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Educational Complex, Erandwane, Paud Road,

Pune - 411 038, Maharashtra, India

Tel.: (020) 25444616 Fax: (020) 25455854

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## **Editorial**

*Future empires are empires of mind. A prosperous country is one which has more intellectual property than material property; number of patents are more meaningful than number of missiles. Innovation, excellence and inclusion are prime concerns of every society and in particular for any profession.*

*Legal profession in particular demands new ideas, interpretation and great intellect. Law changes with the change in the society. Law is not an antique to be taken down, dusted, admired and put back on the shelf. It is a dynamic instrument for bringing about development; the development which is not confined to economic growth, but reaches out to every human being in the country. The focus of law must be human beings. Law is not abstract; it is not a set of mechanical rules. It has a social purpose and an economic mission. Therefore, in a developing country like India, law must be dynamic and not static. Law must not be inhibited by the past; it must look out into the future, and satisfy the hopes, aspirations of the people. As observed by Cardozo: "The inn that shelters for the night is not the journey's end, law like the travelers must be ready for tomorrow."*

*The intellectuals of the society owe a moral duty to review and redesign the law as per the demands of the society. Researchers are true parents of modern legislation. One idea, one innovation and one new interpretation can change the lives of millions. Justice for all is justice for me.*

*Through Bharati Law Review every effort has been taken by us to inspire the young researchers to pen down their thoughts of innovations to promote quality in the content of law. Laws are not dead letters; they must breathe for the society.*

**Prof. Dr. Mukund Sarda**

*B.Sc, LL.M (Gold Medalist), Ph.D, NET*

*Dean, Faculty of Law,  
Principal, New Law College,  
Bharati Vidyapeeth Deemed University, Pune.*



# **BHARATI LAW REVIEW**

**Vol. II - Issue 3  
Jan.–Mar., 2014**

**SPECIAL ISSUE ON**

**“HUMAN RIGHTS: ISSUES OF  
MINORITIES IN CONTEMPORARY INDIA”**

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# **ROLE PLAYED BY INDIAN JUDICIARY IN PROTECTION AND PROMOTION OF MINORITY RIGHTS: AN ANALYSIS**

**Dr. Shilpa Jain\***

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“All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.”

-Andrew Jackson

## **Introduction**

The prevention of discrimination seeks to secure that everyone, as individuals, are treated on an equal basis. In the human rights system the state is the nexus or the focal point, where the rights are organized and balanced. The duty of the state imposes an obligation on the state not to discriminate, protect individuals against social discrimination and to take affirmative action in order to compensate for past discriminations.<sup>1</sup>

Almost all States have one or more minority groups within their national territories, characterized by their own ethnic, linguistic or religious identity which differs from that of the majority population. Harmonious relations among minorities and between minorities and majorities and respect for each group's identity are a great asset to the multi-ethnic and multi-cultural diversity of our global society. Meeting the aspirations of national, ethnic, religious and linguistic groups and ensuring the rights of persons belonging to minorities acknowledges the dignity and equality of all individuals, furthers participatory development, and thus contributes to the lessening of tensions among groups and individuals.

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\* Assistant Professor, Rajiv Gandhi National University of Law, Punjab.

<sup>1</sup> Srivastav V.P., Human Rights Issues and Implementations (Indian Publishers Distributors, Delhi) 2004, Vol.1.

Minority rights have gained greater visibility and relevance all over the world. India is no exception to it being a multi-ethnic, multi-religious, multi-linguistic and multi-cultural society. Diversity of all types is the very soul of India. It is in this context that minority rights have assumed added significance in post-independence India. When India attained independence after its division on religious lines, religious minorities became very apprehensive of their identity. In order to compensate the members of discriminated groups who were placed at a disadvantage Article 15(1)<sup>2</sup> of the Constitution of India specifically bars the State from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth or any of them. Further, Article 29(2) also guarantees protection to citizens against State action which discriminates admission to educational institutions on ground of religion, race, caste or any of them. This being the position, soon after the coming into the force of the constitution, challenges were made to governmental programmers aimed at making special provision for weaker sections of society in the field of education and housing.

### **Defining Minority**

The term "minority" shall include only those non dominant groups in a population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.<sup>3</sup>

Louis Wirth defined a minority group as "a group of people who, because of their physical or cultural characteristics are singled out from the others in the society in which they live for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination."<sup>4</sup>

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<sup>2</sup> Art. 15(1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

<sup>3</sup> *Supra* note 1.

<sup>4</sup> "The Problem of Minority Groups", p. 347 in Ralph Linton (ed.), *The Science of Man in the World Crisis*. New York: Columbia University Press, 1945.

According to Francesco Capotorri UN Special Rapporteur in his report<sup>5</sup> has laid down what constitutes a minority: A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

### **Protection and Promotion of Minority Rights: Role Played by Indian Judiciary**

“A democracy is nothing more than mob rule, where fifty-one percent of the people may take away the rights of the other forty-nine.”

--Thomas Jefferson

The Indian Judiciary is playing the role of safeguarding the rights of the forty nine who are in minority in India and have been on disadvantaged position .When the Constitution of India under Article 15(1) and further under Article 29(2) gave protection to the minorities challenges were made to governmental programmers aimed at making special provision for weaker sections of society in the field of education and housing. Two judicial decisions, one of the Supreme Court and the other of the Bombay High court led to the first Amendment of the constitution in 1951.

The first Supreme Court decision in *State of Madras v. Champakam Dorairajan*<sup>6</sup>: This case was with regard to admission of students to the Engineering and Medical Colleges of the State, the Province of Madras had issued an order (known as the Communal G.O.) that seats should be filled in by the selection committee strictly on the following basis, i.e., out of every 14 seats, 6 were to be allotted to Non-Brahmin (Hindus), 2 to Backward Hindus, 2 to Brahmins, 2 to Harijans. 1 to Anglo-Indians and Indian Christians and 1 to Muslims:

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<sup>5</sup> Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities UN Document E/CN.4/Sub.2/384/Add.1-7 (1977).

<sup>6</sup> AIR 1951 SC 226.

Held by the Full Court that the Communal G.O. constituted a violation of the fundamental right guaranteed to the citizens of India by Art. 29 (2) of the Constitution, namely, that: "No citizen shall be denied admission to any educational institution maintained by the State or receiving aid out of the State funds on grounds only of religion, race, caste, language or any of them and was therefore void under Art.13. The directive principles of State policy laid down in Part IV the Constitution cannot in any way override or abridge the fundamental rights guaranteed by Part III. On the other hand they have to conform to and run as subsidiary to the fundamental rights laid down in Part III.

In *Jagwant Kaur v. State of Bombay*<sup>7</sup>: In this case an order of the collector of Poona under Sec 5 of the Bombay Land Requisition Act for requisitioning Some land in Poona for establishment of a Harijan camp was challenged as violation of Article 15(1). The basis of challenge was that a colony intended for the benefit only of Harijans was discriminative under the above Constitutional provision. Further it was held that Article 46 could not over ride a fundamental right. Consequently the order was declared void.

At the time of decision in the case (18-2-1952) presumably, the first amendment had not come into effect Chief Justice Chagla had observed, "We may that after the amendment it would be possible for the State to set up a Harijan colony in order to advance the interest of the backwards class. But till that amendment was enacted as Article 15 stood, it was not competent for the State to discriminate in favour of any caste or community. Thus it may be pointed out that it was these two decisions, which led to the amendment of Article 15. The first amendment incorporated clause 4 to Article 15 empowering the State, to make special provisions for the advancement of any socially educationally backward classes of citizens or for the Schedule Castes and Schedule Tribes, despite Article 15(1) or clause(2) of Article 29. The object of first constitutional amendment was to bring Articles 15 and 29 in line with Article 16(4)

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<sup>7</sup> AIR 1952 Bom. 461.

which empowers the State to make Special Provisions for the backward classes in matters of public employment.

The addition of clause 4 to Article 15 opened doors for several petitions before the court and the courts have wavered on the interpretation of this clause in several cases. The reason behind this is that the constitution does not state who are to be covered under "backward classes" and there can be how much reservation. But the constitution is not silent it allows the president to set up a commission to investigate into the condition of people in states and then classify them as backward under art 340<sup>8</sup>, as required. Additionally Art. 335<sup>9</sup> says that special provisions for SC/STs should be taken into consideration, consistently with the efficiency of the services.

### **Contribution of Judiciary in Changing the Direction of Reservation in India**

There has been a series of cases after the addition of clause 4 to Article 15 and these cases gave rise or directions to Reservation system in India. In *Balaji v.*

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<sup>8</sup> Article 340: Appointment of a Commission to investigate the conditions of backward classes.

- (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.
- (2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.
- (3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

<sup>9</sup> Article 335: Claims of Scheduled Castes and Scheduled Tribes to services and posts The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

*State of Mysore*<sup>10</sup> it was held that reservation cannot be more than 50%, the classification of backward and more backward is invalid and caste cannot be the only criteria for reservation because Art. 15(4) talks about class and class is not synonymous with caste. So other factors such as poverty should also be considered.

Further Supreme Court held the "carry forward rule" as unconstitutional in the case of *Devedason v. Union of India*<sup>11</sup>. As per carry forward rule posts that could not be filled due to lack of candidates in backward classes would be filled by regular candidates but the same number of additional posts would be reserved in the next year. This caused the amount of reservation to go above 50%. S.C. held that power of Art. 16(4)<sup>12</sup> could not be used to deny equality of opportunity for non-backward people.

In *Janki Prasad v. State of J & K*<sup>13</sup> the Supreme Court did not consider poverty as exclusive test for judging socially and educationally backward classes because that would convert a large portion of population of India to backward classes of citizens.

The court in *State of U.P. v. Pradeep Tandon*<sup>14</sup> did not approve reservation for the rural areas as justifiable reservations because 80% people live in rural areas and it cannot be a homogenous class by itself. The rural element does not make it a class, so on the basis of poverty alone backwardness cannot be judged since poverty is found in all parts of India.

In the case *State of Kerala v. N.M. Thomas* SC held that the relaxation of 2 years given to SC/STs in State of Kerala for passing certain test for promotion is valid. It held that the relaxation does not cause reduction in the efficiency because such people will have to pass the test

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<sup>10</sup> AIR 1963 SC 649.

<sup>11</sup> AIR 1964 SC 179.

<sup>12</sup> Article 16(4) in the Constitution of India 1949 read as:

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

<sup>13</sup> AIR 1973 SC 930.

<sup>14</sup> AIR 1975 SC 563.

anyway. It further held that special provisions for SC/STs could be made even under 16(1) and not only under 16(4). This is because the classification has a reasonable nexus with the objective, of upliftment of backward classes.

Building upon the case of N.M. Thomas, in *Akhil Bhartiya Soshit Karamchari Sangh (Rly) v. Union of India*<sup>15</sup> SC upheld that reservation could be done even without 16(4) because Art. 16(1) has to be read in light of Art. 14, which permits classification based on intelligible differentia and a justifiable nexus with the objective. It further held that "carry forward rule" is valid if the reservation does not become excessive. It held that exact mathematical calculation of 50% is not required in solving human problems but reservation should not be excessive. In this particular situation, 64.4% was not considered excessive. 50% limit was not a strict limit but only a guideline. In *State of MP v. Nivedita Jain*<sup>16</sup> SC held that complete relaxation of qualifying marks for SC/STs for admission in medical colleges is valid. Further in *Indra Sawhney v. Union of India*<sup>17</sup> popularly known as *Mandal Commission* case it was mandated that reservation ordinarily should not exceed 50% upholding carry forward rule subject to overall ceiling of 50%. It is submitted that this view is correct as reservation is an exception to the general principle of equality and as such an exception cannot exceed the main principle. Moreover even the founding fathers of Indian Constitution envisaged reservation much below than 50%<sup>18</sup>. Another important contribution of the Judiciary has been to limit reservation to initial appointment and not to apply it to further promotions.

Another connected issue with promotion is the determination of seniority. This issue cropped up in *Union of India v. Virpal Singh Chauhan*<sup>19</sup>. The court held

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<sup>15</sup> AIR 1981 SC 298.

<sup>16</sup> AIR 1981 SC 2045.

<sup>17</sup> AIR 1993 SC 477.

<sup>18</sup> Manoj Kumar Sharma, "Reservation to Scheduled Castes and Backward Classes in Government Employments: An Analytical Study", in Dr. S.C. Sharma (ed), *Indian Constitution and Weaker Sections*, p. 260(2005).

<sup>19</sup> AIR 1996 SC 448.

that when a person is promoted on the basis of reservation, he shall not be entitled to seniority in the feeder category and as soon as a general candidate having seniority in feeder category is promoted, he regains his seniority. In *D.G. Vishwanath v. State Of Mysor*<sup>20</sup> the reservation made for backward bases on the basis of occupation, income, residence and caste was challenged and the court held that such an order was unjustified. In *Chitralkha v. State of Mysore*<sup>21</sup> the Supreme Court held that though the caste of a group of citizen might be a relevant circumstance for ascertaining their social backwardness, it could not be the sole or dominant test in this behalf. The court respected the criteria adopted by the Mysore government for ascertaining the backwardness that should be social and educational backwardness, similar to backwardness from which the scheduled castes and scheduled tribes have suffered.

The SC departed from the Chirtalekha approach with the passage of time in *P. Rajendra v. State of Madras*<sup>22</sup> the rules adopted by the govt. of madras for regulating admission to medical colleges provided for reservation of seats for socially and educationally backward classes specified in the appendix to that order the order was challenged as violative of Articles 14 & 15 on the ground that list in that order was nothing but actually a list of certain castes only. the supreme court held that was nothing but actually a list of certain castes only the supreme court held that a must not be forgotten that a caste is also a class of citizen and if the caste as a whole is socially and educationally backward reservation be made is favor of such a caste on the ground that it is socially and educationally backward class of citizens within the meaning of Art. 15(4) the court further held that in the present case the list of socially and educationally backward classes has been specified by caste it does not necessarily mean that caste is the sole consideration. If the entire caste is found socially and educationally backward on the basis of relevant facts, the caste as a whole may be regarded as backward class.

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<sup>20</sup> AIR 1963 S.C. 702 MYS 132.

<sup>21</sup> AIR 1964 S.C. 1823.

<sup>22</sup> AIR 1968 S.C. 1012.



The Supreme Court, after considering the various aspects of reservation in series of cases analyzed, examined, scrutinized and reviewed the constitutionality of the reservation system under Article 15(4), 16(4) and 340 in modern perspective in well reasoned and elaborate case of *K.C. Vasanth Kumar v. State of Karnataka*<sup>23</sup> in which a bench of the Supreme Court consisting to Y.V. Chandrachud, J.J. D.A. Dasai, O. Chinappa Reddy, A.P. Sen and E.S. Kenkaratamiah, J.J. held that the reservations in favour of scheduled castes, scheduled Tribes and Backward classes must continue as it is in the present form and for a further period not exceeding fifteen years. But the policy of reservation in employment, education and legislative Institutions should be reviewed after five year or so.

The criterion to judge the backwardness should be the economic backwardness and reservation should not cross a reasonable limit of preference and discrimination. Recently the Supreme Court in *Dr. Fazal Gaffar's* case held that there should not be any reservation in the field of specialties. If however, preference has to be given, it should not exceed 35% of total quota.

### **Analysis of Judicial Decisions**

An analysis of the series of cases stated above it can be stated that the comparison of socially and educationally backward classes with the scheduled castes and scheduled tribes in Article 15(4) the reference to scheduled castes and scheduled tribes were to be construed as including such backward classes as the President may by order specify on receipt of the report of the Commission appointed under Article 340(1) shows that in the matter of backwardness they are compared to Scheduled Castes and Scheduled Tribes. The concept of backward classes is not relative in the sense that any class which is backward in relation to the most advanced class in the community must be included in it. Hence the division of backward classes into backward is unconstitutional. The backwardness should be social and educational and not either social or educational.

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<sup>23</sup> AIR 1985 SC 1495.

Article 15(4) refers to backward classes and not backward castes. The test of caste would break down in respect of communities which have no caste. In the present India Society case, of course caste is a relevant factor in determining social backwardness but it is not the sole or dominant test. In the light of the latest decision of the Supreme Court (*State of U.P. v. Pradeep Tandon*) caste is not a synonym for class. This case reiterated the Balaji approach. The Socially and educationally backward classes of citizens are groups other than groups based on caste. Classes of citizens mean a homogenous group of people with some common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. A classification based only on caste without regard to other relevant factors is not violative of Article 15(4). The onus is on the state to prove that the criteria it has adopted in classifying backward classes are constitutionally permissible. Both caste and poverty are important in determining the backwardness.

The occupation followed by certain classes of people which are looked down upon as inferior or unclean and place of habitation may contribute to social backwardness. Rural population as a whole cannot form socially and educationally backward class. The proportion of population of backward classes to the total population of the state for the purpose of reservation for admission to Professional institutions has been held valid. The inclusion of a class in the list of backward classes should not be perpetual, otherwise the whole purpose of reservation would be defeated. Hence the list should be under constant periodical review by the state. The quantum of reservation to be made is primarily a matter for the state to decide. However, it should be limited.

It can thus be concluded that from *Champakam Dorairajan* to *Arun Kumar* the facets of reservation scheme has undergone several changes and Judiciary has played a very important and crucial role in shaping this policy and bringing about social justice.

## **MINORITY RIGHTS UNDER INDIAN CONSTITUTION: A CRITICAL ANALYSIS**

**Dr. Saroj Bohra\***

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### **Who Are The Minorities?**

The Constitution of India uses the word “minority” or its plural form in some Articles 29 to 30 and 350A to 350B but does not define it anywhere. Article 29 has the word “minorities” in its marginal heading but speaks of “any sections of citizen having a distinct language, script or culture”. This may be a whole community generally seen as minority or a group within a majority community. Article 30 speaks specifically of two categories of minorities—religious and linguistic. The remaining two Articles i.e., 350A and 350B, relate to linguistic minorities only.

In common phrasing, the expression “minority” means “a group comprising less than half of the population and differing from others, especially the predominant section, in race, religion, traditions and culture, language, etc”. The Oxford Dictionary defines “minority” as “a smaller number or part; a number or part representing less than half of the whole; a relatively small group of people, differing from others in race, religion, language or political persuasion”. A special Subcommittee on the Protection of Minority Rights appointed by the United Nations Human Rights Commission in 1946 defined the “minority” as those “non-dominant groups in a population which possess a wish to preserve stable ethnic, religious and linguistic traditions or characteristics markedly different from those of the rest of the population.”<sup>1</sup>

The question of minorities and their rights has been dealt with by the framers of our Constitution as they were deeply concerned about the rights of minorities, whether

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\* Assistant Professor, College of Legal Studies, UPES, Dehradun.

<sup>1</sup> Report of the National Commission for Religious and Linguistic Minorities, 2010.

religious or linguistic. With 22 official languages and 8 major religions, the need for preserving equality remains intact in India today. As regards religious minorities at the national level in India, all those who profess a religion other than Hindu are considered minorities, since over eighty per cent of the population of the country professes the Hindu religion. At the national level, Muslims are the largest minority. Other minorities are much smaller in size. Next to the Muslims are the Christians (2.34 per cent approx.) and Sikhs (1.9 per cent approx.); while all the other religious groups are still smaller. As regards linguistic minorities, there is no majority at the national level and the minority status is to be essentially decided at the state/union territory level. At the state/union territory level, which is quite important in a federal structure of India, the Muslims are the majority in the state of Jammu and Kashmir and the union territory of Lakshadweep. In the states of Meghalaya, Mizoram and Nagaland, Christians constitute the majority. Sikhs are the majority community in the state of Punjab. No other religious community among the minorities is a majority in any other state or Union Territory. When such a huge and vast difference is resting in our country, it becomes necessary to shield and guard the minority section of the society. The purpose behind giving special rights to minorities was not to discriminate between majority and minority but to bring equality and to give security to the minorities.

The National Commission for Minorities Act, 1992 Section 2 (7) states that “Minority, for the purpose of the act, means a community notified as such by the central government”. Acting under this provision, on October 23, 1993 the central government notified the Muslim, Christian, Sikh, Buddhist and Parsi (Zoroastrian) communities to be regarded as “minorities” for the purpose of this act.

In Indian context, minority was defined ‘*In Re: The Kerala Education Bill, 1957*<sup>2</sup> “It is easy to say that a minority community means a community which is numerically less than 50 per cent., but then the question is not fully answered, for part of the question has yet to

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<sup>2</sup> AIR 1958 SC 95.

be answered, namely, 50 per cent of what? Is it 50 per cent of the entire population of India or 50 per cent of the population of a State forming a part of the Union? The State of Kerala, therefore, contends that in order to constitute a minority which may claim the fundamental rights guaranteed to minorities by Arts. 29(1) and 30(1) persons must numerically be a minority in the particular region in which the educational institution in question is or is intended to be situated. A little reflection will at once show that this is not a satisfactory test. Where the line to be drawn and which is the unit which will have to be taken? Are we to take as our unit a district, or a subdivision or a *taluka* or a town or its suburbs or a municipality or its wards? It is well known that in many towns' persons belonging to a particular community flock together in a suburb of the town or a ward of the municipality."

In certain petitions reference to which was made by Supreme Court in its decision in *D.A.V College v. State of Punjab*<sup>3</sup> the Court had held that what constituted a linguistic or religious minority must be judged in relation to the State impugned Act and was a State Act and not in relation to whole of India. 'Minority' is to be determined only in relation to the particular legislation which is being challenged. If a State Law extending to the whole of the state is in question, the minority must be determined with reference to the entire State population. In such a case, any community, linguistic or religious, which is numerically less than 50 per cent of the entire State population, will be a Minority for purposes of article 30 (1).

The Supreme Court<sup>4</sup> has held that for the purpose of Article 30 a minority, whether linguistic or religious, is determinable with reference to a state and not by taking into consideration the population of the country as a whole. Incidentally, 'scheduled castes' and 'scheduled tribes' are also to be identified at the state/Union Territory level. In terms of Articles 341 to 342 of the Constitution, castes, races or tribes or parts of or groups within castes, races or tribes are to be notified as

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<sup>3</sup> AIR 1971 SC 173.

<sup>4</sup> TMA Pai Foundation & Ors v. State of Karnataka & Ors, (2002)8 SCC 481.

scheduled castes or scheduled tribes in relation to the state or union territory, as the case may be.

The State Minorities Commission Acts usually empower the local governments to notify the minorities e.g., Bihar Minorities Commission Act, 1991, Section 2(c); Karnataka Minorities Commission Act, 1994, Section 2(d); Uttar Pradesh Minorities Commission Act 1994, Section 2(d); West Bengal Minorities Commission Act 1996, Section 2(c); Andhra Pradesh Minorities Commission Act 1998, Section 2(d). Similar acts of Madhya Pradesh (1996) and Delhi (1999) however say that government's notification issued under the National Commission for Minorities Act 1992 will apply in this regard— Madhya Pradesh Act 1996, Section 2(c); Delhi Act 1999, Section 2(g); Section 2(d). In several states (e.g. Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Uttar Pradesh and Uttrakhand), Jains have been recognized as a minority. The Jain community approached the Supreme Court seeking a direction to the central government for a similar recognition at the national level and their demand was supported by the National Commission for Minorities.

But the Apex Court did not issue the desired direction, leaving it to the central government to decide the issue<sup>5</sup>. In a later ruling however, another bench of the Supreme Court upheld the Uttar Pradesh law recognizing Jains as a minority<sup>6</sup>.

## **Rights of Minorities**

The right of minorities has been recognized and defined both at national and international levels.

### **At International Level**

**a)** The Universal Declaration of Human Rights, 1948 and its two International Covenants of 1966 declare that “all human beings are equal in dignity and rights” and prohibit all kinds of discrimination—racial, religious, etc.

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<sup>5</sup> Bal Patil v. Union of India, 2005.

<sup>6</sup> Bal Vidya case, 2006.

**b)** The UN Declaration against All Forms of Religious Discrimination and Intolerance 1981 outlaws all kinds of religion-based discrimination.

**c)** The UN Declaration on the Rights of Minorities, 1992 enjoins the states to protect the existence and identity of minorities within their respective territories and encourage conditions for promotion of that identity; ensure that persons belonging to minorities fully and effectively exercise human rights and fundamental freedoms with full equality and without any discrimination; create favorable conditions to enable minorities to express their characteristics and develop their culture, language, religion, traditions and customs; plan and implement national policy and programmes with due regard to the legitimate interests of minorities; etc.

### **At National Level**

In India, Articles 15 and 16 of the Constitution prohibit the state from making any discrimination on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them either generally i.e., every kind of state action in relation to citizens (Article 15) or in matters relating to employment or appointment to any office under the state (Article 16). However, the provisions of these two articles do take adequate cognizance of the fact that there had been a wide disparity in the social and educational status of different sections of a largely caste-based, tradition bound society with large-scale poverty and illiteracy. Obviously, an absolute equality among all sections of the people regardless of specific handicaps would have resulted in perpetuation of those handicaps. There can be equality only among equals. Equality means relative equality and not absolute equality. Therefore the Constitution permits positive discrimination in favor of the weak, the disadvantaged and the backward. It admits discrimination with reasons but prohibits discrimination without reason.

Discrimination with reasons entails rational classification having nexus with constitutionally permissible objects. Article 15 permits the state to make “any special provisions” for women, children, “any socially and educationally backward class of citizens” and

scheduled castes and scheduled tribes. Article 15 has been amended<sup>7</sup> by the Constitution (Amendment) Act 2005 to empower the state to make special provisions, by law, for admission of socially and educationally backward classes of citizens or scheduled castes or tribes to educational institutions, including private educational institutions, whether aided or unaided by the state, other than minority educational institutions. Article 16 too has an enabling provision that permits the state for making provisions for the reservation in appointments of posts in favor of “any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state”.

Notably, while Article 15 speaks of “any socially and educationally backward class of citizens” and the scheduled castes and scheduled tribes without qualifying backwardness with social and educational attributes and without a special reference to scheduled castes/scheduled tribes, Article 16 speaks of “any backward class of citizens”.

The words “class” and “caste” are not synonymous expressions and do not carry the same meaning. While Articles 15 and 16 empower the state to make special provisions for backward “classes”, they prohibit discrimination only on the ground of “caste” or “religion”. In other words, positive discrimination on the ground of caste or religion coupled with other grounds such as social and educational backwardness is constitutionally permissible and therefore, under a given circumstance, it may be possible to treat a caste or religious group as a “class”. Therefore even though Article 15 does not mention minorities in specific terms, minorities who are socially and educationally backward are clearly within the ambit of the term “any socially and educationally backward classes” in Article 15 and “any backward class” in Article 16.

Indeed the central government and state governments have included sections of religious minorities in the list of Backward Classes and have provided for reservation for them. The Supreme Court<sup>8</sup>, held that an entire

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<sup>7</sup> 93<sup>rd</sup> Amendment.

<sup>8</sup> Indira Sawhney & Ors v. Union of India.



community can be treated as a “class” based on its social and educational backwardness. The court noted that the government of Karnataka, based on an extensive survey conducted by them, had identified the entire Muslim community inhabiting that state as a backward class and have provided for reservations for them. The expression “backward classes” is religion neutral and not linked with caste and may well include any caste or religious community which as a class suffered from social and educational backwardness.

Though economic backwardness is one of the most important or perhaps the single most important reasons responsible for social and educational backwardness alone of a class, the Constitution does not specifically refer to it in Articles 15 and 16. In the *Indira Sawhney* case, the Supreme Court had observed: “It is therefore clear that economic criterion by itself will not identify the backward classes under Article 16(4). The economic backwardness of the backward classes under Article 16(4) has to be on account of their social and educational backwardness. Hence no reservation of posts in services under the state, based exclusively on economic criterion, would be valid under clause (1) of Article 16 of the Constitution.”

It is however notable that in the chapter of the Constitution relating to Directive Principles of State Policy, Article 46 mandates the state to “promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice and all forms of exploitation.” This article refers to scheduled castes/scheduled tribes “in particular” but does not restrict to them the scope of “weaker sections of the society”.

Article 340 of the Constitution empowered the president to appoint a commission “to investigate the conditions of socially and educationally backward classes” but did *not* make it mandatory.

## Other Constitutional Safeguards

The other measures of protection and safeguard provided by the Constitution in Part III or elsewhere having a bearing on the status and rights of minorities are:

- i. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India- Article 14;
- ii. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them & No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition Article 15;
- iii. The “secular provision” that has gained traction as one that protects all citizens including Hindus and minorities from engaging in any activity including education. All citizens shall have the right, to practice any profession, or to carry on any occupation, trade or business- Article 19(1)(g);
- iv. No person shall be deprived of his life or personal liberty except according to procedure established by law- Article 21;
- v. Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. *Explanation I.*—the wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion. *Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.- Article 25;
- vi. Subject to public order, morality and health, every

religious denomination or any section thereof shall have the right—(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law—Article 26;

- vii.** Freedom as to payment of taxes for promotion of any particular religion—Article 27;
- viii.** Freedom as to attendance at religious instruction or religious worship in certain educational institutions—Article 28;
- ix.** Special provision relating to language spoken by a section of the population of a state —Article 347;
- x.** Language to be used in representations for redress of grievances—Article 350;
- xi.** It shall be the endeavor of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities—Article 350A;
- xii.** Special officer for linguistic minorities—Article 350B.

### **The following articles need special mention:**

#### **Article 29**

Articles 29 and 30 deal with cultural and educational rights of minorities. Article 29 provides that:

- (1)** any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same; and
- (2)** No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

Unlike Article 30, the text of Article 29 does not specifically refer to minorities though it is quite obvious that the article is intended to protect and preserve the cultural and linguistic identity of the minorities. However, its scope is not necessarily confined to minorities. The protection of Article 29 is available to “any section of the

citizens residing in the territory of India” and this may as well include the majority. However, India is a colorful conglomeration of numerous races, religions, sects, languages, scripts, culture and traditions. The minorities, whether based on religion or language, are quite understandably keen on preserving and propagating their religious, cultural and linguistic identity and heritage. Article 29 guarantees exactly that. There may appear to be some overlapping in language and expressions employed in Articles 15(1) and 29(2). However, Article 15(1) contains a general prohibition on discrimination by the state against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them whereas Article 29(2) affords protection against a particular species of state action, viz., admission into educational institutions maintained by the state or receiving aid out of state funds.

### **Article 30**

Article 30 is a minority-specific provision that protects the right of minorities to establish and administer educational institutions. It provides that “all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice”.

Clause (1A) of Article 30, which was inserted by the Constitution<sup>9</sup> (Amendment) Act 1978, provides that “in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause”. Article 30 (2) further provides that “the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language”.

It would be worthwhile to note that minority educational institutions referred to in clause (1) of Article 30 have

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<sup>9</sup> 44<sup>th</sup> Amendment.

been kept out of the purview of Article 15(4) of the Constitution which empowers the state to make provisions by law for the advancement of any socially and educationally backward classes of citizens or scheduled castes/scheduled tribes in regard to their admission to educational institutions including private educational institutions, whether aided or unaided.

Articles 29 and 30 have been grouped together under common head, namely “Cultural and Educational Rights”. Together they confer four distinct rights on minorities. These include the right of:

- (a)** Any section of citizens to conserve its own language, script or culture;
- (b)** All religious and linguistic minorities to establish and administer educational institutions of their choice;
- (c)** An educational institution against discrimination by state in the matter of state aid (on the ground that it is under the management of a religious or linguistic minority); and
- (d)** The citizen against denial of admission to any state maintained or state-aided educational institution.

Article 29, especially clause (1) thereof, is more generally worded whereas Article 30 is focused on the right of minorities to (i) establish and (ii) administer educational institutions. Notwithstanding the fact that the right of the minority to establish and administer educational institutions would be protected by Article 19(1)(g), the framers of the Constitution incorporated Article 30 in the Constitution with the obvious intention of instilling confidence among minorities against any legislative or executive encroachment on their right to establish and administer educational institutions. In the absence of such an explicit provision, it might have been possible for the state to control or regulate educational institutions, established by religious or linguistic minorities, by law enacted under clause (6) of Article 19.

The minority institutions are given a choice to establish and administer the educational institutions but they are not free from the regulations of the state, they are also to be controlled so that there is no maladministration. This regulation and control is shown in the *St. Stephens*

*College v. University of Delhi*<sup>10</sup> where it is stated that the State has the full authority to intervene and make regulations which serves the interests of students and teacher. The minority institution cannot claim immunity against the general pattern of education. And also discrimination in admission of students cannot be done on the basis of community; the admission should be made on the basis of merits irrespective of the other facts.

Any provision for reservation in a minority institution is necessarily in the interest of the public and not in the interest of the minority institution itself, and no such provision can meet the *Sidhranj* case<sup>11</sup> test and hence it is violative of Article 30(1) of the Constitution.

### **Legal Framework for Protection of Religious Minorities**

Legislation such as the Protection of Civil Rights Act, 1955 formerly known as the Untouchability (Offences) Act, 1955 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been enacted by the central government to protect persons belonging to scheduled castes and scheduled tribes from untouchability, discrimination, humiliation, etc. No legislation of similar nature exists for minorities though it may be argued that unlike the latter act, viz., the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, the former act, viz., the Protection of Civil Rights Act 1955, is applicable across the board to all cases of untouchability-related offences regardless of religion. Therefore if a scheduled caste convert to Islam or Christianity (or any other person) is subjected to untouchability, the committers of the offences maybe proceeded against under the provisions of the act. However, no precise information is available in regard to the act being invoked to protect a person of a minority community.

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<sup>10</sup> AIR 1992 SC 163.

<sup>11</sup> The test laid down in *Sidhranj Bhai* case was as follows:- "Such regulation must satisfy dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education.

The law enforcing agencies appear to be harboring a misconception that the Protection of Civil Rights Act 1955 has been enacted to protect only scheduled castes against enforcement of untouchability-related offences. There is a case for sensitizing the law enforcement authorities and agencies in this regard. But having said that one cannot resist the impression that, the Protection of Civil Rights Act, 1955 has failed to make much of an impact due to its tardy implementation notwithstanding the fact that the offences under this act are cognizable and triable summarily. The annual report on the Protection of Civil Rights Act for the year 2003<sup>12</sup>, laid on the table of each House of Parliament under Section 15A(4) of the act, reveals that only twelve states and Union Territories had registered cases under the act during that year. Out of 651 cases so registered, 76.04 per cent (495) cases were registered in Andhra Pradesh alone. The number of cases registered in nine states and Union Territories varied from one to seventeen. Only in three states, the number of cases registered exceeded twenty. The report also reveals that out of 2,348 cases (out of 8,137 cases, including brought/forward cases) disposed of by courts during the year, a measly 13 cases constituting 0.55 per cent ended in conviction. This appears to be a sad commentary on the state of affairs in regard to investigation and prosecution.

To say that the practice of untouchability does not exist in the rest of the remaining states and Union Territories would be belying the truth that is known to the world. It only denotes pathetic in action on the part of law enforcing agencies. The provisions of the Protection of Civil Rights Act need to be enforced vigorously with a view to ensuring that the law serves the purpose it has been enacted for.

With a view to evaluating progress and development of minorities, monitoring the working of safeguards provided to them under the Constitution and laws, etc. the central government had constituted a non-statutory Minorities Commission in 1978. In 1992 the National Commission for Minorities Act was enacted to provide for constitution of a statutory commission.

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<sup>12</sup> Latest available.

The National Commission for Minorities was set up under the act in 1993. The functions of the commission include:

- (a)** Evaluating the progress of the development of minorities under the union and states;
- (b)** Monitoring the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the state legislatures;
- (c)** Making recommendations for the effective implementation of safeguards for the protection of the interests of minorities by the central government or the state governments;
- (d)** Looking into specific complaints regarding deprivation of rights and safeguards of the minorities and take up such matters with the appropriate authorities;
- (e)** Causing studies to be undertaken into problems arising out of any discrimination against minorities and recommend measures for their removal;
- (f)** Conducting studies, research and analysis on the issues relating to socio-economic and educational development of minorities;
- (g)** Suggesting appropriate measures in respect of any minority to be undertaken by the central government or the state government; and
- (h)** Making periodical or special reports to the central government on any matter pertaining to minorities and, in particular, difficulties confronted by them.

A Constitution Amendment Bill, viz., the Constitution (103<sup>rd</sup> Amendment) Bill, 2004, has been introduced so as to add a new article, viz., Article 340A, to constitute a National Commission for Minorities with a constitutional status. A bill to repeal the National Commission for Minorities Act, 1992 has simultaneously been introduced.

In terms of Section 13 of the Act, the central government shall cause the annual report together with a memorandum of action taken on the recommendations contained therein, in so far as they relate to central government, and the reasons for non-acceptance, if any, of any recommendation as soon as may be after the reports are received to be laid before each House of Parliament.



In the absence of a definite time frame for laying the annual report of the commission, there has been considerable delay in tabling the annual reports of the commission in Parliament. The National Commission for Minorities has submitted twelve annual reports for the years 1992-93 to 2004-05. The annual reports for the years 1996-97, 1997-98, 1999-2000 and 2003-04 have been tabled in Parliament only recently, some as recently as in the winter session 2006 of Parliament. Therefore there appears to be a case for amendment of the act so as to provide for a reasonable time frame for the recommendations to be laid, along with memorandum of action taken, before the Parliament/state legislature. It may be advisable to incorporate a suitable provision in the Constitution amendment bill, laying down a definite time frame for laying the annual reports of the commission on the tables of both Houses of Parliament along with action taken notes.

According to the provisions of clause (9) of Articles 338 and 338A, the Union and every state government shall consult the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes on all major policy matters affecting the scheduled castes and the scheduled tribes respectively. Such a consultation is mandatory and can be construed to be an important constitutional safeguard for scheduled castes and scheduled tribes. A corresponding provision does not exist in the National Commission for Minorities Act, 1992. In the absence of such a provision, the government of the day may or may not consult the National Commission for Minorities on major policy matters impacting minorities, depending on exigencies. Therefore, the National Commission for Minorities Act, 1992 needs to be suitably amended with a view to incorporating in it a provision analogous to the provision in Articles 338(9) and 338A(9). This may instill a sense of confidence amongst minorities about protection of their interests.

While discussing the safeguards, it should be noted that a very important mechanism of ensuring the welfare of scheduled castes is constitution of a Parliamentary Committee on Scheduled Castes. The successive committees have been doing really a good work towards safeguarding the interests of scheduled castes. Such a

mechanism of monitoring effective implementation of the constitutional and legal provisions safeguarding the interests of minorities, and also implementation of general or specific schemes for the benefit of minorities by government and its agencies and instrumentalities is expected to be an effective step for ensuring the welfare of religious minorities.

The National Commission for Minority Educational Institutions Act, 2004 was enacted to constitute a commission charged with the responsibilities of advising the central government or any state government on any matter relating to education of minorities that may be referred to it, looking into specific complaints regarding deprivation or violation of rights of minorities to establish and administer educational institutions of their choice, deciding on any dispute relating to affiliation to a scheduled university and reporting its findings to the central government for implementation. The act was extensively amended in 2006 (Act 18 of 2006) inter alia empowering the commission to inquire *suo motu* or on a petition presented to it by any minority educational institution or any persons on its behalf into complaints regarding deprivation or violation of rights of minorities to establish and administer an educational institution of its choice and any dispute relating to affiliation to a university and report its finding to the appropriate government for its implementation. The act also provides that if any dispute arises between a minority educational institution and a university, relating to its affiliation to such university, the decision of the commission hereon shall be final.

The Commission discussed the provisions of the act as amended and felt the need to make clear-cut, concrete and positive recommendations for improving and streamlining the provisions of the act.

## **Conclusion**

The issue of rights of the minority has been dealt in various ways and is being dealt since a long time but there is a no specific definition of word minority in other words, the article giving the right to the minority does not define “minority” and thus it creates a confusion when

such issues arise. Pronouncements of the Hon'ble Courts have clarified this issue. But still a lot more has to be done to by other authorities to preserve the equality among the citizens of the country.

*In Re: The Kerala Education Bill* lays down many important guidelines which are now dealing with problems which were unsolved in the past. India being a vast country and a mixture of various religions, the question of equality and security becomes a central, important and sensitive issue. Through various provisions, the minorities are conferred with special privileges in order to remain away from the 'inequality'.

An analysis of the judicial decisions<sup>13</sup> shows that although right to recognition and affiliation is not expressly recognized by Article 30(1), without recognition or affiliation there can be no meaningful exercise of the right to establish and administer under Article 30, and that recognition and affiliation can be given only on conditions that do not render that Article illusory.<sup>14</sup>

It is evidently known that by providing such benefits to the minorities it will help in preserving culture but on the other hand there are still many areas in which many modifications are required proper administration of such institutions. Now the focus should be made on these minorities which do not progress because development will ultimately help in the development of the country.




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<sup>13</sup> In Re: The Kerala Education Bill 1957, A.I.R. 1958 S.C. 956; Sidhraj Bhai v. State of Bombay, (1963) S.C.R. 837; St. Xavier's College v. State of Gujrat, AIR 1974; S.C. 1389; DAV College, Bhatinda v. State of Punjab, AIR 1971 SC. 1737.

<sup>14</sup> Shah, J. observed in Sidhraj Bhai v. State of Bombay, (1963) SCR 837 at 850: "Regulations made in the true interest of the efficiency of institutions, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrlctlons...: they secure the proper functioning of the institution in matters educational".

## MINORITY EDUCATIONAL INSTITUTIONS IN INDIA: CONSTITUTIONAL AND JUDICIAL PERSPECTIVES

Dr. Naresh V. Waghmare\*

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### Introduction

The Constitution recognizes the differences among the people of India, but it gives equal importance to each of them, their differences notwithstanding, for only then can there be a unified secular nation. The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole and united India. Articles 29 and 30 do not more than seek to preserve the differences that exist, and at the same time, unite the people to form one strong nation.<sup>1</sup>

With regard to the establishment of educational institutions, three articles of the Constitution come into play. Article 19(1)(g) gives the right to all the citizens to practice any profession or to carry on any occupation, trade or business; this right is subject to reasonable restrictions that may be placed under Art. 19(6). Article 26 gives the right to every religious denomination respectively to establish and maintain an institution for religious and charitable purposes, which would include an educational institution. Article 19(1)(g) and Art. 26, therefore, confer rights on all citizens and religious denominations to establish and maintain educational institutions. There was no serious dispute that the majority community as well as linguistic and religious minorities would have a right under Arts. 19(1)(g) and 26 to establish educational institutions. In addition, Art. 30(1), in no uncertain terms, gives the right to the religious and linguistic minorities to establish and administer educational institutions of their choice.<sup>2</sup>The

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\* Assistant Professor, Department of Law, University of Pune, Pune.

<sup>1</sup> T.M.A. Pai Foundation v. State of Karnataka, AIR 2003 SC 355, Para 160 & 161.

<sup>2</sup> *Id.*

rights of minority institutions are governed by Articles 29 and 30 of the Constitution of India.<sup>3</sup>

The Constitution itself by Article 30 makes a classification as between the minority and the majority, and, by Article 19, a classification as between the citizen and the non-citizen. Different treatment based on this classification is authorized by the Constitution itself.

Articles 29 and 30 are set out in Part III of our Constitution which guarantees our fundamental rights. They are grouped together under the sub-head "Cultural and Educational Rights". The text and the marginal notes of both the articles show that their purpose is to confer those fundamental rights on certain sections of the community which constitute minority communities. Under Clause (1) of Article 29 any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred

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<sup>3</sup> **Art. 29. Protection of Interests of minorities.-**

- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
- (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religious, race, caste, language or any of them.

**Art. 30. Right of minorities to establish and administer educational institutions.-**

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.  
 [(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]
- (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

on all minorities by Article 30(1).<sup>4</sup> This right, however, is subject to Cl. 2 of Art. 29 which provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Art. 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-a-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At the same time, there also cannot be any reverse discrimination. It was observed in *St. Xavier's College* case<sup>5</sup> that "the whole object of conferring the right on minorities under Art. 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection, they will be denied equality." In other words,<sup>6</sup> the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavored or, for that matter, receive more favorable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do.

Against the background of partition it was felt necessary to allay the apprehensions and fears in the minds of

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<sup>4</sup> In Re: The Kerala Education Bill, 1957, AIR 1958 SC 956.

<sup>5</sup> Ahmedabad St. Xavier College Society v. State of Gujarat, AIR 1974 SC 1389.

<sup>6</sup> *Supra* Note 1, Para 138.

Muslims and other religious communities by providing to them special guarantee and protection of their religious, cultural and educational rights. Such protection was found necessary to maintain unity and integrity of free India because even after partition of India, communities like Muslims and Christians in greater numbers living in different parts of India opted to continue to live in India as children of its soil. The Constitution through all its organs is committed to protect religious, cultural and educational rights of all. Arts. 25 to 30 guarantee cultural and religious freedoms to both majority and minority groups. The constitutional ideal, which can be gathered from the group of articles in the Constitution under Chapters of Fundamental Rights and Fundamental Duties, is to create social conditions where there remains no necessity to shield or protect rights of minority or majority.<sup>7</sup>

### **Minority Educational Institution-Right to Establish and Administer**

The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level up to the post-graduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.

*In Re: The Kerala Education case*,<sup>8</sup> the Supreme Court observed that the language employed in Art. 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Art. 30(1) gives the minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. *In Re: The Kerala Education case*<sup>9</sup>, the Supreme Court observed that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve

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<sup>7</sup> Bal Patil v. Union of India, AIR 2005 SC 3172.

<sup>8</sup> *Supra* Note 4.

<sup>9</sup> *Id.*

its distinctive language, script or culture and that is what is conferred on all minorities by Article 30 (1).

The words "establish and administer" in Article 30 (1) must be read conjunctively and so read it clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise.<sup>10</sup> The Article cannot be read to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other it might have been administering it before the Constitution came into force.

The words "educational institutions" are of very wide import and would include a university also, and therefore, it may be accepted that a religious minority had the right to establish a university under Article 30(1).<sup>11</sup>

For the purpose of Article 30(1) the word "establish" means "to bring into existence" and the right given by the Article to the minority is to bring into existence an educational institution, and if they do so, to administer it. The Aligarh University when it came into existence in 1920 was established by the Central legislature by the Aligarh Muslim University Act, 1920. It may be that the 1920 Act was passed as a result of the efforts of the Muslim minority. But that does not mean that the Aligarh University when it came into being under the 1920 Act was established by the Muslim minority.<sup>12</sup>

Article 30(1) covers institutions imparting general secular education.<sup>13</sup> The object of Article 30 is to enable children of minorities to go out in the world fully equipped. It will be wrong to read Article 30(1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. Article 29

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<sup>10</sup> S. Azeez Basha v. Union of India, AIR 1968 SC 662.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Supra* Note 5.



and 30 create two separate rights though it is possible that the rights might meet in a given case.

The words "establish" and "administer" used in Art. 30(1) is to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution.<sup>14</sup> The proof of establishment of the institution is thus a condition precedent for claiming the right to administer the institution.

The minorities do not stand to gain much from the general Bill of Rights or Fundamental Rights which are available only to individuals. The minorities require positive safeguards to preserve their minority interests which are also termed as group rights. The safeguards and group rights have been the part of our Constitution making. The right to establish an educational institution is not confined to purposes of conservation of language, script or culture. The rights in Article 30(1) are of wider amplitude. The width of Article 30(1) cannot be cut down by the considerations on which Article 29 (1) is based. The words "of their choice" in Article 30(1) leave vast options to the minorities in selecting the type of educational institutions which they wish to establish. They can establish institutions to conserve their distinct language, script or culture or for imparting general secular education or for both the purposes.<sup>15</sup>

The Supreme Court held<sup>16</sup> that Article 30(1) gives religious and linguistic minorities the right to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Art. 30.

### **Recognition, Affiliation and Financial Aid/Grant**

Private educational institutions, both aided and unaided, are established and administered by religious and linguistic minorities, as well as by non-minorities. Such

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<sup>14</sup> St. Stephen's College v. University of Delhi, AIR 1992 SC 1630.

<sup>15</sup> *Id.*

<sup>16</sup> *Supra* Note 1.

private educational institutions provide education at three levels, viz., school, college and professional level.

The State may prescribe reasonable regulations to ensure the excellence of the educational institutions to be granted aid or to be recognized. But in the name of laying down conditions for aid or recognition, the State cannot directly or indirectly defeat the very protection conferred by Art. 30. The considerations for granting recognition to a minority educational institution and casting accompanying regulation would be a similar as applicable to a non-minority institution subject to two overriding considerations:

- (1) The recognition is not denied solely on the ground of the educational institution being one belonging to minority; and
- (2) The regulation is neither aimed at nor has the effect of depriving the institution of its minority status.<sup>17</sup>

It has been observed that many educational institutions run by minorities' are being improperly administered as far as the efficiency, excellence and competence in the administration is concerned. Hence, though right to administer a minority educational institution is a fundamental right, yet the Supreme Court does not permit maladministration. The various decisions of the Supreme Court not only regulate the administration of the minority educational institutions but also compels them not to mal-administer their institutions as an absolute right.

### **National Commission for Minority Educational Institutions**

The National Commission for Minority Educational Institutions Act, 2004 was enacted to constitute a National Commission for Minority Educational Institutions and to provide for matters connected therewith or incidental thereto. It was amended twice in the years of 2006 and 2010. As per this Act, educational rights to minorities means, the rights of minorities to establish and administer educational institutions of their choice. Minority, for the purpose of this Act, means a

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<sup>17</sup> P.A. Inamdar v. State of Maharashtra, AIR 2005 SC 3226.

community notified as such by the Central Government. Minority Educational Institution means a college or an educational institution established and administered by a minority or minorities.

## **Conclusion**

Art. 30(1) conferred certain rights not only on religious but on linguistic minorities as well. One such right was to establish educational institutions of their own choice; but that right was not limited to teaching their religion alone or their language alone. No limitation had been placed on the subjects to be taught in such educational institutions. Minorities would ordinarily desire to establish such institutions as would serve both purposes, namely the purpose of conserving their religion, language or culture and also the purpose of giving a good general education to their children. The key to Article 30(1) lay in the words “of their own choice”.

On the basis of the various decisions of the apex court following conclusions may be drawn which includes the right to establish and administer educational institutions comprises right:

- (a) To admit students,
- (b) To set up a reasonable fee structure,
- (c) To constitute a governing body,
- (d) To appoint staff (teaching and non-teaching),
- (e) To take action if there is dereliction of duty on the part of any employees.
- (f) To maintain educational standards and excellence, and
- (g) To protect against discrimination on the ground of minority and to be treated equally in the matters of establishment and administration of educational institutions.

Though the Minority Educational Institutions Commission Act, 2004 has been enacted, in view of Fundamental rights of minorities and judicial decisions on minority educational institutions, it is need of an hour to make the law by the Parliament, on ‘Minority Educational Institutions’, taking into consideration a) the educational interests of minorities, to maintain standards of education at par with the best educational

institutions to bring the minorities in mainstream; b) regulation of the affairs of the minority educational institutions with a view to enjoy equal rights as of other educational institutions. There shall be the provisions as to rights of minority educational institutions; definition of 'minority'- religious and linguistic; meaning of the term 'of their choice' which includes general and secular education, professional education etc; definition of 'educational institution'; right to aid from the state in view of Art.30 (2); right to recognition from the government, educational and professional bodies; right to affiliation of University; right to admit students, right to fix reasonable fee structure, right to appoint teaching and non-teaching staff; right to take action if there is dereliction of duty on the part of any employees.



# **INSTITUTIONAL FRAMEWORK FOR PROTECTION OF MINORITIES IN INDIA: AN ANALYSIS**

**Dr. Sunita Adhav\***

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## **Introduction**

National Human Rights Institutions (NHRI) are administrative bodies set up to protect or monitor human rights in a given country. The growth of such bodies has been encouraged by the Office of the United Nations High Commissioner for Human Rights (OHCHR) which has provided advisory and support services, and facilitated access for NHRIs to the UN treaty bodies and other committees. There are over 100 such institutions, about two-thirds assessed by peer review as compliant with the United Nations standards set out in the Paris Principles. Compliance with the Principles is the basis for accreditation at the UN, which, uniquely for NHRIs, is not conducted directly by a UN body but by a sub-committee of the International Coordinating Committee of National Human Rights Institutions (ICC). Institutions accredited by the ICC with 'A status', meaning full compliance with the Paris Principles, enjoy much greater access to UN human rights treaty bodies and other organs. The secretariat to the review process (for initial accreditation, and reaccreditation every five years) is provided by the National Institutions and Regional Mechanisms Section of the OHCHR. NHRIs can be grouped together in two broad categories: Human Rights Commissions and Ombudsmen. While most Ombudsman agencies have their powers vested in a single person, Human Rights Commissions are multi-member committees, often representative of various social groups and political tendencies. They are sometimes set up to deal with specific issues such as discrimination, although some are bodies with very broad responsibilities. Specialized national institutions exist in many countries to protect the rights of a particular vulnerable group such as ethnic and linguistic minorities, indigenous people, children, refugees or women.

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\* Principal, Modern Law College, Pune.

In most countries, a Constitution, a Human Rights act or institution-specific legislation will provide for the establishment of a National Human Rights Institution. The degree of independence of these institutions depends upon national law, and best practice requires a constitutional or statutory basis rather than (for example) a presidential decree.

Nations Human Rights Institutions are also referred to by the Vienna Declaration and Program of Action and the Convention on the Rights of Persons with Disabilities.

### **Concept of Minority in India**

The position of minorities in Independent India was a question that received the attention of some of the tallest leaders of our freedom movement. The Hindu nationalist position on the matter was made abundantly clear by Veer Savarkar. In his Presidential address to the 20<sup>th</sup> session of the *Hindu Mahasabha* (Nagpur, 1938), Savarkar said:

“The Hindus will be ever ready to grant equal rights and representation to all minor communities in India in legislatures and services, civil and political life in proportion to population and merit. The Hindus although they are in overwhelming majority will still waive their right of claiming any preferential treatment, and special prerogatives which in fact in every other nation are due to the major community. But the Hindus will never tolerate the absurd and unheard of claims of the minorities to have any preferential treatment, weightage or special favours over and above what the majority community obtains.”

The Indian State has steadily moved away from the vision of One Nation, One People. India has a determined and astute religious minority that is fully alive to its long-term political and strategic objectives. It also has a clueless majority led by a short-sighted intellectual and political class. Both these factors have ensured that institutional mechanisms continue to be created by the State to address the ever-escalating imaginary grievances of the minorities. In some cases, these mechanisms were simply handed over to the minorities on a platter though

no corresponding demand had been made by them. Over the years, these mechanisms have become firmly entrenched and have acquired more teeth. They now threaten to undermine the Indian State itself.

The following is an ever-expanding list of Government Programmes and Institutions dealing exclusively with the Minorities:

- 1.** Ministry of Minority Affairs, Government of India (established 2006)
- 2.** Prime Minister's new (2006) 15-point Programme for the Development of (under Ministry of Minority Affairs)
- 3.** **(a)** National Integration Council, presently with the Ministry of Home Affairs;  
**(b)** Communal Harmony Award
- 4.** **a)** Office of the Commissioner for Linguistic Minorities (under Ministry of Minority Affairs);  
**b)** National Commission for Minorities (under Ministry of Minority Affairs);  
**c)** Central Wakf Council (under Ministry of Minority Affairs);  
**d)** Maulana Azad Educational Foundation (under Ministry of Minority Affairs);  
**e)** National Minorities Development and Finance Corporation (under Ministry of Minority Affairs)
- 5.** Haj Committee—presently with the Ministry of External Affairs
- 6.** **a)** Maulana Azad National Urdu University, presently with the Ministry of HRD;  
**b)** National Council for Promotion of Urdu Language;  
**c)** Madrasa Modernization Programme;  
**d)** National Commission for Minority Educational Institutions (NCMEI), established 2004.

## **Minorities in Law and Government**

In the politics of some countries, a minority is an ethnic group that is recognized as such by respective laws of its country and therefore has some rights that other groups lack. Speakers of a legally-recognized minority language, for instance, might have the right to education or communication with the government in their mother tongue. Countries that have special provisions for minorities include Canada, China, Ethiopia, Germany, India, the Netherlands, Poland, Romania, Russia, Croatia and the United Kingdom.

Differing minority groups often are not been given identical treatment. Some groups are too small or too indistinct compared to the majority, where they either identify as part of the same nation as the members of the majority, or they identify as a separate nation but are ignored by the majority because of the costs or some other aspect of providing preferences. For example, a member of a particularly small ethnic group might be forced to check "Other" on a checklist of different backgrounds, and consequently might receive fewer privileges than a member of a more defined group.

Many contemporary governments prefer to assume the people they rule all belong to the same nationality rather than separate ones based on ethnicity. The United States asks for race and ethnicity on its official census forms, which thus breaks up and organizes its population into different sub-groups, but primarily on racial origin rather than national one. Spain does not divide its nationals by ethnic group, although it does maintain an official notion of minority languages.

Some minorities are relatively so large or historically or otherwise so important that the system is set up in a way to guarantee them comprehensive protection and political representation. As an example, the former Yugoslav republic of Bosnia and Herzegovina recognizes the three main nations, none of which constitutes a numerical majority, as constitutive nations, see nations of Bosnia and Herzegovina. However, other minorities such as Romani and Jews are officially labeled as "others" and are excluded from many of these protections. For



example, they may not be elected to a range of high political positions including the presidency.

The issue of establishing minority groups, and determining the extent of privileges they might derive from their status, is the subject of some debate. One view is that the application of special rights to minority groups may be inappropriate in some countries, for example newly established states in Africa or Latin America (not founded on the European nation-state model), where recognition and rights accorded to specific groups may interfere with the state's need to establish a cohesive identity, and hamper the ability of the minority to integrate itself into mainstream society - perhaps to the point at which the minority follows a path to separatism or supremacism.

For instance, In Canada, some feel that the failure of the dominant English-speaking majority to integrate French has given rise to Quebec separatism. This position is countered by those that assert that members of minorities require specific provisions and rights to ensure that they are not marginalized within society (for example, bilingual education may be needed to allow linguistic minorities to fully integrate into the school system and hence compete on a level playing field in society), and that rights for minorities, far from weakening the nation-building project, actually strengthen it; where members of minorities see that their specific needs and ambitions have been acknowledged and catered for, they will commit themselves more willingly to accepting the legitimacy of the nation and their integration (as opposed to assimilation) within it.

### **National Commission for Minorities<sup>1</sup>**

The Union Government set up the National Commission for Minorities (NCM) under the National Commission for Minorities Act, 1992.

Five religious communities, viz. Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis)

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<sup>1</sup> Available at <http://ncm.nic.in/> an official website for National Commission for Minority.

have been notified as minority communities by the Union Government.

The Commission has one Chairperson, one Vice Chairperson and five Members represented five minority communities. At present the Chairperson is Shri. Wajahat Habibullah. Dr. H.T. Sangliana is the Vice Chairperson, Smt. Saeeda Imam, K. N. Daruwalla and Sh. Vinod Sharma is the present Members. The post of two of the Members is vacant.

Andhra Pradesh, Assam, Bihar, Chhattisgarh, Delhi, Jharkhand, Karnataka, Maharashtra, Madhya Pradesh, Manipur, Rajasthan, Tamil Nadu, Uttarakhand, Uttar Pradesh and West Bengal have also set up State Minorities Commissions in their respective States. Their offices are located in the State capitals. The functions of these Commissions, inter-alia, are to safeguard and protect the interests of minorities provided in the Constitution and laws enacted by Parliament and the State Legislatures.

Aggrieved persons belonging to the minority communities may approach the concerned State Minorities Commissions for redressal of their grievances. They may also send their representations, to the National Commission for Minorities, after exhausting all remedies available to them. Complaints taken up by the Commission are featured on its official website.<sup>2</sup>

### **Genesis of NCM**

The setting up of Minorities Commission was envisaged in the Ministry of Home Affairs Resolution dated 12.01.1978 which specifically mentioned that, "despite the safeguards provided in the Constitution and the laws in force, there persists among the minorities a feeling of inequality and discrimination. In order to preserve secular traditions and to promote National Integration the Government of India attaches the highest importance to the enforcement of the safeguards provided for the Minorities and is of the firm view that effective institutional arrangements are urgently required for the

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<sup>2</sup> <http://www.ncm.nic.in>.

enforcement and implementation of all the safeguards provided for the minorities in the Constitution, in the Central and State Laws and in the government policies and administrative schemes enunciated from time to time". Sometime in 1984 the Minorities Commission was detached from Ministry of Home Affairs and placed under the newly created Ministry of Welfare.

With the enactment of the National Commission for Minorities Act, 1992 the Minorities Commission became a statutory body and renamed as National Commission for Minorities.

The first Statutory National Commission was set up on 17th May 1993. Vide a Gazette notification issued on 23rd October 1993 by Ministry of Welfare, Government of India, five religious communities viz., the Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) were notified as minority communities. As per the 2001 Census, these five religious minority communities constitute 18.42% of the country's population.

### **Functions of NCM**

As per Section 9(1) of the National Commission for Minorities Act, 1992, the Commission is required to perform following functions:

- (a) evaluation of the progress of the development of minorities under the Union and States;
- (b) monitoring of the working of the safeguards for minorities provided in the Constitution and in laws enacted by Parliament and the State Legislatures
- (c) making recommendations for the effective implementation of safeguards for the protection of the interests of minorities by the Central Government or the State Governments;
- (d) looking into specific complaints regarding deprivation of rights and safeguards of minorities and taking up such matters with the appropriate authorities;

- (e) getting studies to be undertaken into the problems arising out of any discrimination against minorities and recommending measures for their removal;
- (f) conducting studies, research and analysis on the issues relating to socio-economic and educational development of minorities;
- (g) suggesting appropriate measures in respect of any minority to be undertaken by the Central Government or the State Governments;
- (h) making periodical or special reports to the Central Government or any matter pertaining to minorities and in particular the difficulties confronted by them.

Section 2(c) of NCM Act, 1992 stipulates that 'minority' for the purposes of the Act, means a community notified as such by the Central Government.

### **Complaints received from notified minority communities<sup>3</sup>**

Since the financial year 2000-01, the Commission received the following number of complaints (year-wise):

2000	–	01:	2478
2001	–	02:	2590
2002	–	03:	3146
2003	–	04:	3578
2004	–	05:	3342
2005	–	06:	2078 <sup>4</sup>

The complaints now being received are mostly related to police atrocities, service matters, minority educational institutions and encroachments to religious properties. Reports were called for from the concerned authorities under the Union and State Governments. On receipt of the reports, the Commission makes appropriate recommendations to the respective authorities for redressal of the grievances.

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<sup>3</sup> Available at <http://india.gov.in/official-website-national-commission-minorities-0>.

<sup>4</sup> As on 31. 12. 2005.

### **Constitution of the National Commission for Minorities<sup>5</sup>**

The Central Government shall constitute a body to be known as the National Commission for Minorities to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.

The Commission shall consist of a Chairperson, a Vice Chairperson and five Members to be nominated by the Central Government from amongst persons of eminence, ability and integrity; Provided that five Members including the Chairperson shall be from and amongst the Minority communities.

The Commission shall have all the powers of a civil court trying a suit and, in particular, in respect of the following matters, namely:

- a. Summoning and enforcing the attendance of any person from any part of India and examining him on oath.
- b. Requiring the discovery and production of any document.
- c. Receiving evidence of affidavits.
- d. Requisitioning any public record or copy thereof from any court or office.
- e. Issuing commissions for the examination of witnesses and documents; and
- f. Any other matter which may be prescribed.

### **National Commission for Minority Educational Institutions<sup>6</sup>**

The National Commission for Minority Educational Institutions (NCMEI) was established, to begin with, through the promulgation of an Ordinance. The Department of Secondary and Higher Education, Ministry of HRD, Government of India, notified the National Commission for Minority Educational Institutions Ordinance 2004 (No. 6 of 2004) on 11<sup>th</sup> November 2004. Thereafter, on 16<sup>th</sup> November 2004, the Ministry of HRD

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<sup>5</sup> National Commission for Minorities Act, 1992.

<sup>6</sup> Available at <http://ncmei.gov.in/> an official website for national commission of minority educational institutions.

issued the notification constituting the Commission, with its headquarters in Delhi.

1. The genesis of the National Commission for Minority Educational Institutions can be traced to the UPA Government's manifesto called 'National Common Minimum Programme'. In the NCMP, in its Section on "National Harmony, Welfare of Minorities", it was mentioned that a Commission for minority educational institutions would be established which will provide direct affiliation for minority professional institutions to Central Universities.
2. The NCMEI Act was an outcome of detailed consultations in a meeting held on Minority Education and Welfare at New Delhi which was followed by subsequent discussions in the National Monitoring Committee on Minority Education.
3. The Government brought out an Ordinance in November 2004 establishing the Commission. Later a Bill was introduced in the Parliament in December 2004 and both Houses passed the Bill. The NCMEI Act was notified in January 2005.
4. The Commission is mandated to look into specific complaints regarding deprivation or violation of rights of minorities to establish and administer educational institutions of their choice. Protection of rights of minorities are enshrined in Article 30 of the Constitution which states that "all minorities, whether based on religion or language shall have the right to establish and administer educational institutions of their choice".<sup>7</sup>
5. Thus, the Commission can look into any complaints relating to violation and deprivation of rights of minorities to establish and administer educational institutions of their choice.
6. This is the first time that a specific Commission has been established for protecting and safeguarding the rights of minorities to establish and administer educational institutions of their choice. This

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<sup>7</sup> Law of the Constitution, V.N. Shukla 10<sup>th</sup> edition.

Commission is a quasi-judicial body and has been endowed with the powers of a Civil Court. It is headed by a Chairman who has been a Judge of the Delhi High Court and two members to be nominated by Central Government. The Commission has 3 roles namely adjudicatory function, advisory function and recommendatory powers.

7. So far as affiliation of a minority educational institution to a university is concerned, the decision of the Commission would be final.
8. The Commission has powers to advise the Central Government or any State Government on any question relating to the education of minorities that may be referred to it.
9. The Commission can make recommendations to the Central Government and the State Governments regarding any matter which directly or indirectly deprives the minority community of their educational rights enshrined in Article 30.
10. The empowerment of the Commission has provided a much needed forum for the minority educational institutions to highlight their grievances and to get speedy relief. The subject matter of a petition/complaint include non-issue of No Objection Certificate (NOC) by the State Governments, delay in issue of NOC, refusal/delay in issue of minority status to minority educational institutions, refusal to allow opening of new colleges/schools/institutions by minorities, refusal to allow additional courses in minority educational institutions, delay/refusal in the release of grants in-aid, refusal to give financial assistance, denial of permission to create new posts of teachers in minority educational institutions even though there is increase in the number of students, approval of appointment of teachers being denied, non-equality in pay scales of minority schools teachers as compared to Government school teachers denial of teaching aids and or other facilities like computers, library, laboratory etc. to minority educational institutions on par with Government institution, non-availability of books in Urdu in all

subject for students of Urdu school, non-appointment of Urdu knowing teachers, in adequate payment to Madarasa employees, non-release of grants to Madarasa, non-payment of retirement benefits to teachers and non-teaching staff of minority schools, extension of Sarva Shiksha Abhiyan facilities to minority educational institution especially in the deprived rural areas etc.

### **Rights of Minority Educational Institutions<sup>8</sup>**

The National Commission for Minority Educational Institutions Act 2004 (2 of 2005) as amended by the NCMEI (Amendment Act 2006) lays down rights of Minority Educational Institutions as under:

1. Any person who desires to establish a Minority Institution may apply to the competent authority for the grant of no objection certificate for the said purpose.
2. The competent authority shall:
  - (a) On perusal of documents, affidavits or other evidence, if any; and
  - (b) After giving an opportunity of being heard to the applicant, decide every application filed under sub-section (1) as expeditiously as possible and grant or reject the application, as the case may be:

Provided that where an application is rejected, the competent authority shall communicate the same to the applicant.

3. Where within a period of ninety days from the receipt of the application under sub-section (1) for the grant of no objection certificate:
  - (a) The Competent authority does not grant such certificate; or
  - (b) Where an application has been rejected and the same has not been communicated to the person, who has applied for the grant of such certificate,

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<sup>8</sup> The National Commission for Minority Educational Institutions Act, 2004 (2 of 2005) as amended by the NCMEI (Amendment Act 2006).



It shall be deemed that the competent authority has granted a no objection certificate to the applicant.

## **Conclusion**

Article 30(1) of the Constitution of India gives linguistic and religious minorities a fundamental right to establish and administer educational institutions of their choice. The National Commission for Minority Educational Institutions Act (for short the 'Act') has been enacted to safeguard the educational rights of the minorities enshrined in Article 30(1) of the Constitution. It has been held by the Eleven Judges Bench of the Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka*<sup>9</sup> that a minority, whether linguistic or religious, is determinable only by reference to demography of the State and not by taking into consideration the population of the country as a whole. The concept of minority is not new to any society. In all the countries as per the guidelines of the UN Declaration protection of minority is effectively administered. In India minorities and their educational institutions are protected with the effective institutions for them separately. Apart from the Constitution separate legislations, administrative authorities and commissions look after the mechanism for the protection of minorities.



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<sup>9</sup> (2002) 8 SCC 481.

## MINORITIES, CONSTITUTION AND THE LAW

Dr. Rajeshri N. Varhadi \*

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### Introduction

Abraham Lincoln, the great American President and the champion of democracy has once said that: "In a democracy even if there is a single person on the one side and the rest of the community on the other side the opinion of that single person is as important as the opinion of rest of the community and it should be respected". In a real democracy therefore the rights of the minority groups are protected by special provisions of the Constitution and the law. The founding fathers of the Constitution have therefore very rightly provided Article 30(1) of the Constitution and the Supreme Court has observed that the spirit of this Article is the conscience of the nation that the minorities religious as well as linguistic are not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general education to make them complete men and women of our country.

The expression "minority" has been derived from the Latin word 'minor' and the suffix 'ity' which means "small in number".

According to Encyclopedia Britannica 'minorities' means 'groups held together by ties of common descent, language or religious faith and feeling different in these respects from the majority of the inhabitants of a given political entity'.

J.A. Laponee in his book *The Protection to Minority* describes "Minority" as a group of persons having different race, language or religion from that of majority of inhabitants.

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\* Assistant Professor, Department of Law, University of Mumbai, Mumbai.

In the Year Book on Human Rights U.N. Publication 1950 ed. minority has been described as non dominant groups having different religion or linguistic traditions than the majority population.

The Motilal Nehru Report of 1928 showed a prominent desire to afford protection to minorities, but did not define the expression. The Sapru Report (1945) also proposed, inter alia, a Minorities Commission but did not define Minority. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has defined minority as under:

- a) The term 'minority' includes only those non-documents group of the populations which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;
- b) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristics; and
- c) Such minorities should be loyal to the state of which they are nationals.<sup>1</sup>

The initial courtroom attempt to answer the first question was made in *In Re: The Kerla Education Bill* where the Hon'ble Justice S.R. Das, Chief Justice of India, opined that the expression 'minority' would mean "a community which is numerically less than 50 percent of the total population."<sup>2</sup>

The First Minority Rights were created by Diet of Hungary in 1849. The first post-war international treaty to protect minority, designed to protect them from the greatest threat to their existence was the U.N convention on the protection and punishment of the crime of Genocide.

The Constitution of India contains Articles to give them identity, right to move independently, no restriction regarding movement etc. Article 29 and 30 of the Constitution of India expressly recognizes the rights of minorities. The Constitution of India provides not only

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<sup>1</sup> <http://www.legalservicesindia.com/articles/judi.html>.

<sup>2</sup> Also see, A.M. Patroni v. E. C. Kesavan, AIR 1965 Kerala, 75.

basic rights which are contained in Articles 14 to 32 to the minorities but such rights conserved their religion, language and culture. Article 29 and 30 of the Constitution provides cultural and education rights to minorities.

In *D.A.V. College v. State of Punjab*,<sup>3</sup> there was a question that whether an Arya Samaji Hindu in Punjab were a linguistic minority. Justice P. Jaganmohon Reddy, Supreme Court of India observed that: "The Arya Samajis are entitled to invoke the right guaranteed by Art. 29(1), because, they are a section of citizens having a distinct script also, they are entitled to invoke Art. 30(1), because they are a religious minority.

Thus, It is conceivable that a linguistic or religious minority may start educational institution of its choice solely or mainly with the object of preserving its own language, script or culture. So language as it is apparent that the object of the educational institution founded by religious or linguistic minority is to preserve and develop their own language, script or culture, they are entitled to the protection guaranteed by the Art 30(1).

The Supreme Court in other landmark case of the *Director, L.F. Hospital, Angamaly v. State of Kerala*<sup>4</sup> held that the Christian community in Kerala have the rights to establish and administer educational institution. A school of Nursing is an educational institution. Art.30 confers a right to establish and managed the institution in accordance with their vision and purpose. The right to administer cannot be separated from the right to establish. Because of either of the two is taken away the remaining one would become meaningless. Both the rights are implicit in the right under Art 29. Education is necessary adjunct to the conservation of culture and language. Therefore, the word establish and administer in Art 30(1) must be read conjunctively and so it comes clear.

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<sup>3</sup> *D.A.V. College v. State of Punjab*, 1971 AIR 1737, 1971 SCR 688.

<sup>4</sup> *Town Brethren Assembly, Angamaly v. The State of Kerala* Represented by on 23 February, 2010.

The Supreme Court has pointed out in *Ahmedabad St. Xaviers College v. State of Gujarat*,<sup>5</sup> that the spirit behind article 30(1) is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general education to make them complete men and women of the country.

Article 30(1) uses the terms 'linguistic' or 'religious' minorities. The word 'or' means that a minority may either be linguistic or religious and that it does not have to be both – a religious minority as well as linguistic minority. It is sufficient if it is one or the other or both.

The constitution uses the term 'minority' without defining it. In *Re: The Kerala Education Bill* the Supreme Court opined that while it is easy to say that minority means a community which is numerically less than 50 per cent, the important question is 50 % of what? Should it be of the entire population of India, or of a state, or a part thereof? It is possible that a community may be in majority in a state but in a minority in the whole of India. A community may be concentrated in a part of a state and may thus be in majority there, though it may be in minority in the state as a whole. If a part of a state is to be taken, then the question is where to draw the line and what is to be taken into consideration a district, town, a municipality or its wards.

The ruling in *Re: The Kerala Education Bill* has been reiterated by the Supreme Court in *Guru Nanak University case*,<sup>6</sup> In that case, the Supreme Court rejected the contention of the state of Punjab that a religious or linguistic minority should be a minority in relation to the entire population of India. The Court has ruled that a minority has to be determined, in relation to the particular legislation which is sought to be impugned. If it is a state law, the minorities have to be determined in relation to the state population. The Hindus in Punjab constitute a religious minority. Therefore, Arya Samajists in Punjab also constitute a religious minority having their own distinct language and script. It is within the realm of

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<sup>5</sup> St. Xaviers College Society v. State of Gujarat, (1974) 1 SCC 71.

<sup>6</sup> D.A.V. College v. State of Punjab, [1971] Supp. S.Q.R. 688.

possibility that the population of a state may be so fragmented that no linguistic or religious group may by itself constitute 50 percent of the total state population. In such a situation, every group will fall within the umbrella of Art. 30(1) without there being a majority group in the state against which minorities need to claim protection.

Article 30(1) postulate that the religious community will have the right to establish and administer educational institutions of their choice. In *S.P Mittal v. Union of India*,<sup>7</sup> the Supreme Court has stated: 'In order to claim the benefit of Article 30(1), the community must show: (a) that it is religious/linguistic minority, (b) that the institution was established by it. Without satisfying these two conditions it cannot claim the guaranteed rights to administer it". In *Andhra Pradesh Christian Medical Association v. Government of Andhra Pradesh*,<sup>8</sup> it was held by the court that the institution in question was not a minority institution. The court classified that the protection of Article 30(1) is not available if the institution is a mere cloak or pretension and the real motive is business adventure.

In *Ahemdabad, St. Stephens College v. Government of Gujarat*, (1957, A.I.R. 1958 SC 956) it was observed by the court that: "Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life" and that it is essential that there should be a "proper mix of students of different communities in all educational institutions." This means that a minority institution cannot refuse admission to students of other minority and majority communities.

In *Managing Board, M.T.M v. State of Bihar*<sup>9</sup> the Supreme Court has emphasized that the right to establish educational institutions of their choice must mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to them.

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<sup>7</sup> *S.P. Mittal v. Union of India & Ors.*, [1985] 1 SCC 51.

<sup>8</sup> *A.P. Christians Medical Educational Society v. Government of Andhra Pradesh*, [1986] 2 SCC 667.

<sup>9</sup> *Managing Board, M.T.M. v. State of Bihar*, A.I.R. 1984 S.C. 1757.

Supreme Court has invariably invalidated provisions seeking to regulate the composition and personnel of the managing bodies of minority institutions. A provision interfering with the minorities' choice of managing body for an institution has been held to violate article 30(1). The Gujarat University Act provided that the governing body of every college must include amongst its members a representative of the University nominated by the Vice-Chancellor, representatives of teaching and non-teaching staff and of the college students. In the celebrated *St. Xavier's College* case,<sup>10</sup> the Supreme Court declared the provision as non-applicable to minority institutions because it displaced the management and entrusted it to a different agency; autonomy in administration was lost and new elements in the shape of representatives of different types were brought in. The court emphasized that while the University could take steps to cure maladministration in a college, the choice of personnel of management was a part of administration which could not be interfered with.

In the *St. Stephen's College v. University of Delhi*,<sup>11</sup> the Court ruled out that college was established and administered by a minority community, viz., the Christian community which is indisputably a religious minority in India as well as in the union territory of Delhi where the college is located and hence enjoys the status of a minority institution. On the question of admission of students of the concerned minority community, the court has ruled that, according to Article 30(1), the minorities whether based on religion or language have the right "to establish and administer" educational institutions of their choice and the right to select students for admission is a part of administration. On this point, the court has observed: "It is indeed an important facet of administration.

The right of a minority to establish and administer educational institutions of its choice also carries with it the right to impart instruction to its children in its own language. In *D.A.V. College, Bathinda v. State of Punjab*<sup>12</sup> by a notification, the Punjab Government compulsorily

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<sup>10</sup> *St. Xavier's College Society v. State of Gujarat*, (1974) 1 SCC 717.

<sup>11</sup> ((1992) 1 SCC 558).

