NOTES AND COMMENTS

CONSTITUTIVE FUNCTIONS OF MINORITY RIGHTS AND SOCIAL JUSTICE IN INDIA

Abstract

While the constitutional idea of social justice hinges around the representation of traditionally excluded castes, it makes an exception in case of minority educational institutions. This paper attempts to demonstrate that the basket of minority rights is quite empty to begin with. Such emptiness has been filled with the exclusion of social justice policies. This empty-full basket constitutes religious identity as a valid category for the construction of minority-majority bipartite. The whole subterfuge plays out to perpetuate the hegemony of upper castes cutting across religious lines which prevents the emergence of an egalitarian, liberal and fraternal Indian society that the constitution seeks to facilitate. To make all these arguments, this paper relies on post structural methods to look beyond the fixed, rigid categories employed by the constitution and constitutional courts. Finally, this paper seeks to advance certain conceptual tools to practice democratic constitutionalism in the Indian context.

"It is the tyrants and bad rulers who are afraid of spread of education and knowledge among the deprived classes."

Justice B P Jeevan Reddy[1]

I Introduction

EVERY COLLECTIVE identity encapsulates its own relational and precarious conditions of emergence. Collective forms of identification under compulsions of mass mobilization always incorporate certain antagonism which is constitutive of all societal possibilities.[2] Articulation of majority and minority identities is a typical mode of mobilizing the people along any system of difference among them. This system of difference is reproduced and stabilized through an ensemble of social, cultural, economic, political, and legal practices. Once the hegemony of a particular system of difference is established through such practices, it starts speaking in terms of 'natural differences'. These natural differences begin to conceal specific power relations which

1 *Unni Krishnan* v. *State of Andhra Pradesh*, AIR 1993 SC 2178.

2 For a detailed conceptual detour of this line of thinking see, Ernesto Laclau, and Chantal Mouffe, "Hegemony and socialist strategy: Towards a radical democratic politics." Verso, London (2014); Chantal Mouffe, The Democratic Paradox (Verso 2000); Ernesto Laclau, "On Populist Reason", (Verso, London 2005); Ernesto Laclau, "Why Constructing a People Is the Main Task of Radical Politics" 32 (4) *Critical Inquiry* 646-680 (2006); Ernesto Laclau, "Emancipation(s)" Verso, London (2007).

form the majority or minority identities acting as the constitutive outside for each other. This process ensures the precarious stability of majority and minority identities through an equivalential logic holding their components and operating on the basis of constitutive difference with the outsider. Non-recognition and misrecognition of relatively powerless groups subsumed by majority-minority identities and suppression of their democratic demands by the dominant majority/minority discourse then becomes a common legitimate phenomenon. An essentialist and rationalist approach toward group identities consistently fails to comprehend the systemic exclusion, violence and oppression ingrained in the formation of such identities. However, it is always possible to deconstruct all those nodal points which provide stability to the system of difference and subvert its claims of 'naturalness'. Legal and constitutional practices as nodal points carry special importance in the construction and sustenance of hegemonic identities. Unraveling those nodal points to reveal and reconfigure particular power relations instituted by any hegemonic discourse could open up multiple avenues for the emancipation of the oppressed and redemption of the oppressor.

The construction of religious majority and minority categories in the Indian subcontinent under the supervision of the British colonial state developed a range of legal and constitutional practices which continue to inform contemporary socio-political life.[3] Inscription of religion on caste as the system of difference assigned a special role to minority rights as an important nodal point of majority- minority architecture even in the post-colonial setup. Built around article 30, the basket of minority right continues to perform many vital functions for different hegemonic groups. To begin with, the constitution offered an empty basket of minority rights on religious grounds which has since been organized to preserve the interests of Ashraaf-Savarna castes.[4] The empty basket itself was the outcome of Ashraaf-Savarna anxieties generated by the impending departure of the British Raj from the subcontinent. The succession battle over the spoils of the British Raj between Ashraaf-Savarna represented by the Muslim League and the Congress created a bloody legacy of partition. Residuary Ashraaf left on this side of the border decided to preserve the minority category, howsoever desolate,

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3 G. Aloysius, *Nationalism without a Nation in India* (Oxford University Press, New Delhi, 1st edn., 1998); Gail Omvedt, Understanding Caste: From Buddha to Ambedkar and Beyond (Orient Blackswan, Delhi, 2011); Perry Anderson, *The Indian Ideology*, (Three Essay Collective, Gurgaon, 2nd edn., 2015); Khalid Anis Ansari, "Pluralism and the Post- Minority Condition: Reflections on the Pasmanda Muslim Discourse in North India" in Boaventura de Sousa Santos, Bruno Sena Martins *et.al.* (eds.), *The Pluriverse of Human Rights: The Diversity of Struggles for Dignity* 106-127 (Routledge, 2021).

4 The term 'Ashraaf' has been used in this paper to refer to upper castes who self-identify as socially superior castes by birth using Islamic and Christian symbolism. The term 'Savarna' has been used to refer to upper castes who self- identify as socially superior castes by birth using Brahmanic symbolism. Jointly they have been referred to as 'Ashraaf- Savarna' or 'Savarna Ashraaf' interchangeably depending on the need to emphasize the role of one or the other class.

which their Savarna counterparts were pleased to concede.[5] Continued legitimization of the category of religious minority through article 30 accompanied by all its imagery and continuous jugglery over personal laws, ensured that the category of the religious majority becomes constitutionally legitimate and politically resurgent. All attempts by anti-caste democratic movements to build a socio-political majority of numerically superior but historically disempowered castes in the form of Bahujan identity meet a dead end in the face of communal polarization. While socio-cultural process[6] in the formation of Hindu-Muslim binary has been under rigorous academic scrutiny, it is equally important to understand the post-constitutional mechanism through which this binary is reproduced in an institutionalized way.

While the constitutional idea of social justice hinges around the representation of traditionally excluded castes[7] from all the institutions of national life, it makes an exception in the case of minority educational institutions (MEIs). Religion and language have been made the basis of article 30 overriding the determinative force of 'caste as an enclosed class'[8] in the distribution of educational goods. Religious grounding of article 30 then in turn is paraded to buttress the secular and progressive credentials of the Constitution as a founding document.[9] Judicial interpretation of article 30 further cemented this argument *firstly*, by excluding caste as the axis of social justice in MEIs and *secondly*, by triggering certain constitutional amendments which directly exclude social justice policies from being applied in such institutions. Apart from this constitutive exceptionalism, there is very little within the ambit of article 30 which is exclusively available to religious minorities.

This paper attempts to demonstrate that the basket of minority rights constructed around specific constitutional provisions is quite empty. Secondly, this emptiness has been filled by excluding social justice policies from MEIs. *Thirdly,* the mere presence of MEIs in existing form preserves certain symbols of religious identity as a legitimate religious minority. *Fourthly*, the legitimacy of the religious minority is used to create the legitimacy of the religious majority. *Fifthly*, this whole subterfuge perpetuates the hegemony of Ashraaf-Savarna cutting across religious lines. Finally, the continued

5 Constituent Assembly Debates, V 350-374.

6 *Supra* note 3.

7 In constitutional vocabulary they are known as Scheduled Castes, Scheduled Tribes and Other Backward Classes

8 B. R. Ambedkar, *Castes in India: Their Mechanism, Genesis and Development*, 1916 and *Annihilation of Caste*, 1936, *States and Minorities*, 1947. *Available at:* Babasaheb Ambedkar: Writings and Speeches, Vol 1 at 03-96, 383-449 (1st edn. Education Department, Govt. of Maharastra, 1979).

9 Upendra Baxi, "Outline of a 'Theory of Practice' of Indian Constitutionalism" in Rajeev Bhargava, *Politics and Ethics of the Indian Constitution* 92-118 (Oxford University Press, 2009); H M Seervai, Constitutional Law of India, (Universal Law Publishing, New Delhi, 4th edn., 2014); M. P. Singh, "Celebrating Secularism and Minority Rights in Our Constitution" 17 *Journal of the National Human Rights Commission* 61-87 (2017).

Ashraaf-Savarna hegemony prevents the emergence of a scientific, rational, and egalitarian Indian civilization, which the Constitution seeks to facilitate. To make all these arguments, this paper looks, in specific post-structural ways, beyond the fixed, rigid categories employed by the Constitution and constitutional courts. In this process, the paper draws upon social movements which have challenged 'natural' constitutional categories on the strength of their lived experiences. Judgments of constitutional courts have been used as textual evidence of the judicial role in providing stability to Ashraaf-Savarna hegemony through segregative interventions.

II Constitutive minority rights and social justice provisions

Popular assumptions around article 30 and the hollowness of minority rights

Article 30 is the only express provision in the constitution which refers to religious minorities and hence carries all the burden of minority rights. Article 30(1) provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. It assumes that religion or language forms the basis of minorities entitled to make a choice regarding the establishment and administration of educational institutions. This paper is focused on interrogating the assumptions around the existence of minorities based on religion and their educational needs. The question to be asked is whether, under Indian conditions, religion is the correct axis of social order on which article 30 right is sought to be invoked. Another related question is to what extent religious identity determines the access to educational opportunities for historically excluded classes within the ambit of constitutional provisions.[10]

To answer these questions let us first refer to the constitutional provisions which deal with the access to educational opportunities for different marginalized social groups. Article 15(4) provides that the State shall make special provisions for the advancement of any socially and educationally backward classes of citizens including for the Scheduled Castes (SC) and the Scheduled Tribes (ST). These special provisions have primarily taken the form of reservation in educational institutions for three categories; Other Backward Classes (OBC), SCs and STs. In all studies conducted to determine the educational status of different groups, it has been found that the educational needs of a group can be identified with reference to their caste and socio-economic status.[11] Accordingly, none of these categories take into account the religious identity an individual or class to ascertain the educational needs of that category except for the

10 *Supra* note 3.

11 Kaka Kalelkar Commission Report, 1955; Mandal Commission Report, 1980; Sachar Committee Report, 2006; Rangnath Mishra Commission Report, 2007.

SC category.[12] The three categories, by and large, cover 85% population of the country,[13] including the majority of every religious group whose educational needs are sought to be fulfilled by article 30.

