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

PETITIONER:
T.M.A. Pai Foundation & Ors.

RESPONDENT:
State of Karnataka & Ors.

DATE OF JUDGMENT: 31/10/2002

BENCH:
Ruma Pal.

JUDGMENT:
RUMA PAL, J.

With

Writ Petition (Civil) Nos. 252 of 1979, 54-57, 2228 of 1981, 2460, 2582 2584, 3362, 3517, 3602, 3603, 3634-3636, 8398, 8391, 5621, 5035, 3701 3704, 3715, 3728, 4648-4649, 2479, 2480, 2547 and 3475 of 1982, 7610, 4810, 9839 and 9683-84 of 1983, 12622-24 of 1984, 119 and 133 of 1987, 620 of 1989, 133 of 1992, 746, 327, 350, 613, 597, 536, 626, 444, 417, 523, 474, 485, 484 355, 525, 469, 392, 629, 399, 531, 603, 702, 628, 663, 284, 555, 343, 596, 407,737, 738, 747, 479, 610, 627, 685, 706, 726, 598, 482 and 571 of 1993, ----------(D. No.1741), 295 and 764 of 1994, 331, 446 and 447 of 1995, 364 and 435 of 1996, 456,454, 447 and 485 of 1997, 356, 357 and 328 of 1998, 199, 294, 279, 35, 181, 373, 487 and 23 of 1999, 561of 2000, 6 and 132 of 2002, Civil Appeal Nos.1236-1241 and 2392 of 1977,687 of 1976, 3179- 3182, 1521-1556, 3042-3091 of 1979, 2929-2931, 1464 of 1980, 2271 and 2443-2446 of 1981, 4020, 290 and 10766 of 1983, 5042-5043 of 1989, 6147 and 5381 of 1990, 71-73 of 1991,1890-1891, 2414 and 2625 of 1992, 4695-4746, 4754-4866 of 1993, 5543-5544 of 1994, 8098-8100 and 11321 of 1995, 4654-4658 of 1997, 608,3543 and 3584-3585 of 1998, and 5053-5054 of 2000, 5647-5656 of 2001, and 2334 of 2002, Special Leave Petition (C) Nos.9950-9951 of 1979, 11526 and 863 of 1980, 12408 of 1985 8844 of 1986, 12320 of 1987, 14437, 18061-18062 of 1993, 904-905 and 11620 of 1994, 23421 of 1995, 4372 of 1996, 10360 and 10664 of 1997, 1216, 9779-9786, 6472-6474 and 9793 of 1998, 5101, 4480 and 4486 of 2002 and T.C.(C) No. 26 of 1990, T.P. (C) 1014 of 1993.

I have had the privilege of reading the opinion of Hon'ble the Chief Justice. Although I am in broad agreement with most of the conclusions arrived at in the judgment, I have to record my respectful dissent with the answer to Question 1 and Question 8 in so far as it holds that Article 29(2) is applicable to Article 30(1). I consequently differ with the conclusions as stated in answer to Questions 4, 5(b) and 11 to the extent mentioned in this opinion.

Re: Question 1

What is the meaning and content of the expression "minorities" in Article 30 of the Constitution of India?

Article 30 affords protection to minorities in respect of limited rights, namely, the setting up and administration of an educational institution. The question of protection raises three questions : (1) protection to whom? (2) against whom? and (3) against what? The word minority means "numerically less". The question then is numerically less in relation to the country or the State or some other political or geographical boundary?

The protection under Article 30 is against any measure, legislative or otherwise, which infringes the right's granted under that article. The right is not claimed in a vacuum it is claimed against a

particular legislative or executive measure and the question of minority status must be judged in relation to the offending piece of legislation or executive order. If the source of the infringing action is the State, then the protection must be given against the State and the status of the individual or group claiming the protection must be determined with reference to the territorial limits of the State. If however the protection is limited to State action, it will leave the group which is otherwise a majority for the purpose of State legislation, vulnerable to Union legislation which operates on a national basis. When the entire nation is sought to be affected, surely the question of minority status must be determined with reference to the country as a whole.

In Re: Kerala Education Bill,1957 1959 SCR 995, p.1047, the contention of the State of Kerala was that in order to constitute a minority for the purposes of Articles 29 (1) and 30 (1), persons must be numerically in the minority in the particular area or locality in which educational institution is or is intended to be constituted. The argument was negatived as being held inherently fallacious (p.1049) and also contrary to the language of Article 350-A. However, the Court expressly refrained from finally opining as to whether the existence of a minority community should in circumstances and for the purposes of law of that State be determined on the basis of the population of the whole State or whether it should be determined on the State basis only when the validity of a law extending to the whole State is in question or whether it should be determined on the basis of the population of a particular locality when the law under attack applies only to that locality. In other words the issue was - should the minority status be determined with reference to the source of legislation viz., the State legislature or with reference to the extent of the law's application. Since in that case the Bill in question was admittedly a piece of State legislation and also extended to the whole of the State of Kerala it was held that "the minority must be determined by reference to the entire population of that State". (p.1050)

In the subsequent decision in DAV College V. State of Punjab (I) , this Court opted for the first principle namely that the position of minorities should be determined in relation to the source of the legislation in question and it was clearly said:

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

In D.A.V. College V. State of Punjab (II), Punjabi had been sought to be enforced as the sole medium of instruction and for examinations on the ground that it was the national policy of the Government of India to energetically develop Indian languages and literature. The College in question used Hindi as the medium of instruction and Devnagri as the script. Apart from holding that the State Legislature was legislatively incompetent to make Punjabi the sole medium of instruction, the Court reaffirmed the fact that the College although run by the Hindu community which represents the national majority, in Punjab it was a religious minority with a distinct script and therefore the State could not compel the petitioner-College to teach in Punjabi or take examinations in that language with Gurmukhi script.

