Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE/ORIGINAL/INHERENT JURISDICTION

CIVIL APPEAL NO.5808 OF 2017

Sk. Md. Rafique …Appellant

VERSUS

Managing Committee,
Contai Rahamania High Madrasah and Others …Respondents

WITH

C.A. No.6098/2017

CONMT.PET.(C) No.670/2017 In SLP(C) No.6661/2016

CONMT.PET.(C) No.669/2017 In SLP(C) No.6661/2016

CONMT.PET.(C) No.828/2017 In SLP(C) No.6661/2016

C.A. No.5809/2017

C.A. No.5826/2017

C.A. No.5817/2017

C.A. No.5814/2017

CONMT.PET.(C) No.583/2016 In SLP(C) No.6661/2016

C.A. No.5829/2017

W.P.(C) No.723/2016

CONMT.PET.(C) No.846/2016 In SLP(C) No.6661/2016

CONMT.PET.(C) No.1509/2017 in C.A. No.5808/2017

W.P.(C) No.629/2017

CONMT.PET.(C) No.1798/2017 in C.A. No.5808/2017

CONMT.PET.(C) No.937/2018 in C.A. No.5808/2017

CONMT.PET.(C) No.938/2018 in C.A. No.5808/2017

CONMT.PET.(C) No.1219/2018 in C.A. No.5808/2017

CONMT.PET.(C) No.1274/2018 in C.A. No.5808/2017

CONMT.PET.(C) No.1669/2018 in C.A. No.5808/2017

CONMT.PET.(C) No.1921-1922/2018 in C.A. No.5808/2017

J U D G M E N T

Uday Umesh Lalit, J.

1. These appeals arise out of the Judgment and Order dated 09.12.2015 passed by the Division Bench of the High Court[1] dismissing A.S.T. No.192 of 2014 and other connected matters and thereby affirming the decision of the Single Judge of the High Court passed on 12.03.2014 in Writ Petition No.20650 (W) of 2013 which in turn had found Sections 8, 10, 11 and 12 of the West Bengal Madrasah Service Commission Act, 2008 ("the Commission Act", for short) to be ultra vires.

1 The High Court of Judicature at Calcutta

2. The aforementioned Writ Petition No.20650(W) of 2013 was filed by the Managing Committee of Contai Rahmania High Madrasah challenging validity of Sections 8, 10, 11 and 12 of the Commission Act submitting, *inter alia*, that by virtue of the provisions of the Commission Act, the process of appointment of teachers in an aided Madrasah, which was recognised as a minority institution, was taken over and entrusted to the Commission appointed under Section 4 of the Commission Act; and that the Commission was empowered under the provisions of the Commission Act to make recommendations which would be binding on the Managing Committee of an aided Madrasah. It was submitted that the provisions of the Commission Act transgressed upon the rights of a minority institution of choosing its own teachers. The submission was accepted by the Single Judge of the High Court and the Writ Petition was allowed. Aggrieved, some of the candidates, including the Appellant herein, whose names were recommended by the Commission to be appointed as teachers in aided Madrasahs, filed appeal being A.S.T. No. 192 of 2014 before the Division Bench of the High Court. C.A.N. No. 3078 of 2014 was filed by the Secretary, West Bengal Madrasah Service Commission while M.A.T. No. 473 of 2014 was filed by State of West Bengal challenging the very same decision of the Single Judge. All the

appeals were dismissed by the Division Bench while affirming the view taken by the Single Judge.

3. The decisions of the Single Judge and the Division Bench have given rise to the present set of Appeals wherein number of Intervention Applications have also been filed.

STATUTORY PROVISIONS

4. The West Bengal Board of Madrasah Education Act, 1994 was enacted to establish a Board of Madrasah Education in West Bengal and to provide for matters connected therewith or incidental thereto. The expressions "Madrasah", "Madrasah Education", "Managing Committee" and "Senior Madrasah" are defined in Sections 2(f), (g), (h) and (p) as under:-

> "2(f) "Madrasah" means an educational institution imparting instruction in Madrasah Education;
>
> (g) "Madrasah Education" means a system of education in which instruction is imparted in Arabic, Islamic history and culture, and theology, and includes-
>
> (i) High Madrasah Education System which, in addition to covering Arabic language and Islamic history and culture, imparts general education including primary education with a view to qualifying students for admission to a certificate, diploma or degree course instituted by

> a University or by a Government or by any statutory authority, and includes such other type of education as the State Government may, in consultation with the Board, specify;
>
> (ii) Senior Madrasah Education System which imparts instruction in Arabic language and literature, Islamic theology, history, culture and jurisprudence and some general education with a view to qualifying students for a certificate, diploma or degree of the Board or a University or a Government or any other statutory authority;
>
> (h) "Managing Committee" used in reference to an Institution means the person or the body of persons for the time being entrusted with the management of the affairs of the Institution;
>
> … … …
>
> (p) "Senior Madrasah" means a Madrasah where the Senior Madrasah Education System is followed."

4.1 Chapter 2 of the Act *inter alia*, deals with establishment and composition of the Board while Section 18 deals with constitution of various Committees. Section 19 then deals with functions of the Committees as under:-

> **"19.Functions of Committee.-**(1) It shall be the duty of the Recognition Committee to advise the Board on all matters concerning recognition of Institutions.
>
> (2) It shall be the duty of the Syllabus Committee to advise the Board on all matters relating to the syllabus, courses of studies to be followed and the books to be studied in recognised Institutions and for examinations instituted by the Board.
>
> (3) It shall be the duty of the Examinations Committee to advise the Board on –

(a) matters relating to selection of paper setters, moderators, tabulators, examiners, invigilators, supervisors and others to be employed in connection with examinations instituted by the Board and the rates of remuneration to be paid to them;

(b) the fees to be paid by candidates for such examinations; and

(c) any other matter relating to such examinations which may be referred to it by the Board for advice

(4) It shall be the duty of the Finance Committee to prepare the budget of the Board and to advise the Board on such matters relating to finance as may be referred to it by the Board for advice.

(5) (a) All appeals by the members of the teaching and non-teaching staff against the decisions of the Managing Committees of the recognised Institutions shall be heard and decided by the Appeal Committee.

(b) The decisions of the Appeal Committee under clause (a) shall be final and no suit or proceeding shall lie in any Civil or Criminal Court in respect of any matter which has been or may be referred to, or has been decided by, the Appeal Committee.

(c) Any other Committee or Committees that may be constituted under clause (f) of sub-section (1) of section 18 shall have such powers or functions as the Board may confer or impose on such Committee or Committees."

4.2 Section 20 deals with functions of the Board as under:-

20. Functions of the Board. – (1) It shall be the duty of the Board to advise the State Government on all matters relating to Madrasah Education referred to it by the State Government.

(2) Subject to any general or special orders of the State government, the provisions of this Act and any rules made thereunder, the Board shall have generally the power to direct, supervise and control Madrasah Education and in particular, the power-

(a) to grant or refuse recognition to Madrasah and to withdraw such recognition if it thinks fit and necessary, after considering the recommendations of the Recognition Committee in accordance with such regulations as might be made in this behalf :

(b) to maintain a register of recognized Madrasahs;

(c) to provide by regulations, after considering the recommendations of the Syllabus Committee, if any, the curriculum, syllabus, courses or studies to be followed and books to be studied in recognized Madrasahs for examinations instituted by the Board;

(d) to undertake, if necessary, with the approval of the State Government, the preparation, publication or sale of text-books and other books for use in recognised Madrasahs;

(e) to maintain and publish list of holidays for recognised Madrasahs, list of books approved for use in recognized Madrasahs and for examinations instituted by the Board and to remove the name of any such book from any such list;

(ee) to maintain, print and issue from time to time, the Registration Certificate, Admit Card, Marksheet, Migration Certificate, Certificates and such other papers as it may thinks fit;

(f) To institute various Madrasah Examinations and such other similar examinations as it may think fit and to make regulations in this behalf;

(g) to set down the conditions to be fulfilled by the candidates presenting themselves for examinations instituted by the Board;

(h) to provide by regulations after considering the recommendations of the Examinations Committee, if any, the rates of remuneration' to be paid to the paper-setters, moderators, tabulators, examiners. invigilators, supervisors and others employed in connection with the examinations instituted by the Board, and, the fees to be paid by candidates for such examinations with the approval of the State Government;

(i) to grant or refuse permission to candidates to appear at examinations instituted by the Board and to withdraw such permission if it thinks fit in accordance with such regulations as may be made in this behalf;

(j) to provide by regulations the procedure for filling and disposal of appeals by the members of the teaching and non-teaching staff against the decisions of the Managing Committees of recognized Madrasahs;

(k) to administer the West Bengal Madrasah Education Board Fund;

(l) to institute and administer such Provident Funds as may be prescribed;

(m) to make regulations relating to the conduct, discipline and appeal in respect of the members of the staff ;

(mm) to make regulations relating to conduct and discipline in respect of teachers and non-teaching staff of the recognised Institutions under the Board;

(mmm) to make regulations determining

> the qualification for, and the method of, recruitment of teachers in class I to class IV of the Senior Madrasah;
>
> (n) to perform such other functions as may be assigned to it by the State Government.
>
> (3) Subject to the provisions of sub-section (2). the Board shall have power to make regulations in respect of any matter for the proper exercise of its powers under this Act.
>
> Provided that any decision or action taken or any order made by the Board in the discharge of its functions under this Act shall not be invalid merely on the ground that no regulation has been made under this sub-section.
>
> (4) No regulation shall be valid unless it is approved by the State Government and the State Government may, in accordance with such approval, make such additions, alterations or modifications therein as it thinks fit:
>
> Provided that before making any such addition, alteration or modification, the State Government shall give the Board an opportunity to express its views thereon within such period, not exceeding one month, as may be specified by the State Government.
>
> (5) All regulations approved by the State Government shall be published in the *Official Gazette*."

5. The West Bengal Minorities' Commission Act, 1996 was enacted to constitute a Minorities Commission to study and suggest additional social, economic, educational and cultural requirements of religious and linguistic minorities of West Bengal with a view to equipping them to preserve secular traditions of West Bengal and to promote national

integration. Section 3 deals with Constitution of the West Bengal Minorities' Commission and sub Sections (1) and (3) of Section 4 are as under:-

> "**4. Functions of the Commission.**– (1) The Commission shall perform the following functions:-
>
> (a) evaluate the progress of the development of minorities of West Bengal and review implementation of the policies and. programme of the State Government;
>
> (b) monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament or the State Legislature;
>
> (c) make recommendations for the effective enforcement and implementation of safeguards for the protection of the interests of minorities provided by the Central Government or the State Government;
>
> (d) look into specific complaints regarding deprivation of social, economic, educational, cultural and linguistic rights and safeguards of the minorities and take up such matters with the-appropriate authorities;
>
> (e) recommend to the State Government to accord minority status to religious, linguistic and ethnic groups, provided such groups do not enjoy any constitutional or statutory benefits or status;
>
> (f) cause studies to be undertaken into problems arising out of any discrimination against minorities and recommend measures for their removal;
>
> (g) conduct studies, research and analysis on the issues relating to socio-economic and educational development of minorities;

> (h) make annual report to the State Government on any matter pertaining to any of the functions of the Commission under this section.
>
> … …
>
> (3) The advice of the Commission and, especially, the findings of the Commission concerning deprivation of any right of the minority or any infringement of any well-being of the minority by omission or commission, shall ordinarily be binding upon the State Government."

6. The West Bengal School Service Commission Act, 1997 ("1997 Act", for short) was enacted to provide for the constitution of Regional School Service Commissions and a Central School Service Commission in the State and for matters connected therewith or incidental thereto. The definitions of "School" and "Teacher" in Section 2(n) and (p) are as under:-

> "(n) "school" means a recognized non-Government aided –
>
> (i) secondary school, or educational institution, or part or department of such school or institution, imparting instruction in a secondary education or
>
> (ii) higher Secondary school, or educational institution (other than a college), or part or department of such school or institution, imparting instruction in higher secondary education, or
>
> and includes a sponsored school.
>
> *Explanation I* –"Recognized" with its grammatical variations, used with reference to a school, shall mean –

(a) recognized or deemed to have been recognized under the West Bengal Board of Secondary Education Act, 1963 or

(b) recognized under the West Bengal Council of Higher Secondary Education Act, 1975,

Explanation II – "Aided" with its grammatical variations, used with reference to a school, shall mean aided by the State Government in the shape of financial assistance towards the basic pay of the teachers of that school.

Explanation III – "Basic pay" shall mean the monthly pay of a teacher of a school which corresponds to a stage in the time-scale of pay of the post, held by the teacher in that school.

Explanation IV – "Secondary Education" shall have the same meaning as in clause (1) of section 2 of the West Bengal Board of Secondary Education Act, 1963.

Explanation V – "Higher Secondary Education" shall have the same meaning as in clause (d) of section 2 of the West Bengal Council of Higher Secondary Education Act, 1975.

Explanation VI – "Sponsored School" shall mean a school declared as a sponsored school by the State Government by notification.

(p) "Teacher" means an Assistant Teacher or any other person, holding a teaching post of a school and recognized as such by the Board or the Council or the Board of Madrasah, as the case may be, and includes the Headmaster or the Headmistress [2](but shall not include the Assistant Headmaster or the Assistant Headmistress or the Teacher holding a post against short-term vacancy caused by deputation, leave or lien)."

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2 The words within brackets were inserted by the West Bengal School Service Commission (Second Amendment) Act, 2001.

6.1 Section 3 deals with constitution of the Commission and Regional Commissions. Section 4(4) dealing with composition of Chairman is as under:

> "(4) (a) The office of the Chairman shall be whole-time; the other members shall be honorary.
> (b) The Chairman and other members shall hold office for a term of four years [3][but in the case of *ex officio* member such term shall be one year]:
> (c) Subject to the foregoing provisions of this sub-section, the other terms and conditions of service of the Chairman and other members shall be such as may be prescribed."

6.2 Sections 7 and 9 are as under:-

> "7. **Functions of Regional Commission. –** Notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, it shall be the duty of the Regional Commission to recommend persons for appointment to the posts of Teachers or non-teaching staff in school within its territorial jurisdiction under he supervision and control of the Central Commission on the basis of the result of the State Level Selection Test conducted by the Central Commission.
>
> 9. **Effect of recommendation of Commission –** (1) Notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, appointments to the posts of Teachers and non-teaching staff in school shall be made by the Board or the *ad-hoc* committee or the administrator of the Board on the recommendation of the Regional Commission having jurisdiction.
>
> (2) Any appointment of a Teacher or a non-teaching staff made on or after the commencement of this Act

3 Words ins. By W.B. Act 5 of 2001.

> in contravention of the provisions of this Act shall be invalid and shall have no effect and the Teacher or the non-teaching staff so appointed shall not be a Teacher or a non-teaching staff within the meaning of clause (p) or clause (ia) of section 2, as the case may be."

6.3 Sub-sections (a) and (b) of Section 15, however, stipulated as under:

> "**15. Act not to apply in relation to certain schools**:-
>
> The provisions of this Act shall not apply to-
>
> (a) a school established and administered by a minority, whether based on religion or language, or
>
> (b) a school under any trust, established and administered by a minority, whether based on religion or language, or …… … "

7. By notification issued on 12.10.2007, Government of West Bengal, Minorities Development and Welfare and Madrasah Education Department declared and granted to all recognised and aided Madrasahs under the control of the Government the status of "Minority Educational Institutions". The text of the Notification was as under:-

> "Government of West Bengal
> Minorities Development & Welfare & Madrasah
> Education Department
> Writers' Buildings, Kolkata – 700001
>
> No.1465-MD/07 Dated: 12.10.07

NOTIFICATION

WHEREAS Muslim recognised as Minority Community in the State of West Bengal and minorities have the right under Article 30 of the Constitution of India to establish and administer educational institution of their choice;

AND WHEREAS the State Government is competent to declare a particular institution as a minority institution and till such time the government issue an order declaring that it is a minority institution they can not operate as Minority Institutions;

AND WHEREAS the Supreme Court has held that the Government are the Competent Authority to verify and determine the minority status of an Educational Institution for the purpose of Article 30(1) of the Constitution of India;

AND WEHREAS the Govt. recognised Madrasahs including Hooghly Govt. Madrasah and the Calcutta Madrasah were originally established by the Muslim minority and continuously administered by the members of that minority to subserve and promote the interests of the minority community concerned;

AND WEHREAS the abovesaid Madrasahs were, in course of times, recognised alongwith liabilities by the Government for promoting educational interests of the Muslim minority and on verification it has been ascertained that more than 90% students are pursuing their studies in these institutions and these Madrasahs are functioning under supervision of the W.B. Madrasah Board constituted with member representatives of the Minority Community concerned.

AND WHEREAS the State Govt. having been satisfied about the above antecedents of all the recognised Madrasahs which are aided and guided by the Government prescribed guidelines relating to admissions, selections etc. and about their continuing

and sustained functioning for promoting the interests of the concerned minority have become satisfied that these institutions are fit to enjoy minority status of an Educational Institution for the purpose of Article 30(1) of the Constitution of India.

AND WHEREAS the Govt. in the State of West Bengal have also considered expedients to declare these recognized and aided Madrasahs and those which will be so recognised and aided as such in future as Minority Educational Institution.

NOW, THEREFORE, in accordance with the above considerations and in pursuance of the Article 30 of the Constitution of India the Government is pleased, hereby, to declare that all the recognised and aided Madrasahs under control of this Government and those Madrasahs which will be recognised on similar lines in future, as Minority Educational Institutions. These institutions will also be allowed, in consequence to have the following effects as agreed upon by the State Government.

i) They will continue to get financial assistance as before from the State Government
ii) Reservation policy for employment etc. shall not apply in case of appointment of teachers and non-teaching staff in these Madrasahs.
iii) Selection of teachers may continue to be done by West Bengal School Service Commission through separate panel.

By order of the Governor

(Pawan Agawal)
Secretary to the Govt. of West Bengal"

8. Consequent to the aforesaid notification dated 12.10.2007 conferring status of "Minority Educational Institutions" on all recognised and Government aided Madrasahs, another notification was issued on

28.12.2007 by the Government of West Bengal, Minorities' Development & Welfare and Madrasah Education Department stating that after being conferred such status "the matter of selection of teachers for recognised and aided Madrasahs of this State has gone out of the purview of the existing West Bengal School Service Commission Act, 1997".