Anti-caste movement has long established that caste identity determines access to material opportunities in India, especially educational opportunities.[14] Re-distributive and affirmative action policies of articles 15 and 16 have been premised on this reality.[15] Similarly, most articles under Part XVI of the constitution providing special provisions for certain classes take caste as their starting point.[16] If caste is the axis of Indian social and economic order and, therefore, Constitutional action, why then does article 30 elevate religion for the establishment and administration of any educational institution? What constitutive functions are performed by unrealistic religious assumptions of article 30 in a caste society? However, another widespread assumption developed around article 30 needs careful attention before we answer this question.

In popular discourse, article 30 right is understood as a special concession available to religious minorities exclusively but not to religious majorities.[17] The charge of minority appeasement is animated by this assumption. However, this assumption is as flimsical

12 The scheduled caste category is the only category that mischievously excludes certain castes which profess *Islamic* and *Christian* faiths but their social and educational status is similar to the castes included in the SC list. This violence was done by the communal Presidential Order of 1950 issued under art. 341. Para 3 of this communal order provides that no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a SC. This communal bar assumes that Islam and Christianity magically wipe out all traces of untouchability from those who embrace them.

13 Extrapolation from the 1931 caste census and Mandal Commission Report, 1980 conclusively establish that SC, ST and OBC taken together reach close to 85% of the population. Various studies point out that the OBC population alone is close to 52%. No wonder the ruling class has been so shy of the caste census for nearly a century.

14 Jotirao Phule, "The Whipcord of the Cultivators", 1883 translated by Gail Omvedt and Bharat Patankar; Braj Ranjan Mani, *Debrahmanising History* (Manohar, New Delhi, 1st edn., 2005,); G. Aloysius, "British created Hinduism and Brahmins created the myth that India is Bharat" 2 *Prabuddha: Journal of Social Equality* 1-16 (2018); Naren Bedide, "The Brahmin Keeps India in the 18th Century' 2 *Prabuddha: Journal of Social Equality* 26-33 (2018); Khalid Anis Ansari, "Contesting Communalism(s): Preliminary Reflections on Pasmanda Muslim Narratives from North India" 1 *Prabuddha: Journal of Social Equality* 78-104 (2018).

15 For the struggle of constitutional courts in understanding this reality see; Ayaz Ahmad, "Role of Supreme Court in Arresting Social Democracy" in Salman Khurshid, Yogesh P Singh, Lokendra Malik, *et.al.* (eds.), *The Supreme Court and the Constitution: An Indian Discourse* 182-205 (Wolters Kluwer, New Delhi, 2020).

16 See art. 330 to 342 A.

17 Art. 29 on the other hand despite its misleading marginal note titled "Protection of interests of minorities" has always been understood to belong to both minorities and majorities. See, *The State of Bombay v. Bombay Education Society*, AIR 1954 SC 561.

as the first one. The supporters of article 30 passionately assert that under this article alone religious minorities can impart religious instruction in educational institutions in otherwise constitutionally mandated secular curriculum.[18] However, these article 30 enthusiasts overlook the import of article 19(1)(g), article 26(a), article 28(2) and article 28(3) on the question of religious instruction that can be imparted in any educational institution. Article 28(2) overrides the prohibition imposed by article 28(1) on religious instruction in an educational institution administered by the State if such an institution is established under any endowment or trust which requires that religious instruction be imparted in such institution. In other words, the bar on religious instruction being imparted in an educational institution can be circumvented by the simple device of establishing that institution through endowment or trust. Incidentally, MEIs as envisaged by article 30 too are generally established through educational endowment or trust. Similarly, private educational institutions, both aided and unaided, can be established through an educational endowment, trust or society by all citizens in exercise of the right under article 19(1)(g) and article 26(a).[19]

Therefore, all citizens, irrespective of their religion, are entitled to establish educational institutions both in public and the private sector in which they can secure a provision for religious instruction. This point is further buttressed by article 28(3), which provides that when an educational institution recognized by the State or receiving aid out of State funds imparts religious instruction or conducts religious worship in such institution or any premises attached to it, it has to get the consent of the person (or guardian) attending such an educational institution. This provision envisages that religious instruction or religious worship can be provided in educational institutions recognized by the State or receiving aid out of State funds; only the participation has been made contingent upon consent.[20] Thus, the possibility of imparting religious instruction or conducting religious worship is neither an exclusive preserve of MEIs nor dependent on the existence or non-existence of article 30. In any case, since the minority status of a religious or linguistic community is to be ascertained with reference to the State in which MEIs are established and administered, every religious and linguistic community finds itself clothed with minority status in one or the other State to invoke article 30. Thus, every religious and linguistic community, irrespective of its numerical strength at the national level, can be considered a minority in relation to article 30

18 *Supra* note 9.

19 *Unni Krishnan* v. *State of Andhra Pradesh*, AIR 1993 SC 2178; *T.M.A. Pai Foundation v. State of Karnataka*, AIR 2003 SC 355; *Islamic Academy of Education* v. *State of Karnataka*, AIR 2003 SC 3724; *P. A. Inamdar* v. *State of Maharashtra*, AIR 2005 SC 3226.

20 See the opinion of Ruma Pal J., in *T.M.A. Pai Foundation* v. *State of Karnataka*, AIR 2003 SC 355.

rights in appropriate cases.[21] Therefore, it is utterly misleading to assert that article 30 "*has nothing to do with the majority community*".[22]

Once it is acknowledged that article 30 does not offer anything exclusive to the so-called religious minorities, a curiosity to understand the performative functions of MEIs is inaugurated. A critical survey of judicial opinion in the following few sections would reveal that 'exclusion' of social justice has been the most consistent attribute of article 30.[23] Denial of reservation in admissions and appointments to Pasmanda Bahujan[24] communities in MEIs is the bedrock of judicial underpinning of this article. Under our constitutional scheme, social justice policies in educational institutions are primarily carried out under articles 15(4) and 16(4). None of these articles provide that social justice policies will steer clear of MEIs in their application. Nor does article 30 hint towards any such course. It is the Supreme Court's interpretive derive that managed to insinuate MEIs from the democratizing influence of articles 15(4) and 16(4), so much so that such an exclusion eventually got inscribed under articles 15(5) and15(6) of the Constitution. How the Supreme Court achieved this feat forms the bulk of case law analysis in the following sections. However, why did the Supreme Court adopt an anti- social justice approach *vis-a-vis* article 30? Answering these questions is key to understanding the constitutive functions of minority rights in our peculiar socio-legal and political landscape.

Supreme Court opinion on Kerala Education Bill: Laying the foundation

The question whether the social justice mandate of articles 15 and 16 extends to MEIs was referred by the President to a constitutional bench *In Re The Kerala Education Bill* [25] case. Chief Justice SR Das who authored the majority opinion found those parts of the Kerala Education Bill 1957 to be '*objectionable*' and '*perilously near violating the right*' under article 30 which required educational institutions to give representation to SCs, STs and the Backward Classes in the appointment of school teachers through state public service commission.[26] He wrote that the "*teachers belonging to reserved categories may*

21 This position is judicially established through a long line of cases beginning with *In Re The Kerala Education Bill 1957* AIR 1958 SC 95; *D. A. V. College* v. *State of Punjab, Jullundur,* AIR 1971 SC 1737; *The Ahmedabad St. Xaviers College* v. *State of Gujarat,* AIR 1974 SC 1389; *T.M.A.Pai Foundation v. State of Karnataka,* AIR 2003 SC 355.

22 Justice M. H. Dwivedi in *The Ahmedabad St. Xaviers College* v. *State of Gujarat,* AIR 1974 SC 1389.

23 Sujit Chaudhry, Madhav Khosla, *et.al.* (eds.), *The Oxford Handbook of Indian Constitution* 947 (Oxford University Press, New York 1st edn., 2016).

24 Sujit Chaudhry, Madhav Khosla, *et.al.* (eds.), *The Oxford Handbook of Indian Constitution* 947 (Oxford University Press, New York 1st edn., 2016).

25 1957 AIR 1958 SC 956.

26 Kerala Education Bill, Cl. 11 of the bill specifically provided that in selecting candidates, the Commission was to give 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 severely criticized by the counsel appearing for the Anglo-Indian and Muslim communities.

have no knowledge of the tenets of minority religion and may be otherwise weak educationally".[27] However, the majority reluctantly upheld the provisions relating to the implementation of article 16(4) government directive as permissible regulations. The majority opinion concluded that the provision of the Kerala Education Bill, which sought to restrain government and private schools from charging tuition fees in the primary classes, offended article 30(1). The court reasoned that the imposition of such restriction against the collection of fees from any pupil in the primary classes would make it impossible for MEIs to be carried on. This reference opinion undermined two essential facets of social justice in *the Kerala Education Bill* concerning article 30. First, representation of SCs, STs and the OBCs in MEIs and second, free and compulsory education to all children aged six to fourteen years as mandated by unamended article 45.[28]

The first assertion by the constitutional bench that the teachers belonging to Backward Classes lack knowledge of minority religion and happen to be educationally weak and that a provision for their reservation in MEIs makes '*serious inroads on the right of administration*', betrays the caste prejudice of Ashraaf-Savarna judges. There is no evidence to support such a claim.[29] Such claims only promote the development of anti-social justice epistemology and delegitimize the democratic demands of backward castes in all institutions of common public life.[30] The second assertion that restriction against the collection of fees would make MEIs impossible too had a very weak empirical foundation. It preempted the development of a common education system which could be one of the most effective social justice tools in a society plagued by graded inequality.[3131] Free education for all the students in the primary classes was a tentative step towards a common education system. Its subversion in the name of minority rights secures an exclusive access to elite educational institutions for upper castes irrespective of minority-majority status. From here on, the shield of minority rights, in combination with similar other devices,[32] was used to derail all efforts towards achieving a common education system.

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28 The substance of art. 45 now stands transferred to art. 21A by the Constitution (Eighty-sixth Amendment) Act, 2002, s. 2 (*w.e.f.* 1-4-2010).

29 Sukhdeo Thorat and Katherine Newman, eds., *Blocked by Caste: Economic Discrimination in Modern India* (Oxford University Press, New Delhi, 2010).

30 Subsequent judgments on the issue stand testimony to this epistemic violence.

31 *Supra* note 8.