But assuming that Parliament had itself prescribed Hindi as

the compulsory medium of instruction in all educational institutions throughout the length and breadth of the country. If a minority's status is to be determined only with respect to the territorial limits of a State, non-Hindi speaking persons who are in a majority in their own State but in a minority in relation to the rest of the country, would not be able to impugn the legislation on the ground that it interferes with their right to preserve a distinct language and script. On the other hand a particular institution run by members of the same group in a different State would be able to challenge the same legislation and claim protection in respect of the same language and culture.

Apart from this incongruity, such an interpretation would be contrary to Article 29(1) which contains within itself an indication of the 'unit' as far as minorities are concerned when it says that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. Merely because persons having a distinct language, script or culture are resident within the political and geographical limits of a State within which they may be in a majority, would not take them out of the phrase "section of citizens residing in the territory of India". It is a legally fortuitous circumstance that states have been created along linguistic lines after the framing of the Constitution.

In my opinion, therefore, the question whether a group is a minority or not must be determined in relation to the source and territorial application of the particular legislation against which protection is claimed and I would answer question 1 accordingly.

Re: Question 8

Whether the ratio laid down by this Court in the St. Stephen's case (St. Stephen's College vs. University of Delhi [(1992) 1 SCC 558)] is correct ? If no, what order?

In St. Stephen's College , the Court decided (a) that the minorities right to admit students under Article 30(1) had to be balanced with the rights conferred under Article 29(2). Therefore the State could regulate the admission of students of the minority institutions so that not more than 50% of the available seats were filled in by the children of the minority community and (b) the minority institution could evolve its own procedure for selecting students for admission in the institutions. There can no quarrel with the decision of the court on the second issue. However, as far as the first principle is concerned, in my view the decision is erroneous and does not correctly state the law.

Article 30(1) of the Constitution provides that "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice". Article 29(2) on the other hand says that "no citizen shall be denied admission into any educational institution, maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them".

Basically, the question is whether Article 30(1) is subject to Article 29(2) or is Article 29 (2) subject to Article 30(1)? If Article 30(1) does not confer the right to admit students then of course there is no question of conflict with Article 29(2) which covers the field of admission into "any educational institution". The question, therefore, assumes that the right granted to minorities under Article 30(1) involves the right to admit students. Is this assumption valid? The other assumption on which the question proceeds is that minority institutions not receiving aid are outside the arena of this apparent conflict. Therefore the issue should be more appropriately framed as: - does the receipt of State aid and consequent admission of non-minority students affect the rights of minorities to establish and administer educational institution of their choice?. I have sought to answer the question on an interpretation of the provisions of the Constitution so that no provision is rendered nugatory or redundant ; on an

interpretation of the provisions in the context of the objects which were sought to be achieved by the framers of the Constitution; and, finally on a consideration of how this Court has construed these provisions in the past.

Both Articles 29 and 30 are in Part III of the Constitution which deals with 'Fundamental Rights'. The fundamental rights have been grouped and placed under separate headings. For the present purposes, it is necessary to consider the second, fourth and fifth groups. The other Articles in the other groups are not relevant. The second group consists of Articles 14 to 18 which have been clubbed under 'Right to Equality'. Articles 25 to 28 are placed under the fourth heading 'Right to Freedom of Religion'. Articles 29 and 30 fall within the fifth heading 'Cultural and Educational Rights'.

The rights guaranteed under the several parts of Part III of the Constitution overlap and provide different facets of the objects sought to be achieved by the Constitution. These objectives have been held to contain the basic structure of the Constitution which cannot be amended in exercise of the powers under Article 368 of the Constitution. Amongst these objectives are those of Equality and Secularism. According to those who have argued in favour of a construction by which Article 29(2) prevails order Article 30, Article 29(2) ensures the equal right to education to all citizens, whereas if Article 30 is given predominance it would not be in keeping with the achievement of this equality and would perpetuate differences on the basis of language and more importantly, religion, which would be contrary to the secular character of the Constitution. Indeed the decision in St. Stephens in holding that Article 29(2) applies to Article 30(1) appears to have proceeded on similar considerations. Thus it was said that unless Article 29(2) applied to Article 30(1) it may lead to "religious bigotry"; that it would be "inconsistent with the central concept of secularism" and "equality embedded in the Constitution" and that an "educational institution irrespective of community to which it belongs is a melting pot in our national life". Although Article 30(1) is not limited to religious minorities, having regard to the tenor of the arguments and the reasoning in St. Stephens in support of the first principle, I propose to consider the argument on 'Secularism' first. .