<sup>12</sup> 1971 AIR 1731 1971 SCR 677.

affiliated certain colleges to the Punjab University which prescribed Punjabi in the Gurumukhi script as the sole and exclusive medium of instruction and examination for certain courses. The Supreme Court declared that it violated the right of the Arya Samajists to use their own script in the colleges run by them and compulsorily affiliated to the University.

The National Commission for Minority Educational Institutions Act was passed in year 2004 for giving more teeth to minority education in India. This act allows direct affiliation of minority educational institutes to central universities. This act was enacted in order to provide quality education in minority institutes.

In *T.M.A. Pai Foundation & Others v. State of Karnataka & Others*<sup>13</sup> stands out as the most significant in terms of its reach, complexity and potential for shaping the future of education in the country. The case which was pending in the apex court for nearly 10 years got transferred from a Bench of five judges to one of seven judges and finally to a eleven judge Bench as it involved a fundamental issue of determining who constituted a "minority" for availing the special right of minorities under Article 30(1) of the Constitution "to establish and administer educational institutions of their choice."

The Supreme Court seems to be in favour of freeing minority educational institutions from Government control excepting to maintain academic standards through prescribing qualifications for teachers and minimum eligibility for students. The court is emphatic in declaring that admission of students to unaided minority educational institutions cannot be regulated at all by a State or University if the procedure is transparent and merit-based. The right to admit students is part of the right to administer educational institutions.

## **Conclusion**

India believes in conservation and maintenance of the cultures of diverse groups including minority groups since a democratic system signifies cultural and social

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<sup>13</sup> AIR 2003 SC 355, AIR 2002 SCW 4957.



unity in diversity. It is therefore imperative that in a democracy special protection should be accorded to the minority groups to enable them to retain their cultural identity and to pursue the path of progress along with the main stream of the country.

Our Judiciary has clarified that it is inconceivable that linguistic or religious minority may start educational institutions of its choice solely or mainly with the object of preserving its own language, script and culture. Therefore religious or linguistic minority can start and maintain their educational institutions to preserve and develop their own language, script and culture along with imparting general education to their children.

Indian Judiciary has played a marathon role in protecting and promoting the various rights of the minority groups in the country through their brilliant judicial pronouncements and has contributed phenomenally to achieving the objectives enshrined in the Preamble of the Constitution.



# MINORITY RIGHTS AND THE INDIAN CONSTITUTION

Dr. M.N. Phad\*

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## Introduction

Human rights took the shape of manmade laws and statutes, changing contents from country to country and from century to century.

Human rights shaped in statutory rules developed on the national level through the *Magna Carta* 1215 in 13<sup>th</sup> century, Britain, through the 1776 American Declaration of Independence and through 1789 French Declaration of rights of men which are the turning points on the long road which mankind had travelled from ancient natural rights to fundamental rights (Part III Constitution of India) and modern human rights. Throughout the 13<sup>th</sup> to 20<sup>th</sup> centuries, fundamental rights were successively included into the constitutions of various States.

A new approach to the idea of human rights in the 20<sup>th</sup> century was propounded by the socialist States which advanced the idea of economic, social and cultural rights (right of nations to self determination, and also to natural resources, etc), supplementing the traditional, and individual, political and civil rights.<sup>1</sup>

## Meaning of Human Rights

Human rights, as such, are incorporated in various international Human Rights Instruments.<sup>2</sup> “Human rights mean the rights relating to life, liberty equality of the individuals guaranteed by the constitution or embodied in the International covenants and enforceable by courts in India.<sup>3</sup> As pointed out by Faw Cett: “Human Rights are sometimes called fundamental rights or basic

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\* Assistant Professor, V.P's V.P. Law College, Baramati.

<sup>1</sup> Dr. Tripathi G.P., Constitutional Law-New Challenges 131 (Central Law Publications, Allahabad, First Edition 2013).

<sup>2</sup> Dr. Chandra U., Human Rights 1 (Allahabad Law Agency, Allahabad, Eighth edition 2010).

<sup>3</sup> Dr. Nirmala V., Law Relating to Human Rights 5 (Asia Law house, Hyderabad, 15<sup>th</sup> edition).

rights or natural rights”<sup>4</sup>. E. Barker opines: “Rights are the external conditions necessary for the greatest possible development of the capacities of the personality.”<sup>5</sup>

### **Provisions Regarding Minority Rights in Indian Constitution**

#### **Article 29: Protection of interests of minorities-**

- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
- (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

#### **Article 30: Right of minorities to establish and administer educational institutions-**

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.  
(1-A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.(Ins. by the Constitution (Forty-fourth Amendment) Act1978.)
- (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the

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<sup>4</sup> Dr. Kapoor S.K., International Law and Human Rights 56 (Central Law Agency, Allahabad, 15<sup>th</sup> edition).

<sup>5</sup> Jayapalan N., Human Rights 2(Atlantic Publishers and Distributors, New Delhi, First Edition 2000) also see Dr. More V.M., Phad M.N., “Human Rights and Global Challenges in a Dialectics and Dynamics of Human Rights”, Dr. Mrs. Annie John pp. 452-453(Asia Law House, Hyderabad, 1st Edition, 2012).

management of a minority, whether based on religion or language.<sup>6</sup>

Articles 29 and 30 confer certain special cultural and educational rights on 'minorities'. The word 'minority' has not been defined in the Constitution. The term 'minority' in Article 30(1) covers linguistic and religious minorities. Minority means less than 51 percent. A person belonging to linguistic or religious group may be in minority at one place and may become a member of majority at another place. For example Muslims, are in majority in the State of Jammu and Kashmir. But if Jammu is formed as a separate State within the Union of India under Article 3 of the Constitution, the Muslims are reduced to minority. The Supreme Court has held that for the purpose of determining the 'minority' the unit will be the State and not the whole of India. Thus, linguistic and religious minorities, which have been put at par in Article 30 have to be considered State-wise<sup>7</sup> Article 29(1) is available to all citizens whether in majority or minority but, Article 30(1) is not available to majorities.<sup>8</sup>

Article 29(1) does not mention any restriction. In *Jagdev Singh Sidhanti v. Pratap Singh Daulta*<sup>9</sup>, the Supreme Court held that the right to conserve language, script and culture under Article 29(1) is absolute. The marginal note of Article 29 is "protection of interests of minorities". However, Article 29 is available to all the citizens and is not confined to minorities.

Article 30 does not use the word 'citizens' this raises the question can foreigners not residents in India establish minority educational institutions of their choice? In *S.K. Patro v. State of Bihar*<sup>10</sup>, the Court held that foreigners not resident in India have no such right. This position has again been clarified by the Supreme Court in *St. Stephen's College v. University of Delhi*<sup>11</sup>.

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<sup>6</sup> Majumdar P.K. & Kataria, R.P., *The Constitution of India* 13 (Orient Publishing Company, New Delhi, Eighth Edition reprint 2001).

<sup>7</sup> Dr. Joshi K.C., *The Constitutional Law of India* 291 (Central Law Publications, Allahabad, First Edition 2011) also see *T.M.A. Pai Foundation v. State of Karnataka*, A.I.R. 2003 S.C. 355).

<sup>8</sup> *Id.*

<sup>9</sup> *Id* also see A.I.R.1965 S.C. 183.

<sup>10</sup> *Id* at p. 294 also see A.I.R.1970 S.C. 259.

<sup>11</sup> *Id* also see A.I.R.1992 S.C.1630.

The rights of minorities under Articles 29 and 30 are not higher rights but mere additional protections conferred on minorities. Minority communities have no higher rights than the majority communities. The rights of Articles 30(1) are not absolute. The laws such as pertaining to health, morality and standards of education apply to Article 30 also.

An article 29 and 30 protect the interest of minorities and provides certain rights to the minorities. "These provisions are unique in their thoroughness. There is nothing comparable to these rights in the Bill of Rights of the U.S. Constitution. Two Constitutions which do have provision which resemble certain parts of these two articles are the Burmese and the Irish Republic's....A third country which too thought in terms of making an express provision in this regard is West Germany...None of these Constitutions, however, goes so far as the Constitution of India.<sup>12</sup>

### **Scope of Arts. 29-30**

- Right of any section of citizens to conserve its own language, script or culture {Art. 29 (1)};
- Right of all religious or linguistic minorities to establish and administer educational institutions of their choice {(Art. 30 (1)};
- Right of educational institution not to be discriminated against in the matter of state aid on the ground that it is under management of a minority {Art. 30 (2)};
- Right of a citizen not to be denied admission into State-maintained or state aided educational institution on ground only of religion ,race, caste, or language {Art. 29(2)}

These rights are conferred on certain sections of the community which constitute minority communities Art. 29 and 30 are intended to confer protection to minorities rather than a right as such.

Art. 29(2) and Art. 30(1), read together, clearly contemplate a minority institution with a "sprinkling of

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<sup>12</sup> Prof. Rai Kailash, *The Constitutional Law of India* 297 (Central Law Publications, Allahabad, 10th Edition, 2011).

outsiders” admitted in it. By admitting a member of non-minority into the minority institution, it does not shed its character and cease to be a minority institution<sup>13</sup>. The right to administer may be said to consist of the following rights—to choose its managing or governing body, to choose its teachers and Headmaster/Principal, not to be compelled to refuse admission to students, to use its properties and assets for the benefits of the institution, to select its own medium of instruction, hence, a legislation which would penalize by disaffiliation from the university any institution which uses a language as the medium of instruction other than the one prescribed by it, offends against Art. 30(1)<sup>14</sup>

Limits of the right to administer are such as— to maintain the educational character and standard of such institution, e.g., to lay down qualifications or conditions of service to secure appointment of good teachers, to ensure interests of students, to maintain a fair standard of teaching, to ensure orderly, efficient and sound administration and to prevent maladministration, and to secure its proper functioning as an educational institution, to ensure that its funds are spent for the betterment of education and not for extraneous purposes, to prevent anti-national activity, to enforce the general laws of the land, applicable to all persons e.g., taxation, sanitation, social welfare, economic regulations, public order, morality, to prescribe syllabus, curriculum of study and regulate the appointment of teachers, to ensure efficiency and discipline of the institution.<sup>15</sup>

*In Bal Patil v. Union of India*<sup>16</sup> it was held that the Jain community is not a minority in the State of Maharashtra. Against the background of partition, Articles 29 and 30 were inserted in the Constitution to give special security to the minds of minorities—Muslims and other religious communities—and thus maintain integrity of nation. This was the aim of the constitutional Scheme. But if on the basis of different religious thought or less numerical

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<sup>13</sup> Basu Durga Das, *Shorter Constitution of India* 492 (Butterworths Wadhwa, Nagpur, 14<sup>th</sup> edition reprint 2010) also see P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537 591-592 (para 98).

<sup>14</sup> *Id* at p. 500.

<sup>15</sup> *Id* at pp. 502-503.

<sup>16</sup> Dr. Pandey J.N., *The Constitutional Law of India* 365 (Central Law Agency, Allahabad, 49<sup>th</sup> edition 2012) also see AIR 2005 SC 3172.

strength or lack of health, wealth, education, power or social rights the claim of a section of Indian society to the status of 'minority' is considered and conceded, there would be no end to such claims. A claim by one group of citizens would lead to a similar claim by another group of citizens and conflict and strike would ensue. "Hinduism" can be called a general religion unlike "Jainism" a special religion.

Articles 29 and 30 are intended to protect the minorities so as to enable them to conserve their own language, script and culture and prevent discrimination against minorities on grounds only of religion, race, language or any of them in educational institutions. In the past in certain countries minorities were forced to adopt the script and language of ruling majorities. They were also subjected to certain disadvantages because they had religion different from that of ruling majority and were even forced to convert themselves to the religion of the majority ruling class. In the background of such historical experience many countries have now provided for safeguards to minorities in their constitutions.<sup>17</sup>

The provisions of these two Articles were incorporated in Article 23 of the Draft Constitution which was adopted by the Constituent Assembly but subsequently, at the revision stage, the Drafting Committee divided the provisions of Articles 23 of the Draft Constitution and put them into two Articles 29 and 30. Article 29, which incorporates clauses (1) and (2) of the Draft Articles 23, guarantees to minorities the right to conserve their language, script and culture, etc., and right to admission in educational institutions, whereas Article 30 guarantees them right to establish and administer educational institutions of their choice.<sup>18</sup>

The word 'minority' is not defined in the Constitution but literally it means a non dominant group. It is a relative term and is referred to, to represent the smaller of two numbers, sections or group called 'majority'. In

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<sup>17</sup> Pande G.S, Constitutional Law of India 187 (Allahabad Law Agency, Haryana, 7th Edition, 1999).

<sup>18</sup> *Id* at pp.187-188.

that sense, there may be political minority, religious minority, linguistic minority, etc.<sup>19</sup>

### **Article 29(1) Right of Minorities to Conserve Language, Script or Culture**

Clause (1) of Article 29 guarantees to any section of citizens who have distinct language, script or culture of their own, a right to conserve the same. As the heading of the Article is protection of interests of Minorities' it suggests that only those sections of citizens who are in minority, can claim this right but the Supreme Court in *St Xavier's College v. State of Gujrat*<sup>20</sup> held that the words 'section of citizens' in Article 29 includes minorities as well as majority. No doubt, in the original draft of the Constitution the word 'minority' was used and the Drafting Committee substituted the words 'sections of citizens' in place of the word 'minority.' However the substitution of the words 'sections of citizens' in place of the word 'minority' was only with a view to give protection of Article 29 not only to minorities in technical sense but minorities in a wider sense.

In *D.A.V. College Jullunder v. State of Punjab*<sup>21</sup> the Supreme Court held that religious or linguistic minorities are to be determined in relation to the particular legislation which is attacked. If the legislation in question is of State Legislature these minorities should be determined on the basis of the population of the whole of the State. It is logically follows that if it is Central legislation minority character may be determined on the basis of the population of the whole country. As in the case the legislation in question was of State Legislature it was held that Hindus in Punjab were in minority.

In the original Draft Constitution the words were "language, script and culture" but the Drafting Committee substituted the words "language, script or culture". Shri B.N. Rau pointed out that it was necessary because there were sections of people with separate

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<sup>19</sup> Bakshi P.M., *The Constitution of India* 69 (Universal Law Publishing Co, New Delhi, 10th Edition Reprint 2011) also see *T.M.A. Pai Foundation v. State of Karnataka*, AIR 2003 SC 355.

<sup>20</sup> *Supra* note 18 at p.188. kindly see AIR 1974 SC 1389.

<sup>21</sup> *Id* at p.189 also see AIR 1971 SC 1737.



language and script but who had no separate culture (e.g., Andhras in Orissa). On the other hand, there were sections of people who had separate culture but no separate language or script (e.g., Muslims in Bengal).

In *Shri Krishna v. Gujarat University*<sup>22</sup> the Gujarat High Court had to consider the validity of an Act which prohibited the use of English as a medium of instruction. The Court held that the Act violated Arts. 29 and 30 of the Constitution. The University of Gujarat went in appeal to the Supreme Court, but lost the appeal.

An important consequence of the 'right to conserve' one's script is that citizens have the right to agitate for the protection of their language. 'Political' speeches for the conservation of the language of a section of the citizens cannot, therefore, be regarded as a corrupt practice within the meaning of section 123(3) of the Representation of the people Act, 1951.<sup>23</sup>

In *State of Bombay v. Bombay Education Society*<sup>24</sup> the State Government issued an Order banning admission of all whose language was not English into schools having English as medium of instruction. The Order of the Government was struck down as violative of Article 29(2)

### **Article 29(2) Right of Citizens to Admission in Educational Institutions**

Clause (2) of Article 29 prohibits denial of admission to any educational institution, which is maintained by the state or which receives aid from the State funds, only on grounds of race, religion, caste or language. Thus, reservation of seats on ground of residence in any particular territory does not violate Article 29(2)<sup>25</sup> Under Article 29(2) all citizens belonging to majority group have

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<sup>22</sup> Jhabvala Noshirvan H., *The Constitution of India* 62-63 (C. Jamnadas & Co. educational & law publishers, Mumbai, Nineteenth Edition, 1999), kindly see AIR 1962 Guj. 86.

<sup>23</sup> *Supra* note 20 at p. 66 kindly see Jagdev Singh Sidhani v. pratap Singh, AIR 1965 SC 183(188).

<sup>24</sup> Prof. Narender Kumar, *Constitutional Law of India* 398 (Allahabad Law Agency, Haryana, Seventh edition reprint 2010) also see AIR 1954 SC 561.

<sup>25</sup> *Supra* note 18 at p. 191 also see Chitra Ghosh v. Union of India, AIR 1970 SC 35.

been given a general right to admission to State maintained or aided schools. If an institution maintained by a minority community receives aid from the state it cannot refuse admission to members of other communities.<sup>26</sup> In *St. Stephen's College v. University of Delhi*<sup>27</sup> the Supreme Court has laid down that the minority aided institutions are entitled to prefer candidates of their own community to maintain minority character of the institution but at least 50 percent of the annual admissions should be made available to candidates of other communities. Thus, reservation in favour of candidates of the community administering the institution should not exceed 50 percent. The decision thus allows reservations up to 50 percent.

In *State of Bombay v. Bombay Educational Society*<sup>28</sup> a circular issued by the State Government directed that from the day of the order no primary or secondary school should admit to a school, where English was used as the medium of instruction, any pupil other than a pupil belonging to a section of citizens the language of which was English namely Anglo Indians and citizens of non-Asiatic descent. The order was held unconstitutional for violation of Article 29(2) as denial of admission was solely on the ground of language. However where a writ petition was filed seeking direction that premedical and pre dental entrance examination be held by the Central Government in Hindi and other regional languages and not in English alone, the Supreme Court held that not holding of entrance examination in Hindi or others regional languages does not amount to denial of admission on the ground of language..<sup>29</sup>

Where seats in the educational institutions are reserved by the State Government on the basis of residence or domicile or sex or on the basis of the need of the inhabitants of that State, there would be no violation of Article 29(2)<sup>30</sup>.

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<sup>26</sup> *Id* at p.192 also held in *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.

<sup>27</sup> *Id* also see A.I.R. 1992 S.C. 1630.

<sup>28</sup> *Ibid* also see A.I.R.1954 S.C. 561.

<sup>29</sup> *Ibid* kindly see *Hindi Hit Rakshak Samiti v. Union of India*, A.I.R. 1990 S.C. 851.

<sup>30</sup> *Supra* note 25 at p. 398.

Article 29(2) cannot be invoked for seeking admission into educational institutions getting no grants-in-aid from the State.<sup>31</sup>

The High Court of Madras had held that the effect of omitting the word “sex” from Article 29(2) is that the right of women to admission in educational institutions is a matter within the regulation of college authorities<sup>32</sup> In *English Medium Students Parents Assn. v. State of Karnataka*<sup>33</sup> it held that Karnataka’s language policy which provided instruction in mother tongue at the primary stage with progressive use of Kannada from class III onwards did not violate minority rights under Article 29 or 30.

### **Article 30(1) Right to Establish and Administer Educational Institutions of Their Choice**

Clause (1) of Article 30 guarantees that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. It is clear from the language that the right is two-fold. They can establish an institution of their choice and they also have right to administer it. The expression “educational institution” may include a university. What distinguishes a university from other educational institutions is that a university grants degree of its own which other educational institutional cannot do. The words “establish” and “administer” must be read conjunctively and so read, the minorities will have right to administer educational institution of their choice, provided they have established them, but not otherwise. Minorities will not have right to administer institution which has been established by someone else. The word “establish” means to bring into existence and therefore if minorities bring into existence an educational institution then they will have right to administer it<sup>34</sup>.

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<sup>31</sup> *Id* also see *Asha Gupta v. State of Punjab*, AIR 1987 P & H 227.

<sup>32</sup> *Singh Mahendra P., V.N. Shukla’s Constitution of India* 259 (Eastern Book Company, Lucknow, Eleventh Edition 2010) also see *University of Madras v. Shantha Bai*, AIR 1954 Mad 67.

<sup>33</sup> *Id* at p. 272 kindly see AIR 1994SC 1702.

<sup>34</sup> *Supra* note 18 at p.189.

In *D.A.V. College, Jullundhar v. State of Punjab*<sup>35</sup>, the University prescribed Punjabi language in Gurumukhy script as the exclusive medium of instruction and examination. D.A.V. College was one of the colleges which were compulsorily affiliated to Punjab University. The college was run by D.A.V. College Trust and Society registered under Societies Registration Act as an association comprised of Arya Samajis who were held to be minority community in the State of Punjab. Following *Gujarat University v. Krishna Ranganath*<sup>36</sup> the Supreme Court held “ While the University can prescribe Punjabi as a medium of instruction it cannot prescribe it as the exclusive medium or compel affiliated colleges established and administered by linguistic or religious minorities or by a section of society who wish to conserve their language, script and culture to teach in Punjabi or take examination in that language with the Gurumukhy script.”

In *Bramchari Sidheswar Shai v. State of W.B.*<sup>37</sup> Ram Krishna Mission was held to be a section of Hindu religion and not a religious minority.

### **Article 30(1) does not Confer Any Right on Non-resident Foreigners**

Unlike Article 29 the word ‘citizen’ is not to be found in Articles 30(1) or 30(2). The guarantee is to minorities. The expression ‘minority’ here suggests a section of persons residing in India. It is, therefore, necessary that the persons establishing educational institution must be residing in India but it is not necessary that they should also be citizens of India.<sup>38</sup>

### **State’s Power to Regulate Minority Institutions**

Unlike Article 19 freedom to establish and administer educational institutions by minorities guaranteed under Article 30 is absolute in terms. It is not made subject to any reasonable restrictions to which freedom mentioned

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<sup>35</sup> *Id.* kindly see A.I.R. 1971 S.C. 1731.

<sup>36</sup> *Id.* at p.190 also see A.I.R.1963 S.C. 703.

<sup>37</sup> *Id.* also see (1995) 4 SCC 646.

<sup>38</sup> *Id.* at p.191 also see Bishop S.K. Patro v. State of Bihar, A.I.R. 1970 S.C. 259.

in Article 19 may be subjected<sup>39</sup>. Minority character of an institution does not depend upon declaration of the Government. Declaration is only open acceptance of an existing factual position<sup>40</sup>. Minority institutions may be categorized in three classes:

- (i) Educational institutions which neither seek aid nor recognition from the State,
- (ii) Educational institutions which seek recognition from the State but not aid and
- (iii) Educational institutions which seek aid as well as recognition from the State

Institutions falling in the second and third categories are subject to regulatory measures which may be imposed as conditions for granting recognition or aid such as prescribing syllabus for examination, courses of study, conditions of employment of teachers and discipline of students etc. but not onerous conditions compelling them to surrender their right to administer the institution to the Government. Institutions falling in category (1) are free to administer their affairs in the manner they like. The State has no power under the Constitution to place restrictions on their right to administer<sup>41</sup>. But this does not mean that they are immune from operation of general laws of the land. They cannot claim immunity from contract law; tax measures economic regulations, industrial and social welfare legislations and other measures to meet the need to the society. Right is to administer not to mal administer the institution<sup>42</sup>. The right is subject to regulatory measures which the State might impose for furthering the excellence of standard of education or of ensuring orderly, efficient and sound administration.<sup>43</sup> It is permissible to make regulations for ensuring regular payment of salaries before a particular date of each month. Regulations may provide that the institution would appoint qualified teachers or those funds of the

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<sup>39</sup> *Id* at p.193 also see *Sidhrajibhai v. State of Gujrat*, A.I.R. 1963 S.C. 540.

<sup>40</sup> *Id* kindly see *N. Ahmad v. Manager Emjay High School*, (1998) 6 S.C.C. 674.

<sup>41</sup> *Id* also see *All Bihar Christian Schools Association v. State of Bihar*, (1988) 1 SCC 206.

<sup>42</sup> *Id* also see *In Re: The Kerala Education Bill*, A.I.R. 1958 S.C.956.

<sup>43</sup> *Id* at p.194 kindly see *St.Xavier's College v. State of Gujarat*, A.I.R. 1974 S.C. 1389, 1396.

institution should be spent for the purpose of the education and betterment of the institution. Regulation may also provide for health and sanitation.<sup>44</sup>

In *the All Saints High School v. The Government of Andhra Pradesh & Others*<sup>45</sup> the Supreme Court observed that although, unlike Art.19, the right under Art. 30 is absolute and unconstitutional, this does not mean that it contains a free license for maladministration, so as to defeat the very object behind Art. 30, namely the advancement of excellence and perfection in the field of education

In *Father Thomas Shingare v. State of Maharashtra*<sup>46</sup>, the Supreme Court held that the State cannot impose any restrictions on the right of the minorities to administer unaided educational institutions excepting to ensure excellence in education, but no immunity can be claimed by minority institutions for carrying on nefarious practices of misusing administration for making huge profits by collecting exorbitant sum from them and parents of the students under the cover of Art. 30 (1).

'Minorities' educational institutions will be protected under Art 30 at the stage of law making. But, they don't become immune from the operation of regulatory measures because the right to administer does not include right to mal-administer. The manner and number of admission should not be violative of minority character.<sup>47</sup>

In *State of Bihar v. Syed Asad Raza*,<sup>48</sup> it has been held that for creation of post in a minority institution for appointment prior approval of the Vice-Chancellor is not necessary and the persons so appointed would be entitled to grant in aid in view of Art. 30 (1) of the Constitution.

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<sup>44</sup> *Id* .

<sup>45</sup> *Supra* note 23 at p.63 kindly see A.I.R. 1980 S.C. 1042.

<sup>46</sup> Prof. (Dr.) Rao Pola Koteswar, Prof. G.C.V. Subba Rao's Indian Constitutional Law 232 (S. Gogia & Company Hyderabad, 10th Edition, 2009) Kindly see A.I.R. 2002 SC 463.

<sup>47</sup> *Id* at p.238 also see P.A. Inamdar v. State of Maharashtra, AIR 2005 SC 3226.

<sup>48</sup> *Supra* note 17 at p. 349 also see AIR 1997 SC2425.

The Gujarat University prescribed Gujarati or Hindi as the sole medium of instruction and examination. The Court held that it infringed the right of the Anglo-Indians whose mother-tongue was English and violated Article 30(1).<sup>49</sup>

In Kerala, the Christian community was running a boys school. It sought permission from the authorities to admit girls. The permission was refused on the ground that there was a Muslim girls' school nearby. The Supreme Court lay down that the order refusing the permission was unconstitutional.<sup>50</sup>

### **Article 30(1A) Right to Compensation in Case of Acquisition of Property**

Article 30(1A), which has been inserted by Constitution (Forty-fourth Amendments) Act 1978, provides that in making any law providing for compulsory acquisition of any property of an educational institution established and administered by a minority referred to in clause (1) of Article 30 the State shall ensure that the amount fixed or determined under such law is such as would not restrict or abrogate right guaranteed by Article 30(1). Prior to Constitution (Forty-fourth Amendment Act), 1978 this provisions was in proviso to Article 31(2) which has been repealed by Constitution (Forty-fourth Amendment) Act, 1978<sup>51</sup>

If the State seeks to acquire property belonging to a minority educational institution, the relevant law must provide for such compensation as would enable the minority community to replace the acquired institution by a new one comparable to the acquired one as regards site, size and shape. This cost of reproduction, to say the least, must not be less than the market value of the acquired property, and in the case of scarcity of land and

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<sup>49</sup> Manohar Sujata V., Tope's T.K. Constitutional Law of India 301-302 (Eastern Book Company, Lucknow, Third edition 2010) kindly see *Gujrat University v. Krishna Rangnath Mudholkar*, AIR 1963 SC 703.

<sup>50</sup> *Id* at pp.304-305 also see *Mark Netto v. State of Kerala*, (1979)1 SCC 23.

<sup>51</sup> *Supra* note 18 at p.191.

cost of construction, it may even be higher than the market value of the acquired property.<sup>52</sup>

Right to property of minority Institutions Article 30(1-A) Clause 1-A was inserted in Article 30 by the Constitution (Forty-fourth Amendment) Act, 1978. The Constitution Bench of the Supreme Court in *Society of St. Joseph's College v. Union of India*,<sup>53</sup> has held that the property of minority educational institution under Article 30 cannot be acquired under any general law, such as, the land Acquisition Act, 1894. For this purpose, there must be a separate law for acquiring the property of minority community which does not restrict or abrogate the right guaranteed under Article 30 of the Constitution of India. However, such an extended special protection to minority educational institutions does not seem to be justified. The Court can always examine the abuse of power even under the general law providing for acquisition of the property of the minority educational institutions.

Protection under Articles 29 and 30 is not a privilege, but is a protection to the religious/linguistic minority communities, to attain equality with other religious/linguistic groups of India.<sup>54</sup>

### **Article 30(2) Right against Discrimination in Matters of Granting Aid**

Clause(2) of Article 30 says that State shall not in granting aid to educational institutions discriminate against any educational institution on the ground that it is managed by a linguistic or religious minority. The enactment of special provision by the Supreme Court in *Sidharajbhai v. state of Gujarat*<sup>55</sup> that the right under Article 30(1) is intended to be effective right not to be whittled down by so called regulatory measures.

State can attach reasonable condition to recognition or grant-in-aid but so as not to discriminate on the ground

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<sup>52</sup> *Supra* note 13 at p.309.

<sup>53</sup> *Supra* note 8 at p. 305 also see A.I.R. 2002 S.C. 195.

<sup>54</sup> *Supra* note 25 at p. 396 also see Committee of Management v. State of U.P., AIR 2007 (NOC) 1989(All).

<sup>55</sup> *Supra* note 18 at p.191 kindly see A.I.R.1963 S.C. 540.



that the institution is managed by a religious or linguistic minority.

The Apex Court in *T.M.A. Pai Foundation v. State of Karnataka*<sup>56</sup> has observed that the expression “education” means and includes education at all levels from the primary school level up to the post-graduate level...even professional educational institutions would be covered by Article 30.

The State can regulate the appointment by prescribing requisite qualifications, but the right to appoint candidate of its choice, from amongst qualified candidates, shall be with the management.<sup>57</sup>

A minority whether based on religion or language has a right to establish institutions of a general secular character not designed to conserve their language etc. such as a college of general education, or a teachers’ training college, etc. *Anjuman-e-Islamiah, Kurnool v. State of Andhra* “established by it, students of other communities are also admitted.

As early as 1958, in the famous Kerala Education Bill, the Supreme Court has observed: “The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right”.<sup>58</sup>

A significant facet of the administration of an educational institution is the maintenance of discipline among the members of its staff. The right of the minority institution to take disciplinary action against the teachers and other employees is a very vital aspect of the management’s Fundamental Right to administer the institution. Any rule taking away or interfering with this right cannot be regarded as compatible with Art. 30(1).<sup>59</sup>

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<sup>56</sup> *Supra* note 25 at p. 404 also see AIR 2003 SC 355.

<sup>57</sup> *Id* at p. 407 also see *Malakara Syrian Catholic College v. T. Jone*, (2007) 1 SCC 386.

<sup>58</sup> *Id*.

<sup>59</sup> *Id* at pp. 1447-1448.

## Conclusion

From this research paper researcher has attempted to clarify minority rights. Rights and duties are correlated with each other. Some rights are available to person from his birth and end with his death these are called as human rights or fundamental rights. This research paper deals with minority rights and Indian Constitution. Constitution confers fundamental rights to minorities. Constitutional Law is Supreme Law. In India different type of people are residing together. There is no religion of state. State never favours any religion. All religions are respected in India. Arts. 25 to 28 of the Constitution speak about freedom of religion. Every person has fundamental right to profess, practice and propagate religion. Art.29 and Art.30 recognized and preserve rights of minority. But minority has not defined in the Indian Constitution. According to Art 29 any Indian citizen residing in India has right to conserve its own language, script or culture. Generally state is considered as unit while determining minority. One can work for one's mother language, script or culture. If any institution maintained or receiving aid from state funds then state control such institution. There can be discrimination on the ground of sex or place of birth. Under minority rights seat can be reserved on the basis of residence or sex. Art 29(2) available against state as well as state aided educational institutions. All minorities have right to establish and administer educational institutions from primary to post graduate as well as professional education, but this right is not absolute. Even private educational institution can be controlled by state if administration is not proper or unfair. State shall not discriminate in granting aid to educational institution. State shall not acquire land of minority institution without giving market value of the land. State can control minority institution. Minorities are of two types i.e., Linguistic minority and Religious minority. Minority educational institutions enjoy some special rights these are right to choose and appoint any qualified person as principal. Right to administer includes disciplinary action against the employees, no right to collect capitation fee, determination of fee structure, right to administer excludes right to oppress or exploit the teaching staff. Above all points are highlighted by Supreme Court in

number of case laws recently Central Government declared Jain as religious minority community.



# MINORITY RIGHTS AND THE INDIAN CONSTITUTION

Ms. N. Jayalakshmi\*

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## Introduction

Man was a nomad with no protection and family. When man began to form and live in groups, he formed the groups in such a fashion that some resemblance in their attitude, activities, culture, and color was found. There was homogeneity. These homogeneous groups started following caste system especially in India. Slowly man surrendered to the powerful group or powerful kingdom, which is also known as social contract theory. The powerful group or powerful kingdom commanded and ruled over the weak and they became the minority group.

The Indian society lacks homogeneity as there exist differences of religions, language, culture etc., and there are sections of people who are comparatively weaker than other's culturally, socially and economically. India is a religious tolerant nation, minority groups have contributed enormously during and after independence for building of our nation. Mutual suspicion and distrust exists between various religious and linguistic groups. To promote a sense of security, to ameliorate the conditions of the minorities and to make them useful members of the society the Constitution has set up an effective institutional machinery to oversee that safeguards are properly effectuated by the various governments in the country. This machinery has been strengthened by statutory bodies.<sup>1</sup>

## Objective of the Study

- To understand the concept of minority.
- The rights available to minorities under Indian Constitution.
- To understand the role played by the national commission for minorities.

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\* Assistant Professor, C.M.R. Law School, Bangalore.

<sup>1</sup> M.P. Jain; Indian Constitutional Law; 6<sup>th</sup> edition: 2012; Gurgoan: LexisNexis Butterworths Wadhwa; at p. 18.

## Who is a Minority?

The Oxford dictionary defines “minority” as “the smaller number or part, especially a number or part representing less than half of the whole”.<sup>2</sup> A minority group is a sociological category within a demographic. The term refers to a category that is differentiated and defined by the social majority, that is, those who hold the majority of positions of social power in a society. The differentiation can be based on one or more observable human characteristics, including, e.g., ethnicity, race, gender, wealth, health or sexual orientation. In social sciences, the term “minority” is used to refer to categories of persons who hold few positions of social power.<sup>3</sup>

Anthropologist Charles Wagley and Marvin Harris defined minority groups in 1958 by five characteristics: their relative powerlessness when compared to majority groups, their distinct cultural and/or physical characteristics, their self consciousness, the transmittance of membership by descent rules and inter-marriage.<sup>4</sup>

According to United National Article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence. There is no internationally agreed definition as to which groups constitute minorities.<sup>5</sup>

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is: “A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose member 0 being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of

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<sup>2</sup> <http://www.oxforddictionaries.com/definition/english/minority>.

<sup>3</sup> [http://en.wikipedia.org/wiki/Minority\\_group](http://en.wikipedia.org/wiki/Minority_group).

<sup>4</sup> <http://www.eolss.net/sample-chapters/c13/e1-20-04-04.pdf>.

<sup>5</sup> <http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx>.

solidarity, directed towards preserving their culture, traditions, religion or language”.<sup>6</sup>

*In Re: The Kerala Education Bill*<sup>7</sup>, the Supreme Court observed that while it was easy to say that the minority meant a community which was numerically less than 50% the important question was: 50% of what—the entire population of India or of a State or of a part thereof? A community might be in majority in a State, but it might be a minority in the whole of India. A community might be in majority in a State, but it might be a minority in the whole of India. A community having concentration in a part of the State would be a majority there, though it may be in a minority in the State as a whole. If a part of a State is to be taken then the question would be where to draw a line and what unit would be taken into consideration—a district, a town, a municipality or its ward. The Supreme Court observed that minority was to be determined only in relation to the particular legislation which was being challenged.<sup>8</sup>

The Court in *A.S.E. Trust v. Director, Education, Delhi Adm.*<sup>9</sup> has pointed out that the sections of one religion cannot constitute religious minorities. The term “minority based on religion” should be restricted only to those religious minorities, e.g., Muslims, Christians, Jains, Buddhists, Sikhs etc., which have kept their identity separate from the majority, namely, the Hindus.

It has been held by the Eleven Judges Bench of the Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka*<sup>10</sup> that a minority, whether linguistic or religious, is determinable only by reference to demography of the state and not by taking into consideration the population of the country as a whole.<sup>11</sup>

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<sup>6</sup>[http://www.ohchr.org/Documents/Publications/MinorityRights\\_en.pdf](http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf).

<sup>7</sup> AIR 1958 SC 956.

<sup>8</sup> Prof. Narender Kumar; Constitutional Law of India; 5<sup>th</sup> edn; 2006; Faridabad: Allahabad Law Agency; at p. 393.

<sup>9</sup> AIR 1976 Del 207.

<sup>10</sup> AIR 2002 8 SCC 481.

<sup>11</sup>[http://ncmei.gov.in/writereaddata/filelinks/c296efcb\\_Guidelines.pdf](http://ncmei.gov.in/writereaddata/filelinks/c296efcb_Guidelines.pdf).

## **Nature of Rights of Minorities under Indian Constitution**

The most important event after Independence has been the drafting of the Constitution of India enshrine the principles of equality, liberty and social justice.<sup>12</sup> The Constitution of India has certain provisions relating to minorities. It makes special provisions for the treatment and development of minorities in every sphere of life.

**The Preamble:** The Preamble does not discriminate between minority and majority, it treats them alike. The Preamble contains the quintessence of the Constitution and reflects the ideals and aspirations of the people. The preamble contains the goal of equality of status and opportunity to all citizens. The aspect of social justice is further emphasized and dealt with in the Directive Principles of State Policy.

**Article 14-Equality before Law:** “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

The Preamble of the Constitution itself declares that all people irrespective of their caste, class, colour, creed, sex, region or religion will be provided with equal rights and opportunities. Articles 15(1) and 15(2) prohibit discrimination on grounds of religion. Article 25 promises the right to profess, propagate and practice religion. It is clear that there is no legal bar on any religious community in India to make use of the opportunities [educational, economic, etc.] extended to the people. It is true that some religious communities [e.g., Muslims] have not been able to avail themselves of the opportunities on par with other communities.<sup>13</sup>

The Preamble of the Constitution describes the concept of secularism which means that the State has no religion of its own, and there is equal respect for and protection to all religions. No one is to be discriminated on grounds

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<sup>12</sup> Mamta Rao, *Law Relating to Women and Children*, 2<sup>nd</sup> edn., 2011, Lucknow: Eastern Book Company, at p. 22.

<sup>13</sup><http://www.shareyouressays.com/87317/essay-on-problems-of-minorities-in-india>.

of religion and everyone is guaranteed full and equal freedom of religion.<sup>14</sup>

**Fundamental Rights:** Human rights are the entitlement of every man, belonging to majority or minority community and it has been made enforceable as fundamental rights of India. In *Maneka Gandhi v. Union of India*, Justice Bhagwati said: “These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.”<sup>15</sup>

The special features of fundamental rights which are guaranteed to all citizens irrespective of their minority status are:

- Right to equality (Articles 14 and 15)
- Right to freedom (Articles 19–22)
- Right against exploitation (Articles 23–24)
- Right to freedom of religion (Articles 25–28)
- Cultural and educational rights (Articles 29–30)
- Rights to constitutional Rights (Articles 32–35)

Recognition and protection of minority rights under a legal framework has two fold objectives—firstly to prevent state from being oppressive against the minorities as in a democratic setup government is run by majority, secondly to provide the minority a protective zone whereby they can preserve their separate identity while contributing in national development and progress.<sup>16</sup>

According to Article 29(1), any sections of the citizens residing in any part of India having a distinct language, script or culture of its own has the right “to conserve the same”. Article 29(1) does not refer to any religion. Article 29(1) includes the right “to agitate for the protection of the language”.<sup>17</sup>

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<sup>14</sup><http://www.radianceweekly.com/95/1635/india-with-israel-in-m-east-crisis/2008-02-10/minority-affairs/story-detail/problems-of-religious-minorities-a-big-challenge-to-the-secular-democracy-in-india.html>.

<sup>15</sup> AIR 1978 SC 597.

<sup>16</sup> <http://jurisonline.in/?p=1943>.

<sup>17</sup> Jagdev Singh Sidhanti v. Partap Singh Daulta, AIR 1965 SCA 183.



Article 30(1) gives the linguistic or religious minorities the following two rights:

- The right to establish and
- The right to administer educational institutions of their choice.

Article 30(1) of the Constitution of India gives linguistic and religious minorities a fundamental right to establish and administer educational institutions of their choice. These rights are protected by a prohibition against their violation. The prohibition is contained in Article 13 of the Constitution which declares that any law in breach of the fundamental rights would be void to the extent of such violation.<sup>18</sup>

The benefit of Article 30(1) extends only to linguistic or religious minorities and not to any other section of the Indian citizens.<sup>19</sup> Although, Article 30(1) does not speak of citizens of India, however, it has been held that the minority to claim the protection of this Article must be a minority of persons residing in the territory of India. The Supreme Court in *Bramchari Sidheswar Shai v. State of West Bengal*<sup>20</sup> held that Ramakrishna religion was not distinct and separate from Hindu religion and not minority religion. Therefore, citizens of India, who are the followers of Ramakrishna religion could not claim to belong to a minority based on religion and as such were not entitled to the fundamental right under Article 30(1).

Though Article 30(1) provides rights to the minorities to establish educational institutions but it is not an absolute right and may be subject to reasonable restrictions. The Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka* held that any regulation framed in the national interest must necessarily apply to all institutions, whether run by the majority or the minority.<sup>21</sup>

It is further observed that the right to administer an educational institution includes the right to take

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<sup>18</sup>[http://ncmei.gov.in/writereaddata/filelinks/c296efcb\\_Guidelines.pdf](http://ncmei.gov.in/writereaddata/filelinks/c296efcb_Guidelines.pdf).

<sup>19</sup> M.P. Jain, *Indian Constitutional Law*; 6<sup>th</sup> edn: 2012; Gurgoon: Lexis Nexis Butterworths Wadhwa; at p. 1342.

<sup>20</sup> AIR 1995 SC 2089.

<sup>21</sup> AIR 2003 SC 355.

disciplinary action against the teachers and other employees. A law regulating the manner of the functioning of its managing body would be not violative of the right under Article 30(1).<sup>22</sup>

Article 30(1) also postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. The right to administer has been given to the minority, so that it can mould the institution as it thinks fit, and in accordance with its ideas of how the interest of the community in general. The court held that the word administer and establish have to be read conjunctively.<sup>23</sup>

In *Andhra Pradesh Christian Medical Association v. Government of Andhra Pradesh*, the Supreme Court emphasized that the object of the Art. 30(1) is not to allow bogies to be raised by pretenders. The institution must be an educational institution of minority in truth and reality and not mere masked phantoms.<sup>24</sup>

Article 30(2) debars the State from discriminating against minority institutions in the matter of giving grants. Apart from the provision in the Constitution, Government of India has undertaken a number of initiatives for educational development of minorities, at all levels of elementary, secondary and higher education and in all sectors including vocational, professional and technical education. Apart from the Pre-Matric and Post-Matric Scholarships, Merit-cum-Means Scholarship Scheme and Maulana Azad Fellowship Programme, which are being implemented by the Ministry of Minority Affairs; Ministry of Human Resource Development is also implementing the Scheme for Providing Quality Education in Madarasa (SWQEM) and Infrastructure

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<sup>22</sup> Prof. Narender Kumar; Constitutional Law of India; 5<sup>th</sup> edn; 2006; Faridabad: Allahabad Law Agency; at p. 401.

<sup>23</sup> *Manager, St. Thomas U.P. School, Kerala v. Commr. & Secy. To General Education Dept.*, AIR 2002 SC 756.

<sup>24</sup> AIR 1986 SC 1490; (1986) 2 SCC 667.

Development in Minority Institutes (IDIM) exclusively for the benefit of the minorities.<sup>25</sup>

### **The National Commission for Minorities Act, 1992<sup>26</sup>**

Apart from Articles 29 and 30, for the protection of minority rights, the National Commission for Minorities Act, 1992 came in to force to safeguard and to monitor if such safeguards have been provided to minorities.

The Minorities Commission was set up in January, 1978 for providing an institutional arrangement for evaluating the safeguards provided in the Constitution for protection of the minorities and to make recommendations for ensuring implementation of the safeguards and the laws.

The Minorities Commission with statutory status would infuse confidence among the minorities about the working and the effectiveness of the Commission. The main task of the commission shall be to evaluate the progress of the development of minorities, monitor the working of the safeguards provided in the Constitution and in laws enacted by the Central or State Governments, besides looking into the specific complaints regarding deprivation of rights of the minorities. It shall cause studies, research and analysis to be undertaken on the issues relating to the socio-economic and educational development of the minorities and make recommendations for the effective implementation of the safeguards.<sup>27</sup>

The National Commission for Minorities undertakes review of the implementation of the policies formulated by the Union and State Governments with regard to minorities. It looks into specific complaints regarding deprivation of rights and safeguards of minorities, and

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<sup>25</sup> <http://indiaeduguide.blogspot.in/2013/03/problems-faced-by-minorities-in-getting.html>.

<sup>26</sup> Received the assent of the President on 17-5-1992, pub. in gaz., of India, dt 17.5.1992. Part ii, Sec.i, ext. p.1.

<sup>27</sup> Dr. V. Nirmala: Law Relating to Human Rights; 15<sup>th</sup> edn; 2011; Hyderabad: Asia Law House; at p. 345.

conducts research and analysis on the question of avoidance of discrimination against the minorities.<sup>28</sup>

The Commission shall perform all or any of the following functions, namely:

- Evaluate the progress of the development of Minorities under the Union and States.
- Monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures.
- Make recommendations for the effective implementation of safeguards for the protection of the interests of Minorities by the Central Government or the State Governments.
- Look into specific complaints regarding deprivation of rights and safeguards of the Minorities and take up such matters with the appropriate authorities.
- Cause studies to be undertaken into problems arising out of any discrimination against Minorities and recommend measures for their removal.
- Conduct studies, research and analysis on the issues relating to socio-economic and educational development of Minorities.
- Suggest appropriate measures in respect of any Minority to be undertaken by the Central Government or the State Governments.
- Make periodical or special reports to the Central Government on any matter pertaining to Minorities and in particular the difficulties confronted by them.
- Any other matter which may be referred to it by the Central Government.<sup>29</sup>

The Commission while performing any duty shall have the powers of the civil court trying a suit and in respect of the following matters, namely:

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<sup>28</sup> <http://www.radianceweekly.com/95/1635/india-with-israel-in-m-east-crisis/2008-02-10/minority-affairs/story-detail/problems-of-religious-minorities-a-big-challenge-to-the-secular-democracy-in-india.html>.

<sup>29</sup> [http://ncm.nic.in/ncm\\_act.html#c3](http://ncm.nic.in/ncm_act.html#c3).

- Summoning and enforcing the attendance of any person from any part of Indian and examining him on oath.
- Requiring the discovery and production of any documents.
- Receiving evidence on affidavits.
- Requisitioning any public record or copy thereof from any court or office.
- Issuing commissions for the examination of witnesses and documents; and
- Any other matter may be prescribed.

The Sachar Committee on the basis of Census 2001 identified 100 Muslim dominated district where educational opportunities were minimal Indira Gandhi National Open University (IGNOU) in the 11<sup>th</sup> Plan (2007-2012) has decided to provide educational opportunities to the deprived regions and sections of the Society identified by the Sachar Committee by establishing at least one study centers in each block of the 100 District. The matter was taken by the Commission with the IGNOU.<sup>30</sup>

## Conclusion

The Constitution has not defined the term “minority”, but it has provided all rights to minorities. In certain circumstance it has categorically stated that such right though not absolute, but is meant only for minority class for their protection. Under Article 30(1) when the court spelled out that the words administer and establish must be read conjunctively, it is a classic example that has been proved that they have been given absolute right to mould their institution in consonance with the interest of their community and with the law of the land. The Constitution has been time and again trying to protect the minorities by providing various benefits, but still the fear of communal tension, poor representation and lack of protection lingers in their mind. The main aim of law should be to instill the confidence in the mind of such minorities that their legal rights will be protected and they will be treated in par with the majority and there would be no discrimination between citizens.




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<sup>30</sup> <http://ncm.nic.in/pdf/Agenda%202010.pdf>.

## MINORITY RIGHTS AND PERSONAL LAWS IN INDIA: AN ANALYSIS

Ms. M.S. Pande\*

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From very ancient time, India is a country of multi-religions, casts, creeds, communities, sects-sub sects etc. For each religion, we have different personal laws in India. But its history is not too old. From the era of British, India was introduced with different written statutes. To please different community and religion people, British introduced different laws for them on their religion ground. It is very well understood afterwards that British ruled India for long time, due to their "divide and rule" policy. The same policy is carried out after independence too. We have different minority communities in India, they based mainly on two ground (i) religion and (ii) language. There are many forms and kinds of minorities. In this paper, minorities in context to religions only are discussed. This paper mainly focuses on issues for religious minorities personal laws. In this paper, discussion is made in reference of religion based family law of which provisions differ community to community and religion to religion. Differences and reasons behind this scenario are widely discussed here.

Concept of minority rights is not at all new. In India, from very ancient time, there is existence of *varna pratha*. Under this system there were different four varnas i.e., Brahmin, Kshatriya, Vyasya and Shudra. Shudras were getting protection by other *varnas* on the ground that they were under them and as per *dharma* (religion) they were bound for that. No doubts this system revealed as per changing time but its essence still exist in our society, not in the form as it was before but with major changes and improvements.

In today's world, concept of minority rights is not in terms of that, as it existed before centuries but its concept is definitely closely related with it. Today too their rights are protected and are advocated to be protected in the

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\* Student, Ph.D., Gujarat University, Gujarat .

name of religion and language. All the religions are developed in India, in healthy atmosphere and the instances of disturbance in due course of that, are very few.

As per census 2001 Muslims, Christians, Buddhists, Sikhs and Parsis constitute about 18.4% of the total population of our country. Out of this 18.4%, 72.919% are Muslims, 12.707% are Christians, 10.140% are Sikhs, 4.198% are Buddhists and 00.037% are parsis. In India Muslims, Christians, Parsis, Jews are the main religions minorities. Apart from Hindus, for Muslims, Christians and Parsis (minority communities) Separate Personal Laws are there to deal with their personal issues like marriage, maintenance, adoption, will, succession, inheritance etc.

A Systematic approach of international protection of minority rights began after the First World War by the League of Nations. The minority protection system was meant to protect group rights of homogenous populations within states to further the idea of self determination. After the Second World War the United Nations focus was on universal rights of individuals, rather than on minorities. The end of the cold war, and the many conflicts with ethnic dimensions marked the revival of the protection of minority rights. The result was the adoption of the Declaration on the Rights of persons belonging to National or Ethnic, Religious and Linguistic Minorities by the UN General Assembly in 1992. The 21<sup>st</sup> century faces the challenge to achieve a peaceful coexistence within the multicultural nations of the world.

The Universal Declaration of Human Rights 1948 and its two International Covenants of 1966 declare that "all human beings are equal in dignity and rights" and prohibit all kinds of discrimination-racial, religions etc. The UN Declaration against All Forms of Religions Discrimination and Intolerance, 1981 outlaws all kinds of religion-based discrimination. The UN Declaration on the Rights of Minorities, 1992 enjoins the state to protect the existence and identity of minorities within their respective territories and encourage conditions for promotion of that identity; ensures that persons belonging to minorities fully and effectively exercise human rights and

fundamental freedoms with full equality and without any discrimination; create favourable conditions to enable minorities to express their characteristics and develop their culture, language, religion, traditions and customs; plan and implement national policy and programmes with due regard to the legitimate interests of minorities; etc.<sup>1</sup>

There are Several Provisions regarding Minority Communities in Constitution of India. Main object behind this is; India is a Sovereign Socialist Secular Democratic Republic and it guarantees "Liberty of thoughts, expression, belief, faith and worship to all its citizens." To ensure this object of preamble, provisions are given in Constitution. They are mainly:

- (i) Freedom of Conscience and free profession, practice and propagation of religion (Art. 25)
- (ii) Freedom to manage religions affairs (Art. 26)
- (iii) Protection of interests of minorities (Art. 29)  
Under the head of fundamental Right to freedom of religion (Art. 25 to Art.30) Art. 27, Art. 28 and Art. 30 are also of much importance.
- (iv) Article 46 mandates for Protection of educational and economic interests of scheduled castes, scheduled tribes and other weaker section.
- (v) Article 51A(e) states that; it is the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religions, linguistic and regional or sectional diversities.

Apart from this too, there are several other Articles in Constitution to provide wider rights to minorities.

The Constitution of India uses the word "minority" or its plural form in some Articles 29-30 and 350A to 350B- but does not define it anywhere. Article 29 has the word "minorities" in its marginal heading but speaks of "any sections of citizens having a distinct language, script of culture." This may be a whole community generally seen as a minority or a group within a majority community, Article 30 speaks specifically of two categories of minorities-religions and linguistic. The remaining two

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<sup>1</sup> Constitutional and Legislative Provisions Regarding the Minorities, Chapter-2, [www.sabrang.com](http://www.sabrang.com), Retrieved On 20/01/2014.



Articles 350A and 350B relates to linguistic minorities only.<sup>2</sup>

In common parlance, the expression "minority" means a group comprising less than half of the population and differing from others, especially the predominant section, in race, religion, traditions and culture, language, etc.<sup>3</sup>

In India, Articles 15 and 16 of the Constitution prohibit the state from making any discrimination on the grounds only of religion, race, caste, sex, descent place of birth, residence or any of them either generally i.e., every kind of state action in relation to citizens (Article 15) or in matters relating to employment or appointment to any office under the state (Article 16). However, the provisions of these two Articles do take adequate cognizance of the fact that there had been a wide disparity in the social and educational status of different sections of a largely caste-based, tradition-bound society with large scale poverty and illiteracy. Obviously, and absolute equality among all sections of the people regardless of specific handicaps would have resulted in perpetuation of those handicaps. There can be equality only among equals. Equality means relative equality and not absolute equality. Therefore, the Constitution permits positive discrimination in favour of the weak, the disadvantaged and the backward. It admits discrimination with reasons but prohibits discrimination without reason. Discrimination with reasons entails rational classification having nexus with constitutionally permissible objects.<sup>4</sup>

Constitution provides protection to minority rights with special provisions. Basic reasons behind such provisions were and are that the framers of Constitution were well aware with the social scenario of our nation because all of them belonged from different parts of Indian society. They were well aware about the difference in social system. Hence, to bring all the citizens on same footage and under same roof various provisions were put in the Constitution. The basic theory behind this, was to put strengthen weaker section with main stream and section

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<sup>2</sup> Report of the National Commission for Religions and Linguistic Minorities, Ministry of Minority Affairs, [www.jeywin.com](http://www.jeywin.com), p.12.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, p.13 & 14.

of the society. This could happen only when the weaker sections are given few more facilities to make themselves capable to stand with main stream of society and to get equal status in the society. As a part of this concept several other legislations are also enacted in the society. No doubt this all has benefited the Minority communities not only for religious or linguistic minority communities, but also for sub-caste communities.

For each religion we have different personal law and basic reason behind this is some misconceptions, misrepresentations and misinterpretation of different religion based faiths. In the name of religion many malpractices have went on from the past and they are still continue. Having separate personal law is not at all the problem, if it really gives the best solution of the problem or issue. But the scenario is that, due to special status in the name of religion and minority the old orthodox and timeout usages and customs still prevail in the society. The different group of family laws has created ambiguities among the people of different religions. The circumstances are not such that people are really enjoying their special personal laws but the scenario is that, they are in loss and trouble due to some provisions of their personal law. For illustration; in Muslim community, upto four marriages are allowed for men. In fact this provision has created nuisance in Muslim community because in present era it seems quite unjust and illogical. In Muslims even today husband has universal right to divorce his wife without giving any reason. After that he is free for another marriage if he had four wives calculating with the last divorced wife. How practical it is today? These are only two illustrations; there are many other illogical provisions in Muslim Personal Law. For Christians and Parsis, the situation is with full of ambiguity. No doubt latest Amendments in personal laws have provided few reliefs but not completely changed the social system.

In the name of protecting religious identity of communities, our family laws are claimed to be based on religion but that is not the complete truth. No religion denies for change, if its in common interest of justice. In present era when people opt for dual policy, that means, they choose the option where they get maximum benefit

but they come with arguments when the provision is contrary.

The situation should change as per the changing norms and values of society. Because if anything remains unchanged, in changed circumstances, that causes loss to any related with it. Today when people are not fully religion-abiding, why they should get the privileges only in the name of religion. For civil nature issues people claim their rights under their personal law whereas for criminal liability they are governed by main laws of the country. If it is considered widely and if people are only religion oriented why they don't ask punishment under the provisions of their religious books. The reason behind this is the punishments, for wrong doers are stricter in religious books. How many cases are there in which the culprit has asked for the penalty as provided in his particular religion? The answer is none. Why such dual policy? If one wants personal law of the choice of his religion than one should ask for the penal provisions described or mentioned in one's religion.

In any civilized society, if indeed, the principle of "equality" is followed, that should be in all the forms. Not only for some parts. Issues like marriage, maintenance, adoption, will, succession, inheritance are generally decided as per the provisions of personal laws. The system and provision of law followed for Hindus can't be followed for any other religion and the system and provision of law followed by Muslims also can't be followed by any other religion. This creates ambiguity because the laws, in all the fields are developing continuously. And the thoughts of people of different religion people are greatly affected by globalization, modernization, urbanization, industrialization etc. What is heard as the voice of community, is in fact the voice of few leaders of that particular religion or community. In present era it cannot be counted as the thought of whole community. It requires attention and deep study to know the voice of each individual. If it cannot be done, then justice cannot be made reach to the affected individual. When the justice is asked, generally it is asked by an individual. If the system can't hear the pain of an individual, no substances in providing rights to whole community.

Today not necessarily, the individual comes out to ask for civil issue only under his personal law only but he comes out to ask for relief under any other law of the country. No doubt his demand to get remedy under the provisions of any other personal law, which is not related with his religion, which he profess or follows can't sustained in the eyes of law. But if one comes to ask for the rights under the law which is of general nature, the law doesn't refuse or can't refuse to provide the remedy. For example, if women of all the religions comes to ask for remedy under the provisions of Protection of Women from Domestic Violence Act, 2005. In all the personal laws, provisions for maintenance, resident etc. are there, then why they should be treated under any other law which is not related to the personal laws or any personal law. The common and logic answer for this is, people want change and they are not fully satisfied with the provisions of their existing personal laws only. The main loss is caused to the women of all the religions because prima facie and basically too, our personal laws are not gender just. Due to timely amendments, situation for Hindu women is improved and apart from others Parsi women's rights are also quite gender just but for others situation is really unjust.

What is evident across the board is that special cultural and political rights, once they are granted, are exceedingly difficult to withdraw. Even when something is done for the sake of promoting equal treatment for all, state actions meet with suspicion and mistrust. It is for these reasons that the union state has refrained from reforming the personal laws of the minority communities. Over time, the personal laws of both the Parsi and the Christian community have been reformed internally through the initiatives of the members themselves. The same has not, however occurred in the case of the Muslim Personal Law. The question what role the state can play in ensuring more just treatment for Muslim women is an issue that has divided the community and the nation. Respect for diversity suggests an absence of direct state action and greater room for communities to govern themselves, but can the state act as a catalyst in this process of reform? Should it set targets and timetables for reform to be undertaken by the community? Should it lay down the boundary conditions

or the parameters of what is acceptable and within those parameters allow communities to govern themselves? Which of these strategies should the state adopt? Which will be an effective way of combining the concern for diversity with equality? Judgments on these questions are likely to vary from context to context. What we need therefore is an affirmation of the principle while the policies by which we give effect to that norm can be deliberated upon keeping the specifics in mind<sup>5</sup>

In a paper titled "Individual Rights in India: A Perspective from the Supreme Court" presented at the International Roundtable Conference, held at University of Georgia, between April 3 to 6, 2009, Hon'ble Justice Mr. K.G. Balakrishnan, the then Hon'ble Chief Justice of India, said that, more than the questions about the positive protections afforded to religious groups, it was questions dealing with the notion of 'equal treatment' for all religions and the related controversy over the Hindu Code Bill that evoked the strongest polarized responses. The efforts to reform Hindu Personal Law through the legislative route can be traced back to the early 1920's when several lawyers joined efforts to lobby for the codification of the law relating to marriage, maintenance, adoption, inheritance and succession among other aspects. Besides the immediate benefit of legal certainty and uniformity, codification was also intended to curtail practices such as polygamy, prohibition of inter-caste marriages, denial of property rights to women and the exclusion of lower castes and untouchables from ownership of property in due course. Hence, the progressive demand for codification was cast in the language of social reform and posed as counterpoint to language of social reform and posed as a counterpoint to the apparently regressive position of non-interference taken by the religious conservatives. In fact Dr. Ambedkar proposed that civil rights should be privileged over religious practices and argued that the provisions of a Uniform Civil Code should find place in the chapter on fundamental rights. In many ways, the case for codification mirrored the intent behind the colonial

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<sup>5</sup> Mahajan Gurpreet, Negotiating Cultural Diversity and Minority Rights in India, [www.idea.int](http://www.idea.int), p. 11 & 12, Retrieved on 20-01-2014.

legislative interventions against seemingly retrograde social practices.<sup>6</sup>

In this paper Hon'ble Lordship has further mentioned that the nexus between the exercise of "religious liberty" and the protection of minority rights in India has been prominently discussed with respect to the debates about interference with the personal laws of religions minorities. The debate on the feasibility implementing a Uniform Civil Code raises Several Complicated question-from the case for mitigating gender-based discrimination in personal laws on one hand to preserving religions autonomy on the other hand. An earlier instance of substantive codification i.e. the Hindu Code Bill faced several objections at the time of the drafting of the Constitution. The rhetoric of conservatives (both within and outside the dominant congress party) was that while restraints were placed on customs rooted in the religious beliefs of the majority community, the religious minorities were not so covered. The liberalists' case for a Uniform Civil Code was vehemently opposed on the ground that the imposition of uniformity would reflect majoritarian beliefs and would hence erode the identity of minority group such as Muslims, Christians, Parsees and Jews. The subsequent enactment of the Hindu Code in the 1950's was again criticized by the right-wing parties as an example of 'differential treatment' that amounted to an appeasement of minority interests.<sup>7</sup>

The Fifth Minorities Commission clarified that secularism in India did not connote anti sacerdotalism or anti-clericalism nor did it crusade for anti-religious faith. It said: "Our broad type of secularism looks upon traditional religion, of every label, with benevolent neutrality. It would like to see the end of exploitation or of use of religion for political and economic purposes and to purge of superstition and harmful predatory practice. But beyond that, it encourages religion as apart of beneficial human activity in so far as it can satisfy and serve the criteria of utilitarian ethics, which are secular. Hence, we tend to employ the term secularism for a healing, freedom supporting harmonizing factor in our thoughts and feelings, which enable religious cultures,

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<sup>6</sup> Supreme Court of India.nic.in, p.14, Retrieved on 20/01/2014.

<sup>7</sup> *Id.*

not only survive and live but to do with all the force and vigor they can do this without harming the general social welfare... The impact of our secularism operating as a new social, economic, ethical and moral force resulting from modern knowledge, science and enlightenment can elevate traditional religion by purging it of noxious elements."<sup>8</sup>

While providing the special rights to the minorities, the basic principle of Constitution, "Equality before law" and "Equal protection of law" should not be ignored. Art.14 basically advocates for the view, without which no society in present era can remain healthy in long term. When our Constitution was framed, the Socio-economic-legal-political circumstances were different than today, and hence, various provisions for the upliftment of minority communities were made in the Constitution. Some of these provisions such as reservations, were of such nature that the basic intention behind them was to withdraw them after some period but they are still existing. The main reason behind this is the "vote-bank oriented" politics of all the political parties. Not only this but till today too, none of the political parties have come out to delete such unequal system in the society. The rights of minorities among minorities should also be considered, but that is left behind. Class-interest is seen but individual is ignored. It shouldn't be ignored that the group of individuals constitute a class or a group which is a part of society or a society. In this view, if development of society is required, individual's rights should improve and develop with combination of the principle "equal protection of law to all" and which will really create the society in which all would be "equal before law."

But our religion based personal laws are very far from both these principles and terms of Constitution of India. All have different provisions than to others. An individual, though he is a citizen of India, though he is under the Constitution of India, though he is regulated by the same penal law as other religion people, but he is

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<sup>8</sup> Bhat P. Ishwara\_(2009), Law & Social Transformation, p. 233, Eastern Book Company: Lucknow. The Author of this book has given citation in this book as: Paras 7.62 to 7.66, Fifth Annual Report of Minorities Commission of India, 1982-83. on p.233.

treated differently when it is a question of his personal law related right. How can "equality before law" principle survive in such circumstances. "Reasonable Classification" term cannot be and should not be imposed here because, if it is thought widely, it does not include such things in its concept. If it is at all wished to provide "equal protection of law to all" it should be on the same footage and on the same platform. Without such implementation, at least in this context, Art.14 then just exists in books of Constitution only. While thinking or interpreting any provision of Constitution or any other law, object behind it should be considered first, which is really not taken in account while dealing with the personal laws by the parliament or the government ever.

As discussed above, also the founding parents of Constitution of India, while framing Constitution, were of the view to form a uniform personal law for all the citizens of India, irrespective of their caste, creed or community. And henceforth in part IV of the Constitution, under Article 44, they put a provision to form and regulate a Uniform Civil Code for the citizens of India. If they wished to keep them separate only, why they would have been made such provision in Constitution? The history of making of Constitution reveals all the ifs and buts of the discussion held before finalizing the format of the Constitution. That itself clears the intention of the Constitution framers. It is found that most of the members were of the opinion for implementation of Art. 44 in Indian society. But what delayed it, was, political will power and due to this, this mandate of Art. 44 was delayed to be implemented practically. Decades have been passed there after but still Art. 44 has remained untouched.

Since religions wield overwhelming influence on the social and individual life in traditional societies as that of India, and often overemphasis customary beliefs, thereby retarding or hindering modernization, the question of bringing or concretizing social transformation with the help of law faces practical difficulties. Religious issues often become sites of social tension because of competing religious sentiments. Society as a common hinterland for both religion and state has to prepare itself for an orderly development by respecting paramount human values. A



Principal distancing from all religions and an approach of impartiality in treatment provide a safe walk, soberness and legitimacy for state action. Being a component of the policy of multiculturalism, this approach sets ways and limits to law's regulative task, and inculcates an attitude and mindset for co-existence amidst different religious communities. Secularism as a means of liberation from prejudices and communal frenzies has inherent competence to enhance the worth of human rights and welfare. Search for viable parameters for the appropriate triangular relations among state, religion and individual become an imperative in shaping the legal policies in the task of social transformation.<sup>9</sup>

Culture is not fixed but a process, cultural norms constantly develop and reshape as a result of various factors, including external influences. It should also be recognized that culture is a rich resource that contains many alternative, sometimes contradictory components, and many offer a variety of readings to choose from. In many cases, it is inaccurate to present a single norm or practice as representing the "real" essence of a given culture. The selective use of specific cultural components, and not other, by some members of a group, may serve the interests of dominant sectors of a given community and may silence alternative readings of cultural norms.<sup>10</sup>

The concept of Art. 44 of Constitution is to provide Uniform Personal Law to all. To reveal the basic differences of different personal laws and to provide one and the same solution to all the citizens equally only practical implementation of Art. 44 is required. As discussed above personal laws provide different solutions to two different people, on the same issue, if they are of different religion. To give equal status to all, and to provide sameness in the system of personal laws, no option is available then implementing Uniform Civil Code for all the citizen of India. Here, it is noteworthy that, Art. 44 do not intend to interfere with any religious faith or propagation of religion by an individual or class but it intends to remove only technical and legal differences

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<sup>9</sup> Bhat P. Ishwara (2009), *Law & Social Transformation*, p. 225-226, Eastern Book Company: Lucknow.

<sup>10</sup> Shmueli Merav, *Minority Women, Family Law and the State*, [www.nawl.ca/en/jurisfemme/entry](http://www.nawl.ca/en/jurisfemme/entry), Retrieved on 04/02/2014.

from the various personal laws. While considering other aspects, this aspect needs to be looked first. But on this point, Art. 44 is either misunderstood or misinterpreted or misrepresented by the self centered people who are generally leaders of different communities. Except Uniform Civil Code, no solution is there for the protection of people on personal issues, equally.

The main objection for change in existing personal law comes from the Muslim community. And if it is observed widely, it can be seen easily, that some part of this community has suffered the most due to unchanging mindset. Whereas Christians and Parsis too have some objections, but they are of such nature which can be rectified and solved through talk. Personal law for Hindus is not in question here, but it is noteworthy that it has been amended so many times as per requirement and now they are very up to the level. So many instances are been noted in which people have tried to take the benefit of other personal law by conversion to that particular religion. *Smt. Sarla Mudgal* case<sup>11</sup> is noteworthy verdict on this aspect so many incidents of this nature occur but the illiteracy and poverty ratio existing in our country is one of the reasons, why all the cases don't open up in the society. National law commission has often emphasized on these issues.

Hon'ble Apex Court of India also has passed several judgments in respect of minority communities of different kinds. Many of them have been proved milestones in solving and resolving the various problems of minority communities. In reference of the issue discussed in this paper too, Hon'ble Supreme Court of India has observed in so many of its judgments and has shown its worry and concern for implementation of Art. 44-Uniform Civil Code in Nation. The crux of few of such judgments is noted here.

In *Mohd. Ahmed Khan v. Shah Bano Begum* case<sup>12</sup> Hon'ble Apex Court made a reference to uniform civil code and in para 32 of this judgment and observed that: "It is also a matter to regret that Article 44 of our Constitution has remained a dead letter. It provides that:

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<sup>11</sup> AIR 1995 SC 1531.

<sup>12</sup> ((1985) GLHEL-SC 17763).

"The State shall endeavor to secure for the citizens a uniform civil code through the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take lead in the matter of reforms of their personal law. A common civil code will help the course of national integration by removing disparate loyalties to law which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and unquestionably, it has the legislate competence to do so".

In the same para it is further observed that: "we understand the difficulties involved in brining persons of different faiths and persuasions on a common platform. But a beginning has to be made if the Constitution is to have any meddling. Inevitably the role of the reform has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts to courts to bridge the gap, between personal laws cannot take the place of a common civil code. Justice to all is a far more satisfactory way of dispensing justice then justice from case to case".

In *Smt. Sarla Mudgal President, Kalyani and other v. Union of India and others* case<sup>13</sup> Hon'ble apex court called for the requirement of uniform civil code, Art. 44 and while referring Art. 44 it was observed that: "Article 44 is based on the concept that there is not necessary connection between religion and personal law in a civilised society. Article 45 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, Succession and like matter of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26, 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all the sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the

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<sup>13</sup> (AIR 1995 SC 1531).

national unity and integration, some other communities would not, though the Constitution enjoins the establishments of a "common civil code" for the whole of India".

In this judgment it is also observed that "When Constitution was framed with secularism as its deal and goal, the consensus and conviction to be one, socially found its expression in Article 44 of the Constitution. But religious freedom, the basic foundation of secularism was guaranteed by Articles 25 to 28 of the Constitution, Article 25 is very widely worded. It guarantees all personals, not only freedom of conscience but the right to profess, practice and propagate religion. What is religion? Any faith or belief. The court has explained religious liberty in its various phases guaranteed by the Constitution and extended it to practice and even external over acts of the individual. Religion is more than mere matter of faith. The Constitution by guaranteeing freedom of conscience ensured inner aspects of religious belief. And external expression of it was protected by guaranteeing right to freely practice and propagate religion."

In *John Vallamattom v. Union of India* case<sup>14</sup> the Hon'ble Apex Court has observed that: "Art. 44 provides that the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Art. 25 of the Constitution confer freedoms of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz., Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation. Although it is doubtful whether the American doctrine of suspect

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<sup>14</sup> 2003(0) GLHEL-SC-13037.

legislation is followed in this country. In *Smt. Sarla Mudgal, President, Kalyani and Others v. Union of India and other*, it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect to Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies".

Above thoughts and views of Hon'ble Supreme Court of India also clears the necessity and need of implementing Art. 44 practically in the society. For societal interest at large, this fact has to be accepted that self-centered politics can benefit some but not all the spheres of society.

There are many aspects of minority rights. Many of them are solved but several are yet to be solved. But the issue discussed in this paper can be rectified definitely and that can happen only by forming and implementing Uniform Civil Code for all citizens. Personal rights of minority communities under their personal laws needs to be dealt equally because it is in the best interest of them only. It is widely felt that common civil code will surly help in national integration and it is the duty of the state to form the Uniform civil code for the nation. Though there are the difficulties in filling the gaps among the thoughts of different religions following people but, this was the same situation at the time of independence and at the time of framing our Constitution and as well as at the time of introducing the Hindu code bill by the then Prime Minister of India, Shri Pandit Jawaharlal Nehru. But after that too, more than 65 years have been passed but there is no any positive movement in this direction by the government. It cannot be accepted, now too, that the social scenario is not that much ripen, that uniform civil can be introduced. It is, so that it is a fact that no any such efforts are made by the legislature and hence, it could not be introduced and regulated in our society. The reasons behind that are many. They are political, social, economical, sentimental and even geographical. Strong determination of political will power in essential need for

any change in society without that no change can be made in any field and the same principle is applied in this context too. It had become not only the need but also the necessity of the hour to change the form of personal laws and uniform them as per the present time demand. In the age of globalization one cannot be allowed to have a special status in law on the ground of his religion only. For above noted views, despite of time to time amendments, present family/personal laws have become inconsistent with the time. Hence a drastic change in personal law is required and then only minority communities would be justified in context to their personal/family laws.



# **RIGHTS OF RELIGIOUS MINORITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTION: LAW, EXTENT AND LIMITATIONS**

**Mr. Ashok Wadje\***

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## **Introduction**

Protection of minorities is a worldwide concern almost in all the legal system of the world. Minorities are considered to be and are vulnerable groups facing atrocities and discrimination in numerous ways, which in fact goes against the very basic right to live a peaceful and right to live a life with dignity. The threat is constant in a system or a country or a state with the considerable presence of majority community.

Country like India which has adopted a secular approach in its Constitution, this issues or this concern is of immense importance. Moreover, Indian democratic set up is the involvement and participation of all the communities in the national life. There are six major religions in India prevalent from time immemorial and based on different philosophies. As per Government of India those major religions are: Hindu, Sikh, Jain, Buddhism, Christian and Muslim.<sup>1</sup>

Indian Constitution is unique in self which has adopted a secular approach where state is neither pro nor against any religion. State or legislature, through cannot even establish any new religion by law.<sup>2</sup> At the same time freedom of religion and of conscience<sup>3</sup> is granted to its citizens to practice and profess their own religion with reasonable restrictions<sup>4</sup>. At the same time state is allowed to restrict secular practices of any religion which exceeds

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\* Assistant Professor, Symbiosis Law School, Noida.

<sup>1</sup> Census of India, Ministry of Home Affairs, Govt. of India: [http://censusindia.gov.in/Census\\_And\\_You/religion.aspx](http://censusindia.gov.in/Census_And_You/religion.aspx) (Last updated on February 4, 2014).

<sup>2</sup> Narayan v. State of Madras, AIR 1954 Mad 385 (para 6).

<sup>3</sup> Article 25 of Indian Constitution.

<sup>4</sup> Reasonable Restrictions under Article 25 (1), Article 25 (2) (a) & (b).

this limit or restriction<sup>5</sup>. So freedom of religion is confined only to essential practices of religion.<sup>6</sup> State's interference in the religious affairs is discouraged by the Indian Constitution and this is followed by several judicial precedents discouraging interference of State or state activities in the religion or essential religious practices which forms part of the same.

The real purpose and intendment of Article 25 of Indian Constitution is to guarantee especially to the religious minorities the freedom to profess. No doubt, the freedom guaranteed by Article 25 applies not merely to religious minorities but also to all persons. But in interpreting the scope and content of the guarantee contained in this Article, the court will always have to keep in mind the real purpose underlying the incorporation of the provision in the fundamental rights given in the Chapter III of the India Constitution.

### **Conceptual Framework of “Minority” under Indian Constitution**

The term “minority” in the context of Indian constitution or for the purpose of protection granted by the Indian constitution is to be construed or taken to mean as the group or community or religion which is in the minority by virtue of its number of population in a given area. “minority” term, in this context can be used in relation to two factors/things:<sup>7</sup>

- i. Religious community
- ii. Linguistic community

Article 30 to that effect uses the terms “linguistic” or “religious” minorities. It implies that the minority may either be linguistic or religious and that it does not have to be both: a religious minority as well as linguistic minority. It is sufficient of it is one or the other or both.

Protection is accorded to those groups who are in “minority”: religious or cultural. Neither it is defined nor any description provided for the same.

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<sup>5</sup> Commissioner, HRE v. Sri L. Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

<sup>6</sup> *Id.*

<sup>7</sup> Articles 29, 30 of the Indian Constitution.



The word “minority”, in the absence of special definition, it must be held that any community, religious or linguistic which is numerically less than fifty percent of the population of a State. Such criterion was given *In Re: The Kerala Education Bill, 1957*<sup>8</sup> wherein court has observed that the same can be determined in relation to population of the State. Supreme Court opined that while it is easy to say that minority means a community which is numerically less than 50 percent, the important question is 50 per cent of what? Should it be of the entire population of India, or of a State, a part thereof?<sup>9</sup> The Supreme Court did not however decide this point definitely. However it had come to be accepted that “minority” is to be determined only in relation to the particular legislation which is being challenged. Thus if a State law extending to the whole of a State is in question, the minority must be determined with reference to the entire State population. Further in *T.M.A. Pai Foundation v. State of Karnataka*<sup>10</sup> the same issues was debated as to: in order to determine the existence of a religious or linguistic minority in relation to Article 30, the State or the country as a whole is to be taken as the unit. Supreme Court opined that the test for determining ‘who are linguistic or religious minorities’ within the meaning of Article 30 would be one and the same either in relation to a State legislation or Central legislation.

In *Bal Patil v. Union of India*<sup>11</sup>, it was observed that the “minority” for the purpose of Indian Constitution can be identified as group of people or community who were seen as deserving protection from likely deprivation of their religious, cultural and educational rights by other communities who happen to be in majority and likely to gain political power in a democratic form of government based on religion.