9. The Commission Act was thereafter enacted to provide for the constitution of Madrasah Service Commission in the State and for matters connected therewith or incidental thereto. Statement of Objects and Reasons in relation to the Commission Act was as under:-

> "With the declaration of recognised madrasahs as minority educational institutions by the State Government recently, the West Bengal School Service Commission cannot recommend panel of teachers for recognised madrasahs as per provisions of Section 15 of the West Bengal School Service Commission Act, 1997 (West Bengal Act IV of 1997). Therefore, a need has arisen for setting up of a separate body for recommending panel of teachers for appointment in Recognised Non-Government Aided Madrasahs. In view of this, it has been decided to set up the West Begal Madrasah Service Commission.
>
> 2. The proposed Commission would ensure the preparation of panel of teachers by recruitment in free, fair and transparent manner with a quality education for madrasahs.
>
> 3. The said Commission would also take into consideration the special requirement of teachers in the madrasahs system in the State.

> 4. The Bill has been framed with the above objects in view."

9.1 The expressions "Madrasah", "Teacher" and "vacant post" are defined in Section 2(k), (s) and (t) respectively under the Commission Act as under:-

> "(k) "Madrasah" means a Recognised Non-Government Aided Senior Madrasah, Junior High Madrasah, High Madrasah or Higher Secondary Madrasah imparting instruction in-
>
> (i) High Madrasah Education System within the meaning of sub-clause (i)
>
> (ii) Senior Madrasah Education System within the meaning of sub-clause(ii), of clause (g) of Section 2 of the West Bengal Board of Madrasah Education Act, 1994; or
>
> (iii) Higher Secondary Education;
> Explanation1. – "recognised" with its grammatical variations, used with reference to a Madrasah, shall mean-
>
> (a) Recognized or deemed to have been reconized under the West Bengal Board of Madrasah Education Act, 1994, or
>
> (b) Recognized under the West Bengal Council of Higher Secondary Education Act, 1975
>
> Explanation II. – "Aided" with its grammatical variations, used with reference to a Madrasah, shall mean aided by the State Government in the shape of financial assistance towards basic pay of the teachers of Madrasah.
>
> Explanation III. – "basic pay" shall mean the monthly pay of a teacher of a Madrasah which corresponds to

a stage in the timescale of pay of the post held by the teacher in that madrasah,

Explanation IV.- "Madrasah Education" shall have the same meaning as in clause (g) of section 2 of the West Bengal Board of Madrasah Education Act, 1994;

Explanation V.- "Higher Secondary Education" shall have the same meaning as in clause (d) of section 2 of the West Bengal Council of Higher Secondary Education Act, 1975.

(s) "Teacher" means an Assistant Teacher, or any other person holding a teaching post of a madrasah recognised as such by the Board or the Council, as the case may be, and shall include the headmaster, the Headmistress or the Superintendent.

(t) "vacant post" means a vacancy, caused by–

(i) creation of new post by the State Government, or
(ii) retirement, death, resignation, removal or dismissal of any person from the post of teacher, the post having been sanctioned by the Competent authority or the State Government,

but shall not include a short-term vacancy due to deputation, leave or lien and that of a part time post or the post of Assistant Headmaster or Assistant Headmistress."

9.2 Section 4 deals with composition of the Commission and is to the following effect:-

"4. (i) The Commission shall consist of one Chairman and four members.

(ii) The Chairman shall be an eminent educationist having profound knowledge in Islamic Culture and well-versed in education and teaching experience, either as a teacher of a university, or as a Principal of

> a college, for a period of not less than twelve years, or as a teacher, other than Principal of a college, for a period of not less than fifteen years, or an officer of the State Government not below the rank of Joint Secretary.
>
> (iii) Of the four members under sub-section (1), one shall be a person who, not being an educationist, occupies or has occupied, in the opinion of the State Government, a position of eminence in public life or in Legal or Administrative service, one shall be an eminent educationist having profound knowledge in Islamic Theology and Culture, and the others shall have teaching experience, either as a teacher of a university, or as a Principal of a college, for a period of not less than ten years, or as a teacher, other than Principal of a college, or as a Headmaster or Headmistress or Superintendent of a Madrasah, for a period of not less than fifteen years."

9.3 Sections 8, 10, 11, 12, 13 and 18 of the Commission Act are as under:-

> "8. Notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, it shall be the duty of the Commission to select and recommend persons to be appointed to the vacant posts of teachers in accordance with the provisions of this Act and the rules made thereunder.
>
> …
>
> 10. Notwithstanding anything contained in any other law for the time being in force or any contract, custom or usage to the contrary, the Managing Committee, the ad hoc Committee or the Administrator, as the case may be, shall be bound to appoint the candidate recommended by the Commission to the post of teacher in the Madrasah concerned as per vacancy report.
>
> Provided that in the absence of the Managing Committee, ad hoc Committee or the Administrator,

the Head Master or the Headmistress or the Teacher-In-charge is empowered to issue appointment letter to the candidate recommended by the Commission. Such matter should be ratified at the next available meeting of the Managing Committee, ad hoc Committee or by the Administrator, as the case may be:

Provided further that the Managing Committee, ad hoc Committee, the Administrator or the Headmaster or the Headmistress or the Teacher-in-charge as the case may be, shall, if any error is detected in the recommendation, immediately bring it to the notice of the Commission for removal of such error.

11. Any appointment of a teacher made on or after the commencement of this Act in contravention of the provision of this Act shall be invalid and shall have no effect and teacher so appointed shall not be a teacher within the meaning of clause (s) of Section 2.

12. (i) If the Managing Committee, the ad hoc Committee or the Administrator of a Madrasah, as the case may be, refuses, fails or delays to issue appointment letter to the candidate recommended by the Commission within the period stipulated in the letter of recommendation by the Commission, without any reasonable ground, the State Government may direct the Board to dissolve the Managing Committee or the ad hoc Committee, or discharge the Administrator, as the case may be, or stop all financial assistance to such Madrasah recording reasons thereof and may also issue direction upon the Board or Council, as the case be, to withdraw recognition or affiliation of such Madrasah.

(ii) In case of failure to issue appointment letter to the candidate recommended by the Commission is on the part of the Superintendent, the Headmaster, the Headmistress or the Teacher-in-charge of a Madrasah, he shall be subject to such disciplinary proceedings as may be prescribed.

> 13. Notwithstanding anything contained elsewhere in this Act, the terms and conditions of service of teachers in the employment of a Madrasah immediately before the commencement of this Act, shall not be varied to the disadvantage of such teachers in so far as such terms and conditions relate to the appointment of such teachers to the posts held by them immediately before the commencement of this Act.
>
> … … …
>
> 18. (1) The State Government may, by notification, make rules for carrying out the purposes of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters:-
>
> (a) the terms and conditions of service of the Chairman and other members under section 5;
> (b) the manner in which an inquiry is to be made for removal of the Chairman or any member under section 6;
> (c) the terms and conditions of service of the Secretary under section 7;
> (d) the manner and scope of selection of persons for appointment to the posts of teachers under section 9;
> (e) any other matter which may be, or is required to be, prescribed.
>
> (3) Every rule made by the State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature."

10. The West Bengal Madrasah Service Commission (Amendment) Act, 2010 made certain amendments in the Commission Act. Section 2 of the Amendment Act is to the following effect:-

> "2. In section 8 of the West Bengal Madrasah Service Commission Act, 2008 (hereinafter referred to as the principal Act), after the words "or the Non-teaching staff', the words "and also to recommend the transfer including mutual transfer of the teachers of the Non-teaching staff' shall be inserted."

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11. In exercise of power conferred by the provisions of the Commission Act, the West Bengal Madrasah Service Commission Recruitment (selection and recommendation of persons for appointment and transfer to the posts of teaching and non-teaching staff) Rules, 2010 ("2010 Rules", for short) were promulgated. Chapter-III of 2010 Rules deals with subject "Scope, Method and Manner of Selection" and Rule 8 is to the following effect:-

> "**8. Manner of selection –**
> (1) Selection to any post shall be made on the basis of results of the State/Region/Area Level Selection Test, as may be decided by the Commission, which may comprise any, some or all of the following (as the case may be) –
>
> a) Written Examination
> b) Evaluation of Qualification
> c) Personality Test
> d) Aptitude Test
>
> of the candidates, as the case may be, in the manner as specified in Schedule III
>
> (2) The Commission may, in its discretion, fix the minimum qualifying marks to be scored/obtained by the candidates in written examination or in aggregate or in both and relax the qualifying marks on reasonable ground(s) to be recorded in writing …."

RIVAL SUBMISSIONS:

12. In accordance with the provisions of the Commission Act and 2010 Rules, the Madrasah Service Commission kept making recommendations against vacant posts which had arisen from time to time. Various candidates were appointed as teachers. However, a challenge was raised by the Respondent No.1 by filing Writ Petition No.20650(W) of 2013 as stated hereinabove. It was submitted that in terms of Section 10 of the Commission Act, the Managing Committee or the Administrator would be bound to appoint the candidates recommended by the Madrasah Service Commission and the consequence of not following such recommendation would visit penalty as provided for in Section 12; and that if the Writ Petitioner, as a minority institution, was entitled to administer institution of its choice, it would have a corresponding right to select teachers on its own and that any deprivation of such right would be violative of the Right conferred by Article 30 of the Constitution.

On the other hand, it was submitted on behalf of the State that under the provisions of the Commission Act, the Commission would merely select and recommend teachers and non-teaching staff of

Madrasahs but the appointment would be given by the concerned institution and the overall control of the Managing Committees of the concerned institutes in respect of such staff was not taken away by the Respondents and the day-to-day administration of the Madrasahs was not interfered with. It was further submitted that the number of Madrasahs in the State was 614 and the Madrashs imparted education in accordance with the syllabus prescribed by the competent authority in respect of all subjects, except Arabic and Urdu; that most of the Madrasahs were located in the remote areas of the State and the student population taking education in these Madrasahs was about 5,00,000. The submission was that the State was rendering necessary aid and help to the Managing Committees in finding good quality teachers as per qualifications prescribed by the National Council for Teacher Education for imparting quality education to the students and the whole purpose behind the legislation was to provide the students with good quality teaching. The submission was paraphrased by the Single Judge as under:-

> "For the respondents there are primarily two grounds justifying the relevant provisions of such a legislation. First, the concerned Madrasah is fully aided for its financial requirements which is fulfilled by the State Government. Therefore, it is bound to follow recruitment procedures for fair and comparative selection of teachers. Secondly, in terms of the provisions of the impugned Act the Commission merely selects and recommends a teacher but overall control of such staff lies with the Managing

> Committee where the government does not interfere. Thus the role of the Commission is that of a mere recommendatory body appointed by the government."

DECISIONS OF THE HIGH COURT IN THE PRESENT APPEALS

13. Relying on the decisions of this Court in ***State of Kerala, etc vs. Very Rev. Mother Provincial, etc***[4] and ***Ahmedabad St. Xavier's College Society and Another vs. State of Gujarat and Another***[5] the Single Judge observed:-

> "The Supreme Court has also held that the right to administer an institution is primarily to consist of four principal aspects. First, the right to chose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their committee or body consisting of persons selected by them. Secondly, the right to choose its teachers having compatibility with their ideals, aims and aspirations. Third is the right not to be compelled to refuse admission to the students. Fourthly, the right to use its properties and assets for the benefit of its institution. This judgment thus unambiguously recognizes that the right to select its teachers is a part of the right to administer an institution which Article 30 has conferred on it. The reasons for that has also been very clearly explained in the judgment … … …"

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4 (1970) 2 SCC 417

5 (1974) 1 SCC 717

13.1 The Single Judge relied upon the decisions of this Court in ***Secretary, Malankara Syrian Catholic vs. T. Jose and others***[6] and ***Sindhi Education Society and another vs. Chief Secretary, Government of NCT of Delhi and others***[7] and posed following question:-

> "That regulatory measures are permissible to a limited extent has been judicially accepted. But does the provision impugned in this legislation qualify for being passed as a regulatory measure? In view of the well defined parameters of the regulatory measures can it be said that taking away the right of selection of teachers from the jurisdiction of the petitioners is also an act to regulate the affairs of the Madrasah and not to interfere with its administration? Answers to these queries are essentially related to a resolution of the present dispute."

13.2 Further, after referring to the decision in ***Ahmedabad St. Xavier's College***[5] the Single Judge observed:-

> "… …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 interest of efficiency of instructions, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. It has been specifically laid down hat such regulations are not restrictions on the subsistence of the right which is guaranteed. On the other hand, they secure the proper functioning of the institution in matters of education. The minority institutions cannot be allowed to fall below the standards of excellence expected of an educational

6 (2007) 1 SCC 386
7 (2010) 8 SCC 49

> institution or under the guise of exclusive right of management to decline to follow the general patern."

13.3. The Single Judge then concluded:-

> "Thus, I find that the impugned provisions of the Act tend to take away the protected right conferred upon the minorities to administer institutions according to their choice. The right of the Commission to select and recommend teachers for these institutions in a very major way interferes with the right to administer those institutions rendering a constitutional mandate virtually ineffective. The perception of a prevailing social reality cannot circuitously circumvent a constitutional protection.
>
> The impugned provisions of the Act are thus not only not in consonance with the protection guaranteed by the Constitution but are definitely in derogation thereof. Section 8 of the Act cannot be read in isolation. Read with the subsequent provisions there is an element of compulsion in the effect of the recommendation made by the Commission which is really against the freedom guaranteed in Article 30 of the Constitution of India. Section 8 of the said Act is hereby declared ultra vires the Constitution. In view of what has been discussed before the prayer of the petitioner is moulded and Sections 10, 11 and 12 of the act are also declared ultra vires the Constitution."

14. The challenge raised by the Commission, by the State as well as by the teachers who were recommended under the provisions of the Commission Act was rejected by the Division Bench of the High Court, while accepting the view taken by the Single Judge. The Division Bench observed:-

> "The present enactment is sought to be defended by the State on the ground of funding the institutions and opinion that it is only recommendatory process and not interference with the overall administration of the

institutions. We are afraid whatever by the nature of recommendations it would definitely touch upon the administrative authority or control to be exercised by the minority institutions while administering their institutions in every aspect and respect since institutions would not have the option to choose individuals beyond the recommendations so made. Hence, the scheme of the Act instead of being regulatory, prohibits the freedom of minority institutions in selecting its own personnel. It is one thing to regulate the process of appointment by providing guidelines etc. it is however entirely different to clog the right of choice of the minority institution by prohibiting them to choose any candidate otherwise eligible except from those recommended by the Commission. Since appointment of teachers etc. is very relevant so far as the quality of education is concerned, if there are any mala fides statutory infirmities brought to the notice of the State Government as it is completely funded by the State Government, it is open to the State Government to withdraw financial support if mala fides/illegalities are found in such process of selection of teaching staff etc. Such right is always with the State Government irrespective of minority institutions or other institutions.

So far as the present enactment is concerned, we cannot deviate from the opinion of the learned Single Judge that such act is nothing but violation of the Fundamental Rights guaranteed by the Constitution in terms of Article 29 and 30 of the Constitution of India. Therefore, we decline to interfere with the opinion expressed by the learned Single Judge and accordingly appeals deserve to be dismissed.

We have also heard the submissions made by the learned Counsel who are appearing for some of the teachers who are already appointed and are in service for the last five years or waiting for the appointment of teachers as empanelled in the list.

Since the Act of 2008, according to us is nothing but violation of the Fundamental Rights guaranteed

> by the Constitution to the minority institutions, it is exclusively left to the concerned Madrasahs either to accept contention of such teachers, who are already in service and permit them to continue in service and/or to provide appointment to the candidates who are empanelled by the Commission awaiting such appointment.
>
> With these observations, the appeals are disposed of along with the connection applications."

15. We heard Mr. Mohan Parasaran, Mr. Kalyan Banerjee, Mr. Huzefa Ahmadi, Mr. Jayant Bhushan, Mr. Jaideep Gupta, Mr. Salman Khursheed and Mr. P.S. Patwalia, learned Senior Advocates appearing for various parties and other learned Advocates who took us through the relevant decisions holding the field and also invited our attention to various statutory provisions. Since the submissions, to a certain extent, were over lapping, we are not dealing with the submissions advanced by the learned Counsel individually.

16. The basic issues which arise for consideration are whether the provisions, namely, Sections 8, 10, 11 and 12 of the Commission Act are ultra vires as held by the High Court and whether these provisions transgress the right of minority institutions guaranteed under the Constitution of India. Before we deal with the basic issues raised in these appeals, the various decisions touching upon the extent of rights of minority institutions as guaranteed by the Constitution, need to be adverted

to. Since the decision of this Court in ***TMA Pai Foundation and others vs. State of Karnataka and others***[8] was rendered by a Bench of Eleven Judges, we have divided the discussion under three headings covering relevant decisions:-

A) Decisions upto TMA Pai Foundation;

B) Decision in TMA Pai Foundation; and

C) Decisions after TMA Pai Foundation.

A) **Decisions upto TMA Pai Foundation**

17. In ***Re: The Kerala Education Bill, 1957***[9], a seven Judge Bench of this Court dealt with a reference made by the President of India under Article 143(1) of the Constitution in respect of the Kerala Education Bill, 1957. Some of the salient features of the Bill were paraphrased in the majority opinion delivered by S.R. Das, C.J. and insofar as the present case is concerned, the relevant discussion was:-

> "Clause 9 makes it obligatory on the Government to pay the salary of all teachers in aided schools direct or through the headmaster of the school and also to pay the salary of the non-teaching staff of the aided schools. It gives power to the Government to prescribe the number of persons to be appointed in the non-teaching establishment of aided schools, their salaries, qualifications and other conditions of service. The Government is authorised, under sub-clause (3), to pay to the manager a maintenance grant at such

8 (2002) 8 SCC 481
9 (1959) SCR 995

rates as may be prescribed and under sub-clause (4) to make grants-in-aid for the purchase, improvement and repairs of any land, building or equipment of an aided school. Clause 10 requires Government to prescribe the qualifications to be possessed by persons for appointment as teachers in Government schools and in private schools which, by the definition, means aided or recognised schools. The State Public Service Commission is empowered to select candidates for appointment as teachers in Government and aided schools according to the procedure laid down in clause 11. Shortly put, the procedure is that before the 31st May of each year the Public Service Commission shall select for each district separately candidates with due regard to the probable number of vacancies of teachers that may arise in the course of the year, that the list of candidates so selected shall be published in the Gazette and that the manager shall appoint teachers of aided schools only from the candidates so selected for the district in which the school is located subject to the proviso that the manager may, for sufficient reason, with the permission of the Commission, appoint teachers selected for any other district. Appointment of teachers in Government schools are also to be made from the list of candidates so published. In selecting candidates the Commission is to have regard to the provisions made by the Government under clause (4) of Art. 16 of the Constitution, that is to say, give representation in the educational service to persons belonging to the Scheduled Castes or Tribes–a provision which has been severely criticised by learned counsel appearing for the Anglo-Indian and Muslim communities."

