.J. at p. 1053 speaking for the majority of 6 to 1 said in a Presidential reference under Article 143(1) that the key to the understanding of the true meaning and implication of Article 30(1) is the words "of their own choice" in the article and that the article leaves it to the choice of those minorities to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and the purpose of giving a thorough, good general education to their children.

120. The inter-relation of Articles 29(1) and 30(1) was examined by a bench of five judges of this Court presided over by Hidayatullah, C. J., in *Rev. Father W. Proost and Others* v. *State of Bihar and Others* (supra). The learned Chief Justice, speaking for the Court, said that the width of Article 30(1) cannot be cut down by introducing in it considerations on which Article 29(1) is based ; that whereas the latter article is a

general protection which is given to minorities to conserve their language, script or culture, the former is a special right to minorities to establish educational institutions of their choice and that this choice is not limited to institutions seeking to conserve language, script or culture. He further said that this choice is not taken away if the minority community, having established an educational institution of its choice, also admits members of other communities, and, that the two articles create two separate rights, although it is possible that they may meet in a given case.

121. In *Rev. Sidhajbhai Sabhai and Others* v. *State of Bombay* (supra) the Court overruled the contention that Article 30(1) is limited to conserve only the language, script or culture of religious and linguistic minorities.

122. The question was examined again by this Court in *Rt. Rev. Bishop S. K. Patro and Others* v. *State of Bihar and Others* (supra) where, Shalı, J., speaking for a bench of five judges quoted with approval the observations of Hidayatullah, C. J., in *Rev. Father W. Proost's case* and held that Articles 29(1) and 30(1) confer separate rights, though in a given case, these rights may overlap.

123. In *D. A. V. College, etc.* v. *State of Punjab and Others,*[22] Jaganmohan Reddy, J., speaking on behalf of the Court, observed that Article 29(1) is wider than Article 30(1), in that, while any section of the citizens including the minorities can invoke the rights guaranteed under Article 29(1), the right guaranteed under Article 30(1) is only available to the minorities based on religion or language. He then went on to say that a reading of these two articles together would lead to the conclusion that a religious or linguistic minority has the 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 and that while this is so, these two articles are not inter-linked nor do they permit of their being always read together. He quoted with approval the observations of Hidayatullah, C.J., in *Rev. Father W. Proost's case* to the effect that the width of Article 30(1) cannot be cut down by introducing into it considerations on which Article 29(1) is based, and that, the expression "educational institutions of their choice" in Article 30(1) is not limited to institutions seeking to conserve language, script or culture.

124. Ramaswami, C. J., said in *Dipendra Nath* v. *State of Bihar,*[23] that the crucial phrase in Article 30(1) is "of their choice", that the ambit of the freedom of choice conferred by the article is therefore as wide as the choice of the particular community may make it and that it is open to a religious minority to establish educational institutions for the purpose of conserving its religion, language or culture, and also for the purpose of giving a thorough good secular education to their children as the article applies to both these classes of institutions.

22. *Supra* f.n. 5.

23. AIR 1962 Pat 101.

125. Article 29(1) confers on any section of citizens resident in the territory of India, the right to conserve its language, script or culture. It does not speak of any minority, religious or otherwise. Whereas Article 29(1) confers the right not only upon a minority as understood in its technical sense but also upon a section of the citizens resident in the territory of India which may not be a minority in its technical sense, the beneficiary of the right under Article 30 is a minority, either religious or linguistic. That is one distinction between Article 29(1) and Article 30(1).

126. The second distinction to be noted is that whereas Article 29(1) confers rights in respect of three subjects *viz.*, language, script or culture, Article 30(1) deals only with the right to establish and administer educational institutions. It is true that under Article 29(1) a section of the citizens having a distinct language, script or culture, might establish an educational institution for conserving the same. But, under Article 30(1), the right conferred on the religious or linguistic minority is not only the right to establish an educational institution for the purpose of conserving its language, script or culture, but any educational institution of its choice. Whereas Article 29 does not deal with education as such, Article 30 deals only with the establishment and administration of educational institutions. It might be that in a given case, the two articles might overlap. When a linguistic minority establishes an educational institution to conserve its language, the linguistic minority can invoke the protection of both the articles. When Article 30(1) says that a linguistic minority can establish and administer educational institutions of its choice, it means that it can establish and administer any educational institution. If a linguistic minority can establish only an educational institution to conserve its language, then the expression 'of their choice' in Article 30(1) is practically robbed of its meaning.

127. A mere look at the two articles would be sufficient to show that Article 29(1) cannot limit the width of Article 30(1). There are religious minorities in this country which have no distinct language, script or culture, as envisaged in Article 29(1). For these religious minorities, Article 29(1) guarantees no right. Yet, Article 30(1) gives them the right to establish and administer educational institutions of their choice. That article does not say that only religious minorities having a distinct language, script or culture can establish educational institutions of their choice. What then are the educational institutions which they are entitled to establish and administer under the article? *Ex-hypothesi,* these religious minorities have no distinct language, script or culture. So, the educational institutions which they are entitled to establish and administer cannot be those to conserve their language, script or culture. Therefore, it is clear that the right guaranteed to a religious or linguistic minority under Article 30(1) is the right to establish any educational institution of its choice.

128. The question whether such educational institutions can include a military academy or a police training school need not be considered

in the context of the facts of this writ petition, for, here, we are only concerned with an institution imparting general secular education as ordinarily understood.

129. The learned Additional Solicitor-General appearing on behalf of the State of Gujarat submitted that although religious and linguistic minorities have the fundamental right to establish and administer educational institutions of their choice, they have no right, fundamental or otherwise, to get recognition or affiliation as the case may be, for the educational institutions established by them, unless they submit to the regulations made by the appropriate authority and applicable alike to educational institutions established and administered by the majority as well as to those established and administered by religious and linguistic minorities. The argument was that Article 30(1) does not confer any right to recognition or affiliation, that recognition or affiliation is a privilege which might be granted or withheld as the legislature might think fit.

130. We think that the point raised by the Additional Solicitor-General is of far reaching constitutional importance not only in the sphere of the right of the religious and linguistic minorities to impart general secular education but also in other areas and merits an examination of its juristic basis. And, we also think, that the question has to be disposed of within the strict confines of legal reasoning which laymen might too often deem to be invidiously technical. As judges, we are neither Jew nor Gentile, neither Catholic nor agnostic and we would not be justified in writing our private opinions no matter how deeply we might cherish them. And what is said in support of the decision should insulate us as far as rationally possible from the political or religious conflict beneath the issues. We owe equal allegiance to the Constitution and are equally bound by judicial obligation to support it.[24]

131. It is necessary in the interest of clarity of thought to, begin with an understanding of the real reason for protection of minorities in a democratic polity.

> "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."[25]

132. The problem of the minorities is not really a problem of the establishment of equality because if taken literally, such equality would mean absolute identical treatment of both the minorities and the major-

24. *See* the observations of Justice Frankfurter in *West Virginia State Board of Education* v. *Barnette*, 319 US 624.
25. The recommendation by the Sub-Commission in its report to the Commission on Human Rights—quoted at p. 27 of "*Minority Protection and International Bill of Human Rights*" by Urmila Haksar.

ities. This would result only in equality in law but inequality in fact. The distinction need not be elaborated for it is obvious that "equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations."[26]

133. It may sound paradoxical but it is nevertheless true that minorities can be protected not only if they have equality but also, in certain circumstances, differential treatment.

134. Over one and a half decades ago, Chief Judge Das led this Court in holding that without recognition, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and that the right under Article 30(1) cannot be effectively exercised. He said that the right to establish educational institutions of their choice means the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions and that though there is no such thing as a fundamental right to recognition by the State, yet to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Article 30(1) [see *In re The Kerala Education Bill,* 1957, (supra)].

135. The reason why the Constitution-makers were at pains to grant religious minorities the fundamental right to establish and administer educational institutions of their choice is to give the parents in those communities an opportunity to educate their children in institutions having an atmosphere which is congenial to their religion. Whatever be one's own predilections those who think that man does not live by bread alone but also by the word that comes from God cannot remain indifferent to the problem of religion in relation to and as part of education.

136. As a matter of fact, according to several religious minorities, the State maintains a system of schools and colleges which is not completely satisfactory to them, inasmuch as no place is given to religion and morality. The sheer omission of religion from curriculum is itself a pressure against religion. Since they realize that the teaching of religion and instruction in the secular branches cannot rightfully or successfully be separated one from the other, they are compelled to maintain their own system of schools and colleges for general education as well as for religious instruction.

"It is important to examine the **raison d'etre** of educational institutions administered by religious groups. Clearly, their establishment does not come about because of a deep conviction that such institutions will be able to reach the facts of literature, geography or mathematics better than state schools. Rather, such schools are started with a primarily religious objective — to secure the opportunity for direct religious instruction and to develop a religious atmosphere

26. The Advisory opinion on *Minority Schools in Albania,* 6th April, 1935 publications of the Court, series A/B No. 64, p. 19.

and view point even for the study of literature, geography and mathematics. In other words, religious body establishes and maintains schools in order to create a total environment which will be favourable to the promotion of its particular religious values."[27]

137. It is perhaps, possible to secularize subjects such as mathematics, physics or chemistry, but as Justice Jackson said :

"Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be accentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explanation of our presence on this planet..... But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition is more than one can understand. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teachings about remote subjects such as Confucius or Mohamet."[28]

138. The State cannot insist that the children belonging to the religious minority community should be educated in State-maintained educational institutions or in educational institutions conducted by the majority. The State's interest in education, so far as religious minorities are concerned, would be served sufficiently by reliance on secular education accompanied by optional religious training in minority schools and colleges, if the secular education is conducted there according to the prescribed curriculum and standard. Article 28(3) implies that a religious minority administering an educational institution imparting general secular education has the liberty to provide for religious education in the institution. The continued willingness to rely on colleges conducted by religious or linguistic minorities for imparting secular education strongly suggests that a wide segment of informed opinion has found that these colleges do an acceptable job of providing secular education. The State, concededly, has power to regulate and control the education of its children, but it cannot, by a general law compelling attendance at public school or college, preclude attendance at the school or college established by the religious minority, when the parents seek to secure the benefit of religious instruction not provided in public schools. The parents have the right to determine to which school or college their children should be sent for education.

139. We fail to see how affiliation of an educational institution imparting religious instruction in addition to secular education to pupils as visualized in Article 28(3) would derogate from the secular character of the state. Our Constitution has not erected a rigid wall of separation between church and state. We have grave doubts whether the expression "secular state" as it denotes a definite pattern of church and state relationship can with propriety be applied to India. It is only in a qualified sense that India can be said to be a secular state. There are provi-

27. See "*India as a Secular State*" by Donald Eugene Smith, p. 361.

28. See the opinion of Justice Jackson in *McCollum* v. *Board of Education*, 333 US 203.

sions in the Constitution which make one hesitate to characterize our state as secular. Dr. Radhakrishnan has said :

> "The religious impartiality of the Indian State is not to be confused with secularism or atheism. Secularism as here defined is in accordance with the ancient religious tradition of India. It tries to build up a fellowship of believers, not by subordinating individual qualities to the group mind but by bringing them into harmony with each other. This dynamic fellowship is based on the principle of diversity in unity which alone has the quality of creativeness.[29] Secularism here does not mean irreligion or atheism or even stress on material comforts. It proclaims that it lays stress on the universality of spiritual values which may be attained by a variety of ways."[30]

140. In short secularism in the context of our Constitution means only "an attitude of live and let live developing into the attitude of live and help live."[31]

141. The fundamental postulate of personal liberty excludes any power of the State to standardize and socialize its children by forcing them to attend public schools only. A child is not a mere creature of the State. Those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.[32]

142. The parental right in education is the very pivotal point of a democratic system. It is the touchstone of difference between democratic education and monolithic system of cultural totalitarianism. When the modern State with its immense power embarks upon the mission of educating its children, the whole tendency is towards state monopoly. The fundamental right of the religious and linguistic minorities to establish and administer educational institutions of their choice is the only legal barrier to confine the bursting expansionism of the new Educational Leviathan. Great diversity of opinion exists among the people of this country concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a single iron cast system of education to be imposed upon a nation compounded of several strains, the Constitution has provided this right to religious and linguistic minorities.

143. Today, education is an important function of State and local governments. Compulsory school attendance laws and the mounting expenditure for education both demonstrate a recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment (see *Brown* v. *Board of Education*).[33]

29. *Recovery of Faith*, p. 202 (Italics ours.)
30. Dr Radhakrishnan's Foreword to Dr. S Abid Husain's, *The National Culture of India*, p. vii.
31. Hoarace M. Kallen, *Secularism is the Will of God*, pp. 11, 12, 13.
32. See *Pierce* v. *Society of Sisters of Holy Names*, 268 US 510, 535.
33. 349 US 294.

144. If there is a symbol of democracy in education, it is not the public school as the single democratic school. Rather it is the co-existence of several types of schools and colleges including affiliated colleges on a footing of juridical equality with a consequent proportionately equal measure of State encouragement and support. And, juridical equality postulates that the religious minority should have a guaranteed right to establish and administer its own educational institutions where it can impart secular education in a religious atmosphere.

145. The State's interest in secular education may be defined broadly as an interest in ensuring that children within its boundaries acquire a minimum level of competency in skills, as well as a minimum amount of information and knowledge in certain subjects. Without such skill and knowledge, an individual will be at a severe disadvantage both in participating in democratic self-government and in earning a living. No one can question the constitutional right of parents to satisfy their State-imposed obligation to educate their children by sending them to schools or colleges established and administered by their own religious minority so long as these schools and colleges meet the standards established for secular education.

146. The concept of the common pattern of secular education needs to be brought down to the earth of reality and divested of its fuzzy mystification. The concept has nothing to do with an artificial government-promoted levelling of all differences. The public school is not a temple in which all children are to be baptized into unity of secular democratic faith, while those who stand without are faintly heretical.

> "In democratic countries therefore the freedom of offering education of different types with different values within the framework of the constitution should not be needlessly circumscribed. This is intimately connected with the freedom of thought. The control over colleges suggested above should be such as to secure ultimately observance of these high principles by colleges of their own accord and not through fear of action by the university."[34]

147. Whatever spiritual mission of promoting unity the government may have, it is conditioned by its primal duty of promoting justice, respecting guaranteed rights and ensuring equality of differences.

148. The framers of the Constitution were not unaware that und the system which they created, most of the legislative or government curtailments of the guaranteed fundamental rights will have the suppo of legislative judgment that public interest will be served by its curtailmen than by its constitutional protection. There can be no surrender of constitutional protection of the right of minorities to popular will masquerading as the common pattern of education. This is the reason why this Court has, time and again pointed to the importance of a searching judicial enquiry into legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail rights intended to protect them. That the minorities might be unable to find protection

34. See Report of the Committee on '*Model Act for Universities*', Chapter V. Colleges and Students' Welfare, p. 28.

in political process and, therefore, the Court might appropriately regard their interest with special solicitude was suggested by Stone, J. in his famous foot-note to *United States* v. *Carolene Prod. Cod.*[35]

149. Over the years, this Court has held that without recognition or affiliation, there can be no real or meaningful exercise of the right to establish and administer educational institutions under Article 30(1) [see *In re* : *The Kerala Education Bill,* 1957 (supra) at p. 1067-68); *Rev. Sidhajbhai Sabhai and Others* v. *State of Bombay* (supra at p. 856) and *D. A. V. College, etc.* v. *State of Punjab and Others* (supra at p. 709)].