Religious minority would mean that the only or the principal basis of a minority must be their adherence to one of the many religious and not a sect or a part of the religion and that the other features of the minority are

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<sup>8</sup> AIR 1958 SC 956.

<sup>9</sup> M.P. JAIN, Indian Constitutional Law, (6<sup>th</sup> ed.), 1764 (2010).

<sup>10</sup> (2002) 8 SCC 481.

<sup>11</sup> (2005) 6 SCC 690.

subordinate to the main feature, namely, its separateness because of its religion. A linguistic minority for the purpose of protection granted under Indian Constitution is one which must at least have a separate spoken language. It is not necessary that the language should also have a distinct script for those who speak it to be a linguistic minority.

E.g., an Anglo-Indian community is well known minority community in India based on religion as well as language and has been recognized as such by the Supreme Court of India in *State of Bombay v. Bombay Education Society*<sup>12</sup>.

### **Protection of Minorities: Perspective of Indian Constitution**

Article 29<sup>13</sup> of Indian Constitution in general and Article 30<sup>14</sup> in particular, aims at securing interest of minorities by providing them of certain privileges as a part of Fundamental rights under Chapter III of India Constitution. Their identity, culture, script, customs, religion and language has been considered by securing, protecting and providing certain benefits or privileges

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<sup>12</sup> AIR 1954 SC 561.

<sup>13</sup> **Article 29. Protection of interests of minorities:**

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

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

<sup>14</sup> **Article 30. Right of minorities to establish and administer educational institutions:**

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

1 (1A) In making any law providing for the compulsory acquisition of any property of any educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

pertaining thereto. The same can be seen in Article 30 which grants them special permission to establish and administer their own educational institution of their choice. This is basically for dual purposes:

- i. To secure their interest through: language, religion, culture and identity, and
- ii. To empower their children to participate in main stream of the society through education and learning in educational institution of their choice.

But that does not mean they can misuse the said privilege or special right for the purposes not covered as the objectives behind or under Article 29 and 30 of the Constitution and also for anything which can violate the clause of equality as per Article 14 of the Indian Constitution. In further of it, drafters of Indian Constitution has made precaution to avoid misuse of the same by inserting restriction on the rights of minorities under clause (2) of Article 29 which runs as:

“No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of the State funds on grounds only of religion, race, caste, language or any of them.” It guarantees the rights of a citizen as an individual irrespective of the community to which he belongs.”

### **Establishment and Administration of Educational Institutions: Law, Extent and Limitations**

The right of minorities to establish and administer educational institutions of their choice under Article 30(1) and Article 29(1) can be claimed by an institution only if it is established by a religious or linguistic minority. The guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution but applies also to those established before.<sup>15</sup> The right to establish and maintain educational institutions according to the choice of a minority community is a necessary concomitant to the right to under Article 29 of the Indian Constitution. The right guaranteed under Article 30(1) is twofold:

- i. To establish and
- ii. To administer educational institution of their own

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<sup>15</sup> S.K. Patra v. State of Bihar, AIR 1970 Pat 101 (para 6).

choice.

These words indicate that the extent of the right is to be determined not with reference to any concept of State necessity and general social interest but with reference to the educational institutions themselves, that is with reference to the goal of making the institutions effective vehicles of education for the minority community or other persons who resort to them.

### **Nature, Scope, Extent and Limitation on the Right under Article 30(1)**

No doubt that Article 30 can be construed to preserve and protect religious freedom, autonomy and its individuality, but there is no fundamental right under which an institution can claim either aid or affiliation as a matter right. It is permitted for the State or University, as the case may be, to lay down reasonable conditions to maintain the excellence of standard of education but in the garb of doing so, refusal to grant affiliation cannot made pretext for destroying individuality and personality of the said institution. But regulatory measures which are designed towards the achievement of the goal cannot be said to be violative of Article 30(1).<sup>16</sup>

Following are some important facets<sup>17</sup> of 'right to establish and administer educational institution of their own choice' which one must keep in view, in order to know the nature and scope above mentioned right recognized under Article 30(1):

#### **i. "Management of Affairs"**

The right to administer institutions of minority's choice enshrined in Article 30 (1) means "management of affairs" of the institution. This power as mentioned above is subject to the regulatory power of the state or university<sup>18</sup> as the case may be. So the right conferred on the religious or linguistic minorities to administer educational institutions of their choice

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<sup>16</sup> Frank Anthony P.S.E. Association v. Union of India, AIR 1987 SC 311.

<sup>17</sup> H.K. SAHARAY, THE CONSTITUTION OF INDIA-AN ANALYTICAL APPROACH, 389, 390 (4<sup>th</sup>ed.) (2012).

<sup>18</sup> *Id.*

is not an absolute right. This right is not free from regulation. Just as a regulatory measure are necessary for maintaining the educational character and content of minority institutions, similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration.

## **ii. Educational Institution**

Words “educational institution” is of very wide import and would include a University also and as such it may be construed that a religious minority can even establish a university under Article 30(1).<sup>19</sup>

## **iii. Establish and Administer**

The words “establish and administer” must be read conjunctively with the words “establish and maintain”. *Azeez Basha v. Union of India*<sup>20</sup> can be cited in this context to throw light on these words. The Aligarh University when it came into existence in 1920 was established by the Central Legislature by the 1920 Act. It may be that the 1920 Act was passed as a result of the efforts of the Muslim minority. But that does not mean that the Aligarh University when it came into being under the 1920 Act was established by the Muslim minority.

## **iv. Administration**

The word “administration” in the context of Article 30(1) means “management of affairs” of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served.

## **v. Minority Institutions**

All laws made by the State to regulate the administration of educational institution and grant of aid will apply to minority educational institution also. But if any such regulations interfere with the overall

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<sup>19</sup> *Azeez Basha v. Union of India*, AIR 1968 SC 662 (para 21).

<sup>20</sup> AIR 1968 SC 662 (para 25).

administrative control by the management over the staff, or dilutes, in any manner, the right to establish and administer educational institutions, to that extent, will be inapplicable to minority institutions.

General principles as to establishment and administration of minority educational institution:<sup>21</sup>

**i.** The right of minorities to establish and administer educational institution of their choice has the following elements:

- a)** To choose its governing body in whom the Founders of the institution have faith and confidence;
- b)** To appoint teaching staff and also non-teaching staff and to take action if there is dereliction of duty on their part;
- c)** To admit eligible students of their choice and to set up a reasonable fee structure;
- d)** To use its properties and assets for the benefit of the institution.

**ii.** The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority.

**iii.** The right to establish and administer educational institutions is not absolute. Nor does it include the right to mal-administer. Regulations made by the State concerning generally the welfare of students and teachers, regulation laying down eligibility criteria and qualifications for appointment as also conditions of service of employees, regulations to prevent exploitation or oppression of employees and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not interfere with the right under Article 30(1) of the Constitution.

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

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<sup>21</sup> *Supra* note 18 at pp. 395, 396.

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

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

### **Regulations: How Far Justified?**

After analysis of these propositions of law one can reiterate the principle of law laid down by the Hon'ble Supreme Court of India<sup>22</sup> that: "the right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right."

Regulations which do not affect the substance of the guaranteed rights, but ensure the excellence of the institution and its proper functioning in matters educational, are permissible. Regulations could be made to maintain educational character and standard of institution. From the point of view of regulation, minority educational institutions can be placed into two categories:

1. Institutions receiving aid from the state; and
2. Institutions not getting aid from the state.

When any regulatory measure is charged upon, it would be obligatory for the court to find out as to whether the provisions in fact secure a reasonable balance between ensuring a standard of excellence of the institution and of preserving the right of minority to administer the institution as a minority institution.<sup>23</sup> Further in the case of *Frank Anthony Public School Employees' Association v. Union of India*<sup>24</sup> Supreme Court of India further thrown light on the scope of the right and extent of limitation or restriction thereupon in following words:

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<sup>22</sup> In Re: The Kerala Education Bill, AIR 1958 SC 956.

<sup>23</sup> Managing Committee St. John Inter College v. Girdhari Singh, AIR 2001 SC 1891.

<sup>24</sup> AIR 1987 SC 311.

“The extent of the right under Article 30(1) is to be determined, not with reference to any concept of state necessity and general societal interest but with reference to educational institution themselves, that is, with reference to the goal of making the institutions effective vehicles of education for the minority community or other persons who resort to them. It follows that regulatory measure which is designed towards achievement of the goal of making the minority educational institutions effective instruments for imparting the education cannot be considered to impinge upon the rights guaranteed by Article 30(1) of the Constitution. The question in each case is whether the particular measure is, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of the management in substantial measure.”

Similarly, Supreme Court in *St. Stephen's College v. University of Delhi*<sup>25</sup> made mixed observations as to right, its purpose and restriction thereupon in following words which further signifies the importance of restriction on the right so guaranteed under Article 30(1):

“...[T]here must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. Article 30(1) is protective measure only for the benefit of religious and linguistic minorities and it is essential to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection.”

There are many such an areas in relation minority rights pertaining to establishment of educational institution and administration thereof, in which judiciary has taken a vigilant approach on the ubiquitous minority educational institutes diverting the purpose for which it got protection. Those are:

1. Government grants and recognition and conditions of grants and recognition;
2. Structure of or composition of managing bodies;
3. Appointment of teachers;
4. Disciplinary action against the staff;

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<sup>25</sup> AIR 1992 SC 1630.



5. Admission of students;
6. Medium of instructions;
7. Fees etc.

In several such cases Supreme Court came heavily on the rights so granted by defining the nature, scope and extent of the same as discussed above. Some of them are prominent to be mentioned about in this connection. For example, *T.M.A. Pai Foundation v. State of Karnataka*<sup>26</sup>, Supreme Court of India indicated a greater regulation of aided and unaided minority institutions particularly in the matter of admissions and fees of professional colleges. This actually has led a spate of litigation, of which many cases came up to the Supreme Court. The issues were considered in connection with professional institutions in *Islamic Academy of Education v. State of Karnataka*<sup>27</sup>, and *P.A. Inamdar v. State of Maharashtra*<sup>28</sup>, which ultimately ascertained certain norms<sup>29</sup> pertaining to this right and its regulation.

## Conclusion

Although Article 30(1) is labeled as one of the fundamental rights under chapter III of Indian Constitution it has to be read subject to the regulatory power of the state. Regulations which do not affect the substance of the guaranteed rights, but ensure the excellence of the institution and its proper functioning in several matters pertaining to or as a part or as an incidental to 'right to establish and administer educational institute of their own choice' and as discussed above right to administer cannot encompass the right to mal-administer.

Judiciary has been active in this area by expanding the wide sweep of 'right to establish and administer educational institute of their own choice' by its interpretative tool at the same time of putting heavy but reasonable regulations on the exercise of the right which ultimately ensures that minority educational institutions

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<sup>26</sup> (2002) 8 SCC 481 at p. 582.

<sup>27</sup> (2003) 6 SCC 697 at p. 730.

<sup>28</sup> (2005) 6 SCC 537 at p. 602.

<sup>29</sup> *Supra* note 10, at pp.1367, 1368.

are not meant for their exclusive benefit or any kind of profit oriented mechanism.

Time has also come to think of globalization and rapid changes in the educational sector and as such minority institutions ought to keep pace with such changes and developments. A minority institution may impart general secular education; it need not confine itself only to the teaching of minority language, culture or religion. But to be treated as a minority institution, it must be shown that it serves or promotes in some manner the interests of the minority community by promoting its religious tenets, philosophy, culture, language and literature. Further there should be a nexus between the institution and the particular minority to which it claims to belong. A considerable section of the minority must be benefited by the institution.



## **RIGHT TO FREEDOM OF RELIGION AND SECULARISM: SOME JUDICIAL REFLECTIONS**

**Mr. Gyanendra M. Fulzalke\***

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“It is the duty of all progressive intellectuals to propagate and popularized. This principles of secularism and explain to the people at large all its facets and its aspects.”

- Justice P.B. Gajendragadka

### **Introduction**

Indian society is a blend of more than six religions. Since long these religions are living with great unity and integrity, while adopting Indian Constitution drafters encountered a superhuman task to unite the different religions under one umbrella. India is a country which bounds in personal laws every religious community in personal matters is governed by own laws<sup>1</sup>. Freedom of religion is guaranteed as a fundamental right under Indian constitution. This freedom connotes very citizen of India can profess, practice and propagate any religion as per his/her aspirations. Though this freedom is guaranteed still there is a question before Indian democracy that how to protect the freedom. If we observed Indian conditions then at one par India is secular country, and at other end freedom of religion is greatedened, the secularism means complete neutrality state in the matters of religion. The state shall not boost any religion as an official religion of state. The state shall not give grant in aid to any religious institutions or any financial support to religious activity, religion shall remain a private business of individual. But the central Government and various state Governments are giving financial aid to religious endowments. For example expenditure on *Guru Da Gaddi*, expenditure on Kumbhamela, expenditure for renovation of Temples, Mosques, *vihars*. If we are true secular? Then why this

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\* Assistant Professor, Shri Shivaji Law College, Parbhani.

<sup>1</sup> Paras Diwan, *Muslim Law in Modern India*, Allahabad Law Agency reprint 2008, p. 1.

expenditure we have to think twice it is necessary to prohibit these kinds of attempts. Secularism does not mean equal protection to all religion, but complete neutrality of religion in the matters affairs of state.

### **Concept of Freedom of Religion and Secularism**

The religion is a matter of personal faith and belief. Every human being is attached with a kind of religion. Religion is nothing but a way of life generally adopted by the people in a particular territory. Religion has played a very important role in initial stage of life and up to certain extent today itself has relevancy. We have seen a religion growing up from stage to stage, from the simplest childish prayers to the highest metaphysical abstractions<sup>2</sup>. Swami Vivekananda while delivering a lecture on religion asserted that, religion is idea which is raising the brute unto man and man unto God. Religion is manifestation of natural strength that is in man. The basic aim of religion is to bring peace to man. Any religion that can bring it to man is the true religion for humanity<sup>3</sup>. The religion is nothing but doctrine of belief which is binding on flowers of religion. Religion provides moral principles to be followed by followers in their day to day life, due the existence of religion there is peace in the world. India is the most populous country of the world. The people inhabiting this vast land profess different religions and speak different languages. It is a mosaic of different religion languages and culture. Each of them has made a mark on Indian polity and India today represent synthesis of them all. Despite the diversity of religion and language there runs through the fabric of the Nation the golden thread of a basic innate unity<sup>4</sup>. As the concept of religion was developed and it has controlled whole human life certain evils entered in religion. Many philosophers and jurists suggested that there should be a complete separation between state and religion. The religion should remain as private business of individual.

The freedom of religion is guaranteed in plethora of countries in the world, but this freedom give rise to

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<sup>2</sup> Prof. Hari Narke, Dr. B.R. Ambedkar Writings and Speeches Vol. 3 Unpublished writing, second edition P. 7.

<sup>3</sup> *Atheist Society of India v. Govt. of A.P.*, AIR 1992 AP 310.

<sup>4</sup> *St. Xavier's College V. State of Gujarat*, AIR 1974 SC 1389.

arbitrary use of doctrines and customs and traditions of religion which resulted in control over religion. Secularism is evolved as complete neutrality of religion in the matters of state, but the study religion therefore in school education cannot held to be an attempt against the secular philosophy of the constitution<sup>5</sup>. United State of America adopted complete water tight compartment between religion and state, it means religion shall not interfere state affairs. No doubt freedom of religion is guaranteed under American constitution by First Constitutional amendment Act. Secularism is a condition of a state where no more importance will be given to religion is here that the second meaning of secularism in India applies secularism means and some of this is written in to constitution of country that all religions and cultural groups in India are entitled to practice their faith to be instructed through the medium of their mother tongue to be protected, not attacked without cause by the police<sup>6</sup>. No doubt citizens will have freedom of religion still this liberty is not exclusive reasonable restrictions can be imposed on individual freedom. The state shall keep itself way from observance of any particular religion.

## **Constitutional Provisions of Freedom of Religion and Secularism**

### **1. Preamble of Indian Constitution**

Preamble is the key to open the mind of legislature. It contains aspirations of makers of Indian constitution. Under preamble liberty is guaranteed of thought, expression, belief, faith and worship. It means citizen of India can exercise their freedom of religion without any disturbances. A person can exercise his religious freedom so long as it does not come in to conflict with the exercise of fundamental Rights of others<sup>7</sup>. Whenever there is confusion about interpretation of constitution. In *Keshwananda Bharti's*<sup>8</sup>

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<sup>5</sup> D.J. De, Constitution of India, Asia Law House, Hyderabad, vol. 2 P-1420.

<sup>6</sup> N. Sundaram, Religious Freedom and Secularism Theory and Practice,, Amicus Books, The ICFAI University Press ISBN 81-314-1372-1 P-93.

<sup>7</sup> M.P. Jain, Indian Constitutional Law, 6<sup>th</sup> edition, 2010, Butterworth's LexisNexis Wadhwa,, Nagpur, p. 1321.

<sup>8</sup> AIR 1973 SC 1461.

landmark judgment Supreme Court of India held that preamble of India Constitution is integral and inseparable part of constitution. Forty Second Amendment Act, 1976 inserted Secular word under preamble of Indian constitution.

## **2. Fundamental Rights:**

Article 25 to 30 of Indian constitution devoted to freedom of religion to Indian Citizens. They are as follows.

1. Article 25 of Indian Constitution: Freedom of conscience and free profession, practice and propagation of religion-  
Subject to public order morality and health and to the other provision of this part, all persons are equally entitled to freedom of conscience and the freely to profess practice and propagate religion.  
Nothing in this Article shall affect the operation of any existing law or prevent the state from making any law
  - a. regulating or restricting any economic, financial political or other secular activity which may be associated with religious practice;

Providing for social welfare and reform or throwing open of Hindu religious institutions of public character to all classes and sections of Hindus.

*Explanation I :* The wearing and carrying *kripans* shall be deemed to be included in the profession of Sikh religion.

*Explanation II:* In sub-clause (b) of clause (2) the reference to Hindus shall be construed as including a reference to professing the Sikh, Jain or Buddhist religion and the reference to Hindu religious institution shall be construed accordingly.

2. Article 26 of Indian Constitution: Freedom to manage religious affairs.—Subject to public order, morality and health, every religious

denomination or any section thereof shall have the right—

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

3. Article 27 of Indian Constitution: Freedom as to payment of taxes for promotion of any particular religion.—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination

4. Article 28 of Indian Constitution: Freedom as to attendance at religious instruction or religious worship in certain educational institutions.—

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

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

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

5. Article 44 of Indian Constitution: Uniform civil code for the citizens.—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

## **Legislative Attempts to Keep India as Secular Country**

The Parliament of India is the highest legislature for India. Parliament can make laws for whole nation to keep its mandate our Parliament has enacted various laws to protect freedom of religion and to keep India as secular country, union as well as state legislature enacted various legislations which is one step in the achievement of secularism in India. The 42<sup>nd</sup> Amendment Act, 1976 which inserted Secular word under preamble of Indian Constitution, which declare India as secular state. Some legislative attempts are as follows:

1. Code of Criminal Procedure Code, 1973
2. Special Marriage Act, 1954
3. Dowry Prohibition Act, 1961
4. Foreign Marriage Act, 1969
5. Medical Termination of Pregnancy Act, 1971
6. Protection of Women from Domestic Violence Act, 2005
7. Prevention of Child Marriage Act, 2006
8. Religious Institutions (Prevention of Misuse) Act, 1988
9. Places of Worship (Special Provisions) Act, 1991
10. Bigamy prohibition under Government Service Rule, 1964
11. Birth and Deaths Registration Act, 1969
12. Schedule Caste and Scheduled Tribes (Prevention of Atrocities ) Act, 1989

## **Judicial Approach towards Right to Freedom of Religion and Secularism**

The Indian Supreme Court is final interpreter and watch dog of Indian constitution but apex court in plethora of judgments interpreted secularism as equal treatment to all religions. Freedom of religion and secularism are opposite concepts and state have to maintain balance between two. There was a time in India history when religion provided, regulated fully controlled the legal and judicial system of country. Today the situation is other way round. In the secular India of our times it is the law of land that determines the role of religion in the society and it is the judiciary that determines what the laws on



this aspect of life say mean and require<sup>9</sup>. It is necessary to protect the freedom of religion but most important we have to maintain secularism in India. Secularism is the basic structure of Indian constitution which was confirmed in *S.R. Boomai v. Union of India*<sup>10</sup>. It means state shall not interfere in religious matters of religion. The state will be a complete neutral role and freedom of religion will be very private affair of individual. We are secular first and then freedom of religion is guaranteed under Articles 25 and 26 of Indian Constitution. These Articles itself give power to state that they can intervene in religious matters on the ground of morality, health, public order it clearly implicates that secularism is genus and freedom of religion is species. The rule is that Indian shall remain secular and exception is of freedom of religion. Propriety shall be given to secularism and freedom of religion shall be a very private affair of Individual. Current Indian scenario is ample clear on secularism but role of parliament of India and state legislatures is in big question. It is highly expedient to check and balance the role of legislature and Judiciary in the area of secularism and freedom of religion.

It is the constitutional duty of Indian Judiciary to uphold constitutional mandate. Supreme Court of India also interpreted in different manner in plethora of decisions Apex court held that secularism means equal treatment to all religion, but actual meaning of it is complete demarcation between state and religion. Society not only expects the courts to ensure procedural fairness, but also expects them to be efficient. The courts are the machinery for enforcing laws and regulations. The legal system might have very good laws which provide for the granting of substantive rights to the citizen vis-à-vis his fellow citizens, and vis-a-vis the government<sup>11</sup>. It is the duty of state to incorporate these ideas in reality. Plethora of marginal religious communities are living in India and they shall not feel insecure equal opportunity shall be given to everybody for proper progress and

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<sup>9</sup> Prof. Tahir Mahmood, *Laws of India on Religion and Religious Affairs*, Universal Law Publishing Co., ISBN 978-81-7534-659-8, p. 10.

<sup>10</sup> AIR 1994 SCC 1.

<sup>11</sup> Shimon Shetreet, *Law and Social Pluralism*, LexisNexis Butterworths, ISBN 81-8038-003-3 P 224.

development, and it is the duty of majority to protect the interests and aspirations of minorities. In *Bijoe Emmanuel v. State of Kerala*<sup>12</sup>, which is also known as *National Anthem* case Apex court of India held that it is not mandatory to sing a National Anthem if particular religion doesn't permit its followers then it is optional, this was a landmark judgment because it respected the personal liberty to follow any religion. The role of Indian judiciary can play very important role in this area, still there are plenty of hopes from Apex court of India. In *Acharya Jagdishwaranand Avaduth v. commissioner of police Calcutta*<sup>13</sup>, the basic question before supreme Court of India was that whether a particular rite or observance is an essential religious rite of an religion Apex court of India held that performance of *Tandava* dance with skulls and daggers is not an essential part of religious rites to be observed by *Anand Margis*. In this way state can interfere in the religious matter on the ground of public order. Hence secularism is a basic stricture of Indian Constitution. In another path setting decision Supreme Court of India in *Mohd. Hanif Quareshi v. State of Bihar*<sup>14</sup>, curtail question was that total Bann on cow slaughter vocative to Article 25 of Indian constitution. It was observed by Court that total Bann on cow slaughter is invalid and unconstitutional.

Indian secularism is very different kind of secularism. If we observed Indian conditions minutely particularly the judgments of Courts in India then from the inception of Supreme Court in this Country the Apex court of India wrongly interpreted the concept of secularism. Secularism may be considered as an ethical system founded on the principles of natural morality and independent of revealed religion or supernaturalism<sup>15</sup>. The dictionary meaning of secularism is neutrality of state in the matters of religion. The basic question is that whether this meaning was actually considered by our judiciary the answer is no. every time Apex Court India held in many cases that *Sarvadharmha Sambahv* which means equal treatment to all religions. Is it practically possible for country like India where more than six

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<sup>12</sup> AIR 1986.

<sup>13</sup> AIR 1983.

<sup>14</sup> AIR 1958.

<sup>15</sup> *Encyclopedia Americana*, 1965.

religions are living from thousands of years? If court's interpretation is correct then India may not remain as secular country. But Forty Second Amendment Act, 1976 which inserted Secular world under preamble of Indian Constitution, which specifically declare India as a neutral state in the matters of religion. If we study the decisions of courts particularly after 42<sup>nd</sup> Amendment Act, there is no change in interpretation of concept of secularism.

### **Minority Rights and Secularism**

Minorities are specially protected under Indian constitution. These classes of citizens are very few in number as compare to majority religious institutions. A theoretic state cannot protect the interest of religious minorities as it is committed to one particular religion, whereas a secular country acts as the guardian of religious minorities<sup>16</sup>. It doesn't mean that state shall provide financial assistance for religious purpose because it may against the concept of secularism. Article which provides effective protection to minorities in India are as follows:

Article 29 of Indian Constitution: Protection of Interests of Minorities.—

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

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

9. Article 30 of Indian Constitution: Right of minorities to establish and administer educational institutions. —

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

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<sup>16</sup> Legal News and Views, Vol. 26: No 11: November 2012, p. 1.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

### **Suggestions**

1. There is an urgent need to redefine the concept of secularism.
2. There is immense necessity to stop grant in Aid for religious purpose.
3. The Indian State in letter and spirit shall play a neutral role in the area of religion.
4. The Supreme Court shall interpret secularism as per dictionary meaning.

### **Conclusion**

The concept of freedom of religion and secularism enshrined under Indian constitution are very vague and it is the right time redefines it. These concepts are creating ambiguity in the mind of common people as well as in the mind of judiciary. In a country like country which is developing in every sector of human life it is necessary to concentrate on developmental activities and so the state shall stop from funding religious institutions and denominations. No doubt religious freedom is guaranteed but it doesn't mean that the state shall devote its revenue for such expenditure. If particular religion wants to develop then there is no bar on it but nowadays its becoming the fashion every Government is appeasing the religious institutions.

# HUMAN RIGHTS ISSUES OF VICTIMS OF VIOLENT CRIMES: RESTLESS WAITING FOR RECOGNITION AS MINORITY

Mr. Sukdeo Ingale\*

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## Introduction

Although questions on minority form parts of the popular political discourses in India, the concept of minority remains debated and expanded from time to time. It is crystal clear since Independence and can be illustrated by the recognition of minority status recently received by Jain community. In a situation epitomized by ethnic-hegemony and competing ethnic endeavour, the majority-minority syndrome has turned out to be in inescapable phenomena in Indian democracy.

Since the issue of minority problems have assumed global importance, and since the question of addressing minority issues under every political set-up is of primary concern, there is imperative to develop who constitute majority or minority and under what circumstances. Nonetheless what is noteworthy is that the social relations cannot be viewed only in majority-minority aspects based on number of person belonging to particular group; *ceteris paribus* the interactive and cumulative nature of the social forces influencing inter-group relations needs to be equally emphasized in delineating minority. If such social forces demand, there needs to be “a gateway” for recognition of minority status of any group which needs special protection. To find out possibility of such gateway we need to study meaning and definitions of the term “minority”.

## Definition of Minority

For the first time in India, the Motilal Nehru Committee recommended a number of fundamental rights some of them were to solve communal problems<sup>1</sup>. The Motilal

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\* Assistant Professor, DES NF Law College, Pune.

<sup>1</sup> MITTAL J. K., *Indian Legal and Constitutional History* (4<sup>th</sup> ed. 2007).

Nehru Report<sup>2</sup> showed a prominent desire to afford protection to minorities, but did not define the expression. Sir Tej Bahadur Sapru Committee<sup>3</sup>, set up by the Non-Party Conference also proposed, inter alia, a Minorities Commission but did not define minority.

The Constitution nowhere defines the terms “minority”, nor does it lay down sufficient indicia to the test for determination of a group as minority. Confronted, perhaps, with the fact that the concept of minority, laid its problem, was intercalate, the framers made no efforts to bring it within the confines of a formulation. Even in the face of doubts being expressed over the advisability of leaving vague justiciable rights to undefined minorities, the members of the Constituent Assembly made no attempt to define the term while Article 23 of the Draft Constitution, corresponding to present Articles 29 and 30, was being debated.

In India the term minorities is defined by academicians as the groups that are held together by ties of common descent, language, or religious faith, and feel themselves different from other dominant groups within a political entity<sup>4</sup>. Usually, a minority group is defined on the basis of a relatively permanent and unchanging status and on the basis of being different, often visibly, from the majority group. This definition includes minorities based on ascribed statuses such as race, ethnicity, and gender and other statuses that are difficult or impossible to change, such as sexual orientation and disability. It also includes groups with common identities that are deeply held and relatively unlikely to change, most commonly religious or linguistic groups.

Despite many references to “minorities” in international legal instruments, there is no universally agreed, legally

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<sup>2</sup> *Motilal Nehru Report, 1928* (Jan. 26, 2014), [http://csspoint.yolasite.com/resources/Nehru%20Report%20\(1928\).pdf](http://csspoint.yolasite.com/resources/Nehru%20Report%20(1928).pdf).

<sup>3</sup> *The Sapru Report, 1945* (Jan. 26, 2014) [http://archive.org/stream/saprucommittee035520mbp/saprucommittee035520mbp\\_djvu.txt](http://archive.org/stream/saprucommittee035520mbp/saprucommittee035520mbp_djvu.txt).

<sup>4</sup> Brij Pal, *Empowerment of minority in India*, 1 Global Advanced Research Journal of History, Political Science and International Relations 4, 89-94 (May, 2012) also available at <http://garj.org/garjhpsir/index.htm>.

binding definition of the term “minority”. This is primarily because of a feeling that the concept of “minority” is inherently vague and imprecise and that no proposed definition would ever be able to provide for the innumerable minority groups that could possibly exist. It is often stressed that<sup>5</sup> the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority).

The most widely acknowledged definition is the one formulated by Capotorti<sup>6</sup>.

A minority group as – “a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language”.

The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>7</sup> has defined minority as under:

1) The term “minority” includes only those non-documents group of the population which possesses and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;

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<sup>5</sup> United Nations, *International Standards and Guidance for Implementation* (2010) (Jan. 9, 2014) [http://www.ohchr.org/Documents/Publications/MinorityRights\\_en.pdf](http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf).

<sup>6</sup> FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES* 98 (1991).

<sup>7</sup> The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994), (15 Jan., 2014) <http://www1.umn.edu/humanrts/demo/1994min.html>.

- 2) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristics; and
- 3) Such minorities should be loyal to the state of which they are nationals.

No one of the above definition comes out to be comprehensive to cover all the varied situations, illustrates the difficulty experienced in assigning limits to concept of minority. This must remain the possible explainable reason why Legislature and Courts have not ventured to formulate a general definition.

After analyzing definition of minority and existing position in India, Bishnu N. Mohapatra<sup>8</sup> has drawn two conclusions. First, although an important dimension, numerical weakness alone does not define a minority. Second, minority status is essentially fluid and it varies across level and time. He further opined that in any given context, a minority identity of a group is not solely dependent upon certain objective factors such as population, economic well-being and so on. The group should also possess a subjective awareness of its distinct status in relation to others. Beside these two dimensions, State plays a crucial role in the construction of minority identity. The author does believe it true and this research paper is one step toward recognition of minority status of victims of crimes.

Every situation may not necessarily involve the assumption that the group in order to deserve the title of 'minority' must be distinguishable from the majority by the presence of the feeling or consciousness of its being different from the majority. A group distinguishable from others by the possession of certain objective characteristics, such as language, may not have a feeling or consciousness of its distinct status of being counting as minority. Hence the most acceptable definitions as discussed above are not beyond the reach of argument. That definition appears to be confined to those non dominant groups only which, apart from having certain objective characteristics that are distinctively of their

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<sup>8</sup> BISHNU N. MOHAPATRA, *Minorities and Politics*, in "The Oxford Companion to politics in India 225 (Niraja Gopal Jayal & Pratap Bhanu Mehta eds., 2010)."



own, wish to preserve the distinctive identities and are not willing to be assimilated with the rest of the population.

On the same issue while discussing Islamic discussions of Western Secularism in the 'jurisprudence of Muslim minorities', Andrew F. March<sup>9</sup> proposed a simple assumption to find out what constitute minority. His assumption is that all groups view themselves as more or less insular and equally closed vis-à-vis other groups. In a closed society consisting of only Catholics and Protestants, Catholics see Protestant reason as exclusive and thus potentially threatening. In a more complex society, Catholics see Protestant reason as equally exclusive as Jewish, Islamic, Mormon, or secular reason. In both of these societies, according to this simple assumption, where Catholics are a minority and their own reason cannot prevail they do not prefer the comprehensive reasoning of any of the other groups over any other, and thus have reasons to endorse some form of public reason.

As the Indian society is 'most complex society' consisting of many religions followed and languages spoken, his assumption about more complex society is equally true for Indian society. Hence it claims need of reconsideration of 'traditional concept of minority' through path-breaking research in this area.

### **Criteria of Recognition of Minority Status**

In India, the term "minority" is often used to denote those non-Hindu religious communities whose members are for one reason or another inclined to assert their distinctiveness in relation to Hindus. Thus, Muslims, Christians, Sikhs, Parsees and Jews are commonly described as minorities in India. The Indian Constitution recognizes only two types of minorities based on religion and/or language<sup>10</sup>. It does not recognize minorities based on culture, ethnicity, race or nationality. However, the

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<sup>9</sup> Andrew F. March, *Are Secularism And Neutrality Attractive To Religious Minorities? Islamic Discussions Of Western Secularism In The 'Jurisprudence Of Muslim Minorities' (Fiqh Al-Aqalliyyat) Discourse*, 30 Cardozo Law Review 6, 2821-2854 (2009).

<sup>10</sup> Under Article 25 to Article 30 of The Constitution of India.

emergence of lower caste movements, communal identities and ethno-nationalism have resulted to the phenomenon of identity politics in India on the one hand and deepening majority-minority syndrome on the other. In common parlance, “religion” tends to be limited to the easily identified faiths like Christianity, Hinduism, Judaism, Islam and Buddhism. Minority in India is confined to religious connotations. Hindus are regarded to be the majority while Muslims, Sikhs, Parsees, Anglo-Indians, Christians and now recently Jains are identified as religious minorities.

Religion as the primary basis of grouping people and differentiating between the majority and the minority has persisted even though it is by no means a comprehensive identity in the Indian context. But the fact that the Hindu society is further vertically and horizontally differentiated along caste lines remained out of mind. Indeed caste differences hinder Hindu population to act or behave as a cohesive majority<sup>11</sup>. What exist, as a consequence, are a number of caste groups, more in the shape of diverse minorities rather than a single majority. It necessitates reconsideration of the concept of “minority status based on religion.”

As a minority identity, and similar to religion in this aspect, language has been considered equally important facet of minority identity.

Although religion and language are the primary bases of determining minority identity in India, religious affiliation and linguistic similarities do not hold precedence in most part of India. In Northeast India, the formations of collective identity due to intense “ethnic mobilization” and “ethnic nepotism” detracts religious affiliation considered imperative to outline majority-minority framework. Nonetheless, certain groups of people are identified as “religious” and “linguistic” minority nationally; yet, the consolidation on the grounds of ethnic and caste element have rather been overriding criteria of identification than any others<sup>12</sup>. Thus, in order to define minority, it becomes essential to note the point of

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<sup>11</sup> Ch. Sekholal Kom, *Defining Minorities of India's Northeast*, 6 Eastern Quarterly III, 117-127 (2010).

<sup>12</sup> *Id* at 122.

reference where minority is to be outlined vis-à-vis the prevailing facet of identification resorted in that specific area. In other words, although the dual recognition of religion and language acted as the only accepted identification tools, the feeling of “relative deprivation” and “dominance” along caste and ethnic lines seems to fragment the different population groups into smaller segments. Hence the author believe that to limit concept of ‘minority’ to religious and linguistic groups and to give them special protection, at the end of day, results in misuse of state instrumentality for ‘hidden political ends.’

### **Recognition of Minority Status of Victims of Violent Crimes**

The history of human rights is an unending story of search for absolute values. The history of 2500 years of struggle for human rights can be summed up as follows<sup>13-</sup>

*From exploitation to exploration*  
*From exploration to proclamation*  
*From proclamation to declaration*  
*From declaration to protection*  
*From protection to perfection*

The term human right is emerged only after Second World War. The first documentary use of the expression ‘Human Right’ is found in the Charter of the United Nations<sup>14</sup>, which was adopted after Second World War at San Francisco on June 26, 1945. The preamble of this Charter declared its object as “to reaffirm faith in ‘fundamental human rights’.” But it was not a binding instrument. The only first concrete step in formulation of human right is the United Nations Declaration of Human Rights proclaimed in 1948 as a common standard of achievement for all people and all nations. The Declaration deals with many civil, political, social, economic and cultural rights. The Declaration is to be implemented through two international covenants namely, the Covenant on Civil and Political Rights, 1966 and the Covenant on Economic, Social and Cultural

<sup>13</sup> Lakshminath A., *Human Rights- Post-human Challenges*, 2 JMR 2, 1 (2011).

<sup>14</sup> The Charter of United Nations (Jan. 13, 2014)  
[http://www.unic.org.in/items/Other\\_UNCharter.pdf](http://www.unic.org.in/items/Other_UNCharter.pdf).

Rights, 1966, which came into force in December 1976. These covenants; and thereby human rights protected there under are legally binding on all member States who ratified it. All civilized countries have recognized most of the human rights either in statutes and Constitution itself or while interpreting these legislations. Some countries like UK<sup>15</sup> have changed their primary legislations (and sometime Constitutions) to make their legislative policies suitable for recognition and enforcement of Human Rights.

The concept of human right is inclusive and cannot be defined. The scope of Human Rights is increasing and there is new recognition of many rights which can result in better protection of Human Rights.

Till vary recent days the Human Right issues of victims of violent crimes were not taken seriously. It is only after the Second World War some criminologist started talking about victims' rights and only at the beginning of 21<sup>st</sup> century some legal systems recognized some rights of victims. Otherwise the poor victims of crime were entirely overlooked in misplaced sympathy for the criminals. On other hand the guilty man was lodged, fed, clothed, and entertained in a model cell at the expenses of the state.<sup>16</sup> Some of the rights of an accused person are protected by Indian Constitution under Article 22. But the victim remained unknown to the Indian Law and Criminal Jurisprudence till 2008 when some sort of statutory protection was accorded through the Code of Criminal Procedure (Amendment) Act, 2008. There may be a controversy among academicians as well as professionals about deterrent effect of punishment but there is no second opinion as to the need of protection and rehabilitation of victims of crime. Now it is well accepted that provision of punishment does not serve the cause of the victim. Hence the Hon'ble Supreme Court in *Delhi Domestic Working Women's Forum v. Union of India and others*<sup>17</sup> had directed the National Commission for Women to evolve a "scheme so as to wipe out the tears of unfortunate victims of rape". There are different schemes

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<sup>15</sup> The UK has changed its 11 primary legislations in response to adverse findings of Courts while implementing the Human Rights.

<sup>16</sup> VIBHUTE K. I., *Criminal Justice*, 350 (1<sup>st</sup> ed., 2004).

<sup>17</sup> 1995 (1) SCC 14.

of various State Governments (which are either implemented or in the process of formulation) with objective of protection and rehabilitation of victims of rape. But there is no such recognition of victims of other crimes. Hence the author proposes recognition of minority status for the victims of all types of violent crimes.

As per the existing standard of human rights, the traditional concept of minority denotes groups which basically possess following characteristics:

1. Its members experience discrimination, segregation, oppression, or persecution by a dominant group;
2. It is characterized by physical or cultural, linguistic etc traits, which are permanent or unchangeable, that distinguish from the dominant group;
3. It is a self-conscious social group; and
4. Membership in a minority is generally involuntary.

All the above standards, except about permanent or unchangeable physical, cultural or linguistic traits, are true with respect to victims of violent crime. This jurisprudential conflict about permanent or unchangeable physical, cultural or linguistic traits can be resolved by issuing 'ad-hoc certificates of minority status' in which court can specifically mention about validity period and mode of restitution and rehabilitation to which victim of crime is entitle.

### **The Benefits of Such Recognition**

The Constitution provides two sets of rights of minorities which can be placed in 'common domain' and 'separate domain'. The rights which fall in the 'common domain' are those which are applicable to all the citizens of our country. The rights which fall in the 'separate domain' are those which are applicable to the minorities only and these are reserved to protect their identity. The distinction between 'common domain' and 'separate domain' and their combination have been well kept and protected in the Constitution.

1. Common Domain under the Fundamental Rights – Part III of the Constitution,
2. Common Domain under the Directive Principles of State Policy – Part IV of the Constitution,
3. Common Domain under the Fundamental Duties – Part IVA of the Constitution,
4. Separate Domain under Article 29-30, Article 347, Article 350 and Article 350 A.

Apart from Constitutional Safeguards, there are some benefits in the form of schemes and programmes declared by State and Central Governments to which person became entitle to claim if he/she has been recognized as member of minority group. For example on the occasion of Independence Day, in 2005, the then Prime Minister, in his address<sup>18</sup> to the Joint Session of Parliament on February 25, 2005, had announced “15 Point Programme” for the Welfare of Minorities. The programme includes following benefits of various government schemes-

1. Equitable availability of the Integrated Child Development Services (ICDS) Scheme for holistic development of children and pregnant or lactating mothers from disadvantaged sections.
2. Improving access to School Education through the Sarva Shiksha Abhiyan, the Kasturba Gandhi Balika Vidyalaya Scheme, and other similar Government schemes.
3. Greater resources for teaching Urdu through recruitment and posting of Urdu language teachers in primary and upper primary schools that serve a population in which at least one-fourth belong to that language group.
4. Modernizing Madarsa Education through the Central Plan Scheme of Area Intensive and Madarsa Modernization Programme which provides basic educational infrastructure in areas of concentration of educationally backward minorities and

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<sup>18</sup> Government of India, Ministry of Minority Affairs, Annual Report 2005-06, (Jan. 10, 2014) [www.minorityaffairs.gov.in](http://www.minorityaffairs.gov.in).

resources for the modernization of Madarsa education.

5. Pre-matric and post- matric scholarships for meritorious students from minority communities.
6. Improving educational infrastructure through the Maulana Azad Education Foundation to strengthen and enable it to expand its activities more effectively.
7. A certain percentage of the Urban Self-Employment Programme (USEP) and the Urban Wage Employment Programme (UWEP) will be earmarked to benefit people below the poverty line from the minority communities.
8. Upgradation of skills of members of minority community through technical training in ITIs.
9. Promoting economic development activities among the minority communities by enhanced credit support for economic activities through the National Minorities Development & Finance Corporation
10. Recruitment to State and Central Services through large scale employment opportunities by the Central and the State Governments in the police organisations, the Railways, nationalized banks and public sector enterprises.
11. Equitable share in rural housing scheme by reserving a certain percentage of the various schemes providing financial assistance for shelter for poor beneficiaries from minority communities living in rural area.
12. Improvement in condition of slums inhabited by minority communities under the schemes of Integrated Housing & Slum Development Programme (IHSDP) and Jawaharlal Nehru National Urban Renewal Mission (JNNURM).
13. Prevention of communal incidents by appointing district and police officials of the highest known efficiency, impartiality and secular record in the areas having such previous record.

14. Prosecution for communal offences for severe action against all those who incite communal tension or take part in violence.
15. Rehabilitation of victims of communal riots by providing immediate relief and prompt and adequate financial assistance.

Out of these 15 points, the last three points directly deals with and can be used even if victims can be given 'minority' status. Out of the remaining points, only the point at sr. no. 3 and 6 cannot be used if victims can be given 'minority' status as it specifically relates to religious and cultural minority. Otherwise for all other points minority status to victims of crime does not make any change. All these schemes can be extended for victims of violent crimes. The funds can be raised by different ways. In this regard some academicians have attempted sincerely to find out different ways to build the funds for compensation to the victims of crime. According to Prof. (Dr.) N. R. Madhava Menon<sup>19</sup> there are many ways in which victim compensation can be generated by Center and State Govts. It includes-

1. Initial grants by State and Central Govts.
2. Court fees collected in full or part which exceeds Rs. 100 Crores the whole country every year.
3. Fines imposed on conviction by criminal courts, which may substantially increase, particularly in economic offence and from rich convicts.
4. Unclaimed small decree amount accumulated over the years.
5. Donations to the fund which may be exempted from tax like prime Minister's Relief Funds.
6. Access of Rs. 5 on select pleadings filed in criminal courts.
7. Monetary amount ordered to be paid by courts (punitive damage the Fund in different types of cases coming up before them.

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<sup>19</sup> N.R. MADHAVA MENON, *Victim Compensation Law and Criminal Justice; A Plea for Victim Orientation in Criminal Justice*, in *CRIMINAL JUSTICE- A HUMAN RIGHT PERSPECTIVE OF THE CRIMINAL JUSTICE PROCESS IN INDIA* 365 (K.I. Vibhute ed., 2004).



8. Bail bond forfeitures and
9. Wages earned by prison inmates

Above sources are sufficient to rise funding for protection and rehabilitation of victims of crime. There is no scarcity of funds when different State Governments started paying compensation to the victims of crime. For example State of M.P. The CAG Report<sup>20</sup> revealed that an amount of Rs. 2.46 crore was deposited in the common fund up to March 2006, out of which an amount Rs. 8.10 lakh only could be disbursed to 81 beneficiaries and balance of Rs. 2.38 crore was lying unutilized against which only 25 cases were pending at the end of March 2006. Same is the story of schemes formulated and implemented by many other State Governments. It means the only issue is about instrumentality through which Government can achieve noble objective of protecting human rights of victims through proper restitution and rehabilitation.

### **Jurisprudential Conflicts of Such Recognition of Victims**

In spite of the persisting divergent views, the explanations of definitions of the concept 'minority' reveals four basic elements that make a minority; (i) a minority is a non-dominant and numerically insignificant group; (ii) distinguishable on the basis of physical and cultural features which are not changeable; (iii) collectively being regarded and treated as different and inferior; and (iv) minorities are the product of aggregation/segregation in a definite geographical locale. Thus, it is apparent that the traditional concept of 'minority' includes culturally, ethnically and linguistically distinct group, numerically inferior and non-dominant group living within a larger society. Thus, 'minority' has been understood as a comparatively non-dominant smaller group of people differentiated from others in the same society by race, religion, ethnic, language etc.

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<sup>20</sup> CAG Report, Jail Department, *Audit Report (Civil) for the year ended 31 March 2006* (Jan. 22, 2014) <http://www.agmp.cag.gov.in/reports/State%20Audit%20Reports/2005-06/civil/civ%2005-06%20combine.pdf>.

The Indian Constitution rejects creation of a political majority on the basis of religion or language. The term “minority” is mentioned in four of its Articles namely Articles 29(1), 30, 350-A, 350-B, however, it nowhere defines the term “minority” nor delineates criteria for determining minority. In most cases, “minority” in India is described as that groups which are outside majority (i.e., Hindu). Thus, it implies that the core of Indian identity is Hinduism. This signifies that only religious groups, that are numerically smaller, can be minorities. On the other, it mapped out large ethno-linguistic states within the “Indian Union.” India as a “Union of States” formed laws and codes for Centre-State relationship for distributing powers among these ethnically based territorial provinces (states). As a result, the traditional concept of “minority” became confined to the religious minorities nationally and to a specific linguistic, religious or an ethno-cultural minority within a state, even if that “minority” constituted a majority in another state of India.

Apparently it looks, as Rakesh Kr. Singh<sup>21</sup> believes, that the purpose of Article 29 is to facilitate migration of people. If, for example, a few people from Madras were to come and settle down in Mumbai, they would constitute a cultural and linguistic minority in Maharashtra and Article 29 would protect their culture, language and script. But according to author such situation clearly means that if a person belonging to such religious or linguistic group wants to make avail benefits of minority status – he needs to be part of such state where such religious or linguistic group is recognized as ‘minority’ and he loses the benefits of minority status if he migrates to the state where such group is not minority. Indirectly recognition of minority status on the criteria of religion or language is nothing but to restrict right to reside and settle in any part of the territory of India. In short traditional concept of minority is violation of Article 19 (1) (e) of the Constitution of India.

Hence, it is to be noted that religion or language could not be the only criteria of determining one’s minority identity. In fact, inequality also persists between people

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<sup>21</sup> Rakesh Kr. Singh, *Constitutional Mandate and Rights of Linguistic Minorities*, 48 *JILI* 2, 271 (2006).

professing the same faith and having same language of communication.

Recently some western countries have started debate on recognition of minority status on the basis of sexuality. The same has been started even in India<sup>22</sup>. It must be noted that certain concepts which developed from specific western contexts which *ipso facto* claimed to have universal validity does not necessarily have pernicious consequences for third world societies. In contemporary Indian society, on the same line we must review criteria for recognition of minority status and think seriously for awarding minority status to the victims of violent crimes.

### Way Outs to the Jurisprudential Conflicts

During the framing of Constitution of India, the *Dalits/Harijans* as well as the 'backward' tribals claimed minority status<sup>23</sup>. In the deliberations of Constituent Assembly, the minorities question was regarded as encompassing the claims of three kinds of communities: religious minorities, Scheduled Castes, and 'backward' tribes, for all of whom safeguards in different forms had been instituted by the British and by Princely States in the colonial period.

The representatives of most groups claiming special provisions in some form emphasized that the group was a minority of some kind. So close was the identification of the term 'minority' with the notion of special treatment for a group that even those opposed to a continuation of the colonial system of minority safeguards employed the same language to justify their stand. For instance, it was argued that the 'so-called minorities' were not the 'real minorities'. The latter were variously identified as 'the agriculturists', 'the rural people', 'the backward provinces', even 'the masses'. The claim was that these were the groups that ought to receive special treatment, rather than the communities hitherto favoured by the British Ruler<sup>24</sup>.

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<sup>22</sup> A PUCL-K fact-finding Report about Bangalore, *Human rights violations against sexuality minorities in India*, (Jan.26, 2014) <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf>.

<sup>23</sup> CAD, I, at 139 *see also* p. 284.

<sup>24</sup> CAD, I at 264.

But this view remained “Minority Opinion” in Constituent Assembly and majority of members were not ready to recognize minority status for – the agriculturist, the rural people, etc.

Few members of Constituent Assembly understood that this “Minority Opinion” holds water and when time demands any group (even the masses) can be recognized as ‘minority’ based on criteria other than religion or language. Hence Constituent Assembly replaced word ‘minority’ (as throughout world it is intrinsically connected with religion, language, ethnicity, etc) with ‘any section’ (which is open ended where any group can be accommodated).

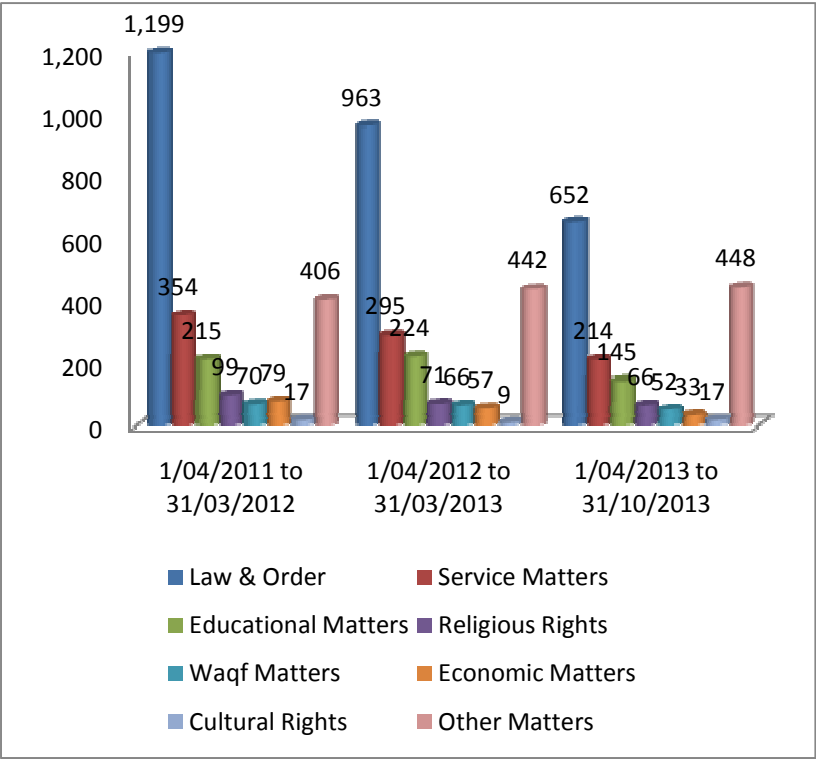
Dr. Ambedkar sought to explain the reason the reason for substitution in the Draft Constitution of the word minority by the words “any section” observing:

“It will be noted that the term minority was used therein not in the technical sense of the word ‘minority’ as we have been accustomed to use it for the purpose of certain political safeguards, such as representation in the Legislature, representation in the service and so on. The word is used not merely to indicate the minority in the technical sense of the word; it is also used to cover minorities which are not minorities in the technical sense, but which are nonetheless minorities in the culture and linguistic sense. That is the reason why we dropped the word “minority” because we felt that the word might be interpreted in the narrow sense of the term when the intention of this House....was to use the word ‘Minority’ in a much wider sense so as to give cultural protection to those who were technically not minorities but minorities nonetheless”.

After more than 60 years to the Constitution of India, now the time demands that for protection and enforcement of Human Rights of victims of crime, we need to recognise victims of crime as ‘minority’. By doing so, with few *jurisprudential adjustments*, Minority

Commission can be used as 'State Instrumentality' for protection and rehabilitation of victims of crime. The author does not see any other better way for protecting Human Rights of victims of violent crimes.

If one tries to analyze working of Minority Commission- it is crystal clear that even today, when victims of crime are not recognized as 'minority'; in most of the cases the National Minority Commission is engaged in solving 'Complaints of Law and Order'(see figure-1). So now the National Minority Commission is playing very vital role in protection and rehabilitation of victims of crimes belonging to 'minority' communities. The author proposes that after successful working for last more than 20 years, now it is demand of time to give constitutional status to the National Minority Commission and to widen its powers and functions to include victims of violent crime as a 'minority'.



**Figure 1:** Subject wise Complaints to National Commission for Minority, **Source:** Reports of Complaint Monitoring System, *available at:* [http://ncm.nic.in/Complaint\\_Monitoring\\_System.html](http://ncm.nic.in/Complaint_Monitoring_System.html).

**Conclusion**

It is not surprising that there should be both favourable and unfavourable views towards recognition of victims of violent crimes as ‘minority’. This research is, after all, a fundamentally doctrinal discussion, rather than a pragmatic one. Internal consistency and overall coherence shows need of and possibility of recognition of minority status of victims of violent crimes for their adherence and support. Fundamentally everyone including academicians, jurist, legislators and common citizen of India agrees that there is need of protection and rehabilitation of victims of violent crime. Most of the State Governments have formulated, and few of them have started implementation of different schemes to achieve

such objective. Indeed, the cost of creating new Instrumentality for such purpose is very high and certainly not expected in India. Hence the author proposes to recognize minority status for victims of violent crime and to make them beneficiary of all the benefits available for members of minority community. For that purpose the author suggests following changes-

- 1 The court, in each and every case for protection and rehabilitation of victims of crime, shall issue certificate of 'Minority Status' mentioning amount of compensation and or any other facility to be provided for restitution and rehabilitation of victims of crime. The National Commission for Minority shall do all the needful, on the production of such certificate of 'Minority Status'.
- 2 For recognition of minority status of victims of crime, the author suggests following amendment to the Constitution of India-

Article 29 A: Protection of Interest of Victims of Violent Crime: (1) every victim of violent crime shall have right to compensation and or restitution including rehabilitation in such manner as the State may, by law, determine.

(2) No victim of violent crime shall be denied the benefits of any scheme or programme available to the member of minority except the rights provided under Article 30 of the Constitution of India.

- 3 Constitutional status to National Commission for Minorities can help in the matters of protections of Human Rights of victims of crimes. The author suggests following constitutional amendment to that effect-

"Article 338 B. National Commission for Minorities- (1) There shall be a Commission for the Minorities to be known as the National Commission for Minorities.

(2).....

.....  
 .....”

The author suggests all analogous provisions as provided under Article 338 and Article 338 A of the Constitution for the National Commission for Schedule Caste and the National Commission for Schedule Tribe respectively.

- 4 Sec. 9(1) of the National Commission for Minorities Act, 1992 needs to be amended for inclusion of following sub-clause:

“j. to award compensation and or to take such measures as required for protection and rehabilitation of victims of violent crimes as per ‘the certificate of minority status’ issued by the Court”





# THE PROTECTION OF CULTURAL RIGHTS OF MINORITIES IN INDIA: AN ANALYSIS OF CONSTITUTIONAL COMMAND

Mr. Abhijeet Ramkrishna Dhere\*

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## Introduction

India is a land which is very well known for its acceptance of various cultures and peaceful co-existence. Various cultures have mixed with each other and have created a very great and unique pattern of culture which is rare on the earth. As far as the history of India is concerned it is very evident that from time to time India has been the very much attracting destination for the invaders. The invaders have come to invade India and have forgotten to go back to their home. They have settled down here only and this has given birth to the multifaceted and pluralistic nature of Indian Society. *Arya, Shakas, Hoon, Mughals, Parsis* all they came to India and lived very happily here. This plural society has given India a very unique face at the international level. In modern time because of some events the issue of peaceful cohabitation has become crucial. The majorities started suppressing the minority voices and then the problem was started. The need was felt for the protection mechanism for the protection of minorities' rights. The Constitution framers were very much aware about this and they have provided with the specific provisions for the same. The issue of minority rights has been very extensively dealt by the Constitution of India. The protection provides for linguistic as well as the religious minorities for the protection of language and their unique culture. The present essay focuses on particularly the issue of cultural rights of the minorities and the mechanism provided for the protection of those rights with the special reference to the judicial pronouncements.

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\* Assistant Professor, Modern Law College, Pune.

## The Conceptual Evolution of the Rights of Minorities

The word minority has not been defined anywhere in the Constitution of India. But for the present essay it is very much important to look into the definition of the word minority. According to the *Encyclopedia Britannica*, the word “minority”, means a culturally, ethnically, or racially distinct group that coexists with but is subordinate to a more dominant group. As the term is used in the social sciences, this subordinancy is the chief defining characteristic of a minority group. As such, minority status does not necessarily correlate to population. In some cases one or more so-called minority groups may have a population many times the size of the dominating group, as was the case in South Africa under apartheid<sup>1</sup>.

In light of this general definition we also have to take into consideration the definition given by our Hon'ble Supreme Court, while deciding over the issue of minority, in *Jain Minority* case<sup>2</sup>, held that: “Minority is as understood from the constitutional scheme signifies an identifiable group of people or community who were seen deserving protection from likely deprivation of their religious, cultural and educational rights by other communities who happen to be in majority and likely to gain political power in a democratic form of government based on election”. Thus accordingly in India there are Five communities which are considered to be the Minorities on the basis of Linguistic and Religious base viz Muslim, Parsi, Buddhist, Sikh and recently included Jain Community, at the national level. And the issue of identification of a minority has to be done on a State basis. The power of Central Government has to be exercised not merely on the advice and recommendation of the National Commission for Minorities but on consideration of the social, cultural and religious conditions of the community in each State. Statistical data produced to show that a community is numerically a minority cannot be the sole criterion. If it is found that

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<sup>1</sup> The Encyclopedia Britannica,  
<http://www.britannica.com/EBchecked/topic/384500/minority>, (2 Feb 2014).

<sup>2</sup> Bal Patil v. Union of India, AIR 2005 SC 3172;(2005) 6 SCC 690; JT 2005(7) SC 185.

a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the National Commission for Minorities Act as such and extend any Special treatment or protection to them as a minority. The provisions contained in the group of Articles 25 to 30 are a protective umbrella against the possible deprivations of fundamental rights of religious and linguistic minorities.<sup>3</sup>

### **The International Developments in the Protection of Cultural Rights of Minorities**

The process of protection of cultural rights of the minorities has not been evolved in a single day. It has taken a substantial time of the history to develop. It is not the contribution of any particular country but it is having a very strong base at the international Level. Therefore it becomes very much essential to look into the International perspective of the issue of cultural rights. Various international treaties and covenants have provided for the protection of the important rights of minorities. Minority protection incorporates some of the earliest articulations of cultural rights and the protection of intangible cultural property in international law. Although cultural diversity was encouraged by such treaty provisions, it was often not their explicit purpose. Instead, peace and progress have been the consistent rationales attached to the inclusion, or otherwise, of such provisions.

In the wake of the twentieth century during the period of wars that is from 1919 to 1945, there was a detailed, but flawed, articulation of minority protection. The Allied governments refused to concede the universal application of minority protection by including it in the Covenant of the League of Nations. They were not willing to include the express mention for the protection of cultural rights of minorities in the Covenant. Instead, it was included in peace treaties with specific central and eastern European States.<sup>4</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> C.A. Macartney, *National States and National Minorities*, 240, (1968); and P. Thornberry, *International Law and the Rights of Minorities*, 41 (1991).

The issues addressed by these treaty provisions, and the Permanent Court of International Justice's (PCIJ) interpretation of them, continue to resonate to the present-day in multilateral instruments covering minorities, cultural diversity, cultural rights and intangible heritage. Drawing from the guarantees afforded certain groups in various nineteenth century, the inter-war minority protection had two distinct components. The first arm covered the principle of non-discrimination, that is, members of the minority were as entitled to equal enjoyment of civil and political rights as other nationals.<sup>5</sup> Although these guarantees provided for the use of minority languages, the PCIJ found that their intended purpose was to 'prevent any unfavorable treatment, and not to grant a special regime of privileged treatment.' They were, it said, of 'a purely negative character in that they are confined to a prohibition of any discrimination.'<sup>6</sup>

On the other hand the second arm of these international guarantees provided that minorities should enjoy the equal right to establish, control and manage their own 'charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.'<sup>7</sup>

When it defined what constituted a minority for the purposes of these treaty provisions, the PCIJ made reference to the intangible elements of their cultural identity. It found that the relevant 'community' was, "...united by ... a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another".<sup>8</sup> This particular interpretation by the PCIJ has proved to be very much dynamic in the international level and therefore the

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<sup>5</sup> Rights of Minorities in Upper Silesia (Minority Schools), 29, 1928 PCIJ Series A, No.15.

<sup>6</sup> *Id.* at 30.

<sup>7</sup> Treaty of Peace between the Allied and Associated Powers and Austria, St Germain-en-Laye, Article 67, Section V, 10 September 1919, in force 8 November 1921.

<sup>8</sup> Advisory Opinion in the Greco-Bulgarian 'Communities', 1930 PCIJ Series B, No.17, 33.

relevant State was placed under a positive obligation to assist in the realization of rights contained under this second arm. This interpretation was reinforced with the requirement that in territory where the minority made up 'considerable proportion of ... nationals' the State was required to provide instruction in the minority language in public education system; and an equitable share of public funds to the communities to realize these goals.<sup>9</sup> This international development has been the base for the evolution of the concept of rights of minorities in Indian context. The Indian Constitution finds its base in these international documents.

### **Genesis and Growth of the Concept in the Indian Constitution**

From the very beginning the Framers of our Constitution were very much aware about the importance of the term "protection of minorities" in every aspect. It was considered as the essential provision for the protection of India's long tradition of peaceful coexistence of various cultures right from the ancient times. The framers therefore expressly provided for the protection of linguistic as well as the cultural rights of the minorities. The constitutional provision for the protection of minorities rights are expressed under Articles 29 and 30. Articles 29 and 30 read as follows.

#### **Article 29: Protection of interests of minorities**

- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
- (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

#### **Article 30: Right of minorities to establish and administer educational institutions**

- (1) All minorities, whether based on religion or language, shall have the right to establish and

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<sup>9</sup> Treaty of St. Germain-en-Laye, Article 68, Section V, 1919.

administer educational institutions of their choice.

- (1A)** In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
- (2)** The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.<sup>10</sup>

From the above provision we can draw a conclusion that the scheme which is provided in the Constitution is very much clear on the point that the distinct culture of the minorities and the distinct language of them is to be preserved and it puts the duty on the State to have a substantial mechanism for the protection and preservation of the same.

This development will be more clarified if we look into the Constituent Assembly debates which were there for this particular inclusion of the term protection of minorities interests. There was a separate Minority Sub Committee was setup to study and review the policies for the minority rights under the Chairmanship of H.C. Mukherjee.<sup>11</sup> The Minorities Sub-committee recommended that the following provisions among others be included under the Fundamental Rights in the Constitution:

- (i)** All citizens are entitled to use their mother tongue and the script thereof, and to adopt, study or use any other language and script of their choice.

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<sup>10</sup> PROFESSOR M. P. JAIN, INDIAN CONSTITUTIONAL LAW, 1704-1708, Volume 1, LexisNexis Butterworths Wadhwa, Nagpur, (6<sup>th</sup> Edition, 2010).

<sup>11</sup> The Parliament of India, available at <http://parliamentofindia.nic.in/ls/debates/facts.htm>, 1 (2 Feb. 2014).

- (ii) Minorities in every unit shall be adequately protected in respect of their language and culture, and no Government may enact any laws or regulations that may act oppressively or prejudicially in this respect.
- (iii) No minorities, whether of religion, community or language, shall be deprived of its rights or discriminated against in regard to the admission into State educational institutions, nor shall any religious instruction be compulsorily imposed on them.
- (iv) All minorities, whether of religion, community or language, shall be free in any unit to establish and administer educational institutions of their choice, and they shall be entitled to State aid in the same manner and measure as is given to similar State-aided institutions.
- (v) Notwithstanding any custom, law, decree or usage, presumption or terms of dedication, no Hindu on grounds of caste, birth or denomination shall be precluded from entering in educational institutions dedicated or intended for the use of the Hindu community or any section thereof.
- (vi) No disqualification shall arise on account of sex in respect of public services or professions or admission to educational institutions save and except that this shall not prevent the establishment of separate educational institutions for boys and girls.<sup>12</sup>

The Advisory Committee in its interim report submitted on 23 April, 1947, incorporated provisions at (ii), (iii) and (iv) above in its clause 18 which read as follows:<sup>13</sup>

**“18. (1)** Minorities in every unit shall be protected in respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect

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<sup>12</sup> DR. SUBHASH KASHYAP, CONSTITUTIONAL LAW OF INDIA, 2590-2598, Volume 1 & 2, Universal Law Publishing Co., Delhi, (Ed. 2008).

<sup>13</sup> *Id.* at 770-772.

- (2)** No Minority whether based on religion, community or language shall be discriminated against in regard to admission into State educational institutions.”

With the fear of the partition of the country already looming large on the horizon when the clause came up for consideration in the Constituent Assembly on 1 May, 1947, there was some discussion on whether such rights would be provided to minorities in the areas that ceded from India. However, the Assembly decided to stick to the principle of protection of minority rights in India irrespective of what happens elsewhere. Clauses 18 (1) and (3) were adopted without any change while clause 18(2) was referred back to the Advisory Committee for clarification.<sup>14</sup>

The Advisory Committee reconsidered sub-clause (2) and in its Supplementary Report submitted on 25 August, 1947, did not suggest an amendment to delete from clause 18(2) the words nor shall any religious instruction be compulsorily imposed on them. The Committee further said:

“We have examined the question as to whether the scope of the clause should be extended so as to include State-aided educational institutions also and have come to the conclusion that in present circumstances we would not be justified in making any such recommendation.”

When clause 18(2) came up for consideration before the Constituent Assembly on 30 August, 1947, the following amendments were moved:

- (i)** Ahmed Ibrahim, one of the members of the Constituent Assembly suggested that sub-clause (2) should not apply to State-aided educational institutions maintained for the benefit of a particular community or section of the people,
- (ii)** Mohan Lai Saxena suggested that no State aid should be extended to any institution imparting religious education unless the syllabus thereof was approved by the State,

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<sup>14</sup> The Constituent Assembly Debates, 497-504, Vol. III.



- (iii)** Purnima Banerji gave suggestion that State-aided institutions should be included within the purview of the sub-clause.

The Drafting Committee after prolonged deliberations presented a revised draft as Article 23 of its Draft Constitution of February, 1948. It read:

- (1) Any section of the citizens residing in the territory of India or any Part thereof having a distinct language, script and culture of its own shall have the right to conserve the same.
- (2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the State.
- (3) (a) All minorities whether based on religion, community or language shall have the right to establish and administer educational institutions of their choice.  
(b) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion, community or language.

When the Draft Constitution was circulated for eliciting opinion and comments, several suggestions were received from members and others including institutions like a State Legislative Councils and personalities like Jaya Prakash Narayan<sup>15</sup>.

Draft article 23 was discussed in the Constituent Assembly on 7 and 8 December, 1947. M.L. Chattopadhyaya said that the article was a great charter of rights for all the linguistic minorities in different parts of India. Of the many amendments, the following were accepted by the Drafting Committee and adopted by the Assembly:

- (i)** The Suggestion which was moved by Dr. Ambedkar, that in clause (1), the words

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<sup>15</sup> Constitutional Assembly Debates, Available at <http://parliamentofindia.nic.in/ls/debates/debates.htm>, 1 (02 Feb 2014, at 2.30pm).

"language, script and culture" be replaced by the words "language, script or culture"<sup>16</sup>

- (ii) Thakurdas Bhargava moved suggestion that clause (2) should read as follows:

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

- (iii) That the word "community" be omitted from clause (3) also, which was moved by Thakurdas Bhargava.<sup>17</sup>

Draft article 23 as amended by the above was adopted to stand part of the Constitution.<sup>18</sup> Finally at the stage of revision, draft Article 23 was divided into two separate articles - Articles 29 and 30 of the Constitution.

This was the process by which the current provision for the protection of the rights of the minorities has been incorporated in the Constitution of India. The protection is provided at the three levels one is at the linguistic level and second is at the cultural level and lastly on the educational level. And we can say that the framers of the Constitution were very keen in protecting all these three rights separately and substantially.

### **Protection of Cultural Interests of the Minorities in India**

As discussed above it is now clear that, in India the protection given to the minorities is twofold. That they can preserve their distinct script as well the distinct culture. In European countries and some Western Countries the stress was laid on the cultural unification of the population. They feared that the cultural diversities will create a threat to the unity and integrity of the nation. On the other hand India has provided a very unique model which lays down the principle of multi culturalism and a pluralistic society. India has established the principle of 'Unity in Diversity'. With respect to this concept if we see our system for the protection of the

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<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> The Constituent Assembly Debates, 904-927, Vol. VII.

minorities interests, we may find that, right from the very beginning of the commencement of the Constitution the more stress has been laid on the language preservation. Comparatively the issue of cultural preservation has not been given that much importance as it was needed. Various schemes were formulated by various governments for the preservation of scripts of the distinct languages. Languages such as *Urdu*, *Gurumukhi*, *Parsi*, *Pali* are protected by the Government by extending the funds at various levels and by creating the research centers for them. But for the cultural heritage of these minority communities the Government has not paid much attention.

The Muslim community is enriched with the Sufi culture and it has been the great heritage for the India. The Sufi music in the form of *Qawwalis* is the most popular form of the art in India well as the world at large. This form has been proved to be very effective for creating the harmony between the growing enmities among the majorities and minorities. This and other art forms which are forming the essential part of the cultures are not taken into consideration by the Government and no substantial step has been taken for the preservation of the same.

As far as the Buddhist minorities are concerned, they are also having the great ancient cultural heritage. The Buddhists can be divided into two major groups. One group is formed by the Buddhists which were there before 1956. And the second part is formed by the people who were converted to Buddhism after the emancipation struggle led by Dr. Babasaheb Ambedkar, in 1956. The former group is largely situated in the North East region of the Country and is having very distinct culture as well language and script. The latter group is largely situated in Maharashtra, who belongs to the scheduled caste. The Buddhists in Maharashtra, who were called as the *Mahars* before the Independence, are the people who are also having the distinct pattern of culture. Their struggle for the emancipation which was started by the Mahatma Jyotiba Phule got its final fruit with under the leadership of Dr. B.R. Ambedkar. And after Ambedkar the struggle is still going on various issues for achieving the social status. This struggle was led with the intention of

cultural emancipation. The *Jalsaa*, an art form which has a very close resemblance with that of Sufi Qawwali, has been the medium for this struggle. On various occasions Dr. Ambedkar has said that the process of emancipation is more effectively led and reach to people only with the help of the popular art forms. The cultural emancipation is as important as the political one.<sup>19</sup> This is a very important cultural heritage for the Buddhist minorities in Maharashtra. The Government has not paid attention for the preservation of this art form and which is now on the verge of vanishing.

In likewise manner the cultural heritage of the Sikh community and Parsi communities is also in danger because of the changing situations. As the Government has not been very keen in protecting and preserving this, these art forms are dependent on the society for their preservation. It is now seen that the majority forces are dominating these minorities' cultural aspects and as a consequences these are at the verge of vanishing. The way in which the Government has provided for the educational and the linguistic protection it has now take into consideration the aspect of preservation of Cultural heritage of these minority communities.

## Conclusion

The art forms such as *Qawwali* and others are very much effective in creating the harmony between various social factors, therefore it needs to be protected and promoted by the Government. The cultural aspect of the human life is the most important and essential element hence it has to be given more importance. The society is developed through the cultural evolution and it is having a great impact on the social life as well as on the political and psychological life of the individual. The society changes very dynamically and according to that the cultural patterns of the society are also changing. In this changing situations the State as to take care that every section of the society is able to protect and preserve its cultural rights. And therefore state has provided them with the adequate means for the protection of their

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<sup>19</sup> NARENDRA JADHAV, AMBEDKAR SPEAKS, Volume I, II and III, Konark Publishers Private Ltd, New Delhi, 2013.

cultural interests. The minority communities which are struggling for their existence but mere existence without their own cultural heritage will give a way to the feeling of alienation in the minds of these minority communities. Thus it is duty of the State to protect their culture to the effect that these sections of the society will feel as they are the part of this society and ultimately this nation. This is particularly also important for the preservation of the goal of the Indian federalism that is 'Unity in Diversity'. The State has to take an affirmative action for this in the form of policies and by providing the protecting mechanisms for the same.



## MINORITY: EXAMINING THE CONCEPT

Mr. Vinod Shamrao Pawar\*

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### Introduction

The 'concept of minority' has become a question of global importance. In India this question has been long standing, controversial and very much discussed in modern times. In the Constitution of India we find reference of two kinds of minorities-religious and linguistic. But the Constitution does not define the term "minority". While extending the protection of the minorities to a particular group it becomes pertinent to identify who the minorities are. It becomes necessary to do so to ensure that the real minorities get the protection of the Constitutional provisions.

In India the minorities are victims of a dual nature. Various studies reveal that they have lagged behind in various fields and at the same time they are said to be appeased by the government. The concept of minority has attracted much attention, especially when the question of Minority Educational Institutions and their rights were discussed by the judiciary and the public at large.

The present article is limited to the concept of minority, its origin, meaning, development and the present situation. It also attempts to study whether there are any conceptual lacunae in the concept and whether the concept as followed in India is in line with the concept as followed by the International Agencies. Such agencies like the United Nations have also tried to define the term minority. But, it can very well be said that:

"The task of defining the term minority proved to be of such difficulties and complexities that neither the experts in this field nor the organs of International Agencies have been able to accomplish it to date. Thus there is no definite definition which is capable of being universally accepted."<sup>1</sup>

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\* Assistant Professor, New Law College, Bharati Vidyapeeth, Sangli.

<sup>1</sup> Mishra Naveen, Singh Sudhir Kumar, Status of Minorities in South Asia, Authors Press, New Delhi p. 4 (1<sup>st</sup> ed., 2002).

This reality has inspired the researcher to undertake the present research and to critically examine the concept of minority with reference to the Indian legal system. It also attempts to examine whether the concept as followed in India and its interpretation by the judiciary has given rise to any ambiguity or misuse. It tries to study the various judgments of the Apex court which are concerned with the concept of minority.

The research further emphasizes that apart from numerical criteria other criteria should also be considered. It further points out the absurd situations which arise after considering language as the criteria for determination of minority status of a community.

### **Objectives of the Study**

- To find out the meaning of the term 'minority' and to trace its historical background in context of India.
- To study the relevance of the concept taking into consideration the peculiar Indian scenario.
- To find out whether there is any conceptual lacuna in the concept of minority as followed in India.
- To study whether any novel approaches can be adopted regarding the concept of minority and their identification.

### **Methodology**

The present study is a Doctrinal Research. For this work mainly secondary data has been used. The sources for collecting data would be Constitutional Assembly Debates, the Constitution of India, Text Books, Case Laws of the Supreme Court of India, Articles from Journals, and Newspapers and the Internet.

### **Meaning of Minority**

In every country of the world there are some minority communities. In the nineteenth century there was the growth of the idea of Nationalism. During this period the question of minorities gained importance. One religion, one race, one language became the characteristics of Nationalism. The main reason for the existence of minorities in various countries is the expansion of

boundaries of countries and migration of various communities for a number of reasons. Religious conversions have also contributed to this. The migration was due to occupation of the homeland by the enemy, or to settle permanently in another country, or to seek refuge in another country. People had to leave their own country due to different political opinion, or in some cases it was voluntary migration. In many instances people were forcibly taken away to work as slaves on farms and plantations of westerners.

Democracy itself implies that the majority will rule because of their numerical superiority. Naturally the minority have to remain subservient to the majority community. In many countries the relations between minority and majority have remained strained due to variety of reasons.

“Minority and majority are basically arithmetical terms showing the relative numerical position of various groups in a particular political entity.”<sup>2</sup>

The concept of minority is not only related to the numerical strength of a particular community, but it is related to the basic difference between the power of the majority and the minority community.

Defining the concept of minority has proved to be a challenge to the global community.

“The world seems to be at the moment gripped with uncertainties at defining the word ‘minority’. According to *International Encyclopedia of Social Sciences*, minority is defined as a group of people-differentiated from others in the same society by race, nationality, religion or language—who thinks of themselves as a differentiated group with negative connotation. Further, they are relatively lacking in power and hence are subjected to certain exclusions and other differential treatment.”<sup>3</sup>

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<sup>2</sup> Tahir Mahmood, (edited) *Politics of Minority Educational Institutions Law and Reality in the Subcontinent*, imprint One, Gurgaon, p. 11, (1<sup>st</sup> ed., 2007).

<sup>3</sup> Mishra Naveen, Singh Sudhir Kumar, *Status of Minorities in South Asia*, Authors Press, New Delhi p. 77 (1<sup>st</sup> ed., 2002.)