(Emphasis supplied)

17. 1 The grievance as raised was set out as under:-

"Their grievances are thus stated : The gist of the right of administration of a school is the power of appointment, control and dismissal of teachers and other staff. But under the said Bill such power of

> management is practically taken away. Thus the manager must submit annual statements (cl. 5). The fixed assets of the aided schools are frozen and cannot be dealt with except with the permission of the authorised officer (cl. 6). No educational agency of an aided school can appoint a manager of its choice and the manager is completely under the control of the authorised officer, for he must keep accounts in the manner he is told to do and give periodical inspection of them, and on the closure of the school the accounts must be made over to the authorised officer (cl. 7). All fees etc. collected will have to be made over to the Government (cl. 8(3)). Government will take up the task of paying the teachers and the non-teaching staff (clause 9). Government will prescribe the qualification of teachers (clause 10). The school authorities cannot appoint a single teacher of their choice, but must appoint persons out of the panel settled by the Public Service Commission (clause 11). The school authorities must provide amenities to teachers and cannot dismiss, remove, reduce or even suspend a teacher without the previous sanction of the authorised officer (clause 12).
>
> (Emphasis supplied)

17. 2 The majority opinion observed:-

> "We are thus faced with a problem of considerable complexity apparently difficult of solution. There is, on the one hand the minority rights under Art. 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 Art. 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. The directive principles cannot ignore or override the fundamental rights but must, as we have said, subserve the fundamental rights. We have already observed that Art. 30(1) gives two rights to the minorities, (1) to establish and (2) to administer, educational

institutions of their choice. The right to administer cannot obviously include the right to mal-administer. The minority cannot surely ask for aid or recognition for an educational institution 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…."

"…..Clauses 6, 7, 9, 10, 11, 12, 14, 15 and 20 relate to the management of aided schools. Some of these provisions, e.g., 7, 10, 11(1), 12(1)(2)(3) and (5) may easily be regarded as reasonable regulations or conditions for the grant of aid. 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 fund and taking away the prestige of the school, for none will care for the school authority. Likewise clause 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 particular 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 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 cls. 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. We, however, find it impossible to support cls. 14 and 15 of the said Bill as mere regulations. The provisions of those clauses may be totally destructive of the rights under Art. 30(1). It is true that the right to aid is not implicit in Art. 30(1) but the provisions of those clauses, if submitted to on account of their factual compulsion as condition of aid, may easily be violative of Art. 30(1) of the Constitution. Learned counsel for the State of Kerala recognizes that cls. 14 and 15 of the Bill may annihilate the minority communities' right to manage educational institutions of their choice but submits that the validity of those clauses is not the subject-matter of question 2. But, as already explained, all newly established schools seeking aid or recognition are, by clause 3(5), made subject to all the provisions of the Act. Therefore, in a discussion as to the constitution validity of clause 3(5) a discussion of the validity of the other clauses of the Bill becomes relevant, not as and by way of a separate item but in determining the validity of the provisions of clause 3(5). In our opinion, sub-clause 3 of clause 8 and cls. 9, 10, 11, 12 and 13 being merely regulatory do not offend Art. 30(1), but the provisions of sub-clause (5) of clause 3 by making the aided educational institutions subject to cls. 14 and 15 as conditions for the grant of aid do offend against Art. 30(1) of the Constitution."

(Emphasis supplied)

18. In ***Rev. Sidhajbhai Sabhai and Others v. State of Bombay and Another***[10]**,** a Bench of six Judges of this Court was called upon to decide following controversy:-

> "The petitioners moved this Court for a writ in the nature of *mandamus* or other writ directing the State of Bombay and the Director of Education not to compel the society and the petitioners to reserve 80% or any seats in the training, College for "the Government nominated teacher" nor to compel the society and the petitioners to comply with the provisions of Rules 5(2), 11, 12 and 14 and not to withdraw recognition of the College or withhold grant-in-aid under Rule 14 or otherwise."

18.1 The petitioners, members of a religious denomination and constituting a religious minority were running a Training College for teachers and 80% of the seats in all non-Government Training Colleges were directed to be reserved for "the government nominated teachers" so that such trained teachers could then be absorbed in Primary and Basic Schools in the State run by District School or Municipal Boards.

18.2 It was submitted on behalf of the State that since the School run by the Petitioners was receiving grant from the State, the State was within its rights to direct reservation of seats as above. After referring to the decision of this Court in ***Re: The Kerala Education Bill case***[9]**,** it was observed by this Court as under:-

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10 (1963) 3 SCR 837

"Article 30(1) provides that all minorities have the right to establish and administer educational institutions of their choice, and Art. 30(2) enjoins the State, in granting aid to educational institutions not to discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. Clause (2) is only a phase of the non-discrimination clause of the Constitution and does not derogate from the provisions made in clause (1). The clause is moulded in terms negative : the State is thereby enjoined not to discriminate in granting aid to educational institutions on the ground that the management of the institution is in the hands of a minority, religious or linguistic, but the form is not susceptible of the inference that the State is competent otherwise to discriminate so as to impose restrictions upon the substance of the right to establish and administer educational institutions by minorities, religious or linguistic. Unlike Art. 19, the fundamental freedom under clause (1) of Art. 30, is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Art. 19 may be subjected to. All minorities, linguistic or religious have by Art. 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Art. 30(1) would to that extent be void. 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.

(Emphasis supplied)

18.3 The effect of the opinion in ***Re: The Kerala Education Bill***[9] was considered as under:-

> It was therefore held that notwithstanding the absolute terms in which the fundamental freedom under Art. 30(1) was guaranteed, it was open to the state by legislation or by executive direction to impose reasonable regulation. 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[9], 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 or public interest, are valid."
>
> The right established by Art. 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Art. 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. 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. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Art. 30(1) will be but a "teasing

> illusion", a promise of unreality. 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. 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."
>
> (Emphasis supplied)

18.4 Finally, it was held,

> "We are, therefore, of the view that the Rule 5(2) of the Rules for Primary Training Colleges, and Rules 11 and 14 for recognition of Private Training institutions, insofar as they relate to reservation of seats therein under orders of Government, and directions given pursuant thereto regarding reservation of 80% of the seats and the threat to withhold grant-in-aid and recognition of the college, infringe the fundamental freedom guaranteed to the petitioners under Art. 30(1)."

19. In ***Rev. Father W. Proost and Others. vs. the State of Bihar and Others***[11]**,** a Bench of five Judges of this Court was called upon to consider the validity of certain provisions including Section 48-A of the Bihar State Universities Act, 1960. In terms of said Section 48-A, no appointments, dismissals, removals and termination of service or reduction in rank of teachers could be made by the governing body of any college without the recommendations of the University Service Commission. By virtue of

11AIR 1969 SC 465 = (1969) 2 SCR73

Section 48A(6), the Commission was empowered to recommend to the governing body of a college for appointment to every post of teacher, names of two persons arranged in order of preference which were considered by the Commission to be the best qualified for such posts. While the challenge was pending in this Court, Section 48-B was introduced which stated *inter alia* that notwithstanding anything contained in certain provisions including in sub-Section (6) of 48-A, the governing body of an affiliated College established by a minority would be entitled to make appointments, dismissals, removals, termination of service or reduction in rank of teachers or other disciplinary measures subject only to the approval of the Commission and the Syndicate of the University. Thus, instead of the Commission making the recommendations under the unamended provisions, now the governing body established by a minority could make appointments which were however subject to the approval by the Commission and the Syndicate of the University. While allowing the petition this Court observed :-

> "The learned Attorney General seeks to read into the protection granted by Art. 30(1) a corollary taken from Art. 29(1). He concedes that the Jesuits community is a minority community based on religion and that, therefore, it has a right to establish and administer educational institutions of its choice. But he contends that as the protection to minorities in Art. 29(1) is only a right to conserve a distinct language, script or culture of its own, the college does not qualify for the protection of Art. 30(1) because it is

> not founded to conserve them. The question, therefore, is whether the college can only claim protection of s. 48-B of the Act read with Art. 30(1) of the Constitution if it proves that the college is furthering the rights mentioned in Art. 29(1).
>
> 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 minorities to establish educational institutions of their choice. This choice is not limited to institution 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.
>
> … … …
>
> In our judgment the language of Art. 30(1) is wide and must receive full meaning. We are dealing with protection of minorities and attempts to whittle down the protection cannot be allowed. We need not enlarge the protection but we may not reduce a protection naturally flowing from the words. Here the protection clearly flows from the words and there is nothing on the basis of which aid can be sought from Art. 29(1).”

20. In ***State of Kerala, etc vs. Very Rev. Mother Provincial, etc***[4], a Bench of six Judges of this Court considered challenge to certain

provisions of the Kerala University Act, 1969. The ambit of the concerned provisions was set out by this Court as under:-

> "16. Section 53, Sub-sections (1), (2) and (3) confer on the Syndicate of the University the power to veto even the action of the governing body or the managing council in the selection of the principal. Similarly, Sub-section (4) takes away from the educational agency or the corporate management the right to select the teachers. The insistence on merit in Sub-section (4) or on seniority-cum-fitness in Sub-section (1) does not save the situation. The power is exercised not by the educational agency or the corporate management but by a distinct and autonomous body under the control of the Syndicate of the University. Indeed Sub-section (9) gives a right of appeal to the Syndicate to any person aggrieved by the action of governing body or the managing council thus making the Syndicate the final and absolute authority in these matters. Coupled with this is the power of Vice-Chancellor and the Syndicate in Sub-sections (2) and (4) of Section 56."

20.1 Thereafter, this Court extracted the relevant provisions which took away the power to take disciplinary action from the governing body and the managing council and conferred it upon the University. The decision of the High Court which had found said provisions to be ultra vires was affirmed by this Court as under:-

> "19. The result of the above analysis of the provisions which have been successfully challenged discloses that that High Court was right in its appreciation of the true position in the light of the Constitution. We agree with the High Court that Sub-Sections (2) and (4) of Sections 48 and 49 are ultra vires Article 30(1). Indeed we think that Sub-Sections (6) of these two

> sections are also ultra vires. They offend more than the other two of which they are a part and parcel. We also agree that Sub-sections (1), (2), (3) and (9) of Section 53, Sub-Sections (2) and (4) of Section 56 are ultra vires as they fail with Sections 48 and 49. We express no opinion regarding these sub-sections vis-a-vis Article 30(1). We also agree that Section 58 (in so far as it removes disqualification which the founders may not like to agree to) and Section 63 are ultra vires Articles 30(1) in respect of the minority institutions. The High Court has held that the provisions (Except Section 63) are also offensive to Article 19(1)(f) in so far as the petitioners are citizens of India both in respect of majority as well as minority institutions. This was at first debated at least in so far as majority institutions were concerned. The majority institutions invoked Article 14 and complained of discrimination. However, at a later stage of proceedings Mr. Mohan Kumaramangalam stated that he had instructions to say that any provision held inapplicable to minority institutions would not be enforced against the majority institutions also. Hence it relieves us of the task of considering the matter under Article 19(1)(f) not only in respect of minority institutions but in respect of majority institutions also. The provisions of Section 63 affect both kinds of institutions alike and must be declared ultra vires in respect of both."

21. In ***D.A.V. College, etc.. vs. State of Punjab and Others***[11]**,** a Bench of five Judges of this Court considered the challenge to certain provisions of the Guru Nanak University, Amritsar, Act, 1969 and notifications issued pursuant thereto. Under Section 2(1)(a) of the Act, a College applying for admission to the privileges of the University was obliged to have a regularly constituted governing body consisting of not more than 20 persons approved by the Senate which body must also include two

representatives of the University. Section 17 required that the staff initially appointed must be approved by the Vice Chancellor and any subsequent changes be reported to the University for Vice-Chancellor's approval. These Sections were struck down by this Court as affecting the fundamental rights of the petitioners. During the course of its discussion this Court stated as under:-

> "36. We have already seen that in *Rev. Father W. Proost and Ors. v. the State of Bihar and Ors.*[11], the provisions of Section 48(A) which required the selection of the teachers of all affiliated Colleges including the Colleges established by the minorities, to be made by the University Service Commission, was held to interfere with the rights of the petitioners in that case. In that case, while the petition was pending in the Court, Section 48 (B) was added to the Bihar State University Act whereby notwithstanding the provisions of Section 48 (A) exemption was given to the minority institutions to make appointments with the approval of the Commission and the Syndicate, the petitioners claimed exemption under Section 48(B) and submitted that as an affiliated College established by a minority based on religion or language they are exempted from Section 48 (A) and that if this petition was accepted they will withdraw the petition which had become superfluous. Even this prayer was not acceded to by the State and consequently it was held that they were entitled to the exemption claimed. This decision is not therefore an authority for the proposition that even the requirement that the staff of a minority educational institution be appointed, dismissed or removed only with the approval of the University or the State does not infringe the right to administer the institution guaranteed under Article 30(1).
>
> 37. In our view there is no possible justification for the provisions contained in Clauses 2(1)(a) and 17 of

> Chapter V of the statutes which decidedly interfere with the rights of management of the petitioners colleges. 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).
>
> 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."

22. In ***Ahmedabad St. Xavier's College Society and Another vs. State of Gujarat and Another***[5] the applicability of some of the provisions of the Gujarat University Act, 1949 to a college run by a minority was in issue before a Bench of nine Judges of this Court. Three sets of provisions were impeached as being violative of Article 30, viz. **(i)** *Sections 40 and 41* in terms of which all colleges within the University area would be governed

by the statutes of the University which may provide for minimum educational qualifications for teachers and tutorial staff and the University may approve the appointments of teachers and may coordinate and regulate the facilities provided and expenditure incurred by such colleges for teaching and research; **(ii)** *Sections 33A(1)(a) and 33A(1)(b)* under which the management of a governing body of every college must include amongst others, 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. Further, under Section 33A(1)(b), for the purposes of recruitment of the principal and members of the teaching staff, there would be a selection committee, which, in the case of recruitment of the principal, must include a representative of the University nominated by the Vice-Chancellor and in case of recruitment of a member of teaching staff, a representative of the University nominated by the Vice-Chancellor and the Head of the Department concerned with the subject taught by such teacher; **(iii)** *Sections 51A and 52A* in terms of which no member of teaching and non-teaching staff of any affiliated college could be dismissed or removed from service or reduced in rank, except after an inquiry; no termination of service of any such member would be valid unless such termination was approved by the Vice-Chancellor; and any dispute

between the governing body of the college and any member of the teaching or non-teaching staff must be referred to a Tribunal of Arbitration consisting of one member nominated by the governing body of the college, one member nominated by the concerned member and an Umpire to be nominated by the Vice-Chancellor.

22.1. In the leading Judgment authored by Ray, C.J., for himself and Palekar, J., the extent of "right to administer" under Article 30 of the Constitution and the effect of regulatory measures upon the width of said right was summed up as under:-

> "19. … … 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 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* 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.

22.1.1 While considering the importance of teachers in an educational institution, Ray, C.J., stated:-

> "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."
>
> (Emphasis supplied)

22.1.2 The conclusion arrived at by the learned Chief Justice was:-

> "45. For these reasons the provisions contained in Sections 40, 41, 33-A(1)(*a*), 33-A(1)(*b*), 51-A and 52-A 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."
>
> (Emphasis supplied)

22.2 While agreeing with the view taken by the learned Chief Justice with respect to aforestated provisions, Jaganmohan Reddy J., speaking for himself and Alagiriswami J., also juxtaposed provisions in various statutes which had come up for consideration before this Court from time to time. As regards the opinion in ***Re: The Kerala Education Bill, 1957***[9], it was observed:-

> "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. 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*[12] 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

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> 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."

22.3 Khanna, J. in his concurring opinion, considered the extent to which regulations could be prescribed, as under:-

> "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 instructions of their choice. The right conferred 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*[10] p. 850]. Further as observed by Hidyatullah, C.J. in the case of *Very Rev. Mother Provincial*[4] 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 sametime 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*, 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.

… … …

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.

… … …

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*[11] 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)."
>
> (Emphasis supplied)

22.4 In his concurring view, Mathew, J. speaking for himself and Chandrachud, J. (as the learned Chief Justice, then was) also dealt with the extent to which the regulations could be prescribed, as under:-

> "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 conceived 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, *exhypothesi*, 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.

… … …

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 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."
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> (Emphasis supplied)

22.5 In his concurring opinion, Beg, J. (as the learned Chief Justice then was) however struck a slightly different chord. At the outset he stated:-

> 197. … … 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. … …"

22.5.1 In his view, third set of provisions namely Sections 51A and 52A did not constitute any unreasonable encroachment on the essence of the rights under Article 30(1) of the Constitution. It was observed:-

> "212. Section 51-A 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 51-A 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 51-A 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

> 52-A 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."

22.5.2 Beg, J., then considered all previous decisions of this Court and made following observations:-

> "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 38-B 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.

… … …

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?"

… … …

232. 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. 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 38-B of the Act."

22.6 In his dissenting view, Dwivedi, J. expressed with regard to the extent of regulatory power as under:-

> "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).”