150. Let us now examine the validity of the argument that as there is no right, fundamental or otherwise, to recognition or affiliation, the government may withhold recognition or affiliation for any reason or impose any condition for the same, and consequently, it may withhold or revoke it even though the reason for doing so may be the minority's refusal to surrender its constitutional rights to administer the institution. This argument is phrased in syllogistic terms : Article 30(1) does not confer a fundamental right upon a religious or linguistic minority to obtain recognition or affiliation ; a State Legislature has no duty or obligation to set up or establish a university with facilities for affiliation of educational institutions, let alone those established and administered by the religious or linguistic minorities ; in fact, there are many universities which are only teaching universities and which do not provide for any facility for affiliation ; if the Legislature is competent to establish universities without providing any facility for affiliation or recognition and thereby withhold affiliation, it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting it with restrictions and conditions and, therefore, the Legislature has power to impose conditions on affiliated colleges established and administered by the religious or linguistic minorities which result in their becoming constituent colleges. And, as a corollary to this argument, it is submitted that the recipient of the benefit or facility, namely, the religious or linguistic minority, is not deprived of its fundamental right since it may retain its fundamental right simply by rejecting the proffered benefit or facility.

151. We think that dangerous consequences will follow if the logic of the argument is accepted in all cases. The rapid rise in the number of government regulatory and welfare programmes, coupled with the multiplication of government contracts resulting from expanded budgets, has greatly increased the total number of benefits or privileges which can be conferred by government, thus affording the government countless new opportunities to bargain for the surrender of constitutional rights. With the growth of spending power of the State — a necessary accompaniment of the modern welfare State — the potentiality of control through the power of purse has grown apace.[36]

35. 304 US 144.

36. See "*The New Property*" by Charles A. Reich, 73 Yale Law Journal, 733.

152. Though the courts have recognized that Article 14 applies to public benefits and public employment as fully as to other acts of State, they are less quick to demand constitutional justification when a benefit or privilege like recognition, affiliation or aid is so conditioned that, to get it, one must surrender some part of one's basic freedoms.

153. The story begins with the judgment of Justice Holmes in *McAuliffe* v. *New Bedford*[37] where he despatched the petition of a policeman who had been discharged from his service for violating a regulation which restricted his political activities by saying that

> "the petitioner may have a constitutional right to talk politics: but he has no constitutional right to be a policeman..... The servant cannot complain as he takes the employment on terms which are offered to him."

154. The notion that "the petitioner has no constitutional right to be a policeman although he has a constitutional right to talk politics" is a specific application of the larger view that no one has a constitutional right to government largess or privilege and is much the same as the argument here that a religious or linguistic minority administering an educational institution has no right to recognition or affiliation, though it has a fundamental right to establish or administer it. This aphorism of Mr. Justice Holmes has had a seductive influence in the development of this branch of the law.

155. In *Davis* v. *Massachusetts*[38] the appellant had been convicted of making a speech on the Boston Common, in violation of a city ordinance forbidding, *inter alia,* the making of any public address upon public grounds without a permit from the mayor. The conviction had been affirmed by the Supreme Court of Massachusetts in an opinion by Justice Holmes, in which he said :

> "The argument that the ordinance was unconstitutional involves the same kind of fallacy that was dealt with in **McAuliffe v. New Bedford.**[37] It assumes that the ordinance is directed against free speech generally.....whereas in fact it is directed toward the modes in which Boston Common may be used."

He continued, in language quoted by the United States Supreme Court in affirming the judgment :

> "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes."

The Supreme Court then said : (at p. 48)

> "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

156. When he took his seat in the United States Supreme Court in 1902, Justice Holmes still adhered to the views about conditional privi-

37. 155 Mass 216. 38. 167 US 43.

leges which he had expressed in *McAuliffe* v. *New Bedford* (supra) and *Davis* v. *Massachusetts* (supra). Writing for the Court in *Pullman Co.* v. *Adams,*[39] he disposed summarily of a contention that a tax on local business was so heavy as to burden the inter-State operations of the Pullman Company saying :

" The Company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."

And, when in 1910, the majority of the Court swung to the opposite position in *Western Union Co.* v. *Kansas,*[40] he dissented saying :

" Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."

A very perceptive critic has written :[41]

" The pith of his (Holmes') argument was expressed in the aphorism 'Even in the law the whole generally includes its parts'. He thus implies that the **power of total exclusion** is a 'whole', of which **the power to impose any burdens what-so-ever on these admitted** is a 'part'."

He went on to say :

" Logically a thing which may be absolutely excluded is not the same as a thing which may be subjected to burdens of a different kind, even though such burdens would be regarded by all as less onerous than the burden of absolute exclusion. The 'power of absolute exclusion' is a term not identical with the 'power of relative exclusion' or the 'power to impose any burdens whatsoever'."

When Justice Holmes was out-voted in the case referred to above and its compansion cases, he accepted the result. Eight years later we find him saying for a unanimous court in *Western Union Tel. Co.* v. *Foster,*[42] which struck down an interference with inter-state commerce :

"It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present characters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end,.....**and a constitutional power cannot be used by way of condition to attain an** unconstitutional result." (emphasis added)

157. The orthodox American doctrine was that the right of a foreign corporation to transact business within the boundaries of a state depends entirely upon the State's permission. That seemed to offer a means of accomplishing the desired result. If the states had power to refuse admittance to foreign corporations entirely, with or without cause, surely they might exact in return for admission whatever they wished. If so, a promise, prior to admission, not to resort to the federal courts, or a liability to expulsion in case of such a resort, required as the price of admission, would seem to be a legitimate and effective means of attaining the desired end. In the case of *Insurance Co.* v. *Morse*[43] the Supreme Court of the United States held void a statute requiring an agreement not

39. 189 US 420.
40. 216 US 1.
41. See *Thomas Read Powell* : 16 Columbia Law Rev. 99, at 110-111.
42. 247 US 105, 114.
43. 20 Wall 445, 447 (US 1874).

to remove suits to the federal courts as a condition precedent to admission. This decision was based upon the ground, supported by dicta expressed in the two earlier cases, that the exaction of the agreement was an attempt to interfere with the exercise of a right derived from the Constitution and the laws of the United States. While the term "unconstitutional condition" was not specifically employed in the opinion, the case seems clearly to be the fountainhead of the doctrine which now goes by that name.[44]

158. The doctrine of "unconstitutional condition" means any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right. This doctrine takes for granted that 'the petitioner has no right to be a policeman' but it emphasizes the right he is conceded to possess by reason of an explicit provision of the Constitution, namely, his right "to talk politics". The major requirement of the doctrine is that the person complaining of the condition must demonstrate that it is unreasonable in the special sense that it takes away or abridges the exercise of a right protected by an explicit provision of the Constitution (*see* William W. Van Alstyne : *"The Demise of the Right-Privilege Distinction in Constitutional Law"*[45]).

159. In *Frost and Frost Trucking Co.* v. *Railroad Comm.*[46] the Supreme Court of United States was concerned with the question of the validity of a statute of California requiring a certificate of public convenience and necessity to be secured by carriers, whether common or private, as a pre-requisite to carrying on their business over the public highways of the state. The Act was interpreted by the Supreme Court as imposing upon the applicant the obligation to assume the duties and liabilities of a common carrier as a condition precedent to the issuance of the certificate. It held the statute, so construed, unconstitutional, primarily on the ground that to force the status of a common carrier upon a private carrier against his will amounts to deprivation of property without due process of law. To the suggestion that, as the state might deny the use of its highways altogether as carriers, it might make its permission conditional upon assumption of the public utility status, the Court responded that to do so would be using the power of refusal to reach a forbidden result, and hence would itself be unconstitutional. Mr. Justice Sutherland, speaking for the majority, observed : (at p. 593)

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny as a privilege altogether, may grant it upon such conditions as it sees fit to impose; but the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favour, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."

This decision clearly declares that, though the State may have privileges

44. See *"Unconstitutional Conditions"* by Maurice H. Merrill, 77 University of Pennsylvania Law Rev . 879. 880.
45. 81 Harv Law Rev 1439.
46. 271 US 583.

within its control which it may withhold, it cannot use a grant of those privileges to secure a valid consent to acts which, if imposed upon the grantee *in invitum* would be beyond its constitutional power.

160. The argument of Mr. Justice Sutherland was, that there was involved in cases like this, not a single power, but two distinct powers and one of these, the power to prohibit the use of the public highways in proper cases, the State possesses ; and the other, the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, the State does not possess. According to him, it is clear that any attempt to exert the latter, separately and substantively must fall before the paramount authority of the Constitution. Then the question is, could it stand in the conditional form in which it is made ? The learned Judge said that if this could be done, constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool — an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

161. This is much the same as what Das. C.J. said in *In re : The Kerala Education Bill* (supra) (at p. 1063) :

> " No educational institutions can in actual practice be carried on without aid from the State and if they will not get it unless they surrender their rights, they will, by compulsion of financial necessities, be compelled to give up their rights under Article 30(1)."

In this situation, the condition which involves surrender is as effective a deterrent to the exercise of the right under Article 30(1) as a direct prohibition would be. Thus considered, it is apparent that the religious minority does not voluntarily waive its right — it has been coerced because of the basic importance of the privilege involved, namely, affiliation.

162. It is doubtful whether the fundamental right under Article 30(1) can be bartered away or surrendered by any voluntary act or that it can be waived. The reason is that the fundamental right is vested in a plurality of persons as a unit or if we may say so, in a community of persons necessarily fluctuating. Can the present members of a minority community barter away or surrender the right under the article so as to bind its future members as a unit ? The fundamental right is for the living generation. By a voluntary act of affiliation of an educational institution established and administered by a religious minority the past members of the community cannot surrender the right of the future members of that community. The future members of the community do not derive the right under Article 30(1) by succession or inheritance.

163. The demise of the unconstitutional condition in the corporation field, however, did not result in terminating the use of the same

reasoning in other areas. The courts, faced with laws requiring the surrender of constitutional rights in connection with other activities, have borrowed phrases and reasoning from the cases dealing with State control of corporations and have transplanted them to contemporary decisions involving numerous and diversified subjects.[47]

164. "Congress may withhold all sorts of facilities for a better life" wrote Mr. Justice Frankfurter in the *Douds Case*[48] "but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms *unrelated to the purpose of the facilities*".

165. Professor Hale said that a State may not, by attaching a condition to a privilege, bring about undue interference with the workings of the federal system; and also, that it may not in this fashion require the surrender of constitutional rights unless the surrender 'serves a purpose germane to that for which the power can normally be exerted without conditions'.[49] The latter limitation, it will be noted, is essentially the same as that voiced by Justice Frankfurter in the *Douds Case*[48] that Congress may not 'exact surrender of freedoms unrelated to the purpose of the facilities'.

166. The most significant characteristic of the power to impose a condition in this area is the relevancy of the condition to the attainment of the objective involved in the grant of the privilege or benefit.

167. A condition may be invalidated on the ground that denying a benefit or privilege because of the exercise of a right in effect penalizes its exercise (see *Steinberg* v. *United States*).[50] In *Sherbert* v. *Verner*[51] the doctrine of "Unconstitutional condition" has been applied by the United States Supreme Court to forbid a State to discontinue unemployment benefits to a Seventh Day Adventist refusing Saturday employment on account of the day being the Sabbath day of her faith. The Court said :

> "Nor may the South Carolina Court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege'. It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. **American Communications Asso.** v. **Douds,**[48] **Wieman** v. **Updegraff,**[52] **Hannegan** v. **Esquire, Inc.**"[53]

168. A State refused to grant subsidies in the form of tax exemptions to veterans of Church groups who declined to sign loyalty oaths. That was held unconstitutional because it implied the use of subsidies as a means to curtail non-criminal speech (see *Speiser* v. *Randall*).[54] In that case the Court said :

> "To deny an exemption to claimants who engage in certain forms of speech

47. See 28 Indiana Law Journal. Notes : "*Judicial Acquiescence in the Forfeiture of Constitutional Rights through Expansion of the Conditioned Privilege Doctrine*", 520, 525.
48. *American Communications Assoc.* v. *Douds*, 339 US 382, 417.
49. See "*Unconstitutional Conditions and Constitutional Rights*" 36 Columbia Law Rev., 321, 357.
50. 163 F Supp 590, 592.
51. 374 US 398, 404-405.
52. 344 US 183, 191, 192.
53. 327 US 146, 155, 156.
54. 357 US 513, 518-9.

is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty'. its denial may not infringe speech. This contention did not prevail before the California Courts, which recognized that conditions imposed upon the granting of privileges or gratuities must be 'reasonable'. . . . . ."

" So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the prescribed speech. . . . . ."

169. A condition may be invalidated on yet another ground: precluding from participation in the enjoyment of a privilege or benefit those who wish to retain their rights would seem an unreasonable classification violative of Article 14. The discriminatory nature of the imposition of the conditions has been alluded to by Mr. Justice Frankfurter in his concurring opinion in *American Communications Association* v. *Douds* (supra). The Additional Solicitor General argued that the State is not denying equality before the law because the burden of the condition applies to all recipients, namely, all who establish and administer educational institutions imparting secular education and seek recognition or affiliation whether they be religious or linguistic minorities or not. The argument is that a benefit-burden package viz., the privilege of affiliation with all the conditions, is being offered without discrimination; that the State or university does not withhold the privilege from any persons or entities, but that the person or entity himself or itself decides whether to accept or reject it. We are of the opinion that, in fact, every one is not being offered the same package since the condition serves as a significant restriction on the activities only of those who have the fundamental right of the nature guaranteed by Article 30(1), namely, the religious and linguistic minorities, and who desire to exercise the right required to be waived as a condition to the receipt of the privilege. It is contradictory to speak of a constitutional right and yet to discriminate against a person who exercises that right.

170. To avoid invalidation of a condition on any of these grounds, it would seem necessary to show that the granting of the benefit or privilege places the recipient in a position which gives the State or the University a legitimate interest in regulating his rights. It appears that there are two legitimate interests which may justify such regulation. First is the interest in ensuring that the benefit or facility given or granted, namely, recognition or affiliation is maintained for the purposes intended, in order to protect the effectiveness of the benefit or the facility itself. Second, social interests must be protected against those whose capacity for inflicting harm is increased by possession of the benefit or facility.[55]

171. An examination of the traditional bases of the power to impose conditions upon governmental benefits or privileges would reveal that the power to impose conditions is not a lesser part of the greater power to withhold, but instead is a distinct exercise of power which must find its own justification, and that the power to withhold recognition or

55. See notes: " *Unconstitutional Conditions*", 73 Harv Law Rev 1595.

affiliation altogether does not carry with it unlimited power to impose conditions which have the effect of restraining the exercise of fundamental rights. The normal desire to enjoy privileges like affiliation or recognition without which the educational institutions established by the minority for imparting secular education will not effectively serve the purpose for which they were established, cannot be made an instrument of suppression of the right guaranteed. Infringement of a fundamental right is nonetheless infringement because accomplished through the conditioning of a privilege. If a Legislature attaches to a public benefit or privilege an addendum, which in no rational way advances the purposes of the scheme of benefits but does restrain the exercise of a fundamental right, the restraint can draw no constitutional strength whatsoever from its being attached to benefit or privilege, but must be measured as though it were a wholly separate enactment.

172. In considering the question whether a regulation imposing a condition subserves the purpose for which recognition or affiliation is granted, it is necessary to have regard to what regulation the appropriate authority may make and impose in respect of an educational institution established and administered by a religious minority and receiving no recognition or aid. Such an institution will, of course, be subject to the general laws of the land like the law of taxation, law relating to sanitation, transfer of property, or registration of documents, etc., because they are laws affecting not only educational institutions established by religious minorities but also all other persons and institutions. It cannot be said that by these general laws, the State in any way takes away or abridges the right guaranteed under Article 30(1). Because Article 30(1) is couched in absolute terms, it does not follow that the right guaranteed is not subject to regulatory laws which would not amount to its abridgment. It is a total misconception to say that because the right is couched in absolute terms, the exercise of the right cannot be regulated or that every regulation of that right would be an abridgment of the right. Justice Holmes said in *Hudson Country Water Co.* v. *McCarter* :[56]

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighbourhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

No right, however absolute, can be free from regulation. The Privy Council said in *Commonwealth of Australia* v. *Bank of New South Wales*[57] that regulation of freedom of trade and commerce is compatible with their absolute freedom ; that Section 92 of the Australian Commonwealth Act is violated only when an Act restricts commerce directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. Likewise, the fact that trade and commerce are absolutely free under Article 301 of the Constitution is compatible with their regulation which will not amount to restriction.[58]

56. 209 US 349, 355, 357.
57. 1950 AC 235, 310.
58. *The Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*, (1963) 1 SCR 491 : AIR 1962 SC 1406.