Article 30 and Secularism

The word 'secular' is commonly understood in contradistinction to the word 'religious'. The political philosophy of a secular Government has been developed in the west in the historical context of the pre-eminence of the established church and the exercise of power by it over society and its institutions. With the burgeoning presence of diverse religious groups and the growth of liberal and democratic ideas, religious intolerance and the attendant violence and persecution of "non-believers" was replaced by a growing awareness of the right of the individual to profession of faith, or non-profession of any faith. The democratic State gradually replaced and marginalised the influence of the church. But the meaning of the word 'secular State' in its political context can and has assumed different meanings in different countries, depending broadly on historical and social circumstances, the political philosophy and the felt needs of a particular country. In one country, secularism may mean an actively negative attitude to all religions and religious institutions; in another it may mean a strict "wall of separation" between the State and religion and religious institutions. In India the State is secular in that there is no official religion. India is not a theocratic State. However the Constitution does envisage the involvement of the State in matters associated with religion and religious institutions, and even indeed with the practice, profession and propagation of religion in its most limited and distilled meaning.

Although the idea of secularism may have been borrowed in

the Indian Constitution from the west, It has adopted its own unique brand of secularism based on its particular history and exigencies which are far removed in many ways from secularism as it is defined and followed in European countries, the United States of America and Australia.
The First Amendment to the American Constitution is as follows:
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'. 'Reynolds v. United States', (1878) 98 U S 145 at p.164.

The Australian Constitution has adopted the First Amendment in S.116 which is based on that Amendment. It reads: "The Commonwealth shall not make any laws for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

Under the Indian Constitution there is no such "wall of separation" between the State and religious institutions. Article 16 (5) recognises the validity of laws relating to management of religious and denominational institutions. Art. 28 (2) contemplates the State itself managing educational institutions wherein religious instructions are to be imparted. And among the subjects over which both the Union and the States have legislative competence as set out in List No. III of the Seventh Schedule to the Constitution Entry No.28 are:

"Charitable and charitable institutions, charitable and religious endowments and religious institutions".

Although like other secular Governments, the Indian Constitution in Article 25(1) provides for freedom of conscience and the individual's right freely to profess, practice and propagate religion, the right is expressly subject to public order, morality and health and to the other provisions in Part III of the Constitution. The involvement of the State with even the individual's right under Article 25(1) is exemplified by Article 25(2) by which the State is empowered to make any law.

"a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

As a result the courts have upheld laws which may regulate or restrict matters associated with religious practices if such practice does not form an integral part of the particular religion .
Freedom of religious groups or collective religious rights are provided for under Article 26 which says that:
"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes.
(b) To manage its own affairs in matters of religion;
(c) To own and acquire movable and immovable property; and
(d) To administer such property in accordance with law.

The phrase "matters of religion" has been strictly construed so that matters not falling strictly within that phrase may be subject to control and regulation by the State. The phrase 'subject to public order, morality and health' and "in accordance with law" also envisages extensive State control over religious institutions. Article 26 (a) allows all persons of any religious denomination to set up an institution for a charitable purpose, and undisputedly the advancement of education is a charitable purpose. Further, the right to practise, profess and propagate religion under Article 25 if read with Article 26(a) would allow all citizens to exercise such rights through an educational institution. These rights are not limited to minorities and are available to 'all persons'. Therefore, the Constitution does not consider the setting up of educational institutions by religious denominations or sects to impart the theology of that particular denomination as anti-secular. Having regard to the structure of the Constitution and its approach to 'Secularism', the observation in St. Stephens noted earlier is clearly not in keeping with 'Secularism' as provided under the Indian Constitution. The Constitution as it stands does not proceed on the 'melting pot' theory. The Indian Constitution, rather represents a 'salad bowl' where there is homogeneity without an obliteration of identity.

The ostensible separation of religion and the State in the field of the States' revenue provided by Article 27 (which prohibits compulsion of an individual to pay any taxes which are specifically appropriated for the expenses for promoting or maintaining any particular religious or religious denomination) does not, however, in terms prevent the State from making payment out of the proceeds of taxes generally collected towards the promotion or maintenance of any particular religious or religious denomination. Indeed, Article 290(A) of the Constitution provides for annual payment to certain Devaswom funds in the following terms: "A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Tamil Nadu every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin." This may be compared with the decision of the U.S. Supreme Court in Everson V. Board of Education (330 IUS 1) where it was held that the State could not reimburse transportation charges of children attending a Roman Catholic School.

Article 28 in fact brings to the fore the nature of the word 'secular' used in the preamble to the Constitution and indicates clearly that there is no wall of separation between the State and religious institutions under the Indian Constitution. No doubt Article 28(1) provides that if the institution is an educational one and it is wholly maintained by the State funds, religious instruction cannot be provided in such institution. However, Article 28(1) does not forbid the setting up of an institution for charitable purposes by any religious denomination nor does it prohibit the running of such institution even though it may be wholly maintained by the State. What it prohibits is the giving of religious instruction. Even, this

prohibition is not absolute. It is subject to the extent of sub-Article (2) of Article 28 which provides that if the educational institution has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution, then despite the prohibition in Article 28(1) and despite the fact that the education institution is in fact administered by the State, religious instruction can be imparted in such institution. Article 28(2) thus in no uncertain terms envisages that an educational institution administered by the State and wholly maintained by the State can impart religious instruction. It recognises in Article 28(3) that there may be educational institutions imparting religious instruction according to whichever faith and conducting religious worship which can be recognised by the State and which can also receive aid out of State funds. Similarly, Article 28(3) provides that no individual attending any educational institution which may have been recognised by the State or is receiving State aid can be compelled to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution without such person's consent. Implicit in this prohibition is the acknowledgement that the State can recognize and aid an educational institution giving religious instruction or conducting religious worship. In the United States, on the other hand it has been held that State maintained institutions cannot give religious instruction even if such instruction is not compulsory. (See. Tllinois V. Board of Education 1947 (82) Law Ed.649).