22.7 The operative part of the Order passed by this Court was:-

> “304. By majority Sections 33-A, 40, 41, 51-A(1)(*b*), 51-A(2)(*b*) and 52-A of the Gujarat University Act, 1949 as amended do not apply to institutions established and administered by linguistic and religious minorities. … … …”

23. In ***The Gandhi Faiz-e-am College, Shahjahanpur*** v. ***University of Agra and Another***[13], a Bench of three Judges of this Court considered whether Statute 14A framed by University of Agra infringed fundamental rights of the minority community under Article 30 of the Constitution. The facts as set out in para 3 were as under:-

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13 (1975) 2 SCC 283

> "3. The appellant is a registered society formed by the members of the Muslim community at Shahjahanpur. Indubitably, the community ranks as a minority in the country and the educational institution run by it has been found to be what may loosely be called a "minority institution", within the constitutional compass of Article 30. The earlier history of the institution need not detain us and a rapid glance at its evolution is enough. The A.V. Middle School was the offspring of the effort of the Muslim minority resident in Shahjahanpur district. It, later became a high school and afterwards attained the status of an Intermediate college. Eventually it blossomed into a degree college affiliated to the University of Agra. In 1948, on the assassination of the Father of the Nation, this college was commemoratively renamed as Gandhi Faiz-e-am College. In August 1964, an application was made on behalf of the college management to the University for permission to start teaching in courses of study including Sociology, Sanskrit, Arabic, Military Studies, Drawing and Painting. The University entertained the thought that a new organisational discipline must be brought into the institution and insisted, as a condition of recognition of these additional subjects as course of study, on certain mutations in the administrative body of the college. The bone of contention before us, as was before the High Court, is that this prescription by the University, in tune with Statute 14A framed by it, is an invasion of the fundamental right guaranteed to the minority community under Article 30 of the Constitution of India. The High Court has negatived the plea of the management and the appeal issues from that decision."

23.1 Statute 14A as quoted in para 6 was to the following effect:-

> "14A. Each college, already affiliated or when affiliated, which is not maintained exclusively by Government must be under the Management of a regular constituted Governing body (which term includes Managing Committee) on which the staff of the college shall be represented by the Principal of the college and at least one representative of the teachers

> of the college to be appointed by rotation in order of seniority determined by length of service in the college, who shall hold office for one academic year."

23.2 Krishna Iyer, J. speaking for himself and Gupta, J. found the provision calculated to promote excellence of the Institution and therefore rejected the challenge. The relevant observations were:-

> "16. The discussion throws us back to a closer study of Statute 14A to see if it cuts into the flesh of the management's right or merely tones up its health and habits. The two requirements the University asks for are that the managing body (whatever its name) must take in (*a*) the Principal of the College; (*b*) its seniormost teacher. Is this desideratum dismissible as biting into the autonomy of management or tenable as ensuring the excellence of the institution without injuring the essence of the right? On a careful reflection and conscious of the constitutional dilemma, we are inclined to the view that this case falls on the valid side of the delicate line. Regulation which restricts is bad; but regulation which facilitates is good. Where does this fine distinction lie? No rigid formula is possible but a flexible test is feasible. Where the object and effect is to improve the tone and temper of the administration without forcing on it a stranger, however superb his virtues be, where the directive is not to restructure the governing body but to better its performance by a marginal catalytic induction, where no external authority's fiat or approval or outside nominee is made compulsory to validate the Management Board but inclusion of an internal key functionary appointed by the autonomous management alone is asked for, the provision is salutary and saved, being not a diktat eroding the freedom of the freedom.
>
> … … …
>
> 24. In all these cases administrative autonomy is imperilled transgressing purely regulatory limits. In

> our case autonomy is virtually left intact and refurbishing, not restructuring, is prescribed. The core of the right is not gouged out at all and the regulation is at once reasonable and calculated to promote excellence of the institution — a text book instance of constitutional conditions."

23.3. Mathew, J. authored a dissenting opinion. Relying upon various views expressed in ***Ahmedabad St. Xavier's College***[5] including one rendered by the learned Judge himself, it was observed :-

> "41. The determination of the composition of the body to administer the educational institution established by a religious minority must be left to the minority as that is the core of the right to administer. Regulations to prevent maladministration by that body are permissible. As the right to determine the composition of the body which will administer the educational institution is the very essence of the right to administer guaranteed to the religious or linguistic minority under Article 30(1), any interference in that area by an outside authority cannot be anything but an abridgment of that right. The religious or linguistic minority must be given the freedom to constitute the agency through which it proposes to administer the educational institution established by it as that is what Article 30(1) guarantees. The right to shape its creation is one thing: the right to regulate the manner in which it would function after it has come into being is another. Regulations are permissible to prevent maladministration but they can only relate to the manner of administration after the body which is to administer has come into being.
>
> 42. The provisions of Statute 14A are in pari materia with those of Section 33-A(1)(*a*) of the Act which fell for consideration in *Ahmedabad St. Xavier's College case* (supra) except that only the principal and the seniormost member of the staff alone are required to be included in the managing committee of the college

> in question here. But, in principle, that makes no difference. The principle, as I said, is that the minority community has the exclusive right to vest the administration of the college in a body of its own choice, and any compulsion from an outside authority to include any other person in that body is an abridgment of its fundamental right to administer the educational institution."

23.4 In terms of the decision of the majority, the challenge was negated and Statute 14A was not found to be vulnerable or void.

24. In ***Lily Kurian*** v. ***Sr. Lewina and Others***[14], a Bench of five Judges of this Court was called upon to consider whether the appellate power conferred upon the Vice Chancellor of the University[15] would encroach upon the rights of a minority institution to enforce and ensure discipline over its teachers.

The matter was considered by this Court as under:-

> **"**51. An analysis of the judgments in *St. Xaviers College case* clearly shows that seven out of nine judges held that the provisions contained in clause (*b*) of sub-sections (1) and (2) of Section 51-A of the Act were not applicable to an educational institution established and managed by religious or linguistic minority as they interfere with the disciplinary control of the management over the staff of its educational institutions. The reasons given by the majority were that the power of the management to terminate the services of any member of the teaching or other academic and non-academic staff was based on the

14 (1979) 2 SCC 124
15 By Ordinance 33 against any order passed by the Management taking disciplinary action against a teacher.

relationship between an employer and his employees and no encroachment could be made on this right to dispense with their services under the contract of employment, which was an integral part of the right to administer, and that these provisions conferred on the Vice-Chancellor or any other officer of the University authorised by him, uncanalised, unguided and unlimited power to veto the actions of the management. According to the majority view, the conferral of such blanket power on the Vice-Chancellor and his nominee was an infringement of the right of administration guaranteed under Article 30(1) to the minority institutions, religious and linguistic. The majority was accordingly of the view that the provisions contained in clause (*b*) of sub-sections (1) and (2) of Section 51-A of the Act had the effect of destroying the minority institution's disciplinary control over the teaching and non-teaching staff of the college as no punishment could be inflicted by the management on a member of the staff unless it gets approval from an outside authority like the Vice-Chancellor or an officer of the University authorised by him. On the contrary, the two dissenting Judges were of the view that these provisions were permissive regulatory measures.

52. The power of appeal conferred on the Vice-Chancellor under Ordinance 33(4) is not only a grave encroachment on the institution's right to enforce and ensure discipline in its administrative affairs but it is uncanalised and unguided in the sense that no restrictions are placed on the exercise of the power. The extent of the appellate power of the Vice-Chancellor is not defined, and, indeed, his powers are unlimited. The grounds on which the Vice-Chancellor can interfere in such appeals are also not defined. He may not only set aside an order of dismissal of a teacher and order his reinstatement, but may also interfere with any of the punishments enumerated in Items (*ii*) to (*v*) of Ordinance 33(2), that is to say, he can even interfere against the infliction of minor punishments. In the absence of any guide-lines, it cannot be held that the power of the Vice-Chancellor

> under Ordinance 33(4) was merely a check on maladministration.
>
> 53. As laid down by the majority in *St. Xaviers College case*, such a blanket power directly interferes with the disciplinary control of the managing body of a minority educational institution over its teachers. The majority decision in *St. Xaviers College case* squarely applies to the facts of the present case and accordingly it must be held that the impugned Ordinance 33(4) of the University of Kerala is violative of Article 30(1) of the Constitution. If the conferral of such power on an outside authority like the Vice-Chancellor, which while maintaining the formal character of a minority institution destroys the power of administration, that is, its disciplinary control, is held justifiable because it is in the public and national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be, to use the well-known expression, a "teasing illusion", a "promise of unreality".

25. In ***All Saints High School, Hyderabad and Others*** v. ***Government of Andhra Pradesh and Others***[16], the question that arose for consideration before a Bench of three Judges of this Court, was whether certain provisions of Andhra Pradesh Recognised Private Educational Institutions (Control) Act, 1975 offended fundamental rights conferred on minorities by Article 30(1). In terms of Sections 3(1) and 3(2), no teacher employed in any private educational institution could be dismissed or removed or reduced in rank except with the prior approval of the competent authority; and in terms of Section 3(2) such approval could be granted if the

16 (1980) 2 SCC 478

competent authority was satisfied that there were adequate and reasonable grounds. Section 3(3)(a) provided that no teacher could be placed under suspension except when an enquiry into the gross misconduct of such teacher was contemplated and as per terms of Section 3(3)(b), no suspension could remain in force for more than two months if the enquiry was not completed within that period.

25.1. Chandrachud, C.J. agreed with Fazal Ali, J. that Sections 3(1) and 3(2) would offend Article 30(1) and as such could not be applied to minority institutions. The learned Chief Justice however did not agree with Faizal Ali, J. insofar as Sections 3(3)(a) and 3(3)(b) but agreed with Kailasam, J. to hold that those provisions did not offend Article 30(1). Faizal Ali, J. had found all the provisions to be invalid while Kailasam, J. had found the concerned provisions to be valid and not violative of Article 30(1) of the Constitution.

26. In ***Frank Anthony Public School Employees' Assoication*** v. ***Union of India and others***[17] validity of Section 12 of Delhi School Education Act on the strength of which certain provisions of said Act would not apply to an unaided minority school, was under challenge. It was submitted by the petitioners that the teachers and other employees

17 (1986) 4 SCC 707

working in an unaided school were entitled to same pay-scale, allowances and benefits as were enjoyed by persons employed in schools governed by the provisions of said Act and to the extent Section 12 excluded applicability of some of the provisions of the Act, said Section was hit by Article 14 of the Constitution. The argument raised on behalf of the institution was :-

> "14. … …the right to appoint members of staff being an undoubted right of the management and the right to stipulate their salaries and allowances etc. being part of their right to appoint, such right could not be taken away from the management of a minority institution."

26.1 While allowing the petition this Court observed:

> "16. The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which will consequently enable them to render better service to the institution and the pupils cannot surely be said to be violative of the fundamental right guaranteed by Article 30(1) of the Constitution. The management of a minority Educational Institution cannot be permitted under the guise of the fundamental right guaranteed by Article 30(1) of the Constitution, to oppress or exploit its employees any more than any other private employee. Oppression or exploitation of the teaching staff of an educational institution is bound to lead, inevitably, to discontent and deterioration of the standard of instruction

imparted in the institution affecting adversely the object of making the institution an effective vehicle of education for the minority community or other persons who resort to it. The management of minority institution cannot complain of invasion of the fundamental right to administer the institution when it denies the members of its staff the opportunity to achieve the very object of Article 30(1) which is to make the institution an effective vehicle of education.

(Emphasis supplied)

… … …

23. We must refer to the submissions of Mr Frank Anthony regarding the excellence of the institution and the fear that the institution may have to close down if they have to pay higher scales of salary and allowances to the members of the staff. As we said earlier the excellence of the institution is largely dependent on the excellence of the teachers and it is no answer to the demand of the teachers for higher salaries to say that in view of the high reputation enjoyed by the institution for its excellence, it is unnecessary to seek to apply provisions like Section 10 of the Delhi School Education Act to the Frank Anthony Public School. On the other hand, we should think that the very contribution made by the teachers to earn for the institution the high reputation that it enjoys should spur the management to adopt at least the same scales of pay as the other institutions to which Section 10 applies. Regarding the fear expressed by Shri Frank Anthony that the institution may have to close down we can only hope that the management will do nothing to the nose to spite the face, merely to "put the teachers in their proper place". The fear expressed by the management here has the same ring as the fear expressed invariably by the management of every industry that disastrous results would follow which may even lead to the closing down of the industry if wage scales are revised."

27. In ***Bihar State Madarasa Education Board, Patna*** v. ***Madarasa Hanfia Arabic College, Jamalia and others***[18] the declaration by the High Court that Section 7(2)(n) was unconstitutional as it conferred power on the Board to dissolve the Managing Committee of a Madarasa, was under challenge. The decision was upheld by this Court observing as under:

> "6. The question which arises for consideration is whether Section 7(2)(*n*) which confers power on the Board to dissolve the Managing Committee of an aided and recognised Madarasa institution violates the minorities constitutional right to administer its educational institution according to their choice. This Court has all along held that though the minorities have right to establish and administer educational institution of their own choice but they have no right to maladminister and the State has power to regulate management and administration of such institutions in the interest of educational need and discipline of the institution. Such regulation may have indirect effect on the absolute right of minorities but that would not violate Article 30(1) of the Constitution as it is the duty of the State to ensure efficiency in educational institutions. The State has, however, no power to completely take over the management of a minority institution. Under the guise of regulating the educational standards to secure efficiency in institution, the State is not entitled to frame rules or regulations compelling the management to surrender its right of administration. In *State of Kerala* v. *Very Rev. Mother Provincial*, Section 63(1) of the Kerala University Act, 1969 which conferred power on the government to take over the management of a minority institution on its default in carrying out the directions of the State Government was declared ultra vires on the ground that the provisions interfered with the constitutional right of a minority to administer its institution. Minority institutions cannot be allowed to

18 (1990) 1 SCC 428

> fall below the standard of excellence on the pretext of their exclusive right of management but at the same time their constitutional right to administer their institutions cannot be completely taken away by superseding or dissolving Managing Committee or by appointing ad hoc committees in place thereof. In the instant case Section 7(2)(*n*) is clearly violative of constitutional right of minorities under Article 30(1) of the Constitution insofar as it provides for dissolution of Managing Committee of a Madarasa. We agree with the view taken by the High Court."

28. In ***St. Stephen's College vs. University of Delhi***[19] a Bench of five Judges of this Court had an occasion to consider the admission process adopted by two aided minority institutions viz. St. Stephen's College at Delhi and Allahabad Agricultural Institute at Naini. The factual context as summed-up in the majority judgment authored by Shetty, J., was as under:-

> "68. It is not in dispute that St. Stephen's College and Allahabad Agricultural Institute are receiving grant-in-aid from the government. St. Stephen's College gives preference to Christian students. The Allahabad Agricultural Institute reserves 50 per cent of the seats for Christian students. The Christian students admitted by preference or against the quota reserved are having less merit in the qualifying examination than the other candidates. The other candidsates with more merit are denied admission on the ground that they are not Christians.
>
> 69. It was argued for the University and the Students Union that since both the institutions are receiving State aid, the institutional preference for admission based on religion is violative of Article 29(2) of the Constitution. The institutions shall not prefer or deny

19 (1992) 1 SCC 558

> admission to candidates on ground of religion. For institutions, on the other hand, it was claimed that any preference given to the religious minority candidates in their own institutions cannot be a discrimination falling under Article 29(2). The institutions are established for the benefit of their community and if they are prevented from admitting their community candidates, the purpose of establishing the institutions would be defeated. The minorities are entitled to admit their candidates by preference or by reservation. They are also entitled to admit them to the exclusion of all others and that right flows from the right to establish and administer educational institutions guaranteed under Article 30(1).”

28.1 The majority judgment dealt with the submissions raised by the institution as under:-

> “80. Equally, it would be difficult to accept the second submission that the minorities are entitled to establish and administer educational institutions for their exclusive benefit. The choice of institution provided in Article 30(1) does not mean that the minorities could establish educational institution for the benefit of their own community people. Indeed, they cannot. It was pointed out in *Re, Kerala Education Bill* that the minorities cannot establish educational institution only for the benefit of their community. If such was the aim, Article 30(1) would have been differently worded and it would have contained the words “for their own community”. In the absence of such words it is legally impermissible to construe the article as conferring the right on the minorities to establish educational institution for their own benefit.
>
> 81. Even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to have a relatively homogeneous society. It may lead to religious bigotry which is the bane of mankind. In the nation building with secular character sectarian

> schools or colleges, segregated faculties or universities for imparting general secular education are undesirable and they may undermine secular democracy. They would be inconsistent with the central concept of secularism and equality embedded in the Constitution. Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life. The students and teachers are the critical ingredients. It is there they develop respect for, and tolerance of, the cultures and beliefs of others. It is essential therefore, that there should be proper mix of students of different communities in all educational institutions."

28.2 The relaxation given by St. Stephen's College to Christian students was dealt with as under:-

> "50. To Christian students, relaxation up to 10 per cent is given. The Scheduled Castes/Scheduled Tribes candidates who are having a minimum of 50 per cent of marks are called for interview for selection to Honours courses. For B.A. pass course, a further concession to them is granted and the qualifying marks are reduced even below 50 per cent. As far as sportsmen and sportswomen are concerned, national or State level players are given concession normally up to 10 per cent and in exceptional cases up to 15 per cent or even more. However, a Christian student, who is below the cut-off percentage by more than 10 per cent is never called for interview.
>
> 51. The actual working of the concession given by the College and the result achieved thereon in several years are set out in Annexure I to Writ Petition No. 1868 of 1980. The Christian students who get concession up to 10 per cent and thereby get preferential admission are only 6 per cent to 10 per cent. They are also admitted in accordance with the standard prescribed by the University and none who falls below the standard has ever been admitted to the College."

