

THE PROTECTION OF CULTURAL RIGHTS OF MINORITIES IN INDIA: AN ANALYSIS OF CONSTITUTIONAL COMMAND

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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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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 apartheid¹.

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* case², 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

¹ The Encyclopedia Britannica,
<http://www.britannica.com/EBchecked/topic/384500/minority>, (2 Feb 2014).

² 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.³

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.⁴

³ *Id.*

⁴ 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.⁵ 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.'⁶

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.'⁷

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".⁸ This particular interpretation by the PCIJ has proved to be very much dynamic in the international level and therefore the

⁵ Rights of Minorities in Upper Silesia (Minority Schools), 29, 1928 PCIJ Series A, No.15.

⁶ *Id.* at 30.

⁷ 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.

⁸ 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.⁹ 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

⁹ 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.¹⁰

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.¹¹ 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.

¹⁰ PROFESSOR M. P. JAIN, INDIAN CONSTITUTIONAL LAW, 1704-1708, Volume 1, LexisNexis Butterworths Wadhwa, Nagpur, (6th Edition, 2010).

¹¹ 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 saves and except that this shall not prevent the establishment of separate educational institutions for boys and girls.¹²

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:¹³

“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

¹² DR. SUBHASH KASHYAP, CONSTITUTIONAL LAW OF INDIA, 2590-2598, Volume 1 & 2, Universal Law Publishing Co., Delhi, (Ed. 2008).

¹³ *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.¹⁴

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,

¹⁴ 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 Narayan¹⁵.

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

¹⁵ 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"¹⁶

- (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.¹⁷

Draft article 23 as amended by the above was adopted to stand part of the Constitution.¹⁸ 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

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 4.

¹⁸ 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.¹⁹ 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

¹⁹ 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.