173. The application of the term 'abridge' may not be difficult in many cases but the problem arises acutely in certain types of situations. The important ones are where a law is not a direct restriction of the right but is designed to accomplish another objective and the impact upon the right is secondary or indirect. Measures which are directed at other forms of activities but which have a secondary or indirect or incidental effect upon the right do not generally abridge a right unless the content of the right is regulated. As we have already said, such measures would include various types of taxes, economic regulations, laws regulating the wages, measures to promote health and to preserve hygiene and other laws of general application. By hypothesis, the law, taken by itself, is a legitimate one, aimed directly at the control of some other activity. The question is about its secondary impact upon the admitted area of administration of educational institutions. This is especially a problem of determining when the regulation in issue has an effect which constitutes an abridgment of the constitutional right within the meaning of Article 13(2). In other words, in every case, the Court must undertake to define and give content to the word 'abridge' in Article 13(2).[59] The question to be asked and answered is whether the particular measure is regulatory or whether it crosses the zone of permissible regulation and enters the forbidden territory of restrictions or abridgment. So, even if an educational institution established by a religious or linguistic minority does not seek recognition, affiliation or aid, its activity can be regulated in various ways provided the regulations do not take away or abridge the guaranteed right. Regular tax measures, economic regulations, social welfare legislation, wage and hour legislation and similar measures may, of course have some effect upon the right under Article 30(1). But where the burden is the same as that borne by others engaged in different forms of activity, the similar impact on the right seems clearly insufficient to constitute an abridgment. If an educational institution established by a religious minority seeks no recognition, affiliation or aid, the state may have no right to prescribe the curriculum, syllabi or the qualification of the teachers.

174. We find it impossible to subscribe to the proposition that State necessity is the criterion for deciding whether a regulation imposed on an educational institution takes away or abridges the right under Article 30(1). If a legislature can impose any regulation which it thinks necessary to protect what in its view is in the interest of the State or society, the right under Article 30(1) will cease to be a fundamental right. It sounds paradoxical that a right which the Constitution makers wanted to be absolute can be subjected to regulations which need only satisfy the nebulous and elastic test of State necessity. The very purpose of incorporating this right in Part III of the Constitution in absolute terms in marked contrast with the other fundamental rights was to withdraw it from the reach of the majority. To subject the right today to regulations dictated by the protean concept of State necessity as con-

59. See generally the judgment of one of us (Mathew, J.) in *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788.

ceived by the majority would be to subvert the very purpose for which the right was given.

175. What then are the additional regulations which can legitimately be imposed upon an educational institution established and administered by a religious or linguistic minority which imparts general secular education and seeks recognition or affiliation?

176. Recognition or affiliation is granted on the basis of the excellence of an educational institution, namely, that it has reached the educational standard set up by the university. Recognition or affiliation is sought for the purpose of enabling the students in an educational institution to sit for an examination to be conducted by the university and to obtain a degree conferred by the university. For that purpose, the students should have to be coached in such a manner so as to attain the standard of education prescribed by the university. Recognition or affiliation creates an interest in the university to ensure that the educational institution is maintained for the purpose intended and any regulation which will subserve or advance that purpose will be reasonable and no educational institution established and administered by a religious or linguistic minority can claim recognition or affiliation without submitting to those regulations. That is the price of recognition or affiliation: but this does not mean that it should submit to a regulation stipulating for surrender of a right or freedom guaranteed by the Constitution, which is unrelated to the purpose of recognition or affiliation. In other words, recognition or affiliation is a facility which the university grants to an educational institution, for the purpose of enabling the students there to sit for an examination to be conducted by the university in the prescribed subjects and to obtain the degree conferred by the university, and therefore, it stands to reason to hold that no regulation which is unrelated to the purpose can be imposed. If, besides recognition or affiliation, an educational institution conducted by a religious minority is granted aid, further regulations for ensuring that the aid is utilized for the purpose for which it is granted will be permissible. The heart of the matter is that no educational institution established by a religious or linguistic minority can claim total immunity from regulations by the legislature or the university if it wants affiliation or recognition; but the character of the permissible regulations must depend upon their purpose. As we said, such regulations will be permissible if they are relevant to the purpose of securing or promoting the object of recognition or affiliation. There will be border line cases where it is difficult to decide whether a regulation really subserves the purpose of recognition or affiliation. But that does not affect the question of principle. In every case, when the reasonableness of a regulation comes up for consideration before the Court, the question to be asked and answered is whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation, namely, the excellence of the institution as a vehicle for general secular education to the minority community and to other persons who resort to it. The question whether a regulation is in the general interest of the public has no relevance, if it does not advance

the excellence of the institution as a vehicle for general secular education as, *ex-hypothesi,* the only permissible regulations are those which secure the effectiveness of the purpose of the facility, namely, the excellence of the educational institutions in respect of their educational standards. This is the reason why this Court has time and again said that the question whether a particular regulation is calculated to advance the general public interest is of no consequence if it is not conducive to the interests of the minority community and those persons who resort to it.

177. In *Sidhajbhai* v. *State of Bombay* (supra pp. 856-57), the Court said that no general principle on which reasonableness or otherwise of a regulation may be tested was sought to be laid down by the Court in *In re : The Kerala Education Bill,* 1957 (supra) and, therefore, the case is not an authority for the proposition that all regulative measures which are not destructive or annihilative of the character of the institution established by the minority can be imposed if the regulations are in the national or public interest. The Court further said that unlike the fundamental freedoms guaranteed by Article 19, the right guaranteed under Article 30(1) is not subject to reasonable restrictions and that the right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. It was the view of the Court that regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution, while retaining its character as a minority institution, effective as an educational institution and that such regulation must satisfy a dual test — the test of reasonableness, namely the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.

178. In *State of Kerala* v. *Mother Provincial* (supra) the Court said — we think in relation to an educational institution which seeks recognition or aid — that the standards of education are not a part of management as such, that the standards of education concern the body politic and are dictated by considerations of the advancement of the country and its people and, therefore, if universities establish syllabi for examinations, they must be followed, subject, however, to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students and that these regulations do not bear directly upon management as such although they may indirectly affect it. The Court said further that the right of the State to regulate education educational standards and allied matters cannot be denied since the minority institutions cannot be allowed to fall below the standards, or under the guise of exclusive right of management, to decline to follow the general pattern and that while the management must be left to them, they may be compelled to keep in step with others. What the Court

said in answer to the contention of Mr. Mohan Kumaramangalam that the provisions in the Kerala University Act which were struck down were conceived in the interest of general education is instructive in this context :

"Mr. Mohan Kumaramangalam brought to our notice passages from the Report of the Education Commission in which the Commission had made suggestions regarding the conditions of service of the teaching staff in the universities and the colleges and standards of teaching. He also referred to the Report of the Education Commission on the status of teachers, suggestions for improving the teaching methods and standards. He argued that what has been done by the Kerala University Act is to implement these suggestions in Chapters VIII and IX and particularly the impugned sections. We have no doubt that the provisions of the Act were made **bona fide** and in the interest of education, but unfortunately they do affect the administration of these institutions and rob the founders of that right which the Constitution desires should be theirs. The provisions, even if salutary, cannot stand in the face of the constitutional guarantee. We do not, therefore, find it necessary to refer to the two reports."

179. In the light of the above discussion let us examine the validity of the impugned provisions of the Gujarat University Act, 1949, as subsequently amended.

180. Section 33A(1)(*a*) provides :

"33A. (1) Every College (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement')—

(a) shall be under the management of a governing body which shall include amongst its members the Principal of the College, a representative of the University nominated by the Vice-Chancellor, and three representatives of the teachers of the college and at least one representative each of the members of the non-teaching staff and the students of the college, to be elected respectively from amongst such teachers, members of the non-teaching staff and students ; and

(b) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include—

(1) in the case of recruitment of the Principal, a representative of the University nominated by the Vice-Chancellor, and

(2) in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the Vice-Chancellor and the Head of the Department, if any, concerned with the subject to be taught by such member."

181. We think that the provisions of sub-sections (1)(*a*) and (1)(*b*) of Section 33A abridge the right of the religious minority to administer educational institutions of their choice. The requirement that the college should have a governing body which shall include persons other than those who are members of the governing body of the Society of Jesus would take away the management of the college from the governing body constituted by the Society of Jesus and vest it in a different body. The right to administer the educational institution established by a religious minority is vested in it. It is in the governing body of the Society of Jesus that the religious minority which established the college has vested the

right to administer the institution and that body alone has the right to administer the same. The requirement that the college should have a governing body including persons other than those who constitute the governing body of the Society of Jesus has the effect of divesting that body of its exclusive right to manage the educational institution. That it is desirable in the opinion of the legislature to associate the Principal of the college or the other persons referred to in Section 33A(1)(*a*) in the management of the college is not a relevant consideration. The question is whether the provision has the effect of divesting the governing body as constituted by the religious minority of its exclusive right to administer the institution. Under the guise of preventing maladministration, the right of the governing body of the college constituted by the religious minority to administer the institution cannot be taken away. The effect of the provision is that the religious minority virtually loses its right to administer the institution it has founded. "Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution according to their way of thinking and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."[60] Sections 48 and 49 of the Kerala University Act, 1969, which came up for consideration in that case respectively dealt with the governing body for private colleges not under corporate management and the managing council for private colleges under corporate management. Under the provisions of these sections, the educational agency or the corporate management was to establish a governing body or a managing council respectively. The sections provided for the composition of the two bodies. It was held that the sections had the effect of abridging the right to administer the educational institution of the religious minority in question there. One of the grounds given in the judgment for upholding the decision of the High Court striking down the sections is that these bodies had a legal personality distinct from governing bodies set up by the educational agency or the corporate management and that they were not answerable to the founders in the matter of administration of the educational institution. The Court said that a law which interferes with the composition of the governing body or the managing council as constituted by the religious or linguistic minority is an abridgment of the right of the religious minorities to administer the educational institution established by it [see also *W. Proost* v. *Bihar* (supra pp. 77-78) and *Rev. Bishop S. K. Patro* v. *Bihar* (supra).]

182. It is upon the principal and teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall

60. See *Kerala* v. *Mother Provincial*, (1971) 1 SCR 734 at 740: (1970) 2 SCC 417, 421 (Para 9).

assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. We can perceive no reason why a representative of the University nominated by the Vice-Chancellor should be on the Selection Committee for recruiting the Principal or for the insistence of head of the department besides the representative of the University being on the Selection Committee for recruiting the members of the teaching staff. So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them.

183. Section 40(1) provides that the Court (senate) may determine that all instructions, teaching and training in courses of studies in respect of which the university is competent to hold examination shall, within the university area be conducted by the university and shall be imparted by the teachers of the university and the Court shall communicate its decision to the State Government. Sub-section (2) of Section 40 says that on receipt of the communication under sub-section (1), the Government may, after making such inquiry as it thinks fit, by notification in the Official Gazette declare that the provisions of Section 41 shall come into force on such date as may be specified.

184. The petitioner contends that this section virtually takes away the very essence of the right of the religious minority to administer the college in question.

185. To decide this question, it is necessary to read some of the other provisions.

186. Section 2(2) defines a 'college' as a degree college or an intermediate college. Section 2(2A) states that a 'constitutent college' means a university college or an affiliated college made constituent under Section 41. A 'degree college' has been defined by Section 2(3) as an affiliated college which is authorized to submit its students to an examination qualifying for any degree of the university. Section 2(13) provides :

> " 'Teachers of the University' means teacher appointed by the University for imparting instruction on its behalf."

Section 2(15A) states that a "University College" means a college which the University may establish or maintain under the Act or a college transferred to the University and maintained by it.

187. On the plain wording of Section 40 it is clear that the governing body of the religious minority will be deprived of the most vital function which appertains to its right to administer the college, namely, the teaching, training and instructions in the courses of studies. in respect of which the university is competent to hold examination. The fundamental right of a minority to administer educational institutions of its choice comprises within it the elementary right to conduct teaching, training and instruction in courses of studies in the institutions so established by teachers appointed by the minority. If this essential component of the right of administration is taken away from the minority and vested

in the university, there can be no doubt that its right to administer the educational institution guaranteed under Article 30(1) is taken away.

188. Section 39 provides that the university shall conduct post-graduate instructions. That means that teaching, training and instruction in post-graduate courses will be conducted by the university. The word 'conduct' occurring in Section 40 cannot have a meaning different from what it has in Section 39. If in Section 39 it means that the university is the exclusive teaching and training agency in post-graduate instruction, there is no reason to think that any vestige of the right to teach, train or instruct will be left to the minority after these matters are taken over by the university. The teaching and training in the college will thereafter be done by the teachers of the university for and on behalf of the university. The definition of the term 'teachers of the university' given in Section 2(13) would indicate that they are teachers appointed by the university for imparting instruction on its behalf.

189. If this section is ultra vires Article 30(1), we do not think that Section 41 which in the present scheme of legislation is dependent upon Section 40 can survive and therefore it is unnecessary to express any view upon the constitutionality of its provisions.

190. Sub-sections (1) and (2) of Section 51A read :

"51A. (1) No member of the teaching, other academic and non-teaching staff of an affiliated college and recognized or approved or institution shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and until—

(a) he has been given a reasonable opportunity of making representation on any such penalty proposed to be inflicted on him, and

(b) the penalty to be inflicted on him is approved by the Vice-Chancellor or any other officer of the university authorised by the Vice-Chancellor in this behalf.

(2) No termination of service of such member not amounting to his dismissal or removal falling under sub-section (1) shall be valid unless—

(a) he has been given a reasonable opportunity of showing cause against the proposed termination, and

(b) such termination is approved by the Vice-Chancellor or any officer of the University authorised by the Vice-Chancellor in this behalf :

Provided that nothing in this sub-section shall apply to any person who is appointed for a temporary period only."

191. It was argued for the petitioners that clause (1)(*b*) of Section 51A has the effect of vesting in the Vice-Chancellor a general power of veto on the right of the management to dismiss a teacher. The exact scope of the power of the Vice-Chancellor or of the officer of the University authorized by him in this sub-section is not clear. If the purpose of the approval is to see that the provisions of sub-section 51A(1)(*a*) are complied with, there can possibly be no objection in lodging the power of approval even in a nominee of the Vice-Chancellor. But an uncanalised power without any guideline to withhold approval would be a direct abridgment of the right of the management to dismiss

or remove a teacher or inflict any other penalty after conducting an enquiry.

192. The relationship between the management and a teacher is that of an employer and employee and it passes one's understanding why the management cannot terminate the services of a teacher on the basis of the contract of employment. Of course, it is open to the State in the exercise of its regulatory power to require that before the services of a teacher are terminated, he should be given an opportunity of being heard in his defence. But to require that for terminating the services of a teacher after an inquiry has been conducted, the management should have the approval of an outside agency like the Vice-Chancellor or of his nominee would be an abridgment of its right to administer the educational institution. No guidelines are provided by the legislature to the Vice-Chancellor for the exercise of his power. The fact that the power can be delegated by the Vice-Chancellor to any officer of the university means that any petty officer to whom the power is delegated can exercise a general power of veto. There is no obligation under the sub-sections (1)(*b*) and (2)(*b*) that the Vice-Chancellor or his nominee should give any reason for disapproval. As we said a blanket power without any guideline to disapprove the action of the management would certainly encroach upon the right of the management to dismiss or terminate the services of a teacher after an enquiry. While we uphold the provisions of sub-clauses (1)(*a*) and (2)(*a*) of Section 51A, we think that sub-clauses (1)(*b*) and (2)(*b*) of Section 51A are violative of the right under Article 30 of the religious minority in question here. In *In re*: *The Kerala Education Bill,* 1957 (supra), this Court, no doubt, upheld provisions similar to those in Section 51A(1)(*b*) and 51A(2)(*b*). But the subsequent decisions of this Court leave no doubt that the requirement of subsequent approval for dismissing or terminating the services of a teacher would be bad as offending Article 30(1). In *D. A. V. College* v. *State of Punjab* (supra), Clause 17 of the impugned statute related to the requirement of subsequent approval for termination of the services of teachers. This Court struck down the provision as an abridgment of the right to administer the educational institution established by the minority in question there.