28.3 The majority Judgment, then, considered the matter from the perspective of *"Rights of Minorities and Balancing Interest"* and observed:-

> "101. Laws carving out the rights of minorities in Article 30(1) however, must not be arbitrary, invidious or unjustified; they must have a reasonable relation between the aim and the means employed. The individual rights will necessarily have to be balanced with competing minority interests. In *Sidhajbhai case*[10] the government order directing the minority run college to reserve 80 per cent of seats for government nominees and permitting only 20 per cent of seats for the management with a threat to withhold the grant-in-aid and recognition was struck down by the Court as infringing the fundamental freedom guaranteed by Article 30(1). Attention may also be drawn to Article 337 of the Constitution which provided a special concession to Anglo-Indian community for ten years from the commencement of the Constitution. Unlike Article 30(2) it conferred a positive right on the Anglo-Indian community to get grants from the government for their educational institutions, but subject to the condition that at least 40 per cent of annual admission were made available to members of other communities.
>
> 102. In the light of all these principles and factors, and in view of the importance which the Constitution attaches to protective measures to minorities under Article 30(1), the minority aided educational institutions are entitled to prefer their community candidates to maintain the minority character of the institutions subject of course to conformity with the University standard. The State may regulate the intake in this category with due regard to the need of the community in the area which the institution is intended to serve. But in no case such intake shall exceed 50 per cent of the annual admission. The

> minority institutions shall make available at least 50 per cent of the annual admission to members of communities other than the minority community. The admission of other community candidates shall be done purely on the basis of merit."

28.4 It was also observed that regulations which serve the interest of students and teachers and preserve the uniformity in standards of education amongst the affiliated institutions could validly be made. The relevant discussion in para 59 was as under:-

> "59. The need for a detailed study on this aspect is indeed not necessary. The right to minorities whether religious or linguistic, to administer educational institutions and the power of the State to regulate academic matters and management is now fairly well settled. The right to administer does not include the right to maladminister. The State being the controlling authority has right and duty to regulate all academic matters. Regulations which will serve the interests of students and teachers, and to preserve the uniformity in standards of education among the affiliated institutions could be made. The minority institutions cannot claim immunity against such general pattern and standard or against general laws such as laws relating to law and order, health, hygiene, labour relations, social welfare legislations, contracts, torts etc. which are applicable to all communities. So long as the basic right of minorities to manage educational institution is not taken away, the State is competent to make regulatory legislation. Regulations, however, shall not have the effect of depriving the right of minorities to educate their children in their own institution. That is a privilege which is implied in the right conferred by Article 30(1)".
>
> (Emphasis supplied)

28.5 The dissenting opinion of Kasliwal, J. quoted a passage from the Constituent Assembly Debates (CAD) touching upon the matter in issue as under :-

> "137**.** These were Articles 23(1) on the one hand and 23(3)(*a*) and 23(3)(*b*) on the other hand in the Draft Constitution. Firstly, Dr B.R. Ambedkar said in relation to draft Article 23(2) corresponding to the present Article 28 of the Constitution that even in relation to Articles 30 and 29 the State was completely free to give or not to give aid to the educational institutions of the religious or linguistic minorities. He said[20]:
>
> > "Now, with regard to the second clause I think it has not been sufficiently well understood. We have tried to reconcile the claim of a community which has started educational institutions for the advancement of its own children either in education or in cultural matters, to permit to give religious instruction in such institutions; notwithstanding the fact that it receives certain aid from the State. The State, of course, is free to give aid, is free not to give aid; the only limitation we have placed is this, that the State shall not debar the institution from claiming aid under its grant-in-aid code merely on the ground that it is run and maintained by a community and not maintained by a public body. We have there provided also a further qualification, that while it is free to give religious instruction in the institution and the grant made by the State shall not be a bar to the giving of such instruction, it shall not give instruction to, or make it compulsory upon, the children belonging to other communities unless and until they obtain the consent of the parents of these

20 VII CAD 884

> children. That, I think, is a salutary provision. It performs two functions…
>
> *Shri H.V. Kamath*: On a point of clarification what about institutions and schools run by a community or a minority for its own pupils — not a school where all communities are mixed but a school run by the community for its own pupils?
>
> *The Hon'ble Dr B.R. Ambedkar*: If my friend, Mr Kamath will read the other article he will see that once an institution, whether maintained by the community or not, gets a grant, the condition is that it shall keep the school open to all communities. That provision he has not read."

138. He reaffirmed the freedom of the State to give or not to give aid to these schools when directly referring to draft Article 23 which is the precursor of the present Articles 29 and 30 as follows[21]:

> "I think another thing which has to be borne in reading Article 23 is that it does not impose any obligation or burden upon the State. It does not say that, when for instance the Madras people come to Bombay, the Bombay Government shall be required by law to finance any project of giving education either in Tamil language or in Andhra language or any other language. There is no burden cast upon the State. The only limitation that is imposed by Article 23 is that if there is a cultural minority which wants to preserve its language, its script and its culture, the State shall not by law impose upon it any other culture which may be either local or otherwise."

And, went on to observe that once an institution was receiving aid,

"it must abide by the rigor of Article 29(2) in the matter of admission of

21 VII CAD 923

students in the college" and "as already held by me, St. Stephen's College and Allahabad Agricultural Institute are not entitled to claim any preferential right or reservation in favour of students of Christian community as they are getting grant-in-aid and as such I do not consider it necessary to labour any more on the question of deciding as to what percentage can be considered as reasonable"

29. We must also refer to two decisions of this Court after the decision in ***Ahmedabad St. Xaviers College***[5] where the appointment of Principal of a minority educational institution was in question.

29.1 In ***Board of Secondary Education and Teachers Training*** v. ***Jt. Director of Public Instructions, Sagar and others***[22], a Bench of two Judges of this Court observed:

> "3. The decisions of this Court make it clear that in the matter of appointment of the Principal, the management of a minority educational institution has a choice. It has been held that one of the incidents of the right to administer a minority educational institution is the selection of the Principal. Any rules which take away this right of the management have been held to be interfering with the right guaranteed by Article 30 of the Constitution. In this case, both Julius Prasad selected by the management and the third respondent are qualified and eligible for appointment as Principal according to rules. The

22 (1998) 8 SCC 555

> question is whether the management is not entitled to select a person of their choice. The decisions of this Court including the decision in *State of Kerala* v. *Very Rev. Mother Provincial* and *Ahmedabad St. Xavier's College Society* v. *State of Gujarat* make it clear that this right of the minority educational institution cannot be taken away by any rules or regulations or by any enactment made by the State. We are, therefore, of the opinion that the High Court was not right in holding otherwise. The State has undoubtedly the power to regulate the affairs of the minority educational institutions also in the interest of discipline and excellence. But in that process, the aforesaid right of the management cannot be taken away, even if the Government is giving hundred per cent grant. We need not go into any other question in this appeal."
>
> (Emphasis supplied)

29.2 In ***N. Ammad*** v. ***Manager, Emjay High School and others***[23] a Bench of two Judges of this Court, while dealing with the issue "whether the management of a minority school was free to choose and appoint any qualified person as Headmaster" observed as under:

> "18. Selection and appointment of Headmaster in a school (or Principal of a college) are of prime importance in administration of that educational institution. The Headmaster is the key post in the running of the school. He is the hub on which all the spokes of the school are set around whom they rotate to generate result. A school is personified through its Headmaster and he is the focal point on which outsiders look at the school. A bad Headmaster can spoil the entire institution, an efficient and honest Headmaster can improve it by leaps and bounds. The functional efficacy of a school very much depends upon the efficiency and dedication of its Headmaster. This pristine precept remains unchanged despite many

23 (1998) 6 SCC 674

changes taking place in the structural patterns of education over the years.

19. How important is the post of Headmaster of a school has been pithily stated by a Full Bench of the Kerala High Court in *Aldo Maria Patroni* v. *E.C. Kesavan*. Chief Justice M.S. Menon has, in a style which is inimitable, stated thus:

> "The post of the headmaster is of pivotal importance in the life of a school. Around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching. The right to choose the headmaster is perhaps the most important facet of the right to administer a school, and we must hold that the imposition of any trammel thereon — except to the extent of prescribing the requisite qualifications and experience — cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution. To hold otherwise will be to make the right 'a teasing illusion, a promise of unreality'."

20. The importance of the key role which a Headmaster plays in the school cannot be better delineated than that. The nine-Judge Bench in the *Ahmedabad St. Xavier's College Society* has highlighted the importance of the role of the Principal of a college. In support of majority view in that decision K.K. Mathew, J. has observed thus: (SCC pp. 815-16, para 182)

> "*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. <u>The right to choose the principal and to have the teaching conducted by teachers appointed by</u>

> 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."

21. H.R. Khanna, J. has adopted a still broader view that even selection of teachers is of great importance in the right to manage a school. Learned Judge has stated thus: (SCC p. 789, para 103)

> "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)."

22. Krishna Iyer, J. who dissented from the majority view in *Gandhi Faiz-E-Am College* v. *University of Agra* has, nevertheless, emphasised the importance of the post of the Principal in the following words: (SCC p. 293, para 21)

> "*21*. An activist principal is an asset in discharging these duties which are inextricably interlaced with academic functions. The principal is an invaluable insider — the Management's own choice — not an outsider answerable to the Vice-Chancellor. He brings into the work of the Managing Committee that intimate acquaintance with educational operations and that necessary expression of student-teacher aspirations and complaints which are so essential for the minority institution to achieve a happy marriage between individuality and excellence."

23. Whatever is said about the importance of the post of Principal of a college vis-à-vis the administration of the institution would in pari materia apply to the Headmaster of a school with equal force.

> **24.** If management of the school is not given very wide freedom to choose the personnel for holding such a key post, subject of course to the restrictions regarding qualifications to be prescribed by the State, the right to administer the school would get much diminished."
>
> (Emphasis supplied)

B) Decision in TMA Pai Foundation

30. A Bench of Eleven Judges was constituted to consider questions touching upon the rights of Minority Educational Institutions under Articles 29 and 30 of the Constitution. The reasons why the Bench of that strength was constituted were set out in brief in paragraph No.3 of the leading Judgment authored by Kirpal, C.J. as under:

> **"3.** The hearing of these cases has had a chequered history. Writ Petition No. 350 of 1993 filed by the Islamic Academy of Education and connected petitions were placed before a Bench of five Judges. As the Bench was *prima facie* of the opinion that Article 30 did not clothe a minority educational institution with the power to adopt its own method of selection and the correctness of the decision of this Court in *St. Stephen's College* v. *University of Delhi* was doubted, it was directed that the questions that arose should be authoritatively answered by a larger Bench. These cases were then placed before a Bench of seven Judges. The questions framed were recast and on 6-2-1997, the Court directed that the matter be placed before a Bench of at least eleven Judges, as it was felt that in view of the Forty-second Amendment to the Constitution, whereby "education" had been included in Entry 25 of List III of Seventh Schedule, the question of who would be regarded as a

> "minority" was required to be considered because the earlier case-law related to the pre-amendment era, when education was only in the State List. When the cases came up for hearing before an eleven-Judge Bench, during the course of hearing on 19-3-1997, the following order was passed:
>
> > "Since a doubt has arisen during the course of our arguments as to whether this Bench would feel itself bound by the ratio propounded in — *Kerala Education Bill, 1957, In Re* and *Ahmedabad St. Xavier's College Society* v. *State of Gujarat* it is clarified that this sized Bench would not feel itself inhibited by the views expressed in those cases since the present endeavour is to discern the true scope and interpretation of Article 30(1) of the Constitution, which being the dominant question would require examination in its pristine purity. The factum is recorded."

31. The Bench framed 11 questions. For the present discussion we are principally concerned with discussion relevant to question Nos.4 and 5. Under heading- *"3. In case private institutions can be governmental regulations and if so, to what extent?"*, the discussion was under various sub-headings. The first sub-heading was "private unaided non-minority educational institutions". Under this sub-heading para 50 of the leading Judgment enumerated what "the right to establish and administer" comprises of, as under:

> **"50.** The right to establish and administer broadly comprises the following rights:
>
> (*a*) to admit students;

> (*b*) to set up a reasonable fee structure;
> (*c*) to constitute a governing body;
> (*d*) to appoint staff (teaching and non-teaching); and
> (*e*) to take action if there is dereliction of duty on the part of any employees."

The other sub-headings were "private unaided professional colleges", "private aided professional institutions (non-minority)" and "other aided institutions". Since the discussion under these sub-headings as well as the next heading does not strictly deal with the matter in the context of minority educational institutions, we may turn to the next heading "5. *To what extent can the rights of aided private minority institutions to administer be regulated?"*

31.1. After discussing about the extent of right under Article 30 of the Constitution, the leading Judgment considered all the relevant cases on the point. The following paragraphs are noteworthy:

> "90. In the exercise of this right to conserve the language, script or culture, that section of the society can set up educational institutions. The right to establish and maintain educational institutions of its choice is a necessary concomitant to the right conferred by Article 30. The right under Article 30 is not absolute. Article 29(2) provides that, where any educational institution is maintained by the State or receives aid out of State funds, no citizen shall be denied admission on the grounds only of religion, race, caste, language or any of them. The use of the expression "any educational institution" in Article 29(2) would (*sic* not) refer to any educational

institution established by anyone, but which is maintained by the State or receives aid out of State funds. In other words, on a plain reading, State-maintained or aided educational institutions, whether established by the Government or the majority or a minority community cannot deny admission to a citizen on the grounds only of religion, race, caste or language.

93. Can Article 30(1) be so read as to mean that it contains an absolute right of the minorities, whether based on religion or language, to establish and administer educational institutions in any manner they desire, and without being obliged to comply with the provisions of any law? Does Article 30(1) give the religious or linguistic minorities a right to establish an educational institution that propagates religious or racial bigotry or ill will amongst the people? Can the right under Article 30(1) be so exercised that it is opposed to public morality or health? In the exercise of its right, would the minority while establishing educational institutions not be bound by town planning rules and regulations? Can they construct and maintain buildings in any manner they desire without complying with the provisions of the building bye-laws or health regulations?

… … …

105. In *Rev. Sidhajbhai Sabhai* v. *State of Bombay* this Court had to consider the validity of an order issued by the Government of Bombay whereby from the academic year 1955-56, 80% of the seats in the training colleges for teachers in non-government training colleges were to be reserved for the teachers nominated by the Government. The petitioners, who belonged to the minority community, were, *inter alia*, running a training college for teachers, as also primary schools. The said primary schools and college were conducted for the benefit of the religious denomination of the United Church of Northern India and Indian Christians generally, though admission was not denied to students belonging to other communities. The petitioners challenged the government order requiring 80% of the seats to be

filled by nominees of the Government, *inter alia*, on the ground that the petitioners were members of a religious denomination and that they constituted a religious minority, and that the educational institutions had been established primarily for the benefit of the Christian community. It was the case of the petitioners that the decision of the Government violated their fundamental rights guaranteed by Articles 30(1), 26(*a*), (*b*), (*c*) and (*d*), and 19(1)(*f*) and (*g*). While interpreting Article 30, it was observed by this Court at SCR pp. 849-50 as under:

> "All minorities, linguistic or religious have by Article 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void. 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."

106. While coming to the conclusion that the right of the private training colleges to admit students of their choice was severely restricted, this Court referred to the opinion in *Kerala Education Bill, 1957 case* but distinguished it by observing that the Court did not, in that case, lay down any test of reasonableness of the regulation. No general principle on which the reasonableness of a regulation may be tested was

sought to be laid down in *Kerala Education Bill, 1957 case* and, therefore, it was held in *Sidhajbhai Sabhai case* that the opinion in that case was not an authority for the proposition that all regulative measures, which were not destructive or annihilative of the character of the institution established by the minority, provided the regulations were in the national or public interest, were valid. In this connection it was further held at SCR pp. 856-57, as follows:

> "The right established by Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. 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. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be but a 'teasing illusion', a promise of unreality. 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. 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."

> 107. The aforesaid decision does indicate that the right under Article 30(1) is not so absolute as to prevent the Government from making any regulation whatsoever. As already noted hereinabove, in *Sidhajbhai Sabhai case* it was laid down that regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality and public order could be imposed. If this is so, it is difficult to appreciate how the Government can be prevented from framing regulations that are in the national interest, as it seems to be indicated in the passage quoted hereinabove. Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf. It is, of course, true that government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law. It will further be seen that in *Sidhajbhai Sabhai case* no reference was made to Article 29(2) of the Constitution. This decision, therefore, cannot be an authority for the proposition canvassed before us."
>
> (Emphasis supplied)

31.2. The leading Judgment thereafter considered the decision of this Court in ***Ahmedabad St. Xavier's College***[5], and while quoting certain passages therefrom, it was observed:

> **"119.** In a concurrent judgment, while noting (at SCC p. 770, para 73) that "*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*",

Khanna, J. then examined Article 30, and observed at SCR p. 222, as follows: (SCC p. 770, para 74)

> "*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."

120. Explaining the rationale behind Article 30, it was observed at SCR p. 224, as follows: (SCC p. 772, para 77)

> "*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."

121. While advocating that provisions of the Constitution should be construed according to the liberal, generous and sympathetic approach, and after considering the principles which could be discerned by him from the earlier decisions of this Court, Khanna, J., observed at SCR p. 234, as follows: (SCC p. 781, para 89)

> "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."

122. The learned Judge then observed that the right of the minorities to administer educational institutions did not prevent the making of reasonable regulations in respect of these institutions. Recognizing that the right to administer educational institutions could not include the right to maladminister, it was held that regulations could be lawfully imposed, for the receiving of grants and recognition, while permitting the institution to retain its character as a minority institution. The 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*". (SCC p. 783, para 92) It was permissible for the authorities to prescribe regulations, which must be complied with, before a minority institution could seek or retain affiliation and recognition. But it was also stated that the regulations made by the authority should not impinge upon the minority character of the institution. Therefore, a balance has 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 that embraced

and reconciled the two objectives could be considered to be reasonable. This, in our view, is the correct approach to the problem.