In the ultimate analysis the Indian Constitution does not unlike the United States, subscribe to the principle of non-interference of the State in religious organisations but it remains secular in that it strives to respect all religions equally, the equality being understood in its substantive sense as is discussed in the subsequent paragraphs.

Article 30(1) and Article 14

'Equality' which has been referred to in the Preamble is provided for in a group of Articles led by Article 14 of the Constitution which says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Although stated in absolute terms Article 14 proceeds on the premise that such equality of treatment is required to be given to persons who are equally circumstanced. Implicit in the concept of equality is the concept that persons who are in fact unequally circumstanced cannot be treated on par. The Constitution has itself provided for such classification in providing for special or group or class rights. Some of these are in Part III itself [Article 26, Article 29(1) and Article 30(1)] Other such Articles conferring group rights or making special provision for a particular class include Articles 336 and 337 where special provision has been made for the Anglo-Indian Community. Further examples are to be found in Articles 122, 212 and other Articles giving immunity from the ordinary process of the law to persons holding certain offices. Again Articles 371 to 371(H) contain special provisions for particular States.

The principles of non-discrimination which form another facet of equality are provided for under the Constitution under Articles 15(1), 16 (1) and 29 (2). The first two articles are qualified by major exceptions under Articles 15 (3) and (4), 16 (3),(4),(4A) and Article 335 by which the Constitution has empowered the Executive to enact legislation or otherwise specially provide for certain classes of citizens. The fundamental principle of equality is not compromised by these provisions as they are made on a consideration that the persons so 'favoured' are unequals to begin with whether socially, economically or politically. Furthermore, the use of the word 'any person' in Article 14 in the context of legislation in general or executive

action affecting group rights is construed to mean persons who are similarly situated. The classification of such persons for the purposes of testing the differential treatment must, of course, be intelligible and reasonable the reasonableness being determined with reference to the object for which the action is taken. This is the law which has been settled by this Court in a series of decisions, the principle having been enunciated as early as in 1950 in Chiranjit Lal Chowdhury V. Union of India and Others 1950 SCR 869.

The equality, therefore, under Article 14 is not indiscriminate. Paradoxical as it may seem, the concept of equality permits rational or discriminating discrimination. Conferment of special benefits or protection or rights to a particular group of citizens for rational reasons is envisaged under Article 14 and is implicit in the concept of equality . There is no abridgment of the content of Article 14 thereby but an exposition and practical application of such content.

The distinction between classes created by Parliament and classes provided for in the Constitution itself, is that the classification under the first may be subjected to judicial review and tested against the touchstone of the Constitution. But the classes originally created by the Constitution itself are not so subject as opposed to constitutional amendments.

On a plain reading of the provisions of the Article, all minorities based on religion or language, shall have the right to (1) establish and (2) administer educational institutions of their choice. The emphasized words unambiguously and in mandatory terms grant the right to all minorities to establish and administer educational institutions. I would have thought that it is self evident and in any event, well settled by a series of decisions of this Court that Article 30(1) creates a special class in the field of educational institutions a class which is entitled to special protection in the matter of setting up and administering educational institutions of their choice. This has been affirmed in the decisions of this Court where the right has been variously described as "a sacred obligation" , "an absolute right" , "a special right" , "a guaranteed right" , "the conscience of the nation" , "a befitting pledge" , "a special right" and an "article of faith"

The question then is does this special right in an admitted linguistic or religious minority to establish and administer an educational institution encompass the right to admit students belonging to that particular community?

Before considering the earlier decisions on this, a semantic analysis of the words used in Article 30(1) indicates that the right to admit students is an intrinsic part of Article 30(1).

First Article 30(1) speaks of the right to set up an educational institution. An educational institution is not a structure of bricks and mortar. It is the activity which is carried on in the structure which gives it its character as an educational institution. An educational institution denotes the process or activity of education not only involving the educators but also those receiving education. It follows that the right to set up an educational institution necessarily includes not only the selection of teachers or educators but also the admission of students.

Second - Article 30(1) speaks of the right to "administer" an educational institution. If the administration of an educational institution includes and means its organisation then the organisation cannot be limited to the infrastructure for the purposes of education and exclude the persons for whom the infrastructure is set up, namely, the students. The right to admit students is, therefore, part of the right to administer an educational institution.

Third, - the benefit which has been guaranteed under Article 30 is a protection or benefit guaranteed to all members of

the minority as a whole. What is protected is the community right which includes the right of children of the minority community to receive education and the right of parents to have their children educated in such institution. The content of the right lies not in merely managing an educational institution but doing so for the benefit of the community. Benefit can only lie in the education received. It would be meaningless to give the minorities the right to establish and set up an organisation for giving education as an end in itself, and deny them the benefit of the education. This would render the right a mere form without any content. The benefit to the community and the purpose of the grant of the right is in the actual education of the members of the community.