According to *Dictionary of Political Science*, the term minority means: "Group which is composite society forms one of the smaller parts. Its numerical weakness implies a potential threat to its equality, and protection of racial, ethnical, religious rights. Minorities are a major concern of our democratic systems. Yet some disablements of a minority are caused by the minority to submit to a contrary will and at many elections, the voice of an even sizeable minority is totally muted."<sup>4</sup>

### **Minorities in India**

The Constitution of India recognizes two categories of Minorities:

- i) Religious minorities and
- ii) Linguistic minorities

India being a multilingual country, the presence of linguistic minorities need not be explained. On the other hand the presence of religious minorities according to Dr. Naveen Mishra, has been explained by Oomen T.K. in the following words:

"Religious minorities in India may be grouped in to three broad categories based on the source of their presence. They are --

- a) Protest religions of India, e.g., Jainism, Buddhism and Sikhism.
- b) Migrant religions, e.g., Judaism and Zoroastrianism.
- c) Religions which are perceived to be products of conquest and colonialism, e.g., Islam and Christianity."<sup>5</sup>

### **The Concept of Minority according to International Agencies**

With the establishment of the United Nations the question of the rights of minorities gained importance. A sub commission on Human Rights known as the Sub-commission on the prevention of Discrimination and protection of minorities was established in 1947. It is

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<sup>4</sup> Bhatt Rakesh, *Dictionary of Political Science*, Mohit Publication, New Delhi (1<sup>st</sup> ed. 2005).

<sup>5</sup> Oomen T.K., *State and Society in India*, Sage Publications, New Delhi, 1990, p. 207, Requoted from Mishra p.127.

important to note that the Universal Declaration of Human Rights which is the highest moral sanction of all human rights contains no provisions about the rights of minorities. The General Assembly stated that the United Nations cannot remain indifferent to the issue of minorities.

“The International Covenant on Civil and Political Rights (1966) stands as the only post-war human rights agreement which contains specific mentioned general statement of the rights of minorities. Art. 27 of the covenant reads, in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their culture, to profess and practice their own religion, or to use their own language”.<sup>6</sup>

The special Rapporteur of the UN Sub Commission on the prevention of discrimination and protection of minorities, Prof Capotorti, offered this definition for the purpose of Article 27: “A minority is a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members being nationals of the state possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if any, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”<sup>7</sup>

### **Adoption of the Concept in India**

While studying the concept of minority in the Indian context, it is important to study the dynamics of the Muslim community. The feeling of minority complex in the various Indian communities may be due to the feeling of insecurity in the minds of these communities. In British India, the British adopted the policy of giving special recognition to the Muslims, along with the Sikhs, Indian Christians, Anglo-Indians and the Depressed Classes. The formation of the Muslim League is an

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<sup>6</sup> Mishra Naveen, Singh Sudhirkumar, Status of Minorities in South East Asia, Authors Press, New Delhi, p. 5 (1<sup>st</sup> ed. 2002).

<sup>7</sup> *Id.*

important event as to the recognition of minority rights of the Muslims in India. The Depressed Classes, under the leadership of Dr. Ambedkar were successful in getting recognition as a minority community in British India.

The Morley-Minto Reforms, the Simon Commission, the three Round Table Conferences, the Communal Award, the Cabinet Mission Plan, and the Constituent Assembly are the milestones in the study of the concept of minority in India. It can help us to know how the concept has gradually changed and evolved to date.

Last but not the least, the realization of the Muslim community as a “religious minority” and propounding of the “Two Nation Theory” led to the unavoidable partition of India. It is with this experience, the minority rights were to be discussed in the Constituent Assembly of India.

### **Discussions in the Constituent Assembly**

The Constituent Assembly had a total of about fifteen committees on various subjects. The Advisory Committee on Minority and Fundamental Rights was one such committee concerned with the minorities. Sardar Vallabhbhai Patel was the Chairman of this advisory committee on minorities. The Report on the minorities was discussed in the constituent Assembly on 27<sup>th</sup> and 28<sup>th</sup> Aug. 1947.

The minorities were classified in to three groups:

**GROUP ‘A’**-- population less than ½ per cent in the Indian domain excluding the states.

- 1) Anglo-Indians.
- 2) Parsees
- 3) Plains tribesmen in Assam

**GROUP ‘B’**-- population not exceeding 1½ per cent.

- 4) Indian Christians.
- 5) Sikhs.

**GROUP ‘C’**-- population exceeding 11/2 percent.”<sup>8</sup>

- 6) Muslims

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<sup>8</sup> Constituent Assembly Debates, Book 1, Vol. V, Lok Sabha Secretariat, New Delhi, p. 224 (first printed 1950, reprinted 2003).

## 7) Scheduled Castes

### **Basis of the Classification ..... the Rationale**

Sardar Vallabhbhai Patel while tabling this Report said: "We have divided the minorities according to their strength or according to their population".<sup>9</sup> Though the constituent Assembly was against separate electorate for the minorities, it does not in any way create hindrance in the recognition or protection of minorities.

Speaking on this issue Mr. Govind Vallabh Pant said: "Do you want the citizens of one country to look to their co-religionist in another state for their protection, or do you want them to be treated as equal citizens of their own free sovereign India? I want all minorities to have an honorable place in this Union of India. I want them to have full opportunities for self-realization and self-fulfillment. I want this synthesis of cultures to go on so that we may have a state in which all will live as brothers and enjoy the fruits of the sacrifices of those who gave their all for the achievement of this freedom, fully maintaining and observing and following the principles of equality, liberty, and fraternity."<sup>10</sup>

After considering the discussions in the Constituent Assembly, we find that though the minorities were provided various safeguards in the new Constitution, we do not find any specific discussion about the 'concept of minority' or the discussion about the 'definition' of the term minority. At the time of classifying the minorities into three groups viz., Group A, B, and C, the numerical strength of the minorities in relation to the population of India was considered. Here it is pertinent to note that, here the minorities were considered at the National level.

The scheduled castes, who were neither considered to be racial, linguistic nor religious minority, were considered to be minority, though they were not minorities in the strict sense of the term. The general attitude of the Constituent Assembly was to provide safeguards to the minorities and give them an honorable place in the Union of India.

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<sup>9</sup> *Id.* at p. 199.

<sup>10</sup> *Id.* at p. 224.

## Constitutional Provisions

Article 29 and Article 30 of the Constitution of India, contain specific provisions regarding minorities.

According to Fadia: “the sole purpose of these provisions is to reassure the minorities that certain special interests of theirs which they cherish as fundamental to their life are safe under the Constitution.”<sup>11</sup>

### Article 29.

Protection of interests of minority-

1. Any section of citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
2. No citizen shall be denied admission to any educational institution maintained by or receiving aid out of state funds on the grounds only of religion, race, caste, sex, and place of birth or any of them.

### Article 30.

Right of minorities to establish and administer educational institutions-

1. All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. The state shall not, in granting aid to educational institutions, discriminate against any educational institutions on the ground that it is under the management of a minority, whether based on religion or language.

**Article 350-** Facilities for instruction in mother tongue at primary stage-

It shall be the endeavor of every state and of every local authority within the state to provide adequate facilities for instruction in the mother tongue at the primary stage

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<sup>11</sup> Fadia B.C., Indian Government and Politics, Sahitya Bhavan publications, Agra, p. 770 (1<sup>st</sup> ed. 1991 rev'd, 2001).

of education to children belonging to linguistic minority groups; and the president may issue to any state such directions as he considers necessary or proper for securing the provision of such facilities.

**Article 350-B**...Empowers the President of India to appoint a special officer for linguistic minorities.

If we consider the above provisions of the Constitution of India, we can summarize them in the following manner-

- a) Art. 29 and 30 are enumerated under the heading cultural and educational rights. Art. 29 speak about protection of interests of minorities. But the Constitution does not provide any definition about the concept of minority. From the reading of Art. 29, we can draw the conclusion that, minorities are the section of people residing in the territory of India or any part thereof who have-
  - i) Distinct language
  - ii) Distinct script or
  - iii) Distinct culture

And the distinct language, script or culture should be of their own. These groups of citizens can conserve their language, script, or culture as of right.

- b) Considering Art 30, the Constitution empowers the minorities to establish and administer educational institutions of their choice. The Art. 30 says- "All minorities whether based on religion or language...."

From the above wording it is clear that the Constitution recognizes two types of minorities-i.e.

- i) Minorities based on religion.
- ii) Minorities based on language.

According to Tahir Mahmood, who had been the Chairman of the Minority Commission-

"The Constitution of India contains no definition of 'minority' and gives no clue for the level of determination of minority status. It speaks of two categories of Minorities- religious and linguistic – but

provides no list of the minorities of either category, though it does mention certain languages by name for a limited purpose [schedule viii]. There is no Parliamentary legislation either specifying the religious or linguistic minorities in the country or prescribing any procedure for identifying them.

The National Commission for Minorities Act 1992 enables the Central Government to notify the minorities for the purpose of that Act only and in the exercise of this power, the government has notified five religious communities- Muslims, Christians, Sikhs, Buddhists and Parsis as minorities. The local Minorities Commission Acts of the states, wherever in force, generally ditto the provisions of NCM Act, while some of them specify the local religious and linguistic minorities. At the national level, while the followers of the Hindu religion constitute the predominant majority in India, all the other communities are regarded as minorities.”<sup>12</sup>

From the above observation of Tahir Mahmood it is amply clear that the concept of minority is not sufficiently clear in the Constitution

### **Ix. Judicial Pronouncements**

Taking in to consideration the above Constitutional provisions and the legal position, we will be relying on the various judicial pronouncements to study the ‘concept of minority’.

*In Re: The Kerla Education Bill*<sup>13</sup>, it has been held that, any community which is numerically less than 50 percent of the state’s population will be considered as a ‘minority’.

In *Aldo Maria Patroni and Others v. E.C. Kesavan*<sup>14</sup>, It was observed by the Supreme Court that, “The word ‘minority’ has not been defined in the Constitution and in

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<sup>12</sup> Tahir Mahmood, *Politics of minority Educational Institutes-Law and Reality in the Sub-Continent*, imprint One, Gurgaon, Haryana, pp. 11,12 (1<sup>st</sup> edn. 2007).

<sup>13</sup> AIR 1958 SC 956-976.

<sup>14</sup> AIR 1965, KERALA 75.

the absence of any special definition we must hold that any community, religious or linguistic, which is numerically less than fifty per cent of the population of the state is entitled to the fundamental right guaranteed by the Article. Held that as the Christians, at the 1961 census, amounted only to 21.22 percent of the population of the state of Kerala, the Roman Catholics who formed the section of that community were a minority within Article 30(1) of the Constitution.” considering the above observation of the Supreme Court, it has been underlined that the concept of minority has not been defined in the Constitution. Again in this case the court seems to have applied the numerical criteria for determining the minority status of a particular community.

In *D.A.V. College, Bhatinda v. State of Punjab*<sup>15</sup>, it has been held that-minority status can be granted if a community can establish that it has a distinct script and they can establish that they are a religious minority. Also while deciding the minority status, it should be decided in relation to the state concerned. If the impugned Act is a state Act, then it should be decided in relation to the state and not in relation to the country as a whole. On that basis it was held that the Hindus in Punjab are a minority in the state of Punjab, though they may not be so in relation to the entire country.

If we consider this peculiar situation, it is evident that an absurd situation has arisen. As known, the Hindus are considered to be a majority in India, but they have been recognized as a minority in the state of Punjab. It is important to note that by applying the same test, Jains and the Sikhs have been held to be minorities in the Union Territory of Delhi (*Arya Samaj Education Trust*, AIR 1976, Delhi, 207, 218.)

In *T.M.A. Pai Foundation v. State of Karnataka*<sup>16</sup>, Delivering the majority judgment the bench answered 11 questions.

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<sup>15</sup> (1971) 2 SSC 261.

<sup>16</sup> (2002) 8 SSC 481.



“Q1. What is the meaning and content of the expression ‘minority’ under Article 30 of the Constitution of India?”

A. linguistic and religious minorities are covered by the expression ‘minority’ under Article 30 of the Constitution. Since reorganization of the states in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the state and not the whole of India. Thus religious and linguistic minorities, who have been put on a par in Article 30, have to be considered state wise”.

The effects of *T.M.A. Pai* case has been summarized by M.P. Raju in the following words-

- i) The decision of *T.M.A. Pai* destroyed the concept of national Minorities.
- ii) This issue should not have been decided in a vacuum without a Factual matrix-it is procedurally wrong to decide any Constitutional issue in a vacuum.
- iii) Prima facie the whole logic is flawed.

The fact of organization or reorganization on linguistic lines does not mean that for the purpose of Article 30 linguistic minorities ought to be determined in relation to the state alone”.<sup>17</sup>

*P.A. Inamdar v. State of Maharashtra*<sup>18</sup>, has been described by M.P. Raju as, “Inamdar 2005 was an attempt by a 7 judge bench to sort out the alleged confusion created by Islamic Academy (2004) when clarifying the 11 judge verdict in *T.M.A. Pai* (2002).

It is important to note that the “Answers to 11 questions in *T.M.A. Pai Foundation* have been quoted in the judgment of *P.A. Inamdar case*. It was held that, “Thus with the dictum of *Pai Foundation*; it cannot be doubted that a minority whether linguistic or religious, is to be determined only by reference to the demography of a state and not by taking into consideration the population of the country as a whole”.

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<sup>17</sup> Tahir Mahmood, *Politics of Minority Educational Institutes-Law and Reality in the Sub-Continent*, Imprint One, Gurgaon, Haryana, pp. 91, 92 (1<sup>st</sup> edn. 2007).

<sup>18</sup> (2005) 6 SSC 537.

Though *P.A. Inamdar* was an attempt to clarify some doubts that were created by Islamic Academy (2004) it does not throw light on the concept of minority from a different perspective. It merely quotes and affirms the views expressed in *T.M.A. Pai Foundation* case, as to the concept of minority. It emphasizes that the unit for determining the minority, whether religious or linguistic should be the state alone.

## **X. Analysis of the Concept of Minority**

The discussion regarding the concept of minority that has been carried out till now can be summarized as follows:

- i) A universally acceptable definition of the 'concept of minority' is an elusive idea.
- ii) There has been a gradual evolution in the concept of minority till date in India.
- iii) The propounding of the "Two Nation Theory" and the resultant partition of India had a great impact on the Constitution makers while framing the Constitution of India.
- iv) The Constitution uses the term minority in two senses, religious and linguistic minorities, but it does not provide a definition of the term minority.
- v) There is no parliamentary legislation either specifying the religious or linguistic minorities in the country or prescribing any procedure for identifying them.
- vi) The National Commission for Minorities Act, 1992 enables the Central Government to notify the minorities for the purpose of the Act only and in exercise of this power, the government has notified five religious communities-Muslims, Christians, Sikhs, Buddhists and Parsis as the minorities. On 20 January 2014, the Government of India awarded minority status to Jain community as per Sec. 2 (c) of the National Commission for Minorities Act 1992.
- vii) When the Constitution of India was adopted in 1950, the important task of interpreting the

- various provisions of the Constitution lay on the Supreme Court of India.
- viii) The concept of minority was much discussed when the question of interpretation of Article 30 arose, which deals with the right of minorities to establish and administer educational institutions of their choice.
  - ix) The Supreme Court has most of the times used the numerical criteria for determining the minority status of a community or a linguistic minority.
  - x) For determining the minority status of a community, the unit that has been used is the 'state' and not the nation as a whole.

## **XI. Findings**

### **A) The numerical criteria**

The Supreme Court on many occasions has applied the numerical criteria for determining the minority status of a community. e.g. *In Re: The Kerala Education Bill, Aldo Mario Patroni and others v. E.C. Kesavan*. The application of only the numerical criteria is not correct, taking into consideration the peculiar socio-economic conditions prevailing in India. Indian society is a caste ridden society and there is rigid social stratification within it. Various privileges like social status, cultural monopoly, land holding, access to educational facilities, representation in services of the state, and political representation are not available to all Indians alike. Some communities though numerically inferior, get much greater privileges in matters of land holding, monopoly over trade and commerce, dominance over cultural and educational field or representation in services of the state.

So without taking into consideration this peculiar Indian position, and applying only the numerical criteria, and expecting that, this numerical criterion will work with mathematical precision is fallacious. The majority and minority communities should be determined with relation to the difference in the power and dominance of the two communities. It is equally important to see

whether a minority community is facing any discrimination. In this regard the observations of Prof. Zoya Hasan, (JNU) Member of National Commission for Minorities is noteworthy:

“Contrary to this widely accepted perception of minorities, the Governments new proposal for state specific minorities is driven by a statistical or numerical approach. The size of a group is not what should concern our policy makers or those committed to eradication of inequality, prejudice and discrimination. This is because numbers per se quantify and describe the proportion of a group in a population; they do not tell us anything about whether a particular minority group is powerful or powerless, advantaged or disadvantaged, represented or under represented. A more meaningful conception of minority would include section of people who, on account of their non-dominant position in the country as a whole (not a specific state) and because of their religion, language, caste or gender, are targets of discrimination. The statistical approach disregards the crucial qualitative condition of vulnerability and disadvantage.”<sup>19</sup>

The framers of the Constitution had seen the partition of India. They wanted to ensure the unity and integrity of the country. In order to create a sense of belonging towards the nation, certain Constitutional safeguards were necessary for the protection of the minorities.

The provisions enshrined in the Constitution of India relating to minorities are basically meant to prevent discrimination, which the minorities may be subjected due to their different religion, language and culture etc. So it casts a Constitutional obligation on the state to see that the minorities are not discriminated against. Thus it becomes necessary that, while providing the protection of Article 29 and 30, the protection is given to the real needy, and not to those sections of the society which are already enjoying a dominant position in the society. The end result will be the perpetuation of the dominance of the influential classes only.

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<sup>19</sup> Zoya Hasan, *Defining Minorities in India, Law and Other Things*, [blogspot.in/2007/07/defining-minorities-in-india.html](http://blogspot.in/2007/07/defining-minorities-in-india.html).

Considering the above discussion, it can be said that application of only numerical criteria for determination of minority communities is not correct. The Constitution of India speaks of two kinds of minorities:

1. Religious and
2. Linguistic

Determination of minority communities on the basis of religion or language itself takes into consideration the numerical criteria only.

### **B) Role of Central Government**

Taking into consideration the Constitutional provisions regarding the minorities, the central government has not enacted any specific legislation to identify the religious minorities or the linguistic minorities. Also there wasn't any legislation for prescribing any procedure for identification of the religious minorities. It can very well be said that, the central government has not carried out its responsibility of identification of the minorities. In the absence of any such legislation, the entire responsibility of interpreting the concept of minority laid upon the judiciary i.e., The Supreme Court of India.

But the paradox is that, though the Supreme Court of India has interpreted the concept of minority on various occasions, through various judicial pronouncements, the solution given by the court again gives birth to another set of problems. It clearly indicates that when the theory is applied to practice, it reveals serious lacunas, which cannot be ignored.

### **C) Whether State can be the unit for determining the minority status?**

The unit for determination of the minority status of any community has been held to be the 'state' by the Apex on many occasions. The Court applied the similar test *In Re: The Kerala Education Bill*, *Aldo Mario Patroni* and *T.M.A. Pai* cases also. By application of this test, the Hindus who are considered to be a majority community in India were considered to be a minority community in the state of Punjab as per decision of *D.A.V. College, Bhatinda* case. This is very absurd.

It is important to refer to the dissenting judgment delivered by J. Ruma Pal in *T.M.A. Pai* case. She has held that the question of minority status must be determined with reference to the country as a whole. This view is important in order to prevent the misuse of the minority status for commercial purposes.

**D) Why various communities are eager to get recognition as minorities?**

Article 30 of the Constitution of India gives the minorities to establish and administer educational institutions of their choice. Though these educational institutions were meant to conserve their distinct language, script or culture, the 'educational institutions of their choice' has been interpreted by the Supreme Court to mean 'institutions imparting general secular education' (*St. Xavier's College v. State of Gujrat*, AIR 1974 SC1389).

With the State constantly shrugging off its responsibility of providing professional education to the citizens, and the judiciary providing an impetus for commercialization of technical education, professional education like medical, engineering and management has become the domain of private players. If such an Institution is a minority educational institution, it has, according to Mihir Desai three broad benefits, which are not available to other institutions-

- 1) Minority educational institutions do not have to maintain reservation in employment or admission for SCs, STs and OBCs as required to be done by other educational institutions.
- 2) In terms of control over employees, minority educational institutions have much greater power than other institutions. For instance in the selection of teachers and principal, the minority educational institutions can have a selection committee which does not include the University representative. Similarly. While in ordinary school the Headmaster normally has to be appointed on the basis of seniority, minority management can select a headmaster of their choice.

- 3) In matters of admission of students, minority educational institutions can have reservation of up to 50% for students of their community.”<sup>20</sup>

The net resultant is that, the minority educational institutions which are genuine are not getting the protection of Article 30, while minority educational institutions which have come up to exploit the situation and derive personal benefits are impatient to get recognition as minority educational institution.

It is pertinent to note that the National Commission for Minority Educational Institutions is flooded with proposals from institutions to get recognition as minority educational institutions and this phenomenon is a recent development. It is certainly the misuse of the protection afforded to the minorities by the Constitution. Though genuine and sincere minority institutions need protection of Article 30, it is the foremost duty of the state to check profit motivated and pseudo minority educational institutions.

### **E) Criteria other than numerical criteria**

The inherent limitations of the numerical criteria have been reiterated by many authors. The following could be the additional criteria for determining the minority status of a community.

- 1) Social Status--It is one of the most important indicator to determine whether a particular community needs the protection available to the minority community. The reality is that social backwardness is an important ground for discrimination in India.
- 2) Educational Status-Education is the root cause of overall development of a community. It is the only tool for moving up the ladder of economic and social empowerment.
- 3) Economic and Industrial Power--It is known that economic dominance of any particular community can

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<sup>20</sup> Mihir Desai, Tahir Mahmood (edn.), *Politics of Minority Educational Institutes-Law and Reality in the Sub-Continent*, Imprint One, Gurgaon, Haryana, pp. 81-82 (1<sup>st</sup> edn. 2007).

make many constitutional safeguards a mockery and can also influence the state machinery to a great extent. It is noteworthy that, 80% of economic enterprise and industries are owned by industrial families of the Parsi community, but they are recognized as a minority at the national level.

- 4) Representation in political fields and services of the State would also be important criteria.

**F) Whether the concept of minority as followed in India confirms to that followed by the international agencies.**

According to the international agencies, apart from numerical inferiority, a minority community must be a disadvantaged group and it should also be in a non-dominant position.

If we consider these two important criteria it is crystal clear that the concept of minority according to the Indian legal system, does not take into consideration these two important criteria. It is only due to ignoring these two aspects the Jains and the Parsis have been recognized as minorities. It can very well be concluded that the concept of minority as followed in India does not confirm to the definition which has been followed by the International Agencies. Though India is not bound to follow the concept of minority which has been adopted by the International Agencies, it is high time that India considers seriously the lacuna which is patently evident in the "concept of minority as followed in India: "Such a step is important to be taken to extend the Constitutional protection available to the minorities, to the minorities in the true sense of the term". What is important is that a total novel approach is needed while interpreting the provisions of Articles 29 and 30. It is equally important to interpret the provisions in the subaltern perspective.

To conclude, the views of *Soli Sorabjee* who had been the Solicitor General of India are very much relevant- "The MRG (Minority Rights Group) concept of minority is more comprehensive. It includes not only religious and linguistic minorities, but all sections of people who on account of their non-dominant position in a society and



because of their peculiar characteristics-be they physical, sexual, cultural, racial, religious or ideological, are the targets of discrimination and are subject to economic and social disabilities and disadvantages. A minority community should not be determined on the basis of quantity-it should be a qualitative determination.

## **Conclusions**

Defining the concept of minority has been a challenge to the global community. Any universal definition which would be applicable to all situations seems to be an elusive idea. Minorities are people who are differentiated from the rest of the population by race, nationality, religion or language. They lack in power and are subjected to certain exclusions and other differential treatment. It is generally agreed that a minority is a group which is 'non-dominant group' and a 'disadvantaged group'. The Constitution of India speaks of 'religious' and 'linguistic' minorities. But it is important to note that the Constitution of India does not define the term 'minority'.

The discussion of the concept of minority in the Indian context is never complete without the role played by the Muslim community and the depressed classes, as other minority communities have played a relatively subtle role in the politics of India. Another community worth mentioning would be the Sikh community, whose assertion of Sikh identity had been very violent, and it had progressed to the demand of *Khalistan*.

During the pre-independence era, the sense of insecurity and suspicion towards the majority resulted in assertion of minority identity. This feeling was further fostered by the British by giving separate recognition to the minorities. The separate identity of the minorities was further strengthened by awarding "communal electorate. During the framing of the Constitution of India, it was the demand of the leaders of the minority community that their interest should be protected in the new Constitution. The founding fathers had before them, the bitter experience of the partition of India. Under this background, the provisions for the protection of minorities were made in the Constitution of India. The

minorities report classified the minorities into three Groups-A, B and C. This classification is essentially based on the numerical criteria. It should be noted that minorities were considered at the national level only. It can be concluded that the general attitude of the Constituent Assembly towards the minorities was to provide them adequate safeguards, and give them a place of honor in the Union of India.

In the Constitution of India, specific mention of the minorities can be seen in Arts. 29 and 30. These provisions are meant to create in the minds of the minorities a sense of belonging towards the nation, and assure to them that certain interests of theirs, which they consider as fundamental, are safe under the Constitution of India. The Constitution of India contains no definition of the term minority and provides no clue for the determination of minority status. Due to this reason, we have to rely on various judicial pronouncements to understand the concept of minority.

The Supreme Court on occasions applied the test of numerical inferiority while determining the minority status of a community. It can be very well said that, the application of only the numerical criteria is not correct considering the peculiar socio-economic conditions in India. The majority and minority status should be determined considering the difference in the power and dominance of the two communities. It is equally important to see whether the minority community faces any discrimination from the majority community. Further, the Court has determined the 'State' to be the unit for determining the minority community. Due to application of this test, the Hindus, who are considered as the majority at the national level, are considered as linguistic minority in the state of Punjab (*D.A.V. College case*) Also religious and linguistic minorities have been put at par and have been considered state wise. The concept of minority as followed in India should be in line with the concept of minority followed by the International Agencies. To foster national integration and curb separatist mentality, it is important to safeguard the interests of the minority communities. In a democratic setup, it is important for the state to admit the existence

of the minorities. For securing their welfare, it is essential to identify “who the minorities are” in the first instance.

The concept of minority as followed by the Indian legal system has the following lacuna, which needs to be addressed immediately. Further the concept should be in line with the concept followed by the International Agencies.

- I) While deciding who is a minority, only the numerical criteria are being considered.
- II) While deciding a particular community as a minority community, its dominance in the society, its disadvantaged position, whether it suffers from any discrimination from the majority community or the state, these factors should be considered.
- III) While deciding the minority status, the unit should be the nation and not the state, because, a community which is a religious majority at the national level becomes a linguistic minority in certain states, while the communities which are linguistic majorities in certain states, become linguistic minorities in the states of their migration.
- IV) Due to this contradictory situation, many communities which are socially and economically powerful and dominant are trying desperately to get the tag of minority, be it religious or linguistic, to perpetuate their monopoly in various fields. Such a trend is visible, with regard to starting of professional educational institutions.
- V) The right contained in Art. 30 seems to be an absolute right. It should be subject to other fundamental rights also. So there should be reasonable restrictions on the right.

### **Suggestions**

Without taking into consideration only the numerical criteria, the President of India should establish a Commission for the proper identification of minorities. The commission should think of formulating a workable definition of minorities in the Indian context. Further the

definition should be in line with the definition as followed by the International Agencies.

The commission should carry out extensive and far reaching social survey. Eminent social scientists, economists, legal luminaries and representatives of the minority communities should be included in the Commission. Thorough discourses on the “terms of reference” should be carried on. One Urban and One or Two Rural units be selected randomly in all districts of the country and extensive empirical survey should be carried on. The data collected can be processed at the National Informatics Center and various indicators are determined to define a particular community as a ‘minority.’

It is high time that the Central Government takes immediate steps to prevent the misuse of the term minority, and pass on the benefits to those who are minorities in the true sense of the term.

In a democratic country, minorities should not exist for a long period. It is in the interest of national integration, that minority and majority assimilate. The majority has a greater role to play. The Central Government should immediately abandon the numerical criteria and establish a Commission for the determination of minorities taking in to consideration additional criteria. It would be an important step towards extending the protection of minorities to those who are minorities in the real sense of the term.



## ISSUE BETWEEN ORTHODOX AND JACOBITE CHRISTIAN FACTIONS IN INDIA: A HUMAN RIGHTS CONCERN

Mr. Jino M. Kurian\*

For more than a century, Indian Christians are witnessing the issue between Orthodox and Jacobite Christian factions. Even though being two minority factions among the Christian minority, the issue has not been addressed as a global or national minority rights violation. In India, the apparent presence of these two factions can be seen predominantly in Kerala and their mission works are not much manifest outside the state. This might be the dynamics preventing the issue not to be discoursed over the boundaries of Kerala. However, being one of the Christian communities in India, which is claiming the succession of first convertors to the religion by the St. Thomas and also as a religious and social issue which has not been solved for more than a century; this minority rights violation should be seriously discussed among the scholars.

Probing over the reasons behind the differences between the two parties, it traces us back to the evolution of Christian religion in India. In A.D. 52, St. Thomas, one of the direct disciplines<sup>1</sup> of Jesus Christ, visited Malayalam speaking southern parts of India and founded seven churches.<sup>2</sup> These people are called as *Malankara* (Malayalam speaking) Jacobite or Orthodox Syrian Christians. The church<sup>3</sup> had grown up and flourished throughout the region. It acquired assets and became financially rich and also marked for administrative efficiency imparted by different metropolitans who were consecrated from time to time.

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\* Student, 2<sup>nd</sup> year, LL.M. (Corporate), Nalsar University of Law, Hyderabad.

<sup>1</sup> The Holy Bible says that Jesus was having confidential disciplines also. Disciplines of disciplines were also preached and brought up the religion in different regions of the world.

<sup>2</sup> Encyclopedia of Religion, Volume 14, page 227.

<sup>3</sup> The word 'church' is used to denote both denominations of the religion and the building, where Christians worship.

It was then the period of invasions over Indian land by different imperial powers. The missionaries from Portuguese forced Syrian Christians to accept Roman Catholicism. Between 1599 to 1654 A.D. due to influence of the Portuguese political power in the East Coast of India, the Malankara Church was compelled to accept Roman Catholic supremacy i.e., the supremacy of the Pope of Rome. The tough resistance from the Syrian Christians resulted in adopting repressive measures by the Portuguese. Books of the Syrians Christians were burnt and destroyed. All traces of apostolic succession in their church were obliterated.<sup>4</sup>

After a series of issues between the Portuguese, in the year 1664, the Syrian Christians of Malankara assembled near the Koonan Cross<sup>5</sup> at Muttancherry and took an oath that they shall never again unite themselves with the Portuguese or Catholic Church. This oath is well known as Koonan Cross Oath. This event marks an epoch in the history of the Syrian church. It splits the followers into two Punthenkoor and Palayakoor. The former became Syrian Christians<sup>6</sup> and the latter Roman Syrians.<sup>7</sup>

Years passed, the Malankara Church had grown up spiritually and financially. The trust created by the church acquired vast assets. On this period many missionaries and bishops from different foreign churches started frequently visiting the church. Their liturgical thoughts and preaching were turbulently influenced and became part of the preachers of the church. With their help foundation for the propagation of the Christianity was strengthened. Gradually disputes were also arisen between the visitor's group and leaders of the church

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<sup>4</sup> Most. Rev. P.M.A. Metropolitan v. Moran Mar Marthoma and Another AIR 1995 SC 2001 para 7.

<sup>5</sup> Cross is the religious symbol of Christians which represents the Holy Cross of Jesus Christ.

<sup>6</sup> Syrian Christians are Christians who follow the Syrian liturgy. They are mainly Oriental Orthodox Churches. The two Syrian Orthodox Churches in Syria and India, along with the Egyptian (Coptic), Ethiopian, and Armenian Churches, belong to the group of Ancient, or Oriental Orthodox, Churches.

<sup>7</sup> Most. Rev. P.M.A. Metropolitan v. Moran Mar Marthoma and Another AIR 1995 SC 2001 para 7.

over the possession and ownership of the properties held together.

Even before the intrusion of Portuguese to the Malankara, the church had exchanges with churches in Persia and later with Antioch. The ordinations of Malankara Metropolitans were being done by the direct or indirect involvement of Patriarch of Antioch on these days. The disputes arose between Christian Mission Society, London, one of the missionaries group and the church was resolved through arbitration.

“It is known as the 'Cochin Award of 1840'. This Award divided the properties between the two bodies allotting among other items 3000 Star Pagodas to the Malankara Church. The properties so allotted to the Malankara Church were as per the Award to be administered by the trustees i.e., (1) the Malankara Metropolitan, (2) a priest-trustee and (3) a lay-trustee. The effect of the Cochin Award was that the dispute between the Mission Society and the Syrian Church came to an end. But it appears between 1808 and 1840 vast assets had been acquired with the trust created by Dionysius VI. These were controlled and administered by the person who was the head of the Church. Therefore, even though one Cheppat Dionysius, a locally ordained Metropolitan was in office, one Mathew Athanasius went to Syria in 1840 and got himself ordained as Metropolitan by the Patriarch of Antioch. Thus the seeds of strife were sown.”

(*Most. Rev. P.M.A. Metropolitan v. Moran Mar Marthoma and Another*, AIR 1995 SC 2001 para 8).

In 1654, the local ordinations were commenced.<sup>8</sup> Thus 1840 marked the beginning of emergence of struggle for supremacy over the Church between locally ordained Metropolitan and the one ordained by the Patriarch of Antioch. Disputes came to the knowledge of Travancore Government. They appointed a tribunal in 1848, known as 'Quilon Committee' to settle dispute. Even though the Committee awarded in favour of M. Athanasius, the members of the church were not satisfied. In 1865, Joseph Dionysius was sent to Syria and ordained as the Malankara Metropolitan. Still, M. Athanasius lived until his last breath as the Malankara Metropolitan and ordained his brother's son Thomas Athanasius to assume his office.

In 1876, another synod was called in Mulunthuruthy, which is popularly known as 'Mulunthuruthy Synod'. At the Synod the Syrian Christian Association popularly called the 'Malankara Association' was formed to manage the affairs of the Churches and the community.<sup>9</sup> It affirmed the Orthodox faith and accepted Joseph Dionysius as the Malankara Metropolitan.

"Whether it was re-assertion of supremacy of Patriarch or not cannot be said as the election of Joseph Dionysius was preceded by two factors, one, that he had been persuaded by the local people, earlier, and he got himself ordained by the Patriarch and second that Thomas Athanasius was a nominee of his brother and he had not been elected by the people. But it, undoubtedly, shows that the spiritual domination was still predominant. However, Thomas Athanasius challenged the ordination by Patriarch and claimed equal status. This could not have been agreed to by anyone as the spiritual

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<sup>8</sup> The first was the ordination in 1654 of Mar Thoma Mitra as Marthoma I. He was ordained as Metropolitan of Malankara by the Patriarch of Antioch through his delegate. From 1665 onwards, therefore, the ordination of the Malankara Metropolitan was carried on by the delegate of Patriarch of Antioch.

<sup>9</sup> Most. Rev. P.M.A. Metropolitan v. Moran Mar Marthoma and another AIR 1995 SC 2001, para 10.



faith in the Patriarch prevented the people in Malabar to acknowledge a person as Metropolitan who was not ordained either by the Patriarch or his nominee. However, Thomas Athanasius refused to hand over the property and Joseph Dionysius was left with no option except to approach the court.”

(*Most. Rev. P.M.A. Metropolitan v. Moran Mar Marthoma and Another*, AIR 1995 SC 2001 para 10).

Thus it commenced the period of legal war for possession over the properties of the church in the courts. Unfortunately, disturbances in the church followed to two factions in the church as 'Patriarch' and the 'Catholico'. Within a short span of time, five suits were filed, the first is known as, '*Seminary Suit*', in 1879, the second as '*Arthat case*' in 1899, the third in 1913 which became famous as '*Vattipanam case*', the fourth in 1938 known as '*Samudayam Suit*' and fifth and last in 1974<sup>10</sup>.

The first was filed by a Patriarch ordained and duly elected Metropolitan at Mulunthuruthy Synod for recovery of property against nominated Metropolitan, whereas the second was filed for enforcement of the order passed in earlier suit as some of the parishes were denying the authority of the Metropolitan to exercise spiritual and temporal control over them. The third was an inter pleader suit by Secretary of State for India due to formation of two groups laying rival claims against the assets. All the three suits were decided in favour of Catholico group. Therefore, the fourth suit was filed by the Patriarch group against Catholicos claiming that they had become heretics and had separated from the Church. This too was decided in favour of Catholicos. But the fifth suits were filed by the Catholicos for reasons. Even though the decisions of these preliminary cases are so discussed, afterwards more than two hundred suits were

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<sup>10</sup> *Most. Rev. P.M.A. Metropolitan v. Moran Ma Marthoma*, AIR 1995 SC 2001, para 11).

filed with regard to partition and other related issues between the two parties.

The Indian Constitutional advocates always argue that minorities' rights are well protected in the country. Comparing with many of the other nations, the system of minority protection in India is commendable. The secular characteristics of the State governance system always try protecting the minorities' rights. Still, as a nation with lots of diversified characteristics and the presence of various indigent minority groups, India should give more caution in strengthening its minority protection measures.

Christians are one of the minority religious groups in the country. Generally people recognize, two major groups among the Christians are Catholics and the Protestants. But the religion contains many other denominations. Syrian Christians including Orthodox and Jacobite Churches are one among them, who have their own religious heads and do not admit the superiority of the Pope.

Moreover a constitutional right, it is the fundamental necessity of every person to believe, propagate and practice his religion. Most of the civilized states of this era are guaranteeing the right of their citizens to practice their religion. Article 25 of the Indian Constitution specifically says that all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and Article 29(1) provides that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

The dispute between Jacobite and Orthodox churches affects a person's as below:

- Denial of access to place of worship and structures (shrines).

Regarding the issue between Orthodox and Jacobite factions, lots of churches, under the dispute are closed for worship. The state is not at all capable to make

peaceful environment in the church premises. So they closed down it until the settlement of the dispute.

While closing down the churches, a believer of this church cannot use the place for worship. He is not allowed to enter the church or to submit his offerings. As per the dogmas of the Orthodox Christians, they follow traditional customs and beliefs. They have great affection towards church and structures used by their forefathers. When it is close down for more than a reasonable time, it leads to the violation of the primary religious rights of a person.

- Restriction for prayers and attendance of the church services.

There is no doubt for the fact that “people conduct prayer to get internal reliefs”. If there are restrictions on a person for the use of the worship place and time of worship, how could he get his internal satisfaction? How is it possible for a believer to relieve his mental agony, if the place of worship he uses is under Police surveillance?

There are some churches opened under restrictive conditions for worship. This has also been done by the state with the help of force. This temporary arrangement which pursues for a long time is in no way settle the large dispute.

Whenever there is friction and turmoil between believers it affects the whole body. It hinders people from entering into worship and receiving from God's Word. It creates an uninviting atmosphere for visitors in the church, it may hinder people from coming to Christ, and can even grieve the Holy Spirit (Eph. 4:30-32).

- Access to the Cemetery.

With respect to the present circumstances, the properties of the churches under dispute are claimed by the both the factions of the church. It includes cemetery, shrines, places of worship and other properties. The main issue is nothing else other than proportionately partitioning the properties held together. According to the church faith, on the second coming of Jesus, all of them

who are resting in the tombs shall rise up and go with him to the heaven. "Marvel not at this; for the hour is coming in which all that are in the graves shall hear His voice and shall come forth — they that have done good, unto the resurrection of life, and they that have done evil, unto the resurrection of damnation." (John 5:28-29)<sup>11</sup>

Hence the church gives foremost emphasis to the cemetery and periodic prayers at the tomb of a late Christian. As similar to the access to the place of worship (church building), access to the cemetery is also part of the faith. The members of these two factions frequently come into arguments with regard to the entry and use of the cemetery. Sometimes even it has gone to the instances where it defames the corpus brought for funeral.

- Recurrent disturbances regarding the properties affect public tranquility.

Arguments and physical aggressions are common in the region where church dispute is so massive. Sometimes it affects the tranquility of the entire region it exists in. The state uses force also for protection of the people and prevention of physical aggressions in the area. This in turn affects the peaceful co-existence of the people in the area. Some of the regions of Ernakulam district of Kerala, generally witnesses similar instances. People of other religions also criticize this trend which followed in their place.

- Unconcerned about the orthodoxly built monumental structures of the ancient churches.

Orthodox and Jacobite have many ancient churches in Kerala. It includes churches which built thousands years ago and having rare sculptures on stone and indigenous wooden works. These structures are rare in the country and assets for its tourism development. The dispute existing churches including Thrikkunath Seminary, church in Kadamattom, church in Kollencherry were founded long years back (all are in Ernakulam district)

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<sup>11</sup> 21st Century King James Version (KJ21).

and renovation measures are hardly done. The churches are close down by the state and preservations or renovations of the building is not possible as per the present situation.

- Hostage spreading to the next generation (it's a religious sentiments).

The issue became a religious sentiment and stretched long by the aggressors. The judiciary tried to solve it several times and still new issue arises from the situation. The new generations of the church, who are not at all cautious of the issue, are also dragged into by the aggressors. If the present situation continues, it would be miserable to say that, two factions are carrying on the sentimental problem to next generation. This would affect religious and spiritual rights on the next generation also.

Mutually consented arbitration is the best method to solve this religious as well as social problem. As Bibles verses teach: "But if he will not hear thee, then take with thee one or two more, that 'in the mouth of two or three witnesses every word may be established.'" (Matthew 18:16).<sup>12</sup> The interpretation of this verse says that if your private attempt fails to resolve the issue, you are then to take one other Christian and again confront the offending party. The presence of another Christian is as a witness to strengthen the serious effect of confrontation, to collaborate the exhortation of scripture, to amplify the Lord's presence in the meeting, and to verify the exchange of testimony. So the problem exist between the two parties are supposed to be solved in between the religion.

The Kerala High Court also made a similar comment in one of its judgments regarding church dispute to settle the dispute through arbitration. Thattathil B Radhakrishnan J.: "...we suggested to the learned counsel for the parties that if there can be a negotiated settlement between the two factions relating to various disputes either by way of mediation or conciliation, as the case may be, it would be appropriate for the community

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<sup>12</sup> 21st Century King James Version (KJ21).

in the furtherance of their spiritual and temporal goals as religious denomination.”<sup>13</sup>

Mahatma Gandhi said that: “I admire Christ but not Christians”. The most civilized and cultured religion in the world which brought forth great development and alleviated the standard of the people, Christian religion in India, deserves high respect and honor. Minor issues exist among the Christian religion, which should not have happened in this religion, should be discussed and solved immediately.

Especially the dispute between Orthodox and Jacobite factions, they have decided to go apart and settle as different churches. Still, new issues arise and the real intention on the part of the members of the churches is not at all fulfilling. Presently, there are more than hundreds of cases between the two factions. It includes criminal as well as civil cases also.

As it is earlier suggested, the exact solution, which can be brought forth, is a mutual consent settlement through a genuinely driven arbitration. For that active and experienced mediators should be presented. Before the mediation, the exact problem between the factions should be addressed among the human rights forums and it has to be identified as human rights violation of a person's rights. Violation of a believer's right to freely practice, propagate and profess a religion.



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<sup>13</sup> RFA No. 310 of 1010, dated 23rd day of November 2010.

## **MINORITIES IN INDIA: PROBLEMS AND PERSPECTIVE**

**Mr. Siddhartha Srivastava\***

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### **Introduction**

India's billion strong populations consist of 6 main ethnic groups, 52 major tribes, 6 major religions, and 6400 castes and sub-castes. Besides, there are 18 major languages and 1600 minor languages and dialects. However, it is practically useful to think of four types of minorities in India: linguistic, religious, caste, and tribal.

### **Linguistic Minorities**

There were some 1,632 languages spoken in India. However, the speakers of 18 major languages constitute about 91% of the population. The anomalies and contradictions apparent in the scheme of official recognition of language generate some concerns for linguistic minorities. There are states, most notably in India's northeast, where the local languages of overwhelming number of people are not yet 'officially' recognized. For example, the state level official languages in Meghalaya, Mizoram and Nagaland are not spoken by the majority of the people in these states.

### **Religious Minorities**

India is among the most diverse societies in the world in terms of religious minorities. It has people from all the major religions in the world—Hindus, Muslims, Christians, Sikhs, Buddhists, Jains and Zoroastrians (Parsis). Religious Composition of Indian Population, as revealed in 2001 census, is as follows: Hindus: 81.4%, Muslims: 12.4%, Christians: 2.3%, Sikhs: 1.9%, Buddhists: 0.8%, Jains: 0.4%, and others: 0.7%. The Muslims constitute the largest religious minority in India and are scattered all over the country. There is only one Muslim majority state in India—Jammu & Kashmir (67%). Sense of insecurity caused by communal violence and

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\* Student, 3<sup>rd</sup> year, B.A. LL.B., Amity Law School, Delhi.

hate campaign by Hindu religious fundamentalists appears to be one of the most common concerns of religious minorities in general and the Muslim community in particular. Socio-economic backwardness and disproportionate representation in almost every aspect of public life are also among the pressing issues for the religious minorities in India.

### **Tribal Minorities**

Indigenous tribal people of India are concentrated in three principal regions. One is India's northeast. The second is in middle India, and includes Bihar, the hill areas of inland Orissa, south eastern Madhya Pradesh, and a portion of northern Andhra. The third region is in India's west, and includes parts of eastern Gujarat, western Madhya Pradesh, and southern Rajasthan. The main demand prevalent among many tribal people is their right to autonomy. In response, the successive governments have relied on two political administrative solutions: the creation of autonomous district and regional councils provided for by the sixth schedule of the Constitution, and the formation of separate states.

This paper tries to deal with the various kinds of minority groups present in India and the various problems faced by them.

### **Who are Minorities?**

The expression "minority" has been derived from the Latin word "minor" and the suffix 'ity', which means "small in number". Various definitions given by various books and committees are as follows:

- **Year Book of Human Rights** describes minority as non dominant group having different religious or linguistic traditions than the majority population.<sup>1</sup>
- **The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities** has defined minority as<sup>2</sup>:

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<sup>1</sup> Molishree , *Minority Educational Institutions: A Critical Analysis*, Centre for Civil Society.

<sup>2</sup> *Ibid.*



- 1) The term 'minority' includes only those non-documents group of the population which possesses and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.
- 2) Such minorities should properly include the number of persons sufficient by themselves to preserve such traditions or characteristics; and
- 3) Such minorities should be loyal to the state of which they are nationals.

The initial courtroom attempt to answer the question who is minority was made *In Re: The Kerala Education Bill*<sup>3</sup> case where the Hon'ble Supreme Court, through S.R Das C.J., suggesting the techniques of arithmetic tabulation held that "minority means a "community" which is numerically less than "50 per cent" of total population." The Kerala High Court also agreed with the above definition and held that the word "*Minority*" is not defined in the Constitution, and in the absence of special definition, any community religious or linguistic –which is numerically less than 50 per cent of the population of the State concerned, is entitled to fundamental right guaranteed by Article 30 of the constitution.<sup>4</sup> Further in *D.A.V. College, Bhutinda v. State of Punjab and Others*<sup>5</sup>, the Hon'ble Supreme Court held that: " what constitute a linguistic or religious minority must be judge in relation to the State inasmuch as the impugned Act was a State Act and not in relation to whole of India". In *Stephen's College v. University of Delhi*<sup>6</sup>, The Court held that the minority under Article 30 must necessarily mean those who form a distinct or identifiable group of citizen of India.

The above definitions referred minorities as a group smaller in number in comparison to majority in a defined area. However, it did not indicate as to what factors must be considered while making a distinction between minorities and the rest. However there are certain

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<sup>3</sup> A.I.R. 1958 S.C. 956.

<sup>4</sup> A.M. Patroni v. Kesavan, A.I.R 1965 Ker 75 at p-76.

<sup>5</sup> 1971 (Supp) S.C.C. 261.

<sup>6</sup> (1992) 1 SCC558 at 560 (para 28).

definitions which provide certain factors which can be considered while categorizing minorities from others.

- According to Encyclopedia Britannica minorities means “group held together by ties of common descent, language or religious faith and feeling different in these respects from the inhabitants of a given political entity”.
- The Oxford Dictionary defines ‘Minority’ as a smaller number or part; a number or part representing less than half of the whole; a relatively small group of people, differing from others in race, religion, language or political persuasion.
- J.A Laponce in his book “The Protection to Minority” describes “minority” as a group of persons having different race, language, or religion from that of majority of inhabitants.
- In the Year Book of Human Rights (U.N Publication 1950 edition) minority has been described as non dominant group having different religious or linguistic traditions than the majority population.

Thus most of the definitions explained above either categorises minorities as a group smaller in numbers or a group having certain characters distinct from others. No definition comes out to be comprehensive to cover all the varied situations and illustrates the difficulty experienced in assigning limits to concept of minority.

### **Indian Constitution on Minorities**

Religious harmony, not mere tolerance, is the bedrock of India’s secularism. It is also the solemn duty of the Government to make every possible effort to protect and promote secular values and provide equality of opportunity to all religious minorities. Enshrined in the Indian Constitution therefore, are several rights that are intended to protect the interests of all citizens, including minorities.<sup>7</sup> The Constitution of India uses the word minority, or its plural form, in Article 29 to 30 and Article 350A to 350B. Under Article 30 the expression

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<sup>7</sup> Official website of Prime Minister of India, *PM on Conference of State Minorities Commissions*, Jan. 13, 2014.  
[http://pmindia.gov.in/bulletin\\_board\\_details.php?nodeid=124](http://pmindia.gov.in/bulletin_board_details.php?nodeid=124).

“minorities” has been used in two senses one based on religion and other based on language while Article 350 relates to linguistic minorities only.<sup>8</sup>

## Article 29

It states that:

- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same; and
- (2) No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

Unlike Article 30, the text of Article 29 does not specifically refer to minorities though it can be clearly deduced that the article is intended to protect and preserve the cultural and linguistic identity of the minorities. However, its scope is not necessarily confined to minorities. The protection of Article 29 is available to “any section of the citizens residing in the territory of India” and this may as well include the majority. However, India is a colourful conglomeration of numerous races, religions, sects, languages, scripts, culture and traditions. The minorities, whether based on religion or language, are quite understandably keen on preserving and propagating their religious, cultural and linguistic identity and heritage. Article 29 guarantees exactly that. There may appear to be some overlapping in language and expressions employed in Articles 15(1) and 29(2). However, Article 15(1) contains a general prohibition on discrimination by the state against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them whereas Article 29(2) affords protection against a particular species of state action viz. admission into educational institutions maintained by the state or receiving aid out of state funds.

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<sup>8</sup> Ninong Ering, *Constitution does not define minorities: govt tells RS*, The Times of India (Aug. 13, 2013), [http://articles.timesofindia.indiatimes.com/2013-08-13/india/41372208\\_1\\_minorities-act-constitution-religious-minorities](http://articles.timesofindia.indiatimes.com/2013-08-13/india/41372208_1_minorities-act-constitution-religious-minorities).

**Article 30**

Right of minorities to establish and administer educational institutions-

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.  
(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause
- (2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 30 is a minority-specific provision that protects the right of minorities to establish and administer educational institutions. It provides that “all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice”. Clause (1A) of Article 30, which was inserted by the Constitution (44<sup>th</sup> Amendment) Act, 1978, provides that “in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause”. Article 30 further provides that “the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language”. It would be worthwhile to note that minority educational institutions referred to in clause (1) of Article 30 have been kept out of the purview of Article 15(4) of the Constitution which empowers the

state to make provisions by law for the advancement of any socially and educationally backward classes of citizens or scheduled castes/scheduled tribes in regard to their admission to educational institutions (including private educational institutions), whether aided or unaided. Articles 29 and 30 have been grouped together under a common head, namely “Cultural and Educational Rights”. Together they confer four distinct rights on minorities. These include the right of:

- (a) any section of citizens to conserve its own language, script or culture;
- (b) all religious and linguistic minorities to establish and administer educational institutions of their choice;
- (c) an educational institution against discrimination by state in the matter of state aid (on the ground that it is under the management of a religious or linguistic minority); and
- (d) the citizen against denial of admission to any state maintained or state-aided educational institution.

Article 29, especially clause (1) thereof, is more generally worded whereas Article 30 is focused on the right of minorities to (i) establish and (ii) administer educational institutions. Notwithstanding the fact that the right of the minority to establish and administer educational institutions would be protected by Article 19(1)(g), the framers of the Constitution incorporated Article 30 in the Constitution with the obvious intention of providing confidence among minorities against any legislative or executive encroachment on their right to establish and administer educational institutions. In the absence of such an explicit provision, it might have been possible for the state to control or regulate educational institutions, established by religious or linguistic minorities, by law enacted under clause (6) of Article 19.

### **Article 350A**

Facilities for instruction in mother-tongue at primary stage-

It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to

any State as he considers necessary or proper for securing the provision of such facilities.

The Constitution imposes a duty on every State to provide adequate facilities for instructions in the mother tongue at the primary stage of education to children of linguistic minority group

### **Article 350B**

Special Officer for linguistic minorities-

(1) There shall be a Special Officer for linguistic minorities to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned.

The President shall also appoint a Special Officer for linguistic minorities who will investigate all matters relating to the safeguards provided for linguistic minorities under the Constitution and report to the President upon those matters as the President may direct.

### **Part III of the Indian Constitution: Fundamental Rights**

Part III of the Indian Constitution guarantees certain fundamental rights for each and every citizen of India. These general rights have significant bearing on the protection of minorities. In particular, these rights include: equality before law,<sup>9</sup> safeguard against discrimination on grounds of religion, race, caste, sex or place of birth,<sup>10</sup> equality of opportunity in matters of public employment,<sup>11</sup> abolition of untouchability,<sup>12</sup>

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<sup>9</sup> Art. 14.

<sup>10</sup> Art. 15.

<sup>11</sup> Art. 16.

<sup>12</sup> Art. 17.

freedom of expression,<sup>13</sup> freedom of association,<sup>14</sup> right to free education up to the age of fourteen,<sup>15</sup> right to freely profess, practice and propagate religion,<sup>16</sup> right of religious denominations to manage religious affairs,<sup>17</sup> safeguard against taxation for promotion of any particular religion,<sup>18</sup> and safeguard against religious instruction in state-funded educational institutions.<sup>19</sup>

Despite the guarantee of non-discrimination as a fundamental right, Indian Constitution enables the state to make special provision for the advancement of any socially and educationally backward classes of citizens or for the schedule castes and the scheduled tribes.<sup>20</sup> Moreover, promotion of educational and economic interests of schedules castes, scheduled tribes and other weaker sections of the people is one of the state policies formulated by the Constitution.<sup>21</sup> The Constitution further provides that 'seats shall be reserved' in proportion to their numbers to scheduled castes and in the Parliament,<sup>22</sup> and in the State Legislatures.<sup>23</sup>

### **Kinds of Minorities and Problems Faced by Them**

The Indian population is composed of 6 main ethnic groups, 52 major tribes, 6 major religions, and 6400 castes and sub-castes. Besides, there are 18 major languages and 1600 minor languages and dialects.<sup>24</sup> However, it is practically useful to think of four types of minorities in India: linguistic, religious, caste, and tribal.

### **Religious Minorities**

The India population consists of people from all the major religions in the world—Hindus, Muslims, Christians,

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<sup>13</sup> Art. 19(1)(a).

<sup>14</sup> Art. 19(1)(c).

<sup>15</sup> Art. 21A.

<sup>16</sup> Art. 25.

<sup>17</sup> Art. 26.

<sup>18</sup> Art. 27.

<sup>19</sup> Art. 28.

<sup>20</sup> Art. 15(4).

<sup>21</sup> Art. 46.

<sup>22</sup> Art. 330.

<sup>23</sup> Art. 332.

<sup>24</sup> T.M.A. Pai Foundation and others v. State of Karnataka and Others, WP (Civil) No. 317/1993, para.158.

Sikhs, Buddhists, Jains and Zoroastrians (Parsis). Religious Composition of Indian Population, as revealed in 2001 census, is as follows: Hindus: 81.4%, Muslims: 12.4%, Christians: 2.3%, Sikhs: 1.9%, Buddhists: 0.8%, Jains: 0.4%, and others: 0.7%.<sup>25</sup>

The largest group among the religious minorities is that of Muslims. It should be noted that India has the third largest Muslim population in world, only after Indonesia and Bangladesh. Even Pakistan, which was carved out for safeguarding the interests of Indian Muslims, has a smaller Muslim population than India. There is only one Muslim majority state in India—Jammu & Kashmir (67%) and one Muslim majority Union Territory—Lakshadweep (95%). Muslims are also found in good numbers in Assam (30.9%), West Bengal (25.2%), Kerala (24.7%), Uttar Pradesh (18.5%), Bihar (16.5%), Jharkhand (13.8%), Karnataka (12.2%), Uttarakhand (11.9%), and Maharashtra (10.6%). However, in terms of number, most Muslims reside in Uttar Pradesh, West Bengal, Bihar, Maharashtra, Assam, Kerala, Jammu & Kashmir, Andhra Pradesh, Gujarat, Madhya Pradesh, Jharkhand, and Tamil Nadu.<sup>26</sup>

There are three states in India where the Christians, the second largest religious minority of India, constitute the majority. All these states are in the north-east, viz., Nagaland (90%), Mizoram (90%) and Meghalaya (70.3%). In terms of ration, Christians also have sizable pockets Manipur (34%), Goa (26.7%), Kerala (19%), and Arunachal Pradesh (18.7%). Among the union territories, the Christians constitute a substantial number in Andaman & Nicobar Islands (21.7%). However, in terms of number, most Christians reside in Kerala, Tamil Nadu, Nagaland, Meghalaya, Andhra Pradesh, Jharkhand, Maharashtra, and Karnataka. Among the other religious minorities, the Sikhs are mainly concentrated in Punjab where they form a majority (59.9%).<sup>27</sup>

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<sup>25</sup> Demographics of India; Wikipedia  
[http://en.wikipedia.org/wiki/Demographics\\_of\\_India](http://en.wikipedia.org/wiki/Demographics_of_India).

<sup>26</sup> Islam in India, Wikipedia  
[http://en.wikipedia.org/wiki/Islam\\_in\\_India#Muslim\\_population\\_by\\_states](http://en.wikipedia.org/wiki/Islam_in_India#Muslim_population_by_states).

<sup>27</sup> Christianity in India; Wikipedia  
[http://en.wikipedia.org/wiki/Christianity\\_in\\_India#State\\_Populations](http://en.wikipedia.org/wiki/Christianity_in_India#State_Populations).



The Buddhists are mainly concentrated in Maharashtra. Jains, the India's oldest religious minority,<sup>28</sup> mainly live in the states of Maharashtra, Rajasthan, Gujarat and Karnataka.

Sense of insecurity caused by communal violence and hate campaign by Hindu religious fundamentalists appears to be one of the most common concerns of religious minorities in general and the Muslim community in particular.<sup>29</sup> It is largely Muslims who are the victims of such communal violence. During the communal riots following the demolition of Babri Masjid in 1992, almost all institutions of state and civil society in India—executive, judiciary, legislature, political parties, police, trade unions etc. failed to protect the besieged Muslim community, and uphold the secular principles that the Indian Constitution is committed to. In 2002, the state of Gujarat in western India witnessed the most horrendous massacres of Muslims by Hindu nationalist groups with the overt involvement of state machinery.

Socio-economic backwardness and disproportionate representation in almost every aspect of public life are also among the pressing issues for the religious minorities in India. Dr. Gopal Singh Report on Minorities submitted to the Government in 1983 found that amongst poorest of the poor, minorities constitute the majority. In particular, the report revealed that there were only 128 Muslims in the Indian Administrative Services out of a total of 3,785 (3.2%), and 57 Muslims in Indian Police service (2.6%).<sup>30</sup> The Report on 'Social, Economic and Educational Status of the Muslim Community of India' submitted to the government of India in 2006 (popularly known as 'Sachar Commission Report') also documented the overall situation of

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<sup>28</sup> R.A. Schermerhorn, *Ethnic Plurality in India*, Arizona, University of Arizona Press, 1978, p.101.

<sup>29</sup> Amrita Basu and Atul Kohli (eds.), *Community Conflicts and the State in India*, Cambridge, Oxford University Press, 1998.

<sup>30</sup> Venkitesh Ramakrishnan, Community on the margins, *The Hindu* (Feb. 1, 2014) <http://www.hindu.com/thehindu/thscrip/print.pl?file=20061215004700400.htm&date=fl2324/&prd=fline&>.

Muslims, the largest religious minority of India, in India. Some of the findings of this report are as follows:<sup>31</sup>

- Muslims live with an inferiority complex as “every bearded man is considered an ISI agent”;
- Social boycott of Muslims in certain parts of the country has forced them to migrate from places where they lived for centuries;
- A community specific factor for low educational achievement is that Muslims do not see education as necessarily translating into formal employment;
- Schools beyond the primary level are few in Muslim localities;
- Many banks have designated a number of Muslim concentration areas as ‘negative or red zones’, where they do not give loans;
- It is common to find names of Muslims missing in the voter lists of a number of states;
- Unemployment rate among Muslim graduates is the highest among Socio-religious groups both among the poor and the non-poor;
- The participation of Muslims in regular jobs in urban areas is quite limited compared to even the traditionally disadvantaged scheduled castes and scheduled tribes;
- Participation of Muslims in security related activities (e.g., Police) is considerably lower than their share in population;
- Compared to the Muslim majority areas, the areas inhabiting fewer Muslims had better roads, sewage and drainage, and water supply facilities;
- The presence of Muslims is only 3% in the IAS, 1.8% in the IFS and 4% in the IPS;
- In no state does the representation of Muslims in the government departments match their population share;
- The presence and participation of Muslims in the Judiciary has been a major point of concern.

Although the religious minorities always claim the benefits of affirmative action as stipulated in Articles 15(4) and 16(4) of the Constitution, the government of

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<sup>31</sup> Anis Chisti, Sachar Committee Report: A Review, *Mainstream Weekly* (Dec. 23, 2006), <http://www.mainstreamweekly.net/article95.html>.

India consistently refuses to extend reservations to religious groups on the ground that it would be divisive. However, it is part of the Indian political strategy, as often argued, to periodically appoint Muslims on positions of high visibility like a President and a Chief Justice to give the impression that Muslims are equal participants in the public life in India.<sup>32</sup>

Recently, the UPA government has given consent for giving national minority status, under the National Commission of Minorities Act, to the Jain community.<sup>33</sup> The Jain community numbering about 50 lakh has minority status in 11 states but was not covered by the National Commission of Minorities Act. Thus, Jains will also come under the ambit of national minority status making a total of six minority community in India.

### **Linguistic Minorities**

By one estimate, there were some 1,632 languages spoken in India.<sup>34</sup> However, the speakers of 18 major languages constitute about 91% of the population. Although the Constitution of India offers detailed provisions on language, it does not provide a clear criterion for defining minority languages.<sup>35</sup> However, it is agreed upon by all that there is no linguistic group at the national level which can claim the majority status and as such the majority-minority question is considered in reference to the state only.<sup>36</sup>

The major demand of linguistic groups is that their language be recognized as an official language of states. This recognition, linguistic minorities argue, reduces the

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<sup>32</sup> Iqbal A. Ansari (ed.), *Communal Riots, The State & Law In India*, New Delhi, Institute of Objective Studies, 1997, pp. 66-75.

<sup>33</sup> Abantika Ghosh, *Jain Community given Central Minority Status*, The Indian Express (Jan 21, 2014) <http://indianexpress.com/article/india/india-others/jain-community-given-central-minority-status/>.

<sup>34</sup> D. D. Basu, *Introduction to the Constitution of India*, New Delhi, Prentice Hall of India, 1997, p. 187.

<sup>35</sup> Rajeshwari V. Pandharipande, "Minority Matters: Issues in Minority Languages in India", *International Journal on Multicultural Societies*, vol.4, no.2, 2002, p. 214.

<sup>36</sup> S. Chaklader, *Linguistic Minority as a Cohesive Force in Indian Federal Process*, New Delhi, Associate Publishing House, 1981, p. 14.

pressures for linguistic assimilation and enables the group to strengthen its identity and solidarity.<sup>37</sup> Accordingly, after independence, many of the Indian states were reorganized, not of course without widespread struggles of the people, along linguistic lines. Thus, almost every major states of India has what may be called a 'home' language, of which it is a 'home' state. At present, the officially recognized languages are-Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Maithili, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santhali, Sindhi, Tamil, Telugu, and Urdu.<sup>38</sup>

The anomalies and contradictions apparent in the scheme of official recognition of language generate some concerns for linguistic minorities. There are states, most notably in India's northeast, where the local languages of overwhelming number of people are not yet 'officially' recognized. For example, the state level official languages in Meghalaya, Mizoram and Nagaland are not spoken by the majority of the people in these states. Kashmiri, which is spoken by 53 per cent of the total population in the state of Jammu and Kashmir, is not the state language. Contrarily, Urdu, the official language of Jammu and Kashmir, is spoken by less than 1 per cent of the total population of the state. Similarly, English, the official language of Meghalaya, is spoken by 0.01 per cent of the total population.<sup>39</sup>

### Indigenous Tribal Groups

Indigenous tribal people of India are concentrated in three principal regions. One is India's northeast. The second is in middle India, and includes Bihar, the hill areas of inland Orissa, southeastern Madhya Pradesh, and a portion of northern Andhra. The third region is in India's west, and includes parts of eastern Gujarat, western Madhya Pradesh, and southern Rajasthan. There

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<sup>37</sup> Myron Weiner, *The Indian Paradox: Essays in Indian Politics*, New Delhi, Sage Publications, 1989, p. 66.

<sup>38</sup> Languages with official status in India [http://en.wikipedia.org/wiki/Languages\\_with\\_official\\_status\\_in\\_India#Eighth\\_Schedule\\_to\\_the\\_Constitution](http://en.wikipedia.org/wiki/Languages_with_official_status_in_India#Eighth_Schedule_to_the_Constitution).

<sup>39</sup> Rajeshwari V. Pandharipande, "Minority Matters: Issues in Minority Languages in India", *International Journal on Multicultural Societies*, vol.4, no.2, 2002, p. 215.

is also a small tribal area in the mountain region of Himachal Pradesh and in the Nilgiri hills in Tamil Nadu. Among the tribal groups, six largest tribes constitute nearly one-half of the India's tribal population. These tribes are: the Gonds of central India; the Bhils of western India; the Santhals of Bihar, West Bengal and Bihar; the Oraons of Bihar and West Bengal; the Minas of Rajasthan; and the Mundas of Bihar. Some tribes, though considerably smaller, constitute a majority of the areas in which they live: the Nagas, Khasis and Garos, for example, in India's northeast.

According to the 2001 census, the schedule tribal population constitutes 8.2% of the total population of India. Among the states, Mizoram has the highest proportion of scheduled tribes (94.5%) while Goas has the lowest (0.04%).

The main demand prevalent among many tribal people is their right to autonomy. In response, the successive governments have relied on two political administrative solutions: the creation of autonomous district and regional councils provided for by the sixth schedule of the Constitution, and the formation of separate states.<sup>40</sup> Such solutions being not in accordance with the aspiration of tribal people, many indigenous groups, particularly in the north-eastern region, have been struggling for self-rule.<sup>41</sup> The overall socio-economic condition of these tribal groups is also far below the national average.

### ***Dalits as a Caste Minority***

The word '*dalits*' comes from the Hindi root *dal* and means 'held under check', 'suppressed' or 'crushed' — or, in a looser sense, 'oppressed'.<sup>42</sup> The caste system is a traditional Hindu system of social segregation, which works on the principle of purity pollution. In this structure of segregation, *dalits* occupy the lowest

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<sup>40</sup> Christian Erni, *Indigenous Peoples Self-Determination in Northeast India*, *Indigenous Affairs*, vol.3, no.1, 2001, p. 61.

<sup>41</sup> Sanjib Baruah, *Territoriality, Indigeneity and Rights in the Northeast India*, *Economic and Political Weekly*, Jan 29, 2014, pp. 15-19.

<sup>42</sup> National Confederation of Dalit Organisations  
[http://nacdor.org/?page\\_id=184](http://nacdor.org/?page_id=184).

position. Traditionally they are considered as untouchable by so called higher castes/dominant caste group. At present, *dalits* are not necessarily present only in the Hindu community. Many *dalits* who converted to other religions in the past few centuries continue to retain their *dalit* heritage. The introduction of Islam to India from about the thirteenth century AD led to widespread conversions by many low-caste and 'untouchable' groups, and by the mid-nineteenth century about one quarter of the population was Muslim.<sup>43</sup> Although the Constitution of India formally outlawed the practice of untouchability-the imposition of social disabilities on persons by reason of their birth in certain castes-back to almost sixty years ago, in practice the *dalit* communities are still subjected to extreme forms of social and economic exclusion and discrimination.

According to the Indian Constitution, *dalits* are not classified as minorities, although the Court, in one instance, labeled them as the "world's most oppressed minority".<sup>44</sup> Within the constitutional scheme, *dalits* are perceived to be included in the term 'scheduled castes'. However, the Constitution does not define or specify as to who are to be regarded as 'scheduled castes', rather leaves it to the discretion of the President to determine and accordingly notify.<sup>45</sup>

According to the 2001 census, the schedule caste population constitutes 16.2% of the total population of India. Four fifth (79.8%) of them live in rural areas while the rest one-fifth (20.2%) in urban areas. The highest percentage of scheduled castes population to the total scheduled castes population of the country live in Uttar Pradesh (21.1%) followed by West Bengal (11.1%) and Bihar (7.8%), Andhra Pradesh (7.4%) and Tamil Nadu (7.1%).

The ground reality for the *dalits* is that India's social hierarchy and ethno demography have affected the context of equal protection provisions of the

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<sup>43</sup> World Directory of Minorities

<http://www.minorityrights.org/?lid=5652&tmpl=printpage>.

<sup>44</sup> State of Karnataka v. Babu Ingale, (1992) 3 SCR 284, para. 15.

<sup>45</sup> Article 366(24) and Article 341 of the Indian Constitution.

Constitution.<sup>46</sup> Their socio-economic condition is quite inhuman. Although the constitutionally mandated affirmative action has had some impact in enabling them to overcome histories of social injustice and religiously sanctified discrimination, still now *dalits* continue to be one of the most underprivileged groups in India in every index of human development. Caste based violence is another concern for the *dalit* community in India.<sup>47</sup>

## Conclusion

Pluralism is the keystone of India's civilization and culture. The Indian nation with its continental size and minority population of country-like-magnitude cannot afford the luxury of letting the vast population of minorities lie low as sleeping partners.<sup>48</sup> They have to be assimilated and empowered, so that they can contribute to the nation. So the need is to address the real problems of minorities. Agreed that there are various legislations and provisions for their upliftment, but they have not been able to serve their purpose completely. The Muzzaffarnagar riots have once again showed that Muslims, that too in state where they are highest in number, are not safe in India. The fact that in various states the official language is not even spoken by 1% of the population shows that something is wrong there. The condition of *dalits*, in spite of various constitutional provisions and legislations, is not up to the mark.

So, the need of the hour is that the various problems related to minority groups should be addressed as soon as possible, so that they can help in development of the nation.



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<sup>46</sup> Maya Chadda, *Minority Rights and Conflict Prevention: Case Study of Conflicts in Indian Jammu and Kashmir, Punjab and Nagaland*, London, Minority Rights Group International, 2006, p. 3.

<sup>47</sup> Smita Narula, *Broken People: Caste Violence against India's 'Untouchables'*, New York, Human Rights Watch, 1999.

<sup>48</sup> Prof. S.N. Singh, *Muslims in India*, Anmol Publishers, New Delhi, 2013.

# EDUCATIONAL RIGHTS OF MINORITIES IN INDIA: REFLECTION ON ARTICLES 29 AND 30 OF THE CONSTITUTION

Ms. Subhashini Narayanan\*

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“Education is a better safeguard of liberty than a standing army.”

-Edward Everett

## Introduction

For a democracy to be healthy and efficient, the protection of the rights of minorities is a *sine qua non*. The protection of the underdogs from the dominating class is essential for their development. The apex court of India has time and again asserted that India is a land of different castes, people, communities, religions and cultures; a land of 6 main ethnic groups, 52 major tribes, 6 major religions and 64 castes and sub-castes. The judges reject any absorptionist or inclusivist trend, attempting to preserve the distinct identity of each group. The Constitution of India broadly recognizes two categories of minorities: linguistic and religious. Under Section 2(c) of the Statute of the National Commission of Minorities, the Government of India has officially recognized Muslims, Christians, Sikhs, Buddhists and Zoroastrians as minority communities. Although the Government of India used religion as the basis for categorizing the population, the religious minorities are not the only minorities in India.

Secularism is one of the basic features of the constitution, thereby indicating that it is beyond the amending power of the Parliament. The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a united and cohesive India. Regarding the constitutional ideal of equality, the Supreme Court of India has explained the ideals of ‘substantive equality’ and ‘differential treatment’. Legitimizing the conferring of

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\* Student, 2<sup>nd</sup> year, B.A. LL.B.(H), Hidayatullah National Law University, Raipur.



certain rights on a special class of citizens, the court has stated that all the people of India are not alike, making preferential treatment to a special section of society the need of the hour. Article 30 of the Constitution is a special right conferred on the religious and linguistic minorities because of their numerical handicap, to instill in them a sense of security and confidence.<sup>1</sup>

### **Concept of Minority**

The word 'minority' has been derived from the Latin word 'minor' which means smaller. The Britannica Encyclopedia defines minority as a culturally, ethnically, or racially distinct group that coexists with but is subordinate to a more dominant group (whatever the numerical strength of such minority). In social scientific usage the term 'minority' is used to denote a group that is assigned an inferior status in society. A minority group is often defined on the basis of a relatively permanent and constant status and on the basis of being different from the majority group. This includes groups with deeply held common identities that are relatively unlikely to change, i.e., linguistic and religious minorities. Minority groups are generally different in a way that is 'socially significant' from groups that hold a dominant place and they are relegated to a subservient position in society. The United Nations Sub-Committee on Prevention of Discrimination and Protection of Minorities and Minority Rights in India has defined the term 'minority' as "only those non-dominant groups in a population, which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population". The members of a minority are often excluded from a full share in mainstream life in society on account of their 'difference' from the majority. Such situations tend to give rise to a discriminatory and bigoted attitude towards the minority in question. Minorities in turn respond strongly by developing a sense

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<sup>1</sup> M.P. Raju, *Minority Rights & Educational Institutions: Latest Developments*, Vol. 9 No.1 Integral Liberation (2005).

of group loyalty and unity isolating them further from the rest of the society.<sup>2</sup>

The Indian Constitution neither defines the term 'minority', nor provides any conditions that need to be fulfilled for a group to be eligible to be recognized as a minority. The drafters of the Constitution left this task to the judiciary. The Supreme Court of India in 1958 set out parameters for determining if a community constituted a minority community.

In *Re: The Kerala Education Bill*<sup>3</sup> the first attempt was made at interpreting the meaning and ambit of the term 'minority'. In this case the Supreme Court held that minority means a community which is numerically less than 50 per cent of the population. This, however, does not define the geographical limits within which the said 50 per cent is to be determined. Later in *D.A.V. College Jalandhar v. State of Punjab*<sup>4</sup> rejecting the contention that a religious or linguistic minority should be determined with respect to the entire population of the country, the Supreme Court held that a minority has to be determined in relation to a particular legislation which is sought to be implemented. In the case of a state law, minorities have to be determined in relation to the population of the state, not the entire country.

In *T.M.A. Pai Foundation v. State of Karnataka*<sup>5</sup> it has been held by the eleven judges' bench of the Supreme Court that a minority, whether linguistic or religious, is determinable only by reference to the demography of the state and not by taking into consideration the population of the country as a whole. The court further held that the rights of linguistic and religious minorities as well as the majority community to set up educational institutions of their choice are unfettered, but that the right to administer them is not absolute.

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<sup>2</sup> Brij Pal, *Empowerment of Minority in India*, Vol. 1(4), Global Advanced Research Journal of History, Political Science and International Relations, pp. 089-094 (2012).

<sup>3</sup> AIR 1958 SC 956.

<sup>4</sup> AIR 1971 SC 1737.

<sup>5</sup> (2002) 8 SCC 481.

## History of Minority Rights in India

Group-preference state policies in India have been in existence since the early twentieth century. Although not very well defined and extensive, provisions for improving the conditions of minorities and bringing them at par with the rest of the society have been around for quite some time. Provisions for special representation for those considered backward in the legislatures and reservation in government employment had been set in motion by the British governance in India as well as by some princely states. Dominant nationalist opinion in the Constituent Assembly believed that availing of group-preference provisions included in the Constitution by religious minorities in India was not fair as such safeguards were being included for the sole reason of helping backward sections of society in overcoming their disabilities and not for promoting the preservation of distinct cultural identities. The concept of safeguards for minorities as a matter of general policy was rejected and such protection was considered legitimate only in the case of particular groups with the specific purpose of expunging the social and economic disabilities of backward sections of society. During the colonial period, minority safeguards were defended as a mechanism to facilitate the political accommodation of different communities and as a means to ameliorate the conditions of disadvantaged groups. The maintenance of a political balance between different communities was regarded as an unacceptable basis for minority safeguards in the nationalist vision and hence the case for safeguards for religious minorities was weakened.<sup>6</sup>

The need for special rights for minorities was felt during the British period when minority-majority awareness was at its peak. The implementation of the divide and rule policy of the British led to the estrangement of the minorities. Above all, fear in the minds of the minority regarding their status and rights post-independence was fuelled by the identification of the Congress with the upper-caste Hindus. Under these conditions, rights protecting minority interests were sought to be incorporated within the framework of the upcoming

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<sup>6</sup> Rochana Bajpai, *Constituent Assembly Debates and Minority Rights*, Vol. 35, Economic and Political Weekly, pp.1837-1845 (2000) .

