PROTECTION OF MINORITY INTERESTS UNDER THE INDIAN CONSTITUTION

By

George Thomas Luis,
B. Com.(Madras), LL. M.(Bombay),
Advocate, High Court, Bombay

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School of Oriental and African Studies,
University of London, London W.C.1

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ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

ABSTRACT

This thesis deals with the provisions of the Indian Constitution which seek to protect minority interests and secure equality of political and civil rights.

Chapter I outlines the Indian problem in the larger perspective of minorities generally. It explains the nature of the minorities' problems, defines minorities and indicates their characteristics. It discusses the role of law in the protection of minority interests, gives the historical background, and evaluates the principle of equality as a basis for the protection of minority interests.

Chapter II considers the scheme of political equality envisaged in the Indian Constitution in three principal areas of citizenship, political representation, and the public services.

Chapter III deals with the religious interests of minorities, in the context of Indian secularism. The chapter defines religious minorities and religious

interests. Autonomy in religious affairs, the right to propagate religion, education, and the safeguarding of communal interests are discussed at length.

Chapter IV discusses linguistic and cultural interests. The chapter begins with a general background of the language problem in India, followed by the definition of linguistic minorities. Specific minority issues dealt with include the conservation of their language and culture, education, employment, and the use of minority languages for official purposes. The need for a review of safeguards is indicated.

Chapter V deals with socio-economic interests, a relatively new factor in the present context but of special significance in India. The chapter discusses the problem of defining 'backward classes' and considers the measures proposed and implemented for the removal of backwardness. Attention is focused on two issues of particular importance, the removal of social disabilities by law, and the use of protective discrimination to achieve equality.

This is followed, in Chapter VI, by concluding remarks.

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G. T. L. Shenoy

ABBREVIATIONS

A.I.R.	All India Reporter
All.	Allahabad
All. L. J.	Allahabad Law Journal
A.P.	Andhra Pradesh
Bom.	Bombay
Bom. L.R.	Bombay Law Reporter
C.A.D.	Constituent Assembly Debates
Cal.	Calcutta
Cmd.	Command
Cmnd.	Command
Guj.	Gujarat
Hyd.	Hyderabad
I.C.L.Q.	International and Comparative Law Quarterly
I.L.R.	Indian Law Reports
I.Y.B.I.A.	Indian Year Book of International Affairs
J.& K.	Jammu and Kashmir
J.I.L.I.	Journal of the Indian Law Institute
Ker.	Kerala
Law ed.	Lawyers' edition

L.S.D.	Lok Sabha Debates
Mad.	Madras
M. Bh.	Madhya Bharat
M.P.	Madhya Pradesh
M.P.L.J.	Madhya Pradesh Law Journal
Nag.	Nagpur
Or.	Orissa
Pat.	Patna
Punj.	Punjab
Raj.	Rajastan
S.C.	Supreme Court
S.C.J.	Supreme Court Journal
S.C.R.	Supreme Court Reports
T.C.	Travancore-Cochin
U.P.	Uttar Pradesh
U.S.	United States of America
Wis. L.Rev.	Wisconsin Law Review
Y.U.N.	Year Book of the United Nations

Chapter I

INTRODUCTION

India, a vast country with an immense population, is a land of tremendous diversity. The lines that divide the population are many and overlapping, inevitably giving rise to majority and minority groups of every kind. The Indian Constitution seeks to achieve unity amid this diversity through the common basis of an equal citizenship. The interests of minorities are sought to be protected through a scheme of equality of civil and political rights of all citizens. It recognises that differences do exist, but rules that they shall not be barriers to participation in the public life of the country and does not hesitate to take extraordinary measures to secure equality where circumstances warrant it. This work is an attempt to consider the scheme of minority protection incorporated in the Constitution.

The discussion of the specific issues concerning Indian minorities starts in the next chapter. The present chapter is devoted to the consideration of a

number of preliminary issues of a general nature. The question of Indian minorities is part of a larger question of human relations and needs to be viewed in that perspective. This chapter provides a background to the discussion of the Indian minorities in the light of a wider general discussion of the nature of the problem, definition of minorities, the role of law, the historical background and the principle of equality, which is the fundamental basis of minority protection.

I. Nature of the problem of minorities

The problem of minorities arises from the fact that there is an inherent diversity in human society. Men differ from each other in a variety of ways in capacity, opinion, taste, inclination and outlook. Those with similar interests tend to develop a group consciousness, which will seek to assert itself when common interests are, or are thought to be, in danger. Different groups are identified by reference to a predominant factor of diversity; such as language, race, religion, social and economic status, and nationality. In a politically organised society this diversity may lead to the existence of a dominant group called the 'majority' and one or more subordinate groups called 'minorities'.