32 For instance, the rights of private players under art. 19(1)(g) have been invoked to install privatized education system, which adds multiple layers of hierarchy, almost mirroring the hierarchy of caste society.

In many ways, the Supreme Court opinion on Kerala Education Bill laid the foundation for insulating MEIs from social justice policies. It paved the way for using article 30 as a weapon against affirmative action measures under articles 15 and 16. Building on the reasoning of *Kerala Education Bill,* J C Shah J., in *Rev Sidhajbhai Sabhai* v. *State of Bombay*[33] held that insofar government orders relate to reservation of seats for the school board teachers in MEIs, they infringe fundamental freedom guaranteed under article 30. However, it was equally possible to save the reservation order by restricting the scope of reservation in MEIs to the OBCs belonging to the concerned minority community based on *Kerala Education Bill* reasoning, both to "*protect the backward classes*" and leave some space for the "*sprinkling of outsiders*". If this had happened, the jurisprudence on article 30 *vis-a-vis* articles 15 and 16 would have evolved in a much more democratic direction. Instead, what was reluctantly tolerated by the court in *Kerala Education Bill* became intolerable in *Rev. Sidhajbhai* on the basis of reasoning advanced in the former! Such intolerance of the Supreme Court towards social justice policies is not confined to minority educational institutions alone. This pattern cuts across the range of affirmative action initiatives envisaged by the Constitution.[34] Nevertheless, it must be noted that *Rev. Sidhajbhai* case was not at all concerned with the applicability of article 16(4) in MEIs. This issue was still governed by the hesitant ratio of *Kerala Education Bill*.

In *Rev. Sidhajbhai*, Shah J., also laid down a dual test to decide the constitutionality of regulations sought to be applied to MEIs. First, the test of reasonableness, and second, that it is conducive to making the institution an effective vehicle of education for the minority community while retaining its character as a minority institution. This in reality was a single test because a regulation could be held reasonable only if it satisfied the second test first. However, this test does not help in deciding when a regulation is conducive to the minority community or when it would destroy the minority character of the institution. Even if these tests were to be applied to regulations giving effect to social justice policies, they could still not be held to be unconstitutional. But *Rev. Sidhajbhai* decision did precisely this.

Right to appoint the Staff: A license to exclude bahujan class

Rev. Sidhajbhai ratio effectively precluded Pasmanda Bahujan students from invoking article 15(4) to secure admission in MEIs. Ground for nullifying article 16(4) was prepared by Hidayatullah J., in *Rev. Father W. Proost* v. *The State of Bihar*[35] whereby he recognized the unqualified right to appoint the staff members for Article 30 institutions by upholding the constitutional validity of section 48-B of the Bihar State Universities Act, 1960. This Act exempted MEIs from common appointment procedure through

33 AIR 1963 SC 540.

34 *Supra* note 15.

35 1969 AIR SC 465.

University Service Commission. If the appointment of staff in MEIs was made by a common appointment procedure then the question of complying with article 16(4) while making appointments could emerge easily. However, once the right to appoint the staff members in article 30 institutions legally fell in the hands of upper caste/ upper-class management or administrators of MEIs, the question of giving effect to article 16(4) became stillborn. Following *Father Proost* in *D. A. V. College* v. *State of Punjab,*[36] P. Jaganmohan Reddy J., held that the statutory provision laying down that the staff of affiliated minority colleges be appointed with the approval of the University Vice Chancellor was violative of article 30. Consistent judicial exceptionalism in favor of MEIs forced some state legislatures to incorporate article 30 exclusions in their laws on educational institutions. For instance, the Bihar High Schools (Control and Regulation of Administration) Act 13 of 1960 subjected the rule making power under it to articles 29, 30 and 337. As a result, when the rules were framed under the Act by the State Government of Bihar, they specifically excluded schools established and administered by the minorities, whether based on religion or language from its application. In *Rt. Rev. Bishop S. K. Patro* v. *State of Bihar*[37] such an exclusion was so naturalized that the Supreme Court invalidated the order of educational authorities requiring the Secretary of the Church Missionary Society Higher Secondary School to constitute a managing committee because it was in violation of the exclusion rule. The question of constitutional representation in the management or administration of MEIs could not emerge at all. For similar reasons, in *State of Kerala* v. *Very Rev. Mother Provincial* [38] where the regulation and composition of managing and administrative bodies was directly in issue, the question of implementing article 16(4) was never raised. It was not considered even when the court considered the right to select the teachers in MEIs. Further, attempts to regulate non-minority private institutions too fell off the ground as any provision held inapplicable to minority institutions could not be enforced against the majority institutions. *Mother Provincial* followed the trajectory of *Kerala Education Bill* in making the ideal of a common education system much more difficult than it always was.

Judicially established exceptionalism of minority rights under article 30

It has been noted above that nothing under article 30 is exclusively available to the so-called religious and linguistic minorities. articles 19(1)(g), article 28(2) and article 28(3) read together confer same rights on every citizen and group of citizens which can be exercised by religious and linguistic minorities under article 30. Nevertheless, the Supreme Court established the exceptionalism of minority rights under article 30 in the face of this reality. Traces of this construction are visible from *Kerala Education Bill*

36 1971 AIR SC 1737.

37 1970 AIR SC 259.

38 1970 AIR SC 2079.

onward. However, this was most explicitly argued by Ray CJ., in *The Ahmedabad St. Xaviers College* v. *State of Gujarat*[39] where he observed that "*the scope of Article 30 rests on linguistic or religious minorities and no other section of citizens of India has such a right* ." In the same case, Justice Khanna observed that "*The majority in a system of adult franchise hardly needs any protection. It can look after itself and protect its interests. Any measure wanted by the majority can without much difficulty be brought on the statute book because the majority can get that done by giving such a mandate to the elected representatives. It is only the minorities who need protection, and article 30, besides some other articles, is intended to afford and guarantee that protection."* [40] In a similar vein, Justice S Mohan in his concurring opinion in *Unni Krishnan* v. *State of Andhra Pradesh*[41] observed that, "*By implication also a fundamental right of the nature and character conferred under Article 30 cannot be read into Article 19(1)(g). The conferment of such a right on the minorities in a positive way under Article 30 negatise the assumption of a fundamental right in this behalf in every citizen of the country*." These observations assume that there already exists a preeminent religious majority which should make certain exceptions for another fully constituted religious minorities. The constitutional and judicial role in constructing the religious majority is quickly effaced by the concern for the religious minorities and the need for exceptional provisions for them. One may ask what purpose is served in establishing such exceptionalism about article 30 when it contains nothing more than the exclusion of social justice policies. If anything, the exceptionalism of MEIs concerning social justice has been used to sneak away social justice from private educational institutions as well.[42]

Reaffirming *Kerala Education Bill, Rev. Sidhajbhai*, *Father Proost*, *D. A. V. College*, *S. K. Patro*, *Mother Provincial,* the 9 judges bench in *St. Xaviers College* by majority held that certain provisions of the Gujarat University Act, 1949 as amended in 1972 which, among other things, contemplated supervisory role for the university in the appointment as well as service conditions of teachers and in the composition of management/ administration in all colleges including minority colleges could not have any compulsory application to minority institutions. If the government affiliating universities were allowed a supervisory role in appointing the faculty and in the composition of management/administration in MEIs, then at some point, reservation policy had to be implemented in MEIs as affiliating universities are bound by it. Further, the tendency to invoke article 30 so as to derail any movement towards common education system continued in *St. Xaviers College* as well. Mathew J., made following observation against the common education system in the garb of protecting minority rights: "*there can be no surrender of constitutional protection, of the right of minorities to popular will masquerading as the*

39 1974 AIR SC 1389.

40 *Ibid.*

41 1993 AIR SC 2178.

42 This point has been elaborated in succeeding sections with reference to relevant judgments and legal provisions.

common 'pattern of education."[43] A rare moment in acknowledgment of the relationship between article 15(4) and article 30 is to be found in the partly assenting and partly dissenting opinion of Dwivedi J., where he observed that the former places certain express limitation on the right contained in later. He found that the right of admission under article 30 is curtailed by article 15(4), which provides an exception to article 29(2).[44] However, Dwivedi J., did not develop any consequential order based on this finding.

Privileging conditions of service over people in service

Analysis of legislations reviewed by the high courts and Supreme Court from *Kerala Education Bill, Rev. Sidhajbhai*, *Father Proost*, *D. A. V. College*, *S. K. Patro*, *Mother Provincial* to *St. Xaviers College* reveals that except for *Kerala Education Bill*, none of them seem to be concerned much about the social class of people who join in the services of educational institutions. However, they remain obsessed with regulating their conditions of service. As a result, the judicial forum was spared theburden to pronounce upon the inclusion/exclusion of people in service of MEIs more directly. On one lone occasion in *Kerala Education Bill*, the Supreme Court reluctantly tolerated the inclusion provision. Nevertheless, in *Rev. Sidhajbhai*, where inclusion provision only indirectly related to the admission of Pasmanda Bahujan, was struck down. However, the cumulative effect of these two judgments on the Parliament and state legislatures was mischievously profound. After these judgments, no government attempted to implement social justice policies in MEIs. Such deference to judicial verdicts by the legislature and executive, which limit the scope of social justice, cannot be understood without an inquiry into the nature of the Indian state and society itself. Anti-caste democratic scholars, through historical, social, cultural, economic and political studies, have established that what emerged after the departure of the British from India was a Brahmanic state of a particular kind. This Indian state is living testimony of Brahmin[45] Savarna hegemony. Over time it mutated from socialist to capitalist to neo-liberal, yet at its core, it remains a Brahmanic state.[46] All its institutions, including its civil society, are knitted with an 'inter-institutional caste grid' which delivers 'singularity of performance' in the service of the Brahmin Savarna caste/class. Holding it all together is the discourse that constructs Brahmin Savarna as 'hindu majority' and Sayed[47] Ashraaf

43 *The Ahmedabad St. Xaviers College* v. *State of Gujarat* 1974, AIR SC 1389.

44 These findings were quoted with approval in *T.M.A. Pai Foundation* v. *State of Karnataka*, AIR 2003 SC 355 by S N Variava J.