Constitution of independent India to dispel the fears of the minorities and to set their concerns to rest.<sup>7</sup> Under the Constitution of 1950, preferential provisions were restricted mainly to the scheduled castes and scheduled tribes. In order to protect the interests of minorities in India, numerous provisions have been incorporated in the nation's Constitution under the head of the 'inalienable' fundamental rights.

### **Constitutional Assembly Debates**

Special treatment for certain groups of people was based on a history of exploitation and injustice by Hindu (high caste) society and the notion that justice required atonement in some form was held. Minority safeguards were intended to be temporary, transitional measures necessary until backward sections of the population were brought up to the level of the rest.

It is generally assumed that all the Constitution-makers advocated the notion of secularism and democracy. Dominant nationalist opinion visualized the ideal as a future situation in which safeguards for minorities would no longer be necessary. It was believed that the inclusion of such safeguards would undermine the fundamental principles on which the new nation state was to be formed. Such protection required the recognition of a person's caste in public policy hence marring the commitment to secularism. A scheme of group preference would lead to departures from a system of equal individual rights and the result would be a compromise on equality and justice. The granting of political safeguards to minorities would fuel separatist tendencies and weaken national unity and cohesion. In the pre-Constitution period, minority safeguards were regarded as instruments of the colonial 'divide and rule' policy intentionally fabricated by the 'deceitful' colonial rulers to mislead the minorities and to create friction between different sections of the nation hence delaying the transfer of power when it became unavoidable.

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<sup>7</sup> Ranu Jain, *Minority Rights in Education: Reflections on Article 30 of the Indian Constitution*, Economic and Political Weekly, June 11, 2005.

Though secularism is commonly interpreted to imply that the state does not give preference to any particular religion, it does not relate to matters of religion alone. In general usage it refers to the elimination of religion and caste as categories of the process of public policy-making. Dominant opinion held that building a nation required the formation of a secular spirit which would prompt people to stop viewing themselves as members of a particular community and instead see themselves as Indians. To be caught in petty group concerns by being communal would undermine the very basis of the new secular ethos aimed at by the dominant nationalists. This view exemplified by Pandit Nehru regarded claims for minority safeguards as distractions from the more pressing problems of development. During this period, the nationalist opinion being liberal in nature propagated the idea of equal individual rights further according centrality to the individual over the community.<sup>8</sup>

### **Protection Offered to Minorities in the Indian Constitution**

Conscious of the complexity of the minority problem in India and estrangement between different sections of the society that it could cause in a country that had recently attained independence, the Constitution-framers were sure to include Constitutional safeguards for the protection of minority rights, though fundamental rights were made available to every citizen of India irrespective of their caste, creed, sex, the language they spoke, race or culture. To prevent the majority from exerting their will unreasonably on unwilling minorities the Constitution, in addition to ensuring basic rights, provided them with the opportunity to preserve their culture, religion and language. To ensure 'actual' equality among the 'unequals' special rights were included in the Constitution for the minorities by giving them the right to establish educational institutions and guaranteeing to them autonomy in matters of administration of these institutions.

Predominantly due to the existence of constitutional safeguards preserving the language, religion and culture

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<sup>8</sup> Rochana Bajpai, *Constituent Assembly Debates and Minority Rights*, Vol. 35, Economic and Political Weekly, pp.1837-1845 (2000).

of the minorities, the ideals of pluralism and secularism have proved to be flexible in India despite attacks from the majority. The Constitution of India confers various rights on the minorities-Articles 15, 16, 25, 26, 27, 28, 29 and 30. Article 15 provides that the State should not discriminate on grounds of religion, race, caste, sex or place of birth against any citizen. Article 16 states that no citizen shall be denied public employment on the ground of religion, race, caste, sex, descent, place of birth or residence. In the interest of the minorities, however, Article 16(4) allows the State to take special measures for the backward class citizens in government positions, in case they are not adequately represented. Article 25 grants every individual the freedom of conscience and the right to profess practice and propagate freely his\her religion. However, this right is not absolute. The freedom to manage one's own religious affairs is provided by Article 26. This Article confers the right to every religious denomination to exercise its own rights. This right has to be exercised in a manner that conforms to morality, public order and health. Article 26 is complementary to Article 25. Further, Article 27 specifies that no person shall be compelled to pay any taxes, the proceeds of which are specifically allocated for the payment of expenses for the promotion and maintenance of any particular religion or religious denomination. Article 28(1) prohibits any educational institution, which is wholly maintained out of State funds, to provide religious instruction on account of India being a secular state.<sup>9</sup>

### **A. Educational Rights**

Article 29 and 30 confer cultural and educational rights on the minorities. Article 29(1) grants the right to any group of the citizens residing in India having a distinct language, script or culture of its own, to preserve the same. Article 29(1) essentially refers to sections of citizens who have a distinct language, script or culture. The link that runs through Article 29(1) is language, script or culture, and not religion. Whether they belong to a minority recognised by the Government or not, Article 29(1) gives the right to all sections of citizens, to preserve their language, script or culture. In the exercise of this

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<sup>9</sup> Manoj Kumar Sinha, *Minority Rights: A Case Study of India*, 12 International Journal on Minority and Group Rights 355-374 (2005).

right to preserve their culture or language that section of the society can set up educational institutions. This right is associated with the right conferred by Article 30. However, the right under Article 30 is not absolute. Article 29(2) lays down that in case an educational institution is maintained by the State or receives aid, no citizen shall be denied admission on the grounds only of religion, race, caste, or language.

### **B. Effect of Governmental Aid on Minority Rights**

Article 29(2) holds that no citizen shall be denied admission on grounds only of religion, race, caste or language to any educational institution maintained by the State or that receives aid out of State funds. On the other hand Article 30(1) guarantees all minorities, whether linguistic or religious, the right to establish and administer educational institutions of their choice. The nature and scope of Government control over minority educational institutions in the context of the non-discrimination principle under Article 29(2) has been interpreted and laid out in the case of *Unnikrishnan v. State of Andhra Pradesh*<sup>10</sup>. According to the majority opinion in the *T.M.A. Pai* case an aided minority educational institution would be required to admit a reasonable extent of non-minority students so that the rights under Article 30(1) would be substantially conferred while the citizens' rights under Article 29(2) would not be violated. However, the Court left it to the State to determine the percentage of non-minority students to be admitted in various minority institutions. The minority right to establish and administer educational institutions is currently governed by the law laid down in the case of *St. Stephen's College v. University of Delhi*<sup>11</sup>. This judgment granted complete freedom to minority educational institutions as long as 50 per cent of the available seats were given to non-minority students. However, in the *T.M.A. Pai* case it was found that fixing the percentage of seats to be given to non-minority students is not desirable in practice. The non-minority component should be reasonable, changing according to the size of the minority, the type of institution and the varying educational needs of the

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<sup>10</sup> (1993) 1 SCC 645.

<sup>11</sup> 1992 (1) SCC 588.

minorities. It was further held in this case that the State could lay down reasonable conditions to be fulfilled by the institution when it was applying for governmental aid, however, it could not force them to give up their rights guaranteed under Article 30. The rights of the minority educational institutions in general remain unchanged despite receiving grants-in-aid.

Judges in general opine that any regulation framed in national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. The right conferred by Article 30(1) cannot override national interest or prevent the government from framing regulations for that purpose; but this would mean that minorities cannot have any special fundamental rights, which are not available to the majority community. A major flaw in the reasoning of the decision is the body responsible for the determining whether a group is a linguistic or religious minority. Majority opinion held that the deciding body should be the State. Minority institutions, which administer educational institutions in the spirit of service alone, have nothing to lose from the judgment in case they do not receive aid from the government and are totally free from any State control.

### **C. National Commission for Minority Educational Institutions Act, 2004**

In order to enforce this right the National Commission for Minority Educational Institutions Act has been enacted to safeguard minority interests. Section 2(g) of the Act defines a minority educational institution as a college or institution (other than a University) established or maintained by a person or group of persons from amongst the minorities. In *S.P. Mittal v. Union of India*<sup>12</sup> the Supreme Court has held that in order to claim the benefit of Article 30(1) the community must show

1. That it is a linguistic/religious minority.
2. That the institution was established by it.

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<sup>12</sup> AIR 1983 SC 1.



Unless and until these two conditions are fulfilled, the institution cannot claim the guaranteed rights to administer it. The proof of the fact of the establishment of the institution is a precedent for claiming the right to administer the institution. The onus of proof lies on one who asserts that an institution is a minority institution. Whether the Government declares it or not, a minority educational institution continues to be one. When the Government makes such a declaration regarding an educational institution, it merely recognizes that the institution was established and is being administered by a minority community. It is merely an open acceptance of the legal character of the institution which must have existed antecedent to such declaration.

The right enshrined in Article 30(1) of the Constitution is meant to benefit the minority by protecting and promoting its interests. However, there should be a nexus between the institution and the particular minority to which it claims to belong. The right claimed by a minority community to administer the educational institutions depends on the proof of establishment of the institution. In *P.A. Inamdar v. State of Maharashtra*<sup>13</sup> it has been held that the minority institutions are free to admit students of their own choice including students of non-minority community and also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational status is lost. If they do so, they lose the protection of Article 30(1) of the Constitution”.

The objects sought to be achieved by Article 30(1) are:

1. to enable the minorities to conserve their religion and language, and
2. to give a thorough good general education to the children belonging to such minority.

So long as the institution retains its minority character by achieving and continuing to achieve the two objectives, the institution would remain a minority institution. The State Government can prescribe percentage of the minority community to be admitted in a

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<sup>13</sup> (2005) 6 SCC 537.

minority educational institution receiving financial aid from the Government, taking into account the population and educational needs of the area in which the institution is located. There cannot be a common regulation in respect of types of educational institutions in different levels of education, for the entire State, fixing the uniform ceiling in the matter of admission of students in minority educational institutions. A balance has to be kept between preserving the right of the minorities to admit students of their own community and that of admitting a few outsiders in their institutions subject to the condition that the manner and number of such admissions is not violative of the minority character of the institution. The minority educational institution is primarily for the benefit of the concerned minority. Hence, the sprinkling of the non-minority students in the student population of the minority educational institution is expected to be peripheral either for generating additional financial source or for cultural courtesy. Thus, a substantive section of student population in minority educational institution should belong to the minority.

The States Reorganization Commission that was set up in the early 1950's to rationalize the administrative structure of the country came to the conclusion that languages of minority groups were commonly not among the languages mentioned in the Eighth Schedule of the Constitution. Therefore, it recommended certain measures to be followed to promote the cause of linguistic minorities. Consequently, Articles 350A and 350B were added to the Constitution. Article 350A discusses the duty of the State to provide adequate facilities for instruction in schools at the primary stage in their mother tongue to children belonging to linguistic minorities. Further, Article 350B makes provisions for the appointment of a Commissioner for Linguistic Minorities whose sole responsibility would be to protect the educational and linguistic rights of minorities.<sup>14</sup>

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<sup>14</sup> Kamal K Sridhar, *Language in Education: Minorities and Multilingualism in India*, Vol. 42, International Review of Education, pp.327-347.

## **D. Relation between Articles 29 And 30**

Close inspection reveals a deep-rooted difference between the two Articles. On one hand Article 30 provides the exclusive right to establish and administer educational institutions to the linguistic and religious minorities, and on the other hand Article 29(2) provides the right to admission in government administered and aided educational institutions to the citizens of India. In the case of *St. Xavier's College v. State of Gujarat*<sup>15</sup> a bench of nine judges examined the interrelationship between Articles 29 and 30 and held that Articles 29(1) and 30(1) dealt with distinct matters and may be considered supplementary to each other in relation to certain cultural rights of minorities.

The case of *St Stephen's College*<sup>16</sup> decided by a bench of five judges of the Supreme Court is a landmark case while examining the relation between Article 29(2) and Article 30(1). It was opined that minority aided educational institutions are entitled to prefer their community candidates to maintain the minority character of their institutions in conformity with the university standard. The State may regulate the intake in this category with due regard to the need of the community in the area which the institution is intended to serve not allowing the intake to exceed 50 per cent of the annual admission. The admission of other community candidates shall be done purely on the basis of their merit and capabilities. The ratio outlined in the *St Stephen's College* case is correct but rigid percentage cannot be stipulated. The authorities can stipulate reasonable percentage in accordance with the type of institution, population and educational needs of the minorities.

## **Conclusion**

The constituent assembly debates show a tolerant rather than an encouraging approach of the state towards the minorities. This further explains the stand of the Constitution-makers to make provisions for minorities who want to seek special rights by asserting their

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<sup>15</sup> AIR 1974 SC 1389.

<sup>16</sup> AIR 1992 SC 1654.

demands instead of giving everything on a platter. The partition of the nation and many other factors had caused the Constitution-makers to become cautious when it came to minorities demanding rights to prevent any hindrance to the process of development in the nation. This was one of the main reasons for imposing restrictions on political rights of the minorities and confining them to social, educational and cultural spheres. The Article itself has been kept a little vague to allow periodical interpretation of the rights by the Indian courts, keeping in consideration the historical requirements of the nation and minority-majority relations. In case of interpretation of Article 30 by the courts, the judgments vary from one case to another, hence, reflecting the personal biases of the judges. This results in making the interpretation of this Article very subjective and vague. The interpretation of this Article further reflects a trend towards gradually reducing the scope of the Article by meting out liberal treatment to linguistic minorities over religious minorities. This has caused many minority communities to be deprived of what is their due. In addition to this, the conjunctive use of Articles 29 and 30 has caused many issues like quote-fixing in seats. Although it is accepted that admission should not be denied to any individual who meets the eligibility criteria set by the institution, the rigid fixing of a ratio affects the enrolment of the members from the minority community in the institution. This provision works to the disadvantage of the minorities who come from a backward economic and educational background and may not have the resources to buy a seat in a general institution or the required merit. In the *T.M.A. Pai* case, although, the ratio of 50:50 has been rejected, the concerned authorities have been given power to adapt the ratio with the educational need of the area. Such a situation could result in creating friction between the government and the minorities. The rising issues in case of minority educational institutions are those of procuring and proving one's minority status which is not always easily granted, government aid compelling such institutions to abide by demands of the State (limiting their autonomy).

## **CONSTITUTIONAL PRIVILEGES TO THE MINORITIES IN RESPECT TO THE EDUCATION: A REFLECTION ON ARTICLE 30 OF THE CONSTITUTION OF INDIA**

**Ms. Masumi Nanavaty\***

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In this paper Article 30 will be looked upon mainly, whereas there are many other Fundamental Rights (Article 15 to 17, and 25 to 30) and Directive Principles of State Policy (Article 330 to 339 and 350) are there for the benefits of the minorities. For an easy reference the Article 30 is stated below:

### **Right of Minorities to Establish and Administer Educational Institutions**

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

[(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

- (2) The State shall not, in granting aid to the educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 30 guarantees the right of minorities to establish and administer educational institutions. It does not

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\* Student, 2<sup>nd</sup> year, Institute of Law, Nirma University, Ahmedabad.

expressly refer to citizenship as a qualification for the members of the minorities.<sup>1</sup>

Whereas, Clause (1) of Article 30 provides the right to all the minorities to establish and administer educational institutions of their choice. It is essential that the rights available to minorities are protected in regard to institutions established and administered by them. Accordingly, institutions declared by the State to be minority institutions under cl. (1) of Article 30 are omitted.<sup>2</sup> The object of Article 30(1) is to give the minorities "a sense of security and a feeling of confidence" not merely by guaranteeing the right to profess, practice and propagate religion to religious minorities and the right to conserve their language, script and culture, but also to enable all the minorities, religious or linguistic, to establish and administer educational institutions of their choice.<sup>3 4</sup>

Whereas, Article 30(2) mandates that in granting aid to educational institutions, the State shall not discriminate against any educational on the ground that it is under the management of a minority, whether based on religion or language. Minority institutions are not to be treated differently while giving financial assistance. Receipt of aid by a minority educational institution does not impair its right under Article 30(1)<sup>5 6</sup>

The expression "educational institutions" means institutions that impart education, including education at all levels from the primary school level up to the postgraduate level as also professional education.<sup>7</sup>

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<sup>1</sup> Right Rev. Bishop S.K. Patro v. State of Bihar, (1969)1 S.C.C. 363: AIR 1970 S.C. 259.

<sup>2</sup> Ashok Kumar Thakur v. Union of India (2008)6 SCC 1, p. 541.

<sup>3</sup> A.P. Christians Medical Educational Society v. Government of A.P. (1986)2 S.C.C. 667: AIR 1986 S.C. 1490.

<sup>4</sup> Prof. M.P. JAIN, Indian Constitutional Law 1351 (Justice Ruma Pal, Samaraditya Pal edn., LexisNexis Butterworths Wadhwa, Nagpur 2012) (1962).

<sup>5</sup> Professor M.P. JAIN, Indian Constitutional Law 1351 (Justice Ruma Pal, Samaraditya Pal edn., LexisNexis Butterworths Wadhwa, Nagpur 2012) (1962).

<sup>6</sup> V.N. Shuklas, Constitution of India 261 (Mahendra P. Singh, 11th edn., Eastern Book Company, Lucknow 2012) (1950).

<sup>7</sup> Durga Das Basu, Indian Constitutional Law 327 (3rd edn., Kamal Law House, Kolkata 2011) (2007).

The concern behind the solemn guarantee in all the cases was to try and convince the minorities that their interests shall and would be protected under the Indian Constitution after the need for the same was felt when the minority- majority context was heightened during the British Period. This minority- majority rule had estranged the minorities to a very large extent. And because of this divide and rule policy the constitutional rights to a minority person were guaranteed and was considered as a motivating force to compel away fear and also to convince the minorities that their rights would be considered in the Independent India. But, because of the Partition of India- Pakistan and because of the assassination of Mahatma Gandhi the rights were then confined to the minorities to socio-cultural field like education.<sup>8</sup>

A few relevant interpretations defining the interpretations of the cases of both High Court and Supreme Court on the Article 30 are discussed in the subsequent research paper.

### **Who is a Minority?**

The term "minority" cannot be just explained simply by interpreting the words in its factual sense. In some societies, it is based on the numerical ratio to the population as a whole at a particular place. The minority is thought of as an opposite to the majority. The international law though uses the term "minority" in a very restricted sense. The origin of the minority group may be possible in any of the following manners:<sup>9</sup>

1. It may formerly have constituted an independent state with its own tribal organization;
2. It may formerly have been part of a State living under its own territory, which was later segregated from this jurisdiction and annexed to another State; or

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<sup>8</sup> Ranu Jain, *Minority Rights In Education: Reflections On Article 30 2430-2437* (ECONOMIC AND POLITICAL WEEKLY, Vol. 40, No. 24).

<sup>9</sup> Dr. Satish Chandra, *Minorities In National And International Laws* 11 (Deep & Deep Publications, New Delhi) (1985).

3. It might have been, or yet to be, a regional scattered group which although was bound to the predominant group by certain feelings of solidarity, has not reached even a minimum degree of real assimilation with the predominant group.

To identify the minority group, five distinctive features are as under:<sup>10</sup>

1. A minority group is a subordinate social group. Its members suffer disadvantages resulting from prejudice and discrimination. These may include segregation and persecution.
2. The members of a minority group have their own physic, culture, dialect etc. which the dominant group holds in low esteem. The group usually has distinguished characteristics.
3. The members of a minority group identify themselves as a part of the group. There is an in-group feeling of loyalty.
4. Membership in a minority group is usually not voluntary. It is by birth.
5. Members of a minority group have strong bounds of brotherhood and generally believe in endogamy.

Article 30(1) gives the linguistic or religious minorities the following two rights<sup>11</sup>:

1. The right to establish, and
2. The right to administer educational institutions of their choice.

As regards the indicia to be prescribed for grant of minority status certificate, a reference to Section 2(g) of the National Commission for Minority Educational Institution Act, 2004, has become inevitable as it defines

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<sup>10</sup> Dr. Satish Chandra, *Minorities In National And International Laws* 11 (Deep & Deep Publications, New Delhi) (1985).

<sup>11</sup> Prof. M.P. JAIN, *Indian Constitutional Law* 1351 (Justice Ruma Pal, Samaraditya Pal edn., LexisNexis Butterworths Wadhwa, Nagpur 2012) (1962).



a Minority Educational Institution. Section 2(g) is as under:<sup>12</sup>

“Minority Educational Institution” means a college or institution (other than a University) established or maintained by a person or group of persons from amongst the minorities.”

Sec. 2(f) of the Central Educational Institutions (Reservation in Admission) Act, 2006, defines a minority educational institution as under: “Minority Educational Institution” means an institution established and administered by the minorities under clause (1) of article 30 of the Constitution and so declared by an Act of Parliament or by the Central Government or declared as a minority educational institution under the National Commission for Minority Educational Institutions Act, 2004.

The Supreme Court has pointed out in *Ahmedabad St. Xavier's College v. State of Gujarat*,<sup>13</sup> that the spirit behind Article 30(1) is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions, of their choice for the purpose of giving their children the best general education to make them complete men and women of the country. The minorities have been given protection under Article 30 in order to preserve and strengthen the integrity and unity of the country. The sphere of general secular education will develop the commonness of boys and girls of India. The minorities will feel isolated and separate if they are not given the protection of Article 30.<sup>14</sup>

The Constitution uses the term "minority" even though they have not defined it anywhere. In *In Re: The Kerala Education Bill*<sup>15</sup>, the Supreme Court opined that while it is easy to say that minority means a community which is numerically less than 50 per cent, the most important

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<sup>12</sup> Government of India National Commission for Minority Educational Institutions, *Guidelines for determination of minority status, recognition, affiliation and related matters in respect of minority educational institutions under the Constitution of India*, 02 – 03.

<sup>13</sup> AIR 1974 S.C. 1389: (1974)1 S.C.C. 717.

<sup>14</sup> V.N. Shukla's, *Constitution Of India* 265 (Mahendra P. Singh, 11th edn., Eastern Book Company, Lucknow 2012) (1950).

<sup>15</sup> AIR 1958 SC 956.

question is 50 per cent of what? Should it be of the entire population of India, or of a State, or a part thereof? Is it possible that the community may be in majority in a State but in a minority in the whole of India. A community in a part of a State and may thus be in majority there, though it may be in minority in the State as a whole. The Supreme Court did not however decide this point definitively. However, it had come to be accepted that 'minority' is to be determined only in relation to the particular legislation which is being challenged.<sup>16</sup>

Thus, if a State law extending to the whole of a State is in question, the minority must be determined with reference to the entire State population. In such a case, any community, linguistic or religious, which is numerically less than 50 per cent of the entire State population, will be regarded as a minority for the purposes of Article 30(1).<sup>17</sup>

The same ruling was then reiterated by the Supreme Court in the *D.A.V. College, Jullundur v. State of Punjab*<sup>18</sup> and ruled that the minority should be a minority in relation to the particular legislation which is sought to be impugned. If it is a State law, the minorities have to be determined in relation to the State population.

The Supreme Court had ruled in *S.K. Patro v. State of Bihar*<sup>19</sup>, that a minority claiming privilege under Article 30 should be a minority of persons residing in India. Foreigners not residing in India do not fall within the scope of Article 30. Residents in India forming the "well defined religious or linguistic minority" fall under the protection of Article 30.<sup>20</sup>

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<sup>16</sup> Prof. M.P. JAIN, Indian Constitutional Law 1351 (Justice Ruma Pal, Samaraditya Pal edn., LexisNexis Butterworths Wadhwa, Nagpur 2012) (1962).

<sup>17</sup> Government of India National Commission for Minority Educational Institutions, *Guidelines for determination of minority status, recognition, affiliation and related matters in respect of minority educational institutions under the Constitution of India*, 10–11.

<sup>18</sup> AIR 1971 S.C. 1737, 1742.

<sup>19</sup> AIR 1970 S.C. 259.

<sup>20</sup> DURGA DAS BASU, INDIAN CONSTITUTIONAL LAW 329 (3rd edn., Kamal Law House, Kolkata 2011) (2007).

In *Azeez Basha v. Union of India*<sup>21</sup>, a Constitutional Bench of the Supreme Court has held that the expression “establish and administer” used in Article 30(1) was to be read conjunctively that is to say, two requirements have to be fulfilled under Article 30(1):<sup>22</sup>

- a) That the institution was established by the community and,
- b) Its administration was vested in the community.

The court in *T.M.A. Pai Foundation v. State of Karnataka*<sup>23</sup> was unanimously of the view that the right to establish and administer an institution in Article 30(1) of the Constitution, comprises the rights<sup>24</sup>:

- 1. To admit students;
- 2. To set up a reasonable fee structure;
- 3. To constitute a governing body;
- 4. To appoint staff;
- 5. To take action if there is any recklessness on the part of the employees.

In *S.P. Mittal v. Union of India*<sup>25</sup>, the Supreme Court has held that in order to claim the benefit of article 30(1), the community must show;

- a) That it is a religious/linguistic minority,
- b) That the institution was established by it.

Without specifying these two conditions it cannot claim the guaranteed rights to administer the educational institution.<sup>26</sup>

Article 30(1) postulates that the religious community will have the right to establish and administer educational institutions of their choice implicating that where a religious minority establishes an educational institution, it will have the right to administer that. The

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<sup>21</sup> AIR 1968 S.C. 662.

<sup>22</sup> *Ibid* 16.

<sup>23</sup> AIR 2003 S.C. 355.

<sup>24</sup> DURGA DAS BASU, INDIAN CONSTITUTIONAL LAW 335 (3rd edn., Kamal Law House, Kolkata 2011) (2007).

<sup>25</sup> AIR 1983 S.C. 1.

<sup>26</sup> DURGA DAS BASU, INDIAN CONSTITUTIONAL LAW 327 (3rd edn., Kamal Law House, Kolkata 2011) (2007).

same right has been given to the minority, so that it can mould the institution as it may think fit, and also in the accordance with its ideas of how the interest of the community and the institution in particular will be best served.<sup>27</sup>

It has been held by a Division Bench of the Madras High Court in *T.K.V.T.S.S. Medical Educational and Charitable Trust v. State of Tamil Nadu*<sup>28</sup> that “once it is established that the institution has been established by a linguistic minority, and is administered by that minority, that would be sufficient for claiming the fundamental right guaranteed under Article 30(1) of the Constitution.” The same principle applies to religious minority also.<sup>29</sup>

A minority educational institution continues to be so whether the Government declares it as such or not. When the Government declares an educational institution as a minority institution, it merely recognizes a factual position that the institution was established and is being administered by a minority community. The declaration is merely an open acceptance of the legal character of the institution which must necessarily have existed antecedent to such declaration.<sup>30</sup>

A Society or Trust consisting of members of a minority community, or even a single member of a minority community, may establish an institution. The position has been clarified by the Supreme Court in *State of Kerala v. Mother Provincial*<sup>31</sup>. Where the Supreme Court had observed that:

“Establishment means bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, institution or the community at large founds the institution or the community at large contributes the funds. The position in law is

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<sup>27</sup> *Manager, St. Thomas U.P. School, Kerala v. Commr. and Secy. to General Education Dept.*, AIR 2002 SC 756.

<sup>28</sup> AIR 2002 Madras 42.

<sup>29</sup> Government of India National Commission for Minority Educational Institutions, *Guidelines for determination of minority status, recognition, affiliation and related matters in respect of minority educational institutions under the Constitution of India*, 10–11.

<sup>30</sup> *N. Ammad v. Emjay High School*, (1998) 6 SCC 674.

<sup>31</sup> AIR 1970 SC 2079.

the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant to this right that in addition to the minority community, others from other minority communities or even from the majority community can take advantage of these institutions.”

A minority institution may impart general secular education; it need not confine itself only to the teaching of minority language, culture or religion. But to be treated as a minority institution, it must be shown that it serves or promotes in some manner the interests of the minority community by promoting its religious tenets, philosophy, culture, language or literature.<sup>32</sup>

In *Andhra Pradesh Christian Medical Association v. Government of Andhra Pradesh*<sup>33</sup>, the Supreme Court emphasized that the object of Article 30(1) is not to allow bogies to be raised by pretenders. The institution must be an educational institution of minority in truth and reality and not mere masked phantom. The Supreme Court had also asserted that the Government, the University and ultimately the court can go behind the claim that the institution in question is a minority institution and to "investigate and satisfy itself whether the claim is well-founded or ill-founded". The Government, the University and ultimately the court "have the undoubted right to pierce the minority veil" and "discover whether there is lurking behind it no minority at all and in any case no minority institution."

It has been held in *P.A. Inamdar v. State of Maharashtra*<sup>34</sup> that "the minority institutions are free to admit students of their own choice including students of non-minority community and also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational status is lost. If they do so, they lose the protection of Article 30(1) of the Constitution".

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<sup>32</sup> V.N. SHUKLA's, CONSTITUTION OF INDIA 266 (Mahendra P. Singh, 11th edn., Eastern Book Company, Lucknow 2012) (1950).

<sup>33</sup> AIR 1986 SC 1490.

<sup>34</sup> (2005) 6 SCC 537.

Under Article 30(1), the requirements of establishment and management have to be read conjunctively. The twin requirements have to be established and in the absence of one, an institution cannot be granted minority status. Thus the Supreme Court has tried to restrict the misuse of the benefits granted to the minorities.<sup>35</sup>

In *St. Stephe's College v. State of Delhi*<sup>36</sup>, the Court observed: " Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life" and that it is essential that there should be a "proper mix of students of different communities in all educational institutions." this only meant that a minority institution cannot refuse admission to the students of other minority and majority communities.

The Supreme Court through the *P.A. Inamdar's*<sup>37</sup> case held that the twin objects sought to be achieved by Article 30(1) in the interest of minorities are:

- To enable such to conserve its religion and language, and
- To give a thorough good general education to the children belonging to such minority.

So long as the institution retains its minority character by achieving and continuing to achieve the aforesaid two objectives, the institution would remain a minority institution.

The crucial phrase of Article 30(1) is 'of their choice' and their 'choice' cannot be limited merely to institutions seeking to conserve languages, scripts or culture of the minorities. Thus, a minority whether based on religion or language has a right to establish institutions of a general education. Nor, is the right of the minority taken away if in an educational institution established by it, students of other communities are also admitted.

It was observed in *P.A. Inamdar's*<sup>38</sup> case that "it necessarily follows from the law laid down in *T.M.A. Pai*

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<sup>35</sup> DURGA DAS BASU, *INDIAN CONSTITUTIONAL LAW* 329 (3rd edn., Kamal Law House, Kolkata 2011) (2007).

<sup>36</sup> AIR 1992 SC 1630.

<sup>37</sup> *P.A. Inamdar v. State of Maharashtra*, (2005) 6 SCC 537.

*Foundation* that to establish a minority institution, the institution must primarily cater to the requirements of the State else its character of the minority institution is lost. However, to borrow the words of Chief Justice S.R. Dass in *In Re: The Kerala Education Bill*, “a sprinkling of that majority from the other States on the same footing as a sprinkling of non minority students would be permissible and would not deprive the institution of its essential character of being a minority institution, determined by reference to that State as a unit”.

On reading Article 30(1) with several landmark judgments and some authoritative pronouncements, the definition of Minority Educational Institution in Section 2(g) of the National Commission for Minority Educational Institution Act, 2004 and Section 2(f) of the Central Educational Institutions (Reservation in Admission Act), 2006 the following facts should be proved for grant of a minority status to an educational institution on regular basis:<sup>39</sup>

1. That the educational institution was established by member(s) of the religious minority community;
2. That the educational institution was established for the benefit of the minority community;
3. That the educational institution is being administered by the minority community.

The aforesaid facts may be proved either by direct or circumstantial evidence. There must be some positive index to enable the educational institution to be identified with religious minorities. There should be nexus between the means employed and the ends desired.<sup>40</sup> If the minority educational institution concerned is being run by a trust or a registered society, then majority of the trustees of the trust or members of the society, as the case may be, must be from the

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<sup>38</sup> *Ibid* 37.

<sup>39</sup> Government of India National Commission for Minority Educational Institutions, *Guidelines for determination of minority status, recognition, affiliation and related matters in respect of minority educational institutions under the Constitution of India*, 09 – 10.

<sup>40</sup> PROFESSOR M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1346 (JUSTICE RUMA PAL, SAMARADITYA PAL edn., LexisNexis Butterworths Wadhwa, Nagpur 2012) (1962).

minority community and the trust deed or Articles of Association or any other document duly executed in this regard must reflect the objective of sub-serving the interest of the minority community. In the absence of any documentary evidence some clear or cogent evidence must be produced to prove the aforesaid facts. There is no bar to the members of other communities to extend their help to the member of a minority community to establish an educational institution of its choice.<sup>41</sup>

According to the *T.K.V.T.S.S. Medical Educational and Charitable Trust v. State of Tamil Nadu*<sup>42</sup>, the Madras Court had held that, "a minority status cannot be conferred on a minority educational institution for particular period to be renewed periodically like a driving license. It is not open for the State Government to review its earlier order conferring minority status on a minority educational institution unless it is shown that the institution concerned has suppressed any material fact while passing the order of conferral of minority status or there is fundamental change of circumstances warranting cancellation of the earlier order."<sup>43</sup>

If a minority status certificate has been obtained by practicing fraud or if there is any suppression of any material fact or any fundamental change of circumstances warranting cancellation of the earlier order, the authority concerned would be within its powers to cancel the minority status certificate after affording an opportunity of being heard to the management of the institution concerned, in conformity with the principles of natural justice.

It is also relevant to note that the minority status certificate granted by the National Commission or by any authority can be cancelled under Section 12C of the National Commission for the Minority Educational Act, 2004 on violation of any of the conditions enumerated therein.

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<sup>41</sup> S.K. Patro v. State of Bihar AIR 1970 SC 259.

<sup>42</sup> AIR 2002 Madras 42.

<sup>43</sup> Government of India National Commission for Minority Educational Institutions, *Guidelines for determination of minority status, recognition, affiliation and related matters in respect of minority educational institutions under the Constitution of India*, 10 - 11.



**Section 12C of the National Commission Minority Educational Act, 2004 is as under**

**12C. Power to cancel-** The Commission may, after giving a reasonable opportunity of being heard to a Minority Educational Institution to which minority status has been granted by an authority or Commission, as the case may be, cancel such status under the following circumstances, namely: -

- a) if the constitution, aims and objects of the educational institution, which has enabled it to obtain minority status has subsequently been amended in such a way that it no longer reflects the purpose, or character of a Minority Educational Institution;
- b) if, on verification of the records during the inspection or investigation, it is found that the Minority Educational Institution has failed to admit students belonging to the minority community in the institution as per rules and prescribed percentage governing admissions during any academic year.

**Regulation of Minority Educational Institution**

The Fundamental Freedom under Article 30(1) is prima facie absolute in nature as it is not made subject to any reasonable restrictions. This means that all minorities, linguistic or religious, have by Article 30(1) the right to establish and administer the educational institutions of their choice and "any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void." The same does not mean that the state cannot impose any regulations on the minority institutions.

In *In Re: The Kerala Education Bill*<sup>44</sup>, Regulations which do not affect the substance of the guaranteed rights, but ensure the excellence of the institution and its proper functioning in matters educational, are permissible.

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<sup>44</sup> AIR 1958 SC 956, 1053.

Regulations could be made to maintain educational character and standard of institution.

By its interpretative process over the years, the Supreme Court has given a wide sweep to the protection conferred on the minority educational institutions under Article 30(1) as well as permitted some regulation thereof by the concerned government in the interest of the well being of the institution concerned.<sup>45</sup>

From this point of view of regulation, minority educational institutions can be placed into two categories<sup>46</sup>:

1. Institutions receiving aid from the State;
2. Institutions not getting aid from the State, each category being further sub-divided according to the nature of the educational institution, namely schools, undergraduate colleges, post-graduate colleges and also professional colleges.

### **Grants and Recognition from the Government**

The situation in today's era is such that an educational institution cannot possibly hope to survive, and function effectively, without government grants, nor can it confer degrees without affiliation to the University. Without recognition, a minority run institution cannot fulfill its role effectively and the right conferred by Article 30(1) is diluted. The right and real exercise of Article 30(1) is to establish effective educational institutions which may sub serve the real needs of the minorities and the scholars who resort to them.

Article 30(2) debars the state from discriminating against minority institutions in the matter of giving grants.

In *Frank Anthony*<sup>47</sup>, the Court had explained thus: "The extent of the right under Article 30(1) is to be determined,

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<sup>45</sup> DURGA DAS BASU, INDIAN CONSTITUTIONAL LAW 329 (3rd edn., Kamal Law House, Kolkata 2011) (2007).

<sup>46</sup> PROFESSOR M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1351, (JUSTICE RUMA PAL, SAMARADITYA PAL edn., LexisNexis Butterworths Wadhwa, Nagpur 2012) (1962).

not with reference to nay concept of state necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the institutions effective vehicles of education for the minority community or other persons who resort to them....The main question in each case is whether the particular measure is, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of the management in substantial measure."<sup>48</sup>

The *State of Karnataka*<sup>49</sup> had denied recognition to a minority teachers' training college on the basis that the State had already had other such institutions and therefore the policy of the government was to not permit the starting of any more such minority institutions.<sup>50</sup> The High Court held the denial of recognition not valid. Without specifically deciding the question whether or not the State can have such a policy, the court concluded that the State had no such firm policy as a matter of fact as it had given permission to another similar institution which applied later than the institution in question.

The same High Court<sup>51</sup> then held that a minority institution need not take prior permission of the government to be started. Recognition must be given to a minority institution if all the conditions are fulfilled and are satisfied. Recognition cannot be denied on the ground that because of the existence of one school in locality there is no need for another school. Such a factor and the policy is irrelevant and invalid so far as a minority institution is in question.

The Supreme Court had observed when the question of government aid in minority institutions, in *St. Stephen's*

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<sup>47</sup> Frank Anthony Public Schools Employees' Assn. v. Union of India AIR 1987 SC 311.

<sup>48</sup> PROFESSOR M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1352, (JUSTICE RUMA PAL, SAMARADITYA PAL edn., LexisNexis Butterworths Wadhwa, Nagpur 2012 (1962).

<sup>49</sup> Socio Literati Advancement Society, Bangalore v. State of Karnataka, AIR 1979 Kant 217.

<sup>50</sup> PROFESSOR M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1352, (JUSTICE RUMA PAL, SAMARADITYA PAL edn., LexisNexis Butterworths Wadhwa, Nagpur 2012 (1962).

<sup>51</sup> Deccan Model Education Society v. State of Karnataka, AIR 1983 Kant 207.

*college*<sup>52</sup>: "The educational institutions are not business homes. They do not generate wealth. They cannot survive without public funds or private aid. It is said that there is also restraint on collection of student's fees. With the same restraint on the collection of fees, the minorities cannot be saddled with the burden of maintaining the institutions without grant-in-aid. They do not have economic advantage over others. It is not possible to have educational institutions without state aid. The minorities cannot, therefore, be asked to maintain educational institutions on their own."

**The conditions are of two types.**<sup>53</sup>

1. It may relate to matters as syllabi, curricula, courses, minimum qualification of the teachers, age of superannuation, library, conditions which are concerned with sanitary problems, health and hygiene etc.
2. It may relate to the management of the institutions.

The underlying purpose for the conditions for grants and recognition is to promote educational standards and uniformity and help the institutions concerned achieve efficiency and excellence and are imposed not only in the interest of general secular education but are also conducive to improvement of minority institutions themselves. Regulatory measures are necessary to maintain the educational character and content of minority institutions. Such conditions cannot be regarded as violative of Article 30(1) and should, therefore, be followed by all educational institutions.

Even the conditions for grant and recognition must satisfy a test<sup>54</sup>:

- i. These conditions must be reasonable.

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<sup>52</sup> St. Stephen's College v. University of Delhi, AIR 1992 SC 1630.

<sup>53</sup> Government of India National Commission for Minority Educational Institutions, *Guidelines for determination of minority status, recognition, affiliation and related matters in respect of minority educational institutions under the Constitution of India*, 26 – 27.

<sup>54</sup> PROFESSOR M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1353, (JUSTICE RUMA PAL, SAMARADITYA PAL edn., LexisNexis Butterworths Wadhwa, Nagpur 2012) (1962).

- ii. These are regulatory of the educational character of the institution and are conducive to making it an effective vehicle of education for the minority community or other persons who resort to it.

### **Affiliations and Recognition**

Section 10(A) of the Act confers a right on the minority educational institution to seek affiliation to any university of its choice.

#### **10A. Right of a Minority Educational Institution to seek affiliation**

1. A Minority Educational Institution may seek affiliation to any University of its choice subject to such affiliation being permissible within the Act under which the said University is established.
2. Any person who is authorized in this behalf by the Minority Educational Institution, may file an application for affiliation under sub-section (1) to a University in the manner prescribed by the Statute, Ordinance, rules or regulations, of the University: Provided that such authorized person shall have right to know the status of such application after the expiry of sixty days from the date of filing of such application.”

The Supreme Court in *Managing Board of the Milli Talimi Mission Bihar and Ors. v. State of Bihar and Ors.*<sup>55</sup>, had clearly recognized that running a minority institution is also as fundamental and important as other rights conferred on the citizens of the country. If the State Government declines to grant recognition or a university refuses to grant affiliation to a minority educational institution without just and sufficient grounds, the direct consequence would be to destroy the very existence of the institution itself. Thus, refusal to grant recognition or affiliation by the statutory authorities without just and sufficient grounds amounts to violation of the right guaranteed under Article 30(1) of the Constitution. The

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<sup>55</sup> 1984 (4) SCC 500.

right of the minorities to establish educational institutions of their choice will be without any meaning if affiliation or recognition is denied.

The primary purpose of affiliation is that the students reading in the minority institutions will have qualifications in the shape of degrees necessary for a useful career in life. The establishment of a minority institution is not only ineffective but also unreal unless such institution is affiliated to a University for the purpose of conferment of degrees on students.” It has been held in *T.M.A. Pai Foundation*<sup>56</sup> case that affiliation and recognition has to be available to every institution that fulfills the conditions for grant of such affiliation and recognition.

A minority educational institution seeking recognition or affiliation must fulfill the statutory requirements like:<sup>57</sup>

1. The academic excellence,
2. The minimum qualifications of eligibility prescribed by the statutory authorities for Head Master/ Principal/ teachers/ lecturers and
3. The courses of studies and curriculum.
4. It must have sufficient infrastructural and instructional facilities as well as financial resources for its growth.

No condition should be imposed for grant of recognition or affiliation, which would, in truth and in effect, infringe the right guaranteed under Article 30(1) of the Constitution or impinge upon the minority character of the institution concerned.

If an object surrender of the right guaranteed under Article 30(1) is made a condition of recognition or affiliation, the denial of recognition or affiliation would be violative of Article 30(1).

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<sup>56</sup> Supra 18.

<sup>57</sup> Government of India National Commission for Minority Educational Institutions, *Guidelines for determination of minority status, recognition, affiliation and related matters in respect of minority educational institutions under the Constitution of India*, 20-21.

The right of the minorities to establish and administer educational institutions of their choice under Article 30(1) of the Constitution is subject to the regulatory power of the State for maintaining and facilitating the excellence of the standard of education. Taking reference to the same, the Supreme Court had held in *P.A. Inamdar's*<sup>58</sup> case that:

"...Subject to a reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests: (1) the test of reasonableness and rationality, (2) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it, and (3) that there is no in road into the protection conferred by Article 30(1) of the Constitution, that is by framing the regulation the essential character of the institution being a minority educational institution, is not taken away."

The right of the minorities to establish and administer educational institutions of their own choices comprises of the following rights:<sup>59</sup>

- a) To choose the governing body in whom the founders of the institutions have faith and confidence to conduct and manage the affairs of the institution.

The Supreme Court has invariably invalidated provisions seeking to regulate the composition and personnel of the managing bodies of minority institutions. A provision if interfering with the minorities' choice of the managing body for an institution has been held to violate the Article 30(1). In the *St. Xavier's College* case,<sup>60</sup> the Court declared the provisions as non - applicable to minority institutions because it displaced the management and entrusted it to a different agency because the autonomy was lost and new elements in the

<sup>58</sup> *P.A. Inamdar v. State of Maharashtra* (2005) 6 SCC 537.

<sup>59</sup> Government of India National Commission for Minority Educational Institutions, *Guidelines for determination of minority status, recognition, affiliation and related matters in respect of minority educational institutions under the Constitution of India*, 28-29.

<sup>60</sup> *The Ahmedabad St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389.

shape of representatives were brought in. The court declared these provisions invalid as they took away from the founders the right to administer their own institution.

The Calcutta High Court<sup>61</sup> has said that the Education board cannot, under any of the circumstances, interfere or take - over the management of a minority school/ college by super-seeding its managing committee and appointing an administrator to take charge of school and also administer it.

- b)** To appoint teaching staff and also non - teaching staff, and to take action if there is dereliction of duty on the part of the employees.

The selection and appointment of teachers, and the head of the institution, is regarded as pre-eminently the function of the administration. The position taken by the Supreme Court<sup>62</sup> is that while a University can prescribe qualifications for the academic staff, the actual selection of teachers must remain in the hands of the administration on the institution and any dilution of this right of the management infringes Article 30(2). It is the management's right to choose the Head Master/ Principal of a minority educational institution and cannot be interfered with by the State.<sup>63</sup>

- c)** To admit the eligible students of their own choice and to set up a reasonable fee structure.

In *St. Stephen's College v. University of Delhi*<sup>64</sup> exempting St. Stephen's College from the uniform admission procedure applicable to all affiliated and constituent colleges of the University of Delhi at the under-graduate level, the Court held that the admission of students to educational institutions is also an important aspect of the administration. The court found that denial of this power to the college to supplement its admission procedure by interview and to compel it to

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<sup>61</sup> Nanda Ghosh v. Guru Nanak Education Trust, AIR 1984 Cal 40.

<sup>62</sup> Ahmedabad St. Xavier's College v. State of Gujarat, AIR 1974 SC 1389.

<sup>63</sup> Board of Secondary Education v. Director of Public Instructions, (1998) 8 SCC 555.

<sup>64</sup> (1992) 1 SCC 558.



make admissions exclusively on the basis of marks obtained in the qualifying examination would be against the rights of the minority community under Article 30(1).<sup>65</sup>

Every Institution is free to devise its own fee structure but the same can be regulated in order to prevent profiteering. No capitation fee can be charged directly or indirectly or in any other form.<sup>66</sup> Capitation fee cannot be changed and no seat can be permitted to be appropriated by payment of capitation fee.<sup>67</sup> Delhi High Court had ruled that<sup>68</sup> under Article 30(1), the right to freely administer educational institutions does not permit the minorities to indulge in commercialization of education in the garb of constitutional protection. The court has ruled that "on the aspect of commercialization and exploitation, minority institution would be primarily placed as other institutions."<sup>69</sup>

Article 30(1A) became necessary because Article 31 was being abrogated from the Constitution. The State has the right to acquire the property belonging to a minority institution. This provision seeks to protect the minority rights somewhat in the regard but the actual implications of Article 30(1A) are not clear. The Supreme Court commented on the scope of Article 30(1A) in *Society of St. Joseph's College v. Union of India*<sup>70</sup>, where the court pointed out that Article 30(1A) had been introduced in the Constitution because Parliament in its constituent capacity apprehended that minority educational institutions could be compelled to close down or curtail their activities by the expedient of acquiring their property and paying them inadequate amounts on compensation.

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<sup>65</sup> V.N. SHUKLA's, CONSTITUTION OF INDIA 270 (Mahendra P. Singh, 11th edn., Eastern Book Company, Lucknow 2012) (1950).

<sup>66</sup> DURGA DAS BASU, INDIAN CONSTITUTIONAL LAW 331 (3rd edn., Kamal Law House, Kolkata 2011) (2007).

<sup>67</sup> P.A. Inamdar v. State of Maharashtra, (2005)6 SCC 537.

<sup>68</sup> Delhi Abibhavak Mahasangh v. Union of India, AIR 1999 Del 128, 149.

<sup>69</sup> V.N. SHUKLA's, CONSTITUTION OF INDIA 269 (Mahendra P. Singh, 11th edn., Eastern Book Company, Lucknow 2012) (1950).

<sup>70</sup> AIR 2002 SC 195.

## Conclusion

Minority educational institutions have a great role to fulfill for the nation and minorities of the State as well. The religious and the linguistic minorities also need to understand that they are the only minorities who need special protection from the majorities. These religious and linguistic minorities should keep in mind their special rights like their Independent State, Reasonable Fee Structure, Government and Private aid, the loyalty towards their own group, etc and help the nation in servicing the real minorities like the poor people, their children, women, the *Dalits*, *Adivasis*, women of the tribal groups and also those who are not mentally and physically fit, because in spite of the additional regulations and less restrictions the minorities should not wary about establishing aided nature of the institutions but go and help these poorer sections of the society.

Lastly if these minority institutions are not masked phantoms who are lurking behind and truly want to help the minorities, the possibilities and the potentialities of the members of the minorities and non - minorities as well, would also change.



## HUMAN RIGHTS OF MINORITY WOMEN

Ms. Shatakshi Anand\*

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### Conceptual Framework

The right you get by the virtue of being born as human is called human rights. The right to breathe freely in the air as if you are equal to everyone else is human rights. You need no documentations and no declaration; you just need to be human to get that right.

The concept of 'Human Rights' is not new, but the first major initiative for protection of human rights at international level was taken by the United Nations on December 10, 1948, when the General Assembly adopted the "Universal Declaration on Human Rights" (UDHR). It says: 'The General Assembly proclaims this "Universal Declaration Of Human Rights" as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'.

It was recognized that the dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. It treats men and women at par and gives them equal rights as it further says: 'Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom'. The declaration was adopted by vast majority of member states including the Islamic states except Saudi Arabia.

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\* Student, 3<sup>rd</sup> year, B.A. LL.B., Symbiosis Law School, Pune.

The Universal Declaration on Human Rights contains 30 Articles. Although nowhere in the declaration any discrimination on the basis of gender has been made, the reference of gender/ women has come in Article 2 and Article 16.

- Article 2 says: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.
- Whereas the Article 16 gives equal status to men and women in respect of marriage, during marriage and at its dissolution. It says, 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution'.

As per the Declaration, everyone has the right to freedom of opinion and expression and everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. It further says, everyone has the right to recognition everywhere as a person before the law. All are equal before the law and are entitled without any discrimination to equal protection of the law All human beings are born free and equal in dignity and rights. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

If you take out the gist of the entire declaration, it simply means that no justification can be there for discriminating against a person. Women, male, black, white, disabled etc all are equal, human beings deserving equal rights and respect like others.

Religion is the faith that makes a person believe in the existence of a supernatural power that guides him in all spheres of life. People lay their origin to religion. The sense of belongings to this world is derived from the religion you practice. Religion gives majority people an identity. It instills an element of hope in the person, every bad or good situation; it's the religion that gives a person a hope to go on. Losing a religious identity is like losing oneself. But a major question is what if the religion and human rights come in conflict?

Underlying the stance that the concept of human rights is fundamentally secular and therefore outside of, and even antithetical to, the worldwide view of religion. In the words of A.K. Brohi, a legal scholar who served as a federal minister in the Pakistan government,

“There is fundamental difference in the perspectives from which Islam and the west each view the matter of human rights. The western perspectives may by and large be called anthropocentric in the sense that man is regarded as constituting the measure of everything since he is the starting point of all thinking and actions. The perspective of Islam on the other hand is the geocentric-god conscious. The believer has only obligation or duties to god since he is called upon the divine laws.<sup>1</sup>

This leaves the person in a paradoxical situation. If the divine law is depleting a person of his human rights, then the person feels in a fix and doesn't know what to do. The United Nations declarations make him feel independent and capable to ask for his rights but the religious laws sometimes pull them back? So is the remedy only to shun the sense of affinity towards religion? Muslim women in particular find themselves in a quandary when they initiate or participate in a discussion on human rights whether in the west or the Muslim societies. Based on their life experience, most Muslim women who become human rights activists or advocates feel strongly that virtually all Muslim societies discriminate against women from cradle to grave. This leads many of them to become deeply alienated from Muslim culture in a number of ways. This sense alienation often times leads to anger

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<sup>1</sup> Chatterjee, Mohini, *Feminism and Women's Human Rights*, vol. 2, Aavishkar Publisher, 2004.

and bitterness towards the patriarchal structures and system of thought which dominates most Muslim societies. Muslim women often find much support and sympathy in the west so long as they are seen as rebels and deviants within the worlds of Islam but many of them begin to realize sooner or later that while they have serious difficulties with Muslim culture they are also not able to identify with the western culture. This realization leaves them to feel-isolated and alone. Much attention has been focused on the sorry plight of Muslim women who are poor and oppressed but hardly any notice has been taken of the profound tragedy and trauma suffered by self aware Muslim women of today who are struggling to maintain their religious identities and personal autonomy in the face of both imperialism of western secular culture and the intricacies of Islamic tradition culture.<sup>2</sup>

For these women, some remedy must be searched within Islam so that women maintain their identity yet are treated as equals. United Nations could not be so trapped in its secular discourse that it would persist in its refusal to deal with the fact that for millions of people whose life are rooted in belief rather than unbelief, human rights become meaningful only when they are placed within the framework of their belief-system.

### **Human Rights and Minority Women**

The Holy *Quran* is supposed to be a record of the exact words revealed by God through the Angel Gabriel to the prophet Muhammad. It contains 114 chapters, *Suras* and is prime source of every Muslim faith and practice. It deals with all the subjects, which concerns human beings, wisdom, doctrine, worship and law. But its basic theme is the relationship between God and its creatures. It provides guidelines for a just society, proper human conduct and an equitable economic system.

Although Islam does not prohibit women from working, but emphasizes the importance of housekeeping and caring for the families of both parents. Many interpretations of Islamic law hold that women may not

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<sup>2</sup> *Ibid.*

have prominent jobs, and thus are forbidden from working in the government. This is an example of violation of the principle of equality.

Men are considered superior to women. As per the Holy *Quran*, men have authority over women because Allah had made one superior to the other because they spend their wealth to maintain them. It says, "And they (women) have rights similar over them (husband) to what is reasonable, but men have a degree over them." (2:228) Men are commanded even to beat their disobedient wives even if he merely fears highhandedness in their wives (quite apart from whether they actually are highhanded). The *Quran* says: "Men are protectors and maintainers of women, because Allah has made one of them to excel the other, therefore the righteous women are devoutly obedient. ....As to those women whose part you see ill conduct, admonish them, refuse to share their beds, beat them." (4:34). This completely justifies a clear cut domination of the male over female subjecting her to a inferior position. Religion authorizes a person to command the others body mind and soul and if the person refuses then she is an outcast from her own religion. It is a terrible state of women.

A Muslim man inherits more than a female. The *Quran* says, "Allah commands you as regards your (children's (inheritance) to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half". (4:11) That is a man shall inherit twice as much as female. Some scholars say that men inherit more than women because the male is the bread earner and the women will be supported by her male relatives but there are circumstances possible where the sister would be in more need of finances than the wealthy brother. The very concept of being maintained by the man depletes the women of her autonomy and self respect. She not considered a human of equal strata.

The *Quran* gives special status to men in case of marriage. As per sura 4:3 of the *Quran*, a man is allowed to become polygamous upto four wives and also the slave girls are considered as the personal property for their male owners as per sura 4:24. The *Quran* also gives the

ease of divorce to the men, which accommodates the men, but not the women. In most of the cases she needs her husband's permission. Women can be divorced by their husbands with or without cause, but she can only seek divorce from her husband with her husband's consent. This is the most arbitrary provision of Islamic law. While a Hindu woman can imprison her husband for sharing her part of love with another wife, Muslim women have to swallow this poison down their throat. They cannot rebel, because it is their religious law and the man is doing justice to the society by giving equal love and care to three weak women.

Further a divorced woman is not allowed to re-marry her ex-husband even if she wishes to do so without satisfying certain conditions that is only if she marries another man and then this second man divorces her. The *Quran* clearly says: 'And if he has divorced her (the third time), then she is not lawful unto him thereafter until she has married another husband. Then if the other husband divorces her, it is no sin on both of them that they reunite.' (2:230)

A Muslim woman's legal testimony is only half of a man's only except in the event that she is accused of adultery. The women are considered deficient in intelligence compared to men. The *Quran* says, "And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs the other can remind her." (2:282). This is nothing but a mere way of saying that female are not that trustworthy or knowledgeable than man. This presumption takes away her right. There is no justification to the arbitrary discrimination. Supreme Court had gone ahead and tried to give women equal rights in divorce law in the *Shah Bano* case<sup>3</sup>, but unfortunately the ruling government pulled back the society to the previous stage and brought about an entire enactment to sooth the male prevalence over Muslim society. Even the secular provision of the Cr.P.C. will be applicable to the couple only if the male counterpart gets ready for it. Human rights of the Muslim Women are in a

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<sup>3</sup> Mohd. Ahmed Khan v. Shah Bano Begum (1985 SCR(3) 844).



pitiable situation and needs serious pondering and amendments.

### **Empirical Research Analysis**

#### **Objective:**

1. To gauge the readiness of the Muslim women for changes in the law.
2. Their view about the human rights problems

#### **Methodology**

Primary research was done by discussing with women the problems and then they were asked to write their views in blank sheets.

#### **Universe**

The research was conducted on 50 women, the area being Mussalleypur haat of Patna district, Bihar.

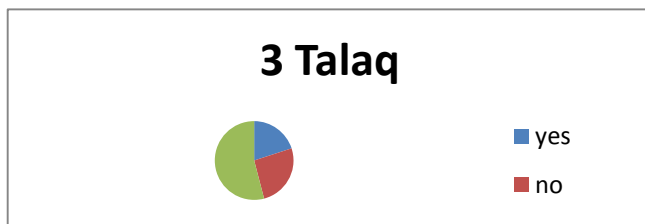
#### **Hypothesis**

Women would be somewhat submissive to current law.

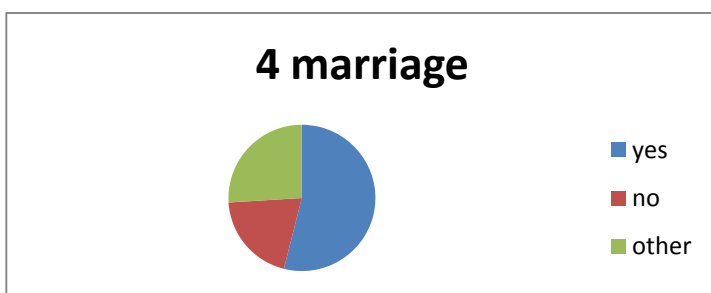
#### **Findings**

This was the last group which was only comprised of muslim women. They were asked 3 question:

1. If they wanted the concept of 3 *talaq* to be removed?
2. If they wanted the concept of 4 marriages to be removed?
3. Their concept about *khula*



- Just 20% of the women said that they wanted the concept to be removed.
- 26% said that it should not be removed because it gives time to think. But they also said that if it is given, then wife should be properly maintained.
- Whereas 54% were not sure. They said it was wrong that only male gets this right but at the same time they accepted that is their religion so they were confused.



- 54% of the women wanted the concept of 4 marriages to be removed. They were not ready to share their husband.
- 20% wanted no interference in their sacred law.
- 26% said it was not required to be removed as it is only in books and not in practice.

In the last question,

- 80% of the people said women should get right in *khula*.
- 18% said they had no idea about the concept of *khula*.
- Rest 2% said if women herself leaves her husband, then she should not get any right.

The Hypothesis was somewhat wrong because specially relating to Muslim Marriage issues, women demanded change. Even in *khula* they wanted their right. And the best part of the discussion was that most of them were from very humble families with less or no education. If they wanted to change, I draw another assumption that middle class and upper class of women also demand the same. The summary of the entire finding is that women

are now prepared for change and society needs to remedy them.

## **Conclusion**

While doing the entire research work, the key point which struck me is that there is no personal attack on ISLAM as a religion. The Islamic Feminists believes and respects Islam and is a great protagonist of the same. The interpretation of the religion is made in such an aspect that there is the birth of the patriarchal control. The main motive of these feminists is to shun this control and to bring about equality on the whole. This seems to a great task owing to its roots buried deep since the ancient times, nevertheless there are some remedies which are available for the same.

As the term 'Islamic Feminism' gained currency in the 1990s through the scholars and activists, it would clarify the perspective of a large number of women somewhere between Islamists and secular feminists. While they would not give up their allegiance to Islam as an essential part of self-determination and identity they did critique patriarchal control over the basic Islamic world-view. Islamic feminism did not define these women, and many still reject the term. However, the term helped others to understand the distinction between them and the two dominant approaches for Muslim women's rights.

The impositions of Uniform Civil Code have been open to several discussions. The forefathers truly believed that there is some sort of modernization required before Uniform Civil Code is implemented. Some still fear that ignoring the personal laws, especially the Muslim Law which has been left completely unaltered, would lead to civil war, wide-scale rioting and social unrest. While making the Indian Constitution, its forefathers wanted to adopt the "secular" model of western democracy, but on the contrary it adopted a "secular" state with religious laws for its religious groups. In India, "secular" means "non intervening in the matter of religion." Drawing from the findings of the research that I conducted, it appears that the basic level of modernization, which is mentioned as prerequisite for the implementation of the Uniform Civil Code has already been achieved. If women, from the

economically lower rung of the society are prepared for change then it has a clear implication that the educated section is already prepared for it. But the time has come where Article 44 of the Indian Constitution which mentions about Uniform Civil Code is the need of the hour, since it respects and keeps religion as the base and brings about equality among the society irrespective of the person's religion.



## **ESSAY ON MINORITY RIGHTS AND INDIAN CONSTITUTION**

**Ms. Megha Dugar\***

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### **Introduction**

This study focuses on different definitions of “minorities” by various authors and the rights provided to them as in Indian Constitution. The paper also discusses the contemporary state of minorities.

This first phase of the secondary research looks at the birth of the word “minority” crawling to Historical Evolution of Minorities and further steps into distinguishing between minority rights to indigenous rights.

The second phase deals with the provisions in the Constitution of India associated with minorities and their effectiveness in the Indian society.

This research bring in light the minority as a social category of powerlessness, caste, linguistic, religious, ethnic group and indigenous people.

The present paper looks into the specific historical trajectories such communities often labelled minorities have had in the past.

The focus of this article is to bring out the majority-minority relationship and the discourse of rights as a community’s tools to enable political self-expression.

The case studies that comprise this paper offer not just a glimpse of the particular histories of these communities but also connect with each other and highlights how the discourse of community rights have been used with various degree of success by minority communities in order to articulate their political and other demands.

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\* Student, 1<sup>st</sup> year, BBA LL.B., SLS, Noida.

Wikipedia says: "A minority group is a sociological category within a demographic. Rather than a relational "social group", as the term would indicate, the term refers to a category that is differentiated and defined by the social majority, that is, those who hold the majority of positions of social power in a society. The differentiation can be based on one or more observable human characteristics, including, for example, ethnicity, race, gender, wealth, health or sexual orientation. Usage of the term is applied to various situations and civilizations within history, despite its popular mis-association with a numerical, statistical minority. In the social sciences, the term "minority" is used to refer to categories of persons who hold few positions of social power."

The Constitution does not define the term "minorities" anywhere but only mentions it in some articles.

"The Constitution of India used the word minority or its plural form in some Article 29 to 30 and 350A to 350B, but does not define it anywhere."

Though Article 29 refers to "minorities" in its marginal heading, it speaks of "any section of citizens having a distinct language, script and culture".

An entire community or a group within a majority community could thus be seen as a minority.

Article 30 speaks about two categories of minorities - religious and linguistic-while Article 350 relates to linguistic minorities only.

The National Commission for Minorities Act has declared five communities-Muslims, Christians, Sikhs, Buddhists and Parsis-as religious minorities.

The Indian Constitution ensures "justice, social, economic and political" to all citizens. The Indian Constitution has adopted measures for the protection of the rights of the religious and ethnic minorities and of the socially and economically disadvantaged classes such as the scheduled castes and scheduled tribes.

The Indian Constitution enshrines various provisions for the protection of the rights and interest of the minorities.

- **Firstly**, India declares herself a secular state. No particular religion is the religion of the overwhelming majority, has been made the religion of the state.
- **Secondly**, Article 29 give the religious and linguistic minorities right to establish and manage educational institutions of its own. The minorities have been given the unrestricted rights to promote and preserve their own culture. Indeed is a country of diverse cultural groups and India is keen to preserve her cultural diversity. Thus for example, even though, Hindi is made the official language of India, primary education everywhere is given in the mother tongue.
- **Thirdly**, Article 29 expressly forbids discrimination on grounds of race, religion, caste, language, in admission to educational institutions run by the state or receiving aids from the state. This means that the doors of all educational institutions run by government or receiving funds from the state are open to all groups of Indians. Linguistic, religious or ethnic minority students cannot be denied admission to such educational institutions.

Article 30 is vital to the protection and preservation of rights of the minorities. The minorities have been given the right to establish and administer educational institutions of their choice. The state also cannot discriminate against educational institutions established and managed by the minorities in matters of granting aids. Such educational institutions however must receive state recognition. The state educational authorities have the right to regulate such educational institutions because the “right to manage does not include the right to mismanage.”

Article 16 guarantee that in matters of public employment, no discrimination shall be made on grounds of race, religion, caste or language etc. This means that in

matters of public employment, all Indians are placed on a footing of equality.

Finally, Article 25 of the Indian constitution guarantees freedom of religion to every individual. This article of the Indian constitution ensures that the members of the religious minority community have the unhindered right to follow their own religion. The state regulates the practice of a religion only when and to the extent it disturbs public peace. The minority not only has the right to follow their own religion, they also have the right to propagate it. But the state certainly does and should regulate conversion through force or temptation. Forcible conversion is forbidden because it transgresses the individual's freedom of conscience.

On the whole, the minorities of all kinds have very secure rights in India which must be a matter of envy to the minorities elsewhere.

Why is the expression 'minority' - such a touchy word - undefined under the Constitution? Is it because a large number of benefits are conferred on minority communities through a series of inviolable fundamental rights?

The Supreme Court takes them as a protective arrangement. In its 2005 judgment in *Bal Patil v. Union of India*, the court said: "The group of Articles 25 to 30 of the Constitution, as the historical background of partition of India shows, was only to give guarantee of security to the identified minorities and thus to maintain integrity of the country."

- **Article 25:** Freedom of conscience and free profession, practice and propagation of religion.
- **Article 26:** Freedom to manage religious affairs.
- **Article 27:** Freedom as to payment of taxes for promotion of any particular religion.
- **Article 28:** Freedom as to attendance at religious instruction or religious worship in certain education institutions.



- **Article 29:** Protection of interests of minorities.
- **Article 30:** Right of minorities to establish and administer educational institutions.

The apex court, in its 2005 judgment, felt that the special guarantees and protection to the religious, cultural and educational rights of minorities was guaranteed as a fundamental right in the Constitution, in the backdrop of the bloody partition, to allay apprehensions and fears in the minds of Muslims and other religious communities.

"Such protection was found necessary to maintain unity and integrity of free India because even after partition, communities like Muslims and Christians in greater numbers living in different parts of India opted to live in India as children of its soil," the court had said.

It said the minorities initially recognized, were based on religion and on a national level, for example Muslims, Christians, Anglo-Indians and Parsis.

However, it had sounded a warning against vote bank politics based on divisive tactics and underlined that "the constitutional ideal, which can be gathered from the group of articles in the Constitution under Chapters Fundamental Rights and Fundamental Duties, is to create social condition where there remains no necessity to shield or protect rights of minority or majority."

The recent Judgment given by Justice S.N. Srivastava of Allahabad High Court to the effect that, Muslims in UP are not a minority within the state, came as a surprise to many. The media is both electronic and print media gave prominent coverage to the judgment. The Judgment has now been stayed by the Division Bench of the same Court. The legal and Constitutional merits and demerits of the proposition will be gone into by the Appeal Courts upholding or overruling the judgment of the single judge of the Allahabad High Court in the coming days.

The Allahabad High Court's judgment has in a way indirectly reopened the debate on rights of minorities

under the Constitution. Samna, a daily edited and published by Bal Thackeray also welcomed the judgment in the issue dated 6 April 2007 stating that too many concessions and privileges are being granted to the Muslims in India. The right wing politicians have led the people of India to believe that minorities enjoy too many special rights and privileges and that minority means Muslims or at best Christians.

There is only one article pertaining to the Minorities in the Constitution of India. Article 30 of the Constitution provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. The Constitution thus envisages that minorities can be based on religion or language. Not only Muslims and Christians but also Buddhists, Sikhs and even Jains are minorities. Moreover, Hindus are a religious minority within the state of Jammu and Kashmir, Mizoram, Meghalaya and Lakshadweep and enjoy the privileges of minorities under the Constitution in those states. But more important, and not perceived in popular imagination, is the category of linguistic minorities. In Maharashtra, all those speaking Gujarati, Tamil, Hindi, Kannada, Malayalam, Urdu and languages other than Marathi are minorities and enjoy the same privileges as religious minorities. Marathi speaking people in India are a minority in states other than Maharashtra. Thus all the citizens in India are a minority and enjoy the privilege of minorities. Not only Akbar Peerbhoy College and Saint Xaviers College in Mumbai are minority institution, but also Mithibai College (set up by Gujarati minorities), SIES College (set up by Tamil speaking minority in Mumbai) K.C. College, Jai Hind College (set up by Sindhi speaking minorities) are recognized as minority educational institutions.

In *TMA Pai Foundation* judgment, the Supreme Court has laid down that the right to establish educational institutions of their choice is available not only to the minorities but to all the citizens of the India. One of the fundamental rights in Article 19 of the Constitution to practice any profession, or to carry on any occupations, trade or business - has been interpreted by the Supreme Court to include right to establish educational institutions, which is a right guaranteed to all the

citizens. What is the exclusive right of the minorities then? Minorities can not only establish educational institutions of their choice but also administer them. Supreme Court has further laid down that the right to establish and administer broadly comprises of right to (a) admit students; (b) set up a reasonable fee structure; (c) constitute a governing body; (d) appoint staff (teaching and non-teaching); and (e) take action if there is dereliction of duty on the part of any employees. Non-minority educational institutions are governed by the policies and regulations of the state government or the Central Government in matters of admission, appointment of staff, fixing the fee structure and constitution of governing body, where as the minority institutions are not.

The right to establish and administer educational institutions is to ensure that religion and language of minorities are preserved, reproduced, regenerated and recreated. The language, culture and religion of the majority need not fear that their language and religion will not be preserved, as the elected representatives are not expected to be insensitive to the cultural, linguistic and religious needs of the majority in spite. Except the right establish and administer educational institutions of their choice, there is no other exclusive right that minorities enjoy under the Constitution of India. Articles 14, 15 and 16 prohibit any discrimination on grounds of religion, race, caste, sex, place of birth by the state. As Sachar Committee Report has pointed out, the Muslim minorities are not privileged but are discriminated and therefore are socially and economically backward. Not privileges, but inclusive growth is what is necessary to ensure social justice which was the dream of the Constitutional Fathers and all Indians minus the elites.

There are many theocratic countries where equal rights are not extended to all of its citizens. They have categorized citizens according to their believes. The rights are also attached differently; we must thank the fathers of our constitution who envisioned equal rights to all citizens and added special rights to religious and linguistic Minorities.

The Indian constitution guarantees equal rights to all its citizens, violation of which by the State or Central Government can be challenged in the High Court or Supreme Court as per the Article 32 of the Constitution, such cases are taken up with utmost urgency. Article 14 of the constitution states that, 'the State shall not deny to any person equality before the law or the equal protection of the laws within territory of India.' It gives equal status to all citizens in freedom and dignity. It further makes clear in Article 15, 'the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them, and it offers, 'equal access to public facilities.' The 93rd amendment added a new clause-Clause 5-to Article 15. This enables the enactment of laws, making special provisions for the socially and educationally backward classes, the Scheduled Castes and the Scheduled Tribes in educational institutions including private educational institutions, except in minority institutions.

It is good to understand the Directive Principles and Fundamental Rights. 'Fundamental rights are legally enforceable and guaranteed rights but directive principles are not enforceable in any court of law. But under article 31-C, a DP may be framed as law even if it abridges fundamental rights. The 42nd Amendment Act allowed DPs to usurp FRs.' Therefore the reservation policy is a directive principle and it can be formulated as per the requirements. It makes clear that the policy on reservation is a directive principle to help a socially weak entity to become better.

The Constitution positively undermined the division of opportunities on the basis of birth to any particular entity. It provides equal opportunities in employments which is made clear in Article 16 'there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state'. It also spells out in clear terms that, 'no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, resident or any of them be ineligible for or discriminated against in any respect of any employment or office under the State.'

It is also to be noted that the constitution provides an additional provision to the government to enact laws to make sure that no section of the society is left out. The Article 16(4) point out that 'Nothing in this article shall prevent the State from making any provision for the reservation of posts in favour of any backward class of citizens, which in the opinion of state is not adequately represented in the services under the state'. The constitution has not defined in clear terms what does it mean by backwardness and how do we determine the backwardness. It has definitely raised questions.

Education is seen as the only means to progress for an individual and society at large. So the Article 29 states that 'no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of the State funds on ground only of religion, race, caste, language, or any of them.' It gives a feeling that unaided educational institutions does not bind by this Article. But opportunity is equally distributed to all.

The constitution of India is very clear in terms of Minority Rights. The Indian Constitution very well protects the minorities and it provides opportunity to develop to its fullness. The recent communal clashes and accusations on minorities raises a question that whether the constitutional rights are exercised well? There is no political will or leadership to pursue the cause of the Minority Community

"The Constitution (103rd Amendment) Bill, 2004 to grant constitutional status to the National Commission for Minorities envisages a change in the way minorities are specified. The Cabinet has reportedly approved a proposal (May 2007) to define minorities State-wise in line with several Supreme Court judgments, most notably that in *T.M.A. Pai*. For the purpose of this legislation, minority will be specified as such in relation to a particular State/Union Territory by a presidential notification issued after consultation with the State Government; this will be in addition to the five minorities (Muslims, Christians, Sikhs, Buddhists, and Parsis) referred to in the NCM Act, 1992. The new approach is not consistent with the understanding developed in the

Constituent Assembly on the protection of minorities and the constitutional compact between the State and minority groups.

Although the Constitution does not define a minority or provide details relating to the geographical and numerical specification of the concept, it is clear that the constitutional scheme envisages this to be determined at the national level. Periodic judicial interventions and categorization has had major repercussions. Over the years, judicial pronouncements have sought to give a restricted meaning to minority rights by limiting them to education and defining minorities at the State level in terms of protection under Article 30 which provides religious minorities the right to set up educational institutions of their choice. The legitimization of a restrictive conception of minority rights can also be noticed, in this context, in the Central Government's proposal to adopt a State-specific notion of minorities.

At the heart of the current controversy is confusion about which groups qualify as minorities and regarding the nature of the unit of determination under this rubric. However, internationally, some agreement exists. Commonly cited characteristics that make groups distinctive and expose them to discrimination include religion, language, culture, and gender. There is also a unanimous opinion that the term 'minority' refers to a power relationship. In this, the size of a group may bear some relation to the degree of power it wields, but presumably because other factors are also involved in the equation, the relationship of group size is not all that significant.

Contrary to this widely accepted perception of minorities, the Government's new proposal for State-specific minorities is driven by a statistical or numerical approach. The size of the group is not what should concern our policy-makers or those committed to eradication of inequity, prejudice, and discrimination. This is because numbers per se merely quantify and describe the proportion of a group in a population; they do not tell us anything about whether a particular minority group is powerful or powerless, advantaged or disadvantaged, represented or under-represented. A more

meaningful conception of minority status would include sections of people who, on account of their non-dominant position in the country as a whole (not a specific State), and because of their religion, language, caste or gender, are targets of discrimination and therefore deserving of special consideration. The statistical approach disregards the crucial qualitative condition of vulnerability and disadvantage.

In the circumstances, defining and confining the category 'minority' to States is not the best way forward; it would be far more helpful to recognize the comprehensive character of minority rights, in consonance with the demands of substantive equality, to include them by revisiting the concept of affirmative action. This would be in step with the slew of policies and measures currently under consideration to address the economic, social, and educational deprivation that minorities experience."

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## MINORITY RIGHTS AND THE INDIAN CONSTITUTION

Ms. Uplabdh Gupta\*

Ms. Shuchita Bais\*\*

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### Introduction

Protection of minorities is the hallmark of a civilization. According to Gandhi ji, the claim of a country to civilization depends on the treatment it extends to the minorities. Lord Acton added another dimension: the most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities. Rights of minorities figured prominently in the Constituent Assembly. Our founding fathers were deeply concerned to ensure full meaningful protection to the members of the minority communities individually and collectively. The minorities particularly Muslims, Christians, Sikhs were apprehensive that their civil and political rights may be ridden rough shod by the majority community despite the secular pretensions of independent India.<sup>1</sup>

The Preamble to the Constitution declares the State to be 'secular' and this is a special relevance for the religious minorities. Equally relevant for them, especially, is the declaration of the Constitution in its Preamble that all citizens of India are to be secured 'liberty of thought, expression, belief, faith and worship and 'equality of status and of opportunity.'

There are many theocratic countries where equal rights are not extended to all of its citizens. They have categorized citizens according to their beliefs. The rights are also attached differently; we must thank the fathers of our constitution who envisioned equal rights to all citizens and added special rights to religious and

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\* Student, 2nd year, B.A. LL.B.(H), Hidayatulaah National Law University, Raipur.

\*\* Student, 2nd year, B.A. LL.B.(H), Hidayatulaah National Law University, Raipur.

<sup>1</sup> Prakash Louis, Minority Report in Secular India, Tehelka report EDIT/OP-ED.



linguistic minorities. The Indian constitution guarantees equal rights to all its citizens, violation of which by the State or Central Government can be challenged in the High Court or Supreme Court as per the Article 32 of the Constitution, such cases are taken up with utmost urgency. Article 14 of the Constitution states that, 'the State shall not deny to any person equality before the law or the equal protection of the laws within territory of India.' It gives equal status to all citizens in freedom and dignity.<sup>2</sup>

The various articles of the Constitution providing rights to the minorities, clearly and firmly point out to only one direction: that of a multi-religious, multi-cultural, multi-lingual and multi-racial Indian society, interwoven into an innate unity by the common thread of national integration and communal harmony. By the yardstick adopted by the framers of the Constitution and crystallized into its provisions the Indian Nation is not just a conglomeration of individual inhabitants of this State; it comprises of two distinct categories of constituents. The two-tier commonwealth of Indian Nation includes, on one hand, every citizen of India individually and, on the other hand, the multitude of religious, linguistic, cultural and ethnic groups among its citizens. The Indian Nation is an enormous coparcenary in which the individual citizens are also members of their own respective branches taking the form of religious, cultural, linguistic and ethnic groups. And all these groups, like all individuals, have the same Fundamental Rights to enjoy and the same Fundamental Duties to discharge.

