



REASON AS RHETORIC: USE OF LANGUAGE IN DECIDING INSTITUTIONAL AUTONOMY FOR ANGLO-INDIAN SCHOOLS

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ABSTRACT

This paper examines the role of rhetoric in framing juridical discourse on the Anglo-Indian community's right to establish and administer educational institutions as guaranteed by Article 30 (1) of the Constitution of India. My study involves a content analysis of the texts of three judgments delivered at the Calcutta High Court, viz. *State of West Bengal v Daughters of the Cross* (1984), *The Association of Teachers in Anglo Indian Schools v The Association of Aids of Anglo Indian Schools in India* (1994) and *Mrs Hasi Sen v State of West Bengal* (2016). In each of these, the court invokes Article 30 (1) to determine the nature and scope of this right vested on the institutions and squares it up against the scope of State intervention. In the process, the judgments offer divergent and even conflicting narratives of institutional autonomy and division of powers. Of particular interest is the court's construct of disciplinary power as an essential and inalienable attribute of autonomy for the Anglo-Indian schools while simultaneously bracketing it within regulatory powers of the State. Taking cue from Stanley Fish's claim of such constructs being given to "mechanisms of persuasion" steered by rhetoric, I posit the judgments as sites actively mapping out questions of identity for the Anglo-Indian community in relation to institutional spaces.

INTRODUCTION

The relevance of taking into account the position of AI Schools vis-a-vis the State in the context of freedom guaranteed under Art 30 (1) cannot be overstated. This is not only because education remains one sector where the Anglo-Indian community

continues playing a significant role. Institutions also function as sites where crucial questions about the rights and autonomy the community wields at the organisational level vis-à-vis the State comes up. It goes without saying that the community has traditionally held a distinct advantage over others in the field of education owing to their proximity both to Western culture and Christianity. Through much of the later nineteenth and early twentieth centuries, an amalgamation of the two was considered best suited to promote the civilising mission of British presence in India. Aimed at not just culturally enriching the natives, but also to lend a strong moral dimension to the character and conduct of the Company officers in India, this argument drew both from evangelism and utilitarianism. Serving as preparatories for the new ruling elite, these institutions became highly sought after, even though both the British and later the Indian rulers remained wary of popular resistance against profession of faith in such institutions. As a result, checks and balances were put in place to ensure that the benefits of a good moral (as opposed to purely functional) education were made available sans the threat to Indian religious practices. This is what eventually culminates into the conscience clause by way of Article 28 which defines and limits the grounds and scope and for imparting of religious instructions in schools.

This paper tries to connect this background of the evolution of AI institutions in India as engines of disseminating modern western education with more recent understandings of the question of their autonomy. This is done through a textual analysis of three court judgments delivered at the Calcutta High Court between 1978 to 2016. Now, one might ask what relevance does a textual analysis have in the legal field? After all, isn't this a blunt transposition of the methodologies of one discipline--namely literature into another--that of law? That, I argue, is precisely the virtue of such an exercise. For one, such an approach delves into the narrative politics underlying the use of precedents. As Ferguson (1990) points out, judgments, in their deployment of precedents, construe a narrative of inevitability of reaching a certain decision or privileging certain perspectives over others. There is what he calls a strong tendency towards normalising "events" into explainable "legal incidents" that "impose a cumulative history along with the decision of an immediate institution". This cumulative history itself is always a result of an interpretive act which endorses, based on preset preferences, one viewpoint over another.

As Stanley Fish (1989) argues, this play of preferences is what grounds legal reasoning in persuasion--the defining feature of rhetoric-- rather than any logical/juridical abstraction. At every instance where a judgment claims to be elucidating on a previously set precedent, then, it is essentially tweaking that precedent to suit its present purpose and thus, as Fish observes:

The distinction between explaining a text and changing it can no more be maintained than the others of which it is a version (finding vs. inventing, continuing vs. striking out in a new direction, interpreting vs. creating). To explain a work is to point out something about it that had not been attributed to it before and therefore to change it by challenging other explanations that were once changes in their turn. Explaining and changing cannot be opposed activities. (Ferguson 1990)

This observation is of particular relevance in judgments within the scope of this paper where precedents are extensively cited and furnish the principle behind the reasoning--what people from law call 'ratio decendi'. These precedents go on to form what Dworkin would call a 'chain-link' across judgments (1986, p. 228) functioning under what I define as an "interpretive constraint" within which all these judgments operate--namely, Article 30 (1) of the Indian constitution which states: "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice"

The guarantee of the "right to establish and administer" has been interpreted by the courts to arrive at the exact spheres of institutional autonomy while also precluding others. Moreover, the courts have also differentiated "administer" as an institutional prerogative from the State's role in managing these institutions. This has further redefined the scope of autonomy guaranteed under Article 30 (1). As will be evident in the following pages, each of these judgments devote considerable attention to identifying and demarcating these competing spheres of state and institutional control and in the process, reduce the scope of the cases solely to resolution of disputes between the two players.