193. Section 52A states that any dispute between the governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college or recognized or approved institution, which is connected with the conditions of service of such member, shall, on a request of the governing body, or of the member concerned be referred to a Tribunal of Arbitration consisting of one member nominated by the governing body of the college, or, as the case may be, the recognized or approved institution, one member nominated by the member concerned and an umpire appointed by the Vice-Chancellor and that the provisions of the Arbitration Act would apply to such arbitration proceeding.

194. This provision sub-serves no purpose and we feel no doubt that it will needlessly interfere with the day-to-day management of the

institution. Any and every petty dispute raised by a member of the teaching or non-teaching staff will have to be referred to arbitration if it seems to touch the service conditions. Arbitrations, not imparting education, will become the business of educational institutions. This section is in our opinion bad in its application to minorities.

195. In the result, we hold that the provisions of Section 33A, Section 40, sub-clauses (1)(*b*) and (2)(*b*) of Section 51A and Section 52A are violative of Article 30(1) of the Constitution and, therefore, they can have no application to educational institutions established and administered by religious or linguistic minorities.

BEG, J. (*concurring*)—The two questions to be answered by us are :

(1) Whether the impact of Article 30(1) of the Constitution upon any of the provisions of the Act before us, or, to put it conversely, whether the effect of any of the provisions of the Act upon the fundamental rights guranteed to minorities by Article 30(1) is such as to invalidate these provisions ?

(2) Whether the rights guaranteed by Article 30 are in any way circumscribed by Article 29 ?

197. On the second question, I have nothing significant to add to what has fallen from My Lord the Chief Justice. I am in entire agreement with the view that, although, Articles 29 and 30 may supplement each other so far as certain rights of minorities are concerned, yet, Article 29 of the Constitution does not, in any way, impose a limit on the kind or character of education which a minority may choose to impart through its Institution to the children of its own members or to those of others who may choose to send their children to its schools. In other words, it has a right to impart a general secular education. I would, however, like to point out that, as rights and duties are correlative, it follows, from the extent of this wider right of a minority under Article 30(1) to impart even general or non-denominational secular education to those who may not follow its culture or subscribe to its beliefs, that, when a minority Institution decides to enter this wider educational sphere of national education, it. by reason of this free choice itself, could be deemed to opt to adhere to the needs of the general pattern of such education in the country, at least whenever that choice is made in accordance with statutory provisions. Its choice to impart an education intended to give a secular orientation or character to its education necessarily entails its assent to the imperative needs of the choice made by the State about the kind of "secular" education which promotes national integration or the elevating objectives set out in the preamble to our Constitution, and the best way of giving it. If it is part of a minority's rights to make such a choice it should also be part of its obligations, which necessarily follow from the choice, to adhere to the general pattern. The logical basis of such a choice is that the particular minority Institution, which chooses to impart such general secular education, prefers that higher range of freedom where, according to the poet Rabindranath Tagore, "the narrow domestic walls" which constitute barriers between

various sections of the nation will crumble and fall. It may refuse to accept the choice made by the State of the kind of secular education the State wants or of the way in which it should be given. But, in that event, should it not be prepared to forego the benefits of recognition by the State? The State is bound to permit and protect the choice of the minority Institution whatever that might be. But, can it be compelled to give it a treatment different from that given to other Institutions making such a choice?

198. Turning to the first and the more complex question, I think it is difficult to answer the argument of the Additional Solicitor-General, appearing on behalf of the State of Gujarat, that, where a minority Institution has, of its own free will, opted for affiliation under the terms of a statute, it must be deemed to have chosen to give up, as a price for the benefits resulting from affiliation, the exercise of certain rights which may, in another context, appear to be unwarranted impairments of its fundamental rights.

199. It is true that, if the object of an enactment is to compel a minority Institution, even indirectly, to give up the exercise of its fundamental rights, the provisions which have this effect will be void or inoperative against the minority Institution. The price of affiliation cannot be a total abandonment of the right to establish and administer a minority Institution conferred by Article 30(1) of the Constitution. This aspect of the matter, therefore, raises the question whether any of the provisions of the Act are intended to have that effect upon a minority Institution. Even if that intention is not manifest from the express terms of statutory provisions, the provisions may be vitiated if that is their necessary consequence or effect. I shall endeavour to show that the view which this Court has taken whenever questions of this kind have arisen before it on the effect of the provisions of a statute, though theoretically and logically perhaps not quite consistent always on propositions accepted, has the virtue of leaving the result to the balancing of conflicting considerations to be carried out on the particular provisions and facts involved in each case.

200. When we examine either the Act as a whole or the impugned provisions of the Act before us, we find no mention whatsoever of anything which is directed against a minority or its educational Institutions. The impugned provisions of the Gujarat University Act, 1949 (hereinafter referred to as 'the Act') are: Section 20 (Clause XXXIX) inserted in the Gujarat University Act, 1949, as amended by the Gujarat University (Amendment) Act, 1972; Section 33A inserted in the Gujarat University Act, 1949, as amended by the Gujarat University (Amendment) Act, 1972 (Gujarat Act No. 6 of 1973); Sections 40 and 41 of the Gujarat University Act 1949, as amended by the Gujarat University (Amendment) Act, 1972 (Gujarat Act No. 6 of 1973); Sections 51A and 52A inserted in the Gujarat University Act, 1949, as amended by the Gujarat University (Amendment) Act, 1972 (Gujarat Act No. 6 of 1973). If we accept the argument that, before enacting the amendments which are assailed,

the State Legislature must be deemed to be aware of the fact that the petitioning minority Institution before us, the Ahmedabad St. Xavier's College, is an affiliated College of the University, it may be possible to say that the amendments must be deemed to be directed against it also. When the minority Institution exercised its choice by applying for affiliation under the provisions of the Act, there were no amendments before it. On the other hand, it may be contended that, where a statutory right is availed of by any party, it must be deemed to have chosen it subject to the condition that the Legislature may change its terms at any time. But, can it be deemed to have opted to submit to any and every future amendment? Perhaps it will be carrying the doctrine of imputed knowledge and consent too far to say that a minority Institution opting for a statutory right must be deemed to have signed a blank cheque to assent to any and every conceivable amendment of any kind whatsoever in future as the price to be paid by it of its choice. No one could be deemed to assent to what is not before him at all. Moreover, can a minority, even by its assent, be barred from the exercise of a fundamental right? It may be that the bar may be only a conditional one so that it could be removed by the institution concerned whenever it is prepared to pay the price of its removal by giving up certain advantages which are not parts of its fundamental right. Such a conditional bar may be construed only as a permissible regulatory restriction.

201. The first provision which has a compulsive effect on Ahmedabad St. Xavier's College Society is Section 5(1) of the Act which says :

> "5(1) No educational Institution situate within the University area shall, save with the sanction of the State Government be associated in any way with, or seek admission to any privileges of, any other University established by law."

As St. Xavier's College is apparently situated within the University area, it is prevented from seeking affiliation to any other University established by law. This would, in my opinion, have the effect of compelling it to abandon its fundamental rights guaranteed by Article 30(1) of the Constitution as a price for affiliation by the Gujarat University because it is not permitted to affiliate with any other University without the sanction of the Government. The petitioner has not, however, in the reliefs prayed for by the petition, asked for a declaration that Section 5 is invalid. But, the compulsive effect of Section 5 was one of the arguments advanced by Mr. Nanavati for the petitioner. The Additional Solicitor-General, arguing for the State, had practically conceded that Section 5 of the Act will be invalid against the petitioner. He, however, hoped to save it in case we could so interpret it as to impose an obligation upon the State Government to give its sanction in every case where a minority Institution applies for affiliation with another University. Inasmuch as Section 5 of the Act has a compulsive effect by denying to the petitioning college the option to keep out of the statute altogether, it would, in my opinion, be inoperative against it.

202. Section 41(1), however, operates even more directly upon the petitioning College, which had been "admitted to the privileges of

the University" under Section 5(3) by affiliation. This provision would have the compelling effect of making it automatically a constituent unit of the University, and must, therefore, be held to be inoperative against the petitioning College as it cannot affect the fundamental rights guaranteed by Article 30(1) of the Constitution. Provisions of Section 40 and the remaining provisions of Section 41 of the Act are all parts of the same compulsive scheme or mechanism which is struck by Article 30(1).

203. If we hold, as I think we must, having regard to the provisions of Article 30(1) of the Constitution, that the words "shall be constituent colleges of the University", used in Section 41(1) of the Constitution, only mean that, so far as the petitioning college is concerned, it "may" become a constituent college of the University, even after a notification under Section 40(2) of the Act, the statute, read as a whole, places before the petitioning college the following four alternatives:

(1) To become a constituent unit of the University.

(2) To continue as an affiliated college on new terms embodied in amended provisions contained in Sections 20, 33A, 51A and 52A of the Act.

(3) To face the consequence of withdrawal of affiliation under Section 37 of the Act and the resulting disadvantages of disaffiliation by failing to comply with the conditions of its affiliation or, in other words, to step outside the statute altogether.

(4) To get the status of an "autonomous" college under Section 38B of the Act for which the petitioning college has already applied.

The range of choices open is thus wide. A minority is left absolutely free to make any choice it likes. It has necessarily to pay the price of each choice it makes knowing what it entails.

204. If the combined effect of provisions of the statute is that four alternative courses are open to the College due to its initial option to apply for "affiliation" which is, strictly speaking, only a statutory and not a fundamental right, can its rights under Article 30(1) of the Constitution be said to be violated unless and until it is shown that its application for autonomy has been or is bound to be rejected? Compelling the College to become a constituent part of the University amounts to taking away of its separate identity by the force of law. But, if the College has really attained such standards of organisation and excellence as it claims to have done, it can have an autonomous status under Section 38B of the Act with all its advantages and freedoms practically for the asking. Could it, in these circumstances, be said that loss of the identity of the College is a necessary consequence of the provisions of the statute before us? No other statute with identically similar provisions and effect was interpreted in any case which has so far come to this Court.

205. If the petitioning College, which has applied for the status of an autonomous College under Section 38B of the Act as amended in 1972, is provided with an avenue of escape by the amended provisions themselves, it seems quite unnecessary to consider the impact of Section 20, Section 33A and Sections 51A and 52A of the Act, which have

been introduced by the Act of 1972, on fundamental rights protected by Article 30. Section 20 does not lay down any function of the Executive Council, of the University with regard to an autonomous College governed by the provisions of Chap. VIA of the Act. Section 33A also applies only to a "College" which is not covered by the provisions of Chap. VIA. Autonomous Colleges have their own standing Committees' under Section 38C of the Act instead of the Governing Bodies mentioned in Section 33A of the Act. Again, Sections 51A and 52A apply only to an "affiliated College or recognised or approved Institution" so that an autonomous College, functioning under the provisions of Chap. VIA, is outside their purview. The only provisions which could have a compulsive effect, in their present form, against the petitioning College could be Section 5 and then Sections 40 and 41 of the Act which would automatically convert affiliated Colleges into constituent Colleges of the University, without the interposition of an option, and, therefore, could be said to deprive the petitioning college of the opportunity to become an autonomous college. In fact, Section 41 of the Act, as it stands, could have the effect of negating the rights conferred by Section 38B of the Act by transforming, mechanically and by operation of the statute, affiliated Colleges into constituent colleges so that no question of autonomy could practically arise after that. Hence, if we confine the operation of Sections 5, 40 and 41 of the Act, as we can, to Institutions other than minority Institutions protected by Article 30(1) of the Constitution because they would compel the petitioning college to lose its identity, it may not be necessary, in the instant case, to consider the impact of any other provision upon the fundamental rights of the petitioning college. It is only if the petitioning college fails in its attempt to become an autonomous college that the question of the impact of Sections 20, 33A, 51A and 52A could arise. The only Sections which could stand in the way of its becoming an autonomous institution could be Sections 5, 40 and 41 of the Act. Therefore, it seems unnecessary in the case before us, to consider the impact of provisions other than Sections 5, 40, and 41 of the Act upon the rights of the petitioning college at present. These questions could be considered premature here.

206. Assuming, however, that we must consider the impact of Sections 20, 33A, 51A, 52A upon the fundamental rights of the petitioning college as it would, atleast until it gets an autonomous status, be affected and governed by them if they are valid, questions arise as to the source or basis and extent of permissible regulation or restriction upon the rights conferred upon the petitioning college by Article 30(1) of the Constitution. Each and every learned Counsel appearing for a minority institution has conceded that, despite the "absoluteness" of the terms in which rights under Article 30(1) may be expressed, there is a power in the State to regulate their exercise. This Court has also repeatedly recognised the validity of the regulation of the rights under Article 30 on various grounds without explicitly stating the actual basis of such power to regulate. I venture to think that if we are able to formulate the exact basis or source of the power of regulation or restriction upon

the fundamental rights contained in Article 30(1) of the Constitution we will be able to lay down with less indefiniteness and more precision and certitude the extent to which the State can regulate or restrict fundamental rights protected by Article 30(1) of the Constitution.

207. Provision for and regulation by the State of the very conditions which secure to minority institutions the freedom to establish and administer its educational institutions is, obviously, inevitable and undeniable. Thus, unless the State could punish lawlessness within an institution or misappropriation of funds by its trustees or prevent abuse of its powers over teachers or other employees by a managing body of an Educational Institution, whether the institution is a minority or a majority institution, neither the attainment of the purposes of education nor proper and effective administration of the institution would be possible. In other words, existence of some power to lay down necessary conditions or pre-requisites for maintaining the right to establish and administer an institution itself in a sound state is inherent in the very existence of organised society which the State represents.

208. Laws made for sustaining the very conditions of organised society and civilised existence, so that the rights of all, including fundamental rights of the minorities, may be maintained and enforced do not rest on mere implication. The specific provisions of Articles 245 to 254 read with the three Legislative lists in the Seventh Schedule of the Constitution confer a host of legislative powers upon State Legislatures and the Parliament to regulate various kinds of activities including those of minority institutions. No doubt Article 30(1), like other fundamental Constitutional rights, is meant to limit the scope of ordinary legislative power. But, it was submitted, on behalf of the State, that it is only a "law which takes away or abridges the rights conferred" by Part III of the Constitution, containing the fundamental rights of citizens, which is "void" and that too only "to the extent of the contravention". Thus, a mere incidental regulation of or restriction upon the exercise of a fundamental right intended to secure and actually ensuring its more effective enjoyment could not be said to be really directed at an abridgement or taking away of the fundamental right at all or to have that effect. Such a law, when analysed, will be found to aim at something quite different from the abridgement of a minority's fundamental rights under Article 30(1) of the Constitution. It would not really take away or abridge the fundamental rights even though it regulates their exercise. If, on the other hand, a law necessarily has the compelling effect of a substantial abridgement or taking away of the fundamental right from a minority institution, it would not be saved simply because it does not say so but produces that effect indirectly. For the purposes of applying Article 13(2) of the Constitution we have to look at the total effect of statutory provisions and not merely the intention behind them. This is how I understand the majority view in *Re Kerala Education Bill*, 1957 (supra).