The social pluralism of India, as fortified by the unique Constitutional concept of secularism, raises the need for the protection and development of all sorts of weaker sections of the Indian citizenry – whether this 'weakness' is based on numbers or on social, economic or educational status of any particular group. The Constitution, therefore, speaks of religious and linguistic minorities, scheduled castes, scheduled tribes and backward classes and makes—or leaves room for making—

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<sup>2</sup> Fr. Anand Muttungal, "Constitutional Safeguards for Minorities in India (Part IV)".

for them special provisions of various nature and varying import.

The word 'minority' or 'minorities' has been used in the constitution of Indian in some Articles – 29 to 30 and 350A to 350B – but it is defined anywhere. Article 29 has the word of "minorities" in its marginal heading but speaks of "any sections of citizens...having a distinct language, script or culture". Article 30 speaks specifically of religious and linguistic minorities. Articles 350A and 350B are related to linguistic minorities.

In common parlance, the expression 'minorities' means a group comprising less than half of the population and differing from others, specially the pre dominant section, in race, religion, tradition and culture, language, etc. A special sub-committee on the Protection of Minority Right appointed by the United Nations Human Rights Commission in 1946 defined the 'Minority as those "non-dominant groups in a population which posses a wish to preserve stable ethnic, religious and linguistic tradition or characteristics markedly different from those of those of the rest of the population."<sup>3</sup> For understanding the concept of minorities we first need to look back at the Indian Constituent Assembly.

### **Minority Rights in the Indian Constituent Assembly, 1946-1949**

The Constituent Assembly debates mark a crucial turning point in the history of state policies of minority preference in India. Since the late nineteenth century, special provisions had been instituted by the colonial state<sup>4</sup> as well as by some princely states<sup>5</sup> for a vast array

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<sup>3</sup> Rochana Bajpai on Minority Rights.

<sup>4</sup> Group representation provisions in central legislatures were first introduced by the colonial state in the Morley-Minto Reforms of 1909, which granted separate electorates to Muslims. The Government of India Act of 1919 extended separate electorates to Sikhs, Indian Christians and Europeans. In the Government of India Act of 1935, a total of thirteen communal and functional groups were granted special representation. Reservations in government appointments for Muslims were first recognized by the colonial state in 1925. The policy was formalized and extended to other communities in 1934. See B. Shiva Rao (ed.), *The Framing of India's Constitution: A Study* (Delhi 1967).

of groups designated as minorities or 'backward'. Under the Indian Constitution of 1950, preferential provisions in legislatures and government employment were restricted mainly to the scheduled castes and 'backward' tribes.

The Constituent Assembly began its proceedings as scheduled on 9 December 1946, with the Muslim League boycotting its sessions. In the Assembly's deliberations, the minorities question was regarded as encompassing the claims of three kinds of communities: religious minorities, scheduled castes, and 'backward' tribes, for all of whom safeguards in different forms had been instituted by the British and by Princely States in the colonial period. The representatives of most groups claiming special provisions in some form emphasized that the group was a minority of some kind. So close was the identification of the term 'minority' with the notion of special treatment for a group that even those opposed to a continuation of the colonial system of minority safeguards employed the same language to justify their stand. For instance, it was argued that the 'so-called minorities' were not the 'real minorities'. The latter were variously identified as 'the agriculturists', 'the rural people', 'the backward provinces', even 'the masses'. The claim was that these were the groups that ought to receive special treatment, rather than the communities hitherto favoured by the British. The speeches of representatives belonging to most religious minority communities reflected concerns regarding the submerging of a distinct cultural identity in independent India.

While the appellation 'minority' was popular among the representatives of almost every group claiming special provisions in the Constituent Assembly, nationalist opinion, for reasons that will be explored below, regarded the term unfavourably and consistently sought to restrict its usage. In nationalist opinion in the Constituent Assembly, individuals as well as groups were recognized

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<sup>5</sup> Some of the earliest instances of policies of group preference in government employment are to be found in the caste based reservation schemes instituted by the princely states, such as Mysore in 1895 and Kolhapur in 1902. See S. Bayly, *Caste, Society and Politics in India From the Eighteenth Century to the Modern Age* (Cambridge 1999).

as entities to which a liberal regime of rights, and its underlying norms of equality and freedom would apply.

Political safeguards, however, were a different matter. While political safeguards for minorities were included in the Report on Minority Rights adopted by the Constituent Assembly in August 1947 and in Part XIV of the Draft Constitution published in February 1948, nationalist opinion was hostile to such provisions from the outset. Political safeguards for minorities were reluctantly admitted as temporary, transitional measures, necessary until 'backward' sections of the population were brought up to the level of the rest, or until groups accustomed to 'privileges' under the colonial system had adjusted to the new order. In the dominant nationalist opinion, however, the ideal was always visualized as a situation in the future where political safeguards for minorities would no longer be necessary. Speeches in the Constituent Assembly employed several variants of arguments from national unity, secularism, democracy and equality and justice in opposition to minority safeguards.

Quotas and rights were provided by the constituent assembly but were admitted as a temporary mechanism for a limited purpose. Quotas were permitted as a means of reducing disparities in the levels of development between different sections of the population and, thereby assisting in the assimilation of these groups as well as in the development of the nation. These grounds were regarded as creating a case for quotas for the scheduled castes and tribes, but not for the religious minorities. As in the case of political representation provisions, an analysis of the legitimating vocabulary for reservation in the public services suggests that the retraction of quotas for religious minorities during the making of the Constitution was always a likely outcome.<sup>6</sup>

### **Religious and Linguistic Minorities**

In contemporary situation the case of religious minorities at the national level in India includes, all those who profess a religion other than Hindu are considered minorities. This is because over 80% of the population of

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<sup>6</sup> Galanter, *Competing Equalities*, p. 363.

the country professes the Hindu religion. Among the minorities at the national level, Muslims are the largest minorities followed by Christians and Sikhs while all the other religious groups are still smaller.

As regard linguistic minorities, there is no majority at the national level and the minority status is to be essentially decided at the state/union territory level. For instance in the state of Jammu and Kashmir and the union territory of Lakshadweep Muslims are the majority. In the states of Meghalaya, Mizoram and Nagaland Christians constitute the majority. Sikhs are the majority community in the state of Punjab.<sup>7</sup>

### **Cultural and Educational Rights of Minorities**

Articles 29 and 30 of the Indian Constitution lay down the provision relating to “Cultural and Educational Rights of Minorities”. Articles 29 and 30, which provide for the protection of interests of minorities and right to establish and administer educational institution respectively, read as follows:

#### **Article 29: Protection of interests of minorities**

1. Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
2. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

#### **Article 30: Rights of minorities to establish and administer educational institutions**

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

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<sup>7</sup> Dhavan, Rajeev, and Fali. S Nariman, ‘The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities’ in B. N Kirpal and others (eds), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000), 256.

2. In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Clause (1), the State shall ensure that the amount fixed by or determined under such as would not restrict or abrogate the right guaranteed under that clause.
3. The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language.

**Right to conserve language, script or culture (Article 29(1)):** Clause (1) of Article 29 provides: “Any section of the citizen residing in the territory of India or any part thereof having a district language, script or culture of its own shall have the right to conserve the same”.

The “right to conserve” means the right to preserve and the right to maintain. The right to conserve one’s own language, script or culture, thus, means and includes the right to preserve and to maintain own language, script or culture. It includes the right to preserve and maintain own language, script or culture. It includes the right to work for one’s own language, script or culture and to agitate for the same.

The right contained in Article 29(a) may be exercised by setting up educational institutions and by imparting instructions to the children of their own community in their own language.

In *D.A.V. College, Bhatinala v. State of Punjab*<sup>8</sup>– The Punjab University was established at Patiala under the Punjab University Act, 1961. After the reorganization of the State of Punjab in 1969, the Punjab Government issued a Notification providing for the compulsory affiliation of all the colleges situated within the area under the jurisdiction of the Punjab University, Patiala. Thereafter, the University issued the impugned circular to all the affiliated colleges requiring them to introduce Punjab in *Gurmukhi* script as the Court struck down the

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<sup>8</sup> AIR 1971 SC 1731.

circular as well as examinations. The Supreme Court struck down the circular as violative of the right of the petitioner to conserve their script and language and to administer their institutions in their own way.

**Right of Minorities to establish and manage educational institutions:** Article 30(1) guarantees to all linguistic and religious minorities the 'right to establish' and the 'right to administer' educational institutions of their own choice. The word 'establish' indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Thus, it leaves it to the choice of the minority to establish such educational institution as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving through general education to their children in their own language.

Clause (2) of Article 30 prohibits the State from making discrimination in the matter of grant of aid to any educational institution on the ground that it is managed by a religious minority or linguistic minority.

In *State of Bihar v. Syed Raza*<sup>9</sup>– It has been held that for creation of post in a minority institution for appointment prior approval of the Vice-Chancellor is not necessary and the persons so appointed would be entitled to grant in aid in view of Art. 30(1) of the Constitution. Clause (2) of Art. 30 provides that the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.<sup>10</sup>

The Supreme Court in *TMA Pai Foundation and Ors. v. State of Karnataka & Ors.*<sup>11</sup>(2002) has held that for the purpose Article 30 a minority, whether linguistic or religious, is determinable with reference to a state and not by taking into consideration the population of the country as a whole. Incidentally, 'Scheduled caste' and

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<sup>9</sup> AIR 197 SC 2425.

<sup>10</sup> Kamaludin Khan, Educational Rights of Minorities, 2<sup>nd</sup> edition, <http://twocircles.net/book/export/html/135425>.

<sup>11</sup> AIR 1994 SCC (2) 94.

‘scheduled tribe’ are also to be identified at the State/Union territory level. In terms of Articles 341 to 342 of the constitution, castes, races or tribes or parts of or groups within caste, traces of tribes are to be notified as scheduled caste or scheduled tribes in relation to the state or union territory, as the case maybe.

Article 15 and 16 of the constitution prohibit the state from making any discrimination on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them either generally i.e., every kind of state action in relation to citizens (Article 15) or in matters relating to employment or appointment to any office under the state (Article 16). However, there is a wide disparity in the social and educational status of different section of a largely caste-based, tradition-bound society with large scale poverty and illiteracy. Equality can only be among equals. Equality does not mean absolute equality but relative equality therefore, to favour the weak, the backward and the disadvantage, the constitution permits positive discrimination with reasons. Discrimination with reasons includes rational classification. Article 15 allows the state to make any special provisions for women, children, any socially and educationally backward class of citizens and scheduled caste and scheduled tribe. Recently Article 15 has been amended by the Constitution (93<sup>rd</sup> amendment) Act, 2005 to empower the state to make special provisions, by law, for admission of socially and educationally backward classes of citizens or schedule caste/tribes to educational institutional, including private educational institution, whether aided or unaided by the State, other than minority educational institutions. Article 16 also has a provision that allows the state for making provisions for the reservations in the appointment of post in favour of “any backward class of citizens which in the opinion of the state, is not adequately represents in the services under the State”. Even though discrimination only on the ground of ‘caste’ or ‘religion’ is prohibited but positive discrimination on the ground of caste or religion along with other grounds such as educational and social backwardness is constitutionally permissible.<sup>12</sup> The Supreme Court in *Indra Sawheny and Ors. v. Union of*

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<sup>12</sup> <http://www.jstor.org/discover/10.2307/4416749?uid=2&uid=4&sid=21103411136297>.



*India*<sup>13</sup>, has held that an entire community can be treated as a 'class' on the basis of its social and educational backwardness.

It can be seen throughout the Constitution that there has been an over emphasis on religious and linguistic minorities. This has led to the emergence of a preferential class of minorities. One corollary of this is that other minorities are frequently overlooked and are not recognized. This hampers their claim to the rights that they have been guaranteed by the constitution. In fact this challenges their status of minority. This problem has remained unaddressed since a long time. Providing proper recognition to other minorities is long overdue. They should be placed at par with the preferential class of minorities since they have also been granted the right to equality.

### **Constitutional Rights and Safeguards**

Minority rights provided in the Constitution can be placed into two domains namely 'common domain' and 'separate domain'. The rights provided under 'common domain' are applicable to all the citizens of our country whereas the rights which fall in the 'separate domain' are those which are applicable to the minorities only and these are reserved to protect their identity.

The Constitution has made provisions for the Fundamental Rights in Part III, which the State has to comply with and these are also judicially enforceable. There is another set of non-justiciable rights stated in Part IV, which are connected with social and economic rights of the people. These rights are known as 'Directive Principles of State Policy', which legally are not binding upon the State, but are "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws" (Article 37). Part IV of the Constitution of India, containing non-justiciable Directive Principles of State Policy, includes the following provisions having significant implications for the Minorities :

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<sup>13</sup> AIR 1993 SC 447.

Obligation of the State 'to endeavour to eliminate inequalities in status, facilities and opportunities' amongst individuals and groups of people residing in different areas or engaged in different vocations; [Article 38(2)]

Obligation of State 'to promote with special care' the educational and economic interests of 'the weaker sections of the people' (besides scheduled castes and scheduled tribes);

Part IVA of the Constitution, relating to Fundamental Duties as provided in Article 51 A applies in full to all citizens, including those belonging to minorities. Article 51A which is of special relevance for the minorities stipulates as – Citizens' duty to promote harmony and the spirit of common brotherhood amongst all the people of India 'transcending religious, linguistic and regional or sectional diversities; and citizens' duty to value and preserve the rich heritage of our composite culture.'

The Constitution has provided a definite space for both the 'domains' i.e., 'common' as well as 'separate'. In Part III of the Constitution, which deals with the Fundamental Rights is divided into two parts viz. (a) the rights which fall in the 'common domain' and (b) the rights which go to the 'separate domain'. In the 'common domain', the following fundamental rights and freedoms are covered: People's right to 'equality before the law' and 'equal protection of the laws'; [Article 14]

Prohibition of discrimination against citizens on grounds of religion, race, caste, sex or place of birth; [Article 15(1) & (2)]

Authority of State to make 'any special provision for the advancement of any socially and educationally backward classes of citizens' (besides the scheduled castes and scheduled tribes); [Article 15(4)]

Citizens' right to 'equality of opportunity' in matters relating to employment or appointment to any office under the State – and prohibition in this regard of discrimination on grounds of religion, race, caste, sex or place of birth; [Article 16(1)&(2)]

Authority of State to make 'any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State; [Article 16(4)]

People's freedom of conscience and right to freely profess, practice and propagate religion – subject to public order, morality and other Fundamental Rights; [Article 25(1)]

Right of 'every religious denomination or any section thereof – subject to public order, morality and health – to establish and maintain institutions for religious and charitable purposes, 'manage its own affairs in matters of religion', and own and acquire movable immovable property and administer it 'in accordance with law'; [Article 26]

Prohibition against compelling any person to pay taxes for promotion of any particular religion'; [Article 27]

People's 'freedom as to attendance at religious instruction or religious worship in educational institutions' wholly maintained, recognized, or aided by the State. [Article 28]

The minority rights provided in the Constitution which fall in the category of 'Separate Domain' are as under:

Right of 'any section of the citizens' to 'conserve' its 'distinct language, script or culture'; [Article 29(1)]

Restriction on denial of admission to any citizen, to any educational institution maintained or aided by the State, 'on grounds only of religion, race, caste, language or any of them'; [Article 29(2)]

Article 46 of Directive Principle of State Policy mandates the State to "Promote with special care the educational and economic interest of the weaker sections of the people... and... protect them from social injustice and all forms of exploitation." In this Article the ambit of weaker sections of the society is not limited to scheduled caste/tribes.

Special provision relating to the language spoken by a section of the population of any State; [Article 347]

Article 340 of the constitution empowers the president to appoint a commission to investigate the condition of socially and educationally backward classes but does not make mandatory

Provision for facilities for instruction in mother-tongue at primary stage; [Article 350 A]

Provision for a Special Officer for Linguistic Minorities and his duties; and [Article 350 B]

Sikh community's right of 'wearing and carrying of *kirpans*'; [Article 25]

Apart from these specific provisions the Constitution in its spirit advocates for equal rights for minorities. It attempts to do right the wrongs that have already been committed towards minorities. For minorities it is not uncommon to face discrimination. To remove this discrimination our constitution strives to take all possible measures. Apart from the constitution there are also some other provisions for the development of minorities. These provisions are largely legislative in nature. Some of them are: Protection of Civil Rights Act, 1955 [formerly known as the Untouchability (Offences) Act, 1955] and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. National Commission for Minorities has also been established by the National Commission for Minorities Act, 1992. The setting up of Minorities Commission was envisaged in the Ministry of Home Affairs Resolution dated 12.01.1978 which specifically mentioned that, "despite the safeguards provided in the Constitution and the laws in force, there persists among the Minorities a feeling of inequality and discrimination. In order to preserve secular traditions and to promote National Integration the Government of India attaches the highest importance to the enforcement of the safeguards provided for the Minorities and is of the firm view that effective institutional arrangements are urgently required for the enforcement and implementation of all the safeguards provided for the Minorities in the Constitution, in the Central and State

Laws and in the government policies and administrative schemes enunciated from time to time. Sometime in 1984 the Minorities Commission was detached from Ministry of Home Affairs and placed under the newly created Ministry of Welfare.<sup>14</sup>

### **Political Scenario**

Article 79 of the Constitution states: "There shall be a Parliament for the Union which shall consist of the President and two Houses... Council of States and House of the People." However, the Constitution being supreme, its organs owe their existence to it. Each organ has to function within the Constitution's provisions. The Indian Constitution has borrowed heavily from the traditions and conventions of the British political system. Yet the doctrine of parliamentary sovereignty does not prevail in India. Indian Parliament is neither sovereign nor supreme. "It is the Constitution which is supreme and sovereign and Parliament will have to act within the limitations imposed by the Constitution."

A legislature has to act within the parameters set by the Constitution. It is expected that the political class would follow the rule of law in letter and spirit. Unfortunately, that does not seem to be the case. How else can one defend statements made by senior leaders that 'minorities' should not be wrongfully arrested or face undue harassment. If they had gone through the Constitution, they would have noticed that the term, minority, has not been explicitly defined. Article 30 (1) stipulates: "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." It goes on to add in vide 30 (3) that "The State shall not, in granting aid to educational institutions, discriminate against any institution on the ground that it is under the management of a minority, whether based on religion or language." It is thus clear that the term, minority, is identified on the basis of religion or language.

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<sup>14</sup> Rao, B. Shiva, v. K.N. Menon, Subhash C. Kashyap, and N.K.N. Iyengar, *The framing of India's Constitution*, vol. 2 (Indian Institute of Public Administration, 1966).

Should the political class define who is a 'minority' or should one go by what is written in the Constitution? Article 30(1) of the Constitution secures the rights of religious and linguistic minorities to administer educational institutions. Minority communities have been given this right under this article to preserve and strengthen the unity and integrity of the nation. If religious or linguistic minorities are not given protection under Article 30, they are likely to feel alienated.

However, it should be remembered that the right conferred upon minorities is not meant to place them at an advantageous position vis-à-vis the majority community. It is necessary to invoke Article 30 to remind India's politicians that minorities include religious and linguistic groups. Attempts to prioritize one over the other would violate fundamental rights. By harping on 'religious minorities', political leaders are doing exactly the opposite of what is enshrined in Article 14, which talks about the right to equality.

Let us explore the definition of the term, minority, as explained in *A.M. Patroni v. E.C. Kesavan*, AIR 1965 KER 75 (FB). Here it was held that any community, religious or linguistic, numerically less than 50 per cent of the population of the State is a minority community. This makes it evident that there may be political minorities, religious minorities and linguistic minorities, and that the unit of determining the status of linguistic and religious minorities would be the State.

A political leader from Karnataka has reportedly asked minorities to default on loans. Linguistic minority groups too have the right to respond to this clarion call on the part of a seasoned politician. In this context, one needs to remember, once again, that the Constitution of India is supreme. Hopefully, India's political leaders should take note, broaden their vision and recognize linguistic minorities. This will help them create equal opportunities for the people of India. Otherwise, they will be severely criticized for ignoring the right to equality guaranteed by Article 14.<sup>15</sup>

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<sup>15</sup> Massey, James, *Minorities in Democracy* (1999), Manohar Publishers, New Delhi, pp. 72-73.

## **National Commission for Minorities**

The Union Government set up the National Commission for Minorities (NCM) under the National Commission for Minorities Act, 1992. Six religious communities, viz.; Muslims, Christians, Sikhs, Buddhists, Zoroastrians (Parsis) and Jains have been notified as minority communities by the Union Government.<sup>16</sup>

The Commission has the following functions:

- Evaluate the progress of the development of Minorities under the Union and States.
- Monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures.
- Make recommendations for the effective implementation of safeguards for the protection of the interests of Minorities by the Central Governments or the State Governments.
- Look into specific complaints regarding deprivation of rights and safeguards of the Minorities and take up such matters with the appropriate authorities.

The Commission has the following powers:

- Summoning and enforcing the attendance of any person from any part of India and examining him on oath.
- Requiring the discovery and production of any document.
- Receiving evidence on affidavit.
- Requisitioning any public record or copy thereof from any court or office.
- Issuing commissions for the examination of witnesses and documents.<sup>17</sup>

## **Conclusion**

Demands for rights and entitlements on grounds of Identity are no doubt very different today than they were in colonial India. The idea of an India irreconcilably divided amongst its many identities would undoubtedly today be dismissed as preposterous. However, it seems

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<sup>16</sup> <http://minorities.in/profiles.php>.

<sup>17</sup> National Commission for Minorities, India.

that the vision of a divided India has been replaced by a curious conception of 'Hindu' majoritarianism. A majoritarianism based on a sacralised conception of a 'Hindu' majority whose bearing on social experience is oblique (in the case of the scheduled castes) at best or tenuous at worst (in the case of the minorities and the backward classes). In other words the constitutional revolution of modern India is also a social vision that gathers up diverse sets of social experience by the dubious presumption that a sacral conception of 'Hindu' society can model the Indian social problem. Ironically it was exactly this lack of resonance with the Indian social condition that motivated the constitutional project to reframe the colonial system of minority rights.





## MINORITIES RIGHTS VIS-À-VIS JUDICIAL PRONOUNCEMENTS

Mr. Ritesh Kumar Sharma\*  
Mr. Nikhil Saini\*\*

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### Introduction

The existence and settlement of minorities in India is not a modern phenomenon, its origin date back to the Aryan period.<sup>1</sup> In numerous ancient Indian relics there are accounts of division of society into 4 classes namely the 'brahmins', 'kshatriyas', 'vaishyas', and 'shudra'.<sup>2</sup> The *shudra's* formed minority in Indian socio economic system, this lead to their exploitation, degradation and subject to inhumane treatment. Further they were named untouchables or the outcaste. The minorities in India during the modern time are not the same as it used to be it has changed drastically over the period of time with the advent and interference of foreigners.

The present India is a result of a rise and falls of monarch followed with the advent of foreigners India has been ruled by Aryans, Muslims and the British but its original inhabitants were the Dravidians who were divided into different castes and religions. With the decline of Muslim rule in India the British found the right opportunity to expand their roots in the country and by the end of 17<sup>th</sup> century it was firmly established in India. The British widened the ongoing gap of religion and then left the country in turmoil with the issue at peak. The partition caused turmoil, bitterness, chaos among the various communities hence we can see that the issue did not emerge overnight but it is one that existed for time immemorial.

For achieving holistic development of a nation its minorities should be taken along in the process of nation

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\* Student, 2<sup>nd</sup> year BBA LL.B.(H), National Law University, Odisha.

\*\* Student, 2<sup>nd</sup> year BBA LL.B.(H), National Law University, Odisha.

<sup>1</sup> HUTTON J.H., CASTE IN INDIA 152 (3rd ed. 1961).

<sup>2</sup> 25 MAX MULLER F. ED., AND G. BUHLER TRANS., THE SACRED BOOKS OF THE EAST (1886).

building and should not be left alienated. There are certain essential core elements in every society enshrined in its constitution for safeguarding the rights of these, it is the duty and obligation of the state to uphold these principles without prejudice and if the state succeeds in its duty then these cases of violation would be brought down. But the debate still goes on whether India's minority has to live with deep seated biases and for how long?

### **Minorities in India**

In India a minority is regarded as one who is separate from the majority group. Not only religious groups consider themselves minorities but it encompasses of caste, tribe, linguistic too. The Indian Constitution recognizes two types of minority groups: linguistic and religious.<sup>3</sup> The Indian Government has recognized the following communities as minorities: **1.**Muslims, **2.**Christians, **3.**Sikhs, **4.**Buddhist, **5.**Zoroastrian and now **6.**Jains also.<sup>4</sup> The ministry of social justice and empowerment has identified these groups and described them under Section 2(c)<sup>5</sup> of Statue of National Commission of Minorities. The NCM does not define the term minorities but an assumption is drawn by seeing past practices that parameter population and religion as a yardstick.<sup>6</sup>

The present UPA 2 government has introduced many policy schemes to uplift the status of these communities and provide them a level playing field, the government has introduced affirmative actions like sub quota of 4.5 % out of 27 % quota of OBC for the development of backward classes of minorities from Jan. 1, 2012.<sup>7</sup>

There is no prescribed definition of the term minorities in national or international arena but certain attempts have been made by authors like Francesco Capotorti, United Nations Special Rapporteur who defines minority

<sup>3</sup> D.D. BASU, HUMAN RIGHTS IN CONSTITUTIONAL LAW (2nd ed. 1994).

<sup>4</sup> National Commission for Minorities Act, 1992, SO No. 816(E).

<sup>5</sup> National Commission of Minorities, § 2(c).

<sup>6</sup> ANNUAL REPORT, MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT GOVERNMENT OF INDIA 29-36(2002-2003).

<sup>7</sup> ANNUAL REPORT, MINISTRY OF MINORITY AFFAIRS GOVERNMENT OF INDIA 71 (2012-13), available at <http://www.minorityaffairs.gov.in>.

as: “A minority is a group which is numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”<sup>8</sup>

Certain things tend to be forgotten among the dim, atrocities on the minorities have been among such things there have been cases of gross violation of their rights, large number of cases relating to violence on the minorities either go unreported or are suppressed, people belonging to the minority community are being victimized by the police in name of terrorist act in the country they are tortured in lockups and made to sign blank documents<sup>9</sup> the cataract of sorrow will never go away from the eyes of the community.

### 1. Linguistic Minorities

In India main problem for attaining nation integration is presence of a sub-national identity based on language. The constitution under the eighth schedule recognizes 18 major languages<sup>10</sup> that lead to people forming their own individual sub identity by regarding themselves a part of their own groups. Religious and cultural feelings are knit together closely in a fabric and can be seen as one moves far away from the Hindi heart land of north India.<sup>11</sup> In 1950 Hindi was chosen as the official language of the nation and further it was decided that it will be solely used as an official language after the constitution was in force for 15 years.<sup>12</sup> This decision led a huge outcry from the southern lands and leads the nation in 1965 to declare the use of English as a second official language

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<sup>8</sup> DEIRDRE FOTTELL & BILL BOWRING, MINORITY AND GROUP RIGHTS IN THE NEW MILLENNIUM 91 (1999).

<sup>9</sup> Peoples Tribunal on the Atrocities Committed against Minorities In The name Of Fighting Terrorism *available at* <http://www.lokraj.org.in/?q=articles/news/peoples-tribunal-atrocities-committed-against-minorities-name-fighting-terrorism>.

<sup>10</sup> INDIA CONST. SCH. § 8.

<sup>11</sup> R. KOTHARI, POLITICS AND THE PEOPLE: IN SEARCH OF A HUMANE INDIA (1989).

<sup>12</sup> *Ibid.*

for indefinite period. Today Most of the States have an official language and people who speak another language as their mother tongue regard themselves as linguistic minorities. Articles 347, 350, 350 A of the Indian constitution provide safeguard to the protection of linguistic minority rights.

## **2. Religious Minorities**

India is a land of diversity a large number of religions are followed here Hinduism being in majority and Islam, Christianity, Buddhism, Zoroastrianism, Jainism in minority. As per the census of 2001 the Indian population was 1,027, 015, 247.40,<sup>13</sup> comprising of 828 million (80.5 per cent) Hindus forming the largest ethnic group followed by 138 million (13.4 per cent) Muslim, 24 million (2.4 per cent) Christians, 19 million (1.9 per cent) Sikhs, 8 million (0.8 per cent) Buddhists and 4.2 million (0.4 per cent) Jain.<sup>14</sup> A supplementary 6.6 million belong to other religions. As per the census report it was seen that India comprises of six major ethnic groups and fifty-two major tribes, six major religions and 6,400 castes and sub-castes; eighteen major languages and 1,600 minor languages and dialects.<sup>15</sup> In a land that has so much diversity it is difficult to hold together people of such vested needs, all the communities have their own religious faiths and it must be respected, at times it becomes difficult to hold together such a wide range of people together but India has been successful in achieving and maintaining it.

## **Judicial Interpretation**

Judicial interpretation have always read secularism as a fundamental law of the land and sought to outline its boundaries as sacred and profane. The Supreme Court has taken the task to set up the policies by being in an activist's role hence it should make sure that it promotes

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<sup>13</sup> Census of India 2001, Provisional Population Totals, *available at* [http://www.censusindia.gov.in/Census\\_Data\\_2001/India\\_at\\_glance/popul.aspx](http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/popul.aspx).

<sup>14</sup> Census of India 2001, Religious composition, *available at* [http://www.censusindia.gov.in/Census\\_Data\\_2001/India\\_at\\_glance/religion.aspx](http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx).

<sup>15</sup> TMAPai Foundation and Ors. v. State of Karnataka and Ors., 2 SCC 195, para 158(1994) [hereinafter TMA Pai Foundation and Ors.].

secularism in the plural multicultural sense. While in some cases the court has taken a strong point on the issue and declared secularism as unamenable feature of the constitution while in other cases the courts definition is susceptible to the interest of the majority encroaching on the rights of minorities.

The legal safeguards for minorities are derived from 3 main sources:

1. The Constitution of India
2. Govt. Schemes and Recommendations of various Committees
3. Judicial Pronouncements<sup>16</sup>

All these sources are discussed in depth in his paper.

## 1. Constitution

The constitution safeguards and protects the rights of linguistic minorities through a system of built in mechanism under Articles 15, 16, 25, 26, 27, 28, 29, 30, 347, 350, 350A and 350B, together with Articles 32 and 226.

Article 15 protects the rights of minorities against the state it prohibits the state from discrimination on grounds of religion, race, caste, sex or place of birth. Article 16 states that no person should be denied public employment on the grounds of religion, race, caste, sex etc. however 16(4) permits state to take affirmative measures for the backward citizens who are not adequately represented. Article 25 grants every individual to the freedom of conscience and the right to practice, profess and propagate his religion. However, proselytization affects the freedom of conscience and thereby, conversion by force, fraud, and inducement is prohibited.<sup>17</sup>

Article 26 is complementary to Article 25 as it lays down freedom to manage religion affairs but subject to public morality, order, and health. The scope of this article is

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<sup>16</sup> MAHMOOD, SYED TAHIR ED., MINORITIES AND STATE AT THE INDIAN LAW: AN ANTHOLOGY 121- 133(1999).

<sup>17</sup> Stainislaus v. State of M.P., (1977) 1S.C.C. 677.

not only limited to minorities but is available to majority also, i.e., Hindus.<sup>18</sup> Article 29 grants the linguistic minorities living in any part of the country to conserve its language culture and script and Article 30, gives them the right to establish and administer educational institution of their choices. Hence these two articles create mutually supportive rights for both minority institutions and people. In *Ahmedabad St. Xavier's College Society and Anr. v. State of Gujarat and Anr.*,<sup>19</sup> the apex court defined the area of Articles 29 and 30 and observed that these two articles confer 4 distinct rights: the right of people of a group which are resident citizens to conserve protect and safeguard its own language, script or culture; the right of religion or linguistic minorities to establish and administer their educational institutions; an educational institution should not be discriminated for state aid on the ground that it is managed by religious or linguistic minority; it is the right of an citizen to be not denied admission into educational institution which are state maintained or state aided on ground only of religion caste, race or language. In *Rev. Sidhajibhai Sabhai v. State of Bombay*,<sup>20</sup> the Supreme Court held that unlike Article 19 of the constitution, the right mentioned in Article 30(1) is a fundamental right in absolute terms and is not subject to reasonable restrictions. The significance of these rights could be inferred from Justice Khanna's opinion that: "no tampering with these rights can be countenanced."<sup>21</sup> The spirit behind 30(1) is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions, of their choice.<sup>22</sup> Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instill in them a sense of security and confidence, even though the minorities cannot be per se regarded as weaker sections or underprivileged segments of the

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<sup>18</sup> Pannalal Bansilal Patil and ors. v. State of A.P., (1996) 2S.C.C. 498.

<sup>19</sup> *Ahmedabad St. Xavier's College Society and Anr. v. State of Gujarat and Anr.* (1974) 1S.C.C. 717 [hereinafter *Ahmedabad St. Xaviers College*].

<sup>20</sup> *Rev. Sidhajibhai Sabhai and Ors. v. State of Bombay and Ors.*, (1963) 3 S.C.R. 837.

<sup>21</sup> *AHMEDABAD ST. XAVIERS COLLEGE*, *supra* note 19, at 717.

<sup>22</sup> *See id.* at 721.

society.<sup>23</sup> A linguistic minority for the purpose of Article 30(1) is one which must at least have a separate spoken language. It is not necessary that that language should also have a distinct script for those who speak it.<sup>24</sup> The expression in Article 30 is that the minorities shall have the right to establish and administer educational institutions of their choice and therefore it is entirely in the hands of the minority community to widen their choice.<sup>25</sup>

Article 347 of the Indian constitution provides for a presidential direction for the official recognition of a language. As per Article 350 every person is entitled to submit a representation for the redress of any grievance to any officer or authority of the union or state in any of the languages used in the union or in the state. Article 350-A provides facilities for instruction in mother tongue at primary stage of education to children belonging to linguistic minority groups. There is a clear violation of Article 29(1), if it is read with Article 350-A, if instructions are given by a state to its linguistic minority, to study a regional language at primary stage, i.e., a language not their own, but it could be prevented if they are given an option. In *D.A.V College, Bhatinda v. State of Punjab*,<sup>26</sup> the apex court held that Punjab university of Patiala can propose Punjabi as a medium of instruction in the collage but it cannot be the sole nor could it compel affiliated collages which are established and maintained by religious or linguistic minorities to teach Punjabi or give exams in that language. In *English Medium S.P.A. v. state of Karnataka*,<sup>27</sup> the Supreme Court clarified that the objective of Article 350-A is to safeguard the interests of linguistic minorities and its existence owns to reorganization of states.

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<sup>23</sup> TMA Pai Foundation v. State of Karnataka, (1994) 2S.C.C. 195 [hereinafter TMA Pai Foundation].

<sup>24</sup> St. Stephen's College v. The University of Delhi et al., (1992) 1 S.C.C. 558 [hereinafter St. Stephen's College].

<sup>25</sup> Faizan Mustafa, The Constitution, Minorities and the Judiciary, available at, <http://www.iosworld.org/constitution%20minority%20and%20judiciary.htm>.

<sup>26</sup> D.A.V. College Bhatinda v. The State of Punjab and Ors., (1971) 2 S.C.C. 269.

<sup>27</sup> English Medium S.P.A. v. State of Karnataka, (1994) 1 S.C.C. 550.

Article 350-B lays down the foundation of the institution of commissioner for linguistic minorities in India (CLM). The office exists since 30 July 1957. In pursuance of Article 350-B, it is the duty of the office of CLM to investigate all matters relating to the safeguards provided for linguistic minorities under the Constitution and report to the president upon those matters at such interval as the president may direct, and the president shall cause all the reports to be laid before each house of parliament and sent to the governments of the state concerned.

Under the Article 32 declares that anyone approach the highest court to gain protection against the violation with the rights comprises of the religious and linguistic minorities to seek remedy. A similar jurisdiction prevailed in the High court under the Article 226. The concern behind this right was to make believe to the minorities that if they discriminated then their interest can be protected by approaching to the highest court. In these situation, constitutional rights will remove the fear and to convince the minorities of protection of their interest. In the constituent assembly debate on Article 23 B.R. Ambedkar said: "It will be noted that the term minority was used therein not in the technical sense of the word 'minority' as we have been accustomed to use it for the purposes of certain political safeguards, such as representation in the Legislature, representation in the services and so on. The word is used not merely to indicate the minority in the technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense, but which are nonetheless minorities in the cultural and linguistic sense. For instance, for the purposes of this Article 23, if a certain number of people from Madras came and settled in Bombay for certain purposes, they would be, although not a minority in the technical sense, cultural minorities.... The article intends to give protection in the matter of culture, language and script not only to a minority technically, but also to a minority in the wider sense of the terms as I have explained just now."<sup>28</sup>

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<sup>28</sup> B.R. Ambedkar (*Constituent Assembly Debates*, 922-923 (1948-49)).



It was held that any community, religious or linguistic, numerically less than 50 per cent of the population of the State is a minority community.<sup>29</sup> Further, the question as to whether community can be said to be a minority community depends upon the question as to whether they are a minority in the State in question or not.<sup>30</sup> It is most humbly submitted that Muslims are, without a doubt a minority religion in the State of Uttar Pradesh, constituting a population of 18.5 per cent.<sup>31</sup>

The status of minority can be identified on the basis of the size of the population of the group. The Supreme Court held that the technique of arithmetical tabulation of less than 50 per cent of population for identifying a minority.

However, in the recent case Supreme Court said that the geographical entity of state for consideration of the status of minority for Article 30. The judgment of the Supreme Court:

“Since reorganization of the states in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the state and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered state wise.”<sup>32</sup>

## **2. Recommendation of Various Committees and Government Schemes**

### **I) Sachar Committee**

PMO constituted the high level of committee<sup>33</sup> under the chairmanship of Rajinder Sachar for preparation of a Report on the Social, Economic and Educational Status of the Muslim Community of India.

The Committee made various recommendations to address the status of the minority. Some of these recommendations were:

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<sup>29</sup> ST. STEPHENS COLLEGE, *supra* note 24.

<sup>30</sup> TMA PAI FOUNDATION AND ORS., *supra* note 15, at 201.

<sup>31</sup> Census of India on Religion 2001, *available at*: [http://censusindia.gov.in/Census\\_And\\_You/religion.aspx](http://censusindia.gov.in/Census_And_You/religion.aspx).

<sup>32</sup> TMA PAI FOUNDATION AND ORS., *supra* note 15, at 201.

<sup>33</sup> SACHAR COMMITTEE REPORT, *available at*, <http://www.minorityaffairs.gov.in/sachar>.

- To create a National Data Centre where the various data must be collected for different Minority groups.
- The status of the minority group must be monitored every five year.
- The discrimination which is there in the society must be removed and legal provisions must be implemented in a strict sense.
- The Authorities should develop a Diversity Index (DI) in the context of institution to strengthen the minorities and allocate them seats in higher education.
- Conduct appropriate curriculum for this purpose in teachers' education, organizing remedial classes and providing public spaces for minorities.
- It also recommended to provide admissions to the most backward amongst all minority group in recognized universities and autonomous colleges. It further discussed to provide different types of reservation to three main Muslims groups i.e., 'Ashrafs', 'Ajlaifs' and 'Arzals'. Arzals Muslim group is the most backward class and they need reservation so that their requisite growth can be achieved.
- The education system must be improved as school children get influenced by what they read; textbooks must have a content of social diversity and remove the material which contains religious intolerance. Institutions must be established where gender basis discrimination is not acceptable.
- Legal mechanism must be established in which complaints of discrimination against minorities will be dealt in matters like employment, housing, obtaining bank loans. There should be an autonomous assessment and a monitoring body should be set up to evaluate the development.

## II) Ranganath Committee Report

The Committee<sup>34</sup> submitted the final report on 2007. It made Major recommendation in the respect

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<sup>34</sup> RANGANATH MISHRA COMMITTEE REPORT, *available at*, <http://www.minorityaffairs.gov.in/ncrlm>.

of the Muslims, who are the largest minority at the national level and yet they are educationally most backward religious community.

- The institution like Aligarh Muslim University and Jamia Millia Islamia should be authorized to promote education for the Muslims students by implementing all possible steps required for this authorization.
- All institutions run by the minority group i.e. Muslims should be given all facilities and advanced aid which help in raising the standards of minority group.
- The Madrasa Modernization Scheme of the government should be suitably revised, and they should be given funds so that they can provide facilities which are needed to be given.
- The rules and processes of the Central Wakf Council should be improved in a way that its main control should be educational development of the minority group. For this purpose, the Council may be legally authorized to collect a special 5 per cent educational levy from all Wakfs, and to sanction utilization of Wakf lands for establishing educational institutions, polytechnics, libraries and hostels.
- Anganwaris, Government Schools and several similar type of institution should be established under the schemes and Muslims families must be advised and incentives should be given to them for sending their children to these institutions.
- The report also recommended that the concessions which are provided to the Scheduled Castes and Scheduled Tribes, in terms of eligibility criteria for admission and low fee should also be given to all minority group specially Muslims women and Buddhists- are generally educationally backward.

### **III) Recommendation of the Steering Committee for the XII Year Plan**

The planning commission formed steering committee on "Empowerment of Minorities"<sup>35</sup> for the XII five year plan.

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<sup>35</sup> RECOMMENDATION OF THE STEERING COMMITTEE ON EMPOWERMENT OF MINORITIES, *available at*,

The strategy was to achieve development of minorities through education, skills development for employment, and to enhance the socio-economic status of the group. It stresses that the education is the main important tool for the socio-economic development of the minority group. The committee made recommendations as follows:

- Scholarships programs should be implemented and department implementing different scholarships should be given in the form of maintenance fee, tuition fee.
- The various components during the XI Year Plan under the scholarships have been constant, so it was recommended that data should be revised and fixed according to the Wholesale Price Index (WPI).
- In the previous plan it was mandatory for the student to obtain 50% marks for Pre-Matric Scholarship. This condition should be discarded as it allows retention of the minority students in schools.
- The rates of admission fees, tuition fees, and maintenance allowance should not be uniform. The rates shall be increasing for the students who are moving up from class IX to Class XII. This will motivate them and allow more number of retention students at the higher standards to gear up for higher studies.

### **Ongoing Schemes under Elementary Education and Literacy**

#### **IV) Sarva Sikhsha Abhiyan**

*Sarva Sikhsha Abhiyan*<sup>36</sup> was launched in 2000 with an objective to provide for a variety of interventions for universal access and retention, bridging social category gaps in elementary education and improving the quality of learning. This scheme include various missions like opening of new schools, improving the infrastructure of the schools, classrooms should be increased, toilets and drinking water facility should be available, regular teacher training, textbooks and support for learning achievement. With the implementation of Right to

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<http://planningcommission.gov.in/aboutus/committee/index.php?about=12strindx.htm#sd>.

<sup>36</sup> SARVASIKSHAABHIYAN, *available at*, <http://mhrd.gov.in/schemes>.

Education Act 2009, there have been changes in the schemes which are as follows:

- Providing all round education, as perceived by the National Curriculum Framework 2005, with complete renovation of the entire teaching syllabus, teaching methodology and management.
- The disadvantaged sections of the society specially children belonging to the backward sections should not only get an equal opportunity so that they stand on the same footing but also condition must be created for them so that they can avail opportunity.
- The term access should not only be restricted to providing basic schooling to the children living in a particular area but it should have a wider meaning to it, it should be also include children belonging to the backward sections of the society that are left behind .
- The gender concern, effort should be made that girls to keep pace with boys in the education perspective which is in national Policy on Education 1986/92, the step should be taken by the authority to bring change in the status of the women.
- Teacher issue: teacher should be trained in such a way that they put effort in creating a classroom culture and make their students think beyond the requisite limits and this will help in formation of healthy environment.
- With the introduction of the Right to Education Act, it put compulsion on parents, teachers, educational administrators and other institutional authority to send children to the schools for studying.

#### **V) Kasturba Gandhi Balika Vidyalaya (KGBV)**

*Kasturba Gandhi Balika Vidyalaya*<sup>37</sup> is the scheme launched by the government in July 2004, for building up residential schools at upper primary level for the girls of the minority group belong to SCs, STs, OBC and other disadvantaged group. This scheme implemented to those areas where female literacy rate is less than the national

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<sup>37</sup> KASTURBA GANDHIBALIKAVIDYALAYA, *available at*, <http://ssa.nic.in/girls-education/kasturba-gandhi-balika-vidyalaya/kgbv-scheme>.

average rate, especially in the backward villages of the country. The scheme provides reservation policy of about 75 per cent to the girls belonging to the SCs, STs, OBC and remaining 25 per cent is for the girls who belong to the families below poverty line. The scheme targets those adolescent girls who are unable to attend the schools, girls who are above the age of 10+ and unable to complete the primary school.

Out of 3600 KGBVs sanctioned, 3439 KGBVs have been operationalized. Out of these, 552 KGBVs have been sanctioned in rural and urban areas of Muslim concentration and 517 of these have been operationalized. 24,590 minority girls have been enrolled out of total of 3, 33,622 girls enrolled.<sup>38</sup>

## **VI) Integrated Child Development Services Scheme**

Equitable availability of Integrated Child Development Services (ICDS) Scheme<sup>39</sup> was launched for the development of children and pregnant mothers from the minority section of the society by providing services through *Anganwadi* centers such as supplementary nutrition, immunization health check-up, preschools and non-format education. These projects were also located in the villages with a substantial population of disadvantaged group to provide benefits of the scheme.

### **A. Supreme Court and Minorities**

It is fascinating to note that it is the judiciary that tells us what compromises of religion. The term religion is not defined in the constitution and it is not one that could be given a definition its scope is wide and difficult to limit it in words. The apex court has not restricted the definition of religion to only the relationship between individual and its creator and the obligations imposed on him. The court has also held that not all religion believe in the presence of a supreme being – like Buddhism and Jainism.

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<sup>38</sup> KASTURBA GANDHI BALIKA VIDYALAYA, available at, <http://ssa.nic.in/girls-education/kasturba-gandhi-balika-vidyalaya>.

<sup>39</sup> INTEGRATED CHILD DEVELOPMENT SERVICES SCHEME, available at, <http://wcd.nic.in/icds.htm>.

In *S.P. Mittal v. the union of India*<sup>40</sup> the court laid down that religion is a matter of faith, belief in the superior is not essential to constitute religion. Religion not only includes a code of ethical rules for its followers but it might prescribe rituals, ceremonies, observance which is regarded as its integral part. In *A.S. Narayan Deekshitulu v. State of Andhra Pradesh*<sup>41</sup> it was held that religion in constitution is a personal matter of faith and belief. Further in *Anandmargis case*<sup>42</sup> the Anandmargis were recognized as a religious denomination but the performance of tandava dance by its followers (carrying lethal weapons and skull in processions or at public places) was held by the honorable court as a non-essential feature. However on appeal it did recognize *Tandava* dance as essential to the religious belief of Anandmargis but restricted it due to maintenance of public order. During this phase the court not only decided what constituted religion but also what practices were to be allowed.

In *Ismail Faruqui v. Union of India*,<sup>43</sup> the Supreme Court's opinioned that the court, in the use of its sovereign power, can acquire places of worship, for the purpose of maintaining law and order. The court said that offering prayer and worshipping to one's own Supreme Being is important however its offering at every location where such prayer is offered is not essential religious practice.

In the *State of West Bengal v. Ashutosh Lahiri*<sup>44</sup> and prior to that, in *M.H. Querseshi v. State of Bihar*<sup>45</sup> the Supreme Court held that Muslim citizens of India are not allowed the freedom to kill cows for '*Qurbani*' as part of their tradition. The court viewed that the slaughtering of cows is not an essential practice of Muslims. And Under the Article 48 of the Constitution, the court banned cow slaughter – giving way to an unacknowledged respect to the Hindu belief in the holiness of the cow.

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<sup>40</sup> S.P. Mittal v. Union of India, (1983) 1 S.C.C. 51.

<sup>41</sup> A.S. Narayana Deekshitulu v. State of Andhra Pradesh and ors., (1996) 9 S.C.C. 548.

<sup>42</sup> Acharya Jagdishwaran and Avadhuta and Ors. v. Commissioner of Police, Calcutta and Anr.(1983) 4 S.C.C. 522.

<sup>43</sup> Ismail Faruqui v. Union of India, (1994) 6 S.C.C. 360.

<sup>44</sup> State of West Bengal v. Ashutosh Lahiri, (1995) 1 S.C.C. 189.

<sup>45</sup> M.H. Querseshi v. State of Bihar, (1959) S.C.R.629.

The judgments of the Supreme Court thus tell us that in matters of religion only essential practices can have absolute protection. This has given a way for continuous interference by the state in matters of religion. By their authority to decide what religion is and what not the courts in India have acquired the authority to regulate the meaning and ambit of religion.

*T.M.A. Pai Foundation and Others v. State of Karnataka & Others*<sup>46</sup>: It is a landmark judgment given by the apex court this judgment shapes the future of minority community in the field of education. It was given by a constitutional bench of 11 judges and involved fundamental questions like who constitutes a minority and who could obtain special rights mentioned under Article 30(1) of the constitution. The court accepted the view that minority is one which is numerically less than the majority and Article 30 covers both linguistic and religious minorities. The bench unanimously accepted that Article 30(1) confers religious and linguistic minorities the right to establish and administer educational institutions including professional institutions. The court held that the right to establish an educational institution is unfettered howsoever the right to administer the educational institution is not an absolute one. The judgment is important from the point of interplay between 29(2) and 30(1), Article 29(2) says that no citizen shall be denied admission on grounds only of religion, race, caste or language to an educational institution maintained or receives aid from state whereas Article 30(1) provides all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice.<sup>47</sup> Nine out of 11 judges in the bench held that aided minority institution have to admit reasonable extent of non-minority students hence Article 30(1) is substantially maintained while citizens' rights under 29(2) are not infringed.<sup>48</sup> The court

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<sup>46</sup> T.M.A. Pai Foundation & Others v. State of Karnataka and ors.,(2002) 8 S.C.C. 481.

<sup>47</sup> N.R.M. Menon, *Minority Rights and Education*, THE HINDU, January 10, 2003 [hereinafter Menon, *Minority Rights and Education*].

<sup>48</sup> M.P. RAJU, MINORITY RIGHTS MYTH OR REALITY: A CRITICAL LOOK AT THE II JUDGE VERDICT WITH FULL TEXT, 19-44 (2002) [hereinafter Raju, *Minority Rights Myth or Reality*].



left it to the state to decide the percentage of non-minority students.<sup>49</sup>

In the past the minority's right to establish and administer educational institution was maintained by *St. Stephens's* judgment which provided a cap of 50 per cent but the bench held that providing a rigid cap is not desirable in law or in practice.<sup>50</sup>

The court stated that the right enshrined under Article 30(1) of the constitution cannot be such that overrides the national interest or averts the government from framing regulations in that matter.<sup>51</sup> Minority as a community cannot have fundamental rights, which are not provided to the majority community or non-minorities this principle emerged out of the judgment.<sup>52</sup> Law of the land which includes rules and regulations must apply to all whether it is majority or minority.

## Conclusion

Looking at the present scenario we can say that in spite of so many constitutional assurances and enactments, the socio-economic development of this section of the society is not even nearer to the expectations of the constitution makers there is a dire need to rethink and formulate minorities rights that are being butchered, the constitution provides various articles to safeguard the community and protect its identity but in practical life these rights are not implemented as they should be. The constitution is not followed in the same spirit in which it was drafted by drafters of the Indian Constitution, the minority have become a tool of the political superior who use them to take mileage in the votes run, in lieu of actual development the community is given small incentives in form of schemes that are too not properly implemented. There is a need to introduce new central law that provides multi-culturalism and pluralism in educational institutions, making the social composition

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<sup>49</sup> *Ibid.*

<sup>50</sup> Menon, *Minority Rights and Education*, *supra* note 47. See also Acharya Jagdishwaranand Avadhuta and Ors. v. Commissioner of Police, Calcutta and Anr. (1983) 4 S.C.C. 522.

<sup>51</sup> Raju, *Minority Rights Myth or Reality*, *supra* note 48 at 45.

<sup>52</sup> *Ibid.*

of that institution diverse to tackle the problem of alienation that is being faced by the community. In case of judiciary there are three trends followed by it firstly, the judgments of the judges are contextual hence they are different, and reflect personal convictions of the judges. This makes the interpretation of the article vague and subject to constant struggle between the minorities and the state. Secondly the judgments are more liberal towards the linguistic minorities than religious ones and lastly they represent a trend towards reducing the scope of the article giving more scope to government control and interference, the courts in India that are being looked forward as savior of the rights of people hence should come forward in playing a proactive role in happier construction of existing constitutional provisions on minorities by being in conformity to the international standards. The government has launched many schemes for the betterment of disadvantaged groups in various parts of the countries but these schemes do cover the remote areas people in the village and blocks are not aware of the schemes. Corruption also plays a major role in the failure of the schemes in many places funds which are sanctioned by the government under the schemes do not reach to the targeted groups. The food material which is provided to children in *Anganwadis* is found to be of inferior quality. A committee must be devised to look into these issues and work for the benefit of the minority group. Any government scheme which is targeted for the minorities should be adequately advertised in both urban and rural areas where these minorities reside.



## EDUCATIONAL STATUS OF THE INDIAN MUSLIMS: A QUESTION MARK ON SECULAR INDIA?

Ms. Kanika Middha\*  
Ms. Sanskriti Mall\*\*

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### Introduction

At the inception of the Nation, India sworn to be a secular nation and incorporating in it people of all religions and communities with a promise to protect the interest of all religions and flourish it with the best of its abilities. India as a nation is posed with great threats as out of its total population, Hindus consist of majority numbers i.e. 80.5 % of the population with the remaining five communities including Muslims, Christians, Sikhs, Buddhists, Zoroastrians and others consisting of minority of 19.5% of the population<sup>1</sup>. Out of which Muslims consist of 13.4% of it<sup>2</sup> making it the largest minority in the country.

The term 'minority' however is not defined by our Constitution, but the general idea is that a minority community is a disadvantaged section of any society. The Supreme Court *In Re: The Kerala Education Bill*<sup>3</sup> stated that to determine minority, a community has to be a numeric minority in a particular region in which an educational institution in question is situated for it to avail minority educational rights. The issue of 'minority' especially in terms of religion has been very sensitive and complex in India and continues to remain the same. Apart from the communal violence, it has been so because of the existing inequalities persisting in many sectors including educational sector, employment sector etc., amongst different communities especially between Muslims and other communities. Along the years India as a nation has come a long way in many spheres including

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\* Student, 4<sup>th</sup> year, B.A. LL.B., Institute of Law, Nirma University Ahmedabad.

\*\* Student, 4<sup>th</sup> year, B.A. LL.B., Institute of Law, Nirma University Ahmedabad.

<sup>1</sup> Computed from Census of India, 2001, Religion Data.

<sup>2</sup> *Ibid.*

<sup>3</sup> 1959 1 SCR 995.

those of economy, health, literacy, but have all the different communities, with special reference to the Muslims, been able to grow and develop at the same rate? The answer is 'No'. There are many disparities at each level.

The study however, is restricted to the educational status of the Muslims in India as compared to the other communities in India. Apart from the socio-economic conditions, the literacy rate of the Muslims is also the lowest in India as compared to other religious groups which is an issue of concern. There is variation in the literacy rate amongst five major religious minorities.<sup>4</sup>

It is well evident and accepted that role of education in today's era is highly important in contribution towards development and empowerment. Nelson Mandela<sup>5</sup> once said: "Education is the most powerful weapon which you can use to change the world." Education undisputedly, is a tool and indeed a ladder for success and development not only for any community or society but for the entire nation. Lower level of literacy rate leads to poorer economic conditions. It is therefore important to educate people to bring change into the social and economical structure of any nation and for its empowerment. Right to Education in India is a Fundamental right<sup>6</sup> which must be enjoyed by all the citizens of India in letter and spirit including the minority communities. Along with the general rights, Constitution of India has provided the minorities with special rights to help them stand on equal footing with the others.

### **Constitutional Protection and Legal Instruments**

Researchers have pointed out that historically, the rights of religious minorities have been ignored by India's constitutional makers, which was amply evident from the Constituent Assembly debates. As argued by commentators on minority rights that:<sup>7</sup>

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> Nelson Mandela was the President of South Africa (10 May 1994 – 14 June 1999). He was also an Activist and a Lawyer.

<sup>6</sup> The Constitution (Eighty-sixth Amendment) Act, 2002.

<sup>7</sup> Rochana Bajpai, 'Constituent Assembly Debates and Minority Rights', *Economic and Political Weekly*, Vol. XXXV, Nos. 21-22, 27 May 2000, pp. 1837-1845.

There was no principled defence in the nationalist vocabulary for safeguards in the case of religious minorities. This marked a crucial shift from the colonial framework where the entitlement of minority groups to special representation and other forms of safeguards had been an established principle. The illegitimacy of safeguards for religious minorities within a broadly shared normative vocabulary was a crucial factor that facilitated their abolition during constitution making.<sup>8</sup>

The protection provided to the minorities was not enough, even though the Constitution<sup>9</sup> provides for certain rights to all its citizens and imposes certain obligations on the state to provide for education to all its citizens. Some rights are general which are enjoyed by all the citizens whereas some of the rights are special and specific in nature to be given protection to the minorities.

### **General Rights under the Constitution of India**

- **Article 14**

It provides to all citizens equality under the eyes of law and equal protection before law within the territory of the country. All citizens are equal before law including the Muslims as well. If treated unequally, it would amount to violation of right to equality.

- **Article 15**

According to Article 15 no citizen or any community for that matter shall face any discrimination on the basis of any of the criteria's such as religion, caste, sex, gender, race or birth.

- **Article 21**

It has been observed by the Supreme Court in the judgement of *Miss Mohini Jain v. State of Karnataka and Ors*<sup>10</sup> that every citizen has right to education even though expressly not given by the Constitution in Part III of the constitution as a Fundamental right. It is a part of right to life and liberty and State shall endeavour to protect and promote the same.

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<sup>8</sup> Rochana Bajpai, 'Values in political rhetoric', Seminar, No. 524, April 2003.

<sup>9</sup> The Constitution of India, 1949.

<sup>10</sup> 1993 AIR 2178, 1993 SCR (1) 594.

- **Article 45**

It imposes duty on the state in the form of Directive Principles of the State Policy to provide for free and compulsory education to all children up till 14 years of age within the period of 10 years after adopting the Constitution.

- **The Constitution (86<sup>th</sup> Amendment) Act, 2002**

Long before the RTE Act<sup>11</sup> came into being, right to education was expressly included as a Fundamental right. A separate Article 21A was introduced to provide for free and compulsory education to all the children between the ages of six to fourteen years.

- **Right to Education Act, 2009**

The Right to Education Act is enacted by the parliament of India on 4 August 2009, to give the children between 6 to 14 years of age, free and compulsory education under Article 21A of the Indian Constitution.

### **Special Rights/Protection under the Constitution of India**

Though Constitution of India does not explicitly define the term 'minority' but it confers upon the minority communities with certain rights and guarantees to protect the same in the form of following Articles. Two most important sections pertaining to the minority educational rights are as follows:

- **Article 29**

It entitles the minorities a right to conserve their language, script or culture and secondly to protect them from being denied any right in any educational institution established or maintained by the State itself or funded by it on any of the following grounds:- religion, language, caste or race.

- **Article 30**

Most importantly Section 30 empowers the minorities to establish and administer their own educational institutions and secondly state shall not discriminate

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<sup>11</sup> Right to Education Act, 2009.

while granting aid to it on the sole ground that it is managed by the minorities.

But even after the Constitution has conferred upon the communities with various rights and protections, what has led to such a huge gap between the level of literacy rates amongst Muslims and other religious groups or what has led to the educational backwardness of the Muslims? What are the causes that have left the community lagging behind? Is educational backwardness the cause for their socio- economic conditions as well? Though the Constitution has provided with special protection why haven't they been able to benefit from it?

It is observed that the rights given by the constitution are not enjoyed by all citizens in letter and spirit with special reference to the Muslims. It is evident that they face discrimination and exclusion even today after sixty seven years of independence. It therefore questions the secular image of the nation which is indeed problematic.

Apart from these constitutional protections the government of India has also set up many institutions to evaluate progress of development of these minorities. Various Commissions have been set up to safeguard the interest of minority communities in an effort to provide them equal platform. Following mentioned are the statutory bodies established by the Government and their role in providing them adequate safeguards for access to education.

### **Statutory Bodies**

The Government of India has established many institutions to uphold the rights of Minorities and enforce these rights guaranteed to them. Their roles and functions are mentioned here under.

- **The Maulana Azad Education Foundation (MAEF)**  
This scheme was registered in the year 1989. It devises and implements schemes and plans to benefit the educationally backward minorities.

- **The National Commission for Minorities (NCM)**  
NCM is a statutory body instituted by the Central government in the year 1992. It was set up to perform various functions such as to evaluate and monitor the developmental progress of minorities, make detailed reports on any matter related to minorities and to make recommendations and provide suggestive measures for their developmental process.
- **The National Commission for Backward Classes**  
The commission was set up by the Government of India under National Commission for Backward Classes Act, 1993. This commission investigates the conditions of disadvantaged sections such as the socially and educationally backward classes which include therein the sections of religious minorities which are socially and educationally backward.
- **The National Commission for Minority Educational Institutions (NCMEI)**  
NCMEI was constituted in the 2004 by an ordinance and then introduced as a Bill and was passed by both houses in 2004. It has been set up mainly for protection of the rights of minorities to establish and administer educational institutions according to their choice.
- **National Monitoring Committee on Minorities' Education (NMCME)**  
It is constituted by Ministry of Human Resource Development. It has further five sub-committees to look into the implementation of the schemes which are aimed at minorities and also promotion of Urdu language. It was reconstituted in the year 2011.<sup>12</sup>

It is certain that these institutions have played an important role in enforcement of minority rights, educational rights in particular and also that some minority communities have also performed quite well having been benefited from their developmental processes. However, it can be seen in various parts of our

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<sup>12</sup> Educational Development of Minorities, Ministry of Human Resource Development, Government of India, accessed at on [http://mhrd.gov.in/more\\_minoedu](http://mhrd.gov.in/more_minoedu) , February 8, 2014.



country the Muslim community in particular have not equally benefited from the development. The data of the same has been provided in the various committee reports setup by the Government to inquire into the detailed status of Muslims in educational sector.<sup>13</sup> These institutions are not adequately functioning with respect to providing educational rights to Muslims community in particular. To elaborately understand the current status it is important to throw some light on the condition of the Muslim community in India in the educational sector.

### **Overview of Findings of Various Reports on the Status of Muslims: Empirical Data**

Minorities have faced historical backwardness in both economic and educational sphere. Gopal Singh Committee, (Dr. Gopal Singh Panel on Minorities, June 1983) which threw light on educational backwardness and under representation in government employment. Class variation does exist in Muslim minorities, but the backwardness is seen in the community as a whole. The empirical data collected shows injustice done by the state towards the community and the neglect since independence which produced gross injustice as well as peripherality.<sup>14</sup>

Government of India has established many committees thereafter to produce detailed reports on the condition of Muslim community in terms of education, their socio-economic status and various other aspects. These reports provided empirical information on a large scale on status of Muslims in India. Following are the highlights made on the Committee reports on educational status.

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<sup>13</sup> Prime Minister's address at Conference of State Minorities Commissions, Press Information Bureau, Government of India, New Delhi, January 13, 2014 accessed at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=102452> on February 8, 2014.

<sup>14</sup> *Supra* note 11.

## Sachar Committee Report<sup>15</sup>

Sachar Committee is said to be the first high level committee which was organized to look into the following aspects of the Muslim community in India being social, economical and educational. Prior to Sachar Committee, many other committees were established but their recommendations and suggestions stayed unimplemented. Also, there was no systematic data available on the same. Following are the major observations made on the report:

- Data was prepared on both quantitative and qualitative measures.
- Quantitative measure such as 'literacy rate' suggests that According to the Census of India, 2001 Literacy rate of the Muslims was way lower than the total population (national average) and other minorities as well. Muslims with the literacy rate of 59.1% and the national average on 65.1%.
- The gap between the education level of Muslims and 'all others'<sup>16</sup> has only been widening over the years.
- According to the report of the committee the condition of the Muslims was as bad as that of the SC's and ST's. Both these groups have attained the lowest literacy rate in comparison with the others. But SC's and ST's have at least been able to benefit from the affirmative action policies by the government.
- The NSSO<sup>17</sup> 61<sup>st</sup> Round data which was taken in the year 2004-05 clearly makes it visible that in recent years the literacy rates for the schedule caste/tribes as compared to that of Muslims have improved in a faster trend.
- Enrolment and attendance data also show that rates of enrolment and attendance Muslims in rural as well as urban areas were far lower than all others. In fact

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<sup>15</sup> Sachar Committee was organized in the year 2005 and was chaired by Justice Rajendra Sachar. It was presented on November 17, 2006.

<sup>16</sup> 'All others' constitutes of other religious minority groups apart from Muslims including that of Christians, Sikhs, Buddhists, Zoroastrians and others.

<sup>17</sup> The National Sample Survey Organization was established in India in 1950 which conducts socio-economic surveys. It is an organization under Ministry of Statistics of the Government of India. It is now known as National Sample Survey Office.

the conditions of the SC's and ST's have been on an increasing trend as compared to that of Muslims.

- The drop-out level from the school was highest in Muslims. Almost 1/4<sup>th</sup> of the population of Muslim children within the age group of 6-14 have dropped-out or have never even attended school.
- According to the census of India, 2001, average years of schooling among the age group of (7-16) were the lowest in Muslims.
- At every level i.e., Primary, Secondary or Higher education, Muslim children were the lowest in percentage to have attained education at these levels as compared to the overall population or even other minority groups for that matter.
- Even at graduate and post graduate level the representation is also sub-standard.
- Most importantly with the level of growth in literacy rate and educational level in India, the gap between Muslims and all others have only been increasing , with the increase in all levels of education especially in urban areas.
- Urdu medium Schools have also been performing very poorly due to the lack of basic amenities.
- Limited access to *Madrasas*<sup>18</sup>.

### **Justice Ranganathan Mishra Commission Report<sup>19</sup>**

Following are the observations:

- Literacy rate amongst women has been found to be lowest in the Muslims.
- The gender gap in literacy rate in Muslims is much greater than the over-all gender gap of all communities.

Rest of the observations made on the condition of the Muslims were quite similar to that of the Sachar Committee Report.

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<sup>18</sup> *Madrasas* are an important community initiative. This is type of educational Institution to impart religious knowledge.

<sup>19</sup> The report was prepared and presented by the Commission on May 10, 2007.

**Steering Committee Report<sup>20</sup>**

The major observations which have not been covered by the earlier Committees are as follows:

- Since the literacy rate was the lowest amongst Muslims in most states, as a result the poverty ratio was also the highest amongst them including both urban and rural areas. While the other minority communities were in a better off condition.

The Data shows a very appalling and alarming projection of the status of Muslims in India. This condition is the result of multiple factors which includes Stereotypes and discrimination against Muslim identity making them difficult to get admission, non availability of primary or secondary schools in the Muslim dominated localities which causes special disadvantage to the Muslim girls leading to low level of education in females, the poor economical condition of the parents which make them unable to send their children to school, poor infrastructure of schools, prevalence of child marriage in some sub communities, lack of access to quality education, religious orthodoxy, poor condition of religious schools etc.

From the reports of all the three committees it is evident that the situation is very problematic. Further a comparative analysis has been done in the reports between Muslims and other communities or population as a whole. It has been realized a huge difference occurs between the former and the latter. Key reasons have also been identified which are the root causes for the same. Low level of education is not only the result of religious orthodoxy of the Muslim community, which is believed to be the popular perception of the masses, but there are other reasons on record which need to be taken care of by the government and it should come out with certain measures to combat the same. There are certain steps taken by the government in elevating and uplifting these

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<sup>20</sup> Report of the Steering Committee was prepared on 'Empowerment of Minorities' by a Working group on which was constituted by the Planning Commission on May 6, 2011. National Commission for Religious and Linguistic Minorities was chaired by Justice Ranganathan Mishra.

disadvantaged minorities and particularly the Muslim community.

### Steps Taken and Their Implementation

Since the empirical data on the status of the Muslim community has been revealed by various committee reports, the issue has become debatable and has created a buzz in the country. Thereafter, many steps and initiatives have been taken to improve the condition of the disadvantaged minorities particularly the Muslims. Many suggestions and recommendations and suggestions were given by various committees on development of these disadvantaged groups especially Muslims. On the basis of recommendation given in these reports, certain initiatives have been taken by the Government. Initiatives such as guidelines for the implementation of Prime Minister's New 15 point programme<sup>21</sup> were given and a follow-up on Sachar Committee Report was drafted to look into the implementation part of the policies and recommendations to know their status and progress of these initiatives.<sup>22</sup>

One of the main objectives of the New 15 point programme was to enhance the educational opportunities for the minorities. It gives certain guidelines on how to achieve the same for e.g., providing with *Anganwadi* centres by the ICDS<sup>23</sup> Scheme, improvement of School education under the scheme of *Sarva Shiksha Abyan*, promoting and providing with resources for teaching Urdu language, modernization of *Madrasas* so that these institutions keep up with the modern educational system,

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<sup>21</sup> The Hon'ble President, in his address to the Joint Session of Parliament on February 25, 2005, had announced that the Government would recast the 15 Point Programme for the Welfare of Minorities with a view to incorporate programme specific interventions. Prime Minister, in his address on the occasion of Independence Day, 2005, announced to revise and revamp the 15 Point Programme for Minorities.

<sup>22</sup> Implementation of 15-Point Programme for Minorities Reviewed, PRESS RELEASES, November 8, 2007  
New Delhi, accessed at <http://pmindia.nic.in/press-details.php?nodeid=671> on Feb 02, 2014.

<sup>23</sup> The Integrated Child Development Services is a programme sponsored by Government of India focusing on child development with an objective raise the level of health and nutritional level of children.

providing with scholarships to the students, improving the infrastructure of the school under MAEF and provide required assistance to continue expanding its activities. Even though these schemes have been introduced but it has been observed that they have not been implemented in its entirety.

Secondly, as much as follow up report on the Sachar Committee Report is concerned, it was realized that even though there have been steps taken to implement the suggestions but the pace at which the process of implementation is taking place is quite slow and stagnant and therefore needs a quicker response to the same.<sup>24</sup>

Many schemes and policies following the Sachar Committee Report were introduced. But the policy implementation part seems to have been failing as still Muslims are the underprivileged section of the society as the data shows in the reports. Even after six years of the drafting of the Sachar Committee Report, the data from the Steering Committee shows that access to education for Muslims still remain a problem. Certain issues have been identified. The data shows that there is a difference between fund allocations for implementation of the development schemes for minorities and actual expenditure for implementing the same.<sup>25</sup> It has been observed that there is under spending in the important areas related to development and providing access to education to minorities. The data provided pictures a far too less flattering status of the Indian Muslims.

### **Theorizing Minority Rights with Secularism**

In India, minority rights are heterogeneous in nature. The claim is made because it is not easy to analyze the construction and discourse on minorities. We in India decide majority-minority equation primarily on numerical basis; be it on grounds of religion, caste, language or class. There is no doubt that Muslims are in minority since independence, hence state as well the Constitution guaranteed them 'rights' so that they don't fall as prey to tyranny of majority and achieve the goal of 'equality'.

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<sup>24</sup> *Supra* note 17.

<sup>25</sup> 11<sup>th</sup> Five Year Plan Financial Performance, Report of the Steering Committee on 'EMPOWERMENT OF MINORITIES' 5-6 (2011).

The question of minority rights with regard to Muslims in India has been trapped into the questions of identity and security and less attention is paid on the aspect of equity by the dominant governmental discourse of policymaking. While all the aspects of identity, security and equity of the Muslims are interlinked, the historical experience of the post-colonial Indian state has been that of addressing the Muslim's question on the foundation of secularism and nationalism.<sup>26</sup>

"In last two decades there has been a great community mobilization against the inequality and hegemony in the society which Taylor calls "Politics of Recognition"<sup>27</sup>. Neoliberal policies have taken the hegemonic status in the Indian society which believes in the principle of status quo. It does not need any sort of intervention by the government. In this era of globalization any sort of affirmative action is seen as opposition to competition which is the dominant ideal of globalization. But we will have to understand that competition starts from level playing field. The whole performance of the government is accounted according to the implementation of these neo liberal policies.

Secondly, we can notice a politics of particularism with narrow sectarian approach primarily claiming certain democratic demands for only a selective group or community. This politics is aptly expressed among the excluded groups although it is more organized in the case of *dalits*.<sup>28</sup> With such sectional mobilizations it was difficult to sustain the concept of undifferentiated, deprived Muslim community fighting for its due share in polity. After Mandal Commission caste became the primary identity for getting benefit of affirmative action. Certainly OBC Muslims receive benefits of reservation, but their strength is very nominal in the whole community which is educationally as well as economically backward.

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<sup>26</sup> Aiyar Yamini, *Minority Rights, Secularism and Civil Society*, EPW, Vol XXXIX, Oct. 2004.

<sup>27</sup> Taylor Charles, *Politics of Recognition*, Oxford: Blackwell, 1994.

<sup>28</sup> Maidul Islam, *Rethinking The Muslim Question in Post-Colonial India*, Social Scientist, Vol. 40, August 2012.

## **Impact of Educational Backwardness of Muslims on Secular Nature of the State**

Secularism in India is understood as all religions being treated equally by the state. There shall be no discrimination by the State on the ground religion. Yet Muslims are continuously facing marginalization and alienation at so many levels. This disturbs the very foundation of secular and socially just nature of Indian state. The status and condition of Muslims is very much contradictory to the same. It is however very important to understand the nexus between Secular nature of the State and Educational empowerment of the minorities and especially, the Muslims. As from the very beginning there have been much visible tensions between Hindus and Muslims which cannot be ignored.

There are many questions which need to be addressed related to this issue. What is coming in the way of their development? Is it because of the communalization in our country that's stopping the empowerment of this particular community? It brings out the secular-communal debate in India. It has been evident from the empirical data given in the reports that since independence SC/ST's have still shown considerable change and development in the education sector by the government policies of affirmative action where as the development of Muslims in educational sector has been stagnant. It is questionable that if the Muslim community is even worse off than the Schedule caste and Schedule tribes than why the government has not implemented affirmative action for the Muslims. Therefore it calls on an urgent basis for the formulation of such policies which bring about the desired changes and development.

## **Recommendations and Suggestions**

On the basis of all the observations regarding the status of minorities especially Muslims when it comes to accessibility to education and their economic development these points are to be taken into consideration:

- There is a need to lay down special emphasis on setting up of primary schools in all the localities and



make sure that a minimum level of school education is made compulsory by every state.

- Muslim children must be treated at par with the children of other sections of the society and must be entitled to similar educational provisions and policies
  - *Madarsa*, where the Muslim children are sent for their schooling must be made technically equipped with the education tools of the new era.
  - The government schools must be made easily accessible to the Muslim children especially girls as the non-availability of the institution hampers their entire development process.
  - More and more female participation must be appreciated in the education sectors and they must be provided with all the essential commodities and facilities required for their subsistence and security i.e., appointment of female teachers
- Introduction of scholarships must be made for promoting students to go for professional and technical studies in order to raise their standard of living through their economic upliftment.
- Certain training programmes must be conducted by the local authorities for the people who are lacking technical skill which would be highly beneficial for the Muslim community as most of them are involved in skill based professions.
  - Also, their talent must be recognized and given due acknowledgment.
  - There shall be proper implementation of the policies and schemes formulated for the benefit of the minority communities.
  - Affirmative policies should be formulated to extend the benefits to the backward sections of Muslims.

## Conclusion

Muslim community of India has been kept deprived from the very beginning. The data from the various reports show various levels of inequality and discrimination faced by them. It can be said that the Indian State in its entirety failed to actively realize the rights of Muslim community and respond to their backwardness. Though the Constitution of India through introduction of certain Articles (Art. 25-29) has tried to resolve the issue of

Muslims being deprived of many opportunities in India but the present figures show that their status remains the same as being the minority and ironically the one which constitutes the highest percentage of minority. Despite of the various attempts made by the legislators as well as the governments the status of Muslims has not raised to a considerable level. It has been seen that the SC's and ST's have developed in the educational sector at a higher rate than the Muslims. Their condition has been identified as even worse than the worst-offs of our country. It is high time that we realized that educational backwardness hinders the social and economic upliftment of any community too. There are certain lacunas in government policies such as lack of policies including affirmative action for the community. A push is however required to make them reach the desired standards. There has been a flood of plans and policies pertaining to the social, economical and educational upliftment of Muslims but still Muslims as a community which forms a part of minority in India are lacking far behind other disadvantaged groups like SC and STs. The precise reason for this is not only the fallacies and non-implementation of public policies rather it is also certain customs and traditions of their community which are making them to move at a comparatively slower rate. The pace at which the community is heading towards development in educational sector poses serious threats to the secular nature of the State and makes it questionable. As per the observations made by the various committee report and data analysis it has been observed that India has failed to recognize their educational rights. Also the status of Muslim women is such that they do not get a chance to receive any education in particular as they are kept in *pardah*. Therefore, these problems need to be addressed by the authorities and sincere efforts should be made to improve their conditions. On the basis of the recommendations made by the Sachar Committee female education and participation in education system must be promoted so as to improve their living conditions as well as their status. Secondly, all the governmental policies pertaining to the subject must undergo scrutiny and proper checks and balances must be maintained to keep an eye on the efficacy of these policies and how far they are proving to be productive for the purpose they are being framed. The

data collected on the status of Indian Muslims is an eye-opener for the State and society as well. It therefore calls for change in existing policies and prevailing systems in India. Education is a tool which will bring change in the existing conditions and would amount to over-all development as well. Also not only would it advantage that particular community but would ultimately contribute in the growth of the entire nation. This problem has to be addressed in its entirety. There is lack of proper implementation of these steps or initiatives taken or schemes formulated, which needs to be focused upon. Though, there have been serious efforts made by the government in uplifting the status of the minorities especially Muslims and certain steps have been taken in furtherance of the same but still there is a lot required to be done.