123. After referring to the earlier cases in relation to the appointment of teachers, it was noted by Khanna, J., that the conclusion which followed was that a law which interfered with a minority's choice of qualified teachers, or its disciplinary control over teachers and other members of the staff of the institution, was void, as it was violative of Article 30(1). While it was permissible for the State and its educational authorities to prescribe the qualifications of teachers, it was held that once the teachers possessing the requisite qualifications were 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 was regarded as one of the essential ingredients under Article 30(1). The Court's attention was drawn to the fact that in *Kerala Education Bill, 1957 case* this Court had opined that clauses 11 and 12 made it obligatory for all aided schools to select teachers from a panel selected from each district by the Public Service Commission and that no teacher of an aided school could be dismissed, removed or reduced in rank without the previous sanction of the authorized officer. At SCC p. 792, Khanna, J., observed that in cases subsequent to the opinion in *Kerala Education Bill, 1957 case*[9] this Court had held similar provisions as clause 11 and clause 12 to be violative of Article 30(1) (*sic* in the case) of the minority institutions. He then observed as follows: (SCC p. 792, para 109)

> "The opinion expressed by this Court in *Re Kerala Education Bill, 1957* 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, 1957* in this respect was hesitant and tentative and not a final view in the matter."
>
> (Emphasis supplied)

31.3. After considering all the decisions, the matter was summed up as under:

> "135. We agree with the contention of the learned Solicitor-General that the Constitution in Part III does not contain or give any absolute right. All rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part. It is difficult to comprehend that the framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution. We find it difficult to accept that in the establishment and administration of educational institutions by the religious and linguistic minorities, no law of the land, even the Constitution, is to apply to them.
>
> 137. It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality and standards of education apply. The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).
>
> 138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious

minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-à-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At the same time, there also cannot be any reverse discrimination. It was observed in *St. Xavier's College case*[5] at SCR p. 192 that : (SCC p. 743, para 9)

> *"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."*

In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do.

139. Like any other private unaided institutions, similar unaided educational institutions administered by linguistic or religious minorities are assured maximum autonomy in relation thereto; e.g. method of recruitment of teachers, charging of fees and

> admission of students. They will have to comply with the conditions of recognition, which cannot be such as to whittle down the right under Article 30."
>
> (Emphasis supplied)

31.4. The matter was then considered in the context where aid was being received by the concerned minority institution and to what extent its autonomy in administration, could be curtailed or regulated. It was observed:

> "144. It cannot be argued that no conditions can be imposed while giving aid to a minority institution. Whether it is an institution run by the majority or the minority, all conditions that have relevance to the proper utilization of the grant-in-aid by an educational institution can be imposed. All that Article 30(2) states is that on the ground that an institution is under the management of a minority, whether based on religion or language, grant of aid to that educational institution cannot be discriminated against, if other educational institutions are entitled to receive aid. The conditions for grant or non-grant of aid to educational institutions have to be uniformly applied, whether it is a majority-run institution or a minority-run institution. As in the case of a majority-run institution, the moment a minority institution obtains a grant of aid, Article 28 of the Constitution comes into play. When an educational institution is maintained out of State funds, no religious instruction can be provided therein. Article 28(1) does not state that it applies only to educational institutions that are not established or maintained by religious or linguistic minorities. Furthermore, upon the receipt of aid, the provisions of Article 28(3) would apply to all educational institutions whether run by the minorities or the non-minorities. Article 28(3) is the right of a person studying in a State-recognized institution or in an educational institution receiving aid from State funds, not to take part in any religious instruction, if imparted by such institution, without his/her consent

(or his/her guardian's consent if such a person is a minor). Just as Articles 28(1) and (3) become applicable the moment any educational institution takes aid, likewise, Article 29(2) would also be attracted and become applicable to an educational institution maintained by the State or receiving aid out of State funds. It was strenuously contended that the right to give admission is one of the essential ingredients of the right to administer conferred on the religious or linguistic minority, and that this right should not be curtailed in any manner. It is difficult to accept this contention. If Articles 28(1) and (3) apply to a minority institution that receives aid out of State funds, there is nothing in the language of Article 30 that would make the provisions of Article 29(2) inapplicable. Like Article 28(1) and Article 28(3), Article 29(2) refers to "*any educational institution maintained by the State or receiving aid out of State funds*". A minority institution would fall within the ambit of Article 29(2) in the same manner in which Article 28(1) and Article 28(3) would be applicable to an aided minority institution. It is true that one of the rights to administer an educational institution is to grant admission to the students. As long as an educational institution, whether belonging to the minority or the majority community, does not receive aid, it would, in our opinion, be its right and discretion to grant admission to such students as it chooses or selects subject to what has been clarified before. Out of the various rights that the minority institution has in the administration of the institution, Article 29(2) curtails the right to grant admission to a certain extent. By virtue of Article 29(2), no citizen can be denied admission by an aided minority institution on the grounds only of religion, race, caste, language or any of them. It is no doubt true that Article 29(2) does curtail one of the powers of the minority institution, but on receiving aid, some of the rights that an unaided minority institution has, are also curtailed by Articles 28(1) and 28(3). A minority educational institution has a right to impart religious instruction — this right is taken away by Article 28(1), if that minority institution is maintained wholly out of State funds. Similarly on receiving aid out of

State funds or on being recognized by the State, the absolute right of a minority institution requiring a student to attend religious instruction is curtailed by Article 28(3). If the curtailment of the right to administer a minority institution on receiving aid or being wholly maintained out of State funds as provided by Article 28 is valid, there is no reason why Article 29(2) should not be held to be applicable. There is nothing in the language of Articles 28(1) and (3), Article 29(2) and Article 30 to suggest that, on receiving aid, Articles 28(1) and (3) will apply, but Article 29(2) will not. Therefore, the contention that the institutions covered by Article 30 are outside the injunction of Article 29(2) cannot be accepted.

… … …

151. The right of the aided minority institution to preferably admit students of its community, when Article 29(2) was applicable, has been clarified by this Court over a decade ago in *St. Stephen's College case*. While upholding the procedure for admitting students, this Court also held that aided minority educational institutions were entitled to preferably admit their community candidates so as to maintain the minority character of the institution, and that the State may regulate the intake in this category with due regard to the area that the institution was intended to serve, but that this intake should not be more than 50% in any case. Thus, *St. Stephen's* endeavoured to strike a balance between the two articles. Though we accept the ratio of *St. Stephen's* which has held the field for over a decade, we have compelling reservations in accepting the rigid percentage stipulated therein. As Article 29 and Article 30 apply not only to institutions of higher education but also to schools, a ceiling of 50% would not be proper. It will be more appropriate that, depending upon the level of the institution, whether it be a primary or secondary or high school or a college, professional or otherwise, and on the population and educational needs of the area in which the institution is to be located, the State properly balances the interests of all by providing for such a percentage of students of the minority

> community to be admitted, so as to adequately serve the interest of the community for which the institution was established.
>
> 152. At the same time, the admissions to aided institutions, whether awarded to minority or non-minority students, cannot be at the absolute sweet will and pleasure of the management of minority educational institutions. As the regulations to promote academic excellence and standards do not encroach upon the guaranteed rights under Article 30, the aided minority educational institutions can be required to observe *inter se* merit amongst the eligible minority applicants and passage of common entrance test by the candidates, where there is one, with regard to admissions in professional and non-professional colleges. If there is no such test, a rational method of assessing comparative merit has to be evolved. As regards the non-minority segment, admission may be on the basis of the common entrance test and counselling by a State agency. In the courses for which such a test and counselling are not in vogue, admission can be on the basis of relevant criteria for the determination of merit. It would be open to the State authorities to insist on allocating a certain percentage of seats to those belonging to weaker sections of society, from amongst the non-minority seats."
>
> (Emphasis supplied)

31.5. Finally, as regards Question No.5(c), the leading judgment gave its answer as under:-

> ***"Q. 5. (c)*** Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees, etc.

would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

“Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee.”

C) <u>Decisions after TMA Pai Foundation</u>

32. In ***Brahmo Samaj Education Society vs. State of West Bengal***[24]**,** a Bench of two Judges dealt with the issue that arose as under:-

> **"5.** The main question for consideration is, whether the appointment of teachers through the selection of the College Service Commission is permissible or not, in other words, to decipher the role of the State in the matter of appointment of teachers. To establish *and administer* an educational institution is held to be a right coming under Article 19(1)(*g*) of the Constitution as enunciated in *T.M.A. Pai Foundation* v. *State of Karnataka*[8]. According to Article 19(6) of the Constitution, the right to establish and maintain an educational institution is subject to the reasonable restrictions imposed by the State in the interest of general public. At the same time, subject to public order, morality and health, every religious denomination or any section thereof can establish *and maintain* educational institutions under Article 26(*a*) of the Constitution. Reading Article 19(1)(*g*) and Article 26(*a*) of the Constitution together, the petitioners have a right to establish and maintain educational institutions and hence we do not think it is necessary to decide the issue of minority/denominational status of Brahmo Samaj to decide the issue in hand. In our view, this issue does not arise in the context of the present case.
>
> **6.** The question now before us is to decide whether the appointment of teachers in an aided institution by the College Service Commission by restricting the petitioners' right to appointment is a reasonable restriction in the interest of general public or not. The petitioners have a right to establish and administer educational institution. Merely because the petitioners are receiving aid, their autonomy of administration cannot be totally restricted and institutions cannot be treated as a government-owned one. Of course the State can impose such conditions as are necessary for the proper maintenance of standards of education and

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to check maladministration. It is stated in *T.M.A. Pai*[8] that:

> "*71*. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State. The merit may be determined either through a common entrance test conducted by the university or the Government followed by counselling, or on the basis of an entrance test conducted by individual institutions — the method to be followed is for the university or the Government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the Government or the university to provide that consideration should be shown to the weaker sections of the society. (SCC at p. 550, para 71)
>
> *72*. Once aid is granted to a private professional educational institution, the Government or the State agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The State, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State. The State would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many States, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue

expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The State, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same. Ever since in *Kerala Education Bill, 1957, Re*[9] this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers. 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 institutions. In other words, rules and regulations that promote good administration and prevent maladministration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve harmony among affiliated institutions. At the same time it has to be ensured that even an aided institution does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by Government or as a wholly owned and controlled government institution and interfere with constitution of the governing bodies or thrusting the staff without reference to management.

73. There are a large number of educational institutions, like schools and non-professional

> colleges, which cannot operate without the support of aid from the State. Although these institutions may have been established by philanthropists or other public-spirited persons, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the State. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedures. Such rules and regulations can also provide for the reasons and the manner in which a teacher or any other member of the staff can be removed. In other words, the autonomy of a private aided institution would be less than that of an unaided institution.
>
> ... ...
>
> **10.** When a larger Bench consisting of eleven Judges of this Court in *T.M.A. Pai* has declared what the law on the matter is, we do not want to dilute the effect of the same by analysing various statements made therein or indulge in any dissection of the principles underlying it. We would rather state that the State Government shall take note of the declarations of law made by this Court in this regard and make suitable amendments to their laws, rules and regulations to bring them in conformity with the principles set out therein."

33. In ***P.A. Inamdar and others*** v. ***State of Maharashtra and others***[25] a Bench of Seven Judges of this Court culled out the issues which arose for its consideration as under:

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"26. These matters have been directed to be placed for hearing before a Bench of seven Judges under orders of the Chief Justice of India pursuant to the order dated 15-7-2004 in *P.A. Inamdar* v. *State of Maharashtra*[26] and order dated 29-7-2004 in *Pushpagiri Medical Society* v. *State of Kerala*[27]. The aggrieved persons before us are again classifiable in one class, that is, unaided minority and non-minority institutions imparting professional education. The issues arising for decision before us are only three:

(*i*) the fixation of "quota" of admissions/students in respect of unaided professional institutions;

(*ii*) the holding of examinations for admissions to such colleges, that is, who will hold the entrance tests; and

(*iii*) the fee structure.

The questions spelled out by orders of reference

27. In the light of the two orders of reference, referred to hereinabove, we propose to confine our discussion to the questions set out hereunder which, according to us, arise for decision:

(*1*) To what extent can the State regulate admissions made by unaided (minority or non-minority) educational institutions? Can the State enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions?

(*2*) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether the direction made in *Islamic Academy*[28] for compulsorily holding an entrance test by the State or association of institutions and to choose therefrom the students entitled to

26 (2004) 8 SCC 139
27 (2004) 8 SCC 135
28 (2003) 6 SCC 697

> admission in such institutions, can be sustained in light of the law laid down in *Pai Foundation*?
>
> (*3*) Whether *Islamic Academy* could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions?
>
> (*4*) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by *Islamic Academy*?"

33.1. While dealing with real purpose of Article 30 of the Constitution, it was stated:-

> **"70.** The real purpose of Article 30 is to prevent discrimination against members of the minority community and to place them on an equal footing with non-minority. Reverse discrimination was not the intention of Article 30. If running of educational institutions cannot be said to be at a higher plane than the right to carry on any other business, reasonable restrictions similar to those placed on the right to carry on business can be placed on educational institutions conducting professional courses. For the purpose of these restrictions both minorities and non-minorities can be treated at par and there would not be any violation of Article 30(1), which guarantees only protection against oppression and discrimination of the minority from the majority. Activities of education being essentially charitable in nature, the educational institutions both of a non-minority and minority character can be regulated and controlled so that they do not indulge in selling seats of learning to make money. They can be allowed to generate such funds as would be reasonably required to run the institute and for its further growth."
>
> (Emphasis supplied)

33.2 The discussion shows that the matter was considered in the context of the rights of unaided institutions and not with regard to "minority educational institutions receiving State aid" as is evident from para No.123 of the decision. Para No.103 of the decision shows that minority educational institutions were classified in three categories and para No.104 onwards points difference between professional and non-professional educational institutions. Paragraph Nos.104 to 107 were as under:

> ***"Difference between professional and non-professional educational institutions***
>
> 104. Article 30(1) speaks of "educational institutions" generally and so does Article 29(2). These articles do not draw any distinction between an educational institution dispensing theological education or professional or non-professional education. However, the terrain of thought as has developed through successive judicial pronouncements culminating in *Pai Foundation* is that looking at the concept of education, in the backdrop of the constitutional provisions, professional educational institutions constitute a class by themselves as distinguished from educational institutions imparting non-professional education. It is not necessary for us to go deep into this aspect of the issue posed before us inasmuch as *Pai Foundation* has clarified that merit and excellence assume special significance in the context of professional studies. Though merit and excellence are not anathema to non-professional education, yet at that level and due to the nature of education which is more general, the need for merit and excellence therein is not of the degree as is called for in the context of professional education.
>
> 105. Dealing with unaided minority educational institutions, *Pai Foundation*[8] holds that Article 30

does not come in the way of the State stepping in for the purpose of securing transparency and recognition of merit in the matter of admissions. Regulatory measures for ensuring educational standards and maintaining excellence thereof are no anathema to the protection conferred by Article 30(1). However, a distinction is to be drawn between unaided minority educational institution of the level of schools and undergraduate colleges on the one side and institutions of higher education, in particular, those imparting professional education, on the other side. In the former, the scope for merit-based selection is practically nil and hence may not call for regulation. But in the case of the latter, transparency and merit have to be unavoidably taken care of and cannot be compromised. There could be regulatory measures for ensuring educational standards and maintaining excellence thereof. (See para 161, answer to Question 4, in *Pai Foundation*.) The source of this distinction between two types of educational institutions referred to hereinabove is to be found in the principle that right to administer does not include a right to maladminister.

106. S.B. Sinha, J. has, in his separate opinion in *Islamic Academy* described (in para 199) the situation as a pyramid-like situation and suggested the right of minority to be read along with the fundamental duty. Higher the level of education, lesser are the seats and higher weighs the consideration for merit. It will, necessarily, call for more State intervention and lesser say for the minority.

107 Educational institutions imparting higher education i.e. graduate level and above and in particular specialised education such as technical or professional, constitute a separate class. While embarking upon resolving issues of constitutional significance, where the letter of the Constitution is not clear, we have to keep in view the spirit of the Constitution, as spelt out by its entire scheme. Education aimed at imparting professional or technical qualifications stands on a different footing from other educational instruction. Apart from other

> provisions, Article 19(6) is a clear indicator and so are clauses (*h*) and (*j*) of Article 51-A. Education up to the undergraduate level aims at imparting knowledge just to enrich the mind and shape the personality of a student. Graduate-level study is a doorway to admissions in educational institutions imparting professional or technical or other higher education and, therefore, at that level, the considerations akin to those relevant for professional or technical educational institutions step in and become relevant. This is in the national interest and strengthening the national wealth, education included. Education up to the undergraduate level on the one hand and education at the graduate and postgraduate levels and in professional and technical institutions on the other are to be treated on different levels inviting not identical considerations, is a proposition not open to any more debate after *Pai Foundation*. A number of legislations occupying the field of education whose constitutional validity has been tested and accepted suggest that while recognition or affiliation may not be a must for education up to undergraduate level or, even if required, may be granted as a matter of routine, recognition or affiliation is a must and subject to rigorous scrutiny when it comes to educational institutions awarding degrees, graduate or postgraduate, postgraduate diplomas and degrees in technical or professional disciplines. Some such legislations are found referred in paras 81 and 82 of S.B. Sinha, J.'s opinion in *Islamic Academy*."

34. In ***Kanya Junior High School, Bal Vidya Mandir, Etah, U.P. v. U.P. Basic Shiksha Parishad, Allahabd, U.P. and others***[29] one of the issues that arose was whether the school established and administered by individuals professing – Jain Religion could be said to be a Religious Minority Educational Institution in the State of U.P. It was concluded by

29 (2006) 11 SCC 92

this Court that since the school was recognised as a Minority Educational Institution by the Division Bench of the High Court of Judicature at Allahabad, it could not be denied that status and as such before terminating the services of a teacher, prior approval of the District Basic Education Officer was not necessary.

35. In ***Secretary, Malankara Syrian Catholic College v. T. Jose and others***[6] the principal question that arose for consideration was whether right to choose a Principal is part of the right of a minority institution under Article 30(1) of the Constitution. This Court considered the relevant decisions on the point and also quoted para No.16 of the decision of this Court in ***Frank Anthony Public School case***[17]. The general principles relevant to establishment and administration of educational institutions by minorities were summed up as under:-

> "19. The general principles relating to establishment and administration of educational institution by minorities may be summarised thus:
>
> (*i*) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:
>
> (*a*) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(*b*) to appoint teaching staff (teachers/lecturers and Headmasters/Principals) as also non-teaching staff, and to take action if there is dereliction of duty on the part of any of its employees;

(*c*) to admit eligible students of their choice and to set up a reasonable fee structure;

(*d*) to use its properties and assets for the benefit of the institution.

(*ii*) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation, etc. applicable to all, will equally apply to minority institutions also.

(*iii*) The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article 30(1).