45 Brahmin is the highest caste in the caste order, like the Sayed caste.

46 Aakar Patel, "When will the Brahmin-Bania hegemony end?" *Livemint,* Aug 28 2009, *available at*: https://bit.ly/3oKmGGV (Last visited on Dec. 20, 2022); Braj Ranjan Mani, "Neobrahmanism, Human Rights and Social Democracy", Roundtableindia.co.in, Feb. 1, 2012, *available at:* https://bit.ly/34DG1T9 (last visited on Dec. 22, 20222).

47 Sayed is the highest caste in the caste order, like the Brahmin caste.

as 'muslim minority'.[48] This majority-minority dialectic carried with reference to religious symbolisms conceals the miserable numerical inferiority of Ashraaf Savarna castes and the privileges they derive from such a discourse at the cost of Pasmanda Bahujan. That is why the Ashraaf Savarna class keeps all public and private spaces including legislative, executive and judicial preoccupied with issues, fights and debates which revolve around hindu-muslim, majority-minority axis. Reproduction of such fights and debates preclude democratic issues especially those which relate to the representation of Pasmanda Bahujan from emerging even as a contention. Privileging conditions of service over people in service by the legislature or executive typically leads to legal battles and debates which are more appropriately termed as 'hegemonizing fights and debates'.[49] Through such hegemonizing fights and debates over relatively irrelevant issues, the hegemonic class seeks to perpetually suspend all deliberation on issues that concern the subjugated class.

This pattern continued after *Ahmedabad St. Xaviers College* as well. Following *Ahmedabad St. Xaviers College*, in *Lilly Kurian* v. *Sr. Lewina*[50] ordinance framed under the Kerala University Act, 1969, which conferred appellate powers on the Vice Chancellor of affiliating University concerning service conditions of staff was made inapplicable on MEIs by Justice A P Sen. In *All Saints High School, Hyderabad* v. *Government of Andhra Pradesh*[51] now the Andhra Pradesh State Legislature passed a law to regulate the service conditions of teachers in private educational institutions. Most of these provisions were held to be violative of article 30 by the majority led by Chief Justice Chandrachud, just as they were struck down in the earlier judgments. Similarly, in *Frank Anthony Public School* v. *Union of India,*[52] Parliament passed a law to regulate, among other things, the service conditions of teachers in the Union Territory of Delhi. Only this time, section 12 of the Delhi School Education Act 1973 which made the provision relating to the service conditions of employees inapplicable to unaided minority institutions, was found to be discriminatory and void by O Chinnappa Reddy J., as he thought that defects found in earlier cases had been cured by the impugned provisions before him. Another hegemonizing legal battle involving MEIs often concerns itself with the minority status of an educational institution. The issue in such battles is framed on the

48 The Christian minority too is constructed for similar purposes but owing to smaller numbers, its salience in supporting the construction of the hindu majority remains confined to small pockets only. The Muslim minority project, on the other hand, has been scaled up to larger territories across India. Hence its national salience.

49 Ayaz Ahmad "Judicial Hand in the Governmental Control Over Media" published in an edited book titled " *Institutional Decline during Neo-liberal Regime: Notes from India*", in Yogesh P Singh, Afroz Alam, (eds.) 138-158 (Thomson Reuters, New Delhi 2022).

50 AIR 1979 SC 52.

51 AIR 1980 SC 1042.

52 AIR 1987 SC 311.

following trope: the right to administer under article 30 must be preceded by the proof of establishment of the institution by the minority community. For instance, in *S. Azeez Basha* v. *Union of India,*[53] Wanchoo J., took great pain to bring out the meaning of word 'establish' only to depart from the path established by the previous judgments of the Supreme Court on the subject. He held that the Aligarh Muslim University was brought into existence by the Central Legislature and the Government of India. Therefore, the Muslim minority could not claim to administer it under article 30.[54]

Although this judgment did not change anything on the ground, it did manage to completely obscure the issue of Pasmanda Bahujan representation in Aligarh Muslim University, which continues to be dominated byAshraaf-Savarana.[55] In *St. Stephen's College* v. *The University of Delhi*[56] too, this issue was labored at a great length by the majority opinion. Again, the inter-institutional caste grid operated in such a way that the question of representation of Pasmanda Bahujan in MEIs could not be raised in any of these cases. Successfully keeping the issue of social justice out of MEIs despite the engagement of multiple institutions from different geographies in a different context is nothing but a singularity of performance in action. These cases reproduced hegemonizing legal fights and debates for Ashraaf-Savarna in judicial forums, which successfully kept out the issues and concerns of Pasmanda Bahujan.

50% Ashraaf and 50% Savarna in MEIs

The representation question in MEIs, for the first time, became a direct issue in *St. Stephen's College* v. *The University of Delhi,*[57] where the directives of the university to admit students through a uniform admission process and not to give preference to students belonging to the minority community was challenged. However, the question was resolved by the majority of judges led by K. Jagannatha Shetty J., in such a manner that 50% of seats in MEIs got reserved for minority students, which established them. The other 50% got reserved for students other than the minority community.[58]

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53 AIR 1968 SC 662.

54 For the fallacy of this reasoning, see Ayaz Ahmad, "Judgment on the Minority Character of AMU: A Classical Case of Fallacious Legal Reasoning", *Livelaw.in* on Jan. 20, 2016. *Available at*: https://bit.ly/3MYM2e4 (last visited on Dec. 10, 2022).

55 Tosib Alam and Surinder Kumar, "Social and Economic Status of Backward Muslims in Uttar Pradesh: Need for An Inclusive Policy" 49:1 *Social Change* 90 (2019). Hussain Anis Khan, " How Inclusive and Diverse is Jamia Millia Islamia?" *The Wire*, April 14, 2019. Esha Roy, "Why NCPCR has recommended minority schools be brought under RTE" *The Indian Express*, Aug. 12, 2021.

56 AIR 1992 SC 1630.

57 AIR 1992 SC 1630.

58 The discovery of the magic number 50% on this occasion, like other occasions by the judiciary, has no relation to the population size of the concerned groups, whether counted based on religion or caste.

In the absence of any scheme for SC, ST and OBC students in MEIs, it practically meant that 50% of seats would go to the Ashraaf students hailing from the so-called minority communities, and 50% of seats would go to the Savarna students owning to their accumulated educational and cultural capital. The majority judgment treated this case as a virgin territory on the reservation of seats in MEIs, ignoring that in the *Kerala Education Bill* case, the Supreme Court had reluctantly upheld the provision of reservation for SC, ST and OBCs in the context of article 16(4). *St. Stephen's College* was an occasion where the Supreme Court could firm up the hesitant ratio of *the Kerala Education Bill* in the context of articles 15(4) and 16(4). More so when it had reached the court after the implementation of Mandal Commission Report,[59] which had conclusively established that all religious groups are divided on caste lines and lower caste exclusion from educational resources is common to all of them. Nevertheless, after paying flowery tributes to minority rights and social justice, the majority judgment laid down a 50-50 formula at the cost of Pasmanda Bahujan cutting across the minority-majority construct. After *Kerala Education Bill*, MEIs were administered on the implicit understanding that they were free to prefer students, teachers and other staff from their community. Shetty J, in this context, observed that the advisory opinion in the *Kerala Education Bill* case recognized a fair degree of discrimination in favor of religious minorities. Right after this, he quoted Justice Gajendragadkar from *M. R. Balaji* v. *State of Mysore,*[60] where he pointed out that "*the reservation to socially and educationally backward classes would serve the interests of the society at large by promoting the advancement of the weaker elements in the society*". Shetty J even quoted Justice Ray from *State of Kerala* v. *N.M. Thomas,*[61] where in the context of articles 14, 15 and 16, he observed that "*preferential treatment for members of the backward classes alone can mean equality of opportunity for all citizens*". Yet Shetty J failed to extend this logic to MEIs while laying down his 50-50 formula in favor of Ashraaf Savarna.

Even the dissenting opinion of M Kasliwal J, in *St. Stephen's College* elided the question of Pasmanda Bahujan representation. Kasliwal J, in his dissent, demonstrated full awareness of the scope and applicability of article 15(4) in MEIs. He expressly held that "*the right of admission is further curtailed by Article 15(4) which provides an exception to Article 29(2). Article 15(4) enables the State to make any special provision for any advancement of any socially and educationally backward class citizens or for the Scheduled Castes and Scheduled Tribes in the matter of admission in the educational institutions maintained by the State or receiving aid from the State*." However, he too refused to apply his logic to the case before him and held that MEIs are not entitled to claim any preferential right or reservation in

59 Report of the Backward Classes Commission, 1980. *Available at*: http://www.ncbc.nic.in/User_Panel/UserView.aspx? TypeID=1161 (last visited on Dec. 20, 2022).

60 AIR 1963 SC 649.

61 AIR 1976 SC 490.

favor of backward class students.[62] His conclusion effectively meant that 100% of seats in MEIs should remain open to Savarna Ashraaf; otherwise, article 29(2) would be violated. This conclusion is strikingly similar to the Supreme Court position in the *State of Madras* v. *Champakam Dorairajan,*[63] articulated 40 years before *St. Stephen's College*!

Neoliberal churning and the *Mohini Jain-Unni Krishnan* trigger

Adoption of the New Economic Policy in 1991 under expanding neoliberal world order championed by the global elite ushered in a tectonic shift in the way Indian economy and society were organized. It led to churning in the field of education as well. [64] The proliferation of private educational institutions meant that the question of social justice in such institutions acquired greater importance. Moreover, partial implementation of the Mandal Commission Report and its qualified judicial approval[6565] in *Indra Sawhney* v. *Union of India*[66] ensured that the issues of accessibility and representation in private and public educational institutions find some expression in judicial forums. The issue of accessibility on economic grounds in private educational institutions was taken up first in *Mohini Jain v. State of Karnataka.*[67] After proclaiming education to be a fundamental right under Part III of the Constitution,[68] Justice Kuldeep Singh observed that "*the capitation fee brings to the fore a clear class bias. It enables the rich to take admission whereas the poor has to withdraw due to financial inability*." He went on to strike down those parts of the notification issued under the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, which permitted higher fees to be charged to students (not including foreign and NRI students) from outside Karnataka. Incidentally, this Act contained a scheme of "Government Seats" in private educational institutions whereby reservations for SC, ST and OBCs could be specified and fees fixed by the government. However, a spate of petitions filed by private educational institutions, including MEIs engaged in medical and engineering education,

62 A decade later, the dissenting opinion of Justice Sayed S M Quadri in *T.M.A. Pai Foundation* v. *State of Karnataka*, AIR 2003 SC 355 treaded on a similar trajectory

63 AIR 1951 SC 226.

64 Henry A. Giroux, Neoliberal Savagery and the Assault on Higher Education as a Democratic Public Sphere in "The Idea of the University" (Issue 29) of Café Dissensus on Sept. 15, 2016. *Available at*: https://bit.ly/3i2V7om. (last visited on Dec. 20, 2022).