## ROLE OF STATE IN THE WAKE OF COMMUNAL RIOTS

Ms. Nayanika Ruia \*

Mr. Pranav Gupta\*\*

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### Introduction

India is a land of myriad ethnic, religious, caste and linguistic minorities affiliated to distinct belief systems, sub-cultures and regions. The republic of India is the largest democracy in the world which shares its boundaries with Tibet, Nepal, china, Bhutan, Burma, Bangladesh, Pakistan, Sri Lanka and so on after getting the independences from Englishmen. Integration of these diverse communities – some large enough to aspire to a regional homeland and others content to remain as part of the Indian state – has been a central preoccupation of Indian governments since 1947. India has adopted a democratic model which aimed at the concepts of socialist, secular, sovereign, and democratic republic in which the subject of ‘secular’ added after sometime, and this had happened via various influencing factors and forces which includes politicians, legal elite, western philosophers etc. This study explores India’s policies and practice towards minorities and the role of the state and police administration in regulating the issues related to the minority group and the communal violence.

### Concept of Minority

India is a shelter to all the religions known to mankind in present scenario and pluralism is the stamp of Indian society. This multi religious and communal concept is not new, as it can be traced back to leaders associated with the national movements, literature works and the drafting of the Constitution etc. but with the changing time and limited resources for the upliftment, the struggle to have that resources made the people against each other. The stronger ones went ahead and the weaker

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\* Student, 1<sup>st</sup> year, BBA LL.B., SLS, Noida.

\*\* Student, 1<sup>st</sup> year, BBA LL.B., SLS, Noida.

ones were crushed in a chariot of standard, majority and religions etc. the concept of Minority is defined as:

“A minority is a population group with ethnic, religious and linguistic characteristics differing from the rest of the population, which is non-dominant, numerically smaller than the rest of the population and has the wish to hold on to its separate identity.”<sup>1</sup>

### **India Recognizes Three Types of Minorities**

Religious, caste-based and linguistic:

1. Religion based: According to the National Minorities Commission, the designated minorities are the Muslims, Sikhs, Christians, Buddhists and Zoroastrians. All religious minority groups are granted the right to personal laws. Of these, the Muslim civil code has proved the most controversial.
2. Caste based: Part XVI of the Constitution designates Scheduled Castes (SC) and Scheduled Tribes (ST) for protection. The Other Backward Castes (BCs) and Classes were added later by various acts of Parliament. These minorities have been targets of historical discrimination derived from the traditional caste hierarchy.
3. Language based: There are two ways in which linguistic minorities are granted political space for participation and representation: through federal autonomy and by drawing up a schedule of languages and identifying minority languages for protection.

### **Laws for the Minorities**

The scheme of safeguards provided by the Constitution of India, which the nation gave unto itself on January 26, 1950, was more elaborate and comprehensive. The basic concepts are enshrined in the Preamble to the Constitution and the chapter on the Fundamental Rights. Our Constitution lays great emphasis on the fundamental unity and equality of the people of India. The Union of India (of which the States form an integral

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<sup>1</sup> Henrard (2000).

part) recognizes only one common citizenship for the entire population, and guarantees equality of rights and opportunities to all its citizens. The Constitution makes adequate provision for stimulating the personality of the individual and ensures equal treatment and full opportunities to linguistic minorities. These rights are accompanied by specific safeguards in respect of language, culture, freedom of speech, freedom of worship, and equality of opportunities in securing employment, and in trade and commerce.

Few articles those basically deal with the rights of minorities:

Art. 25-Right to Freedom of Religion, Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

- Articles 14-18 Right to Equality
- Articles 29-30, Cultural and Educational Rights, to accommodate the diverse groups existing in the country.

### **Why to Care for Minorities**

It is important to understand the conditions and problems of minorities in India. First, despite a relatively impressive array of constitutional and legislative guarantees, and the establishment of a broad range of institutions, autonomous bodies and commissions to monitor and protect the rights of minorities, India's disadvantaged and marginalized segments find their access to power and judicial redress blocked by a coalition of powerful forces. Minorities face discrimination, violence and atrocities. Constitutional and legislative protections have not prevented periodic pogroms against religious minorities, as in Gujarat in 2002, when more than 2,000 Muslims were killed, or in the riots following Indira Gandhi's assassination that led to the Murder of 3,000 Sikhs in Delhi alone. The government response to such riots has been ineffective.

Second, the wide gap between existing laws and the reality of minority conditions deserves attention. As a

member state of the United Nations (UN), India is bound by the Universal Declaration of Human Rights (UDHR) and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM). Of particular relevance to this study is Article 3 of the UNDM.

Of all the religious and ethnic issues in contemporary India, history has cast its deepest shadow on Hindu-Muslim relations. The most critical contemporary phase of this history was the partition of 1947. A Muslim sovereign state of Pakistan was born amidst ghastly communal violence but almost as many Muslims as there were in the new constituted Pakistan, for various reasons, stayed in India. The partition did not solve the Hindu-Muslim problems; it caused the situation of the Muslims in India more pathetic despite of several laws by the Indian constitution, the state has failed to regulate them, which further resulted abysmal and cruel misshape on the name of religion, caste and race.

There are many riots and other related activities which has left a pathetic stain on functioning of India's government and its policy making system.

### **What is the Role of a State?**

Protection of minority rights is the obligation of the State where the minority resides, so governance plays a vital role in involving minorities in societies and protecting their rights and interests. Through recognition, dialogue, and participation, all the citizens of a diverse society can form a greater understanding of one another's concerns. The media and education have important roles to play in this regard, as do political representatives and community leaders. Although no country has a perfect record on minority rights, though an attempt should be done to make a nation as a happy ground for all its citizens.

In order to prevent conflict, protect minorities, integrate ethnic diversity and foster friendly relations between States, we must not erode the principles, standards and mechanisms that have been carefully developed in the past half-century. Indeed, States should not only ensure

that policy and practice guarantee the minimum of minority rights, but they should promote full and effective equality between persons belonging to national minorities and those belonging to the majority."<sup>2</sup> So make a state better for its citizen, Indian government should improve on:

- Judicial system
- Education system
- Education standards of politician
- Safety of every individual.
- Equal aid to every community and culture and especially to the neediest ones.
- Effective Laws for the upliftment for the minority group.

### **Case Study: Muzaffarnagar Riots**

In the recent decades, with a sharp rise in the communal incidents and religion based tensions, the growth of communal riots and force has acquired a dangerous position in India. Communal violence has been prevailing in India since a long time. For example, the 1984 anti-Sikh riots.

27<sup>th</sup> August 2013, a terrifying yet sad day in India which gave birth to a new group of communal riots namely 'Muzaffarnagar Riots'. Severe clashes between the two communities, the 'Muslims' and 'Jats' in Muzaffarnagar and Shamli, India broke out in the parts of rural areas and communally sensitive district of Muzaffarnagar in Uttar Pradesh which claimed more than 43 lives leaving 93 plus injured. These riots in Muzaffarnagar have not only raised questions about the social stability in India but also about the ability of the civil administration in order to remove disorder and enforce tough rules and laws against targeted communal violence.

From inception, the situations and factors which led to the emergence of such serious riots and violence was, on this one day when a Hindu girl was walking past a

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<sup>2</sup> H:\cscssccscs\Sovereignty, responsibility, and national minorities statement by OSCE minorities commissioner-High Commissioner on National Minorities.htm.



Muslim community on her way to school; she was being harassed by a man who passed lewd, insulting comments on her. The girl then further complained to her brothers about the incident. Without giving it a thought, the brothers took the matter in their own hands and decided to teach that guy a lesson by inserting a knife into the guy's stomach, which ultimately resulted in his death. The guy who had harassed the girl belonged to the Muslim community. The friends, family and neighbors of that Muslim boy caught hold of the girl's brothers and lynched them mercilessly in front of many witnesses. This was not the end but a beginning which opened doors to the Muzaffarnagar communal riots. The girl's father, when tried filing a FIR against the family of the boy who had harassed the girl, the police refused to register the FIR. On the other hand, when the Muslim family went to file a FIR for the murder of their son who harassed the girl, the police readily registered the case and arrested the Father of the girl with his other close relatives.

Here, the problem actually started, as by thinking that clear discrimination was done by the administration, the Jat community requested the *panchayat* of their community to force the police in order to drop the charges against girl's father. Nonetheless, the Administration did not take any final decision. The Jat community again approached the Panchayat under the '*Bahu Beti Bachao Sammelan*' and distributed a few inflammatory videos and pictures via CD/MMS. With no action brought in by the main people of the district, people of the Muslim community took advantage of the situation and on a certain day attacked the people of the Hindu community. After this incident, the riots spread like fire which became uncontrollable.

### **1. Impact of the Media**

The vernacular media and a few major national news channels (electronic) have seemed to have played a vital role in provoking and instigating serious violence and aggression against the Muslim community. Through unfound and false stories, a mischievous and deliberate attempt in spreading hatred between the communities was a part of the role which the media played. Nonetheless, with the support of the representatives of political parties like BJP, they used social media like

Facebook, MMS and CD's as a tool arouse hatred before as well as during the riots. Moreover, the people of Muzaffarnagar gave a communal color to the violence by exaggerating the incidents. Many Hindi news channels and newspapers misreported the happenings on daily basis by setting up a picture in the minds of the public that it was the Muslims who were slaughtering the Hindus and initiating distorted violence. As a result, there was a severe rise in the rumors and passion to fight and revolt back in the riots.

## **2. Role of Police and Administration**

The role of the police administration is majorly important during a communal violence in order to maintain peace and decorum in the society. In the Muzaffarnagar riots, the police was reluctant in serving the sufferers, as in spite of repeated calls made by the people for help, the police refused to intrude. The women were refused to be protected by the police, which as a result persuaded them to take shelters into homes by the mobs. On the contrary, the police patrols denied to help the injured men and also taunted the Muslims by abusing them continuously. The FIRs and complaints were not addressed and registered by the police even when the names of the attackers were mentioned as evidence. The administration was unsupportive throughout the riots as it failed to provide proper security to its citizens and at present is unable to provide curable and required relief in the different camps to the displaced survivors. Lack of allowance paid to inmates, shortage of food and water, lack of special supplies like milk for the children; no provision for the pregnant mothers and their babies, no doctors/infirmaries for treating the injured and survivors etc.

## **3. Economic Loss**

The result of these riots and communal violence were tremendous as they had a dreadful impact on the economy. Many survivors, mostly the daily wage laborers like small traders, vendors, farm labors etc. having their small homes in Muzaffarnagar were forced to leave their homes. In order to protect and save their lives from the Jat mobs (armed), they had to flee from their houses which as a result displaced many people eventually. Their houses were looted and burnt, along with which all their

cattle and animals were slaughtered with the men. The women had no hopes of returning back or getting rehabilitated soon as they were unaware of the 'compensation' as a right which they could demand from the state. They were clueless about which occupation would they engage themselves now, as they had lost each and everything which they possessed like livestock, home etc.

#### **4. The Condition of Women and Children**

The condition of women and children has been critical always in the human tragedy. They are perpetually the worst sufferers in all scenarios. Women faced many hardships while living in the relief camps like a refugee as they were constantly subjected to a pitiable plight on their condition. Their children at the camps were constantly traumatized. The women survivors elaborated on mass assaults which took place during the riots. Women and their daughters were raped in public and then burnt alive. For the same, the FIR's were filed but no action took place by the police. The education of many children was affected. Many were brutally and mercilessly killed. A large number of school-going young girls were married off quickly by their parents in fear for their security and safety. The conditions at the relief camps were also poor with improper sanitation, dirty surrounding, insufficient food for children etc.

#### **Drawbacks of State while Handling Sensitive Issues like Minorities**

Even after celebrating the 66<sup>th</sup> Independence Day, the condition of Indian politics has got worse. In today's arena of politics, the people of this nation majorly got carried away and cast their vote in name of caste, religion, community etc. which ultimately bring forth the non-organized and a kind of tyranny government which sometimes deals its citizens like Jews used to deal in concentration camps. Such type of election and formation of government in India raises a huge question on the validity and reality of its so called 'democratic and secular' approach. Some most common issues related to political instability and poor governance are:

- Caste, religion, community based voting and politics.
- Misuse of authority by ministers and Gov. Officers to satisfy their vote banks, like Godhara Kand, Babri Masjid issues etc.
- Low standard of educational eligibility criteria for MPs and MLAs for the election.
- Misuse of Media which includes print media, electronic media.
- Internet (Facebook, twitter etc.) is most burning and dangerous medium. It had done a lot in emblazing problems in Mujaffar Nagar riots.
- Politics for only reservations to attract the voters of a particular group or religion should be stopped.
- No effective legislation for the violence with respect to the minority group.

### **Suggestions**

- To end the minority conflicts a political solution that guarantees minority rights is essential; ceasefires and peace agreements should be negotiated with full, free and effective participation of minority groups.
- The central state government must fulfill its constitutional obligations and promote genuine autonomy at the state level, permitting minorities space for self-rule
- To uphold this commitment there should be explicit constitutional provision for separation of powers and non-interference of the central government in autonomous regions' governance.
- The Government of India should also repeal anti-terrorism legislation such as the Armed Forces Special Powers Act, which has the effect of negating autonomous states' control over their own affairs.
- All communities, including the smallest and most marginalized minorities, have a right to participate in public and political affairs (UNDM Articles 2.2, 2.3); electoral systems and methods of governance should provide for political representation of all (including minority women and men) at state and central state level, and

should provide incentives for political parties and democratic institutions that appeal to all communities across ethnic, religious and linguistic lines.

- In keeping with India's duty under Article 2.5 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the government should place no restrictions on the rights of minorities to maintain kinship links across borders. Such links may also be promoted by setting up cross-border bodies to address issues of common interest, which have an important role in facilitating openness and supporting identities. Status of India with regard to international minority rights standards.
- Civil society should play a role in promoting inter community cooperation and supporting positive relations across ethnic, religious and linguistic lines, and should work to increase the capacity of marginalized minorities to advocate for their rights.
- The Government of India should implement its obligations to promote minorities' rights to practice their culture, religion and language (ICCPR Article 27).
- There should be effective anti-discrimination legislation and mechanisms to challenge discrimination at all levels to uphold Constitutional provisions. This should be accompanied by special measures where minorities have been excluded, as the means to overcome inequalities.

### **Role of the Police in India**

The police are one of the omnipresent organizations in our society. In case of need, crisis, difficulty and danger when the citizen is clueless about what to do and whom shall he/she approach; the police patrol or the police station are then the most approachable and appropriate unit for the citizens. The police are the only most visible working representative of the government. They are the most dynamic, interactive and accessible organization of the society. Their functions, duties and roles in the

society are complex and dubious with the main aim to maintain law and order in the society. The functions and the role of the police include enforcing and upholding of the law to protect life, property, liberty, dignity of the members of the society and human rights. It preserves and promotes public order to protect and prevent internal security, terrorist activities, breach of militant activities and communal harmony. It is appointed to safeguard the public properties like roads, bridges, railways etc. against any kind of attack or violence. It protects the citizens of its nation from crime; by their own preventive measures and actions they reduce the probability of the commission of a crime. Fairly registering all complaints which are brought to them and investigating all kinds of cognizable offences, acknowledging the receipt of the first information report to the complainant, maintaining security in the community by preventing conflicts and promoting amity, aiding the individual and providing active assistance in case of necessary help are a few essential duties of a police. It facilitates an orderly movement among people and vehicles in order to regulate and control traffic. Social responsibility of the police include behaving with decorum and courtesy with the members of the society, particularly women, senior citizen, children and mentally or physically challenged individuals by guiding and assisting them requisitely. Insuring harmony and peace during conflict between communities, the conduct of the police always is governed to the principles of human rights norms and impartiality with special focus to protect the weaker sections of the society along with minorities. Preventing harassment of children and women in public areas like stalking, abusive gestures, remarks and signs of harassment which cause distortion and disturbance in the society. Maintenance of essential government services in order to obey and follow an order given by the government or any superior institution is the basic duty of the police officer. The role of the police in India is to protect, promote and preserve the human rights and interest of the backward classes, weak and poor strata's of the society.<sup>3</sup>

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<sup>3</sup> <http://police.pondicherry.gov.in/Model%20Police%20Manual%20by%20BPRD/Draft%20Police%20Manual%20BPRD%20-Volume%202.pdf>.

## Drawbacks of the Indian Police

The system of Indian police constitutes of various drawbacks, where the police suffers a variety of procedural, personnel, organizational and behavioral paradoxes and ailments.<sup>4</sup>

1. Corruption, a root cause which provokes the police to breach its duty by either getting bribed for money or due to the political interference in its duty. Under political pressure and high orders, the police often get deviated from its duties towards the society.
2. The lackadaisical attitude of the police officers in the Indian system portrays its work to be inefficient, casual and careless.
3. Low salaries which are paid to the police in today's cost of living, demotivates and pressurizes the police to persuade illegal ways in order to earn money as a part of corruption.
4. One of the main factors is job security, which is taken for granted by the police officers under the wake of which they prefer to get bribed and prevail on a wrong path in order to earn more money.
5. Inadequate and lack of professional training of a personnel, no modernization of the equipment and the system demoralizes the ability, strength and competence among the police.
6. The most important reason which makes the whole police system inefficient is that they are dummies in the hands of the political parties and politicians. They get bribed very easily to perform an act which is against their rules and duties, while supporting the political parties because of which corruption flourishes.
7. Illegal detention and arrest, ill-treatment and police torture, false register of complaints and lack of investigation of a crime which violates the human rights of the public and citizens in the

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<sup>4</sup> <http://www.indiaeyewitness.com/Channels/Issues.asp?category=Police%20System>.  
<http://www.firstpost.com/blogs/how-to-improve-indias-police-a-roadmap-677462.html>.  
[http://www.loksatta.org/cms/documents/indianpolicesystem\\_summary.pdf](http://www.loksatta.org/cms/documents/indianpolicesystem_summary.pdf).

society are a few obstacles in a police officer's accountability.

For example, as witnessed in the Muzaffarnagar riots, the police was reluctant in serving the sufferers, women and children during the communal violence. They even denied to register and address complaints and FIRs which were made by the people. They were unsupportive throughout the riots and failed to provide proper security to the people of Muzaffarnagar.

### **Suggestions**

1. In order to substantially improve the functioning and efficiency of the Indian police force, a division of the unit into three fields i.e. mechanism, investigation and maintenance of law and order in the society should be done.
2. To enhance the public accountability and ensure the unnecessary interference of the political parties into the duty of the police, a collegium should be set up where a few key officers should be appointed to take control of the situations which give rise to corruption like bribing.
3. There should be an independent body which would have a jurisdiction over the complaints and FIRs filed by the public which are often unattended.<sup>4</sup>
4. The overall functioning and efficiency of the lower-level officers can be highly boosted by training them in a better and modernized atmosphere, paying them better allowances and creating a system which encourages them with a positive action, instead of a negative one.
5. Sustained social and political support for reform should be provided where it can ensure that the reform is maintained and properly initiated.
6. Leadership among police can also make the reform more effective as a good police leader should have professionalism, integrity, competence and ability to motivate its staff. Adequate resources and/or low-cost measures.
7. A good and proper system of evaluation should be done on a regular basis which is essential for identifying the widespread implementation of



successful reforms which can in turn improve the police performance and efficiency.

8. Salaries and promotions should be increased for hardworking and fair police officers as they not only encourage them to perform better but also help them to sustain a comfortable life.
9. With stringent laws under the legislation which primarily focus on the conduct of the police towards the society, i.e., to maintain peace and order, protect women and children, secure its citizens etc. helps to transform the work of the police into a more candid nature.
10. Employing women officers and just, truthful police officers whose soul duty is to protect the society from crime and violence instead of the aim to earn more money.

## **Conclusion**

Hence, the state as well as the police together play a crucial role in preventing the breach of human rights of the minorities. During a communal violence, when the lives, property etc. of the people are under a threat, a need for a proper framework which clearly distributes and assigns the work of the state and police individually is required. This should further be synced between each other for a proper coordination during an emergency. Breach of duty and rights by the police and the state disorientates and distorts the entire system which in turn impacts and affects the minorities of the society severely as they might get displaced, tortured, killed etc. Minorities form an essential part of this society and thus, their rights should be secured and protected by the police as well as the state for a proper functioning of the nation.



## **RIGHTS OF LINGUISTIC MINORITIES AND POLITICAL INFLUENCE**

**Ms. Manvi Damle\***  
**Ms. Apeksha Sizaria\*\***

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The term linguistic minorities refer to a class of people who are less in number and speak a language that is different from that of the majority in a state. However, this is a very superficial view of the problem. It is very difficult to define the term “linguistic minorities” in specific as it takes a new turn at every new place, has a very vast form and has to be understood in a different context. Indian multilingualism is very unique where one language is written in many scripts and many languages are written in one script. As the proverb says “Every two miles the water changes, every four miles the speech.” There is “Diglossia”- the coexistence of a highly elaborate, formal language alongside a more colloquial form of the same tongue - occurs in many instances. For example, spoken Bengali is so divergent from written Bengali as to be nearly another tongue.<sup>1</sup> Such is the diversity of language in India.

To be more elaborative and specific there are different aspects to why people belong to the minority group of language which may vary from person to person, such as they may be “permanent residents” i.e., Bengali speakers residing in Belgaum district or Marathi speakers in Assam , they may be “transitory” i.e., coming to a different state to earn livelihood , they might be the speakers of the language which has its own script and literature and on the other hand it is even possible that no script or literature exists for a language. Another possibility might be absence of regional language for a state i.e., none of the language is spoken by more than half of the population, for e.g., in Nagaland, Arunachal

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\* Student, 1<sup>st</sup> year, B.A. LL.B., Institute of Law, Nirma University Ahmedabad.

\*\* Student, 1<sup>st</sup> year, B.A. LL.B., Institute of Law, Nirma University Ahmedabad.

<sup>1</sup> LINGUISTIC STATES INDIA, available at [http://www.indianchild.com/linguistic\\_states\\_india.htm](http://www.indianchild.com/linguistic_states_india.htm).

Pradesh and Meghalaya. In such a case all the languages spoken in the state are regarded as minority. At present around 114 languages are spoken in the country out of which 22 are scheduled. Almost all the languages spoken in the country basically belongs to four different families i.e., Dravidian, Indo-Aryan, Sino-Tibetan, Austro-Asiatic.

There are two different features that define the minority, first is “functional load”<sup>2</sup> and second is “functional transparency”. Functional load refers to the ability of a particular language to cover the maximum domains. Higher the domain it covers, higher will be the load. For e.g., English, it covers a large domain such as in education, politics, management, business, national and international interaction etc., so it has higher load. On the other hand any tribal language has only one domain which is at home, so it has lesser load on it. Functional transparency refers to the degree of functional load i.e., the control and autonomy of the language in the particular domain. Higher the autonomy, higher will be the transparency. For example, Sanskrit explains a lot about Hinduism and has its own say in it, so it is higher on transparency.

In India, there are various laws made for protection of minorities. India is a democratic country where there has to be rule by the masses and protection of minorities has to be ensured. But being so diversely multilingual it is very difficult in India, to implement any law without side effects.

The formation of states in India has been the biggest example of the above. The main aim after India gained independence was carving out of states on linguistic basis such that maximum people speaking the same language could be grouped together. Under the provisions of Article 3 of the constitution this was done as it allows formation of a new state. Odisha was the first state to be formed on linguistic basis in 1936 because of the consistent efforts of Madhusudan Das. Later, in 1952, Potti Sreeramulu fasted until death, demanding the

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<sup>2</sup> RAJESHWARI V. PANDHARIPANDE, MINORITY MATTERS: ISSUES IN MINORITY LANGUAGES IN INDIA, *International Journal on Multicultural Societies*, Vol. 4, No. 2 available at <http://www.unesco.org/most/v14n2pandhari.pdf>.

separation of state of Andhra Pradesh, so that the Telugu speaking population could get a separate state. He wanted protection of linguistic rights of his people and thus, a new state. However, today years after the formation of Andhra Pradesh, demand for a separate state of “Telangana” began. Telangana was made a part of Andhra Pradesh in 1952 partition. Since then, this insecurity has always prevailed. One might wonder why people speaking the same language are demanding separate states or probably what relevance this holds in context of this paper where we are discussing violation of rights of linguistic minorities. But it surely does. Telangana is a backward part of Andhra Pradesh, very rich in resources. Andhra Pradesh government has exploited the resources in this region in a way that has not been favorable for people of Telangana. Main reasons for demanding Telangana are:

- Rivers like Krishna and Godavari flow through Telangana, but the water from the dams are sent to Andhra.
- Because of less literacy and backwardness of Telangana people, most of the new jobs, postings in government and education are given to people from Andhra.
- Except for common language, the people of Andhra and Telangana have different dialects, histories, cultural systems, different food habit.i.e.telangana.org

Also, 45% of the state income comes from Telangana region. When it comes to utilization of funds, the share of Telangana is only 28%.<sup>3</sup> Hyderabad has become the bone of contention between them. Hyderabad is one of the most developed cities. This development has been at the cost of exploitation of resources in the Telangana region, where people, however, never received any benefits out of the same. Therefore, division of “Telangana” is a contentious issue in context of placing Hyderabad in any one state, where one has taken up the task and made efforts to develop the city while on the other hand is an area that provided the required resources for

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<sup>3</sup> Interview with Dr. Jayshanker, ‘Why Telangana’ , available at [http://www.telangana.com/why\\_telangana.htm](http://www.telangana.com/why_telangana.htm).

development. In the context of this paper, it is necessary to understand that if demand for Telangana is considered then unity and integrity of India is risked. So many languages are spoken in this country with uncountable dialects and variations. If states are on divided considering all of them, India will be left in pieces. When disputes can arise in a state where people share the same ethnicity, they can surely arise in multilingual states. This is so because there is probably no such area which is totally unilingual. Every area has some people speaking a language that is different from what maximum people speak. There are bilingual or multilingual belts present in many areas. It also included certain tribal belts who spoke so many languages and dialects of the same. Out of 114 languages in the country, 88 are classified as tribal languages, out of which only four i.e. "Bodo", "Dogri", "Maithili" and "Santali" are included in scheduled languages. 36.3 million of Indians from 1.2 billion speak absolute minority language, which is mostly "Adivasi" language. However, the "Adivasi" population is estimated to be 70-80 million. This shows that not all "Adivasis" are speaking their language.<sup>4</sup> They may still relate to their cultural roots but constant discrimination, suppression, lack of protection and modernization have seriously impaired the development of these languages, rendering them with less number of speakers. Through this paper we would suggest that altering state boundaries to protect rights of linguistic minorities is not a viable option in a country like India. Instead, it should be ensured that rights of linguistic minorities should be protected and safeguarded in such a way that there remains no feeling of insecurity and desire to form a new state. When this is achieved, goal of democracy will be realized in its true sense.

Now, considering such a complex scenario it becomes difficult to identify the "linguistic minorities" in India.

The eighth schedule of the Indian constitution includes twenty-two languages, which constitute 93 mother tongues. Earlier it had fourteen languages, Assamese,

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<sup>4</sup> Kamal K. Sridhar, *Language in education: Minorities and multilingualism in India*, 42(4) International Review of Education 327-347 (1996).

Bengali, Gujarati, Hindi, Kannada, Kashmiri, Malayalam, Marathi, Oriya, Tamil, Telugu, Punjabi, Sanskrit and Urdu, when the constitution was first formed in 1956. Later on Sindhi was added in 1969, Nepali, Manipuri and Konkani in 1992 and Four tribal languages “Bodo”, “Dogri”, “Maithili” and “Santali” in 2003. It is the duty of the government of India to develop these languages.

Now, the common misconception is, that mere classification of a language as “scheduled” gives it a status and makes it a majority language. This is however, true only to a certain extent. It is true that these languages are those languages which are spoken by most people in India, but then it is necessary to see the other side of the coin. For e.g., Telugu is a scheduled language and so is Tamil. Most people in Tamil Nadu speak Tamil and most in Andhra Pradesh speak Telugu. When a Telugu speaking person moves from Andhra Pradesh to Tamil Nadu he also becomes a linguistic minority. Therefore, it is evident that even a major language can become a minority with change of place. Sometimes a language may be a majority language, but may not be given official status by the state. For e.g., In Kashmir, 80% people speak “Kashmiri” and “Dogri”, however the official language of the state is “Urdu”.<sup>5</sup> Even if “Urdu” is declared as the official language in Kashmir, it still remains a minority language at the state level and its protection and promotion is not ensured merely by declaring it an official language. It is evident that declaring a language as “scheduled” or “official” will surely add to its status but does not ensure its development, which usually is the actual objective behind such declaration. Protection and promotion of languages of linguistic minorities can take place when the government of a country takes certain steps in this direction.

Also, though the culture should be protected but “one language” policy and its relevance can’t be ignored. Say for example a Gujarati speaking patient residing in Madhya Pradesh goes to a Hindi speaking doctor and converses with him in his own native language. Now here lie the chances of misinterpretation, which may cause

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<sup>5</sup> See *supra* note 2.

harm to one the party. Here it becomes important to understand that conserving a language and not being ready to use any other language are two very different things. Though there is a hair line difference between both concepts, but they should not be confused with. The main purpose should be protection, not creating chaos.

Considering the situation, one of the most threatened rights of linguistic minorities is their right to education. Though, laws exist in this regard, but again they lack implementation. Article 29<sup>6</sup> and Article 30<sup>7</sup> are the two main articles in part three of the Indian constitution regarding protection of minorities. However, there are certain loopholes. Firstly, the constitution of India does not define the term minorities in specific. It is considered to include both religious and linguistic minorities. Therefore, when laws are made there is always some kind of ambiguity associated with it.

The article allows citizens to preserve their language and guarantees admission in state run educational institutions without discrimination. However, this provision does not seem to be sufficient to cater to the needs of multilingual Indian landscape. When a tribal person, who cannot understand any language except his mother tongue, is admitted into a state run institution, where medium of instruction is different, he automatically feels alienated. Education for him becomes strenuous which finally results in increased number of drop-outs from schools. To avoid such outcomes, it is not only necessary to ensure admission in educational institutions but also the medium of instruction should be looked after.

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<sup>6</sup> INDIA CONST. art. 29. "Protection of interests of minorities. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of state funds on grounds only by religion, race, caste, language or any of them."

<sup>7</sup> INDIA CONST. art 30. "Right of minorities to establish and administer educational institutions: (1) All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. (2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

International organizations like UNESCO, have acknowledged the importance of education in mother tongue. However, situation in India is so complex that even if maximum people are given the opportunity of getting educated in their mother tongue, a large section of population will still be left out as their mother tongue might not have proper scripts, books or literature available for studying. The population of this section might equal the entire population of US.<sup>8</sup> Feasibility of the law is at stake. The question we need to ask is whether such laws can be implemented without harming any section of minorities, if not benefitting them.

It was soon realized that most minority languages were also those that were not specified in schedule eight of the constitution. Therefore, The State's Reorganization Committee inserted Article 350-A<sup>9</sup> and 350-B<sup>10</sup> in the constitution which were specifically made for linguistic minorities.

Providing education in mother tongue, atleast at the elementary level, to the speakers of major languages in India, who live in their home states has not been a major problem. The law has been implemented to a great extent. For e.g. People whose mother tongue is Gujarati and they reside in Gujarat. However for the rest of the population, this law does not really work. Speakers of tribal languages and speakers of major languages who have migrated to other places are still suffering.

National Commission for Minority Educational Institutions Act considers only Muslims, Christians, Sikhs, Buddhists, Parsis and now Jains as minorities (under section 2(c) of National Commission of

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<sup>8</sup> See *supra* note 4.

<sup>9</sup> INDIA CONST. art 350-A. "It should be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision for such facilities."

<sup>10</sup> INDIA CONST. art 350-B. "There shall be a special officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each house of Parliament, and sent to the Governments of the States concerned."



Minorities Act, 1992 in January, 2014), as notified by the government of India.<sup>11</sup> So any Tamil speaking person who lives in Gujrat might not be able to avail any benefits under the act. He may be minority in the state of Gujrat like Muslims, Christians, Sikhs, Buddhists, Parsis and Jains but will not come in the ambit of the act. Also, as article 350-B states, a commissioner is appointed as the head of National Commission of Linguistic Minorities. He looks into all matters relating to violation of rights of linguistic minorities. Commission has the powers of a civil court and can make recommendations to the central government. In 2012, as stated in "The Milli Gazette" in an article by N.A Ansari, certain recommendations were made by the commission. In its 48<sup>th</sup> report the commission has firmly stated that "education to children belonging to minority communities should be imparted in their mother tongue upto primary level, teaching of their mother tongue should be made compulsory upto secondary level and facilities of teaching the language of their choice or liking should be provided to such students i.e. minority students. In addition to these, under the 'Scheme of the Safeguards'.<sup>12</sup> It has been recommended that in places where the population of linguistic minorities is 15 percent or more, facilities of providing teachers of minorities language, syllabus books, translations and other things also should be provided. Yet another recommendation is that if in any district or place the population of people belonging to linguistic minorities is 60 percent their language (or mother tongue) should be made the additional official and administrative language so that people speaking this language should get an opportunity of doing official work (or perform official duties) in their own language." However it has been observed that most such recommendations pile up in government offices. Not much heed is paid, especially if they are not in favor of the ruling government.

Also the dominance of English in India, considering the historical background of British colonialism, has been an

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<sup>11</sup> Government of India National Commission for Minority Educational Institutions, Guidelines for determination of Minority Status, Recognition, Affiliation and related matters in respect of Minority Educational Institutions under the Constitution of India. available at [http://ncmei.gov.in/writereaddata/filelinks/c296efcb\\_Guidelines.pdf](http://ncmei.gov.in/writereaddata/filelinks/c296efcb_Guidelines.pdf).

<sup>12</sup> *Ibid.*

impediment. English has become a universal language and thus, has gained more importance, mainly at the cost of other languages. Many minority groups have themselves started undermining their own language and have lost faith in it. Implementation has also been tough in small and rural areas where schools lack properly trained teachers, Languages lack scripts and Libraries lack linguistic literature. However, we can find certain steps that have been taken internationally to instill a sense of confidence among people for their language. For e.g. Canada has been successful in setting an example worldwide by becoming the first country to adopt the concept of “multiculturalism”<sup>13</sup> To be more elaborative it means to make people value what they follow from ancestors and take pride in it. As mentioned earlier in the paper, one of the main reason for a language becoming a minority is because of the people who themselves consider their own language as a medium of embarrassment and hence opt to speak a language spoken by the majority. Canadian government was successful enough to catch this nerve of the minority and declared the concept of “multiculturalism”, so that people feel belongingness with their motherland in spite of being of diverse nature. This proved to be a milestone on the road whose destination is unity. Though it won't be justified to measure India on the same parameters, but both the countries share the similarity on being diversity in them. If people are encouraged to speak their mother tongue and preserve their culture for generations, then possibility is to achieve the goal of unity to a certain extent. Secondly one of the most important point that can't be ignored is that no matter how many laws government pass to protect the minority, role of a layman in it can't be questioned. It is high time to sensitize the republic about the seriousness of the issue and how it is the duty of every person to preserve, protect and promote the culture they are brought up in. Every person should take interest and try to promote the speakers to carry forward their culture.



<sup>13</sup> JULIANA BIONDO, LINGUISTIC MINORITY RIGHTS: PICKING A SIDE, available at <http://yulr.org/linguistic-minority-rights-picking-a-side>.

## ROLE OF STATE AND POLICE IN THE WAKE OF COMMUNAL RIGHTS

Ms. Gagandeep Sobti\*

Ms. Aadya Dubey\*\*

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### Medieval Legacy

Is it not an irony that in post-British India, the country's political leadership in pursuit of votes and vote banks is carrying forward the violent medieval legacy only for their political interests and dividends that come from such riots?

The pre-medieval invaders of India generally settled in Indian soil and merged in the cultural cauldron of this land. But the Islamic conquests were different. The conquerors indulged in mass killings, forced conversions with the superimposition of an alien Arab-Turk-Perso culture all in the name of religion. This created a permanent conflict between the two major religious groups. The creation of Pakistan in the name of religion and the failure of post independence Indian rulers to bridge the gap between the two communities have only exacerbated the distrust between the two communities.<sup>1</sup> Praising their faith as God's final and perfect religion, these conquerors declared that it was their divine right to conquer the non-Muslim world and to superimpose their culture on the people of the conquered territories. This mindset of the invaders clashed with the spiritual beliefs of the conquered people and thus created a permanent chasm. One cannot but agree that this was not just a conflict of religion but a conflict of civilization between the ruling class and the ruled.

The invaders had earlier succeeded in their mission in Persia and other gulf countries and rejected Judaism and Christianity as defective variants of Islam but the

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\* Student, 4<sup>th</sup> year, BBA LL.B., SLS, Noida.

\*\* Student, 4<sup>th</sup> year, BBA LL.B., SLS, Noida.

<sup>1</sup> Banerjee, S., 2002, *When the 'Silent Majority' Backs a Violent Minority*, *Economic and Political Weekly*, 37(13): 1183-1185.

response of the natives in India was different and the ruled continued their resistance all through. Since then, the socio-cultural division between the two communities had remained a permanent feature of Indian society.<sup>2</sup> Nobel Prize winner V.S. Naipaul in his book *Half a Life* observed that: "Islam has had a calamitous effect on converted peoples. To be converted you have to destroy your past, destroy your history. You have to stamp on it, you have to say "my ancestral culture does not exist, it does not matter".<sup>3</sup>

### **The British Rule and Its Narrow Objectives**

After the end of the imperialistic Islamic rule in 1857 and shift of power from the Muslim rulers to the British, there was a marked change in the attitude of the Hindus also towards the former as well as the new ruler. While "the Hindus looked upon the British rule as deliverance from Muslim yoke, and considered English education as a blessing, the Muslims in their eagerness to preserve their religion and religious views rejected English education". (*Muslim Politics and Leadership in South Asian Sub-continent* by Yusuf Abbasi, p. 13).

The British ruler did not like to resolve the conflict between the two communities. They looked at the whole issue as a law and order one and emphasis was on communal harmony to prevent a break down in law and order and nothing more.

The post-Mogul historians repeatedly wrote about the Indo-Arab composite culture of this land but ignored the wounded psyche of the natives. Though the Hindus and Muslims were living together for more than a millennium both the groups always remained in social isolation from each other. At the instance of Mahatma Gandhi, the Hindus joined the *Khilafat* Movement launched by the Muslims against the British for restoration of Ottoman Empire but this unity was also a temporary one.

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<sup>2</sup> Brass, P.R., 1994, *The Politics of India since Independence*, 2nd ed, Cambridge: Cambridge University Press.

<sup>3</sup> <http://blogs.wsj.com/indiarealtime/2013/09/26/the-politics-of-communal-violence/>.

## Partition and Thereafter

The Indian National Congress had opposed the two-nation theory tooth and nail but its leaders succumbed to the pressure of Muslim League leaders who gave a call for Direct Action in 1946 that led to widespread communal riots in the sub-continent. These riots were said to be one of the immediate causes of partition.<sup>4</sup>

When India emerged as an independent democratic and secular republic, the then ruling Congress only tried to philosophize the Hindu-Muslim issue by repeating the same Marxian theory of composite culture by ignoring the fact that the “pang of toothache cannot be borne by philosophical speculation”. Of course the term “secular” was not incorporated in the Constitution at the time of its framing, its spirit was secular. But instead of formulating a practicable policy to resolve the historical communal conflict, the ruling political party carried forward the same policy of the earlier rulers. Ironically, the Marxists and Left-liberal intelligentsia also supported them.<sup>5</sup>

## Revival of the Muslim League Politics by the Muslim Leaders and their Parties

This resulted in the Muslim League reviving the movement for the separate identity of the Muslims on the basis of religion which was nothing but a fight for a shared political power on the basis of a separate religious identity. For them, democracy and secularism were alien to their faith. “Democracy is a concept completely alien to the Muslim psyche to the extent that there is no equivalent terminology for it in Arabic or other languages spoken by Muslims.” (*Understanding Mohammad—A psychobiography of Allah Prophet* by Ali Sina, a Canadian Muslim of Iranian descent). They ignored the concept of common national identity as accepted by other minorities like Jews, Christians and Zoroastrians (Parsis) who hardly had any communal conflict in this secular country.

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<sup>4</sup> Brass, P.R., 1994, *The Politics of India since Independence*, 2<sup>nd</sup> ed., Cambridge: Cambridge University Press.

<sup>5</sup> <http://economictimes.indiatimes.com/topic/communal-parties>.

Had the ruling establishment been bold enough and abandoned the concept of minority and majority in framing the constitution, the Indian Muslims like their counterparts in other non-Muslim majority democratic countries of the world would have resigned themselves to being equal citizens. They would have either opted for Pakistan or accepted the concept of common law for all. But our Constitution makers ignored the hard historical fact of religion which was the main reason behind partition and again divided the people into majority (read Hindu) and minority on the basis of religion by incorporating some articles which provided special privileges to the latter<sup>6</sup>. This generated a communal consciousness in both the communities and also revived the seething historical wounds in the psyche of the majority community particularly when the ruling establishment remained more concerned with the communal demands of the minorities. Emergence of other communal organizations could not be prevented.

### **Vote Bank Politics to Fore**

In between Pandit Jawaharlal Nehru to Manmohan Singh, a number of commissions and councils like National Integration Council, Minority Commission, Rangnath Mishra Committee, Sachchar Committee were set up by the Central Government but such efforts could hardly resolve the communal conflict in the country. These exercises rather prompted almost all the political parties to go for competitive bidding to go for “vote banks” in the elections. Distribution of communal sops to the minorities particularly in pre-election year by the so called secular parties only accelerated the identity politics played by the minority religious leaders.

By and large only the vote-seeking political parties are blamed whenever there is any communal riot. But the so called secular media should be held equally responsible for not agitating against the vote bank politics being played by the political parties. If only the government had not interfered with the *Shahbano* case, things could have been different today. But it was not to be as vote bank

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<sup>6</sup> Devji, F.F., 1992, Hindu/Muslim/Indian, *Public Culture*, 5(1): 1-18.

politics appeared to be more important and crucial for survival of some of the political parties.<sup>7</sup>

Keeping alive the communal issues like over a decade old Gujarat Riots, Arrest of Muslim suspects in terror cases, arrest and conviction of Batala House Encounter in 2008 and 2013 respectively suggest that the Muslim leaders have made it a strategy to flex their muscle on any issue which goes against the Muslims.

### **The Batla Encounter**

Within a month of the Batala House encounter in September 2008, various Muslim organizations organized a meeting in Jama Masjid Delhi on 14<sup>th</sup> October and condemned the arrest of Muslim youths who were suspected as accused in this encounter. It may be mentioned that Shahi Imam of this mosque in his invitation letters had highlighted the “bomb blasts, blame game, illegal arrests, and torture of Muslim youths” and also alleged: “The highly discriminatory actions of State police forces and central intelligence agencies have let loose a reign of terror to which Central government has turned a blind eye”. He felt that: “If we don't unite by closing our ranks to meet this challenge, history will never forgive us”. The meetings made this encounter a political issue which is still persisting.

Surprisingly, even the then Jamia Millia Islamia Vice Chancellor Mashirul Hasan a widely acclaimed campaigner of ‘moderate and tolerant Islam’ joined the communal polarization move and offered to provide legal assistance to the two arrested students of the university. He even led a street march in support of the Islamists.

Thus, with a sustained campaign the Muslim leaders succeeded in convincing the community members across the country that their community members killed in the police encounter and arrested were innocent and not terrorists. They went to the extent of preaching that the death of Mohan Sharma was caused by the bullet fired by his own colleague either deliberately or by accident.

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<sup>7</sup> <http://www.hindustantimes.com/india-news/newdelhi/unsure-what-will-work-in-2014-polls-political-parties-play-communal-card-too/article1-1121826.aspx>.

## Revisiting Pre Partition Scenario

The increase in communal riots since the beginning of the new millennium on the eve of election years namely 2004, 2009 and 2013 shows that India is revisiting the pre-partition challenge of the communal flame engulfing the country. But the most unfortunate part of the scenario is the role of political parties, 'secular' intelligentsia, journalists, writers and academics in running down the image of the country in the world.

If the people of the country in general and ruling class in particular do not take lessons from the historical wrongs committed by Indians who brought defeat and dishonour to the nation either to save their throne or skin, we are bound to fail in bridging the gap of communal mistrust in the society. The prevailing dissatisfaction of the Muslim community and consequent unrest is a dangerous sign for both the internal and external security of the country.

The answer lies in a strong political will of both the state and central leadership to shed their politics of vote bank and one sided approach in handling the communal riots as otherwise the country will continue facing the challenge of the medieval legacy. Muzaffarnagar riot will not be the last and we will only see more riots in future.

In the decade since religious violence in Gujarat left hundreds of Muslims dead, the State's chief minister, Narendra Modi, who is accused of failing to stop the clashes, has struggled to shift attention from his image as a Hindu nationalist to his credentials as a pro-business administrator.

Still, Mr. Modi's political career, which reached a new high this month with his nomination as the Bharatiya Janata Party's candidate for Prime Minister, has been shaped by the riots in 2002 in which over 1,000 people died.<sup>8</sup>

In a country with a long history of sectarian violence, Mr. Modi's supporters often defend the controversial

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<sup>8</sup> <http://asiancorrespondent.com/113760/analysis-the-politics-of-indias-communal-violence/>.



leader by invoking the memory of another deadly riot—one that took place under the Congress party's watch. In 1984, nearly 3,000 people, mostly Sikhs, died in retaliatory violence after two Sikh bodyguards assassinated the then Prime Minister, Indira Gandhi.

Many senior Congress leaders were accused of inciting mobs and organizing the clashes, and a few of them are still being tried by Indian courts. The party's president, Sonia Gandhi, is also facing a lawsuit filed by a Sikh group in a U.S. court for allegedly protecting its members whom the group says was involved in the riots. Analysts have tried to explain why the criticisms leveled against Mr. Modi over the 2002 riots have been sharper and lasted longer than the backlash the Congress faced after the 1984 riots. The difference, some say, lies in the fact that the Congress is largely perceived as secular, whereas the BJP has acquired a reputation for being a Hindu majoritarian party.

Rajeev Bhargava, the director of the Centre for the Study of Developing Societies in New Delhi, said many people were willing to forgive Congress because "it is not a constitutively communal party".

"The wounds of 1984 are limited to what happened in 1984," Mr. Bhargava, who studies secularism, said. "It was an isolated incident, but there was no ideological foundation or pattern and therefore no fear of it being repeated."

By contrast, he said, the BJP's core ideology is centered on Hindu nationalism. The party rose to power in the nineties through a movement for the construction of a contentious Ram temple in Ayodhya that culminated in the violent destruction of a mosque in 1992, sparking bloodshed across India.

"The 2002 riots were not an aberration," said Zafarul Islam Khan, the President of the All India Muslim Majlis-e-Mushawarat, an umbrella body of Muslim groups. "A hard-line Hindu agenda is part of the BJP's plan."<sup>9</sup>The

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<sup>9</sup> Sarkar, T., 2005, 'Educating the Children of the Hindu Rashtra: Notes on RSS Schools' in Jaffrelot, C., ed. 2005. *The Sangh Pariwar: A Reader*, New Delhi: Oxford University Press 197-206.

BJP says it is focused on the country's overall development and in turn accuses Congress of practicing vote-bank politics aimed at garnering Muslim votes.<sup>10</sup>

Congress has made political decisions to win over religious voters. In the 1980s, the then Prime Minister Rajiv Gandhi, under pressure from orthodox Muslim clergy, overturned a landmark Supreme Court judgment that gave a Muslim woman the right to alimony. He also embraced the emotive temple issue to boost his re-election prospects in 1989, allowing the contentious foundation laying ceremony of a Ram temple next to a mosque.

But in making these moves, Congress showed political expediency rather than religious conviction, some analysts argue. Writing in the Indian daily *The Telegraph* in July, columnist Mukul Kesavan said: "Congress, by a kind of historical default, is a pluralist party that is opportunistically communal while the BJP is an ideologically communal party that is opportunistically secular."

But Sikh groups argue there is little to differentiate the two national parties. They accuse Congress of making false promises to the minority community while continuing to protect leaders who they say were involved in the violence. "The Congress party was in power then and they are in power now," said Karnail Singh, president of the All India Sikh Students Federation, who called the 1984 riots genocide. "They have controlled the system to suppress the truth and to prevent justice from being done."

Still, some analysts say the Congress party's attempts to reconcile with the Sikh community softened critics, a situation they contrast with Mr. Modi's refusal to apologize for the 2002 riots. Two successive Congress-run governments since 2004 have been led by the Sikh Prime Minister, Manmohan Singh, who apologized for the riots when he came to power. "I have no hesitation in apologizing not only to the Sikh community but to the whole nation, because what

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<sup>10</sup> <http://www.firstpost.com/politics/most-communal-party-of-the-country-is-congress-rajnath-singh-1192309.html>.

took place in 1984 is a negation of the concept of nationhood enshrined in our Constitution,” he said at the time.

Another explanation is that Sikhs form a small minority in India and seldom figure prominently in political calculations, said Shekhar Gupta, a leading Indian journalist. They form less than 2% of India’s population, while Muslims account for 13.4%. The rivalry between Hindus and Muslims has a long and emotive history, beginning before India’s partition that led to the creation of the Islamic state of Pakistan.

Right-leaning commentators say Congress, which has relied on Muslim votes to win elections: “has kept the issue alive” because it has developed a vested interest in keeping the community fearing for its personal safety. “They honed in on the 2002 riots and assiduously created a demonology around it,” said Swapan Dasgupta, a Delhi-based political analyst. Congress spokesman Sanjay Jha said his party had not played vote bank politics over the riots, which he called “state sponsored,” an accusation the BJP denied.

Any idiocy and cruelty that has ever been recorded in the annals of history re-emerges during communal riots. As religious hatred engulfed the nation and over 1,000 people died, every possible refinement in human unkindness and poignant twists of fate were on display. Children are burned alive. New weapons-the lethal acid sling-shot-appear on the scene. A woman making tea on the street for the policemen standing outside her home in Bombay dies when the same *jawans* turn their guns on the building. Police arriving at the scene of ferocious fighting in Bombay’s Dharavi slum discover that the cause is not the Babri masjid but a stolen chicken.<sup>11</sup>

Muslims infuriated by the sacrilege at Ayodhya went onto the streets to protest. Finding, in several states, that the police were using considerable force against them, they felt even more indignant. As Saeed Hameed, editor of *Tanveer Weekly* in Bombay, said: “The feeling was that the police didn’t even raise a *lathi* when *kar sevaks*

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<sup>11</sup> <http://www.kashmirtimes.com/newsdet.aspx?q=23093>.

demolished the mosque but are shooting us when we protest against the destruction." An analysis of what happened and the reasons for some unpredictable developments, such as the staggeringly high death toll in Maharashtra and the comparative calm in Bihar.

**Gujarat:** The police collude and the administration sits idle. The violence which exploded in a state known to be a communal tinder-box shocked even thick-skinned residents hardened to atrocities and provided employment to ironsmiths who were asked by Hindu fanatics to work round the clock making sharp weapons. A majority of those who died were Muslims who had come out on the streets in cities such as Ahmedabad and Surat to protest against the demolition and succumbed to Hindu mobs or trigger-happy policemen. In Ahmedabad alone, 28 of the 37 Muslims who died were killed by police bullets. The administration lurked in the shadows, showing no will to stop the carnage. Five days after it began, the army had to be called in. When the police were not firing, they were passive.

There is no evidence to show that political parties were involved. Lumpen elements were, though, particularly in areas where prosperous Muslim traders lived. Hundreds of shops were looted or torched under the police's gaze. The end result was greater polarization. One sign of this was the behavior of Hindus who attacked a group of intellectuals protesting against the demolition, shouting: "Where were you when Hindu temples were demolished in Kashmir?"

**Madhya Pradesh:** Hindu fanatics and the press inflame passions. It was party time in Bhopal. As the news of the demolition arrived, Bajrang Dal and VHP workers celebrated by bursting crackers and distributing sweets. The police remained silent spectators. By the next morning, the bloodletting had begun. By December 12, the escalating violence had already taken 95 lives in Bhopal and 25 in other towns in the state. The stormtroopers of the Sangh brotherhood provided plenty of encouragement for the rioters by openly brandishing weapons while BJP MLA Shailendra Pradhan fuelled the hatred, saying: "In Bhopal, the minority community broke all limits of demonic barbarism."

Chief Minister Sunderlal Patwa did little by way of damage control. It was only when it became clear that the Centre might dismiss his Government that the state police got a handle on the situation. Nor were matters helped by unsubstantiated reports in Bhopal dailies such as the *Madhya Pradesh Chronicle* and the *Navbharat* that about 70 girls had been abducted from the city and then gang raped publicly. The reports were denied by the administration but it was too late. Bhopal was already burning.

**Maharashtra:** Numerous Muslims killed in police firing. Most of the people waiting outside the overcrowded morgue at J.J. Hospital in Bombay to identify their loved ones were Muslims. They all had a similar story to tell of a male relative being shot by the police. Nissar Ahmed spoke of how his brother Races Ahmed, 28, had gone out of their hut near the Bandra railway station to see a clash between two groups. The police opened fire, and Races was hit in the leg. As he hobbled back home, two constables shot him in the chest. The vast majority of deaths in Bombay were from police bullets as policemen, armed with handguns, rifles and sten guns, fired straight into Muslim crowds. Bombay Police Commissioner S.K. Bapat admitted that most of the deaths were caused by police firing.

What started off as a clash between Muslim youths and armed police trying to protect public property turned communal as the riots spread from the densely-populated Muslim areas of south and central Bombay to the huge slums of Dharavi, Deonar and Ghatkopar. And a new weapon appeared: a tyre tube stretched between two poles used to direct quarter liquor bottles filled with acid at targets. Estimated range: 500-750 metres. A helping hand was provided by the assiduously inflammatory Shiv Sena chief Bal Thackeray who said the Government was harassing Hindus just to keep Muslims happy. The Muslim League also swung into action, putting up posters urging Muslims to make their anger known-and they did, galvanized into further protests by images they kept seeing of the demolition on satellite television. After a week's madness, however, Bombay was limping back to normalcy.

**Assam:** Bangladeshi immigrants add a new dimension. The epicenter may have been in Ayodhya but the tremors were felt in Assam as though it were just next door. As the news spread like a raging prairie fire, furious Muslims went on the rampage killing Hindus and destroying temples. The worst affected were the districts dominated by immigrant Muslims. The State Government says only 68 persons died in the week of massacres but local newspapers put the figure much higher. The political ramifications of the violence are alarming. Since the Muslims who went on the offensive were largely immigrants from Bangladesh, the ethnic divide in the state now has religious overtones. An intelligence official from Assam cautions: "The Assamese did not endorse the demolition of the *masjid*. But the violence unleashed by the immigrants will only harden attitudes towards them."

**West Bengal:** Marxist smugness exacerbates the violence. Last rocked by communal violence in 1946, the mayhem this time was far worse. The orgy of unreason not only drove the two communities apart, it also punctured the Marxist Government's cockiness that it could nip any communal trouble in the bud. This cockiness had caused complacency—one of the main reasons why Calcutta was so badly affected. The administration's responses were ludicrously slow. Even when police stations were half a kilometre away from trouble spots, help took ages to arrive. Ram Chandra Kashyapi, 63, rang up the police eight times but nobody came: "I have lived through the 1946 riots. What happened this time is infinitely worse" said an army officer: "It was not a very bad situation but a badly managed one." The Marxists' optimistic decision to lift the curfew helped the mobs regroup and reorganize and led to the second round of rioting.

**Uttar Pradesh:** Bad, but not as bad as expected. It was the one place that everybody expected to go up in flames but, oddly enough, while sensitive towns such as Kanpur and Varanasi were gripped by the nationwide frenzy, other towns were relatively calm. The reason being that most people had had their fill of Ayodhya-related violence in 1990 under Mulayam Singh Yadav. But no thanks to the State Government. Most districts hardly had enough forces to cope with large-scale rioting. Anxious to pre-

empt a Hindu attack, many Muslims went on the offensive. For all the tension, however, it was back to business as usual after a few days.

**Rajasthan:** Swift police action minimizes deaths. The death toll in this BJP-ruled state could have been colossal. What prevented catastrophe was the prompt reaction of the police? On the morning of December 7, as soon as a violent mob had gathered near a place of worship in Jaipur, the police opened fire, killing 15 people. But, in police parlance, it was "effective firing". Its impact was felt almost immediately. The situation was under control within two hours. Chief Minister Bhairon Singh -Shekhawat also called in the army in seven towns immediately. And eight towns were placed under curfew.

**Bihar:** Muslims listen to Laloo. As soon as the first dome of the Babri Masjid collapsed under the *kar sevaks'* onslaught, Chief Minister Laloo Prasad Yadav swivelled around in his chair, picked up the telephone and dialed the district magistrates and police chiefs one by one: "Shoot whoever foments communal violence. Deal with the situation ruthlessly; otherwise you know how I will deal with you." Before the incendiary news could get around, the police and paramilitary forces had moved into communally sensitive areas. The army was standing by too. Laloo's directives initially helped contain violence but pent-up emotions finally erupted in towns like Ranchi, Jamshedpur and Munger. However, the toll-24 dead-was among the lowest in the country. Of these, nine people died in police firing. One reason for the muted backlash was Laloo's nurturing of Muslim-Yadav unity. He was able to persuade Muslim leaders to influence their flock to maintain sanity in return for promise of protection. Laloo also went round the state appealing to both sides to keep calm. To beef up security, he even ordered the withdrawal of 82 sections of armed security men on VTP duties.

**Kerala:** ISS keeps mum but police firing takes heavy toll. The Muslim League issued R c SAI a strike call the moment it heard the news. By early evening, everybody knew about the demolition. Students preparing for exams closed their books and sat glued before TV sets. Panic spread. In a pleasant surprise, the Government and the

police swung into action immediately. Prohibitory orders were declared in all sensitive areas. And the Government announced that severe action would be taken against trouble-makers. Leaders of both communities urged restraint.

The violence began with a bomb blast in an auto rickshaw in Trivandrum and exploded into an uncontrollable riot in Kasargode. Railway stations and Central Government offices were attacked. The police were clearly out of their depth and the army had to be flown in to Kasargode and Malappuram from Trivandrum. More troops were requested for from Hyderabad as the BJP called for a *bandh*.

The *bandh* evoked little response, yet it extracted a toll of four lives. The only redemption: no place of worship was attacked. Malappuram temple came pretty close but its priests managed to dissuade the rampaging mob. The rabid ISS maintained a low profile. The Government too did not provoke it by making pre-emptive arrests of its activists. In fact, ISS chief Abdul Nasser Mahdhani who had reason to feel vindicated after the Ayodhya incident, remained silent, even in the face of reports about the ban on the ISS?

**Andhra Pradesh:** Police firmness keeps the hatred within bounds. Few cities in the country anticipated violence as well as Hyderabad, which has been a communal trouble-spot since the early 80s. But when trouble broke out, its scale was far less than expected. This was mostly because the police had made many preventive arrests and Chief Minister K. Vijaya Bhaskara Reddy had given the force a free hand. The *carte blanche* to the police turned out to be a mixed blessing. Expecting a long spell of curfew, the police did not impose one in the sensitive old city area till rioting actually started. Then, when faced with riotous mobs, instead of first trying to disperse them by using *lathis*, the police fired, causing many of the deaths. Karnataka: 60 DEAD. Muslim mobs outnumber the police. The moment the news about the mosque began circulating, furious Muslim mobs began gathering in the Muslim-dominated area of Shivajinagar of Bangalore looking for a confrontation. Half-a-dozen districts in the state were affected. The basic cause of



bloodshed was that the police were hopelessly outnumbered everywhere as mobs, armed with broken tube lights, iron rods and cycle chains, took to the streets. The State's three CRPF companies had been posted at Ayodhya. As DGP A.J. Anandan said that their plight was pathetic. Most of their men haven't slept for a week since they came on duty in December. The Government desperately sought additional forces but the Centre, inundated with similar requests, was unable to help.

**Tamil Nadu:** All quiet on the southern front. While the rest of the country was exploding with fury, Tamil Nadu appeared to be an oasis of peace. Madras was particularly quiet. The only aberration was a few stray incidents in the southern districts such as Tirunelveli where two people died in police firing when a mob attempted to set fire to a police station. Even the reaction of the political parties seemed muted in comparison with other states. The DMK and the AIADMK decided to observe a *bandh* on December but it was incident-free, thanks to the Government and the police who had' been on red alert as early in December. The relative calm can be attributed to the remarkable restraint shown by Muslims. All they did was stage a few demonstrations and close down businesses. The BJP's limited base in the state was another reason for the relative calm. Punjab and Haryana, two towns affected was put under curfew. These two states were spared the carnage, though a curfew was imposed for the first time since 1947 in the Muslim majority town of Malerkotla in Punjab in December when some people tried to take out processions and damage a temple. Haryana's Gurgaon district, with a sizeable Muslim population, was also put under curfew.<sup>12</sup>

## Conclusion

The problem of communalism at the present stage of societal development in India is almost intractable. This is as difficult as eradication of prejudices from the human mind. It is easier to part with money or comfort, but it is much more difficult to part with one's pet

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<sup>12</sup> <http://indiatoday.intoday.in/story/babri-masjid-bloody-aftermath-across-india/1/162906.html>.

prejudices. These prejudices have resided in human mind for centuries; framework of years or even decades appears to be too short for ridding the human psyche of prejudices particularly those relating to color, religion and language. But this realization should not act as a deterrent in coming to grips with the problem and chalking out a purposeful plan of action to contain it and ultimately to solve the problem.

The task of curing India of communal virus is no less difficult than transforming her from a semi-feudal superstition-ridden society into a modern enlightened society. The hold of the past on our people has to be loosened by developing in them futuristic orientation. People of various communities and religious persuasions joined together in the common endeavor to overcome their present disabilities and to attain a prosperous future would have little time and inclination for petty squabbles and recriminations.

They will labour together in fields, factories and laboratories to increase the food production, consumer goods and sophisticated devices and gadgets to improve the quality of life. Economic linkages between people of different communities will provide an antidote to communal virus and heal the wounds of the past. The educational institutions, particularly the universities, can play a pivotal role in enhancing awareness about the anthropological and sociological findings that confirm the equality of races and communities.

While elimination of communal feelings requires multi-pronged strategy involving educational, social and political measures, prevention of communal conflagration requires alertness and immediate response from the law and order administration. The District Administration should regularly update itself about the various developments likely to cause communal ruckus. An political parties, instead on trying to cash in the people's religious or minority sentiments should behave in an acceptable way, rather than treating various sects of religiously complicated society that India is as a mere vote bank.

It can initiate preventive detention of mischievous elements from the concerned communities and can thus reduce the chances of a communal conflagration. The local magistrates should keep themselves updated with the happenings in religious congregations and should be on the lookout for any serious portents of communal trouble. Timely information can ensure preparedness of the administration for unpleasant situations as it will not be caught napping. If this happens, India might see the dawn of coming years in a new light. Otherwise, something will always be holding the spirit of the nation back.



## MINORITY RIGHTS AND ITS REFLECTION IN THE INDIAN DEMOCRACY

Mr. Vivaswan Awasthi\*  
Ms. Ranjani Jagannath\*\*

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### History of Minorities and Their Rights in India

India possesses one of the biggest cultural and religious diversity in the world. Such is the case from past ten centuries or more, owing to the invasion of different classes of people in India. India's diversity is an array of its billion and odd population consists of six main ethnic groups, 52 major tribes, six major religions, and 6,400 castes and sub-castes, besides 18 major languages and 1,600 minor languages and dialects.<sup>1</sup> Since the late nineteenth century, the British as well as some princely states, for a wide range of groups designated as 'minorities', have made certain special provisions.<sup>2</sup>

The Morley-Minto Reforms brought a religious division, by giving separate electorates to Muslims, in pursuance of their 'divide and rule' policy. Apart from this, the colonial rulers and princely states instituted several reforms to a three-fold classification of minorities, namely, the religious minorities, scheduled castes and backward tribes. The colonial rule ended with the partition of India and creation of a separate State for Pakistan for the Muslim community. Even though a significant number of this community chose to stay back in India, there were several anxieties about the future of

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\* Student, 3<sup>rd</sup> year, B.Com. LL.B.(H), GNLU, Gandhinagar.

\*\* Student, 3<sup>rd</sup> year, B.A. LL.B.(H), GNLU, Gandhinagar.

<sup>1</sup> Joshua Castellino and Elvira Dominguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis*, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199296057.001.0001/acprof-9780199296057-chapter-3>, (last accessed on 22<sup>nd</sup> Jan. 2014).

<sup>2</sup> B. Shiva Rao (ed.), *The Framing of India's Constitution, A Study* (Delhi, 1967).

the Muslims in a Hindu-dominated society.<sup>3</sup>

Independent India was given the task to tackle the anxieties of the religious minorities that were formed. In a situation where social and cultural identities had been mobilized, there were several imponderables.<sup>4</sup>

### **Minorities in Pre-independence Era**

The non-cooperation and the civil disobedience movement resulted in strong mixture of nationalism and communism feelings. Dr. Ambedkar was invited to the second round table conference in London in 1932, for which he wished to propose separate electorates for the 'untouchables'. Gandhi vehemently opposed this idea as he believed it would further lead to division among Hindus. All this along with Nehru's report, gave rise to a struggle for independence as the prime objective, and issue of caste and minorities became secondary within the Congress. Mohammed Ali challenged this formulation when he proposed that a parity existed between Hindus and Muslims that overrode their demographic imbalance.<sup>5</sup> Similarly, Ambedkar too, reserved his comments on the 'majority' population of India, opposing the formulation. By the time of the Poona Pact of 1932, national identity had come to be aligned with the idea of democratic majority, while communalism was widely understood as the politics of the religious minorities.<sup>6</sup> Thus came the birth of the battle for recognition of minorities in its initial phase of the pre-independent India.

In November 1939, Gandhi brought out demands for Constituent Assembly. In *Harijan* he wrote 'the constituent assembly provides the easiest method of arriving at a just solution of the communal problem. Today we are unable to say with mathematical precision

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<sup>3</sup> Gurpreet Mahajan, *Negotiating Cultural Diversity and Minority Rights in India*, Democracy Conflict and Human Security: Further Readings, Centre for Political Studies, Jawaharlal Nehru University.

<sup>4</sup> *Id.*

<sup>5</sup> Shabnum Tejani, *Indian Secularism: A Social and Intellectual History 1890-1950*, p. 234 Indiana University Press (2008).

<sup>6</sup> *Id.*

who represents whom; but the Constituent Assembly will represent all communities in their respective proportion'.<sup>7</sup> This was passed by the Congress in their resolution in March 1940. Soon after, Jinnah called upon all Indian Muslims to adopt the demand for 'independent states of Pakistan' at the League's session in Lahore.<sup>8</sup> Jinnah argued that the Congress was not a nationalist but a Hindu party, and a constituent assembly could not proceed without the agreement of India's Muslims.<sup>9</sup> The 1946 Cabinet Mission plan identified the threat of communal problems which lay on the premise that the 'Hindus with the greatly superior numbers must be a dominating element'.<sup>10</sup>

After Nehru's statement opposing the plan drafted by the Cabinet Mission for the allotment of proportion of seats to Muslims, Sikh and General, Jinnah launched the Direct Action Day, meant to be a peaceful campaign but ultimately led to widespread communal violence and bloodshed. When the much debated partition became a reality, it was seen by an overwhelming number in the assembly as a result of secessionist politics of the minority.<sup>11</sup> Thereafter, the debate shifted to what constituted a 'minority' and how it was to be defined.

### **Ambedkar's Reasoning for *Dalit* Rights**

Dr. Ambedkar articulated *dalit* rights in the name of rights for untouchables, depressed classes, scheduled castes and tribes in a given historical context.<sup>12</sup> He linked the discontent in the parliamentary democracy to the

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<sup>7</sup> Chaube, Constituent Assembly of India, p. 31, Manohar Publishers and Distributors, Revised edition (2000).

<sup>8</sup> See *supra* note 5 at p. 238.

<sup>9</sup> See *supra* note 5 at p. 239.

<sup>10</sup> N. Manswergh (ed.), Transfer of Power Documents, Vol. VII, p. 583 London, 1977.

<sup>11</sup> See *supra* note 5 at p. 247.

<sup>12</sup> Dr. P. Kesava Kumar, Liberal Democracy and Kymlicka's Conception of Minority Rights: Towards a Perspective of *Dalit* Rights, (30 June 2013), [http://roundtableindia.co.in/index.php?option=com\\_content&view=article&id=6582:liberal-democracy-and-kymlicka-s-conception-of-minority-rights-towards-a-perspective-of-dalit-rights&catid=124&Itemid=140](http://roundtableindia.co.in/index.php?option=com_content&view=article&id=6582:liberal-democracy-and-kymlicka-s-conception-of-minority-rights-towards-a-perspective-of-dalit-rights&catid=124&Itemid=140), last accessed 22<sup>nd</sup> Jan. 2014.

idea of liberalism which had not been delivered to the masses in the right proportion. He did not want the Indian mass to suffer such weakness, and hence propounded a written constitution where the right to liberty, property is envisaged to each person irrespective of their social or economic status. He points out that parliamentary democracy in standing out as a protagonist of liberty has continuously added to economic wrongs of the poor, downtrodden and disinherited class.<sup>13</sup>

Hence, political democracy goes in vain where there is no social or economic democracy which he argues is the tissue and fibre of political democracy. This was the strength of his argument for the *dalits*. He felt the western thought of democracy was more surreal in nature. Even in the Draft Constitution, he emphasized on morality and social customs. He proposed a moral community with right to equality, liberty, and fraternity borrowed from the French philosophy.

Therefore, *dalit* rights, he believed, should be assessed within this political, social and economic framework, where each is judged by what he individually possesses. The idea of reservation for the *dalits*, took a start with Ambedkar's views, and was subsequently added in the Constitution.

### **Constituent Assembly Debates**

Each article in the Constitution has been deliberated upon by the members of the Assembly, and amendments been passed, following which motion was adopted. Minority rights constitute a big mass of the Constituent Assembly debates as this was a sensitive issue at that period. Though 'minority' occurs only four times in the Constitution (Arts. 29, 30, 350A, and 350B) discussion of the concept of 'minority' in India needs to pay due attention to debates that took place in the legislative assembly.<sup>14</sup> The debate on Article 23 (of the Draft Constitution, now in the form of Articles 28 and 29)

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<sup>13</sup> *Id.*

<sup>14</sup> See *supra* note 1.

ensued around the issue of what should constitute minority rights. The original report on Part III of the Constitution prepared by the Committee on fundamental rights did not contain the word 'minority'. K.M Munshi is responsible for bringing the concept of 'national minorities' in Article 30 of the Constitution. However, the word 'minority' only appears in Article 30(1) but is omitted in Article 29. The reason was explained by Dr. Ambedkar as:

"The word is used not only to indicate the minority in the technical sense of the word; it is also used to cover minorities which are nonetheless minorities in the linguistic and cultural sense."<sup>15</sup>

These provisions were inserted to annul any discrimination against the minorities, where the minority claim is based on religion is decided on the numerical basis and on any other yardstick other than religion is decided on the stretched meaning as Dr. Ambedkar has explained, must be construed in the true spirit of the historical jurisprudence and legislative intent.

Moreover, the Constituent Assembly debates inclined more on achieving a socialistic vision of a nation wherein a vast majority lived in poverty, irrespective of caste, creed, or religion than with the tag of 'minority'. Gandhiji propagated:

"...[A]n India, in which the poorest shall feel that it is their country in whose making they have an effective voice; ...an India in which all communities shall live in perfect harmony. There can be no room in such an India for the curse of untouchability or the curse of intoxicating drinks and drugs. Women will enjoy the same rights as men."<sup>16</sup>

In the Assembly's deliberations, the minorities question was regarded as encompassing the claims of three kinds of communities: religious minorities, backward castes and tribals, for all of whom safeguards in different forms

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<sup>15</sup> Dr. Ambedkar, Constitutional Assembly Debates, Vol. VII, Amendment no. 678, 8<sup>th</sup> December 1948, available at <http://parliamentofindia.nic.in/ls/debates/vol7p22.htm>, last accessed on 21<sup>st</sup> Jan. 2014.

<sup>16</sup> M.K. Gandhi, *India of My Dreams*, Published 2009 by Diamond Pocket Books (1947) 9–10.



had been instituted by the British and by princely states during the colonial period.<sup>17</sup> Each group wanted to attain the minority status of some kind, and sought to receive more safeguards than other minority groups. It was argued that only through the retention of their own distinct cultures could members of these communities contribute effectively to the nation.<sup>18</sup> Minorities as backwards classes were connoted on the basis of social and economic backwardness and not on numerical basis as they were a part of the Hindus. However, some argued in keeping with Congress nationalist opinion, that political safeguards were undesirable and that the solution to the problems of these groups lay in the removal of economic and social disabilities.<sup>19</sup>

The demand for separate electorates by the Muslims was one of the key debates of the Constituent Assembly. It was finally rejected by the house on the ground that it would destroy the national character of India and would bring in distinctiveness of communities, and could sabotage the political community. Also religion was a sensitive subject, and the house felt it lies safer outside the political sphere as they were incompatible with secularism principles.

The debate on quotas in services is also an interesting argument. The house passed the quotas as undesirable with the exception of backward communities only for a short run. The reason behind this motion was neither did they want to identify caste in the political agenda, nor did they want to deviate from the principle of equality enshrined in the Constitution.

Reservation in government posts was regarded as undesirable not only for the country but also for the backward castes themselves.<sup>20</sup> Here the most common arguments were that not only would quotas stigmatize

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<sup>17</sup> Rochana Bajpai, *Constituent Assembly Debates and Minority Rights*, Economic and Political Weekly, May 27, 2000, available at [http://www.epw.in/system/files/pdf/2000\\_35/21-22/Constituent\\_Assembly\\_Debates\\_and\\_Minority\\_Rights.pdf](http://www.epw.in/system/files/pdf/2000_35/21-22/Constituent_Assembly_Debates_and_Minority_Rights.pdf), last accessed Jan. 26<sup>th</sup> 2014.

<sup>18</sup> See the statements of Rev Jerome D'Souza, *CAD*, vol. III, p. 296.

<sup>19</sup> See *supra* note 17.

<sup>20</sup> *Id.*

the recipients induce feelings of inferiority among them and stifle initiatives for self-development but also that they would benefit only a few, already privileged sections within the group.<sup>21</sup>

### **Challenges to Protection of Minority Rights: How has Indian Democracy Tackled it?**

The 8<sup>th</sup> Schedule of the Indian Constitution has recognized a variety of languages as the official language. Apart from this, the Constitution also mentions 'National Minority' as Muslim, Christian, Sikh, Parsees and Buddhists.

There is a twofold dimension of minority rights in the current scenario. First, they made community a legitimate subject of political discourse; and second, they placed the issue of inter-group equality on the agenda.<sup>22</sup>

However, it also proposes two basic problems to the Indian democracy, one, it transgresses the right to equality which form a fundamental pillar of the Indian Constitution and two, the minorities recognized are indifferent to the issues of their internal minorities. Thus, while special safeguards provided to identify minorities curb the hegemony of any one community or the nation-state, they do not guarantee free and equal status to all groups and communities in society.<sup>23</sup>

### **Division of *Dalit's* on the Basis of Religion**

The presidential order of 1950 brought about a few amendments to the rights of minorities. It provided the same '*dalit* rights' to Sikh and Buddhist minorities but refused the same to Christian minorities. This order deviated from Articles 14 and 15 of the Constitution and divided the *dalits* on the basis of religion. No explanation was given for the exclusion of Christian although the

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<sup>21</sup> See *supra* note 17.

<sup>22</sup> Emmanuel Nahar, *Minority Rights in India: Christian Experiences and Apprehensions*, *Mainstream Weekly*, Vol. XLV No. 1, (December 23, 2006).

<sup>23</sup> *Id.*

then Union Minister of Welfare and Labour, stated that irrespective of religion economic and social backwardness must be addressed.

### **The Reservation Debate**

A major problem posed by recognition of minority rights is in the field of government employment. The Government in India is the largest employer, and it is thus obvious that the State must follow Article 16(1) which reads: "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".<sup>24</sup> Therefore, the State must observe equality in its own employment mechanism.

However, the plight of minorities even after 6 and odd decades of independence, has not improved as visualized by the founders. One major reason for this is the fact that the Constitution has explicitly provided for qualified rights of minorities over every other class, gives them a handful of opportunities which are being taken for granted. These opportunities have not been utilized to strive and come out of the 'backwardness of the class' but these opportunities are rather being used as a platform to merely conceive employment as they see no other easy way through. This problem is especially seen with the social minorities. Religious minorities do not figure in this particular issue as they have been given a different background of rights under the Constitution. The founders had conceived the idea of reservation in employment, but had clearly stated that this reservation would be in force only for a short period of time, because they were then expected to use the benefits and grow to become on par with the rest of the society. They did not introduce this concept to allow the minorities to misuse the provision to their advantage. This calls for legislative intent while interpreting the Constitution which clearly passed a resolution that quotas are undesirable with the exception of backward communities only for a short run. This short run has been amended by the Parliament several times, and extended up to 2010. The viability of

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<sup>24</sup> Constitution of India, Art. 16.

this extension has been much debated. The bottom line however is, India being the largest democracy must re-analyze the conditions of minorities and re-draw boundaries.

### **Cultural Diversity**

The common tendency when addressing questions of cultural diversity is to treat given communities as near-natural groups, with clearly identified boundaries that demarcate them from other communities.<sup>25</sup> Similarly, when we speak of cultural diversity, it is usually assumed that the communities to be accommodated are empirically given and there is little room for dispute there.<sup>26</sup> These assumption need to be visited yet again due to the varied reactions from the society.

The claims for due recognition of a given identity-based community may come both from the desire to seek some redistribution of goods as well as deeply felt expressive needs. Most often the two are combined, and this poses serious challenges. This shows that the recognition vested today is open to manipulation and hence this poses a serious threat to the very essence of democracy.

The disputes have often concerned claims from ethnic groups on a homeland and territory separated from a certain state or in other cases, demands for autonomy or even secession from the Indian union have been made.<sup>27</sup> The extent and force of these movements are best illustrated in a publication issued in 1995.<sup>28</sup>

One solution to this complex issue is to provide formal

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<sup>25</sup> Gurpreet Mahajan, *Negotiating Cultural Minority and Diversity Rights in India*, Vol. II Democracy, Conflict and Human Security: Further Readings, Idea Publications, [http://www.idea.int/publications/dchs/upload/dchs\\_vol2\\_sec3\\_4.pdf](http://www.idea.int/publications/dchs/upload/dchs_vol2_sec3_4.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> Ingolf Kiesow Nicklas Norling, *The Rise of India: Problems and Opportunities*, <http://www.silkroadstudies.org/new/docs/Silkroadpapers/2007/0701India.pdf>, last accessed Jan. 31, 2014.