Features of this problem are, its universal existence, continuity, and characteristic complexity.

There is no area on earth where it does not exist in some form or other. It has featured very prominently in the social and political developments of most countries, especially those of Europe, over a long period of time. Attempts at its solution have been many and varied. While they may have provided a temporary solution, the problem itself continues to exist, though possibly in an altered form. In a sense no permanent cure is possible so long as men continue to live in society. It cannot be categorised or assigned exclusively to any one particular branch of study. As has been pointed out, it is not a 'problem' or a 'question' (as it has been often designated) which is susceptible of a clear solution, as those of physics or mathematics.[1] If is a complex issue with many facets and its solution requires the application of the entire field of human knowledge and behaviour. Politicians, sociologists, psychologists, lawyers, or any other professional group by themselves can do little towards that end.

The social and political implications of this question need particular attention.

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[1]P. de Azcarate, League of Nations and National Minorities, (1945), Preface, p.vii.

Social Aspect

Minority problems are said to be but one form of the struggles of the individuals and groups who differ in their ability to exert power within a social unit.[2] The possession of, and the ability to use power allow individuals and groups to achieve their ideological objectives in varying degrees, by influencing and impressing others. On the group level, social power is the sum total of all those capacities, relationships, and processes by which compliance of others is secured; this compliance may be voluntary or involuntary, conscious or unconscious, beneficial or detrimental — but always for purposes determined by the power holder. This exercise of power is accompanied by domination on one side and subordination and dependence on the other. The relations between individuals and groups are regulated by social control, including the supreme control exercised by the government. The issue of minorities is thus seen as an aspect of power relationship within society.[3]

From another point of view, the subject belongs to the field of social pathology in the wider sense.

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[2] J. S. Roucek, "The Eternal Problem of Minorities", XVI, 4, United Asia, (1964), p. 235 at p. 237.

[3] Ibid.

The position of minorities in a society is said to be a critical instance of the general social health (or sickness), and an index to the state of the "parent society".[4] It is also a subject that belongs to the study of social stratification, for the specific places which the minorities occupy in the social structure have to be identified in relation to the whole.[5]

Political Aspect

It is, however, at the level of political organisation that the problem of minorities has the greatest implications in the national and international spheres.

It remains essentially an issue of domestic jurisdiction of the states concerned both on legal and poactical grounds. With regard to the former, the doctrine of state sovereignty strictly confines the issue within the borders of the state and makes it a matter of internal adjustment. No state would be willing to permit another state, or even an international organisation, to interfere in what it considers its internal affairs. The latter ground is even more forceful. As P. N. Drost has pointed out,[6] human rights and minority rights are always dependent

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[4]Ruth Glass, "Insiders :— Outsiders: The Position of Minorities", 17, New Left Review, (1962), p.34, at p.37.

[5]Ibid.

[6]P. N. Drost, Human Rights as Legal Rights, (Reprint, 1965), p.168.

on the structure of the society and its positive laws. All rights are relative and dependent on the (local) national milieu of the individual or group. The limitations set on individual's rights in the interests of the community must necessarity vary from country to country, according to the conditions of national life. Minority rights are, therefore, generally understood to comprise only the preservation of particular characteristics and the promotion of cultural development within the state.[7] For this reason it would not be practical to lay down minority rights of universal application. It was pointed out during the deliberations in the United Nations on such a proposition that the problem of minorities was greatly complicated by the different structures of various states and that such an attempt to apply minority provisions of universal scope might lead to disruption of national unity.[8]

An outstanding feature of the problem at the national level is that it is a constitutional issue of the greatest importance. For, this determines and regulates the relationship between the majority and the minorities, which so profoundly affects political, cultural

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[7] Ibid.

[8] Y.U.N., 1948-49, p.544.

and economic life of the states, and whose ramifications extend to the basic issues of social and political philosophy. It is related to such problems as the nature of the state, the legitimacy and limits of political authority and the adjustment of relationships between the individuals, groups, and the state. It introduces the question of dichotomy between culture and politics, and thus leads to an examination of sub-state associations and an evaluation of the moral function of the government. It raises the question of the degree of uniformity which is essential to a political society and the relevance of compulsion to its attainment, thereby presenting itself as a phase of the moral problem of human freedom and toleration.[9]

At the supra-national level the problem of minorities is part of the general problem of international order. A notable feature of international law today is its increasing concern for the promotion of human rights throughout the world. It is of interest to note that the international concern for human rights has its origin in early provisions for the protection of minorities. Particular mention may be made of the stipulations of religious liberty incorporated in various treaties in the period

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[9] I. L. Claude, Jr., National Minorities: An International Problem, (1955), p. 3.

following the Reformation.[10] The protection of minorities and the development of human rights have gone hand in hand in contributing to the grouth of international law, which in turn has influenced their recognition everywhere.