Finally, - the words 'of their choice' is not qualified by any words of limitation and would include the right to admit students of the minority's choice. Since the primary purpose of Article 30(1) is to give the benefit to the members of the minority community in question that 'choice' cannot be exercised in a manner that deprives the community of the benefit. Therefore, the choice must be directed towards fulfilling the needs of the community. How that need is met, whether by general education or otherwise, is for the community to determine. The interpretation is also in keeping with what this Court has consistently held. In State of Bombay v. Bombay Education Society , the Court said:

"surely then there must be implicit in such fundamental right the right to impart instruction in their own institutions to the children of their own Community in their own language. To hold otherwise will be to deprive article 29(1) and article 30(1) of the greater part of their contents."

In Kerala Education Bill, 1957, it was said:

"The minorities, quite understandably, regard it as essential that the education of their children should be in accordance with the teachings of their religion and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture. The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above."

The issue of admission to minority institutions under Article 30 arose in the decision of Rev. Sidhajbhai Sabhai where the State's order reserving 80 per cent of the available seats in a minority Institution for admission of persons nominated by the Government under threat of derecognition if the reservation was not complied with, was struck down as being violative of Article 30(1). It was said that although the right of the minority may be regulated to secure the proper functioning of the institution, the regulations must be in the interest of institution and not 'in the interest of outsiders'. The view was reiterated in St. Xaviers College when it was said:

"The real reason embodied in Article 30(1)

of the Constitution is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general education to make them complete men and women of the country."

In St. Stephen's College, the Court recognised that:
"The right to select students for admission is a part of administration. It is indeed an important facet of administration. This power also could be regulated but the regulation must be reasonable just like any other regulation. It should be conducive to the welfare of the minority institution or for the betterment of those who resort to it."

However, in a statement which is diametrically opposed to the earlier decisions of this Court, it was held:
"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"
(P.607)

This conclusion, in my respectful view, is based on a misreading of the decision of this Court in Kerala Education Bill. In that case, there was no question of the non-minority students being given admission overlooking the needs of the minority community. The Court was not called upon to consider the question. The underlying assumption in that case was that the only obstacle to the non-minority student getting admission into the minority institution was the State's order to that effect and not the "choice" of the minority institution itself and a minority institution may choose to admit students not belonging to the community without shedding its minority character, provided the choice was limited to a 'sprinkling'. In fact the learned Judges in St. Stephens case have themselves in a subsequent portion of the judgment (p.611) taken a somewhat contradictory stand to the view quoted earlier when they said:
" the minorities have the right to admit their own candidates to maintain the minority character of their institutions. That is a necessary concomitant right which flows from the right to establish and administer educational institution in Article 30(1). There is also a related right to the parents in the minority communities. The parents are entitled to have their children educated in institutions having an

atmosphere congenial to their own religion."

The conclusion, therefore, is that the right to admission being an essential part of the constitutional guarantee under Article 30(1), a curtailment of that fundamental right in so far as it affect benefit of the minority community would amount to the an infringement of that guarantee.

An Institution set up by minorities for educating members of the minority community does not cease to be a minority institution merely because it takes aid. There is nothing in Article 30(1) which allows the drawing of a distinction in the exercise of the right under that Article between needy minorities and affluent ones. Article 30(2) of the Constitution reinforces this when it says, "The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language". This assumes that even after the grant of aid by the State to an educational institution under the management of the minority, the educational institution continues to be a minority educational institution. According to some, Article 30(2) merely protects the minority's right of management of the educational institution and not the students who form part of such institution. Such a reading would be contrary to Article 30(1) itself. The argument is based on the construction of the word 'management'. 'Management' may be defined as 'the process of managing' and is not limited to the people managing the institution. In the context of Article 30(1) and having regard to the content of the right, namely, the education of the minority community, the word 'management' in Article 30(2) must be construed to mean the 'process' and not the 'persons' in management. 'Aid' by definition means to give support or to help or assist. It cannot be that by giving 'aid' one destroys those to whom 'aid' is given. The obvious purpose of Article 30(2) is to forbid the State from refusing aid to a minority educational institution merely because it is being run as a minority educational institution. Besides Article 30(2) is an additional right conferred on minorities under Article 30(1). It cannot be construed in a manner which is destructive of or as a limitation on Article 30(1). As has been said earlier by this Court in Rev. Sidhabhai Sabhai, clause (2) of Article 30 is only another non-discriminatory clause in the Constitution. It is a right in addition to the rights under Article 30(1) and does not operate to derogate from the provisions in clause (1). When in decision after decision, this Court has held that aid in whatever form is necessary for an educational institution to survive, it is a specious argument to say that a minority institution can preserve its rights under Article 30(1) by refusing aid.

I would, therefore, respectfully agree with the conclusion expressed in the majority opinion that grant of aid under Article 30(2) cannot be used as a lever to take away the rights of the minorities under Article 30(1).

Articles 29(2) and 30(1)

Article 29(2) says that "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them".