A THREE-SIDED FRAY

In *Hasi Sen v State of West Bengal* (2016), the question of rightful due by way of arrears comes up. For the petitioners, this is a matter of right owing to the services rendered by them and forms the basis of their plea. This is an argument made then,

under a sound and well-established principle of justice where one merits recognition of their work. At the level of presenting this argument however, the counsel representing the petitioners attempts to recast the question of arrears due not so much in terms of rights of the individual employees or groups of employees. Rather, what emerges is a question of whether the minority institution is compromising on its ability and duty to uphold educational standards as mandated and required by the State. In fact, the State which is required to generally oversee the functioning of the Anglo-Indian institution in this regard is at least nominally implicated in this case to the extent that it appears as the primary respondent to the petition presented.

From here on the judgment delves increasingly into two questions: first, of procedural delays and second, the extent of state interference desirable with regard to the functioning of the institution. It is the second question which is vital for the purposes of this paper. As is evident in the arguments presented before the Court, the issue of defense available to the institution under Article 30 (1) when availing State grants emerges as a recurring contention across both sides. As a result, the individual's claims against the institution momentarily recede to the background and yields way to the interpretive constraint of the institutional rights being at odds with the State control. A crucial fallout of this is the bracketing of the question of rights to the fruits of one's labour within more utilitarian questions of ensuring "maintenance of educational standards" and "competently staffed" schools. It is this sphere, the counsel for the petitioners argues, where state intervention is necessary and overarching.

The decisive shift in narrative from the person versus the institution to the institution versus the state is strongly evident especially in the closing remarks of the judgment where the court pulls up the school for daring defiance of the rule of law. "It is needless to elaborate that the above reproduced stand taken of the Respondent no 6 School taken...presents a picture of shameless insubordination to the Rule of Law prescribed by the Code." So what is the exact nature of transgression by the school? As observed a few sentences later, "an unacceptable undermining of or, affront to the role of a lawfully representative government authority trying to do its duty of uniformly regulating educational institutions in the state." By emphasising on importance of uniform educational regulations, the court subscribes in effect to the assumption that the maintenance of educational standards in terms mandated by the State is a

prerogative of the institution and thereby places significant limitations on the understanding of autonomy guaranteed by Article 30 (1). As the use of the rather strong phrases “unacceptable undermining” and “affront to the role of a lawfully representative govt authority” show, this autonomy is subject completely to State control and is no autonomy at all. It is this understanding that features as a crucial factor in then arbitrating the dispute between the institution and the individual. In fact, the cause of the individual is taken up by the court only to the extent that it concurs with the exercise of powers by the State to limit the power of the institution where it threatens to subvert its mandate. It is from this perspective that the Court’s invocation of itself as a protector of the State as a *parens patriae*, a paternal figure, both nurturing and authoritative, as it intervenes in the dispute between sides, needs to be understood.

DEFINING INSTITUTIONAL AUTONOMY

And yet, this defining of the limits of institutional autonomy is also a demarcation of the limits of State power. The 2016 Hasi Sen case, bears, in this respect, a striking resemblance to the arguments presented before the Calcutta High Court in the *Daughters of the Cross vs State of West Bengal* case of 1978. The contention between the State and the school in this case is more direct and evident in that it forms the issue before the court. Like in the Hasi Sen case, here too the respective limits of the State and institutional exercise of power and right are in question. In deciding the validity of a section of the Code that makes available the option of appeal to the Inspector of Schools—a State functionary-- for a dismissed employee, the Court employs, based on its requirements and precedents, a two-pronged test: that of reasonableness and maintenance of educational standards. In fact, in points 10 and 11, the Court seems to have evolved its own test as it establishes a difference between “administration and management” on the one hand, and “smooth and efficient running” on the other hand, of the minority institutions. The former remains absolutely with the institutions and the second constitutes the sphere of state control and most crucially, the maintenance of educational standards. As should be evident, such a distinction is bound to be riddled with problems from the start, for smooth and efficient running of an institution would be integral part of both administering and managing it. Come what may, the court drives a wedge between the two and the “educational sphere” is effectively separated from the management of schools and is kept beyond the purview

of institutional autonomy. For the court, state control, though nominally limited, encompasses decisively “the educational character of the institutions” and yet cannot “infringe or interfere with the fundamental rights of the institutions”.