The rights of minorities and the creation of an international community have each influenced the other, though the manner of that influence has undergone considerable change over the years. In the past, the problem chiefly concerned itself with the national minority groups, with the attendant danger of external intervention by a state in an effort to control the treatment of a minority affiliated to it. National aspirations of minorities might have led to a demand for secession or for union with an ethnically related state, thus threatening the international structure. Bilateral dispute might have developed if a state displayed an active interest in a minority in another state. If a state persecuted its national minority groups, the moral indignation of other people might have led to action against the offending government. Foreign intervention would have raised controversies on sovereignty, jurisdiction, boundaries, and the legality of intervention. While at present such intervention cannot altogether be ruled out, it may be assumed that in the existing inter-

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[10] Moses Moskowitz, Human Rights and World Order, (1959), p. 14.

national set-up such a possibility is very remote.

At present problems of minorities are viewed in a broader perspective and on a wider scale than formerly. The term 'minorities' need now no longer refer to national minority groups only, but may include a number of other groups. The question of the protection of minorities is now regarded as one aspect of the larger issue of human rights. The growth of international law has now lessened the danger of intervention and consequent conflict to a great extent. The position of minorities today is greatly influenced by international standards, and a state's freedom with respect to its own people is limited by it.[11] Due to the advance of science and communications, the world has grown smaller. What would have been purely local issues earlier now make world headlines pointing out the problems that lie beneath them. In a sense no such issue today is without international implications. This is likely to affect significantly the location, structure, and aspirations of minorities. As Ruth Glass has pointed out, their status and horizons can no longer be fixed by parent societies alone, but will be determined largely with reference to international

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[11] I. L. Claude, Jr., Op. cit., p. 60.

standards.[12] International organisations, such as the United Nations, the European Commission of Human Rights, and the International Commission of Jurists have played a significant role towards this development.

II. Definition and Characteristics of Minorities

Two brief definitions can serve as a starting point for this discussion: a purely objective one according to which a minority is "a group whose race, language or religion is different from that of the majority"; and a purely subjective one (from the point of view of the minority) according to which a minority is "a group that thinks of itself as a minority."[13] Extreme as they are, they serve to indicate the underlying issues.

It is necessary to add at the very outset that no single universally acceptable definition of a minority exists. The term 'minority' is a vague and variable concept. In trying to make it specific the students of politics, sociology, history and law tend to differ in their emphasis on the various characteristics of minorities, and consequently on the method of their protection.

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[12] Ruth Glass, Op. cit., at pp.44-45.

[13] J. A. Laponce, The Protection of Minorities, (1960), pp. 3-4.

Their definitions are purpose-oriented. The concept itself, in general, has been undergoing change over the years. Before the first World War it was understood only in its legal, arithmatical and political meanings.[14] In recent times it has come to be accepted in a wider sense in modern Constitutions, so as to include cultural and other groups. The Indian Constitution makes a distinct contribution, as social and bconomic backwardness emerges as a new factor in determining minority status.

The task of definition is bound to remain an unenviable one. The characteristics of minorities must necessarily vary from one society to another and also in time and place. While there are certain common characteristics, there are others which are peculiar to particular groups. The treaties of the pre-League of Nations period concerned themselves with providing for specific groups mentioned therein without involving themselves in definitions. The League of Nations, which created an elaborate system of treaties for the protection of minorities, made no mention of minorities in the Covenant, and the treaties referred only to "inhabitants differing from the majority of the population in race, language or religion."[15] The

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[14] Ibid, p.3; also J. S. Roucek, note 2 supra, p.236.

[15] Treaty of Varsailles, Article 93.

United Nations Commission on Human Rights set up a Sub-Committee and entrusted it with the task of defining minorities,[16] but at its sixth session the Sub-Committee decided to abandon its attempt. It concluded that, in view of the great variety of minority groups in the world, it was not feasible to arrive at a brief, and satisfactory definition of groups entitled to protection, and that each situation, where a group claims recognition as a minority and claims special measures of protection, should be considered on its own merits.[17] The Sub-Committee was urged to give further study to the problem but at its seventh session it again decided to abandon the whole question.[18]

Generally speaking various definitions on minorities can be divided into two broad categories: those with a political approach, which by and large concern themselves with the problem of national minorities, and others with a predominantly sociological approach.