(*iv*) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the

freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

(v) Extension of aid by the State does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilisation of the aid, without however diluting or abridging the right under Article 30(1).

… … …

21. We may also recapitulate the extent of regulation by the State, permissible in respect of employees of minority educational institutions receiving aid from the State, as clarified and crystallised in *T.M.A. Pai* The State can prescribe:

(*i*) the minimum qualifications, experience and other criteria bearing on merit, for making appointments,

(*ii*) the service conditions of employees without interfering with the overall administrative control by the management over the staff,

(*iii*) a mechanism for redressal of the grievances of the employees,

(*iv*) the conditions for the proper utilisation of the aid by the educational institutions, without abridging or diluting the right to establish and administer educational institutions.

In other words, all laws made by the State to regulate the administration of educational institutions and grant of aid will apply to minority educational institutions also. But if any such regulations interfere with the overall administrative control by the management over the staff, or abridges/dilutes, in any other manner, the right to establish and administer educational institutions, such regulations, to that extent, will be inapplicable to minority institutions."

35.1 As regards freedom to choose the principal, it was observed:-

> 22. The Principal or Headmaster of an educational institution is responsible for the functional efficiency of the institution, as also the quality of education and discipline in the institution. He is also responsible for maintaining the philosophy and objects of the institution.

35.2 It also relied upon the passage from the decision of this Court in ***N. Ammad***[23]**,** as under:-

> 25. In *N. Ammad* the appellant contended that he being the seniormost graduate teacher of an aided minority school, he should be appointed as the Headmaster and none else. He relied on Rule 44-A of the Kerala Education Rules which provided that appointment of Headmaster shall ordinarily be according to seniority from the seniority list prepared and maintained under clauses (*a*) and (*b*) of Rule 34. This Court held: (SCC p. 680, paras 18-19)
>
> > "*18*. Selection and appointment of Headmaster in a school (or Principal of a college) are of prime importance in administration of that educational institution. The Headmaster is the key post in the running of the school. He is the hub on which all the spokes of the school are set around whom they rotate to generate result. A school is personified through its Headmaster and he is the focal point on which outsiders look at the school. A bad Headmaster can spoil the entire institution, an efficient and honest Headmaster can improve it by leaps and bounds. The functional efficacy of a school very much depends upon the efficiency and dedication of its Headmaster. This pristine precept remains unchanged despite many changes taking place in the structural patterns of education over the years.

19. How important is the post of Headmaster of a school has been pithily stated by a Full Bench of the Kerala High Court in *Aldo Maria Patroni* v. *E.C. Kesavan*[30]. Chief Justice M.S. Menon has, in a style which is inimitable, stated thus:

> 'The post of the headmaster is of pivotal importance in the life of a school. Around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching. The right to choose the headmaster is perhaps the most important facet of the right to administer a school, and we must hold that the imposition of any trammel thereon—except to the extent of prescribing the requisite qualifications and experience—cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution. To hold otherwise will be to make the right "a teasing illusion, a promise of unreality".'

Thereafter, this Court concluded that the management of minority institution is free to find out a qualified person either from the staff of the same institution or from outside, to fill up the vacancy; and that the management's right to choose a qualified person as the Headmaster of the school is well insulated by the protective cover of Article 30(1) of the Constitution and it cannot be chiselled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post; and that any such statutory or executive fiat would be violative of the fundamental right enshrined in Article 30(1) and would therefore be void. This Court further observed that if the management of the school is not

30 AIR 1965 Ker 75 : 1964 KLT 791 (FB)

> given the wide freedom to choose the person for holding the key post of Principal subject, of course, to the restriction regarding qualifications to be prescribed by the State, the right to administer the school would get much diminished.

35.3 It was, thereafter, concluded:-

> **"27.** It is thus clear that the freedom to choose the person to be appointed as Principal has always been recognised as a vital facet of the right to administer the educational institution. This has not been, in any way, diluted or altered by *T.M.A. Pai*. Having regard to the key role played by the Principal in the management and administration of the educational institution, there can be no doubt that the right to choose the Principal is an important part of the right of administration and even if the institution is aided, there can be no interference with the said right. The fact that the post of the Principal/Headmaster is also covered by State aid will make no difference."

36. In ***Sindhi Education Society and another*** v. ***Chief Secretary, Government of NCT of Delhi and others***[7] a Bench of two Judges of this Court considered *inter alia* whether under Rule 64(1)(b) of the Delhi School Education Rules, 1973, instructions could be issued to fill in the posts of teachers in an aided Minority Educational Institution in accordance with the policy of reservation by candidates from the categories of Scheduled Casts and Scheduled Tribes. The ratio of the cases decided by this Court in **Re**: ***The Kerala Education Bill, 1957***[9] and in ***Ahmedabad St. Xaviers' College***[5] was considered as under:

> **"46.** In the said case, the Court held that right of the minorities to some extent was restricted in the sense that general control still could be exercised by the authorities concerned, but in accordance with law. That is how Clause 11 of the Bill, which has been very heavily relied upon by the respondents before us, completely puts an embargo on the appointment of teachers of their choice and the teachers could only be appointed out of the panel selected by the Public Service Commission. This clause was held not to be in violation of the Constitution, but Clauses 14 and 15, which related to taking over of the management of an aided school for the conditions stipulated therein, were held to be unconstitutional and bad. This was in view of the law stated under the Bill and its scheme that weighed with the Court to record the findings aforenoticed.
>
> **47.** Still another seven-Judge Bench of this Court, in *Ahmedabad St. Xavier's College Society*[5] was primarily concerned with the scope of Articles 29 and 30 of the Constitution, relating to the rights of minorities to impart general education and applicability of the concept of affiliation to such institutions. Of course, the Court held that there was no fundamental right of a minority institution to get affiliation from a university. 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 instructions prescribed by that university, and it agrees to follow the uniform courses of study. Therefore, measures which will regulate the courses of study, the qualifications and appointment of teachers, the conditions of employment of teachers, the health, hygiene of students and the other facilities are germane to affiliation of minority institutions.

36.1 In the context of the decision in ***TMA Pai Foundation***[8], it was observed:

"55. The respondents have placed reliance upon the law stated by the Bench that any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by majority or the minority. Such a limitation must be read into Article 30. The rule under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf. It is, of course, true that government regulations cannot destroy the minority character of the institution or make a right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law.

56. The appellant also seeks to derive benefit from the view that the courts have also held that the right to administer is not absolute and is subject to reasonable regulations for the benefit of the institutions as the vehicle of education consistent with the national interest. Such general laws of the land would also be applicable to the minority institutions as well. There is no reason why regulations or conditions concerning generally the welfare of the students and teachers should not be made applicable in order to provide a proper academic atmosphere. As such, the provisions do not, in any way, interfere with the right of administration or management under Article 30(1). Any law, rule or regulation, that would put the educational institutions run by the minorities at a disadvantage, when compared to the institutions run by the others, will have to be struck down. At the same time, there may not be any reverse discrimination.

91. In *T.M.A. Pai case*[8] the right to establish an institution is provided. The Court held that the right to establish an institution is provided in Article 19(1)(*g*) of the Constitution. Such right, however, is subject to reasonable restriction, which may be brought about in terms of clause (6) thereof. Further, that minority, whether based on religion or language, however, has a fundamental right to establish and administer educational institution of its own choice under Article 30(1).

> **92.** The right under clause (1) of Article 30 is not absolute but subject to reasonable restrictions which, inter alia, may be framed having regard to the public interest and national interest of the country. Regulation can also be framed to prevent maladministration as well as for laying down standards of education, teaching, maintenance of discipline, public order, health, morality, etc. It is also well settled that a minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and, at the same time, would be required to admit a reasonable extent of non-minority students, to the extent, that the right in Article 30(1) is not substantially impaired and further, the citizen's right under Article 29(2) is not infringed."

36.2 While considering the amplitude of the Rule in question, it was observed:

> **"101.** To appoint a teacher is part of the regular administration and management of the school. Of course, what should be the qualification or eligibility criteria for a teacher to be appointed can be defined and, in fact, has been defined by the Government of NCT of Delhi and within those specified parameters, the right of a linguistic minority institution to appoint a teacher cannot be interfered with. The paramount feature of the above laws was to bring efficiency and excellence in the field of school education and, therefore, it is expected of the minority institutions to select the best teacher to the faculty. To provide and enforce any regulation, which will practically defeat this purpose would have to be avoided. A linguistic minority is entitled to conserve its language and culture by a constitutional mandate. Thus, it must select people who satisfy the prescribed criteria,

> qualification and eligibility and at the same time ensure better cultural and linguistic compatibility to the minority institution.
>
> **112.** Every linguistic minority may have its own social, economic and cultural limitations. It has a constitutional right to conserve such culture and language. Thus, it would have a right to choose teachers, who possess the eligibility and qualifications, as provided, without really being impressed by the fact of their religion and community. Its own limitations may not permit, for cultural, economic or other good reasons, to induct teachers from a particular class or community. The direction, as contemplated under Rule 64(1)(*b*), could be enforced against the general or majority category of the government-aided schools but, it may not be appropriate to enforce such condition against linguistic minority schools. This may amount to interference with their right of choice and, at the same time, may dilute their character of linguistic minority. It would be impermissible in law to bring such actions under the cover of equality which in fact, would diminish the very essence of their character or status. Linguistic and cultural compatibility can be legitimately claimed as one of the desirable features of a linguistic minority in relation to selection of eligible and qualified teachers."

36.3 It was also observed that despite Rule 64(1)(b), a circular was issued on 21.03.1986 exempting Minority Institutions from complying with the requirements of said Rule; and that the subsequent insistence through circular of September 1989 did not disclose any reason for such departure and it was, therefore, observed:

> **"117.** Thus, the framework of reservation policy should be such, as to fit in within the constitutional scheme of our democracy. As and when the

> Government changes its policy decision, it is expected to give valid reasons and act in the larger interest of the entire community rather than a section thereof. In its wisdom and apparently in accordance with law the Government had taken a policy decision and issued the Circular dated 21-3-1986 exempting the minority institutions from complying with the requirements of Rule 64(1)(*b*) of the DSE Rules. Despite this and the judgment of the High Court there was a change of mind by the State that resulted in issuance of the subsequent Circular of September 1989. From the record before us, no reasons have been recorded in support of the decision superseding the Circular dated 21-3-1986."

36.4 In the aforesaid circumstances, the appeal was allowed and it was held that Rule 64(1)(b) and the circular of 1989 would not be enforceable against Linguistic Minority Schools in the NCT of Delhi.

37. In ***Chandana Das (Malakar) vs. State of West Bengal and others***[31] the question that arose was set out in para 6 as under:-

> **6.** … …whether the Institution's right to select and appoint teachers is in any way affected by the provisions of the Rules of Management of Recognised Non-Government Institutions (Aided and Unaided), 1969 framed under the provisions of the West Bengal Board of Secondary Education Act, 1963?"

In terms of Rule 28 teachers on permanent or temporary basis, against permanent or temporary vacancies, could be appointed only on the recommendation of the *West Bengal Regional School Service*

31 (2015) 12 SCC 140

Commission[32]. However, according to Rule 33, on the application by any institution to which the provisions of Articles 26 and 30 of the Constitution apply, rules could be framed by the State Government. According to the State, the concerned institution had never claimed minority status and was never recognised as minority institution. Reliance was also placed on Rule 8(3) of the Rules for Management of Recognised Non-Government Institutions (Aided and Unaided), 1969 whereunder permission for special constitution was granted to the institution and, therefore, it was submitted that having accepted the special constitution, it could not turn around and contend that it was a minority institution as per special rules framed in terms of Rule 33.

37.1 There was disagreement between the Judges constituting the Bench. According to Thakur, J, as the learned Chief Justice then was, since the institution was set up by Punjabi speaking Sikh community, a linguistic minority in the State, the mechanism provided for making appointments under Rule 28 had no application to minority educational institutions for whom there could be special dispensation under Rule 33. During the course of his Judgment, Thakur, J. observed:-

> **"21.** It is unnecessary to multiply decisions on the subject for the legal position is well settled. Linguistic

32 Constituted in forms of 1997 Act – as dealt with in para 6 hereinabove.

> institution and religious are entitled to establish and administer their institutions. Such right of administration includes the right of appointing teachers of its choice but does not denude the State of its power to frame regulations that may prescribe the conditions of eligibility for appointment of such teachers. The regulations can also prescribe measures to ensure that the institution is run efficiently for the right to administer does not include the right to maladministration. While grant-in-aid is not included in the guarantee contained in the Constitution to linguistic and religious minorities for establishing and running their educational institutions, such grant cannot be denied to such institutions only because the institutions are established by linguistic or religious minority. Grant of aid cannot, however, be made subservient to conditions which deprive the institution of their substantive right of administering such institutions. Suffice it to say that once Respondent 4 Institution is held to be a minority institution entitled to the protection of Articles 26 and 30 of the Constitution of India the right to appoint teachers of its choice who satisfy the conditions of eligibility prescribed for such appointments under the relevant rules is implicit in their rights to administer such institutions. Such rights cannot then be diluted by the State or its functionaries insisting that the appointment should be made only with the approval of the Director or by following the mechanism generally prescribed for institutions that do not enjoy the minority status."
>
> (Emphasis supplied)

37.2 Banumathi, J., however, found that the concerned institution had never claimed to be a minority institution and had, in fact, accepted the special constitution in terms of Rule 8 (3). It was, therefore, observed:-

> **"52.** The fourth respondent school has accepted the special constitution and it has not chosen to challenge the same. As rightly held by the High Court, when the fourth respondent school has accepted the special

> constitution and has not claimed to be a minority institution, the appellants who are merely employees of such an institution, cannot contend that the institution was a minority institution entitled to appoint its own teachers."

37.3 Because of the disagreement, the matter was directed to be placed before a Bench of three Judges of this Court, which has since then rendered its decision on 25.09.2019[33]. It was noted that Rule 32 specifically declared that nothing in the concerned Rules would apply to an educational institution established and administered by a minority referred to in clause (c) of Section 2 of the West Bengal Minorities' Commission Act, 1996, which had, in turn, defined expression "*minority*" to mean a community based on religion such as Muslim, Christian, Sikh, Buddhist, or Zorastrian (Parsee). As regards the first question, it was, therefore, observed in paragraphs 17 to 20 that the Institution was a minority educational institution. It was also considered whether declaration as to status of the minority institution by the competent authority was necessary before the institution could claim the status of being a minority institution. Both the issues which had led to disagreement between two Judges were thus, squarely answered and the decision of Thakur, J. was accepted to be the correct view on both counts.

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33 Reported in **2019 SCC OnLine SC 1253** [Chandana Das (Malakar) vs. State of West Bengal and others]

37.4 During the course of its discussion, this Court also considered the decision in ***Ahmedabad St. Xavier's College***[5] case and observed:-

> "**30.** A reading of the aforesaid judgment would leave no manner of doubt that if Respondent No. 4 is a minority institution, Rule 28 of the Rules for Management of Recognized Non-Government Institutions (Aided and Unaided) 1969, cannot possibly apply as there would be a serious infraction of the right of Respondent No. 4 to administer the institution with teachers of its choice."

DISCUSSION AND CONCLUSION

38. In the backdrop of the decisions of this Court referred to hereinabove, we must now consider whether the relevant provisions of the Commission Act transgress upon the rights of a minority institution or said provisions can be termed as "tenable as ensuring the excellence of the institution without injuring the essence of the right"[34] of a minority institution. Right from ***Re: The Kerala Education Bill***[9] Case the issue that has engaged the attention of this Court is about the content of rights of minority educational institution and the extent and width of applicability of regulations and what can be said to be permissible regulations. If the cases in the first segment i.e. upto the decision in ***TMA Pai Foundation***[8] are considered, the following principles emerge:-

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34 Expression used by Krishna Iyer J. in the Gandhi Faiz – e-am College case[13]

A) In ***Re: The Kerala Education Bill***[9] Case, Clause 11(2) in terms of which the State Public Services Commission was empowered to select candidates for appointment as teachers in Government and aided schools, was found to be a permissible regulation. It was observed that such provision, *inter alia*, was applicable to all educational institutions and was designed to give protection and security to the teachers engaged in rendering service to the nation.

B) The decision in ***Sidhajbhai Sabhai***[10]**,** however, observed, "*Unlike Art. 19, the fundamental freedom under clause (1) of Art. 30, is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Art. 19 may be subjected to*." It went on to add "*Regulation made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed*." It read the decision in ***Re: The Kerala Education Bill***[9] case as "*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 or public interest, are valid*." It however laid down a test - "*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."

C) (i) In ***Ahmedabad St. Xavier's College***[5] case, while considering the importance of teachers in an educational institution, Ray C.J. in his leading judgment observed, "*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*." It was further stated that "*regulations which will serve the interests of the teachers are of paramount importance in good administration*."

(ii) According to Khanna, J., "*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*."; and "*Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed*." A word of caution was also expressed while observing, "*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."

Khanna, J. then laid down "*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*.";

(iii) Mathew, J. however stated, "*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, exhypothesi, 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*."

D) In ***Gandhi Faiz-e-am College***[13], Krishna Iyer, J. found "*In our case autonomy is virtually left intact and refurbishing, not restructuring, is prescribed. The core of the right is not gouged out at all and the regulation*

is at once reasonable and calculated to promote excellence of the institution — a text book instance of constitutional conditions." The regulation was, however, not found to be permissible by Mathew, J.

E) In ***Frank Anthony Public School***[17] case, it was emphasized, "*The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers*."

39. We now turn to ***TMA Pai Foundation***[8] case and consider the principles that it laid down and whether there was reiteration of the principles laid down in the decisions of this Court in the earlier segment or whether there was any change or shift in the emphasis.

A) In para 50, five incidents were stated to comprise the "*right to establish and administer*" and three of them were stated to be :-

(a) right to admit students;
(b) right to appoint staff – teaching and non-teaching; and
(c) right to take disciplinary action against the staff.

The discussion in the leading judgment was under various headings and the important one being "5. *To what extent can the rights of aided private minority institutions to administer be regulated?*"

B) The earlier decisions of the Court were considered and while considering the judgment of this Court in ***Sidhajbhai Sabhai***[10] case it was observed:-

> "*If this is so, it is difficult to appreciate how the Government can be prevented from framing regulations that are in the national interest, as it seems to be indicated in the passage quoted hereinabove. Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf. It is, of course, true that government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law*."