It is because Article 30(1) covers the right to admit students that there is an apparent conflict between Article 29(2) and Article 30(1). There are two ways of considering the relationship between Article 30(1) and Article 29(2), the first in the context of Article 14, the second by an interpretation of Article 29(2) itself. Article 29(2) has not been expressed as a positive right. Nevertheless in substance it confers a right on a person not to be denied admission into an aided institution only on the basis of

religion, race etc. The language of Article 29(2) reflects the language used in other non-discriminatory Articles in the Constitution namely, clauses (1) and (2) of Article 15 and clauses (1) and (2) of Article 16. As already noted both the Articles contain exceptions which permit laws being made which make special provisions on the basis of sex, caste and race. Even in the absence of clauses (3) and (4) of Article 15 and clauses (3),(4) and 4(A) of Article 16, Parliament could have made special provisions on the forbidden bases of race, caste or sex, provided that the basis was not the only reason for creating a separate class. There would have to be an additional rational factor qualifying such basis to bring it within the concept of 'equality in fact' on the principle of 'rational classification' . For example when by law a reservation is made in favour of a member of a backward class in the matter of appointment, the reservation is no doubt made on the basis of caste. It is also true that to the extent of the reservation other citizens are discriminated against on one of the bases prohibited under Article 16(1). Nevertheless such legislation would be valid because the reservation is not only on the basis of caste/race but because of the additional factor of their backwardness. Clauses (3) and (4) of Article 15 like clause 3,4 and 4(A) of Article 16 merely make explicit what is otherwise implicit in the concept of equality under Article 14.

By the same token, Article 29(2) does not create an absolute right for citizens to be admitted into any educational institution maintained by the State or receiving aid out of State funds. It does not prohibit the denial of admission on grounds other than religion, race, caste or language. Therefore, reservation of admissions on the ground of residence, occupation of parents or other bases has been held to be a valid classification which does not derogate from the principles of equality under Article 14. [See: Kumari Chitra Ghosh v. Union of India : 1969(2) SCC 228) . Even in respect of the "prohibited" bases, like the other non-discriminatory Articles, Article 29 (2) is constitutionally subject to the principle of 'rational classification'. If a person is denied admission on the basis of a constitutional right, that is not a denial only on the basis of religion, race etc. This is exemplified in Article 15(4) which provides for :

"Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Tribes."

To the extent that legislation is enacted under Article 15 (4) making special provision in respect of a particular caste, there is a denial of admission to others who do not belong to that caste. Nevertheless, Article 15(4) does not contradict the right under Article 29(2). This is because of the use of the word 'only' in Article 29(2). Article 15(4) is based on the rationale that Schedule Castes and Tribes are not on par with other members of society in the matter of education and, therefore, special provision is to be made for them. It is not, therefore, only caste but this additional factor which prevents clause 15(4) from conflicting with Article 29(2) and Article 14.

Then again, under Article 337, grants are made available for the benefit of the Anglo-Indian community in respect of education, provided that any educational institution receiving such grant makes available at least 40% of the annual admissions for members of communities other than the Anglo-Indian community. Hence 60% of the admission to an aided Anglo-Indian School is constitutionally reservable for members of the Anglo-Indian community. To the extent of such reservation, there is necessarily a denial of admission to non-Anglo Indians on the basis of race.

Similarly, the Constitution has also carved out a further exception to Article 29(2) in the form of Article 30 (1) by recognising the rights of special classes in the form of minorities based on language or religion to establish and administer educational institutions of their choice. The right of the minorities under Article 30(1) does not operate as discrimination against other citizens only on the ground of religion or language. The reason for such classification is not only religion or language per se but minorities based on religion and language. Although, it is not necessary to justify a classification made by the Constitution, this fact of 'minorityship' is the obvious rationale for making a distinction, the underlying assumption being that minorities by their very numbers are in a politically disadvantaged situation and require special protection at least in the field of education.

Articles 15(4), 337 and 30 are therefore facets of substantive equality by making special provision for special classes on special considerations.

Even on general principles of interpretation, it cannot be held that Article 29(2) is absolute and in effect wipes out Article 30(1). Article 29(2) refers to 'any educational institution' the word "any" signifying the generality of its application. Article 30(1) on the other hand refers to 'educational institutions established and administered by minorities'. Clearly, the right under Article 30(1) is the more particular right and on the principle of 'generalia specialibus non derogant , it must be held that Article 29(2) does not override he educational institutions even if they are aided under Article 30(1) .

Then again Article 29(2) appears under the heading 'Protection of interests of minorities'. Whatever the historical reasons for the placement of Article 29(2) under this head, it is clear that on general principles of interpretation, the heading is at least a pointer or aid in construing the meaning of Article 29(2). As Subba Rao, J said "if there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt." Therefore, if two interpretations of the words of Article 29(2) are possible, the one which is in keeping with the heading of the Article must be preferred. It would follow that Article 29(2) must be construed in a manner protective of minority interests and not destructive of them.

When 'aid' is sought for by the minority institution to run its institution for the benefit of students belonging to that particular community, the argument on the basis of Article 29(2) is that if such an institution asks for aid it does so at the peril of depriving the very persons for whom aid was asked for in the first place. Apart from this anomalous result, if the taking of aid implies that the minority institution will be forced to give up or waive its right under Article 30(1), then on the principle that it is not permissible to give up or waive fundamental rights, such an interpretation is not possible. It has then been urged that Article 29(2) applies to minority institutions under Article 30(1) much in the same way that Article 28(1) and 28(3) do. The argument proceeds on the assumption that an educational institution set up under Article 30(1) is set up for the purposes and with the sole object of giving religious instruction. The assumption is wrong. At the outset, it may also be noted that Article 28(1) and (3) do not in terms apply to linguistic minority educational institutions at all. Furthermore, the right to set up an educational institution in which religious instruction is to be imparted is a right which is derived from Article 26(a) which provides that every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes, and not under Article 30(1). Educational institutions set up under Article 26(a) are, therefore, subject to clauses (1) and (3) of Article 28. Article 30(1) is a right additional to Article 26(a). This follows from