"National" Minorities

According to P. de Azcarate, the expression "National minority" refers to a more or less considerable

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16 Y. U. N.,1947-48, p. 581.

17 Y. U. N., 1954, pp 214-215.

18 Y. U. N., 1955, p. 172.

proportion of the citizens of a state who are of a different "nationality" from that of the majority.[19] The sub-stratum of such a minority is an indefinite and indefinable factor known as "national consciousness". Generally speaking, though not necessarily, linguistic, cultural, racial and religious factors, together with innumerable others of a historic, economic, psychological and geographical nature are responsible for creating such a consciousness.[20] Such a minority is —

> " ... a group of people, who, because of common racial, linguistic, religious or national heritage which singles them out from the politically dominant cultural groupj fear that they may either be prevented from integrating themselves into the national community of their choice or be obliged to do so at the expense of their identity."[21]

The problem of "national minorities" arises from the conflict between the ideal of a homogenous national state and the reality of ethnic heterogeneity, and thek tendency of the majority nationality to resent the presence of an unassimilated mass in its body politic. This type of situation exists the world over, where one national group happens to live in a country inhabited by a different national group. Europe and South-East Asia can be cited as examples.

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[19] Op. cit., p.4.

[20] Ibid, p. 6.

[21] J. A. Laponce, Op. cit., p. 6.

However, this situation does not exist in India. Indians as a whole have a single nationality. The most outstanding feature of India is that, despite its vastness and breathtaking diversity, there is the consciousness of a single nationality. Historical, cultural and geographical factors have promoted a common consciousness in India, which transcends the barriers of race, religion and language. The divisions and differences are many, but group-consciousness is limited in time and place to a particular interest characteristic of that group. Even the idea of a sub-national groups has been repudiated.[22] The definitions of a national minority have, therefore, little or no relevance in India. This does not, however, mean that there are no characteristics common to both the national minorities and other minorities, nor that the definitions are mutually exclusive.

Other minorities

Of the definitions which can be applied to all minorities, one attempted by the United Nations may be cited. Minorities are —

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[22] Report of the Linguistic Provinces Commission, (Dar Commission), (1948), pp. 210-211.

> those non-dominant groups in a polpulation, which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.[23]

But mere differences alone are not sufficient. As the following definition indicates, there must be the elements of dominance and subservience, which result from a constellation of social processes and which find expression in terms of subtle discrimination or overt behaviour. Minorities are -

> the individuals and groups which differ or are assumed to differ from their dominant social groups and have developed, in varying degree, an attitude of mind which gives them a feeling of greater social security within their own growp than in their relation to the dominant group. The differences, although varying in degree, are distinguishing characteristics not only in terms of race, religion, nationality, and state allegiance, but also in the composite cultural pattern. However, such differences in and of themselves are not sufficient to make a group a minority without the accompanying attitude of dominance and subservience, consciously accepted or tacitly assumed.[24]

The important factor appears to be the dominant position of the "majority" group, which lies in its greater power over the social, political, and economic mechanism of the society. This aspect has been highlighted by Margaret Mead in another definition. Minorities are -

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[23] Yearbook on Human Rights for 1950, (1952), p. 490; also, Y. U. N., 1951, p. 496.

[24] F. J. Brown, "The Meaning of Minorities", in F. J. B rown and J. S. Roucek (ed.), Our Racial and National Minorities, (1937), p.6.

> those groups suffering subordinate position as segments of complex social and cultural units forming political entities.[25]

Emphasis on political organisation as a significant factor may also be noted.

Differential and unequal treatment, whether forced upon minorities or desired by them, emerges from other definitions. Louis Wirth indicates the earlier type. According to himj a minority is

> a group of peolle, who, because of 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. ... Minority status carries with it the exclusion from full participation in the life of the society.[26]

The remedy in such situations may seem to lie in providing for the equality of treatment of these groups wisth the rest of the population. But this alone would not be sufficient in all cases. Distinction has to be made between two types of minority groups: one whose members desire equality with dominant groups in the sense of non-discrimination alone; and the other whose members desire equality with dominant groups in the sense of non-discrimination

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[25] Quoted in J. S. Roucek, op. cit., (n. 2, supra), p. 239.

[26] "The Problem of Minority Groups", in Ralph Linton, (ed.), The Science of Man in the World Crisis, (1945), p. 347.

plus the recognition of certain special rights and the rendering of certain positive services.[27] The consensus in some quarters is that the minority status should be restricted to only the latter. This was the line adopted by the Sub-Committee of the Commission on Human Rights in the text proposed by it:

> The protection of minorities is the protection of non-dominant groups, which while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment, in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. [28]

It is apparent that different definitions emphasise different characteristics of minorities. It is now proposed to consider briefly some of the important characteristics of minorities emerging from the generality of definitions.