<sup>28</sup> P.S. Datta, *Ethnic Peace Accords in India*, New Delhi: Vikas Publishing, (1995).

recognition to the languages of the diverse communities. No tribal language has been made an official language albeit it is spoken by more than a million people.

Giving political and self governance is one way to achieve a united nation, but this thought must go hand in hand with the basic structure of our constitution, as the Indian society still prejudices the position of women to a large extent. Therefore, though there is a pressing need to recognize community desires, at the same time, equal rights of all citizens must not be compromised.<sup>29</sup>

Policies seeking to enhance cultural diversity, must positively acknowledge the existence of minorities, for it to succeed. The enforcement of Special Marriage Act, 1954 was a giant step towards a modern society acknowledging harmonization of communities. This is also a tread towards a uniform civil law.

### **Possible Solutions**

In India the Ministry of Minority Affairs was created on 29th January, 2006 to ensure a more focused approach towards issues relating to the minorities and to facilitate the formulation of overall policy and planning, coordination, evaluation and review of the regulatory framework and development programs for the benefit of the minority communities.<sup>30</sup> The Government also created the National Commission for Minorities Act in 1992.

Yet another solution lies in the task of minimizing communal violence, although it had reduced greatly since the bloody partition. This must be done in a systematic manner, not just by appeasing the minority community to increase vote banks by political parties, but by genuinely creating a harmony between the majority and minority through strong secular policies. What is

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<sup>29</sup> Amrita Basu and Atul Kohli (eds), *Community, Conflict and the State in India*, Oxford: Oxford University Press, (1998).

<sup>30</sup> Dr. Arun Kumar Sharma, *Defining Minorities in India*, IIT HSS Department, [http://www.academia.edu/1438983/Defining\\_minorities](http://www.academia.edu/1438983/Defining_minorities), last accessed 1<sup>st</sup> Feb. 2014.

strengthened, on the one hand, is intra-community rather than inter-community bonds and, on the other, a traditional and more orthodox leadership, which is more insular and hostile to the expression of differences within the community.<sup>31</sup> Distributing freebies, ridiculing the majority, and keeping the minority at the height of every decision are no way of promoting cultural diversity. This would result in ignorance of majority for the benefit of minorities, which would in turn convert the majority into minority, not in terms of numbers but in terms of benefits and advantages.

However, despite the efforts, the current policy tackling minority is creating an adversarial spirit in the civil society and annihilation of Indian civilization.<sup>32</sup> Therefore, there is a need for restructuring of policies and analyzing alternative approaches.

Dr. Arun Kumar Sharma<sup>33</sup> has proposed a four-model alternate approach to solving the minority issue at hand. The first model proposed is the Sarvodaya Model, wherein there is equalization of benefits on all levels and constraint on higher scales of income with more emphasis on morality at the individual level.

The second model proposes the representative educational elite in bureaucracy that is the original demand for caste and community reservation, which serves no good purpose but enhances the British policy of 'Divide and Rule'.

The reflexive affirmative actions calls for a beginning of reverse discrimination whereby the elite from all categories are truncated from the state support, thus implying defining not the backward classes but the forward classes whose share in the power and wealth should be increasingly restricted, be they from any caste

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<sup>31</sup> See *supra* note 25.

<sup>32</sup> Agrawal, S.P., and Aggarwal, J.C., Educational and Social Uplift of Backward Classes: At What Cost and How? Concept Publishing Company, New Delhi.(1991).

<sup>33</sup> See *supra* note 30.

or community.<sup>34</sup>

The western approach is giving preferential treatment to minorities in all walks, but this we have seen only helps in increasing vote banks in the Indian context and is hardly a solution. The benefits of all the models above could be extracted to create a balanced approach.



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<sup>34</sup> *Id.*

## MINORITY RIGHTS AND EDUCATION

Mr. Aditya Mishra\*  
Mr. Suresh Khadav\*\*

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### Introduction

India is the largest democracy of the world. It is a land of religious, cultural and linguistic diversity. Correspondingly we have the division of population into a majority and several minorities on the basis of religious, cultural as well as on linguistic communities.

The basic object of minority protection is to instill confidence in them, create a feeling that they will never be overrun by the majority and to homogenize the pluralities in a civil society and to integrate minorities fully and equally into the national life of the state characterized by the ethos and interest of majority. The term minority occurs only in Articles 29 and 30 of the Indian Constitution. Article 30 recognizes the right of a minority whether based on religion or language to establish and administer educational institutions of their choice and prohibits the state from discriminating against any educational institutions on the ground that it is under the management of a minority. Article 30(1) holds a very special place for the fact that through education alone minorities can conserve their language, script and cultural heritage. It is the most important factor for the development of man as well as of the society. Even the international law recognizes that education is general human right and also crucial part of minority rights.

The Constitution of India uses the word 'minority' or its plural form in some Articles – 29 to 30 and 350A to 350B -but does not define it anywhere. Article 29 has the word "minorities" in its marginal heading but speaks of "any sections of citizens... have a distinct language, script or

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\* Student, 2<sup>nd</sup> year, B.A. LL.B., National Law University and Judicial Academy, Assam.

\*\* Student 2<sup>nd</sup> year, B.A. LL.B., National Law University and Judicial Academy, Assam.



culture". Article 30 speaks specifically of two categories of minorities - religious and linguistic. The remaining two Articles - 350A and 350B - relate to linguistic minorities only. In common parlance, the word "minority" means a group comprising less than half of the population and differing from others, especially the predominant section, in race, religion, traditions and culture, language, etc.<sup>1</sup> The word "Minority" is defined by the Oxford Dictionary as a smaller number or part; a number or part representing less than half of the whole; a relatively small group of people, differing from others in race, religion, language or political persuasion". The United Nations Human Rights Commission appoint a special Subcommittee on the Protection of Minority Rights in 1946 which defines the word 'minority' as those "non-dominant groups in a population which possess a wish to preserve stable ethnic, religious and linguistic traditions or characteristics markedly different from those of the rest of the population."

### **Minority Rights under Article 30 of the India Constitution**

Article 30(1) – the "minorities only" clause that is at the centre of all this.

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

### **Article 30: Right of minorities to establish and administer educational institutions**

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
- (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in

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<sup>1</sup> Khan Arshi, *Exclusion of Minorities in South Asia: Denial, Deprivation And Discrimination*, INDIAN JOURNALS.COM (Feb. 8, 2014), <http://jfmt.indianjournals.com/ijor.aspx?target=ijor:jes&volume=2&issue=1&article=009>.

clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

- (2)** The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 19(1)(g) the “secular provision” that has gained traction as one that protects all citizens including Hindus and minorities from engaging in any activity including education

- (g)** All citizens shall have the right, to practice any profession, or to carry on any occupation, trade or business.

Article 29(1) under “Protection of interests of Minorities” says any section of citizens having a distinct culture, language, or script of its own shall have the right to conserve the same.

The Constitution of India provides certain fundamental rights (Articles 15-17, 25 to 30) and directive principles (Articles 330- 339 and 350) for the benefit of minorities in India.

The rights are protected by a prohibition against their violation, and are backed by a promise of enforcement. They, being part of the Fundamental Rights, are invested with sanctity and a status higher than that of the ordinary law and, consequently, every legal provision or executive action must conform to the mandates implied in them. The prohibition is contained in Article 13 which bars the state from making any law abridging or limiting any of these provisions and threatens to veto any law found inconsistent with. The injunction runs against the whole state which term under Article 12 is defined to include government and Parliament of India and the government and the legislature of each of the states and all local and other authorities. The term 'law' includes

within its amplitude any ordinance, order, bye-law. Rule, regulation, notification, custom or usage having the force of law; and the prohibition binds all such instrumentalities within the state as have legal authority to formulate such law. The promise of enforcement is contained in Article 32 which, conferring practicability to the assertions contained in Article 13, declares that the right to move the Supreme Court by appropriate proceedings for the enforcement of Fundamental Rights is guaranteed and thus imposes a duty upon the highest court to afford protection against any violation and vests a corresponding right in the religious and linguistic minorities to seek remedy in case the rights are threatened with deprivation or infringement. A similar jurisdiction has been conferred upon the High Court's under Article 226. The rights are made justifiable before the courts for double purpose of protecting them against arbitrary action of regulatory authorities wielding the force of state and against excesses of elected legislatures dominated by transient numerical majorities and often swayed by passions and prejudices.<sup>2</sup>

As regards religious minorities at the national level in India, all those who profess a religion other than Hindu are considered minorities, since over 80 per cent [of the] population of the country professes the Hindu religion. At the national level, Muslims are the largest minority. Other minorities are much smaller in size. Next to the Muslims are the Christians (2.34 per cent) and Sikhs (1.9 per cent); while all the other religious groups are still smaller. As regards linguistic minorities, there is no majority at the national level and the minority status is to be essentially decided at the state/union territory level. At the state/union territory level – which is quite important in a federal structure like ours – the Muslims are the majority in the state of Jammu and Kashmir and the union territory of Lakshadweep. In the states of Meghalaya, Mizoram and Nagaland, Christians constitute the majority. Sikhs are the majority community in the state of Punjab. No other religious community among the minorities is a majority in any other state/UT.

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<sup>2</sup> Ranu Jain, *Minority Rights in Education: Reflections on Article 30 of the Indian Constitution*, 40, ECONOMIC AND POLITICAL WEEKLY, 2430, 2437 (2005).

Education is the vehicle by which a child grows to be an independent adult. It is also the means by which cultural values are transmitted and the child is bound to his or her family, community and society. The right to education has a special value as it enables children to increase their chances of having their other rights fulfilled. "Education is the single most important instrument for social and economic transformation. A well educated population, adequately equipped with knowledge and skill is not only essential to support economic growth, but is also a precondition for growth to be inclusive since it is the educated and skilled person who can stand to benefit most from the employment opportunities which growth will provide." The Muslim community should realize that there is a need for systematic transformation of the thinking process and the resulting behaviour through proper education. "In fact our salvation lies in acquiring strong knowledge economies powered by information technology, innovation and education."

Going by the Sachar Committee Report, Muslims were scraping the bottom of the educational barrel of the country. Their enrolment and retention rates at the primary and secondary levels were lower than the national average. Sufficient numbers of educational institutions were not available for Muslims across the country. Equal opportunity was also not available to all sections of Muslims.<sup>3</sup>

Most of their institutions are lacking in infrastructural and instructional facilities. Growth in numbers of their educational institutions has not been accompanied by an improvement in the delivery of quality education.

An important section of children of the Muslim community had involuntarily been excluded from mainstream education on account of their economic, social and cultural status. Concerted efforts were needed to promote access for such children to schooling and other educational resources. "Minorities in general and Muslims in particular should strive hard to harness every

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<sup>3</sup> M.S.A. Siddiqui, *Focus on Education of Minority Communities*, The Hindu, Dec. 19, 2012.

source that could lead them to quality education, quality growth and quality development”.

Given the importance of a knowledge economy, the establishment of educational institutions of global standards ought to become the priority of minority communities. Internationalism in higher education needed to be promoted. The development of self-respect, a strong sense of ethics and inter-faith understanding through education were perhaps the most important mission of educational institutions.

Educational rights for minority groups may be included in states' education systems and also enshrined in their statutes. However, states' laws, their declarations and their educational systems are largely normative statements. For many minority groups, the key issue is whether educational practice actually recognizes those legal obligations and aspirations and provides a full, effective and fulfilling education for their young people.

### **Sachar Committee Report**

The Government of India constituted Justice Sachar Committee for preparation of a Report on the Social, Economic and Educational Status of Muslim Community of India, and Justice Ranganath Mishra Commission for identifying criteria for socially and economically backward classes among the religious and linguistic minorities, and to suggest various welfare measures for Minorities including Reservation.

The members of the Committee visited different parts of the country to assess the grassroots situation and grasp the realities by experience rather than merely with the help of statistics brought to their desks by investigators. The Committee tried to sift the perception of members of the Muslim community (as well as of non-Muslims) and understand the nature and magnitude of the community's grievances, to be able to judge the veracity or otherwise of the expressions of negligence and deprivation.

Most of the grievances of the community are common knowledge and those who have access to the Urdu press

in different parts of the country are fully aware of the endless stories of 'woes' and 'miseries' of the community. But a systematic study of these grievances had to be made and the Sachar Committee ventured to do that. We shall deal with the grievances briefly later but, first, a review of the findings of the Sachar Committee in different areas of its concern.<sup>4</sup>

### **Finding of the Sachar Committee**

The 403-page report, has listed its findings on population growth, literacy levels, employment, health and various other developmental indicators. The Sachar Committee report also put forth recommendations to address the conditions and issues identified as affecting Muslims in India. These include creation of an Equal Opportunity Commission, mechanisms to promote participation of Muslims in public bodies, financial support to help increase employment share, and provisions examining ways of linking *madarsas* to the formalized education and employment structure.

### **Main Recommendations<sup>5</sup>**

- Set up an Equal Opportunity Commission to look into grievances of deprived groups like minorities.
- Create a 'nomination' procedure to increase participation of minorities in public bodies.
- Provide legal mechanism to address complaints of discrimination against minorities in matters of employment, housing, schooling and obtaining bank loans.
- Establish a delimitation procedure that does not reserve constituencies with high minority population for SCs.

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<sup>4</sup> Anees Chishti, *Sachar Committee Report: A Review*, XLV, MAINSTREAM WEEKLY (2006).

<sup>5</sup> Priya Parker, *Summary of Sachar Committee Report: High Level Committee to examine the socio-economic and educational status of the Muslim community in India*, PRS LEGISLATIVE RESEARCH, (Feb. 8, 2014) <http://www.prsindia.org/parliamenttrack/report-summaries/sachar-committee-report-high-level-committee-to-examine-the-socio-economic-and-educational-status-of-the-muslim-community-in-india-660/>.

- Initiate and institutionalize a process of evaluating contents of textbooks to purge them of explicit and implicit material that may impart inappropriate social values, especially religious intolerance.
- Create a National Data Bank (NDB) where all relevant data for various socio-religious categories are maintained.
- Set up an autonomous assessment and monitoring authority to evaluate the extent of development benefits.
- Encourage the University Grants Commission to evolve a system where part of allocation to colleges and universities is linked to diversity in student population.
- Facilitate admissions to the most backward amongst all socio-religious categories in regular universities and autonomous colleges and evolving alternate admission criteria
- Provide different types of affirmative action to three main Muslim groups (Ashrafs, Ajlafs and Arzals): Designate Arzals Muslim group as most backward classes as they need multifarious measures, including reservation. Provide Hindu-OBC-type attention to Ajlaf Muslim group.
- Provide financial and other support to initiatives built around occupations where Muslims are concentrated and that have growth potential.
- Increase employment share of Muslims, particularly where there is great deal of public dealing. Working out mechanisms to link *madarsas* with higher secondary school board.
- Recognize degrees from *madarsas* for eligibility in defense, civil and banking examinations.
- Provide hostel facilities at reasonable costs for students from minorities on a priority basis.
- Promote and enhancing access to Muslims in 'Priority Sector Advances'.
- Include in teacher training components that introduce importance of diversity and plurality and sensitizing teachers towards needs and aspirations of Muslims and other marginalized communities.
- Open high quality Urdu medium schools wherever they are in demand and ensuring high quality textbooks for students in the Urdu language.

- Draw Muslims on relevant interview panels and boards.
- Improve participation and share of minorities, particularly Muslims, in business of regular commercial banks.
- Set up a national Wakf development corporation with a revolving corpus fund of Rs. 500 crore.
- Create new cadre to deal with specific Wakf affairs.

The government approved 72 of 76 recommendations made by the Sachar Committee, while rejecting three of them and deferring a decision on another. The government rejected three of its recommendations to enumerate castes as a part of its decennial census exercise. The government also turned down the Committee's recommendations to have a new all India cadre of officer to manage state Wakf Boards and the Central Wakf Council, besides having an alternative admission criterion to facilitate admission of the most backwards among all socio-religious categories (SRCs) in universities and autonomous colleges.

After the implementation of Recommendation made by the Sachar Committee Recruitment of minorities had increased in government jobs, security forces and the banking sector, and simultaneously priority sector lending for minorities had gone up from 9 per cent to 15 per cent. Besides, 40 lakh scholarships were awarded to minority students, and minority-specific development programmes implemented in as many as 90 minority-concentration districts.<sup>6</sup>

### **Supreme Court Judgment: Minority Education Right**

The recent Supreme Court judgment on the educational rights of minorities does not adequately reflect international trends for strengthening protection of minority rights. There is a need to rethink and reformulate minority rights, and enact a central law providing for multi-culturalism and pluralism along with inter culturalism in all educational institutions, with the provision that minorities will have unfettered right to

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<sup>6</sup> Manmohan, *Minorities have benefited after Sachar Committee Report*, THE HINDU, Dec. 30, 2011.



regulate their admission without resorting to exclusion of non-minorities<sup>7</sup>. The Supreme Court takes them as a protective arrangement.

In its 2005 judgment in *Bal Patil v. Union of India*, the court said: "The group of Articles 25 to 30 of the Constitution, as the historical background of partition of India shows, was only to give guarantee of security to the identified minorities and thus to maintain integrity of the country." The apex court, in its 2005 judgment, felt that the special guarantees and protection to the religious, cultural and educational rights of minorities was guaranteed as a fundamental right in the Constitution, in the backdrop of the bloody partition, to allay apprehensions and fears in the minds of Muslims and other religious communities.<sup>8</sup>

"Such protection was found necessary to maintain unity and integrity of free India because even after partition, communities like Muslims and Christians in greater numbers living in different parts of India opted to live in India as children of its soil."

In *T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.* the larger bench of the Supreme Court headed by Chief Justice B.N. Kirpal held that 'the state governments and universities cannot regulate the admission policy of unaided educational institutions run by linguistic and religious minorities, but state governments and universities can specify academic qualifications for students and make rules and regulations for maintaining academic standards. The same principle applies in the appointment of teachers and other staff and an unaided minority educational institution would be free to hire as it pleased as long as some essential qualifications were adhered to. Minority educational institutions would have to comply with conditions laid down by universities or boards to get recognition or affiliation. They have the right to admit

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<sup>7</sup> Iqbal A Ansari, *Minority Rights in Education: Reflections on Article 30 of the Indian Constitution*, 38 ECONOMIC AND POLITICAL WEEKLY 1827,1829 (2003).

<sup>8</sup> Dhananjay Mahapatra, *Statute ensures minorities rights*, THE TIMES OF INDIA, Apr. 6, 2007.

students of their choice, but subject to an objective and rational procedure of selection and compliance of conditions if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them scholarships. The admissions should be on merit and be conducted in a transparent manner.<sup>9</sup>

The court further held that commercialization of education was not permissible. The *Unni Krishnan's* case was partly overruled to the extent of scheme relating to the grant of admission and the fixing of the fee as it was not considered to be correct. The court also overruled the decision in *St. Stephen's* case where it had held that minority educational institutions were free to reserve seats up to 50% for minority students. The court has now empowered the states to fix quotas for minority students taking into account the type of institution, population and educational needs of the minorities.

It said the minorities initially recognized were based on religion and on a national level, for example Muslims, Christians, Anglo-Indians and Parsis.

However, it had sounded a warning against vote bank politics based on divisive tactics and underlined that "the constitutional ideal, which can be gathered from the group of articles in the Constitution under Chapters Fundamental Rights and Fundamental Duties, is to create social condition where there remains no necessity to shield or protect rights of minority or majority."

## Conclusion

Treating unequals as equal is as bad as treating equals as unequals. Our Constitution provides for equality for equality of opportunity to all but meting out equal treatment to those who did not start off equally in the first place means treating unequals as equals. Minorities in India have had to face adverse discrimination and, therefore, do not stand on equal footing with others, which made the framers of the Constitution, through

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<sup>9</sup> All India Taleemi Ghar Lucknow, (Feb. 8, 2014), <http://www.feduni.org/TMA-V-Karnataka.asp>.

Article 29 and Article 30, accord special rights to the people who form religious or linguistic minority in India.<sup>10</sup> There are excellent minority educational institutions which have been rendering quality education at moderate costs before the capitation fee menace began warranting judicial intervention. The situation is different today because of the policy of liberalization, politics of conversion, and the compulsions of democratic governance. Minority institutions which continue to administer educational institutions in the spirit of service (and not profiteering) have nothing to lose or fear from the judgment.

The subject of minority education rights is a sensitive issue. At the same time the educational process has the potential to effectively facilitate and strengthen mutual respect and understanding between the various communities within States.



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<sup>10</sup> Kamaluddin Khan, *Educational rights of minorities*, (Feb.8, 2014), [http://twocircles.net/legal\\_circle/educational\\_rights\\_minorities\\_kamaluddin\\_khan.html](http://twocircles.net/legal_circle/educational_rights_minorities_kamaluddin_khan.html).

## **SECULARISM TO PROTECTIONIST REGIME: A CRITICAL ANALYSIS**

**Ms. Nabeela Siddiqui\***  
**Mr. Mohd. Haider Abbas\*\***

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While writing a critical commentary on the constitution of India, Seervai confessed that no chapter has given him more anxious thought than Chapter 7 on the Right to Freedom of Religion. The learned author says that the founding fathers rightly made freedom of conscience and freedom of religion a fundamental right.<sup>1</sup> India is a pluralistic society and a country of religions. It is inhabited by people of many religions. The framers of the Constitution thus desired to introduce the concept of secularism, meaning state neutrality in matters of religion. They also wanted to confer religious freedom on various religious groups. Religion has been a very volatile subject in India both before and after Independence. The Constitution therefore seeks to ensure state neutrality in this area.<sup>2</sup>

Religious tolerance and equal treatment of all religious groups are essential part of secularism. Secularism in India does not mean irreligion. It means respect for all faiths and religions. The State does not identify itself with any particular religion.<sup>3</sup> The Supreme Court of India explained the significance of the secular character of the Indian polity thus:

“There is no mysticism in the secular character of the State. Secularism is neither anti-God nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of State and ensures that no one shall be discriminated against on the ground of religion. The Constitution at the same time expressly guarantees freedom of

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\* Student, B.A. LL.B., Aligarh Muslim University, Aligarh.

\*\* Student, B.A. LL.B., Aligarh Muslim University, Aligarh.

<sup>1</sup> Seervai, *Constitutional Law of India*, (1993) 4<sup>th</sup> ed. Vol. 2 1271.

<sup>2</sup> M.P. Jain, *Indian Constitutional law*, (2005) 5<sup>th</sup> edition Reprint.

<sup>3</sup> Dr. Radhakrishnan, *Secularism in India* (ed. V.K. Sinha) 127 (1968); P.B. Gajendragadkar, *Indian Parliament and Fundamental Rights* (TLL); N.A. Subramaniam, *Freedom of Religion*, 3 JIL 323 (1961).

conscience and the right freely to profess, practice and propagate religion. The Constitution makers were conscious of the deep attachment the vast masses of our country had towards religion, the sway it had on their minds and significant role it played in their lives. To allay all apprehensions of interference by the legislature and the executive in matters of religion, the rights mentioned in Articles 25 to 30 were made a part of the fundamental rights and religious freedoms contained in those articles were guaranteed by the Constitution.”<sup>4</sup>

In *Bommai*<sup>5</sup>, a nine judge bench of the Supreme Court referred to the concept of secularism in the India context.

According to Justice Sawant, J.:

“.... Religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution....”

B.P. Jeevan Reddy, J. observed:

“.... While the citizens of this country are free to profess practice and propagate such religion faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally.”

The concept of secularism is not merely a passive attitude of religious tolerance. It is also a positive concept of equal treatment of all religions. The concept of secularism was not expressly incorporated in the Constitution at the stage of its making. However, its operation was visible in the Fundamental Rights and Directive Principles. The concept of secularism, though not expressly stated in the Constitution, was, nevertheless, deeply embedded in the constitutional philosophy.

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<sup>4</sup> The Ahmedabad St. Xavier's College Society v. State of Gujarat, AIR 1974 SC 1389.

<sup>5</sup> S.R. Bommai v. Union of India AIR 1994 S.C. 1918; (1994) 3 SCC 1.

In 1976, through 42<sup>nd</sup> Amendment of the Constitution, the concept of secularism was made explicit by amending the preamble. By this Amendment, the word “secular” was introduced in the Preamble to the Constitution and, thus, what was hitherto implicit was made explicit. The Constitution does not define the term secular as it is a very elastic term and not capable of any precise definition and so it is best left undefined. A Secular state does not extend patronage to any particular religion.<sup>6</sup>

Verma, J., delivering the majority opinion in *M. Ismail Faruqui v. Union of India*,<sup>7</sup> observed in relation to the concept of secularism:

“It is clear from the Constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasizing that there is no religion of the state itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in the manner the concept of secularism embodied in the Constitutional scheme as agreed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one faced of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.”

The right of worship was granted by court for man to worship as he pleased. There can be no compulsion in law of any creed or practice of any form or worship.<sup>7</sup> Man is not answerable to the State for the variety of his religious views.<sup>8</sup>

In *S.R. Bommai v. Union of India*<sup>9</sup>, the Supreme Court has held that “Secularism is a basic feature of the Constitution”. The state treats equally all religions and religious dominations.

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<sup>6</sup> M.P. Jain, *Indian Constitutional Law*, (2005) 5th ed. Reprint.

<sup>7</sup> *Cantwell v. Connecticut*, (1931) 310 U.S. 29.

<sup>8</sup> *United States v. Ballard*, (1944) 322 U.S. 78.

<sup>9</sup> See *supra* note 7.

The word “religion” has not been defined in the Constitution and has been held to be hardly susceptible of any rigid definition. Religion is certainly a matter of faith and is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent First Cause. A religion has undoubtedly its basis in a system of beliefs and doctrines which are regarded by those who profess that religion as conducive to the spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept it: it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms an observances might extend to matters of food and dress. Religion in its broadest sense includes all forms of faith and worship, all the varieties of man’s belief in a Superior Being or a Moral Law.<sup>10</sup>

A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well. If, therefore, the tenets of Jainism or Parsi religion lay down that certain rights or ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character, simply because they involve expenditure of money or employment of priest or use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to secular authority or prohibit them in any manner they like under the guise of administering the trust estate.<sup>11</sup>

According to Dr. Radhakrishnan: “Religion is the code of ethical rules and also means rituals, observances, ceremonies and modes of worship which are its outer manifestations. It can be identified with feelings, emotions, sentiments, instincts, cult, perception, conscience and belief or faith”.<sup>12</sup> J. Clayton Feaver says,

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<sup>10</sup> P.M. Bramadathan Nambooripad v. Cochin Devaswom Board, AIR 1956 Travancore 19 (FB) para 12.

<sup>11</sup> Ratilal Panchand Gandhi v. The State of Bombay, AIR 1954 S.C. 388 para 12.

<sup>12</sup> S. Radhakrishnan, *An Ideal View of Life*, Ch. III, p.84.

“Religion aims at unification, and being all inclusive and co-extensive with the whole of life.... It does not simply to be one phase of experience among many existing side by side with others and on equal terms. It means to intensify, vitalize, and enhance every human function and activity”.<sup>13</sup>

The courts too, have always admitted difficulty of defining the term ‘Religion’. And in *Adelaide Company’s* case, the court observed that “it would be difficult if not possible to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist or have existed, in the world.”<sup>14</sup>

Field J. of Supreme Court of U.S.A in *Davis v. Beason*<sup>15</sup> observed that , the term “religion” has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his been and character and of obedience to his will.

In *Sardar Syedna Tahir* case<sup>16</sup> McChogla while dealing with the constitutionality of the Bombay Prevention of Excommunication Act 1949 defined religion as a matter of man’s faith and belief. It is a matter concerning a man’s contact with his creator. It has nothing to do with the manner in which the practice is accepted or adopted as forming part of a particular faith or religion. Thus, Chagla J. followed what has been devised by Field’s in *Davis v. Beason*. Supreme Court while dealing with the case of *L.T. Swamiar*<sup>17</sup>, said: “Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic”. Though the Supreme Court related the term religion with a “belief in God or Creator” in 1889, yet more or less a liberal approach was made and some constitutional protection was given to the religions which do not believe in God as they have done to Christianity.

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<sup>13</sup> J.C. Feaver, Religion in philosophical and cultural perspective, p.11.

<sup>14</sup> *Adelaide Company of Jehovah’s Witness, Inc. v. The Commonwealth*, 67 CLR 116 (1943).

<sup>15</sup> *Davis v. Beason*, 133 US 333 at 342 (1889).

<sup>16</sup> *Sardar Syedna Tahir v. Moasaji*, AIR 1953 Bombay, p. 188.

<sup>17</sup> *The Common Hindu Religions Endowments v. L.T. Swamiar* (1954) S.C.R. 1023.



The definition of Religion has been widened by the Supreme Court of USA so as to include religions like Buddhism as it stated in *Fowler v. Rohde Islands* case<sup>18</sup> that Methodist Presbyterian or Episcopal Ministers, Catholic Priests, Muslim Mullas, Buddhist Monks could preach to their congregation in Pawtucket's Part with impunity. Thus, Judiciary in India has adopted a comprehensive and liberal derived definition of the term religion so as to suit heterogeneous, multi-religious community in India and to give enough latitude to various faiths and denominations reasonable opportunity to exercise basic freedom granted under Articles 25 and 26 of the Constitution of India. But it has its own limitations and this has limited considerably the autonomy of religious life.

In *Ghulam Abbas v. State of Uttar Pradesh*<sup>19</sup>, in a writ petition under Article 32 the Supreme Court enforced the customary religious rights of the *Shia* community on a piece of land. The Court said that the State could not interfere with the established customary rights to perform their religious ceremonies and functions. In a landmark judgment in *Santosh Kumar v. Secy. Ministry of Human Resources Development*<sup>20</sup>, the Supreme Court has held that introduction of Sanskrit language as a subject in Central Board of Secondary Education (CBSE) is not against secularism as it is the "mother of all Aryan languages". This is when the deviation of judiciary in interpreting the essence of religious freedom began.

Therefore the norm that only such practices as are essential an integral part of a religion needs to be protected. It therefore falls upon the courts to decide, on the basis of evidence adduced before them concerning the conscience of the community and the tenets of the religion concerned, whether a practice for which protectionist claimed is "religious" in character, and, if so, whether it is an essential and integral part of the said religion or is merely "secular or superstitious in nature".<sup>21</sup>

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<sup>18</sup> 345 US at 69, L.Ed. 828 (1943).

<sup>19</sup> AIR 1981 SC 2168: (1984) 1 S.C.C. 81.

<sup>20</sup> AIR 1995 S.C. 293.

<sup>21</sup> Commissioner Hindu Religious Endowments v. Lakshmindra Swamiar, AIR 1954 S.C. 282: 1954 S.C.R. 1005.

As the Supreme Court has observed in the case noted below:<sup>22</sup>

“What constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.”

The judicial role in this area has been described by the Supreme Court as follows:

“The Court, therefore, while interpreting Articles 25 and 26 strikes a careful balance between the freedom of the individual or the group and regard to religion, matters of religion, religious belief, faith or worship, religious practice or custom which are essential and integral part and those which are not essential and integral and the need for the state to regulate or control in the interest of the community”.<sup>23</sup>

James Mill, *History of British India* in which he laid the foundation for a communal interpretation of Indian history provided the justification for ‘Two Nation theory’. He was the first historian to develop the thesis of dividing Indian history into three periods, which he called Hindu Civilisation, Muslim Civilisation and British Civilisation. Mill’s nomenclature was based on religious aspect. Mill was severely critical of Hindu culture and described it as being backward in progress and anti-rational. This led to Indian historian having defined Hindu Civilisation even if it meant over glorifying the ancient past. Communal interpretation of Indian history is of poor quality. If the assumption is weak in evidence and support, they must be disregarded. The study of History should be the social change, set-up, administration etc., not on the basis of ruler to which he belongs.

The modern secular historian understood the terminology used by the contemporary historian to apply to the whole society. Conflict to the ruling class is understood to conflict at a social level. Sultan Allauddin

<sup>22</sup> H.H. Srimadh Pararulala Ethiraja Ramanuja Jeeyar Swami v. State of Tamil Nadu, AIR 1972 S.C. 1586, at 1593.

<sup>23</sup> A.S. Narayana v. State of Andhra Pradesh, AIR 1996 S.C. 1765, 1792: (1996) 9 S.C.C. 548.

Khilji took strong measures to suppress rebellious Hindu *Zamindars* (along with no less strong measures to suppress the Muslim *Iqtadars*, including very pious people who had nothing to with the rebellions).

The Nationalist Historians<sup>24</sup> tried to meet the challenge of communalism with all sincerity but unfortunately they chose to fight the adversary on his ground. Communal Historians praise Akbar's liberal policy to isolate other medieval rulers. When we study the history of society rather than history of individual our whole communal approach will change. Tension within ruling class for obvious political and economic reasons is often given a religious or ideological colour.

It is a great question why communalism arose and grew in modern India from last hundred years. We note that both nationalism and communalism are the products of a similar modern process the growing economic, political and administrative unity of the country.

According to Dr. Romila Thapar and Sri Harbans Mukhiya communalism was not in existence in the ancient and medieval period. It means that it is a product of modern Indian nationalism is an ideology that develops in identity of common interest of Indian people, in particular gains the common enemy, foreign imperialism. On the other hand communalism is developed in section and certain area.

Communalism is generated by the lack of deeper penetration of nationalist outlook and ideology. New national identity is needed. Identity around religion was of course cannot only be one available. Caste, language, tribe, region can serve the purpose.<sup>25</sup> Historian uses the term Hindu leaders and Muslim leaders.

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<sup>24</sup> Bipin Chandra, "COMMUNALISM AND WRITING OF INDIAN HISTORY".

<sup>25</sup> The One Man Commission of Inquiry by a sitting Judge of the Bombay High Court, Mr Justice B.N. Srikrishna, was appointed on January 25, 1993 to enquire into Bombay riots and subsequent serial bomb blast. It started functioning in April 27, 1993. It was dissolved by Shiv Sena-BJP Government on January 23, 1996 when it came to power. On May 27, 1996 it was revised on the suggestion of Atal Bihari Vajpayee during his short spell of Premiership. The Commission ended recording of evidence of July 3, 1997. A total of

“It is also due to the lack of secular approach and deeper penetration of nationalism. Nationalism can’t make appeal against communalism because religious elements are there. Our educational institutions, mass media, including newspapers and All India Radio and political parties have made no efforts to disseminate among people a modern scientific understanding and awareness of nationalism. They have failed to spread a nationalist outlook. Their appeal to nationalism against communalism leaves a large number of people cold.”

Communal violence though not in India, has entered into a new phase. It has not only engulfed just the political terrain of parties and elections but has penetrated deeply into socio-cultural roots and religious mainstay of this ancient civilization. The cultural ethos stood for unity and integrity. To perpetuate this unity in diversity the modern India has wedded herself to secular democracy. These very ideals are being challenged and are sought to be replaced by communally charged ideology of Hindu Rashtra and Hindutva. Publication of the Justice B.N. Srikrishna Commission Report, 1998 testifies how ugly could be the face of communalism, what holocaust it can cause and what miseries it would inflict on the victims just to ensure some peoples ascendancy to state power. Probably no other enquiry into communal violence ever since independence was so much thorough, discreet, fair and forth right than the Srikrishna Commission enquiry into the Bombay rights of December 1992, January and March 1993 in the wake of demolition of Babri Mosque on December, 6 1992 by votaries of *Hindutva*, the Sangh Parivar<sup>26</sup>. Violence is not a new social phenomenon of modern India. It has existed in some form or the other. According to Andre Beteille violence takes different forms in a democratic society.

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504 witnesses were examined by the Commission (Deccan herald, August 8, 1998. The report consist of two volumes and runs into 800 pages with 24 pages of “Memorandum of Action to be taken”).

<sup>26</sup> “We will never be able to reckon the scope and extent of violence inflicted on the disadvantaged members of society and tolerated by them in their everyday life,” Andre Beteille, “Modernity and Morality”. Times of India, 29, October, 1998 ([www.timesofindia.com/today/29edit9htm](http://www.timesofindia.com/today/29edit9htm)).

## Recent Communal Activities

- **2,500 people killed in 8,473 riots in last decade: Government states**<sup>27</sup>

In an alarming trend, more than 2,500 people have been killed in incidents of communal violence in the country since 2002, out of which 107 lost their lives this year alone. A total of 2,502 people died in 8,473 incidents of communal disturbances across the country during the decade. 28,668 people were also injured in these riots, according to Union Ministry of Home Affairs statistics. 107 people have been killed in 479 riots, including the recent Muzaffarnagar violence, this year till September 15, 2013. Altogether 1,697 people were also injured in these riots which have taken place in different parts of the country.

- **107 killed in riots this year; 66 Muslims, 41 Hindus**<sup>28</sup>

Perhaps for the first time, the government has identified the religion of victims of communal violence across the country, saying of the 107 people killed so far this year, 66 were Muslims and 41 Hindus. The worst scenario has emerged from Uttar Pradesh, where twice as many Muslims lost their lives than others. According to a Union home ministry document, U.P. recorded 62 deaths (42 Muslims and 20 Hindus) in communal violence, the highest in the country. India's most populous state and politically crucial state had recorded the highest number of deaths (39) in communal unrest in 2012 as well. U.P. saw 93 riots in the first nine months of 2013 along with 108 incidents of tension. A total of 219 Muslims and 134 Hindus were injured. The statistics come at a time when western UP's Muzaffarnagar district is limping back to normalcy after bloody riots in which at least 48 people were killed and more than 50,000 displaced from their homes. The frequency of flare-ups in UP, which has 80

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<sup>27</sup> <http://www.rediff.com/news/slide-show/slide-show-1-2500-people-killed-in-8473-riots-in-last-decade-govt-stats/20130922.htm> (retrieved on 6.02. 2014 at 10:58 a.m.).

<sup>28</sup> <http://www.hindustantimes.com/india-news/newdelhi/107-killed-in-riots-this-year-66-muslims-41-hindus/article1-1126579.aspx> (retrieved on 6.2.2014 at 11.a.m.).

Lok Sabha seats, has triggered talk of conspiracies to polarise voters on communal lines in the run-up to the general elections due in 2014. The Home Ministry's statistics, circulated among members of the National Integration Council, indicate the administrative machinery often does not respond effectively when minorities are targeted. Overall, till September 15, the country saw 479 riots. Altogether 1,697 people including 794 Hindus, 703 Muslims and 200 police officials were injured. The home ministry compiles the data on the basis of reports from the state governments. Dr Syed Zafar Mahmood of Zakat Foundation said he had his doubts about the accuracy of the official statistics, suggesting they did not capture the complete picture. "It is much worse," he said.

"There are camps after camps full of people who fled their homes during the Muzaffarnagar riots. Why are they only full of Muslims?"

In Maharashtra, 10 people were killed and 271 injured in 56 incidents of communal violence. Seven of the 10 killed were from the minority community. Of the injured, 101 were Hindus, 106 Muslims and 64 police officials. Bihar saw 40 communal disturbances, 25 incidents of tension-like situation and recorded nine deaths - five Hindus and four Muslims. Among the injured, 123 were Hindus, 66 Muslims and 19 police officials. Gujarat saw 54 cases of communal violence, 21 of tension and recorded six deaths - three Hindus and three Muslims. The injured included 85 Hindus, 57 Muslims and five police personnel. In 2012, the country had seen 640 incidents of communal violence and 93 deaths - 48 Muslims, 44 Hindus and one police official. A total of 2,067 people were injured. The injured included 1,010 Hindus, 787 Muslims, 222 police officials and 48 others. Among the injured, 266 were Hindus, 197 Muslims and 25 police officials. Maharashtra had recorded 94 riots, 208 incidents of tension and 15 deaths - nine Muslims and six Hindus - in 2012.

Among the injured, 110 were Muslims, 97 Hindus, 44 police officials and 29 others. Madhya Pradesh had recorded 89 incidents of communal disturbance, 92 of tension and deaths of five Muslims and four Hindus in

2012. Among the injured 146 were Hindus, 80 Muslims and 15 police officials. In West Bengal, eight Muslims and one Hindu were killed, while 38 Muslims and 19 Hindus suffered injuries in 23 cases of communal disturbance and 21 of tension in 2012. There were 20 riots and 30 incidents of tension in Bihar last year, leading to the death of three Hindus. A total of 87 Hindus and 52 Muslims were injured. Gujarat had seen 57 incidents of communal disturbance, 20 of tension and recorded the death of four Hindus and one Muslim in 2012. The injured included 91 Muslims, 82 Hindus and 28 police officials.

### • **Chronology of communal violence in India<sup>29</sup>**

One of the first major communal riots took place in August 1893 in Mumbai in which about a hundred people were killed and 800 injured. The period between 1921 and 1940 marked a particularly difficult phase. The 1926 Muharram celebrations in Calcutta were for example marred by a clash that led to 28 deaths. India witnessed its worst communal riots in 1948 after the partition. Noakhali in Bengal and several villages of Bihar were the worst hit. The first major riots between Hindus and Muslims after the bloodshed of partition in 1947 occurred in Jabalpur in Madhya Pradesh in 1961. 1969 Ahmedabad riots: Communal riots between Hindus and Muslims erupted in Ahmedabad in 1969.

At least 1000 people had died during this riot. At the time there was a dispute over the leadership of the Congress party between Indira Gandhi and Morarji Desai. Hindu-Muslim riots broke out in Jamshedpur and Aligarh in 1979 and in Moradabad in 1980. 1984 Sikh riots: The assassination of Prime Minister Indira Gandhi on October 31, 1984 sparked riots that lasted 15 days. Several inquiry panels later, eight people were convicted. The politicians and police got away. The mayhem began at about 6 p.m. shortly after the death of Indira Gandhi was announced at the All India Institute of Medical Sciences, Delhi. The news set the tone for a communal

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<sup>29</sup> <http://www.hindustantimes.com/news-feed/archives/chronology-of-communal-violence-in-india/article1-8038.aspx> (retrieved on 6.02.2014 at 11:03 a.m).

massacre that India hadn't quite witnessed since Independence.

Chaos reigned on the streets and locality after locality in the capital echoed with the shrieks of the dying and burning people. A fortnight of carnage saw over 2,700 dead and many thousands injured. "President Zail Singh wanted the army to act, but it didn't. The then prime minister and home minister did not take his calls," recalls Tarlatan Singh, who was Zail Singh's press secretary. The worst affected areas were the ones that had elected Congressmen HKL Bhagat and Sajjan Kumar to the Lok Sabha. Yet the police could do nothing to lay their hands on them.

**1987 Meerut riots:** The riots began on May 21, 1987 and continued for two months. The state police conducted a probe but all cases were later withdrawn by the state. The armed personnel accused went scot free. As with most riots, there are conflicting versions on what set this one off: burning of mills or a reaction to the carnage by the Provincial Armed Constabulary (PAC) person.

A majority claim it was the armed police. The PAC men wanted to arrest a man from the Hashimpura area but were stopped by a mob. When the uniformed men tried to force their way in, the crowd became violent. The PAC called in reinforcements and retaliated instantly. About 40 bodies were later found floating in the canal near Maliana village. This ignited communal passions and Meerut was soon on fire. Within hours, over 350 shops in the city and three petrol pumps had been burnt. In the following two months, 350 people were killed, among them prominent residents including a doctor from Hapur and an army captain.

Rationality took the backseat as one set of residents instigated massacres against another. It took several weeks for a 13,000-strong army detachment to restore peace in Meerut. The Uttar Pradesh government, under pressure from the Rajiv Gandhi government, withdrew hundreds of cases from district courts in Meerut. As a result, there were no convictions. The PAC, having terrorised a large section of Meerut, was the biggest gainer-and justice the biggest loser.



**1989 Bhagalpur riots:** On October 23, 1989 began the month-long riots triggered by police atrocities. Of the 864 cases filed by the police, 535 were closed and most accused acquitted for lack of evidence. Following police atrocities in 1989, the silk city of Bhagalpur saw massacre and arson in which over 1,000 people died, nearly 50,000 were displaced and 11,500 houses torched.

In the carnage, an army major herded 100 men, women and children to a house at Chanderi village and posted the local police for their protection. The next morning, however, he found the house empty. Four days later, 61 mutilated bodies were found in a nearby pond, among them a live Malika Bano whose right leg had been chopped off. Bano narrated a story that continues to haunt Bhagalpur.

On the night of October 27, a frenzied mob took over the house from the police, slaughtered the people hiding inside and tossed their bodies in the pond. Of the 864 cases registered by the Bihar Police, chargesheets were filed in only 329 cases. In 100 of these, the accused were acquitted for want of evidence. Chanderi was no different. Of the 38 accused, only 16 were convicted and sentenced to rigorous life terms, while 22 were acquitted.

The Babri masjid demolition set off riots between December 1992 and January 1993. The Sri Krishna panel examined 502 witnesses, but no police officer has yet been punished.

**1992 Mumbai riots:** Hours after the demolition of the Babri masjid, Mumbai erupted. For five days in December 1992 and then again for a fortnight in January, the city witnessed unprecedented riots. As many as 1,788 people were killed and property worth crores of rupees destroyed.

On January 25, 1993, the Maharashtra government set up the Sri Krishna Commission of Inquiry, which recorded the evidence of 502 witnesses and examined 2,903 exhibits. But three years later, on January 23, 1996, the BJP- Shiv Sena government wound up the commission, only to reinstate it later under public

pressure. The commission finally submitted its report on February 16, 1998. Of the 17 police officers who were formally charged in mid-2001, not one has been arrested so far. Even departmental action has not been initiated against them. In April this year, former city police commissioner RD Tyagi and eight serving police officers accused of killing nine people, were discharged by a Mumbai sessions court.

**2002 Gujarat riots:** On February 27, 2002 suspected Muslim mob attacked a train carrying activists of the Vishwa Hindu Parishad (VHP) back from the disputed holy site of Ayodhya. The attack left 58 Hindu activists dead.

The episode resulted in major riots, which left many Muslims dead in Gujarat.

- **Lucknow:** Alleging spurt in incidents of communal violence in SP regime, BSP members today said that at least 12 communal riots had taken place due to failure of the government in past one year.<sup>30</sup>

"The SP government has failed to check communal violence in the state. In past one year at least 12 communal riots have taken place", leader of Opposition Swami Prasad Maurya said during question hour in the Assembly.

Maurya said that in BSP's four term in Uttar Pradesh not a single incident of communal tension was reported but as soon as Samajwadi Party formed the government the situation has changed. Replying to him, Parliamentary Affairs minister Mohammad Azam Khan said that in Bahujan Samaj Party regime their men were involved in loot, rape and other such activities and now as they did not have any work they were vitiating communal atmosphere of the state. The discussion started on question of BSP member Dharmpal Singh, who sought to know from the government whether

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<sup>30</sup> [http://articles.economictimes.indiatimes.com/2013-03-12/news/37651104\\_1\\_communal-violence-prasad-maurya-bsp](http://articles.economictimes.indiatimes.com/2013-03-12/news/37651104_1_communal-violence-prasad-maurya-bsp) (retrieved on 06.02.2014 at 11:04 a.m.).

national integration department of the state have formed integration committees in district level.

In his reply, concerned minister Brahma Shankar Tripathi said that out of 75 districts he got information in this regard from 44 districts and response was awaited from the rest of the districts. The member alleged that government was not serious in forming these committees. Amidst noisy scenes, Speaker Mata Prasad Pandey asked opposition to raise the matter in the House during discussion on law and order later in the day.

There are several factors which are responsible for the disintegration of the country but here we shall be dealing with the most important factor, which is very frequently misused by political pandits, general public and even by administrative agencies just trivial and temporary gain. Today, main factor in communal tension is political vote banking. The leaders are playing a vote bank policy without bothering the consequences in future. Their basic strategy is to calculate how much seats they shall gain with maximum disintegration and minimum efforts. They even go to the extent of dividing the common public in Hindu-Muslim, Upper Caste- Lower Caste, Northern-Southern, and Hindi-English etc. The basic need that is public interest is always veiled. In 1907, the Hindu Mahasabha was formed for the protection and promotion of the interest of the Hindus. Their outlook towards all problems was from a communal angle. Some other Religious-Political parties were formed during the process namely Bharatiya Jana Sangh, Bharatiya Janata Party, RSS, VHP, Bajrang Dal, Durga Vahini. They advocate a Hindu Rashtra which is absolutely communal in nature. As a result their election campaigning is totally an outburst of communal views proposing an agenda of Hindu favourism. Muslim League, the Jamat-e- Islami, The Muslim Majlis in contrary to prove their might propose the complete reversal of the above policy. In the name of Muslim empowerment they ought to propagate an extremist view of disunification of brotherhood.

These groups are a constant threat toward the basic nature of Constitution. Their basic aim being (divide and rule policy). Where there is an extensive collision of Hindu- Muslim interest, other sects act as a catalyst in

raking up the issue. Among the Sikhs, the Akali Dal, stands for the promotion of the interest of the Sikhs in India, contributing both the attributed of regionalism and communalism. The Election Manifesto gives the importance to the issues like protection and preservation of Democracy, stability in the country, integrity of nation to fight against communalism and evils like corruption. Communal Parties in the total reversal of these policies stand for the cause of religious casteism and regionalism. In the Authors opinion, such parties should be banned from contesting elections.

Communal political parties mobilise in the name of political opinion the fire of disintegration to gain benefits as in terms of seats from a particular constituency. The Representation of Peoples Act defines what constitutes corrupt practices and electoral offence. Politicians play a vital role in promoting the enmity widening the gap between different communities irrespective of the problem i.e., Shah Bano Controversy, Salman Rushdie, Babri Masjid-Ram JanmBhoomi, religious procession, rape of a girl of other community (*Mathura Ahir Case*) dispute of land between two communities, murder of criminals by other communities etc.

The impact of communalism has engulfed whole of the contemporary India. This issue today needs the instantaneous attention and in its reversal a consolidation of secular forces. In each of the recent cases of violent religious activism, the supporters who have encompassed these deep-seated anti-state religious ideologies have fondled personally upset with what they regard as the domination of the secular state. They experience this oppression as an assault on their pride and feel insulted and shamed as a result.

The failures of contemporary society—though economic, political, and cultural—are often experienced in personal ways as humiliation and alienation, as a loss of selfhood. Acts of violence against the secular state become emblematic expressions of empowerment. Endeavours to claim clout in a public pitch is supposed as hostile and marginalizing. Religious activists think that they are simply reclaiming the political power of the state in the name of religion. It might be a workable arrangement in a

pre-modern world where religious sensibilities aren't winned with an expansive sense of moral order, and a religion-based polity could embrace a varied and pluralistic society.

The mockery is that the modern idea of religion is much narrower than that, limited to particular sets of doctrines and to particular confessional communities. The use of communal ideology and religion in election process has been an unfortunate aspect of Indian democracy. Democracy is perceived not as an instrument for creation of a more responsible society but as a system of government that ensures power to the group in largest in number. To put an end to communalism it is necessary that Indian society embodies such values as values of tolerance and mutual respect.



## SECULARISM: A TOOL FOR UNITING OR DIVIDING

Mr. Siddharth Nandwani\*

Mr. Bhaskar Bhushan\*\*

### Introduction

“Religion is not in doctrines, in dogmas, nor in intellectual argumentation; it is being and becoming, it is realization.”<sup>1</sup> Hinduism is therefore, not a definite dogmatic creed, but a vast, complex, subtly unified mass of spiritual thought and realization.<sup>2</sup> India is a pluralistic society and a country of religions. It is inhabited by people of many religions. The framers of constitution thus desired to introduce the concept of ‘secularism’, meaning thereby state neutrality in matters of religion. They also wanted to confer religious freedom on various religious groups.<sup>3</sup> So it was of prime concern to introduce the term ‘secular’ to achieve religious solidarity and peace because religion has been a very volatile subject in India both before and after independence. The Constitution therefore seeks to ensure state neutrality in this area.<sup>4</sup>

Etymologically, the word ‘secular’ comes from the Latin word *saeculum*, which first meant ‘age’ or a ‘great span of time’ or the ‘spirit of the age’. Later it acquired another meaning, of belonging to ‘this world’. There existed two worlds, the secular and the religious- eternal, temporal and spiritual, each with distinctive practices and institutions. This was the birth within Christian discourse of the notion of relative separation or disengagement. However, it was the spiritual order that ultimately remained decisive.<sup>5</sup>

\* Student, 3<sup>rd</sup> year, BBA LL.B., New Law College, Bharati Vidyapeeth Deemed University, Pune.

\*\* Student, 2<sup>nd</sup> year, BBA LL.B., New Law College, Bharati Vidyapeeth Deemed University, Pune.

<sup>1</sup> Gautam Sen, *The Mind of Swami Vivekananda* § 53.6 (19<sup>th</sup> ed. 2008).

<sup>2</sup> Radhakrishnan, *The Hindu View of Life* § 21.1 (19<sup>th</sup> ed. 1954).

<sup>3</sup> Prof. M.P. Jain, *Indian Constitutional Law* § 1315.1 (6<sup>th</sup> ed. Re. 2012).

<sup>4</sup> *Ibid.*

<sup>5</sup> Achin Vanaik, *Communalism Contested* § 65.1 (1997).

With the passage of time, the concept of secular later developed into the concept of secularization.

The term 'secularization' emerged after the Peace of Westphalia in 1648 and is a process originally referred to as the transfer of ecclesiastical lands to civic control. By the nineteenth century and in the still powerful flush of Enlightenment values, G.L. Holyoake of Britain coined the term 'secularism' to define an ideology and movement wherein social (and individual) morality, hitherto determined by the transcending principles of religion, were now to be determined by reason, and anchored to the good of man or woman in this life.<sup>6</sup> He started the movement of propagating the term and its ideology in 1846, and laid down its principles in his two books, *Principles of Secularism* and *The Origin and Nature of Secularism*.<sup>7</sup> Agnostic or indifferent to religion, this version of 'secularism' acquired a more atheistic slant through Holyoake's disciple, Charles Bradlaugh. But 'secularism' as a rationalist movement, agnostic, indifferent or atheistic, soon stalled. It ignored rather than confronted religion or religious discourse.<sup>8</sup>

Thus the whole idea of Secularism is not to accept the recognition of a specific legal regime for each community because the emergence of the very concept owes its inception to the noble idea of inclusiveness and a process of creating a society where the principles of individual faith were subordinate to the peaceful existence of a layman, where government or state served to be the guardian of the individual by fostering their pluralistic beliefs.

### **Historical Background: Social Transformation through 'Secularism'**

Tracing the history which asserts that the concept Secularism emerged as a reaction to communalism, the idea of western countries but the ground reality was that it even existed in our ancient literatures and was prophesized by our great rulers since the time

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<sup>6</sup> *Ibid.*

<sup>7</sup> S.L. Verma, *Towards theory of positive Secularism* § 43.2 (1<sup>st</sup> ed. 1986).

<sup>8</sup> See *supra* note 5.

immemorial. An attitude of objectivity, Humanism, co-existence and toleration permeated the secular spirit of ancient Indian thoughts. A distinctive openness is exhibited in *Rigveda* which stated: "Truth is one, and the learned may describe it variously." It considers all human beings as parts of universal soul and preaches individual equality as a forerunner of religious equality. As stated in *Atharvaveda*, "This earth, which accommodates people of different persuasions and language, as in a peaceful home, may it benefit all of us."<sup>9</sup> Ashoka in his twelfth edict proclaimed:

"He who does reverence to his own sect while disparaging the sects of others, wholly from attachment to his own, with intent to enhance the glory of his own sect, in reality, by such conduct, inflicts the severest injury on his own sect. Concord, therefore, is meritorious, to wit, hearkening and hearkening willingly to the law of piety as accepted by other people."<sup>10</sup>

The Satavahanas, Kushanas and the Gupta rulers paid equal patronage to all the religions. Under the Vardhana rulers different schools of religion and philosophy flourished side by side. The Shiva cult propounded in the south posed no problem of social disharmony because of well-laid ethos of religious tolerance. Liberal patronage to all religions without discrimination was the policy of Chalukyas, Rashtrakutas, Hoysalas and Cholas.<sup>11</sup>

Thus it was a step forwarded to establish the idea of Secularism which has now emerged as a significant method of maintaining peace, harmony and accord in the society.

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<sup>9</sup> Prithvi Sukta in *Atharvaveda* "*Janam vibharti bahutham vivaachasam maanaa dharmanam prithavee yathokasam*".

<sup>10</sup> S.Radhakrisnan, *Indian Religions* § 18 (Orient Paperbacks, 1979, New Delhi 1992).

<sup>11</sup> P. Ishwara Bhat, *Law and Social Transformation in India* § 234.1 (1<sup>st</sup> ed. 2009, Re. 2012).



## Constitutional Background

The word 'secularism' and its concept were defined by the Hon'ble Supreme Court in the case of *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehra*<sup>12</sup>:

"The concept of secularism was defined in the realms of philosophy and in utilitarian terms. The courts set the role of the State to be neutral or impartial in extending its benefit to the citizens of all casts and creeds and cast a duty on the State to ensure through its laws that disabilities are not imposed based on persons practicing or professing any particular religion."

This was the precedent that earmarked the intervention of judiciary in taking active participation over the matters relating to religion that pertain to Secularism.

## 'Secularism' in India: Uniting the Nation

The value premises:

The Preamble to the Constitution and Article 25-28.

The Core Concept of Secularism as an independent paradigm.

Witnessing the fireballs from communities presiding prior to and after independence i.e. during the period of partition, in which millions of people shook their hands with the almighty, demanded the insertion of the word 'secular' into the Indian Constitution, and finally the term was introduced into the preamble by 42<sup>nd</sup> Amendment Act of 1976.

Even the masterminds behind our national movement were of the view that the term should be brought into existence so that our goal of providing every person the right to profess, practice and propagate religion be achieved. It was at that time Pandit Nehru declared:

"The government of a country like India, with many religions that have secured great and devoted

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<sup>12</sup> A.I.R. (1976) 2 S.C.C. 17.

following for generations, can never function satisfactorily in the modern age except on a secular basis.”<sup>13</sup>

Thus the attraction of secularism for the country lay in the fact that it was the only prudent option for construction a nation out of fragmented, polarized identities that had emerged and consolidated themselves during the colonial and the anti-colonial phase. In India, where two new nations had emerged out of a blood-spattered history, the need was to forget that people who had shared the same historical consciousness, the same language and the same folklore for centuries has eventually split over religion. This demanded to integrate these divided people on new ideologies, on new perspectives and on new issues. This could happen only through secularism that gave due recognition to religious identities, and yet attempted to transcend them as far as the public sphere was concerned. The state couldn't refuse to recognize the religious identities of its people. What it could do was to stipulate that all religions were, in principle, equal.<sup>14</sup>

Accordingly, the concept of secularism emerged in India with three fold objectives, which were:

- Firstly, that the state would not attach itself to any one religion, which would thereby establish itself as the state religion;
- Secondly, all citizens were granted the freedom of religious belief;
- Thirdly, the state would ensure equality among religious group by ensuring that one group is not favoured at the expense of another.<sup>15</sup>

Believing on three fold objective as specified, the amount of relief that could not be estimated was such that the insertion of the term bought something that it changed the entire philosophy which existed earlier. secularism and democracy: these were the two gods of

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<sup>13</sup> D.E. Smith, *Nehru and Democracy: The Political Thought of an Asian Democrat* § 154 (1958).

<sup>14</sup> Neera Chandhoke, *Beyond Secularism: The Rights of Religious Minorities* § 50.3 (1999).

<sup>15</sup> *Ibid.*, p. 49.

the newly independent countries of the 'third world'. Whenever and wherever religion was invoked in the post-colonial world, it was a component of, not as a substitute for national identity. Despite the fact that the movement for Pakistan had been fought in the name of Islam, Jinnah ruled out the idea that a theocratic state would be established in the country. Inaugurating the Constituent Assembly of Pakistan on the eve of the formation of the country, on 11 August 1947, Jinnah promised equality to all citizens of Pakistan.<sup>16</sup>

Now I think we should keep that in front of us as our ideal, and you will find, that in course of time Hindus will cease to be Hindus and Muslims will cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the state.<sup>17</sup>

In virtually every country of Asia and Africa, voices that invoked religion for political purposes were dismissed as primordial. They had no place in a modern, secular state.<sup>18</sup> Thus it was the sole tool for uniting the groups which existed in the country so that everything goes smoothly.

The concept of secularism in India is briefly explained and enshrined under Constitution of India, the mother of all laws. The reference of which is drawn from Articles 25 to 28 of the Indian Constitution. The basic idea of introducing the concept was to confer rights not only to those who are the citizens of the country but also to all persons in India. These constitutional donations are not only restricted to individuals but also extends its purview to religious group i.e., religious groups are also covered under the umbrella of Freedom of Religion and Conscience. Articles 25 to 28 provides protection to all religions and religious practices and assures that there is no interference by the state in religious affairs i.e. state doesn't support or discriminate any religion and does not has any religion of its own as observed by the Hon'ble

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<sup>16</sup> *Ibid.*, p.,54.

<sup>17</sup> Rafiq Zakaria, *The Widening Divide: An Insight Into Hindu-Muslim Relations* § 48 (1995).

<sup>18</sup> See *supra* note 10.

Supreme Court in the case of *S.R. Bommai v. Union of India*<sup>19</sup> where Sawant, J.: observed,

“Religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of Secularism enshrined in the constitution.”

According to B.P. Jeevan Reddy, J.:

“While the citizens of this country are free to profess, practise, and propagate such religion, faith or belief as they choose, so far as the state is concerned, i.e., from the point of view of the state, the religion, faith, or belief, of a person is immaterial. To it, all are equal and all are entitled to be treated equally.”

Thus providing equal opportunity to all was the rule. Beyond this, to secure all citizens of their rights, needful steps were taken as even anti-secular forces were not allowed to participate as they would divide antecedents of different religious faith and will then create tyranny among them which will then be followed by riots and anti-secular movements. Therefore, the constitution framers levied religious matter confined to individuals and gave power to the state to look into the matters pertaining to religions.

The concept of secularism is more or less a face of equality principle. Thus for understanding the idea of *Secularism* the reference has to be made to Articles 14, 15, 16 and 29-30 as these foster the concept of secularism which has been observed by the Hon'ble Courts in India. In the case of *M. Ismail Faruqui v. Union of India*<sup>20</sup> while delivering the majority opinion, Verma, J., observed:

“It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasizing that there is no religion of the state

<sup>19</sup> AIR 1994 S.C. 1918 : (1994) 3 S.C.C. 1.

<sup>20</sup> AIR 1995 S.C. 604, at 630 : (1994) 6 S.C.C. 360.

itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasizes this aspect and indicates that it is in this manner the concept of Secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touch stone of the constitution. The concept of Secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.”

Thus the concept seemed to achieve its very object of uniting but has left itself to diversified range of confusions.

### **The Crossroads of Indian Secularism**

Knowing the fact that the concept of Indian secularism is completely different from the western notion of Secularism brings us at a critical juncture presenting before us a few fundamental questions answers to which are important in determining the practical applicability of the concept of Indian secularism which often becomes a matter of debate and discussions because of its fundamental differences which exists between the Indian and the occidental notion of secularism.

Indian secularism is going through serious hurdles which can be aptly understood by the below mentioned quote:

‘When I use a word’, Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’

‘The question is’, said Alice, ‘whether you can make words means so many different things.’

‘The question is’, said Humpty Dumpty, ‘which is to be master—that’s all.’

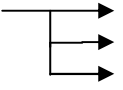
**-Lewis Carroll**, *Through the Looking Glass*<sup>21</sup>

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<sup>21</sup> T.N. Madan, *Modern Myths, Locked Minds* § 233 (1998).

India's unique secularism calls for religious neutrality rather than indifference. The relationship of religion with the state is a tricky matter for any modern secular democracy in which debates centres on the question of the appropriate limit for the external regulation of the religion. When religious freedom should end, and modern democratic principles should begin, are the concerns of layman's and the learned alike. Religion is a matter of personal faith or belief but it has social orientations which are diverse and varying. Every individual has a right or a privilege but one cannot enjoy his privilege by infringing upon the privileges available to others alike. The sphere of individual freedom is a subset of collective social behaviours wherein our actions have the consequent implications upon other individuals and society in many ways and at different levels. Knowing this, every individual has to conduct his religious behaviour in a way that the other fellow-person equally blessed like him doesn't feel offended. This brings us to claim that the issue of *Secularism* is a subject common to different disciplines of academics and hence, requires rigorous introspection and enquiries into various subjects which are affecting the ideology behind "Secularism Whether Being a Uniting or a Dividing tool".

The issue of secularism is a collective representation of various constituent factors that are affecting it either implicitly or explicitly, which are as follows:

- The Role of State 
  - The Legislature
  - The Executive
  - The Judiciary
- The Perception of Religion: Nexus Between Religion and Secularism;
- Population of the Country or the Masses: Role of Politics and Political Parties;
- Individual Identity and Secularism.

## The Role of State Legislature

Legislature refers to a body of those individuals who contribute in making laws for the society. A law may be defined as a set of principles that are laid down for the purposes of ordering the life of people in the country passed by the legislative authority, derived from court decisions and established by local customs. They define Do's and Don'ts for the people of country but the question being, can only an enactment really make a country secular?<sup>22</sup> The responsibility of legislature is to make laws that are thoroughly consistent and to create a set of laws that are not in conflict with each other. Legislature being a part of elected democracy is a group of elected representatives that eventually take birth from party system. Politics rather than being a tool of empowering the nation has been reduced to a way of securing immunity and privileges which is now affecting the quality of law making process as the government has not been able to clarify its position or approach related to religion. The failure can be justified by the below mentioned e.g. India's commitment towards Secularism is inconsistent with the operational set of personal laws governing different religions and nurturing different individual identities therein. The lack of political will towards Directive Principles of State Policy's Article 44 Uniform Civil Code (UCC) adds to the state of indecision and creates confusion.

## Executive

The body of individuals who have the responsibility to govern and administer the country. It sees that the laws made are implemented properly, but it has been going through serious dilemmas. The bureaucracy is greatly superseded by politicians; issues like corruption, *red tapism*, lack of sensitivity and understanding the contemporary issues and their complex implications have been a part of the same problem every now and then, which eventually are creating anonymity among the departments itself.

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<sup>22</sup> Shri V.M.V. Naval Kishore, National Foundation for Communal Harmony, *Secularism and the Law*, available at [http://nfch.nic.in/WORD\\_FILE/SECULARISM.pdf](http://nfch.nic.in/WORD_FILE/SECULARISM.pdf) (last visited February 6, 2013).

The instance of government officers acting on the order of politicians without thinking about what is right or wrong and which is the result of immense pressure is a best example which overcasts the breakdown of government personnel's. The anonymity between the ruling party and the right-wing parties and their collective failure in the *Babri-Masjid* case which could have been settled by diplomatic negotiations and a serious failure of the government where the opposition party seemed to ridicule the ruling party like nothing else connotes the very fact of serious breakdown in the administrative setup and their reluctance to act has created a spot in the history of India's institutional setup and has questioned the intent of the system whether being the one that unites or divides.

The incident where the intervention of the state and its favouritism policy was out-casted affected the very meaning of the term secular.

The rebuilding of the Somnath Temple by the Saurashtra Government wherein it sanctioned funds for installation ceremony and the President of India being present on the occasion were able to gave official colour to the whole project but it was an incident of the institution associating itself with a particular religion bringing fear in the minds of minorities and the Prime Minister having deep personal reservation on the issue though the commitment being that the state's would not have the options of religious preferences<sup>23</sup>, are few examples illustrating about the problems as faced by the executive departments.

### **The Judicial Pro-activeness**

"While in United State of America, we go for strict church-state separation; in India it has involved the active interpretation of religious doctrines wherein judiciary acquired the authority to evaluate essential and non essential ingredients of a religion, and this power of

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<sup>23</sup> S. Gopal in G. Parthasarthy and S. Gopal, *Jawaharlal Nehru and India's Quest for a Secular Identity, Occasional Papers on History and Society*, Nehru Memorial Museum and Library, First Series, No XLII pp. 16-17 (1987).



interpreting has brought with it the power to rationalize it.”

In 1960's the courts devised 'The Essential Practices' doctrine in which the essentialness or usefulness of a religious practice or action was scrutinized. This doctrine paved a path to Indian judiciary for resolving the tension between different religious freedoms and the paramount: modernistic liberal constitutional values of practising, propagating and preaching religion. This helped our judiciary in simplifying the scenario by interpreting religious doctrines in conformity with the above mentioned values. The Court room thereby became a sight for cleaning and reforming religion because 'superstitious beliefs' fell outside the constitutionally protected premises for religious freedom. Petitioners lost cases not because of their right to religious freedom had limits, but because they misunderstood their very own religion. This allowed courts to internally regulate religion, thereby avoiding the problems of conflict between the public purpose of the state and religious freedom which typically came with external regulation of religious principles.

Through interpretation of religious and texts and doctrines for themselves for the purpose of decision making and dispute settling, courts were able to solve the dual purpose of individual ambiguity and personal disillusionments and the clear and concise position of the state backed up by the authentic religious sources. Courts were able to deny any form of disagreement all together and were able to show that the secular public purposes of the state where the best expression of the free exercise of the particular religion in question by deciding only those matters that came to its notice through the institutional setup. The idea was to promote a composite nationalism which would integrate all Indians regardless of their religion. Religion was only to be an umbrella which would protect in and every living being from the state of inactivity and would empower them rather than creating divisions on the name of ideologies that were subordinate to the purpose they sought to achieve.

All said and done, any nation that has grown from strengths to strengths derives its power and potential

from the institution it fosters, culture it follows and the ideology and principle it imparts to its citizenry, but above all this abstract notion of system becomes reality only when the people who are the part of it have the intent and the will to do so. All the three institutions can't work without the help of the other two and together as they form the principle setup of our nation. But on this issue of Secularism, inference can be drawn that the system has fallen apart and has failed to perform their very own functions, reasons best known to them.

There are numerous instances of the same when we objectively peep into history.

### **The Perception of Religion: Nexus between Religion and Secularism**

India as a country is deeply religious. The idea of India can't exist without religion. Religion is in fact a source of strength that strengthens the bond among individuals, ideologies and contributes to the cause of Indian Nationalism. Religion is nothing but being and becoming. The word religion means *Dharma*, the duty full notion of what is right and wrong. It is realization in action '*Dharyatri Dharma*' something that can be adorned which is the synonym of life itself i.e. religion is nothing but life lived on the principles of righteousness.

Religion and Secularism are contemporary and complementary to themselves as religion in India seems to stand for blind belief and reactions, dogma and bigotry, superstition and exploitation, and the preservation of vested interest.<sup>24</sup> But in the depth of it, it supplies, nurtures as well as satisfies a deeper inner craving of humanity.

But due to reasons unknown; the Constitution of India acknowledges the concept of minorities but it has not been defined precisely leaving a good deal to be inferred, which creates a soft stance over the issue of the religion and secularism. The division created in the name of majority and minority is nothing but political agenda and Secularism is an elastic concept which can contain all

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<sup>24</sup> See *supra* note 21 p. 239.3.

such tensions and the disparities among religions and its followers. The issue of secularism can only be seen through the composite lens of religion and the individual perception of religion in symphony with the social outlook i.e., we have to consider the role that religion plays in the collective Indian behaviour of different religions and the individual perceptions which are in conflict with each other. This situation has created lacunas which are being used by political giants to exploit and rule, which is an extension of the British Colonial Management principle of 'Divide And Rule', contemporaneously used for the 'Vote Bank Politics' and creating divides in the civil society.

### **Population of the Country or the Masses: Role of Politics and Political Parties**

The population of the country is divided into communities, sects and hence, have numerous differences among themselves. People who are part of different communities advocate for the betterment of their communities. We have to realize and recognize the fact that communities work for empowering their members and the people both identify with and are identified by their community. Due to this variation, plurality and diversity, masses are distinctly divided into groups over different issues that affect their life; political parties exploit this condition by catering to their demands and voicing their concerns. This does bring transparency and empower the masses but the way by which political parties try to make use of this situation is very dangerous. The issues in their hand is of value and importance but it later turns into an agenda of gaining power which has nothing to do for the solution to the issue and is nevertheless, a fake promise of assuring protection to all. The issue of secularism in the light of minority-majority conundrum is exploited by the political fraternity in the same way mentioned above. The masses often submit to the immediate pleasures rather than accepting and practicing what is just and fair which can be illustrated by the case of *Shah Bano Begum* case<sup>25</sup>:

Where the Supreme Court entitled Muslim woman for maintenance but was criticized by the

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<sup>25</sup> Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.

protestors claiming that the verdict of the supreme court has attacked on their religion and has denied the right from their own personal laws, seeing the situation political move, Rajiv Gandhi's Government directed the parliament to enact a law over turning the judgment of the Supreme Court which was not for the benefit of the masses but for the impression that it would affect the future gaining of votes from the minorities. The role of Rajiv Gandhi Government was seen as an appeasement towards Muslim minority and it can be inferred that they merely tried to use the sentiments existing amongst the communities.

Thus seeing the situation un-tackled, political parties have tried to take the benefit of this, leading to immense destruction of sentiments of others and further creating mess and debilitating the value of a concept of secularism.

### **Individual Identity and Secularism**

As discussed above about communities, it is equally important to understand the nature of every individual that it is a part of Indian Polity but is opinionated personally. Individual identity and ideology play a significant role in determining the feasibility of law imposed by the state. India being essentially a religious country with diverse ideas and principalities, Secularism for an individual is nothing but a system of values that make him tolerant, sensitive towards others. A concept as novel as Secularism can only be a success when a diversity of individuals reach a common plane of understanding which can further the values of our constitutional principles. Religious sentiments are not only a part of religious groups but are also the part of individual faiths and beliefs and hence require respect which could than create amity, accord, harmony and vice-versa.

Therefore it is very tough to exactly determine what should be omitted or added, but law and the position of state which includes all three institutions, religion being at the centre of thought and action, the presence of diversity, variations and a blend of religiously liberal as

well as religiously orthodox individuals and communities create diasporas of multiculturalism which is primary to the existence of India's Secularism. The role of various sects and society claiming to be different from each other give a connective colour to the problem of Secularism. The role of religious parties is secondary to the existence as they only represent the voice of the population, but understanding the depth of democracy and the problem of electoral process as well as the multi party system, a serious issue like Secularism often becomes a politicized matter losing its aesthetic value. The Indian history of discourse, colloquia and argumentative traditions of opinion adds to the versions of variations in secularism and creates a mirage in which creates an illusion of 'to be or not to be'.

### **Suggestions**

Ideas like secularism can't be held as a dividing tool but it is a collection of abstract, philosophical and lofty principles of statehood because of the purpose for which it has been introduced in the Constitution. Constitutions are made for creation of a collective identity but not for a divided polity which has now taken a different view whereby we have given minority's status to those who even can't be part of it. Therefore it can be said that it is an issue that creates division only when understood and practiced as well as prophesized differently or erroneously. But we should consider it as a normative and positive concept which is contemporarily being used otherwise and in the light of above mentioned arguments the researchers have come up to the conclusion that, being a democratic country, secularism is a dialect of religion and reasoning but due to its dogmatization and it being forcefully molded and narrowed consistently, the core meaning of the concept loses its importance and purpose due to the factors mentioned above, which are in practice only to nullify the effect of self emancipation, process of secularization and is a threat to democracy itself. Therefore following considerations should be appreciated so as to strengthen the very fabric of Secularism:

- Implementation of Uniform Civil Code;

- Tackling fundamentalism by strengthening secularism;
- Controlling power-hungry politicians;
- Introducing the concept of civil religion explicitly;
- Strengthening the values of democracy;
- Collective understanding the concept of pluralism;
- Striving for inter-communal harmony and fostering universal brotherhood.

Thus, the researchers have highlighted the overall arguments so as to give attention to each and every aspects of 'secularism' which is now understood as an efficient tool for either Uniting or Dividing. But the researchers favour 'secularism' being a tool for uniting the nation.



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  - ❖ "A" Grade University status by the Ministry of HRD, 2013
  - ❖ 11<sup>th</sup> Rank by *Outlook*, June 2012
  - ❖ 17<sup>th</sup> Rank by *India Today*, June 2011
  - ❖ Re-accredited with "A" Grade by NAAC, 2011
  - ❖ 10<sup>th</sup> Rank by *Outlook*, June 2010
- Best Law School: *The Week*, *Lawyers Collective*, *Times of India*, [www.lawentrance.com](http://www.lawentrance.com).
- National Law Day Award conferred by the President of India to Vice Chancellor, BVDU.
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- Teaching Faculty: Retired judges, senior advocates, academicians, corporate personnel, international knowledge partners.
- Regular guidance from Supreme Court and High Court Judges and Jurists through Judicial Colloquia.

- ICT Methods of Teaching: Clinical Legal Education/Justice Education.
- Euro-American International Research Centre.
- Euro-American Legal Study Centre and International Research Centre.
- Human Rights and Women Empowerment Cell.
- Rich Library valued more than Rs. 1 crore with Computer Cell.
- More than 100 research articles and 13 books published during this year.
- Laurels won at International Moot Court Competitions.
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- Online Legal Databases: *MANUPATRA*, *WESTLAW*, *LEXISNEXIS*, *SCC Online*, *CLA online*, etc.
- Excellent Placement at national and international firms; Internship at Supreme Court, High Court, Law Commissions and NGOs.
- Foreign Cell: Foreign students from 10 countries.
- Paper presentations at International Conferences at Oxford, Harvard, Poland and China.
- Prof. Dr. Mukund Sarda was invited as resource person by the University Of Oxford, UK.
- Alumni association registered: Emphasis on role of stakeholders.
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- Outstanding performance at curricular and extra-curricular activities.
- Organization of national seminars and workshops: 75 Judges from High Courts and Supreme Court have delivered legal discourse.
- Guidance and counseling to the students from senior advocates-Ram Jethmalani, Soli Sorabjee, P.P. Rao, Abhishek Manu Singhvi, M.C. Mehta, Geeta Luthra and Pinky Anand etc.



- Student Dialogues with Member of Parliament- Rahul Gandhi, Supriya Sule, Shatrughan Sinha, Madhu Gaud Yakshi, Ranjit Sinh Mohite-Patil etc.
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