65 *Supra* note 15.

66 (1992) Supp 2 SCR 454 (SC).

67 AIR 1992 SC 1858.

68 The Supreme Court could have very well proclaimed that privatization of education is in violation of the golden triangle sketched by it poetically through Art. 14, 19 and 21, which could obviate the need for proclaiming education as a fundamental right altogether. Of course, that would have made impossible much of the analysis done in this paper of the judicial and constitutional developments post *Mohini Jain* judgment.

challenged the correctness of *Mohini Jain's* decision and such schemes of some southern states in *Unni Krishnan.*[69]

The entry of MEIs in *Unni Krishnan* case triggered a series of judicial and legislative interventions which used MEIs as the constitutive outside to organize private educational space into an exclusive preserve of the upper castes/class. Although *Unni Krishnan* limited the general proclamation of *Mohini Jain* about the fundamental right to education only for children up to the age of 14 years, it significantly strengthened the scope of social justice in private educational institutions, including MEIs. B P Jeevan Reddy J., evolved a scheme of 50% 'free seats' and 50% 'payment seats' for private, professional colleges. Under this scheme, 50% of 'free seats were to be filled by the government nominees, and remaining 50% of payment seats were to be filled by those candidates who were prepared to pay the full fee. Students for both types of seats were to be selected through a common entrance exam based on their inter se merit. Reservation of seats for constitutionally permissible classes could be made on both types of seats with the approval of the affiliating University. Moreover, the fee chargeable in each professional college was subjected to the ceiling prescribed by the appropriate authority or by a competent court. Every state government was directed to constitute a committee to fix the ceiling on the fees chargeable by professional colleges. Every authority granting recognition/affiliation was mandated to implement this scheme in the institutions seeking recognition/affiliation from it. In fact, the said scheme was held to constitute a condition of such recognition or affiliation in addition to the extent terms and conditions.

It is to be noted that *Unni Krishnan* premised this scheme on articles 14 and 15 along, with the relevant legislations of Andhra Pradesh, Maharashtra, Karnataka and Tamil Nadu, in addition to the preambular promise of justice social, economic and political. *Mohini Jain* and *Unni Krishnan* judgments on capitation fees, free seats, allotment of seats through common entrance exams and reservation schemes in private educational institutions could exert democratizing influence on them. Under such an influence, private educational institutions could evolve as a partly shared space[70] with diverse social classes in their formative stages. *Unni Krishnan* and *Mohini Jain* made valiant attempts to neutralize the growing inegalitarian effects of neoliberalism and Savarna Ashraaf dominance in privatized education. Of course, none of this valor would have been necessary if the Supreme Court could muster sufficient courage to hold privatization of education as unconstitutional encroachment of articles 14, 19 and 21 in the first place. However, as the subsequent judicial efforts too were grounded in the constitutional ideal of a fraternal and egalitarian society, sabotaging them directly was

69 *Supra* note 1.

70 Partly shared because 50% of payment seats could still be claimed predominantly by Ashraaf-Savarna castes only.

difficult for Ashraaf Savarna strategists. Hence, the bogey of MEIs was summoned to confront the *Mohini Jain- Unni Krishnan* ratio. The critical components of this ratio, capitation fee, free seats, allotment of seats through common entrance exams and reservation scheme, were framed as a transgression of the rights of MEIs. True, *Unni Krishnan* consciously refrained from making any order or direction about MEIs, and a few matters relating to them were delinked to be heard separately.[71] But it was insufficient to prevent MEIs from playing their constitutive role conceived by judicial minds.

Several state governments insisted that MEIs too follow the *Unni Krishnan* scheme*;* MEIs intuitively claimed that being MEIs, they were exempt from any such scheme, the issue landed in the Supreme Court, and the familiar story followed. The Supreme Court, in its interim order,[72] modified the *Unni Krishnan* scheme in favor of MEIs to the extent that 50% of seats could be filled up by candidates selected by the state government based on a competitive test with the fee as determined by the government for this class of students. The remaining 50% of seats could be filled by candidates selected by MEIs belonging to a particular religious or linguistic minority. MEIs were exempted from the common entrance test (CET) as well, they were free to devise their own admission test. This order was later approved[73] with the modification that out of the 50% of seats to be filled by the government, half will be payment seats, and half will be free seats. Similarly, out of the 50% of the seats to be filled by the MEIs, half will be payment seats, and the other half will be free seats. Consequent to such exemptions and modifications in the *Unni Krishnan* scheme concerning MEIs, the whole issue of equal access to privatized education got transformed into a dispute about the scope of article 30 and MEIs[74]! Such a transformation is evident in how questions were framed for subsequent determination from *T. M. A. Pai* up to *P A Inamdar* judgments.

T.M.A. Pai onslaught against the spirit of *Unni Krishnan* using MEIs

Once certain exemptions from the *Unni Krishnan* scheme were granted to MEIs and its sanctity breached, the tag of MEI became a convenient escape route from the democratic influence of the *Unni Krishnan* scheme. A large number of private educational institutions falsely started claiming to be MEIs only to gain the advantage of 50%

71 *Shahal H. Musaliar* v. *State of Kerala*, Writ Petition (civil) 598 of 1993, order dated Aug. 18, 1993.

72 *Islamic Academy of Education* v. *State of Karnataka*, Writ Petition (Civil) 350 of 1993; *S. Venkatesha Education Society* v. *State of Karnataka*, Writ Petition (Civil) No. and 355 of 1993, order dated May 14, 1993.

73 *T.M.A. Pai Foundation v. State of Karnataka*, AIR 1994 SC 2372.

74 Such a transformation was noted by Virendra Kumar differently. However, he could not articulate the constitutive role of MEIs in this transformation primarily because he sought to defend the *Unni Krishnan* scheme by invoking art. 29(2) at the cost of art.15(4) and 16(4). See Virendra Kumar, "Minorities' Right to Run Educational Institutions: "T.M.A. Pai Foundation" in Perspective" 45 *Journal of Indian Law Institute* 200 (2003).

admissions on their own.[75] For the same reason, a demand for uniform treatment of all professional colleges – minority or otherwise - in the matter of admissions started gaining traction before courts. The Supreme Court's interim response by a three judges bench which included Kuldeep Singh J., and B P Jeevan Reddy J., was to increase the NRI quota, to increase the fee structure of 'free seats' by renaming it as 'merit seats', to suggest subvention and loan schemes and finally, to leave the substantial questions concerning the implementation of the *Unni Krishnan* scheme as questions of MEIs to be reconsidered/modified by a larger bench.[76]

The reconsideration by a larger bench in *T. M. A. Pai*[77] concluded with the scraping of the *Unni Krishnan* scheme, *inter alia,* on the ground that it violated the rights of MEIs under article 30. Unable to trace any sound constitutional basis for the 'unreasonableness' of the *Unni Krishnan* scheme, all the counsels for private educational institutions as well as the Solicitor General of India urged in unison that the scheme violated the rights of MEIs. Once *Unni Krishnan* scheme was held to be unconstitutional *vis-a-vis* MEIs, all that other private educational institutions had to plead was parity with MEIs in order to avoid the said democratic scheme. One ground on which the *Unni Krishnan* scheme was declared unreasonable by the majority judges in *T. M. A. Pai* led by Chief Justice B N Kirpal was that paradoxically some students who came from private schools and who belonged to more affluent families were able to secure higher positions in the merit list of the common entrance test, and were thus able to seek admission to the "free seats".[78] If one is to go by this argument and conclusion, the effect of scraping the *Unni Krishnan* scheme was going to be 100% capture of seats by students coming from rich and affluent backgrounds! Such effect could easily be offset by the constitutional policy of reservation for Pasmanda Bahujan on both free and payment seats which, was integral to the *Unni Krishnan* scheme. State governments never implemented this part of the scheme resulting in the anomaly noted above which, gave an excuse to the *T. M. A. Pai* majority judges to scrap the scheme altogether. The *T. M. A. Pai* court, instead of prodding state governments on their failure, was more anxious to consider the impact of this scheme on MEIs and the merit and effect of article 30. In this way, the infanticidal fate of the *Unni Krishnan* scheme was sealed through MEIs to a great extent.

The common entrance test, another important aspect of the *Unni Krishnan* scheme intended to check the arbitrary practices of private educational institutions in the

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75 *T.M.A. Pai Foundation* v. *State of Karnataka*, AIR 1995 SC 2431.

76 *Ibid.*

77 *T.M.A. Pai Foundation* v. *State of Karnataka*, AIR 2003 SC 355.

78 A similar fate awaits all affirmative schemes in India which conceive social justice on class or religious grounds, ignoring the determinative role of caste in access to educational and economic goods. This judgment tacitly acknowledges that all merit is constructed through access to social, educational, and financial resources.

matter of admissions, was shot down in *T. M. A. Pai* by invoking *St. Stephen's College*[79] ruling, which upheld the right of MEIs to have an admission procedure of its own. Similarly, the matter of deciding fee structure, the constitution of a governing body, and the appointment of teachers and staff in private unaided non-minority educational Institutions were brought at par with MEIs by *T. M. A. Pai* judgment. Even the disciplinary control over teachers and staff was left to the mercy of the management of private institutions, just like MEIs. The reasoning offered by B N Kirpal J., for this feat is ominously reminiscent of the reasoning in MEI judgments analyzed above.