Collective status

Whatever the particular circumstances and modes of differentiation, a minority group is so categorised not on grounds of its individual origin, conditions and aptitude, but because the members of the group have particular roles or locations in the society, explicitly or

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[27] Memorandum submitted by the Secretary General of the United Nations, Definition and Classification of Minorities, (1950), p. 2. U. N. Document No. E/ CN.4/ Sub.2/ 85, of 27th December, 1949.

[28] U. N. Document No. E/ CN.4/ Sec. IV.

implicitly. A minority group in a sense is created, and certainly maintained by such categorisation.[29] J. S. Roucek suggests that minority groups survive only by becoming self-conscious social units. Their special traits form the basis of an esprit de corps, a sense of belonging to a group distinct from the dominant cluster. Their group self-consciousness is kept alive by the awareness of their common problems, which keeps the group intact. The intensity of that self-consciousness, however, will vary according to local conditions.[30]

Social status and marginal location

According to Ruth Glass, differential social status in a society indicates the existence of minorities. Minorities are said to exist in stratified societies by having a more specifit ingroup structure and culture than the rest. It is a group whose "crossing points" to a wider social universe are restricted, which has not the comprehensive distribution of social status, and which is concentrated in the lower and marginal ranks. Even where such group's positions are scattered, the status of the individual at the higher level is still determined by

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[29] Ruth Glass, op. cit., (n. 4, supra), at p. 35.

[30] J. S. Roucek, op. cit., pp. 240-241.

or associated with their collective status of inferiority (e.g., a "Negro Banker"). Hence the most distinctive and also the most general characteristic of a minority is its marginal location in society. For a variety of reasons — ethnic origin, colour, religion, language, occupation, social custom, or a combination of these and other factors— minorities are regarded as being different, and as being somehow apart. Such a group can never have a homogenously high social status, though it need not necessarily have a homogenously low one either. It is a status of not belonging, or not quite belonging, that is their characteristic mark. The treatment that they receive may be contradictory: accepted in some places, and kept out of other (e.g., more easily accepted as employees than as tenants); more easily accepted in formal social relationship in the public sphere than in the informal relationship in the privete sphere. It is a vulnerable social status associated with notions of inferiority.[31]

Quantitative and qualitative aspect: power relationship

Although the term 'minority' indicates a numerical factor, as a test it is far from being satisfactory.

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[31] Ruth Glass, op. cit, pp. 43-44.

It is a minority that runs the government, pioneers social thinking, and generally exercises influence and control over a larger body. In the colonial world the native "Minorities" always outnumbered the ruling "Majorities". A simple quantitative definition of minorities can cause a good deal of bewilderment, and in some instances one would find whole societies seemingly consisting of minority groups.

According to Roucek, the minority status is characterised by a power-relationship aspect. Minority problems are said to be but one form of the struggles of the individuals and groups, who differ in their ability to exert power within a social unit. It is not so much the actual differences, but the creation of power-loaded situations, leading to social and political subordination of a group that creates minority status.[32] This implies the existence of a corresponding dominant group, with a higher social status and greater privileges. Not all groups that exist in a society can be categorised as minorities on account of differences, whether real or assumed, nor under all circumstances. There are societies which have traditionally consisted of many distinct components, without giving rise to minority status. It is not specific characteristics

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[32] J. S. Roucek, op. cit, p. 237.

that mark a people as a minority, but the relationship of that group to some other group in the society in which they live.

While the ratio between a majority and a minority may not always be a significant factor, it should be realised that numbers are nevertheless important. For the purpose of their recognition and protection, minorities should properly include a number of persons sufficient by themselves to preserve their traditions or characteristics.[33]

Permanence as a condition

The existence of differences among people is a normal phenomenon and so is the tendency to form themselves into groups. A minority situation can arise only when these group differences are permanent, and when there is no possibility of the groups being merged with one another in the foreseeable future.[34] This feature of permanance is in addition to the factors which we have discussed earlier. Where the differences are of a temporary nature, as in the case of political parties, no minority problem arises, and the groups based on such differences will dissolve as soon as the differences disappear.

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[33] Y. U. N., 1951, p. 496.

[34] Victor D'Souza, "The Problem of Minorities", 96, Modern Review, (1954).

In general the term 'minority' has been restricted to the unifying symbols of race, language, religion and nationality.[35] Whether any other groups of a social, political or economic nature can be designated as minorities would very much depend on particular circumstances. As we shall see, social and economic backwardness in India under peculiar circumstances of social stratification, bids fair to be classified as such.