C) Thus, the principle laid down in ***Sidhajbhai Sabhai***[10] that the right under Article 30(1) cannot 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 was not accepted in ***TMA Pai Foundation***[8]. The emphasis was clear that any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority and put the matter beyond any doubt. A caveat was however entered and it was stated that the

Government regulations cannot destroy the minority character of the institution.

D) The leading judgment then observed that the correct approach would be - what was laid down by Khanna, J. in ***Ahmedabad St. Xavier's College***[5] case:-

> "*A balance has 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 that embraced and reconciled the two objectives could be considered to be reasonable. This, in our view, is the correct approach to the problem*."

E) The majority judgment then summed up the matter and stated:-

> "*It is difficult to comprehend that the framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution*. ……..
>
> 137. …… *The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).*"

It was further laid down :-

> "*In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. ….. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions*."

40. The decision in ***TMA Pai Foundation***[8]**,** rendered by Eleven Judges of this Court, thus put the matter beyond any doubt and clarified that the right under Article 30(1) is not absolute or above the law and that conditions concerning the welfare of the students and teachers must apply in order to provide proper academic atmosphere, so long as the conditions did not interfere with the right of the administration or management. What was accepted as correct approach was the test laid down by Khanna, J. in ***Ahmedabad St. Xavier's College***[5] case that a balance be kept between two objectives - one to ensure the standard of excellence of the institution and the other preserving the right of the minorities to establish and administer their educational institutions. The essence of Article 30(1) was also stated – "*to ensure equal treatment between the majority and the minority institutions*" and that rules and regulations would apply equally to the majority institutions as well as to the minority institutions.

41. The decisions of this Court rendered after ***TMA Pai Foundation***[8] case, may now be considered.

A) In ***Brahmo Samaj Education Society***[24]**,** the argument that the appointment of teachers through College Service Commission would maintain equal standard of education for all throughout the State was not accepted and it was observed that the equal standards would be maintained by insistence on qualifying tests or examinations. This Court, however, did not consider whether the Rules in question were valid or not and left it to the authorities to bring the rules and regulations in conformity with the principles laid down in ***TMA Pai Foundation***[8]. It may be stated here that a review petition has since then been allowed and the matter now stands referred to a Constitution Bench.[35]

B) The decision of this Court in ***P.A. Inamdar***[25] was not directly concerned with the rights of the minority educational institutions receiving aid. It, however, dealt with the matter regarding admission of students in unaided professional educational institutions and observed that the admission of students in minority unaided professional educational institutions must also be governed on the basis of merit. It thus did not accept the right to admit students to be an unqualified right inhering in a minority professional educational institution. The discussion in that case shows that the admissions based on merit in professional educational

35 As observed in para 41 of Chandana Das – (2019) SCC Online SC 1253

institutions were found to be in the national interest and strengthening the national welfare.

(C) ***Malankara Syrian Catholic College***[6] was concerned with selection and appointment of a Principal in an unaided minority educational institution. It was stated in para 19 that the right conferred on minorities under Article 30 was only to ensure equality with majority and was not intended to place the minorities in a more advantageous position vis-à-vis the majority and that there was no reverse discrimination in favour of minorities and that the general laws of the land relating to national interest, would equally apply to minority institutions. It was also observed that the Principal or Headmaster of any educational institution would be responsible for functional efficiency of the institution and also for the quality of education and discipline in the educational institutions as well as maintaining the philosophy and objects of the institution. On that premise, the right to choose a Principal was accepted to be part of the right of a minority educational institution. It also relied upon the decision in ***N. Ammad***[23] case which in turn had relied upon the Full Bench decision of the Kerala High Court. It was, therefore, stated that the power to choose a Headmaster was always recognised as an important facet of the right to the administer the educational institutions.

(D) ***Sindhi Education Society***[7] was concerned with the issue whether instructions could be issued to fill up the posts of teachers in an unaided minority institution in accordance with the principles and policy of reservation. The concerned rules empowered the authority to issue such instructions. However, a Circular was issued on 21.03.1986 exempting minority institutions from complying with the said Rule. The subsequent insistence through Circular of September, 1989, which did not disclose any reason for departure was not held to be enforceable. The discussion in the case undoubtedly deals with the issue whether the minority educational institutions have a right to choose persons to be appointed as teachers and could there be any regulations and could that right be in any way affected by regulations. However, in the context of a Linguistic Minority Schools it was observed that such institutions must have a right to select the best teachers who not only satisfy the prescribed criteria, qualification and eligibility but also ensure better cultural and linguistic compatibility. Since, the candidates nominated in terms of powers conferred by Rule 64(1)(b) and the instructions issued in Circular of September, 1989 would not satisfy such requirements and ensure compatibility, the appeal was allowed.

(E) In ***Chandana Das***[31]**,** the principal issue was whether the concerned institution was a minority institution or not. On that issue, there was a disagreement between two Judges of this Court and the matter was referred to a Bench of three Judges which accepted the view of Thakur, J. and held that the institution was a minority educational institution[33]. The issue arose in the context whether recommendations of the West Bengal School Service Commission as regards appointments of teachers against permanent or temporary vacancies could be validly issued in so far as a minority educational institution was concerned. It may be stated that in terms of Section 15 of 1997 Act, nothing in that Act would apply to "*a School established and administered by a minority whether based on religion or language*" and as such the recommendations of the West Bengal School Service Commission could never apply to a minority institutions. Once the view taken by Thakur, J. was accepted and it was held that the institution was a minority institution, by virtue of said Section 15, the West Bengal School Commission could not be competent to issue any direction.

45. Thus, going by the decision of eleven Judges of this Court *in* ***TMA Pai Foundation***[8], so long as the principles laid down therein (as culled out in para 40 hereinabove) are satisfied, it is permissible if any regulations seek to ensure the standard of excellence of the institutions while

preserving the right of the minorities to establish and administer their educational institutions.

Out of five incidents which constitute "the right to establish and administer" an educational institution as noted in para 50 of the leading judgment in ***TMA Pai Foundation***[8], the right to admit students has not been considered to be an absolute and an unqualified right. The decision in ***P.A. Inamdar***[25] shows that in professional educational institutions or those imparting higher education, merit based selection has been taken to be in the interest of the nation and subserving and strengthening the national welfare. Selection of meritorious students has been accepted to be in the national interest. A minority institution cannot in the name of right under Article 30(1) of the Constitution, disregard merit or merit-based selection of students as regards professional and higher education. The right to take disciplinary action against the staff has also not been accepted to be an unqualified right. ***TMA Pai Foundation***[8] itself lays down that even in an unaided minority educational institution, a mechanism must be evolved and appropriate Tribunal must be constituted to consider the grievances and till then the Tribunals could be presided over by a judicial officer of the rank of a District Judge. To that extent, there was a definite departure from the law laid down in ***Ahmedabad St. Xavier's College***[5] case which

had struck down Sections 51-A and 52-A of the Gujrat University Act, 1949.

46. When it comes to the right to appoint teachers, in terms of law laid down in ***TMA Pai Foundation***[8] a regulation framed in the national interest must necessarily apply to all institutions regardless whether they are run by majority or minority as the essence of Article 30(1) is to ensure equal treatment between the majority and minority institutions. An objection can certainly be raised if an unfavourable treatment is meted out to an educational institution established and administered by minority. But if ensuring of excellence in educational institutions is the underlying principle behind a regulatory regime and the mechanism of selection of teachers is so designed to achieve excellence in institutions, the matter may stand on a completely different footing.

47. The test accepted in ***TMA Pai Foundation***[8]**,** and the balance between two objectives can well be considered in the context of two categories of institutions; *one* imparting education which is directly aimed at or dealing with preservation and protection of the heritage, culture, script and special characteristics of a religious or a linguistic minority; while the *second* category of institutions could be those which are

imparting what is commonly known as secular education. When it comes to the institutions in the former category, the teachers who believe in the religious ideology or in the special characteristics of the concerned minority would alone be able to imbibe in the students admitted in such educational institutions, what the minorities would like to preserve, profess and propagate. But, if the subjects in the curriculum are purely secular in character, that, is to say, subjects like Arithmetic, Algebra, Physics, Chemistry or Geography, the intent must be to impart education availing the best possible teachers. In the *first* category, maximum latitude may be given to the managements of the concerned minority institutions as they would normally be considered to be the best judges of what would help them in protecting and preserving the heritage, culture, script or such special features or characteristics of the concerned minorities. However, when it comes to the *second* category of institutions, the governing criteria must be to see to it that the most conducive atmosphere is put in place where the institution achieves excellence and imparts best possible education.

48. As laid down in the leading judgment in ***Ahmedabad St. Xavier's College***[5] case, regulations which will serve the interest of the students so also regulations which will serve the interest of the teachers are of

paramount importance in good administration; that regulations in the interest of efficiency of teachers are necessary for preserving harmony amongst the institutions; and that the appointment of teachers is an important part in educational institutions. It is quite natural that qualitatively better teachers will ensure imparting of education of the highest standard and will help in achieving excellence. As accepted in ***Frank Anthony Public School***[17] case, the excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff and would in turn depend *inter alia* on the quality of teachers.

49. Thus, if the intent is to achieve excellence in education, would it be enough if the concerned educational institutions were to employ teachers with minimum requisite qualifications in the name of exercise of Right under Article 30 of the Constitution, while better qualified teachers are available to impart education in the second category of institutions as stated hereinabove. For example, if the qualifying percentile index for a teacher to be appointed in an educational institution, considering his educational qualifications, experience and research, is required to be 50, and if teachers possessing qualifications far greater and higher than this basic index are available, will it be proper exercise for a minority

educational institution to select teachers with lower index disregarding those who are better qualified? Will that subserve pursuit of excellence in education? One can understand if under the regulatory regime candidates who are otherwise less qualified are being nominated in the minority educational institution and the minority educational institution is forced to accept such less meritorious candidates in preference to better qualified candidates. In such cases, the minority educational institution can certainly be within its rights to agitate the issue and claim a right to choose better teachers. But if the candidates who are selected and nominated under the regulatory regime to impart education which is purely secular in character, are better qualified, would the minority institution be within its rights to reject such nomination only in the name of exercise of a right of choice? The choice so exercised would not be in pursuit of excellence. Can such choice then be accepted?

If the right is taken to be absolute and unqualified, then certainly such choice must be recognised and accepted. But, if the right has not been accepted to be absolute and unqualified and the national interest must always permeate and apply, the excellence and merit must be the governing criteria. Any departure from the concept of merit and excellence would not make a minority educational institution an effective vehicle to achieve

what has been contemplated in various decisions of this Court. Further, if merit is not the sole and governing criteria, the minority institutions may lag behind the non-minority institutions rather than keep in step with them.

Going back to the example given above, as against index of 50 i.e. the minimum qualifying index, if a candidate nominated under the regulatory regime is at an index of 85, selection by a minority educational institution of a candidate at an index 55 may certainly be above the minimum qualifying mark, but in preference to the one at the index of 85 who is otherwise available, the appointment of a person at the index level of 55, will never give the requisite impetus to achieve excellence. A meritorious candidate at the index level of 85 in the above example, if given the requisite posting will not only help in upholding the principle of merit but will in turn generate an atmosphere of qualitative progress and sense of achievement commensurate with societal objectives and ideology and such posting will, therefore, be in true national interest.

50. At the cost of repetition, it needs to be clarified that if the minority institution has a better candidate available than the one nominated under a regulatory regime, the institution would certainly be within its rights to reject the nomination made by the authorities but if the person nominated for imparting education is otherwise better qualified and suitable, any

rejection of such nomination by the minority institution would never help such institution in achieving excellence and as such, any such rejection would not be within the true scope of the Right protected under Article 30(1) of the Constitution.

51. With these basic principles in mind, we may now consider the statutory provisions under which the teachers could be nominated under the Commission Act and see whether the concerned regulations help in achieving excellence or whether those provisions are violative of the Rights of the minority institutions.

52. In terms of Section 4 of the Commission Act, the Commission is to consist of a Chairman and four Members. The Chairman of the Commission has to be an eminent educationist having profound knowledge in Islamic Culture and must be well versed in education with teaching experience *inter alia* as a teacher of a University or as a Principal of a college, for a period of not less than twelve years. It is true that the latter part of Section 4(ii) speaks of an officer of the State Government not below the rank of Joint Secretary who could also be appointed as the Chairman of the Commission. But in our view, considering the nature of duties that the Chairman is to discharge, even an officer of the State Government has to be a person with profound knowledge in Islamic

Culture. Apart from the Chairman, there are four Members who are to be appointed in terms of Section 4(iii) of the Commission Act. Out of these four Members, one has to be an eminent educationist having profound knowledge in Islamic Theology and Culture, while the other two Members must have teaching experience *inter alia* as a teacher of a University, or a Principal of a College for a period of not less than ten years. The fourth member could be a non-educationist, but he must have held the position of eminence in public life or in Legal or Administrative Service. Predominant composition of the Commission is thus of educationists and two of them have to be persons with profound knowledge in Islamic Culture and Islamic Theology. The provisions of the Commission Act are thus specially designed for Madrasahs and Madrasah Education System in the State. Rule 8 of the 2010 Rules stipulates fair and transparent process of merit based selection and the statutory mechanism would ensure that only those teachers would be selected who would be best suited to impart education in Madrasah Education System. The State Legislature has taken care to see that the composition of the Commission would ensure compatability of the teachers who would be selected to impart education in Madrasah Education System, which is also emphasized in the Statement of Objects and Reasons.

53. It is true that the recommendations or nominations of teachers made by the Commission are otherwise binding on the Managing Committees of concerned Madrasahs, but, in terms of second proviso to Section 10 of the Commission Act, if there be any error, it is open to the Managing Committee of the concerned Madrasah to bring it to the notice of the Commission for removal of such error. The concept of 'error' as contemplated must also include cases where the concerned Madrasah could appoint a better qualified teacher than the one nominated by the Commission. If any such error is pointed out, the Commission will certainly have to rectify and remove the error. The further protection is afforded by Section 12 of the Commission Act, under which the concerned Madrasah could be within its rights to refuse to issue appointment letter to the candidate recommended by the Commission if any better qualified candidate is otherwise available with the managing committee of the concerned Madrasah. Such refusal may also come within the expression 'any reasonable ground' as contemplated in Section 12(i) of the Act.

The legislature has thus taken due care that the interest of a minority institution will always be taken care of by ensuring that i) in normal circumstances, the best qualified and suitable candidates will be nominated by the Commission; ii) and in case there be any error on part of the Commission, the concerned Managing Committee could not only point out

the error which would then be rectified by the Commission but the Managing Committee may also be within its rights in terms of Section 12 (i) to refuse the nomination on a reasonable ground.

54. The regime put in place by the State legislature thus ensures that the Commission comprising of experts in the field would screen the talent all across the State; will adopt a fair selection procedure and select the best available talent purely on merit basis; and even while nominating, the interest of the minority institution will also be given due weightage and taken care of. The statutory provisions thus seek to achieve 'excellence' in education and also seek to promote the interest of the minority institutions. The provisions satisfy the test as culled out in the decision of this Court in ***TMA Pai Foundation***[8] case.

55. In our considered view going by the principles laid down in the decision in ***TMA Pai Foundation case***[8]**,** the concerned provisions cannot, therefore, be said to be transgressing the rights of the minority institutions. The selection of the teachers and their nomination by the Commission constituted under the provisions of the Commission Act would satisfy the national interest as well as the interest of the minority educational

institutions and said provisions are not violative of the rights of the minority educational institutions.

56. The aforesaid conclusions have been arrived at by us in keeping with the principles laid down by this Court in ***TMA Pai Foundation***[8] case.

We are aware that in ***Brahmo Samaj Education Society***[24]***, Sindhi Education Society***[7] and ***Chandana Das (Malakar)***[33]**,** decided after ***TMA Pai Foundation***[8], this Court had also dealt with the question whether the concerned authorities could validly nominate teachers to be appointed in minority educational institutions. ***Brahmo Samaj Education Society***[24] did not specifically deal with the question whether rules were valid or not and left it to the authorities to bring the rules and regulations in conformity with the principles in ***TMA Pai Foundation***[8] case. ***Sindhi Education Society***[7] dealt with the issue in the context of reservation. It also found that the teachers nominated by the concerned authorities would not be compatible to teach in educational institutions run by linguistic minorities. In ***Chandana Das (Malakar)***[33] the basic issue was whether the concerned institution was a minority institution or not. ***Sindhi Education Society***[7] and ***Chandana Das (Malakar)***[33] dealt with statutory regimes which did not have any special features or matters concerning compatibility of teachers

which could be required going by the special characteristics of the minority educational institutions. However, the additional feature in the present matter shows that the composition of the Commission with special emphasis on persons having profound knowledge in Islamic Culture and Theology, would ensure that the special needs and requirements of minority educational institutions will always be taken care of and thus the present case stands on a different footing.

We, therefore, have no hesitation in going by the test culled out in the ***TMA Pai Foundation***[8] and hold that the provisions of the Commission Act are not violative of the rights of the minority educational institutions on any count.

57. In the premises, while allowing these appeals, we set aside the view taken by the Single Judge and the Division Bench of the High Court and dismiss Writ Petition No.20650(W) of 2013 and other connected matters. We also hold Sections 8, 10, 11 and 12 of the Commission Act to be valid and constitutional.

58. In the end, we declare all nominations made by the Commission in pursuance of the provisions of the Commission Act to be valid and

operative. However, if after the disposal of the matters by the High Court any appointments are made by the concerned Madarshas, such appointments of teachers shall be deemed to be valid for all purposes. But the Commission shall hereafter be competent to select and nominate teachers to various Madarshas in accordance with the provisions of the Commission Act and the Rules framed thereunder.

59. With the aforesaid observations these appeals are allowed. No separate orders are required to be passed in respect of Writ Petitions and contempt petitions which stand disposed of in terms of declaration as above. No orders as to costs.

……..J.
[Arun Mishra]

……..J.
[Uday Umesh Lalit]

New Delhi;
January 6, 2020.