The predilection of MEIs in *T. M. A. Pai* series of orders and judgments was fundamentally to determine the impact of *Unni Krishnan* scheme on them. With the invalidation of the *Unni Krishnan* scheme one would expect there was very little left to be determined with respect to MEIs. But after bringing parity between MEIs and private educational institutions so as to insulate both from the democratic spirit of *Unni Krishnan* scheme, *T. M. A. Pai* judgment went on to devote large number of pages on the nature and scope of article 30 rights. Discussion from the previously settled question of the unit for the purpose of determining a "minority", to the extent of the rights of aided and unaided MEIs, to the interplay of articles 29 and 30 was extensively made to hold that any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. What would constitute 'national interest' with reference to a given regulation for MEIs was left to speculation by future benches.[80] For instance, whether a regulation to give effect to the constitutional provision for reservation in MEIs would be in the national interest was not clarified. With nothing left to be determined with respect to MEIs, B N Kirpal J., made pointless proclamations about secularism and equality being part of the basic features of the Constitution and article 30 preserving secularism in the country. In one ironical paragraph, the autonomy of private unaided institutions in the method of recruitment and disciplinary procedure for teachers/staff, charging of fees, and admission procedure secured by importing MEI jurisprudence into private unaided institutions was sought to be extended back to unaided MEIs! There were a few minor additions to MEI jurisprudence by *T. M. A. Pai* majority judgment, though. The 50-50 formula of *St. Stephen's College* was made flexible depending upon the level of the institution and the population and educational needs of the area in which the institution was located. With this qualification percentage of the non-minority students to be admitted to MEIs was left to be notified by the concerned state government. There was a meek observation that the state authorities could insist on allocating a certain

79 AIR 1992 SC 1630.

80 On this point, both the assenting opinion of Justice B N Kirpal and the dissenting opinion of Justice Sayed S M Quadri was answering hypothetical questions because, after the demise of the *Unni Krishnan* scheme in the earlier parts of *T .M. A. Pai* judgment, there was no regulation (neither in national interest nor in the interest of MEIs) which could be imposed on MEIs.

percentage of seats to SC, ST, and OBC groups, from amongst the non-minority seats in aided MEIs. For the minority seats, even such a meek suggestion was unthinkable. In fact, V N Khare J., in his concurring opinion, observed that the *"...word 'caste' is unheard of in religious minority communities*". How could he then think of Pasmanda representation in MEIs who, for him, were non-existent?[81] Similarly, Sayed S M Quadri J., and Ruma Pal J., in their partly assenting and partly dissenting opinions, invoked the concept of 'equality in fact' to argue for the preferential rights for minorities in MEIs but could not think it necessary to support the equality in fact for Pasmanda Bahujan. Ironically, they did so by referring to articles 15 and 16, which guarantee equality, in fact, for Pasmanda Bahujan in all institutions of national life! S N Variava J., too while open to giving preference to physically handicapped or dependents of employees in MEIs, remained oblivious of the need for such preference to Pasmanda Bahujan. However, while building his argument for the applicability of article 15(1), 28(2), 28(3), and 29(2) on article 30, he quoted with approval the finding of Dwivedi J., in *St. Xaviers College* that article 15(4) places an express limitation on article 30 right. But Variava J., much like Dwivedi J., too failed to draw any consequential order in favor of Pasmanda Bahujan.

Interpreting the interpretation from *Islamic Academy* to *P A Inamdar*

Contemporary social scientists, especially the practitioners of discourse theory, stand firmly against the possibility of uncontested final determination of any meaning, whether in language or society.[82] This approach proceeds by taking into account the subjectivity of the interpreter/reader and how it is shaped by a complex interplay of power, contingency, and identification. It implies that the meaning of words and texts can only be partially fixed, and the possibility of an alternative signification can never be hermetically sealed.[83] Radical implications of these developments in linguistic, social, and political fields are yet to be worked out fully to comprehend Indian legal theory and practice.

V.N. Khare J., in *Islamic Academy of Education* v. *State of Karnataka,*[84] speaking for the constitutional bench, constituted to interpret the interpretation of *T. M. A. Pai* judgment, started by noting that various state governments, different high courts and educational institutions understood that judgment differently. However, the democratic

81 On this point, both the assenting opinion of B N Kirpal J., and the dissenting opinion of Sayed S M Quadri J., was answering hypothetical questions because, after the demise of the *Unni Krishnan* scheme in the earlier parts of *T .M. A. Pai* judgment, there was no regulation (neither in national interest nor in the interest of MEIs) which could be imposed on MEIs.

82 David Howarth, *Discourse*, (Rawat Publications, New Delhi, 2019); David Howarth, Jason Glynos and Steven Griggs, "Discourse, explanation and critique" 10:1 *Critical Policy Studies* 99-104 (2016).

83 *Ibid.*

84 AIR 2003 SC 3724. Also see *Modern School* v. *Union of India* (2004) 5 SCC 583.

impulse of V.N. Khare J., and the majority for which he wrote the *Islamic Academy* opinion could not completely square up with the inegalitarian thrust of *T. M. A. Pai* judgment. Khare J., after acknowledging two contradictory principles of *T. M. A. Pai* i) that each institute must have the freedom to fix its fee structure ii) that there can be no profiteering and capitation fees cannot be charged, held that the respective state governments shall set up, in each state, a fee committee. This committee was directed to decide whether the fee proposed by educational institutions was justified. The committee was at liberty to approve the fee structure or propose another fee the institute could charge. Charging any other amount not approved by the committee would amount to charging of capitation fee, which could be duly penalized by the appropriate authorities.On the question whether minority and non-minority educational institutions stand on the same footing and have the same rights under the T. M. A. Pai judgment, the majority of *Islamic Academy* held that the minorities are given a special right under article 30, which gives them certain advantages Such advantages as per *Islamic Academy* include, *firstly,* exemption from future laws that might be enacted to nationalize education or to take over the management of educational institutions.[85] This hypothetical advantage was immediately qualified by asserting that a minority institute can be closed down in national interest. *Secondly*, MEIs have a preferential right to admit students of their community/language, which is not available to non-minority educational institutions. The operational reality of this second advantage has been brought out in the analysis of *St. Stephen's* 50-50 formula in favor of Ashraaf Savarna.

On the question of the right of private unaided professional colleges to admit students and the method of their admission Khare J., held that in non-minority professional colleges, admission of students, other than the percentage given to the management, can only be based on merit as per the common entrance tests conducted by government agencies. The same questions for professional MEIs were answered similarly with a rider that they can admit students of their community/language in preference to a student of another community in their management quota. The admission to management quota seats could be made either based on the common entrance tests conducted by the State or on the basis of CET to be conducted by an association of all colleges of a particular type in that State, e.g., medical, engineering or technical. Once again, while the preferential right of MEIs to admit students of their community/ language was recognized, the exclusion of Pasmanda Bahujan remained unrecognized. In the end, the majority opinion of the *Islamic Academy* directed respective state governments to appoint a permanent committee to oversee the common entrance tests and permit an institution that had been permitted to follow its admission procedure for the last 25 years. The seats to be filled by the management and state governments were fixed in the ratio of 50:50 as an interim arrangement. However, the committee

85 S B Sinha J., dissented from this hypothetical proposition.

could permit the admission of students from minority community in MEIs over the quota allotted to them by the state government if it was felt necessary.

Through its hermeneutic technique, the majority judgment of the *Islamic Academy* managed to restore some traces of democratic spirit ushered by *the Unni Krishnan* scheme lost to the 11 judges bench of *T. M. A. Pai*. However, zero progress on the democratic claims of Pasmanda Bahujan in MEIs, even, in this case, underlines their constitutive role in perpetuating Ashraaf-Savarna hegemony. Partly assenting and partly dissenting opinion of S. B. Sinha J., expressed this constitutive function in following words, "*It would be constitutionally immoral to perpetuate inequality among majority people of the country in the guise of protecting the constitutional rights of minorities and constitutional rights of backward and downtrodden*". Despite this clear expression, Sinha J., clubbed minority and backward category together to give the impression that some kind of majority exists minus the former two category people. Further, as per Sinha J, this mythical majority of people suffer from inequality when in reality, it is the backward and downtrodden people who are in the majority by all estimates.[86] By referring to religious minority alongside backward and downtrodden he manages to present Savarna Ashraaf as majority and their minority rule as the rule of majority. In this vein, Justice Sinha opined that article 15 (4) and 16 (4) cannot be applied on article 19(1)(g) or article 30 educational institutions. Here the reference to article 30 MEIs appears only as a shield for the Savarna- Ashraaf owned article 19(1)(g) educational institutions against constitutional vision of social justice.

All such assenting, dissenting and, concurring opinions came together in *P. A. Inamdar* v. *State of Maharashtra,*[87] where seven judges bench of the Supreme Court sat to reinterpret the interpretation of the *T. M. A. Pai judgment* as interpreted by *Islamic Academy*. The counsel[88] for so-called minority and non-minority educational institutions vehemently assailed the *Islamic Academy* judgment for going beyond *T. M. A. Pai* in violation of article 19(1)(g) and article 30. The strongest words of disapprobation were reserved for the reservation policy in favor of SCs, STs, and OBCs in unaided minority and non-minority educational institutions. On behalf of the respondent States it was categorically submitted that "*if the scheme as evolved in Islamic Academy of setting up of permanent Committees is not allowed, education which is already commercialized to some extent would be wholly inaccessible to students coming from middle classes, lower-middle classes and poor sections of the society*". However, for *P. A. Inamdar,* reassessing the relationship between articles 29 and 30 was more convenient. After reaffirming their repeatedly affirmed relationship, R.C. Lahoti J., brought up the 'sprinkling' of a minority from other states on the same footing as a sprinkling of non-minority students. On the rest

86 *Supra* note 13.

87 AIR 2005 SC 3226.

88 Most of these counsels are from the upper caste; almost all are from the upper class.

of MEI issues, the opinion in *Kerala Education Bill* was reiterated. The separate opinion of S. B. Sinha J., found special favor in *P. A. Inamdar* for the reasons noted above.