In summing up this discussion, five characteristics of minorities enumerated by Wagely and Harris may be noted: i) minorities are subordinate segments of a complex state society; ii) they have special or cultural traits held in low esteem by the dominant segments of the society; iii) they are self-conscious units bound by the special traits which their members share and by the special disabilities which these bring; iv) membership in a minority is transmitted by a rule of sescent; and v) minority peoples, by choice or necessity, tend to marry within the group.[36] It should be noted, though, that these characteristics are always subject to variation according to local conditions.

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[35] J. S. Roucek, op. cit, p. 236.

[36] C. R. Wagley & M. Harris, Minorities in the New World, (Reissue, 1964), p. 10.

Types of minorities

Minorities have been sought to be classified by a variety of criteria by different writers. Thus, there are bloc minorities and diffused minorities, border minorities and enclosed minorities, minorities by will and minorities by force.[37] Ruth Glass mentions extreme minorities (those stigmatised, exploited, and segregated), hidden minorities (because discrimination against them is not overtly institutionalised and the status differentiation to which they are submitted is not crude); and potential minorities.[38] The Memorandum submitted by the Secretary General of tee United Nations to the Sub-Commission on Prevention of Discrimination and Protection of Minorities contemplated classification from such viewpoints as quantity, contiguity, citizenship, national characteristics, origin and situation, territorial jurisdiction and desires of minorities.[39]

Louis Wirth proposes a classification of minority groups in terms of their ultimate objectives. He suggests that there can be four aims: i) a minority can have

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[37] J. A. Laponce, op. cit., pp. 8-12.

[38] Op. cit., p. 41.

[39] Definition and Classification of Minorities, (1950), pp. 16-22.

pluralistic aims, — it may seek to preserve its own identity and culture on a basis of tolerance of differences and equality of opportunity; ii) it may seek to be assimilated, ultimately to lose its separate identity and merge with the dominant group; iii) it may be secessionist in its aims, and seek to achieve political as well as cultural independence from the dominant group; and iv) it may be a militant minority with a goal of political domination over the majority and other minorities in the society.[40] However, the two last mentioned are relatively rare. Most minorities tend to favour some kind of pluralism.

Minorities and minority interests in India

There are three principal categories of minorities in India: religious, linguistic, and socio-economic (or what are known as 'backward classes'). Each of these categories consists of several groups which quality for minority status in different degrees according to the characteristics of minorities discussed above. Some of these groups are easily ascertained, others are not. Their identification must be postponed, tobe discussed in appropriate chapters. For the present we must confine ourselves to considerations of a general nature relating to the

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[40] Louis Wirth, "The Problem of Minority Groups",(n. 26 supra), pp. 354-63.

definition of minorities in India.

On account of the existence of a large number of minority groups of various kinds it would be quite impossible to deal with each of them individually within the scope of the present work. Nor would such a treatment be particularly advantageous in view of the fact that the Constitution does not make any special provision for any specific group as such. Hence in each chapter minorities of the same category have been dealt with collectively with regard to the interests common to all of them.

The three groups of interests mentioned above are the foremost factors of stratification of Indian society. These are factors, which have been described as those that are "perhaps a little more explosive in our country." [41]

It will be noticed that two of the traditional grounds of minority status, viz., race and nationality, are conspicuously absent among those mentioned above, and that a new factor, socio-economic interests, has been added. As noted above, the factor of nationality in the context of minorities has no relevance in India. Although racially India is a "patchwork and a curious mixture",

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[41] Report of the Committee on Emotional Integration, (1962), P. 2.

no racial problems have arisen or can arise in India.[42] The problems of Indian minorities are different from those generally associated with "ethnic minorities". Ethnic minorities are, "groups bound together by common ties of race, nationality or culture living together in an alien civilisation but remaining culturally distinct."[43] While India has many distinct cultures, there is none which at present can be described as "alien". Indian culture is a composite culture. The component units are integral parts of it and despite their distinctiveness, have much in common. Thus, Indian Muslims, in spite of differing from the majority community in institutional religion, have much in common with it in fundamental, religious and moral consciousness, social structure, family life and in the general way of living.[44] It has been suggested that in India cultural distinctiveness is the result more of the geographic factor than that of race or religion. It is pointed out that the Muslims of Bengal are culturally closer to the Hindus of Bengal than their counterparts in Punjab.[45]

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[42] Jawaharlal Nehru, Discovery of India, (4th ed., 1956), p. 386.

[43] Caroline F. Ware, quoted in J. S. Roucek, op. cit.,p.239.