the fact that it has been separately and expressly provided for and there is nothing in the language of Article 30(1) making the right thereunder subject to Articles 25 and 26. Unless it is so construed Article 30(1) would be rendered redundant . Therefore, what Article 30 does is to secure the minorities the additional right to give general education. Although in a particular case a minority educational institution may combine general education with religious instruction that is done in exercise of the rights derivable from Article 26(a) and Article 30(1) and not under Article 30(1) alone. Clauses (1) and (3) of Article 28, therefore, do not apply to Article 30(1). The argument in support of reading Article 30(1) as being subject to Article 29(2) on the analogy of Article 28(1)and 28(3) is, I would think, erroneous.

For the reasons already stated I have held the right to admit minority students to a minority educational institutions is an intrinsic part of Article 30(1) . To say that Article 29(2) prevails over Article 30(1) would be to infringe and to a large extent wipe out this right. There would be no distinction between a minority educational institution and other institutions and the rights under Article 30(1) would be rendered wholly inoperational. It is no answer to say that the rights of unaided minority institutions would remain untouched because Article 29(2) does not relate to unaided institutions at all. Whereas if one reads Article 29(2) as subject to Article 30(1) then effect can be given to both. And it is the latter approach which is to be followed in the interpretation of constitutional provisions. In other words, as long as the minority educational institution is being run for the benefit of and catering to the needs of the members of that community under Article 30(1), Article 29(2) would not apply. But once the minority educational institution travels beyond the needs in the sense of requirements of its own community, at that stage it is no longer exercising rights of admission guaranteed under Article 30(1). To put it differently, when the right of admission is exercised not to meet the need of the minorities, the rights of admission given under Article 30(1) is to that extent removed and the institution is bound to admit students for the balance in keeping with the provisions of Article 29(2).

A simple illustration would make the position clear. 'Aid' is given to a minority institution. There are 100 seats available in that institution. There are 150 eligible candidates according to the procedure evolved by the institution. Of the 150, 60 candidates belong to that particular community and 90 to other communities. The institution will be entitled, under Article 30(1) to admit all 60 minority students first and then fill the balance 40 seats from the other communities without discrimination in keeping with Article 29(2).

I would, therefore, not subscribe to the view that Article 29(2) operates to deprive aided minority institutions the right to admit members of their community to educational institutions established and administered by them either on any principle of interpretation or on any concept of equality or secularism.

The next task is to consider whether this interpretation of Article 29(2) and 30(1) is discordant with the historical context in which these Articles came to be included in the Constitution. Before referring to the historical context, it is necessary to keep in mind that what is being interpreted are constitutional provisions which "have a content and a significance that vary from age to age". Of particular significance is the content of the concept of equality which has been developed by a process of judicial interpretation over the years as discussed earlier. It is also necessary to be kept in mind that reports of the various Committees appointed by the Constituent Assembly and speeches made in the Constituent Assembly and the record of other proceedings of the Constituent Assembly are admissible, if at all, merely as extrinsic aids to construction and do not as such

bind the Court. Ultimately, it is for this Court to say what is meant by the words of the Constitution.

The proponents of the argument that Article 29(2) over-rides Article 30(1) have referred to excerpts from the speeches made by members of Constituent Assembly which have been quoted in support of their view. Apart from the doubtfulness as to the admissibility of the speeches, in my opinion, there is nothing in the speeches which shows an intention on the part of the Constituent Assembly to abridge in any way the special protection afforded to minorities under Article 30(1). The intention indicated in the speeches relating to the framing of Article 29(2) appears to be an extension of the right of non-discrimination to members of the non-minority in respect of State aided or State maintained educational institutions. It is difficult to find in the speeches any unambiguous statement which points to a determination on the part of the Constituent Assembly to curtail the special rights of the minorities under Article 30(1). Indeed if one scrutinises the broad historical context and the sequence of events preceding the drafting of the Constitution it is clear that one of the primary objectives of the Constitution was to preserve, protect and guarantee the rights of the minorities unchanged by any rule or regulation that may be enacted by Parliament or any State legislature.

The history which preluded the independence of this country and the framing of the Constitution highlights the political context in which the Constitution was framed and the political content of the "special" rights given to minorities. I do not intend to burden this judgment with a detailed reference to the historical run-up to the Constitution as ultimately adopted by the Constituent Assembly vis--vis the rights of the minorities and the importance that was placed on enacting effective and adequate constitutional provisions to safeguard their interests. This has been adequately done by Sikri, C.J. in Keshavanand Bharati V. State of Kerala on the basis of which the learned Judge came to the conclusion that the rights of the minorities under the Constitution formed part of the basic structure of the Constitution and were un-amendable and inalienable.