Judicially constructed artificial distinction between professional and non-professional education institutions was used by *P. A. Inamdar* to hold that the States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State, nor does it have any power to implement the reservation policy. Reservation of seats in such institutions was held not in minority interest within article 30(1) or a reasonable restriction within article 19(6) of the Constitution. The bubble of merit that O. Chinnappa Reddy J., so completely busted in *K.C. Vasanth Kumar* v. *State of Karnataka*[89] was inflated again by Lahoti J., to support his pronouncement. In the name of merit,[90] the scheme of management seats and state government seats evolved by the *Islamic Academy* was overruled. However, *P. A. Inamdar* found no merit issues with the NRI quota and legitimized it to 15%! MEIs were granted a free hand to admit students of their own choice, including non-minority community students and members of their community from other States, to a limited extent, without giving effect to the representational mandate of article 15(4). However, common entrance test for admission was held not to cause any dent in the right of MEIs as they could exercise their choice from the list of successful candidates prepared at the CET. For non-minority institutions, too, CET was made permissible. Determination of the fee structure was left to the sweet will of both minority and non- minority institutions. However, regulation of fees was made permissible on the 'impossible to determine ground' of preventing profiteering. Finally, the two committees of the *Islamic Academy* for monitoring admission procedure and determining fee structure were held to be permissive regulatory measures in the interest of minorities and the student community as a whole. They were held not to violate the right of minorities under article 30(1) or the right of minorities and non-minorities under article 19(1)(g). However, these committees were made temporary until the Central Government or the state governments could devise a suitable mechanism and be subjected to judicial review.

It is to be noted that all key questions framed by *P. A. Inamdar* concerning reservation policy, admission procedure, determination of fee structure, and the two committees of *Islamic Academy* were first answered with reference to MEIs and article 30. These answers were then easily extended to non- minority private educational institutions as well. Thus, the organization of a private educational space as an exclusive Savarna Ashraaf abode was achieved using the constitutive force of MEIs.

89 (1985) SCR Supl. (1) 352.

90 For a contemporary account of merit and its hegemonic deployment see, Michael J. Sandel, *The Tyranny of Merit*, (Farrar, Straus and Giroux, New York 2020).

From judiciary to Parliament: Constitutionalizing the exceptional

Deconstruction of judicial discourse on MEIs visibilizes following two facets associated with it; i) MEIs are used as the constitutive outside to organize Savarna Ashraaf interests in the field of education, and for this purpose, ii) the specificity of MEIs is maintained by the exclusion of social justice policies from them. But the direct expression of these facets in *P. A. Inamdar* outraged democratic forces, which the Parliament could not ignore. However, as an essential limb of the inter-institutional caste grid, the Parliament responded in a way that preserved the constitutive force of MEIs and secured the Savarna Ashraaf interests simultaneously. The Parliament inserted clause (5) in article 15 by the Constitution 93rd Amendment Act, 2005, which provided that nothing in article 15 or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally OBCs of citizens or for the SCs or the STs in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, *other than the minority educational institutions referred to in clause (1) of article 30*. Three things come out of this amendment; one, that the representation of Bahujan Pasmanda in non-minority private educational institutions became dependent on the sweet will of the State;[91] second, their representation in MEIs went out of the constitutional purview. Third, by restricting the special provision only to admissions, the question of reservation in appointments in private educational institutions was closed, which was open till *P. A. Inamdar*. In other words, what was systematically constructed as exceptional by the Supreme Court became constitutional with this amendment.

Following the lead provided by the 93rd Constitutional Amendment Act, the Central Educational Institutions (Reservation in Admission) Act, 2006 (CEI Act)[9292] aimed to secure Pasmanda Bahujan representation in Central Educational Institutions, too excluded MEIs from the ambit of reservation.[93] Section 4 of the CEI Act, which legislated such exclusion side by side, also excluded two more areas of judicially constructed anti-social justice zones;[94] i) institutions of excellence, research institutions, institutions of national and strategic importance as specified in the Schedule to this

91 For the tragic consequences of such an arrangement in higher education, see Yogesh Pratap Singh and Ayaz Ahmad, "Privatization of Higher Education in India: Constitutional Vision, Emerging Issues and Trends" 7 *RGNUL Law Review* 1-20 (2017).

92 (No. 5 of 2007).

93 For another legislation that enacted the exclusion of reservation from MEIs and its routine acceptance by a division bench of the Supreme Court see *Indian Medical Association* v. *Union of India* (2011) 7 SCC 179.

94 These areas of judicially constructed anti-social justice zones are variously termed as 'technical posts', post involving 'specialties and super-specialties', 'posts at the higher echelons' and 'super-specialties courses'. See *supra* note 14.

Act, ii) a course or program at high levels of specialization, including at the post-doctoral level, within any branch or study or faculty, which the Central Government could specify. This section provides clear legislative

evidence about the constitutive usage of MEIs in legally safeguarding Savarna Ashraaf interests; by insulating MEIs from social justice policies the Parliament also insulated judicially constructed anti- social justice zones. Now judicially constructed anti-social justice zones could easily be protected under the high ideal of protecting the minority rights.

Nevertheless, the validity of the 93rd Amendment Act, 2005 and CEI Act, 2006 was challenged in *Ashoka Kumar Thakur* v. *State of Bihar*.[95] The majority, led by Chief Justice K. G. Balakrishnan, held that 93rd Amendment Act does not violate the basic structure doctrine so far as it relates to the admission of SC, ST, and OBC students in aided educational institutions. This principle, in any case, was already covered by article 15(4). However, as such aided institutions include MEIs also, the exclusionary part of article 15(5) was validated *vis-a-vis* MEIs on the ground that it only gave effect to the mandate of article 30.[96] By now, we know that article 30 gives no such mandate which warrants exclusion of article 15(4) or 16(4) from article 30 institutions. Such an exclusionary mandate has been judicially thrust upon MEIs for the hegemonic purposes of Ashraaf Savarna. Dalveer Bhandari J., in his partly assenting and partly dissenting opinion, openly felt that the exemption of MEIs from reservation elevates their status to a certain extent as it liberates more institutions from the caste-based reservation! In his opinion, while caste-based reservation divides the nation, religion-based educational institutions unite it. It carries the faith that religion-based MEIs of Sayed Ashraaf help Brahmin Savarna to unite the caste-divided population into religious majority and minority groups. Such a faith was decisive in judging the constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act 2009). The RTE Act mandated that every recognized school, imparting elementary education even if it was an unaided school, admit in Class I, to the extent of at least 25% of the strength of that class, children of the age 6 to 14 years belonging to the weaker sections and provide free and compulsory education till its completion. Chief Justice S. H. Kapadia, Justice Swatanter Kumar, and K.S. Radhakrishnan J., in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[97] unanimously held that those provisions of

95 (2008) 6 SCC 1 (SC).

96 By necessary implication, the constitutional validity of s. 4 of Central Educational Institutions Act, 2006 *vis-a-vis* MEIs too was upheld. This obviated the need to review the other two types of anti-social justice zones covered by s. 4 of the CEI Act, 2006. These exclusions were not even framed as an adjudicatory issue. The constitutive function of MEIs in safeguarding Savarna Asharaaf interests was also in full play on this occasion.

the RTE Act 2009, which extend it to unaided minority schools infringe the fundamental rights guaranteed under article 30(1) of the Constitution. Therefore they shall not apply to such unaided minority schools.[98] Article 15(5) now provides a perfect constitutional basis for this exceptional conclusion. Once again, the Parliament got its cue to legalize the exceptionalism of MEIs constructed by judicial interpretation. It amended the RTE Act in 2012, expressly subjecting it to article 30, meaning that MEIs will not provide free and compulsory education to 25% of students belonging to socially disadvantaged groups.[99]

The validity of those parts of article 15(5), which concern admission in private unaided educational institutions, was directly considered by a constitutional bench of the Supreme Court in *Pramati Educational and Cultural Trust* v. *Union of India*.[100] While A. K. Patnaik J., writing for the unanimous court, found reservation provision for unaided non-minority institutions to be an element of their charitable character, for unaided MEIs same provision was found to pose a threat to their minority character under article 30(1). Inclusion of unaided non-minority institutions within reservation policy was considered to be in furtherance of the preambular promise of equal opportunity hence consistent with the basic structure of the Constitution.[101] Exclusion of MEIs from reservation policy was also considered to be in furtherance of the preambular promise of equal opportunity, which too was found to be consistent with the same basic structure.[102] The exclusion was deemed necessary by the unanimous court even when the RTE Act 2009 made suitable provision for the reimbursement of expenditure incurred by the MEIs in imparting free education to 25% of students from socially and financially weak backgrounds. In addition, Patnaik J., wrote that excluding Pasmanda Bahujan from admissions in MEIs maintains the secular character of India as well.

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97 (2012) 6 SCC 102.

98 K.S. Radhakrishnan J., in his dissenting opinion, clubbed unaided minority and non-minority institutions to insulate both from the social justice provisions of the RTE Act 2009. The same strategy on the question of social justice was followed in *T. M. A. Pai* and *P. A. Inamdar*, which was partially disapproved by the 93rd Constitutional Amendment. The majority opinion in *Society for Unaided Private Schools* was in perfect harmony with art. 15(5), which preserved the specificity of MEIs by excluding social justice from them and, therefore, retained their constitutive character.

99 The definition of weaker section and disadvantaged group under the RTE Act 2009 includes Pasmanda Bahujan.

100 (2014) 8 SCC 1.

101 The validity of art. 15(5) was already upheld by a division bench led by J B.Sudershan Reddy in *Indian Medical Association* v. *Union of India* (2011) 7 SCC 179. Curiously, *Pramati* does not refer to this judgment at all, which made forceful arguments in support of reservation and the mandate of art. 15(5).