209. The essence of the right guaranteed by Article 30(1) of the

Constitution is a free exercise of their choice by minority institutions of the pattern of education as well as of the administration of their educational institutions. Both these, taken together, determine the kind or character of an educational institution which a minority has the right to choose. Where these patterns are accepted voluntarily by a minority institution itself, even though the object may be to secure certain advantages for itself from their acceptance, the requirement to observe these patterns would not be a real violation of rights protected by Article 30(1). Indeed, the acceptance could be more properly viewed as an assertion of the right to choose which may be described as the "core" of the right protected by Article 30(1). In a case in which the pattern is accepted voluntarily by a minority institution, with a view to taking advantage of the benefits conferred by a statute, it seems to me that it cannot insist upon an absolutely free exercise of the right of administration. Here, the incidental fetters on the right to manage the institution, which is only a part of the fundamental right, would be consequences of an exercise of the substance or essence of the right which, as I see it, is freedom of choice. No doubt, the rights protected by Article 30(1) are laid down in "absolute" terms without the kind of express restrictions found in Articles 19, 25 and 26 of the Constitution. But, if a minority institution has the option open to it of avoiding the statutory restrictions altogether, if it abandons, with it, the benefits of a statutory right, I fail to see how the absoluteness of the right under Article 30(1) of the Constitution is taken away or abridged. All that happens is that the statute exacts a price in general interest for conferring its benefits. It is open to the minority institution concerned to free itself from any statutory control or fetters if freedom from them is considered by it to be essential for the full exercise of its fundamental rights under Article 30(1) of the Constitution. This article, meant to serve as a shield of minority educational institutions against the invasion of certain rights protected by it and declared fundamental so that they are not discriminated against, cannot be converted by them into a weapon to exact unjustifiable preferential or discriminatory treatment for minority institutions so as to obtain the benefits but to reject the obligations of statutory rights. It is only when the terms of the statute necessarily compel a minority institution to abandon the core of its fundamental rights under Article 30(1) that it could amount to taking away or abridgement of a fundamental right within the meaning of Article 13(2) of the Constitution. It is only then that the principle could apply that what cannot be done directly cannot be achieved by indirect means. Having stated my approach to the interpretation of Article 30(1) of the Constitution, I proceed now to consider the effect of this article on the impugned provisions.

210. It appears to me that Section 20 of the Act, which deals with the powers of the Executive Council of the Gujarat University, does not directly or indirectly touch a minority institution's rights under Article 30(1) of the Constitution merely because the Executive Council may take decisions which may have that effect. Indeed, if Article 30(1) operates as a fetter on the powers of the Executive Council as well, the Council is powerless to take such decisions under Section 20 of the Act which

take away or abridge fundamental rights so as to be struck by Article 13. In any case, it is only when specific decisions and actions said to have that effect are brought before the Courts that their validity, in purported exercise of powers conferred by Section 20 of the Act, could be determined because the section itself gives a general power not specifically directed against minority institutions.

211. Section 33A of the Act requires the observance of a general pattern with regard to the constitution of the governing body of an affiliated college irrespective of whether it is a minority or a majority institution. The mere presence of the representatives of the Vice-Chancellor, the Teachers, the Members of the Non-teaching staff, and the students of the College would not impinge upon the right to administer. In my opinion, such a "sprinkling" is more likely to help to make that administration more effective and acceptable to everyone affected by it. A minority institution can still have its majority on the governing body. And, we are not concerned here with the wisdom or acceptability to us of this kind of provision. We have only to decide, I presume, how it affects the substance of the right conferred by Article 30(1) of the Constitution.

212. Section 51A of the Act appears to me to lay down general conditions for the dismissal, removal, reduction in rank and termination of services of members of the staff of all colleges to which it applies. Again, we have not to consider here either the wisdom or unwisdom of such a provision or the validity of any part of Section 51A of the Act on the ground that it violates any fundamental right other than the ones conferred by Article 30(1) of the Constitution. If, as I have indicated above, a greater degree of interference with the right to administer or manage an institution can be held to be permissible as a logical consequence of the exercise of an option of a minority for an institution governed by a statute, with all its benefits as well as disadvantages, it seems to me that provisions of Section 51A do not constitute an unreasonable encroachment on the essence of rights of a minority institution protected by Article 30(1) of the Constitution which consists of freedom of choice. For similar reasons, I do not think that Section 52A of the Act constitutes an infringement of the special minority rights under Article 30(1) of the Constitution when the institution opts for a statutory right which necessarily involves statutory restrictions. Of course, if these provisions could be held to be invalid on any grounds as against all affiliated colleges, whether they are administered by minorities or majorities in a State, they could be held to be invalid against the petitioning college too on those grounds. But, as I have already said, we are not concerned here with such grounds or questions at all.

213. In *Re The Kerala Education Bill,* 1957 (supra), this Court rejected the argument that minority institutions have an absolute right to be free from all control in managing their institutions. The majority of the learned Judges held (at p. 1062):

"The right to administer cannot obviously include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institu-

tion run by them in unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive of the welfare of the scholars. It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided. Learned Attorney-General concedes that reasonable regulations may certainly be imposed by the State as a condition for aid or even for recognition."

The function of education was set out there as follows (at page 1019):

"One of the most cherished objects of our Constitution is, thus, to secure to all its citizens the liberty of thought, expression, belief, faith and worship. Nothing provokes and stimulates thought and expression in people more than education. It is education that clarifies our belief and faith and helps to strengthen our spirit of worship."

214. A person of secular outlook may consider good works or performance of one's moral obligations and duties as the best form of worship. People may differ in their opinions about what is worthy of worship. But, there is little room for differences of opinion when it is asserted that the spirit which the State is bound to foster is that of pursuit and worship of the ideals set out in the preamble to our Constitution.

215. Explaining Article 30 of the Constitution, Das, C. J., said (*ibid* — at p. 1053):

"The key to the understanding of the true meaning and implication of the Article under consideration are the words 'of their own choice'. It is said that the dominant word is 'choice' and the content of that Article is as wide as the choice of the particular minority community may make it. The ambit of the rights conferred by Article 30(1) has, therefore, to be determined on a consideration of the matter from the points of view of the educational institutions themselves."

He also said (*ibid* at p. 1052):

"The real import of Article 29(2) and Article 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."

216. To my mind, the majority opinion in the *Kerala Education Bill case* (supra) only lays down certain general principles. It does not declare anything more to be unconstitutional and invalid than that which has a compelling effect so as to practically leave no choice open before a minority institution except to submit to statutory regulation as the price to be paid for its existence at all as an educational institution. It did not deal with the case in which a minority institution had the option of choosing more or less autonomy, under the terms of a statute, depending upon the State of efficiency and excellence achieved by it, as is the position in the statute before us. Both the majority and minority view expressed there was that the recognition by the State was not part of the guaranteed fundamental right under Article 30(1) of the Constitution, and also that such recognition by the State could entail payment of a price for it. The majority and the minority views differed only with regard to the reasonably permissible amount of statutory compulsion as a

price for aid and recognition. If the price to be paid is a fetter upon the exercise of a fundamental right, the very essence or core of the fundamental right being an exercise of choice, what is reasonable or not must, necessarily, depend upon the total effect of all the provisions considered together and not of particular provisions viewed in isolation from the rest. And, we should, I venture to think, remind ourselves that we cannot lightly substitute our own opinions for the legislative verdict on such a question.

217. It seems to me, with great respect, that, in *Rev. Sidhrajbhai Sabhai & Ors.* v. *State of Bombay & Anr.* (supra), this Court went somewhat beyond the majority view in *Re Kerala Education Bill case* (supra) after pointing out that no "general principle on which reasonableness or otherwise of a regulation may be tested was sought to be laid down by the Court" in that case. It was held there that it was not necessary that a regulation should be deemed to be unreasonable "only if it was totally destructive of the right" under Article 30(1). Here, the question really considered was whether threats of withdrawal of recognition and of the grant to the college could be used to compel a minority educational institution to admit nominees of the Government into it. The use of such coercive methods was held to be unconstitutional. A test of validity of a regulatory measure was propounded as follows (at p. 857):

> "Such regulation must satisfy a dual test — the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

It was, however, pointed out, after observing that the fundamental freedom under clause (1) of Article 30 is expressed in absolute terms (at p. 850):

> "This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right. The fundamental freedom is to establish and to administer educational institutions: it is a right to establish and administer what are in truth educational institutions, institutions which cater to the educational needs of the citizens, or sections thereof. Regulation made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institution, in matters educational."

Thus, here also a distinction was made between impairment of the substance of the fundamental right and an incidental encroachment upon the right to administer for the purpose of ensuring essential conditions of good education and the health and well being of those connected with imparting of education at an institution.

218. In *Rev. Father W. Proost & Others* v. *the State of Bihar and Ors.* (supra), the right of St. Xavier's College at Ranchi to impart general education, not circumscribed by the requirements of Article 29(1) of the Constitution, was recognised in view of the width of Article 30(1). No doubt it was held here that a provision for subjecting the managerial functions of the governing body of the college to the supervision of a statutory University Service Commission was unconstitutional. This

however, was not a decision in the context of a provision, such as Section 38B of the Act before us, which offers the right to the petitioning college to become quite independent and free from the administrative control of the University altogether. The effect of that decision must, in my opinion, be confined to the situation which emerged from a consideration of the terms of the statute before this Court for interpretation on that occasion.

219. In *Rt. Rev. Bishop S. K. Patro & Ors.* v. *State of Bihar & Ors.* (supra), an order passed by the Education Secretary to the Government of Bihar, setting aside the elections of the President and Secretary of the Church Missionary Society Higher Secondary School and directing the institution to take steps to constitute a managing Committee in accordance with the terms of the orders sent to it was challenged. The legal sanction for such an order itself was not clear. It was, therefore, after reference to the provisions of Article 30(1) of the Constitution and the earlier cases decided by this Court, set aside. Apart from the question that it was a case on the ambit of the right under Article 30(1) of the Constitution, it does not appear to me to be helpful in resolving the difficulties of the case before us.

220. In *State of Kerala etc.* v. *Very Rev. Mother Provincial, etc.* (supra) this Court had occasion to consider again the ambit of Article 30(1) of the Constitution and its impact upon the provisions of the Kerala University Act 9 of 1969. It was pointed out that Article 30(1) has two distinct spheres of protection separated in point of time from each other: the first relating to the initial right of establishment, and the second embracing the right of administration of the institution which has been established. Administration was equated with management of affairs of the institution and it was observed (at page 740):

> "This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."

Immediately after that, however, followed a paragraph which, with great respect, I find some difficulty in completely reconciling with any "absolute" freedom of the management of the institution from control:

> "There is, however, an exception to this and it is that the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if universities establish syllabi for examinations they must be followed, subject however to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right or management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others."

221. Evidently, what was meant was that the right to exclusive management of the institution is separable from the right to determine the character of education and its standards. This may explain why "standards" of education were spoken as "not part of management" at all. It meant that the right to manage, having been conferred in absolute terms, could not be interfered with at all although the object of that management could be determined by a general pattern to be laid down by the State which could prescribe the syllabi and standards of education. Speaking for myself, I find it very difficult to separate the objects and standards of teaching from a right to determine who should teach and what their qualifications should be. Moreover, if the "standards of education" are not part of management, it is difficult to see how they are exceptions to the principle of freedom of management from control. Again, if what is aimed at directly is to be distinguished from an indirect effect of it, the security of tenure of teachers and provisions intended to ensure fair and equitable treatment for them by the management of an institution would also not be directly aimed at interference with its management. They could more properly be viewed as designed to improve and ensure the excellence of teachers available at the institution, and, therefore, to raise the general standard of education. I think that it is enough for us to distinguish this case on the ground that the provisions to be interpreted by us are different, although, speaking for myself, I feel bound to say, with great respect, that I am unable to accept every proposition found stated there as correct. In that case, the provisions of the Kerala University Act 9 of 1969, considered there were inescapable for the minority institutions which claimed the right to be free from their operation. As I have already observed, in the case before us, Section 38B of the Act provides the petitioning College before us with a practically certain mode of escape from the compulsiveness of provisions other than Sections 5, 40 and 41 of the Act if claims made on its behalf are correct.

222. In *D. A. V. College, Bathinda, etc.* v. *State of Punjab & Ors.* (supra), this Court considered the effect of a notification of the Punjab Government and the constitutionality of Sections 4(2) and 5 of the Punjabi University Act 35 of 1961, the result of which was that the petitioning college there ceased to be affiliated to the University constituted under the Punjab University Act of 1947 and was compelled to become affiliated to another University, the Punjabi University under the Act of 1961. The consequence was that, if this compulsory affiliation was valid, a notification of the Punjabi University, declaring that Punjabi "will be the sole medium of instructions and examinations for the pre-university even for science group from the year 1970-71", became applicable to it. Apparently, there was no reasonable means of escape from these provisions so that the affected institution was compelled to change its character and medium of instruction in order to comply with the provisions of the Act. In such a situation, its rights protected both by Articles 29(1) and 30(1) were held to be infringed by the offending provisions.

223. In *D. A. V. College etc.* v. *State of Punjab & Ors.* (supra) the validity of certain sections of Guru Nanak University (Amritsar) Act 21 of 1969, and of some statutes of the University made under it, was considered by this Court in the light of fundamental rights guaranteed by Articles 29(1) and 30(1) as well as Article 19(1)(*c*) of the Constitution. The attacks on Sections 4 and 5 of the Guru Nanak University Act as well as on Clause 18 under Chap. V of the University statutes failed but Clauses 2(1)(*a*) and 17 were struck down for conflict with the rights guaranteed by Article 30(1) of the Constitution since their effect was to compel compliance with their provisions as "conditions of affiliation". It was held there (at p. 709, SCC p. 283, para 38) :

> "Clause 18 however in our view does not suffer from the same vice as Clause 17 because that provision in so far as it is applicable to the minority institutions empowers the University to prescribe by regulations governing the service and conduct of teachers which is enacted in the larger interests of the institutions to ensure their efficiency and excellence. It may for instance issue an ordinance in respect of age of superannuation or prescribe minimum qualifications for teachers to be employed by such institutions either generally or in particular subjects. Uniformity in the conditions of service and conduct of teachers in all non-Government Colleges would make for harmony and avoid frustration. Of course while the power to make ordinances in respect of the matters referred to is unexceptional the nature of the infringement of the right, if any, under Article 30(1) will depend on the actual purpose and import of the ordinance when made and the manner in which it is likely to affect the administration of the educational institution, about which it is not possible now to predicate."

224. It was urged on behalf of the petitioning college that if it could get the advantages of affiliation or recognition by the University only under the terms of an enactment which requires it to adhere to a pattern or scheme under which substantial powers relating to management of the institution have to be surrendered, it really amounts to compelling it to abandon the exercise of its fundamental right of management guaranteed by Article 30(1) of the Constitution because, without recognition, the guarantee would be illusory. It is submitted that the situation which emerges is that there is, practically speaking, no alternative left before the college other than compliance with the terms of affiliation or recognition without which its students could not get degrees. The result would be, it is submitted, that education by it will not help those to whom it is imparted to get on in life and thus will have little practical value. This means, the argument runs, that the minority institutions would be discriminated against and denied equality before the law which Article 30(1) of the Constitution is meant to confer upon it.

225. The answer given is that such arguments could be advanced only to urge that there must be some alternative provision for minority colleges, which do not want to pay the price of the same statutory controls as majority managed colleges for affiliation and recognition, but provisions which apply uniformly to minority as well as majority managed colleges could not be invalidated on such a ground. In other words, it may be that Article 30(1) of the Constitution enables a minority to contend that, in order to secure an equal protection of laws, the State should make some statutory provision so that minority institutions may

obtain recognition or teach for degrees recognised by the State without sacrificing any part of its rights of management guaranteed by Article 30(1) of the Constitution. No claim for an order directing the State to make such alternative provision for the petitioning minority institution is made before us. What is really claimed is that the minority institutions must get affiliation on terms other than those prescribed for majority managed institutions when the statute before us has no provisions for affiliation on any such special alternative terms for minority colleges. The impugned provisions applicable to affiliated colleges, whether majority or minority managed, apart from Sections 5, 40 and 41 which are separable, are contained in Sections 20, 33A, 51A and 52A of the Act. If we were to hold that affiliation is open to a minority institution on some other terms not found in the statutory provisions at all, it would, it seems to me, really amount to nothing short of legislation which is really not our function. Moreover, in the case before us, on the claims put forward on behalf of the petitioning college, it appears very likely that the college will get the benefit of Section 38B of the Act, and, therefore, will escape from the consequences of affiliation found in the impugned sections.