[44] S. Abid Husain, National Culture of India, (1961), p.176.

[45] Constitutional Proposals of the Sapru Committee,(Sapru Report), (1945), pp. 128-29; Also, Victor D'Souza, op. cit.,(n. 34, supra).

The inclusion of the new factor of socio-economic interests is justified on the ground that the particular circumstances obtaining in India have led to the formation of many backward groups in the population endowed with minority characteristics. It may be noted that caste is a major factor of stratification of Indian society. There are said to be approximately three thousand castes and tribes in India.[46] It has been suggested that under the present circumstances, when caste is losing its former significance, each caste group may be considered a separate minority.[47] There is a great degree of inter-relation between social and economic status in India. This factor is of greatest importance in view of the special measures adopted by the Indian Constitution to remove social and economic backwardness.

The other two factors, *viz.*, religion and language, need no apology for inclusion. The former would surely be the first to spring to mind at the mention of the word 'minorities' in the Indian context; nor would this be surprising in the historical context of communal tension in India. In fact, some writers are wont to regard

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[46] D. N. Majumdar, *Races and Cultures of India*, (4th ed., 1961), p. 281.

[47] Victor D'Souza, *op. cit.*, (n. 34, *supra*).

religious minorities as the only minorities in India.[48] It may also be mentioned that in the context of the deliberations in tee Constituent Assembly of India, the reference to minorities was, by and large, a reference to religious minorities. The question of the role of religious minorities is particularly relevant in the context of a secular state in India. As to the question of linguistic minorities, it is relatively a new problem, which came into existence with the reorganisation of States on a linguistic basis in 1956. Language has become a highly emotional issue in India, giving rise to much heat an passion. The problem of linguistic minorities becomes particularly significant against this background. In scale and proportions it is a vast problem affecting such practical aspects of minorities' life as education, employment, and culture, and for which adquate Constitutional measures are yet to be formulated.

The task of defining minorities is particularly complex in India on account of the vastness of the country, its tremendous diversity, and its peculiar social structure. The problems faced elsewhere are aere multiplied and enlarged in proportion. The factors of differentiation are found overlapping and inextricably inter-

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[48] Jawaharlal Nehru, Discovery of India, (4th ed., 1956), p. 386; Taya Zinkin, India Changes, (1958), p. 152.

mixed. No single factor can finally mark out a distinct minority group. A person may belong to more than one minority group or may belong to one or more minority groups and at the same time be a member of another majority group. Reference to any single divisive factor would indicate not one group, but several groups with distinct identities of their own and qualifying for the minority status in varying degrees, as for instance, in the case of religious minorities. Another factor of differentiation would indicate groups capable of being both the majority and minorities depending on their geographical location, as for instance in the case of a linguistic group which is in the majority within a linguistic State, and a minority outside it.

In terms of size, minority groups in India can range from several million strong to a few thousands or even hundreds. Thus, among religious minorities Muslims number over 50 millions, while Parsis (who are both a religious and ethnic minority) are to be counted in thousands. The figures relating to linguistic minorities can never be static due to freedom of movement and residence guaranteed in the Constitution, and, therefore, are not easily ascertainable. The'backward classes' are an indefinite mass of people, whose numbers are highly flexible and vary according to the criteria of backwardness current for the time being.

Finally, the Indian Constitution does not recognise minority status, except within the limited context of Articles 29 and 30, which deal with cultural and educational rights. The objective of the Constitution is an egalitatian society, where group differences shall not count, and where there will be an equality of status among all citizens irrespective of such differences. However, it cannot be denied that for the present at least the ideals of the Constitution and the facts of the situation are at variance with each other. It would be unrealistic to ignore that very real differences exist. Non-recognition of the existence of minorities in the legal sense does not automatically solve the problem. There are many instances where actual minorities recognised as such do not exist in the legal sense at all. Yet despite the Constitutional guarantees of all the rights of full citizenship, there are groups, such as Negroes and other minorities in the United States of America, who are excluded from the enjoyment of these rights through social pressure.[49] To ensure equality among all citizens it is, therefore, necessary to recognise the special needs of different sections of the

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[49] F. J. Brown, "The Meaning of Minorities", in F. J. Brown & J. S. Roucek (ed.), Our Racial and National Minorities, (1937), p. 3, at p. 5.

people. It is relevant to note that though the Indian Constitution apparently seems to have overlooked the question of minorities, in fact it has been greatly influenced by it. As we shall see later, though the Constitution does not expressly deal with minorities, a great many of its important provisions have been designed in answer to the question of minorities.[50]

III. The Protection of Minority Interests

A. The role of law

Perhaps it is necessary to caution at the outset against the danger of over-emphasising the role of law in the protection of minority interests. The realisation of rights and freedoms is not a problem to be solved by *a priori* legal definitions, but by creating better conditions of life for the individual and the society. It would be unrealistic to claim that law alone can provide adequate protection of minorities or that it can do so regardless of circumstances.