I need only add that the rights of linguistic minorities assumed special significance and support when, much after independence, the imposition of a 'unifying language' led not to unity but to an assertion of differences. States were formed on linguistic bases showing the apparent paradox that allowing for and protecting differences leads to unity and integrity and enforced assimilation may lead to disaffection and unrest. The recognition of the principle of "unity in diversity" has continued to be the hall mark of the Constitution a concept which has been further strengthened by affording further support to the protection of minorities on linguistic bases in 1956 by way of Articles 350-A and 350-B and in 1978 by introducing clause (1-A) in Article 30 requiring "the State, that is to say, Parliament in the case of a Central legislation or a State legislature in the case of State legislation, in making a specific law to provide for the compulsory acquisition of the property of minority educational institutions, to ensure that the amount payable to the educational institution for the acquisition of its property will not be such as will in any manner impair the functioning of the educational institution". Any judicial interpretation of the provisions of the Constitution whereby this constitutional diversity is diminished would be contrary to this avowed intent and the political considerations which underlie this intention.

The earlier decisions of this Court show that the issue of admission to a minority educational institution almost invariably arose in the context of the State claiming that a minority institution had to be 'purely' one which was established and administered by members of the minority

community concerned, strictly for the members of the minority community, with the object only of preserving of the minority religion, language, script or culture. The contention on the part of the executive then was that a minority institution could not avail of the protection of Article 30(1) if there was any non-minority element either in the establishment, administration, admission or subjects taught. It was in that context that the Court in Kerala Education Bill held that a 'sprinkling of outsiders' being admitted into a minority institution did not result in the minority institution shedding its character and ceasing to be a minority institution. It was also in that context that the Court in St. Xaviers College (supra) came to the conclusion that a minority institution based on religion and language had the right to establish and administer educational institution for imparting general secular education and still not lose its minority character. While the effort of the Executive was to retain the 'purity' of a minority institution and thereby to limit it,"the principle which can be discerned in the various decisions of this Court is that the catholic approach which led to the drafting of the provisions relating to minority rights should not be set at naught by narrow judicial interpretation".

The 'liberal, generous and sympathetic approach' of this Court towards the rights of the minorities has been somewhat reversed in the St. Stephens case. Of course, this was the first decision of this Court which squarely dealt with the inter-relationship of Article 29(2) and Article 30(1). None of the earlier cited decisions did.

The decision of this Court in Champakam Dorairajan V. State of Madras cannot be construed as an authority for the proposition that Article 29(2) overrides the constitutional right guaranteed to the minorities under Article 30(1), as Article 30(1) was not at all mentioned in the entire course of the judgment. Similarly, the Court in State of Bombay v. Bombay Education Society was not called upon to consider a situation of conflict between Article 30(1) and 29(2). The Bombay Education Society, was in fact directly concerned with Article 337 and an Anglo-Indian educational institution. In that background, when it was suggested that Article 29(2) was intended to benefit minorities only, the Court negatived the submission as it would amount to a 'double protection', "double" because an Anglo-Indian citizen would then have not only the protection of Article 337 by way of a 60% reservation but also the benefit of Article 29(2). It was not held by the Court that Article 29(2) would override Article 337.

There is thus no question of striking a balance between Article 29(2) and 30(1) as if they were two competing rights. Where once the Court has held:

"Equality of opportunity for unequals can
only mean aggravation of inequality.
Equality of opportunity admits
discrimination with reason and prohibits
discrimination without reason.
Discrimination with reasons means rational
classification for differential treatment
having nexus to the constitutional
permissible objects."

and where Article 29(2) is nothing more than a principle of equality, and when "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" ,it must follow that Article 29(2) is subject to the constitutional classification of minorities under Article 30(1).

Finally, there appears be an inherent contradiction in the statement of the Court in St. Stephens that:
"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." (p.614)

I agree with the view as expressed by the Learned Chief Justice that there is no question of fixing a percentage when the need may be variable. I would only add that in fixing a percentage, the Court in St. Stephens in fact "reserved" 50% of available seats in a minority institution for the general category ostensibly under Article 29(2). Article 29(2) pertains to the right of an individual and is not a class right. It would therefore apply when an individual is denied admission into any educational institution maintained by the State or receiving aid from the State funds, solely on the basis of the ground of religion, race, caste, language or any of them. It does not operate to create a class interest or right in the sense that any educational institution has to set apart for non-minorities as a class and without reference to any individual applicant, a fixed percentage of available seats. Unless Article 30(1) and 29 (2) are allowed to operate in their separate fields then what started with the voluntary 'sprinkling' of outsiders, would become a major inundation and a large chunk of the right of an aided minority institution to operate for the benefit of the community it was set up to serve, would be washed away.

Apart from this difference with the views expressed by the majority view on the interpretation of Article 29(2) and Article 30(1), I am also unable to concur in the mode of determining the need of a minority community for admission to an educational institution set up by such community. Whether there has been a violation of Article 29(2) in refusing admission to a non minority student in a particular case must be resolved as it has been in the past by recourse to the Courts. It must be emphasised that the right under Article 29(2) is an individual one. If the non-minority student is otherwise eligible for admission, the decision on the issue of refusal would depend on whether the minority institution is able to establish that the refusal was only because it was satisfying the requirements of its own community under Article 30(1). I cannot therefore subscribe to the view expressed by the majority that the requirement of the minority community for admission to a minority educational institution should be left to the State or any other Governmental authority to determine. If the Executive is given the power to determine the requirements of the minority community in the matter of admission to its educational institutions, we would be subjecting the minority educational institution in question to an "intolerable encroachment" on the right under Article 30 (1) and

let in by the back door as it were, what should be denied entry

altogether.

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