226. It is true that Section 38B of the Act imposes certain conditions which, if the claims made on behalf of the petitioning college are correct, the college will have no difficulty in satisfying. In any case, until its application for an autonomous status is rejected, it could not reasonably complain that the other provisions of the Act, apart from Sections 5, 40 and 41 of the Act, will be used against it. For this reason also, it appears to me to be unnecessary, at least at this stage, to make a declaration about the effect of Sections 20 and 33A and 51A and 52A upon the fundamental rights of the petitioner protected by Article 30(1) of the Constitution.

227. Section 38B, to which I attach considerable importance for the purposes of this case, reads as follows :

"33B. (1) Any affiliated college or University college or a recognised institution or a University Department may, by a letter addressed to the Registrar, apply to the Executive Council to allow the college, institution or, as the case may be, Department to enjoy autonomy in the matters of admission of students, prescribing the courses of studies, imparting instructions and training, holding of examinations and the powers to make necessary rules for the purpose (hereinafter referred to as 'the specified matters').

(2) Either on receipt of a letter or application under sub-section (1) or where it appears to the Executive Council that the standards of education in any affiliated college or University college or recognized institution or University Department are so developed that it would be in the interest of education to allow the college, institution or Department to enjoy autonomy in the specified matters, on its own motion, the Executive Council, shall—

(a) for the purpose of satisfying itself whether the standards of education in such college, institution or Department are so developed that it would be in the interest of education to allow the college, institution or Department to enjoy autonomy in the specified matters—

(i) direct a local inquiry to be made by a competent person or persons authorised by the Executive Council in this behalf, and

(ii) make such further inquiry as may appear to it to be necessary;

(b) after consulting the Academic Council on the question whether the college, institution, or Department should be allowed to enjoy autonomy in the specified matters and stating the result of the inquiry under clause (a) record its opinion on that question; and

(c) make a report to the Court on that question embodying in such report the result of the inquiries, the opinion of the Academic Council and the opinion recorded by it.

(3) On receipt of the report under sub-section (2), the Court shall, after such further inquiry, if any, as may appear to it to be necessary record its opinion on the question whether the college, institution or Department should be allowed autonomy in the specified matters.

(4) The Registrar shall thereupon submit the proposals for conferring such autonomy on such college, institution or Department and all proceedings, if any, of the Academic Council, the Executive Council and the Court relating thereto, to the State Government.

(5) On receipt of the proposals and proceedings under sub-section (4), the State Government, after such inquiry as may appear to it to be necessary, may sanction the proposals or reject the proposals.

(6) Where the State Government sanctions the proposals, it shall by an order published in the Official Gazette confer on the college, institution or Department specified in the proposals, power to regulate the admission of students to the college, institution or, as the case may be, the Department, prescribing the course of studies in the college, institution or Department, the imparting of instructions, teaching and training in the course of studies, the holding of examinations and powers to make the necessary rules for the purpose after consulting the Executive Council and such other powers as may have been specified in the proposals.

(7) A college, recognised institution or University Department exercising the powers under sub-section (6) shall be called an autonomous college, autonomous recognized institution or, as the case may be, autonomous University Department.

(8) In the case of an autonomous college, autonomous recognized institution or autonomous University Department, the University shall continue to exercise general supervision over such college, institution or Department and to confer degrees on the students of the college, institution or Department passing any examination qualifying for any degree of the University."

228. The effect of an enactment upon the fundamental rights of a minority educational institution, as I have already tried to indicate above, depends upon the totality of actual provisions, and, indeed, also upon the actual facts relating to a particular institution. Is it possible for us to gauge the total effect without taking all these factors into consideration? I venture to think, with great respect, that we cannot determine the effect of each provision in the abstract or in isolation from other provisions and the facts relating to the particular petitioning college put forward before us.

229. It may be that Article 30(1) of the Constitution is a natural result of the feeling of insecurity entertained by the minorities which had to be dispelled by a guarantee which could not be reduced to a "teasing illusion". But, is it anything more than an illusion to view the choice of a minority as to what it does with its educational institution as a matter of unconcern and indifference to the whole organised society which the State represents?

230. The Nineteenth Century "liberal" view of freedom as "absence of constraint", which was largely negative, was voiced by J. S. Mill in his "*Essay on Liberty*".[61] In the introduction, the learned author set out the purpose of his essay as follows (See : *"Great Books of the Western World"*, J. S. Mill at page 271):

"The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used by physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

231. Is Article 30 of the Constitution meant to reflect a philosophy such as that of Herbert Spencer in "Man versus State", as extended to minority groups assumed to be pitted against the State, or, is the philosophy underlying it not the more generous one animating the whole of our Constitution and found stated in the preamble which, according to Chief Justice Das, in the *Kerala Education Bill case* (supra), embraces also the purpose of education? Indeed, the difficulty of separating the good of the individual, or, by an extension, the good of a group constituting a minority from the good of the whole society, was thus expressed by J. S. Mill himself (at p. 305):

"No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them. If he injures his property, he does harm to those who directly or indirectly derived support from it, and usually diminishes, by a greater or less amount, the general resources of the community. If he deteriorates his bodily or mental faculties, he not only brings evil upon all who depended on him for any portion of their happiness, but disqualifies himself for rendering the services which he owes to his fellow creatures generally; perhaps becomes a burden on their affection or benevolence; and if such conduct were very frequent, hardly any offence that is committed would detract more from the general sum of good. Finally, if by his vices or follies a person does no direct harm to others, he is nevertheless (it may be said) injurious by his example; and ought to be compelled to control himself, for the sake of those whom the sight or knowledge of his conduct might corrupt or mislead."

232. Even if Article 30(1) of the Constitution is held to confer absolute and unfettered rights of management upon minority institutions,

61. *American State Papers—Federalist—J. S. Mill*, p. 267, 271 and 305.

subject only to absolutely minimal and negative controls in the interests of health and law and order, it could not be meant to exclude a greater degree of regulation and control when a minority institution enters the wider sphere of general secular and non-denominational education, largely employs teachers who are not members of the particular minority concerned, and when it derives large parts of its income from the fees paid by those who are not members of the particular minority in question. Such greater degree of control could be justified by the need to secure the interests of those who are affected by the management of the minority institution and the education it imparts but who are not members of the minority in management. In other words, the degree of reasonably permissible control must vary from situation to situation. For the reasons already given above, I think that, apart from Sections 5, 40 and 41 of the Act, which directly and unreasonably impinge upon the rights of the petitioning minority managed college, protected by Article 30(1) of the Constitution, I do not think that the other provisions have that effect. On the situation under consideration before us, the minority institution affected by the enactment has, upon the claims put forward on its behalf, a means of escape from the impugned provisions other than Sections 5, 40 and 41 of the Act by resorting to Section 38B of the Act.

233. Consequently, I hold that Sections 5, 40 and 41 of the Act are restricted in their operation to colleges other than those which are protected, as minority educational institutions, by Article 30(1) of the Constitution. Appropriate directions must, therefore, issue to the opposite parties not to enforce these provisions against the petitioning college. But, I am of opinion that no such declaration or directions are required as regards the remaining provisions of the Act.

DWIVEDI, J. (*partly dissenting*)—Since I partly agree and partly disagree with the plurality-opinions, it has become necessary for me to write a separate judgment.

CONTRAST BETWEEN ARTICLES 25 AND 26 AND 30(1) OF THE CONSTITUTION

234. In a broad sense, all fundamental rights may be traced to a single central idea of 'Liberty'. 'Liberty' has its various phases. The rights safeguarded by Articles 25 and 26 constitute one of those phases: the rights safeguarded by Article 30(1) constitute another phase. Article 25 and 26 guarantee religious liberty; Article 30(1) guarantees educational liberty. To be more precise, Article 30(1) safeguards the freedom of establishing and administering educational institutions. It is true that an educational institution may also impart religious instruction and may thus serve as a means to the exercise of religious freedom. But Article 30(1) elevates the right of establishing and administering an educational institution to the plane of an independent right. It is a case of a means becoming an end by itself.

235. Again, the beneficiaries of the rights under Articles 25, 26

and 30(1) are different. Article 25 safeguards the religious freedom of an individual. Article 26 safeguards the religious freedom of a group of persons in respect of certain specified matters. The individual and the group may belong to a minority community as well as to the majority community. In contrast, Article 30(1) safeguards the right of the minority community. It has nothing to do with the majority community. Thus, although Article 30(1) safeguards a group-right like Article 26, it is radically different from Article 26 as it is confined only to the minority community.

236. While Articles 25 and 26 are concerned with religious freedom, Article 30(1) extends the right of establishing and administering an educational institution not only to a religious minority but also to a linguistic minority who may be even atheists. So the scope of Article 30(1), as regards both the content of the right and the beneficiaries of the right, is wider than that of Articles 25 and 26.

237. Article 25(2) disentangles certain activities, including secular activity, from religious practices and makes them subject to legal regulation or restrictions. But Article 30(1) secures the right to a secular activity to a religious or linguistic minority. Such a minority may establish and administer institutions for imparting secular general education. The right to establish and administer educational institutions for imparting secular general education cannot be disentangled from the whole plexus of rights under Article 30(1), and the right under Article 30(1) cannot be confined to the mere imparting of religious or linguistic education.

CONTRAST BETWEEN ARTICLE 29(1) AND ARTICLE 30(1)

238. The content of the right under Article 29(1) differs from the content of the right under Article 30(1). Article 29(1) secures the right of a section of citizens having distinct script, language or culture to conserve the same. Article 30(1), on the other hand, guarantees the right of a religious or linguistic minority to establish and administer educational institutions. Article 29(1) gives security to an interest: Article 30(1) gives security to an activity. [Compare the marginal note to Article 29(1).]

239. It is true that an educational institution may serve as a means for conserving script, language and culture. But this is not the sole object of Article 30(1). A religious or linguistic minority, in exercise of its right under Article 30(1), may establish an educational institution which may have no concern with the object of conserving its script, language and culture. The minority community may establish an educational institution also for imparting secular general education with the object of making its members worthy of serving the Nation and making them capable of enriching their own life ethically, intellectually and financially.

240. Article 30(1) does not, in express or implied terms, limit the right of the minorities to establish an educational institution of a

particular type. The right to establish an educational institution impliedly grants two kinds of choices. The minorities have a right to establish or not to establish any particular type of educational institution. This is the negative choice. The minorities may establish any type of educational institution. This is the positive choice.

241. Choice is inherent in every freedom. The right to form associations and unions under Article 19(1)(*c*) extends to every kind of associations and unions. Similarly, the choice of a citizen in respect of property under Article 19(1)(*f*) or business and profession under Article 19(1)(*g*) is not limited to any specified type of property or business or profession. A citizen may acquire, hold and sell any kind of property or carry on any business or profession. Of course, these freedoms are subject to State regulation under Article 19(3), (5) and (6). But freedom without choice is no freedom. So it seems to me that the words 'of their choice' merely make patent what is latent in Article 30(1). Those words are not intended to enlarge the area of choice already implied in the right conferred by Article 30(1).

242. The Court has already held that the right to establish an educational institution under Article 30(1) is not confined to the purposes specifies in Article 29(1). [See *The State of Bombay* v. *Bombay Education Society*;[62] *In Re Kerala Education Bill* (supra) pp. 1047 and 1052-53; *Rev. Father W. Proost and Others* v. *State of Bihar* (supra) p. 180 and *D. A. V. College* v. *State of Punjab* (supra) p. 695].

THE RIGHT OF AFFILIATION

243. Three different arguments have been urged before us on this issue: (1) The right is necessarily implied in Article 30(1). Accordingly the right of affiliation is also a fundamental right. (2) It is neither expressly nor impliedly granted by Article 30(1). Accordingly it is not a fundamental right. On the contrary, affiliation is a statutory concept and may be obtained on the fulfilment of the conditions prescribed therefor by a statute. (3) Although it is not a fundamental right, it is necessarily implicit in Article 30(1) that affiliation cannot be denied for refusal of a minority institution to give up totally or partially its right under Article 30(1).

244. Evidently, there is no express grant of the right of affiliation in Article 30(1). In my view, it is not also necessarily implied in Article 30(1). My reasons are these: (1) the context does not favour the asserted implication. The framers of the Constitution have taken special care to dissipate doubts as regards choice by the words 'of their choice'. They have also taken special care to extend a guarantee to a minority educational institution against discrimination in the matter of aid from the State on the ground that it is under the management of a minority based on religion or language. [See Article 30(1)]. If they had intended to elevate the right of affiliation to the status of a fundamental

62. (1955) 1 SCR 568, 578 and 582: AIR 1954 SC 561.

right, they could have easily expressed their intention in clear words in Article 30. It is obvious that a minority institution imparting only religious instruction or teaching its own theology would neither need nor seek affiliation. It would not seek affiliation because affiliation is bound to reduce its liberty at least to some extent. Again, as our State is secular in character, affiliation of an institution imparting religious instruction or teaching only theology of a particular religious minority may not comport with the secular character of the State. As Article 30(1) does not grant the right of affiliation to such an institution, it cannot confer that right on an institution imparting secular general education. The content of the right under Article 30(1) must be the same for both kinds of institutions. [See *Re Kerala Education Bill* (supra) at pp. 1076-1077 per Venkatarama Iyer, J.]

245. In *Romesh Thappar* v. *The State of Madras,*[63] this Court said :

"(T)here can be no doubt that the freedom of speech and expression includes freedom of propagation of ideas ; and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential as liberty of propagation. No doubt without circulation the propagation would be of little value."

It is urged that as freedom of circulation is held to be implied in freedom of speech and expression, so the right of affiliation should be implied in the right to establish educational institutions. The argument is plausible but fallacious. There is a distinction between freedom of thought and freedom of speech and expression. The former gives freedom to a man to think whatever he likes ; the latter gives him freedom to communicate what he thinks to one or more persons. Consequently, the latter necessarily implies freedom of propagation or circulation of ideas. But the right of affiliation is not necessarily implied in that sense in the right of establishing educational institutions. History shows that educational institutions have existed with vigour and excellence without State recognition or affiliation. In Europe unaffiliated academies have made great contribution to the development of science and humanities. In pre-independent India there were a number of unaffiliated and unrecognised educational institutions of good repute. One of our late Prime Ministers was a product of one of those institutions. The vast area of private sector employment would be open to students coming out of unaffiliated educational institutions, if they are otherwise merited. The mere accident of recruitment to the State services being made on the basis of recognised degrees and diplomas should not be a sufficient reason to read the right of affiliation in Article 30(1). The State may at any time abandon this facile and mechanical suitability test and may make selections by competitive examinations open to all, whether possessing or not possessing a recognised degree or diploma.

246. However, in case of an affiliating University affiliation cannot be denied to a minority institution on the sole ground that it is managed by a minority whether based on religion or language or on arbitrary or irrational basis. Such a denial would be violative of Articles

63. 1950 SCR 594 at p. 597 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514.

14 and 15(1) and will be struck down by courts. Again, Article 13(2) prohibits the State from taking away or abridging the right under Article 30(1). Since the State cannot directly take away or abridge a right conferred under Article 30(1), the State cannot also indirectly take away or abridge that right by subjecting the grant of affiliation to conditions which would entail the forbidden result. [See *In Re Kerala Education Bill* (supra) at pp. 1063-1064].

AFFILIATING UNIVERSITY

247. Sri Palkhivala has submitted in the course of his reply that Article 30(1) obligates every State to have at least one affiliating University. I am wholly unable to accept this submission. As Article 30(1) does not grant the right of affiliation, the State is not under an obligation to have an affiliating university. It is open to a State to establish only a teaching University.

ILLUSORY ABSOLUTENESS OF ARTICLE 30(1)

248. Some Counsel supporting the petitioners have, I think, wrongly over-emphasised the verbal absoluteness of Article 30(1). According to Sri Tarkunde, while Article 19(1)(*g*) gives a right to the majority community to establish and administer educational institutions subject to reasonable restrictions in the public interest, Article 30(1) gives similar right to a religious or linguistic minority in absolute terms. According to him, Article 30(1) should be construed to confer a higher right on the minority than the one conferred on the majority by Article 19(1)(*g*). According to Sri Palkhivala, the right under Article 30(1) is conferred in absolute language and can neither be taken away nor abridged by the State on account of the injunction of Article 13(2).