What remains, one may ask, of autonomy once the primary function of the institutions becomes a part of state control? The answer interestingly is, matters such as decisions on retention or dismissal of employees gets situated squarely within the domain of complete institutional autonomy and is classified as an integral part of the freedom under Art 30(1). Thus, the job security of a teacher is neatly de-linked from ensuring quality educational standards in the school and is interpreted as a space beyond state control. This might seem to be a departure from the Hasi Sen case, and to that extent, the Hasi Sen case, in that it appears in 2016, might indicate in its close linking up of the welfare of teachers with the betterment of the institution, a positive development in juridical narrative. However, the fact is, this de-linking serves to preserve the interpretive constraint of reading only Article 30 (1) solely as a negotiating instrument between the State and the institution.

As the analysis above shows, equating of institutional autonomy with the power to discipline and penalize staff is not something explicitly stated but inferred based on practice. Thus, the right in question is not merely a right of the institution against the State. Rather, it is the right of the institution to penalize and initiate disciplinary proceedings against an employee unfettered by any State restrictions. For this, the de-linking of the purpose of ensuring quality education and the rights of an employee becomes essential. This allows plotting the case solely in terms of the interpretive constraint of dispute between the state and the institution which culminates in the court framing a narrative advocating a withdrawal of the State. As a result, in considering the validity of the said clause, arguments pertaining to the rights of the employee, the uncertainty abrupt dismissal holds for her, the hardship she might suddenly find confronted with are glossed over—presumably the considerations the clause had weighed.

SCOPE OF STATE INTERVENTION

The Association of Teachers in Anglo Indian School v The Association of Aids of Anglo-Indian Schools in India and Others (1994) can in fact be thought of a sort of

meta-commentary on the other two cases, if only for the range of issues pertaining to institutional rights and State control that are brought up.

In keeping with the trend of ruling against state interference in matters of disciplinary action against employees, here too the judgment upholds institutional autonomy, citing precedents that underline the importance of securing for the “founders the rights which the Constitution desires should be theirs”. Once again, the fundamental right of being able to administer the institution was invoked to defend the right of the governing body of the school to effect a dismissal of a teacher or member of the staff without referral to the external arbitration committee as envisaged by the Code. In one of its strongest arguments citing a precedent for limited state control, the judgment attempts to clearly outline the acceptable areas of state control in lieu of affiliation to a state board/council sought by the institution. Thus “recognition or affiliation is sought for the purpose of enabling students to sit for an examination conducted by the university and to obtain a degree conferred by the University...the University has an interest to “ensure that “regulations advancing these purposes are reasonable and no linguistic minority can claim recognition without submitting to such regulations”. As a result, “no regulation unrelated to the purpose can be imposed” and all regulations “relevant to the purpose of securing or promoting the object of recognition shall be permissible”. To the extent the institutions are educational institutions that seek to graduate students through a recognised channel of examination and assessment, such interpretation of Article 30 (1) actually curbs institutional autonomy.

What sets this case really apart from the rest, however, are the other issues where the Court interprets in favour of state intervention—most notably, in matters pertaining to the appointment of members to the governing council of the institutions where state approval would be necessary. Interestingly, the judgment does not seem to regard this as an instance of interference into the autonomy of the institution and reads down the provision of approval as being merely formal and procedural in nature. Thus, the validity of a degree of state intervention, however nominal, is upheld in stark contrast to the question of exercising power of dismissal against members of the staff. The court also adopts a similar stance in deciding on the question of religious instruction and argues for strong regulatory controls to prevent the practice without consent from the parent of the ward. This, even though it was argued that the Anglo-Indian schools

refrain from imparting religious instruction without consent as a matter of practice. The court clearly does not wish to leave the issue to the good faith of the schools and considers regulatory intervention on the part of the State imperative.

CONCLUSION

What emerges from the above analysis of the interpretive constraint within which the judgments shape up may be enumerated as follows:

First, a tendency for selective interpretation of freedom guaranteed under Article 30 (1). Thus, while issues such as regulation of salaries, constitution of members of the governing council or the availability of conscience are identified as directly impacting the stand of the institution vis-a-vis- society as an imparter of knowledge, and hence liable to state control, the freedom to dismiss and penalize staff is ruled in all of these occasions as an unqualified freedom.

Second, these interpretations, while upholding the sanctity of 30 (1), ultimately bestow considerable power on the state. This is evident in the Association v Association judgment which decisively places all policies with regard to education—presumably the heart and soul of an educational institution within the control of the state.

Third, in being interpreted thus, it significantly diminishes the power of the institutions, whereby they are effectively reduced to function as arms of the State as envisaged by the East India Company officials following Macaulay's Charter and the subsequent empowering of missionary institutions. Thus, the freedom available with the AI institutions is significantly whittled down and overinvested in the sphere of meting out punishments whereas it stands diluted in the sphere of exercising autonomy in all other spheres involving the running of the school and most importantly, the planning of education.

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