102 The basic structure doctrine, a product of judicial hermeneutics, suffers from the same interplay of subjectivity, power, contingency, and identification of the members of the legal fraternity who gave birth to it. The rhetoric of protecting minority rights was used in good measure to articulate this suspect doctrine. See *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

This approach betrays the exclusionary nature of Indian secularism and indicates its unique contribution to perpetuating Savarna Ashraaf hegemony.[103] The court overruled even that part of *Society for Unaided Private Schools*, which had allowed the RTE Act 2009 to remain applicable to aided minority schools. In what way the presence of a few Pasmanda Bahujan students in Class I could trample the special character of MEIs? What power could such kids exert on MEIs to force them out of oblivion? There is no way to reconcile with this judgment unless one acknowledges the constitutive functions of MEIs in serving Savarna Ashraaf interests.[104]

Constitutionalizing judicially constructed exceptionalism of MEIs *vis-a-vis* social justice policies reached its zenith with the Constitution (One Hundred and Third Amendment) Act, 2019, which added article 15(6). This dubious amendment of the Constitution aimed at further cementing Savarna Ashraaf entitlements by providing them 10 % reservation, grants routine exemption to MEIs from its application.[105] What makes this exemption even more revealing is that it was made by the so- called anti-minority party even when the amendment was assured of full Parliamentary support.[106]

Evolving a constitutional strategy for associated mode of living

Educational institution is a place where democratic ethos can be inculcated among youthful minds. An educational institution's ability to house students and staff together, cutting across social identities, makes it the most promising space for the development of fraternal spirit. This potential of educational institutions in creating fraternity among students and faculty leading to greater social affinity, can be realized only when it is organized with the presence of diverse social classes in them. Judicial intervention in making articles 15(4) and 16(4) inapplicable on MEIs in the garb of protecting article 30 minority rights outcasts this potential. Therefore, developing constitutional strategies to reorganize present educational space as a shared place for associated living is a foremost democratic task of our time. Taking into account extant constitutional, legal, and judicial positionality, the following strategies are tentatively suggested to create a democratic opening in present and future educational spaces:

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103 For a comprehensive investigation into the nature and character of Indian secularism, see Prakash Chandra Upadhyaya, "The Politics of Indian Secularism, 26(4) *Modern Asian Studies* 815-853 (1992); Perry Anderson, *The Indian Ideology*, (Three Essay Collective, Gurgaon, 2nd edn., 2015).

104 After the *Pramati* judgment, the exceptional began to be treated as 'normal' in legislative and judicial consideration of any issue concerning educational institutions, including MEIs. See *Modern Dental College and Research Center* v. *State of MP* (AIR) 2016 SC 2601.

105 See, Ayaz Ahmad and Yogesh Pratap Singh, "*Crumbling Social Justice and the Need for Representative Higher Judiciary*", in Kuffir Nalgundwar *et.al.* (eds.), *EWS: The Quota to End All Quotas* (Shared Mirror, Hyderabad, 2021).

106 It was National Democratic Alliance (NDA) led by Bhartiya Janta Party (BJP), which passed the 103rd Constitutional Amendment. BJP is widely perceived as a communal party due to its frequent invocation of religious symbolism.

Firstly, Providing reservation to Pasmanda Bahujan, who hail from the respective religious or linguistic group that has set up MEIs, is entirely consistent with existing judicial logic that regulatory provisions aimed at improving the quality of MEIs are not violative of article 30. This can be done without externalizing the process of appointment and admission in MEIs, which is a nonnegotiable judicial dictate to date.[107] The reasoning, in this case, is aligned to the extant judicial position that; "*the regulatory clauses improve the administration and do not inhibit its autonomy and are therefore good and valid*";[108] that it will only make MEIs "*an effective vehicle of education for the minority community or other persons who resort to it*";[109] that it would be "*a permissible regulation which in no way 'detracts from the fundamental right guaranteed by Art. 30(1)*";[110] that it is meant for the "*excellence of education and efficient administration* of MEIs"[111] as the provision for Pasmanda Bahujan representation remains within the minority communities. This representation scheme for Pasmanda Bahujan in MEIs is least likely to face resistance from judicial corners or minority right enthusiasts.

Providing reservation to all Pasmanda Bahujan irrespective of religious or linguistic affiliation in MEIs. Article 29(2) has been consistently held to apply to article 30(1) right in a harmonious way. When article 29(2) is made applicable to article 30(1), then article 15(4), as the constitutionally carved out exception to article 29(2), is equally applicable to article 30(1). In other words, wherever article 29(2) goes, articles 15(4) and 16(4) follow it. This consequential interpretation was unjustly plugged by the Constitutional 93rd Amendment Act of 2005 concerning admissions to MEIs. Be that as it may, a scheme providing representation to all Pasmanda Bahujan in MEIs irrespective of religious or linguistic affiliation under article 15(4) and 16(4) will liberate the judicial mind from wrestling between article 29(2) and article 30(1) as the prohibitions of article 29(2) would be wholly addressed by such a representation. Implementation of reservation policy in MEIs will not impair the substance of article 30 right in a significant way. It will not result even in an incidental encroachment upon the right to administer. Providing reservations to SC, ST, and OBCs in MEIs might precipitate the removal of the religious barrier from the SC category as not giving reservations to Dalit Muslims and Dalit Christians in Muslim/Christian MEIs would become visible as glaring injustice on the religious ground alone. Moreover, expanding the OBC category to make it proportionate to their population might also become inevitable. If Dalit Muslims and Dalit Christians are not absorbed in the SC category,

107 *Gandhi Faizeam College* v. *University of Agra*, AIR 1975 SC 1821.

108 *Ibid.*

109 See *Rev Sidhajbhai Sabhai* v. *State of Gujarat*, AIR 1963 SC 540; *The Ahmedabad St. Xaviers College* v. *State of Gujarat*, AIR 1974 SC 1389.

110 *Frank Anthony Public School* v. *Union of India*, AIR 1987 SC311.

111 *T.M.A. Pai Foundation* v. *State of Karnataka*, AIR 2003 SC 355.

their continuance in the OBC category would require an increase to 50% of OBC quota.

However, this representation scheme for Pasmanda Bahujan across religions in MEIs will make them indistinguishable from general educational institutions except perhaps for the managerial control, which would remain predominantly with the Sayed Ashraaf class. It then brings us to the ideal solution to the problem analyzed in this paper.

Repealing Article 30 and providing reservation to all Pasmanda Bahujan communities in all educational institutions, whether public or private, by sub-categorizing similarly placed castes with reference to their socio-educational status. Removing religion-based educational institutions from the constitution will make it difficult for Savarna Ashraaf groups to configure it as a communal space guarding caste hierarchies. In private educational institutions, the scheme of free seats combined with a system of representation for Pasmanda Bahujan can incrementally realize the democratic ideal of the common education system. It is through a common education system alone that a society fractured along caste and communal lines can fructify into a nation of coequal citizens.

III Conclusion

Hegemonic practices produce certain social myths and collective imaginaries to preserve socially constructed political identities, which are always constituted with the inclusion and exclusion of a select class of people.[112] One such myth is that social justice should remain out of bounds from MEIs. The judicial spunk in trying to protect this notion as being in the interest of minorities is a similar imaginary. Continuous reconstruction of religious majority and religious minority is inherent in the ringing tone of Supreme Court judgments on MEIs. Thus, the apparent large hardheartedness of the inter-institutional caste grid concerning article 30 disguises the constitutive function of minority rights. The exclusion of social justice from MEIs is the logical extension of this constitutive logic. Apart from preserving communal identities, there is very little that article 30 does to fulfill the educational needs of those who require educational support. It is a constitutional device to permanently fix the boundaries of religion and maintain the minority-majority categories to protect the interests of Savarna Ashraaf castes across religions.[113]

At one stage, the constitutive force of MEIs thwarted experiments with the common education system and organized private educational institutions as exclusive Savarna Ashraaf den at another. The crux of the matter is that article 30, in its present form, erases the possibility of an educational space that Pasmanda Bahujan could share with

112 *Supra* note 81.

113 Nidhin Donald, "Religion as 'unsettled': Notes from Census and Anti-Caste Mobilizations", 1 *Prabuddha: Journal of Social Equality* 68-77 (2018).

Ashraaf Savarna to launch a decisive attack against everyday caste and communal practices. By erasing the fraternal space for associated living, the hollow of minority rights constitutes and perpetrates Savarna Ashraaf hegemony. That is why the judicial questfor a balance between article 30 and articles 15(4) and 16(4) of the constitution keeps tilting in favor of Savarna Ashraaf, driven by the overwhelming upper caste/ class social location of senior advocates and judges in the higher judiciary. In the perpetuation of Savarna Ashraaf hegemony, constitutional, legal, and judicial practices concerning MEIs play a crucial role. Therefore, the dis-articulation of Savarna Ashraaf hegemony in social, economic, and political domains will remain incomplete unless hegemonic constitutional, legal, and judicial practices are rethought.

The human and civilizational cost of Savarna Ashraaf hegemony is unfathomable. Stubborn refusal to provide reservation to Pasmanda Bahujan in MEIs has resulted in the disproportionate presence of Savarna Ashraaf in these institutions in the name of 'sprinkling of outsiders.'[114] Disproportionate representation of upper castes in educational institutions, whether general or minority, has subverted the democratic potential of all institutions, including the higher judiciary. While the maintenance of religiously informed majority-minority discourse does allow Ashraaf Savarna to edge out the democratic claims of Pasmanda Bahujan, it has a debilitating effect on their creative potential. Ashraaf Savarna, under perpetual dread of each other and anxiety of Pasmanda Bahujan, morally and intellectually cripple themselves.[115] In this context, following poignant observation of Justice B. Sudershan Reddy remains as relevant as ever:[116]

> It would appear that we have now entered a strange terrain of twilight constitutionalism, wherein constitutionally mandated goals of egalitarianism and social justice are set aside, the State is eviscerated of its powers to effectuate social transformation, even though inequality is endemic and human suffering is widely extant particularly amongst traditionally deprived segments of the population, and yet private educational institutions can form their own exclusive communes for the imparting of knowledge to youngsters, and exclude all others, despite the recognized historical truth that it is such rules of exclusion have undermined our national capacity in the past.

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114 *Supra* note 54.

115 Gopal Guru, "Constitutional Justice: Positional and Cultural" in Rajeev Bhargava, *Politics and Ethics of the Indian Constitution* 230-246 (Oxford University Press, 2009).

116 Gopal Guru, "Constitutional Justice: Positional and Cultural" in Rajeev Bhargava, *Politics and Ethics of the Indian Constitution* 230-246 (Oxford University Press, 2009).

Democratic constitutionalism which endorses social justice in all educational spaces will not only empower Pasmanda Bahujan but also liberate Ashraaf Savarna. Only after 'we the people of India' are free from mutual hostility and fear can we constitute India into a Sovereign, Socialist, Secular, Democratic, Republic and secure to all its citizens: Justice, social, economic, and political.[117]

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117 Preamble to the Constitution of India, 1950.

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