249. It is true that Article 30(1) is expressed in spacious and unqualified language. And so is Article 14 : "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." However, this Court has read the limitation of classification in the general and unrestricted language of Art. 14.

> "(T)he general language of Article 14.....has been greatly qualified by the recognition of the State's regulating power to make laws operating differently on differnt classes of persons in the governance of its subjects, with the result that the principle of equality of civil rights and of equal protection of the laws is only given effect to as a safeguard against arbitrary State action." (**State of West Bengal** v. **Anwar Ali Sarkar**:[64] per Patanjali Sastri, C. J.)

> "Article 14 confers a right by enacting a prohibition which in form, at least is absolute.....but.....Article 14 is not really absolute, for the doctrine of classification has been incorporated in it by judicial decisions. Article 14, as interpreted by the courts would run in some such words as these : The State shall not deny to any person equality before the law or equal protection of the law provided that nothing herein contained shall prevent the State from making a law based on or involving a classification founded on an intelligible differentia having a rational relation to the object sought to be achieved by the law." (Constitutional Law of India by H. M. Seervai, 1967 Edn. p. 188.)

64. 1952 SCR 284 at p. 295 : AIR 1952 SC 75 : 1952 Cri LJ 510.

According to Patanjali Sastri C. J., the *necessity* of making special laws to attend particular ends obliged the Court to read down the wide language of Article 14. (*Chiranjit Lal* v. *Union of India*[65] and *Kathi Raning Rawat* v. *State of Saurashtra.*[66]

250. Like Article 30(1), the 1st Amendment of the U. S. Constitution is also expressed in absolute terms :

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof : or abridging freedom of speech, or of the Press ; or the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

Nevertheless it has been held by the U. S. Supreme Court that the liberty recognised in the 1st Amendment is not absolute and is subject to regulation. "(Freedom of religion) embraces two concepts, freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be." (*Cantwell* v. *Connecticut*).[67] As regards freedom of speech, Justice Frankfurter has said :

> "(T)he first ten amendments to the Constitution, commonly known as 'Bill of Rights' were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors and which had from time immemorial been subject to certain well recognised exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognised as if they had been formally expressed."[68]

251. Like Article 30(1), Section 92 of the Australian Constitution is also expressed in absolute terms : "On the imposition of uniform duties of customs, trade, commerce and intercourse amongst the States, whether by means of internal carriage or ocean navigation shall be *absolutely free.*" (emphasis added) Nevertheless, it has been held that this 'absolute' freedom is subject to regulation. The words "absolutely free" "have occasioned the greatest problems in relation to Section 92. It was early settled that they were not limited to pecuniary burdens, but while it is clear that the nature of freedom predicated does not involve an abnegation of all legal restrictions upon trade, commerce, and intercourse, the precise extent of permitted interference is not easy to formulate... The difficulty of stating a general rule applicable to all cases arises from the impossibility of reducing an essentially practical subject to general abstract terms. The precise nature of trade, commerce and intercourse, exactly what it comprehends for the purpose of Section 92, no more, and no less and the quality of the freedom prescribed are questions which have been differently answered and with differing results."[69]

252. The Privy Council has recently held that the regulation of trade, commerce and intercourse amongst the States is compatible with its absolute freedom. (*Commonwealth of Australia and Others* v. *Bank of New South Wales and Others.*[70]) As to the extent of regulation, the Privy

65. 1950 SCR 869, 890 : AIR 1951 SC 41.
66. 1952 SCR 435, 442 : AIR 1952 SC 123.
67. 310 US 296, 303-304.
68. 95 Law Edn. 1137, 1160.
69. W. S. A. Waynes : *Legislative, Executive and Judicial Powers in Australia,* 2nd Edn. p. 339.
70. 1950 AC 235.

Council said :

" (T)heir Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstances, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade, commerce and intercourse thus prohibited and thus monopolized remained absolutely free."[71]

253. This survey should be sufficient to explode the argument of absolute or near-absolute right to establish and administer an educational institution by a religious or linguistic minority from the absolute words of Article 30(1). Absolute words do not confer absolute rights, for the generality of the words may have been cut down by the context and the scheme of the statute or the Constitution, as the case may be. Thus while restricting the generality of the word 'arrest' in Article 22(1) and (2) of the Constitution, Das, J. said :

" If, however, two constructions are possible then the court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory." **(State of Punjab** v. **Ajaib Singh)**[72]

254. A glance at the context and scheme of Part III of the Constitution would show that the Constitution-makers did not intend to confer absolute rights on a religious or linguistic minority to establish and administer educational institutions. The associate Article 29(2) imposes one restriction on the right in Article 30(1). No religious or linguistic minority establishing and administering an educational institution which receives aid from the State funds shall deny admission to any citizen to the institution on grounds only of religion, race, caste, language or any of them. The right to admit a student to an educational institution is admittedly comprised in the right to administer it. This right is partly curtailed by Article 29(2).

255. The right of admission is further curtailed by Article 15(4) which provides an exception to Article 29(2). Article 15(4) enables the State to make any special provision for the advancement of any socially and educationally backward class of citizens or for the scheduled caste and scheduled tribes in the matter of admission in the educational institutions maintained by the State or receiving aid from the State.

256. Article 28(3) imposes a third restriction on the right in Article 30(1). It provides that no person attending any educational institution recognised or receiving aid by the State shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person

71. *Ibid* at p. 311.

72. 1953 SCR 254, 264 : AIR 1953 SC 10.

or, if such person is a minor, his guardian has given his consent thereto. Obviously, Article 28(3) prohibits a religious minority establishing and administering an educational institution which receives aid or is recognised by the State from compelling any citizen reading in the institution to receive religious instruction against his wishes or if minor against the wishes of his guardian. It cannot be disputed that the right of a religious minority to impart religious instruction in an educational institution forms part of the right to administer the institution. And yet Article 28(3) curtails that right to a certain extent.

257. To sum up, Articles 29(2), 15(4) and 28(3) place certain express limitations on the right in Article 30(1). There are also certain implied limitations on this right. The right should be read subject to those implied limitations.

258. Part III of the Constitution confers certain rights on individuals, on groups and on certain minority groups. Those rights constitute a single indivisible balancing system of Liberty in our Constitution. The system implies order and harmony among the various rights constituting our Liberty according to the necessities of each case. Obviously, the rights could never have been intended by the Constitution-makers to be in collision with one another. For instance, a citizen cannot exercise his right of freedom of speech and expression on another man's property without his leave, for such exercise of right would violate the latter's right to hold property conferred on him under Article 19(1)(*g*). Although the right of a religious denomination under Article 26 to manage its own affairs is not expressly made subject to Article 25(2)(*b*) which protects a law throwing open Hindu religious institutions of a public character to all classes of Hindus, this Court upheld the validity of a law throwing open public temples to exclude class of Hindus. Speaking for the Court, Venkatarama Aiyar, J. said :

> "The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted then Article 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Article 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Article 25(2)(b) will prevail. While, in the former case, Article 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 25(b). We must accordingly hold that Article 26(b) must be read subject to Article 25(2)(b)." **(Sri Venkataramana Devaru and Others v. State of Mysore)**[73]

259. Accordingly, the right in Article 30(1) cannot, in my view, be so exercised as to violate a citizen's legal or constitutional rights.

73. 1958 SCR 895, 918 : AIR 1958 SC 255.

Thus the management cannot punish a member of the teaching or non-teaching staff or a student for legitimate exercise of his freedom of speech and expression or of forming associations or unions.

260. The Constitution-makers have endeavoured to unite the people of our country in a democratic Republic. The democratic Republic would not last long if its members were in constant war among themselves for the ascendancy of their separate rights. It will soon drift into Absolutism of one kind or another. European history demonstrates that whenever one group has attempted to deny liberty to another group, it has lost its own liberty. Pagans persecuted Christians and lost their own liberty. Christians, in their turn, denied religious freedom to pagans and surrendered their own freedom either to an Absolute Emperor or to an Infallible Pope. Catholics and Protestants denied religious freedom to one another and strengthened the absolutism of the monarchy.

261. Absolute rights are possible only in the moon. It is impossible for a member of a civilized community to have absolute rights. Some regulation of rights is necessary for due enjoyment by every member of the society of his own rights.

262. It cannot be disputed that the right under Article 30(1) is also subject to regulation for the protection of various social interests such as health, morality, security of State, public order and the like, for the good of the people is the supreme law. Today, education, specially Science and Technology, is a pre-emptive social interest for our developing Nation. "It is now evident that the real source of wealth lies no longer in raw material, the labour force or machines, but in having scientific, educated, technological manpower base. The education has become the real wealth of the new age."[74] The attack on complex and urgent problems of the country has to be made "through two main programmes: (1) The development of physical resources through the modernisation of agriculture and rapid industrialisation. This requires a science-based technology. . . . (2) The development of human resources through a properly organised programme of education".

263. It is the later programme . . . . . which is the more crucial of the two. While the development of the physical resources is a means to an end, that of human resources is an end in itself, and without it, even the adequate development of physical resources is not possible."[75] Obviously secular general education, more especially science and technology, should play decisive role in the development and prosperity of our Nation. Accordingly our State should be as much interested as, nay more than, the religious or linguistic minorities in the right and socially needful education of students of the minorities. The students do not belong only to the minorities; they belong also to the Nation. The over-accentuated argument of imparting secular general education in a religious atmosphere seems to me to overlook this important national aspect.

74. J. D. Bernal, *Science in History*, Pelican Book, Vol. I, p. 117.

75. *Kothari Education Commission Report*, para 1, 12.

Secular general education should be the Nation's first concern. It may legitimately be assumed that the Constitution-makers were alive to the priority which education should receive in the programme of our Republic. (See Articles 41, 45 and 46.) How could they then intend to confer an absolute or near-absolute right on a religious or linguistic minority to establish and administer an educational institution for imparting secular general education ?

264. It is well to remember that it is the Constitution which we are expounding. A statute is a specific contrivance for dealing with the specific needs of the people at a particular time and place. But the Constitution is a general contrivance for the good government and happiness of all the people of our developing Republic. It is made for the present as well as for the future. Like all great organic texts, it is written in broad and accommodating language. उभयं वेद वचनम् (The words of the Veda are commodious — M. B., Shanti Parwa, XIX, 1). Far from implying state inaction, the general language of Article 30(1) is, to my mind, designed to give due flexibility to the legislatures and to the courts in adjusting the rights in Article 30(1) to the necessities of each case.

265. Bose, J. has observed :

"(The) true content (of the words of the Constitution) is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formulas which have their essence in mere form. They constitute a frame-work of government written for men of fundamentally differing opinions and written as much for the future as for the present. They are not just pages from a text book but form the means of ordering the life of a progressive people." [**State of West Bengal** v. **Anwar Ali Sarkar** (supra) at p. 359.]

The learned Judge further said :

"(The words of the Constitution) are not just dull, lifeless words static and hide-bound, as in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs." [(supra) at p. 363]

EXTENT OF REGULATORY POWER

266. The extent of regulatory power of the State would vary according to various types of educational institutions established by religious and linguistic minorities. Educational institutions may be classified in several ways : (1) According to the nature of instruction which is being imparted by the minorities. It may be religious, cultural and linguistic instruction or secular general education or mixed ; (2) According to grant of aid and recognition by the State. Some institutions may receive aid ; the others may not. Similarly, some institutions may receive recognition ; the others may not. There may be some others which may receive both aid and recognition ; some others may receive neither aid nor recognition. (3) According to the standard of secular general education which is being imparted in the institutions — primary, secondary

and higher. (4) According to the nature of education such as military academy, marine engineering in which the State is vitally interested for various reasons.

267. The extent of regulatory power may vary from class to class as well as within a class. For instance, institutions receiving aid and recognition may be subject to greater regulation than those which receive neither. Similarly, institutions imparting secular general education may be subject to greater regulation than those which are imparting religious, cultural and linguistic instruction solely.

268. An educational institution would consist of: (1) the managing body of the institution, (2) teaching staff, (3) non-teaching staff, (4) students; and (5) property of various kinds. Here again, the extent of the regulatory power may vary from one constituent to another. For instance, the teaching staff and property may be subject to greater regulation than the composition of the managing body. Plainly, no minority educational institution can be singled out for treatment different from one meted out to the majority educational institution. A regulation meeting out such a discriminatory treatment will be obnoxious to Article 30(1).

269. Subject to these preliminary remarks, it is now necessary to consider how far a regulation may touch upon the right conferred by Article 30(1) without inquiring the wrath of Article 13(2). In other words, what is the test for deciding whether a regulation imposed on a minority educational institution takes away or abridges the right conferred by Article 30(1)? It has already been discussed earlier that the test of a valid regulation is its necessity. Any regulation which does not go beyond what is necessary for protecting the interests of the society (which includes the minorities also) of the rights of the individual members of the society should be constitutional. It cannot be said that such a regulation takes away or abridges the rights conferred by Article 30(1).

270. No hard and fast rule can be prescribed for determining what is necessary. The question should be examined in the light of the impugned provisions and the facts and circumstances of each case. What is required is that the impugned law should seek to establish a reasonable balance between the right regulated and the social interest or the individual right protected. The Court should balance in the scale the value of the right regulated and the value of the social interest or the individual right protected. While balancing these competing interests, the Court should give due weight to the legislative judgment. Like the Court, the Legislature has also taken the oath to uphold the Constitution. It is as much the protector of the liberty and welfare of the people as the Court. It is more informed than the Court about the pressing necessities of the Government and the needs of the community. [See *State of West Bengal* v. *Anwar Ali Sarkar* (supra) at p. 303 per Das, J.]

271. I find it difficult to accept the argument that a regulation, in order to be constitutional, must always be shown to be calculated

to improve the excellence of the minority educational institutions. It is conceded by counsel supporting the petitioners that the State may prescribe the curriculum and syllabus for the minority educational institutions which are aided or recognised by it. Now a regulation prescribing curriculum and syllabus may not necessarily be calculated to improve the excellence of a particular minority educational institution. Left to itself, a minority educational institution may opt for a higher standard of instruction than the one prescribed by the State in its curriculum or syllabus. It appears to me that the State prescribes the curriculum and syllabus as much from the point of view of excellence of instruction as from the point of view of having a uniform standard of instruction. A uniform standard is perhaps necessary owing to the different calibre of students coming from different developed and undeveloped strata of society and from different developed and undeveloped geographical regions of the country.

272. But it is pressed upon us that the (*sic*) prescribing a curriculum and syllabus is not a part of the administration of an educational institution. With profound respect to the learned Judges who decided the *Mother Provincial Case* (supra), I find it difficult to accept this argument. Counsel supporting the petitioners have maintained that the State could not prescribe curriculum and syllabus for religious, cultural or linguistic instruction which is being imparted in a religious or linguistic minority unaided and unrecognised educational institution. The reason obviously is that curriculum and syllabus is a vital part of the administration of an educational institution.

273. As far as Catholic educational institutions are concerned, Catholics believe that education belongs pre-eminently to the Church. Catholic dogma categorically denies the premise that secular general education can be isolated from religious teaching. In 1930 the encyclical 'Christian Education of Youth' Pope Pius XI has commended : "The only school approved by the Church is one (where) the Catholic religion permeates the entire atmosphere (and where) all teaching and the whole organisation of the school and its *teachers, syllabus and textbooks in every* branch (is) regulated by the Christian spirit." (Pfeffer : *Church, State and Freedom*, 1953, Edn. p. 294.)

274. Nor should the regulatory power be hamstrung by such concepts as "real and effective exercise of the right" should not be touched by the regulation or that regulation should not "directly and immediately" impinge on the right conferred by Article 30(1). What is a real and effective exercise of the right will depend on how far the impugned regulation is necessary in the context of time, place and circumstances for safeguarding any competing social interest or any competing constitutional or legal right of an individual.

275. The majority opinion in *Re Kerala Education Bill* (supra) supports the construction which I am seeking to put on Article 30(1). Speaking for the majority, Das, J., said : (p. 1062)

"We are thus faced with a problem of considerable complexity apparently difficult of solution. There is on the one hand the minority rights under Article

30(1) to establish and administer educational institutions of their choice and the duty of the Government to promote education, there is, on the other side, the obligation of the State under Article 45 to endeavour to introduce free and compulsory education. We have to reconcile between these two conflicting interests and to give effect to both if that is possible and bring about a synthesis between the two." (emphasis added)

Holding that Clauses 9, 11(2) and 12(4) were permissible regulations, the learned Chief Justice said : (at p. 1064)

"Clauses 9, 11(2) and 12(4) are, however, objected to as going much beyond the permissible limit . . . .It is said that by taking over the collections of fees . . .etc. and by undertaking to pay the salaries of the teachers and other staff the Government is in reality confiscating the school, for none will care for the school authority. Likewise Cl. 11 takes away an obvious item of management, for the manager cannot appoint any teacher at all except out of the panel to be prepared by the Public Service Commission, which, apart from the question of its power of taking up such duties may not be qualified at all to select teachers who will be acceptable to religious denominations and in particlar sub-clause (2) of that clause is objectionable for it thrusts upon educational institutions of religious minorities teachers of Scheduled Castes who may have no knowledge of the tenets of their religion and may not be otherwise weak educationally. Power of dismissal, removal, reduction in rank or suspension is an index, of the right of management and that is taken away by Clause 12(4). These are, no doubt, serious inroads on the right of administration and appear perilously near violating that right. But considering that those provisions are applicable to all educational institutions and that the impugned parts of Clauses 9, 11 and 12 are designed to give protection and security to the ill paid teachers who are engaged in rendering service to the nation and protect the backward classes, we are prepared, as at present advised to treat these Clauses 9, 11(2) and 12(4) as permissible regulations which the State may impose on the minorities as a condition for granting aid to their educational institutions."

276. At the moment I am not concerned with the correctness or incorrectness of the view that Clauses 9, 11(2) and 12(4) are constitutional. I have quoted this passage in order to bring out the technique of adjudging the constitutionality of a statute which has commended itself to the majority of the Court. That technique requires the Court to balance the right conferred by Article 30(1) and the social and individual interests which it is necessary to protect.

277. In *Rev. Sidhajbhai Sabhai and Others* v. *State of Bombay* (supra), Shah, J., said : (at p. 850)

"Regulations made in the true interests of **efficiency of instruction, discipline, health, sanitation, morality, pnblic order and the like may** undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed ; they secure the proper functioning of the institution, in matters of education." (emphasis added)

278. This passage also shows that the Court has adhered to the view taken by Das, C.J., in *Re Kerala Education Bill* (supra) to the effect that the State has power to make regulations for protecting certain social interests.

279. The decision in this case does not seem to me to be in conflict with the construction suggested by me, because the Court took the view that the right of the Private Training Colleges to admit students of

their own choice was "severely restricted" by the governmental order. In other words, the impugned order went much beyond what was necessary in the circumstances of the case.

280. In the *State of Kerala* v. *Very Rev. Mother Provincial* (supra), Hidayatullah, C. J., speaking for the unanimous Court, observed : (at p. 740)

> " 'Administration' means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."

With great respect, I find it difficult to go that far. Take for instance, the right of any citizen, including a religious or linguistic minority to establish and administer a military academy for imparting theoretical as well as practical training to the students admitted to it. Sri Nanavati, counsel for the petitioners, conceded that this right may be restricted and regulated in the interest of the security of the State. The State may make a regulation for effective control and supervision of the arms and ammunition belonging to the academy by the officers of its own choice and confidence. The State may, I believe, go to the length of even prescribing that the arms and ammunition should be kept in the government armoury and should be issued by a State officer holding charge of the armoury. The right under Article 30(1) forms part of a complex and inter-dependent group of diverse social interests. There cannot be a perpetually fixed adjustment of the right and those social interests. They would need adjustment and readjustment from time to time and in varying circumstances.

281. In *D. A. V. College* v. *State of Punjab* (supra), this Court struck down Clause 17 of the statutes which provided that the staff initially appointed should be approved by the Vice-Chancellor and that all subsequent changes should be referred to the University for the Vice-Chancellor's approval. However, Jaganmohan Reddy, J., speaking for the unanimous Court, observed : (see SCC p. 283, para 37)

> "In our view there is no possible justification for the provisions contained in Clause . . . 17 of Chapter V of the statutes which decidedly interfere(s) with the rights of management of the Petitioners' College. These provisions cannot therefore be made as conditions of affiliation, the non-compliance of which would involve disaffiliation and consequently they will have to be struck down as offending Article 30(1)."

The words "no possible justification" in the passage seem to me to suggest that the Court would have upheld Clause 17 if the State of Punjab could have satisfied the Court that it was necessary to subject the power of appointment, etc. of teachers to the approval of the Vice-Chancellor. There seems to be nothing in *Rev. Father W. Proost and Others* v. *The State of Bihar* (supra) and *D. A. V. College, Bhatinda* v. *State of Punjab* (supra) which would militate against the construction of Article 30(1) sugested by me.

282. No new principle is expounded in the decisions of various High Courts in *Aldo Maria Patroni* v. *V. E. C. Kesavan*,[76] *Dipendra Nath Sarkar* v. *State of Bihar* (supra), *The Muslim Anjuman-e-Taleem, Dharbhanga* v. *The Bihar University*,[77] *Varkey* v. *State of Kerala*,[78] *State of Kerala* v. *The Corporate Management of Schools of the Archdiocese of Chananacherry*,[79] and *Director of School Education, Tamil Nadu* v. *Rev. Father G. Irogiaswamy*.[80] All these decisions follow one or the other decisions of this Court as they should have done. Accordingly it is not necessary to refer to them in any detail.

283. Sri Nanavati has also relied on a decision of the Permanent Court of International Justice in Case No. 182 referred to in the Annual Digest of Report of Public International Law Cases (years 1935-1937) by Lauterpacht. Article 4 of the Declaration relating to the position of minorities in Albania provided that "all Albanian nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion". Article 5 of the Declaration ran as follows :

> "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 language and to exercise their religion freely therein."

In 1933 the Albania National Assembly amended the Albanian Constitution thus :

> "The instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed."

Following this amendment certain Albanian minorities, presumably of Greek origin, complained to the League of Nations regarding the violation of their right guaranteed by Article 5 of the Declaration. The matter went to the Permanent Court of International Justice for consideration. The majority of the Court (with three dissents) was of opinion that the constitutional amendment violated the rights of the minorities guaranteed by Article 5 of the Declaration.

284. It is difficult to appreciate how the majority opinion would shed any useful light on the nature and scope of the right guaranteed by Article 30(1). Obviously, the context of Article 30(1), both national as well as textual, bears no comparison with the context of the Albanian Constitutional Amendment and Article 5 of the Declaration.

285. It is now necessary to examine the various impugned provisions in the light of the construction of Article 30(1) suggested earlier in this judgment.

76. AIR 1965 Ker 75.
77. AIR 1967 Patna 148.
78. ILR (1969) 1 Ker 48.
79. 1970 KLT 232.
80. AIR 1971 Mad 440.

SECTION 33A(1)(a)

286. I agree with the plurality view that it is obnoxious to Article 30(1), and I have nothing further to add.

SECTION 33A(1)(b)

287. Counsel for the petitioners, Sri Nanavati, abandoned the attack against this provision. Counsel for the State and the Gujarat University accordingly gave no reply. Sri Nanavati did not attack the provision even in his reply. So I should not express any opinion on this provision.

SECTION 40

288. Section 39(1) provides that within the University area, all post-graduate instruction, teaching and training shall be conducted by the University or by such affiliated colleges or institutions and in such subjects as may be prescribed by the Statutes. The petitioners do not challenge this provision. But they seek to question Section 40 which is similar to Section 39(1). Section 40(1) provides that the Court may determine that all instructions, teaching and training in courses of studies in respect of which the University is competent to hold examinations shall within the University area be conducted by the University and the Court shall communicate its decision to the State Government. Section 40(2) provides that on receipt of the communication the State Government may after making such inquiry as it thinks fit, by notification in the Official Gazette declare that the provisions of Section 41 shall come into force on such date as may be specified in the notification.

289. It has already been held earlier that the right of affiliation is not a fundamental right guaranteed by Article 30(1). Accordingly I see no difficulty in the University take-over of the teaching in undergraduate classes.

290. Section 41 consists of five sub-sections. Sub-section (1) provides that all affiliated colleges will become constituent colleges of the University. We are not concerned with sub-section (2). Sub-section (2) provides that no educational institution shall, save, with the consent of the University and the sanction of the State Government be associated with or seek permission to any privileges of any other University.

291. I do not think that any legitimate objection can be taken to sub-section (1). Merely because an affiliated college is made a constituent college of the University, would not necessarily offend Article 30(1). The definition of the expression 'constituent college' by itself is innocuous. After all, someone has said : "What is there in a name !" The concept of a constituent college is fluid. It is the degree of external control exercised over the administration of a minority college, and not its statutory name, that is relevant for the purposes of Article 30(1). For instance, the associate colleges (which are similar to affiliated colleges) of the Allahabad University are subject to University control in the matter of appointment of teachers. But the Motilal Nehru Medical College,

Allahabad, which is a constituent college of that University, is not subject to such control. While the Selection Committee selecting teachers to the associate colleges consists of certain University authorities, the selection of teachers to the constituent college is made wholly by the U. P. Public Service Commission and the University has no voice whatsoever in the selection of the teachers. (See Allahabad University Calendar, 1968.) Sub-section (3) cannot also be objected to. It permits an affiliated college which does not want to be a constituent college to get affiliated to another University with the permission of the State and the Gujarat University.

292. Serious objection on behalf of the petitioner has, however, been taken to clauses (ii) to (vi) of sub-section (4). Sub-section (4) may be divided in two parts. According to the first part the relations of the constituent colleges and the University shall be governed by the statutes to be made in that behalf. The second part provides that any such statutes may provide in particular for the exercise by the University of the powers in respect of the constituent colleges specified in clauses (ii) to (vi) of sub-section (4).

293. Obviously, the first part of sub-section (4) confers a general power of making statutes. The second part thereof specifies certain matters on which the statutes should be made. The two parts of sub-section (4) follow the normal pattern of provisions in modern statutes providing for rule making. The second part of sub-section (4) is merely illustrative of the generality of the power conferred by the first part. While counsel for petitioners have urged that clauses (ii) to (vi) clearly violate rights under Article 30(1), the Additional Solicitor-General has urged that the wide language of those clauses may be so read down as to make them constitutional. I do not think it is necessary to enter into this controversy at all. It may be presumed for the sake of argument that clauses (ii) to (vi) of sub-section (4) are violative of Article 30(1). Even so, the petitioners stand to gain nothing thereby, for no legitimate objection can be advanced against the first part of sub-section (4). Then it comes to this that unless statutes are actually made, the constitutional attack is premature.

SECTION 51A

294. Section 51A consists of two sub-sections. The first sub-section provides that no member of the teaching and non-teaching staff of an affiliated college shall be dismissed or removed or reduced in rank except after an inquiry, in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Until he has been given a reasonable opportunity of making representation against the penalty proposed, he cannot be punished. This part of sub-section (1) is similar to Article 311(2) of the Constitution, and no legitimate objection can be taken to it. Sub-section (1) also contains another rider on the power of the administration to fire its staff. According to this rider, the penalty inflicted by the management shall not take effect until it is approved by the Vice-Chancellor or any

other officer of the University authorised by the Vice-Chancellor in this behalf.

295. Sub-section (2) provides that the services of no member of the teaching and non-teaching staff shall be terminated unless he had been given a reasonable opportunity of showing cause against the proposed termination. It is clarified that this provision shall not apply to a person who is appointed for a temporary period. Like sub-section (1), this power is also made subject to the approval of the Vice-Chancellor or any other officer of the University authorised by the Vice-Chancellor. No legitimate objection can be taken to the first part of sub-sections (1) and (2). But serious objection is taken to the provision for the approval of the Vice-Chancellor or any other officer of the University authorised by the Vice-Chancellor in this behalf.

296. It is true that the right to fire an employee belongs to the employer under the contract of service. It is also true that the right to fire is a management right safeguarded under Article 30(1). But this right cannot include the right to take away or abridge the employee's constitutional right to form associations, to carry on his profession and other constitutional and legal rights. The purpose of Section 51A is to check this kind of misuse of the right to fire an employee. So the Vice-Chancellor's power of approval is not unguided and unreasonable. After the Chancellor, the Vice-Chancellor is the next highest officer of the University. It should be presumed that in granting or withholding approval he would act according to reason and justice.

297. When the matter goes before the Vice-Chancellor for approval, both the management and the teacher or the member of the non-teaching staff should be heard by him. Hearing both parties is necessarily implied, because without hearing either of them it will be difficult for him to make up his mind whether he should grant or withhold approval to the action proposed by the managing body of the educational institution. It would also follow that while granting approval or disapproval, the Vice-Chancellor should record reasons, for the exercise of his power is subject to control by courts. The statute does not make his order final, and courts would surely nullify his order if it is arbitrary, mala fide or illegal.

298. If the managing body exercises the right to fire mala fide or as a measure for victimization, it will be proper for the Vice-Chancellor to withhold approval. The Vice-Chancellor may also withhold approval where fair hearing has not been given or where the record of the inquiry contains no evidence to establish the guilt for which the teacher or the member of the non-teaching staff has been punished. On the other hand, if the Vice-Chancellor finds that the punishment is imposed after due hearing and is supported by evidence, and is not imposed mala fide or as a measure of victimization, he cannot withhold approval.

299. It is also urged that the power of giving approval is not conferred exclusively on the Vice-Chancellor. It is open to him to nominate any other officer of the University for this purpose. Section 8 of the Act enumerates the officers of the University. They are :(1) the

Chancellor; (2) the Vice-Chancellor; (3) the Pro-Vice-Chancellor; (4) the Deans of Faculties; (5) the Registrar; (6) the University Librarian; and (7) such other officers of the University as may be declared by the statutes to be the officers of the University. The first six officers are all important and responsible officers of the University. They can be trusted to exercise the power of approval in a reasonable manner. It has not been pointed out to us whether statutes have made any other officer an officer of the Universiy. So we are not concerned with the last clause.

300. It seems to me that the power of approval by the Vice-Chancellor is necessary in the interest of the security of service of the teaching and non-teaching staff. Security of service is necessary to promote efficiency and honest discharge of duty. It is calculated to improve the institution in the long run. The members of the teaching and non-teaching staff cannot ordinarily afford to go to courts for redress of their grievances. Section 51A provides a cheaper and, more expeditious remedy to them for the redress of their grievances. The impugned provision is identical to Section 33, Industrial Disputes Act which this Court has held to be valid.

301. It may be stated that this aspect of the matter which I have considered in regard to Section 51A was not placed before the Court in the earlier cases. As the power of approval is confined to checking the abuse of the right to fire employees, I am of opinion that it does not offend Article 30(1).

SECTION 52A

302. It consists of two sub-sections. Sub-section (1) provides that any dispute between the governing body and any member of the teaching and non-teaching staff of an affiliated college which is connected with the conditions of service of such member shall, on a request of the governing body or of the member concerned, be referred to a Tribunal of Arbitration consisting of one arbitrator nominated by the governing body and the other by the member of the teaching and non-teaching staff and an Umpire appointed by the Vice-Chancellor. Sub-section (2) in effect provides that the provisions of the Arbitration Act, 1940 shall apply to the arbitration under sub-section (1).

303. Counsel supporting the petitioners have urged that this amounts to external interference with the management of the affairs of the college. This provision is also intended to check the abuse of power of administration by the managing body and to provide a cheap and expeditious remedy to the small-pursed teaching and non-teaching staff. It is necessary in the interest of security of service. I am unable to discover any legitimate objection to it on the basis of Article 30(1).

ORDER OF THE COURT

304. By majority Sections 33A, 40, 41, 51A(1)(*b*), 51A(2)(*b*) and 52A of the Gujarat University Act, 1949 as amended do not apply to institutions established and administered by linguistic and religious minorities. All parties will pay and bear their own costs.