Having said this, it cannot be denied that law has a vital role to play in society and consequently with

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[50] *Infra*, p.68 *et seq*.

regard to the question of minorities. The term 'law' is used here in its wider sense to include both the positive law and natural law. In all modern societies social control is exercised under and in the name of the positive law of the state. In the present organisation ofsociety the interests of the individual and society have to be recognised, protected and enforced by the state. A system of priorities has to be worked out to resolve a conflict of interests depending on the resources and advancement of the society. The law in this sense is a "collective name for what is perhaps the most important set of institutions by which man has sought to reinforce his reason against his passions."[51] According to the positivists, all norms in a society are derived from an ultimate legal order as personified by the state. In the theory of natural law, on the other hand, human rights are anterior and superior to positive law.[52] While its rules are not certain and it lacks sanctions its abstract and moral justice is beyond dispute. The positive law ought to have its philosophical basis in natural law. The actual rules of law in a society would depend on the genius of its people, the

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[51] Percy Corbett, quoted in F. R. Scott, Civil Liberties and Canadian Federalism, (Reprint, 1961), p.27.

[52] P. N. Drost, op. cit., p. 168.

social conditions, and its present and future needs. It is necessary to strike a balance between the two poles of realism and idealism, between "what is" and "what ought to be". This is not an easy task.

According to P. N. Drost, in the protection of minority interests the law has a dual role.[53] Its primary role is to protect the very foundation of society itself. Liberty has no meaning outside society and the exercise and enjoyment of human rights can be achieved only in society. The law should therefore first secure the structure of society by laying down a minimum code of conduct for all members to follow, and require the observance of it. Minority rights have little meaning, if the basic rights of the individual are not honoured. Therefore the competitive aspirations towards political freedom and social security of the individual in society should be first adjusted and merged in a general system of human rights in the first instance.

Having performed this function, the role of law becomes secondary till other conditions have been fulfilled. The realisation of interests depends upon the degree of political maturity and economic welfare in a

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[53] Ibid, p. 12.

given country and these in turn are dependant on the moral and educational standing of the society. A high level of general, political and moral education on the one hand, and a high standard of living on the other are two indispensable conditions for the achievement of the high ideals expressed in declarations of human rights and fundamental freedoms. In the absence of willingness, however promoted, on part of the majority to respect the minority rights, there is little that can be done under the coersion of the law. Law can play a better role where the political, social and economic conditions of life have advanced. It can then provide a framework to translate and interpret public demand as expressed in political, economic and social terms into the language of the law. Fundamental freedoms belong more to the fields of politics and economics, but they need legal implementation for their effective existence.

It is proposed to consider briefly three issues concerning minority interests and the role of law.

Individual's interests and group interests

Interests are said to be the needs, demands, expectations, desires, hopes and aspirations which are sought to be satisfied.[54] Such of them as are made legally

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[54] For a general discussion on "interests", see J. Stone, Social Dimensions of Law and Justice, (1966), Chapter 4, p. 164 ff; Also, Roscoe Pound, Jurisprudence, vol.III, (1959), chapters 14 and 15, generally.

enforceable are called rights. Interests are therefore of a wider nature, though, in the context of minorities, the term 'rights' is very often used in this wider sense.

The effectiveness of any legal measure depends on how best it meets the needs for which it was designed. In seeking to protect minority interests, therefore, it is necessary first to ascertain how it affects individuals and groups in society.

The individual being the basic unit of the society, it is essential to afford him opportunities for the full development of his personality. People can have collective rights only when the basic freedoms and rights of the individual have been accepted. A people cannot develop their collective personality, if the individual members cannot preserve their cultural characteristics. Hence the Minority Treaties, (infra), even when they were chiefly concerned with the protection of national, linguistic, and religious minorities, in their definition of rights to be accorded to minorities enunciated standards which were based on the acceptance of certain fundamental rights of the individual.[55] In the development of human rights, thus, the rights of the individual are fundamental.

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[55] Moses Moskowitz, Human Rights and World Order, (1959), p. 15.

However, the danger of over-emphasis on the individual should be avoided. It may seem that a universal system of human rights, complete in geographical and substantive scope and adequately enforced, would cover all possible rights and basic freedoms of a group or people and there might seem to be no necessity to formulate and implement the rights and freedoms of groups separate and distinct from the rights and freedoms of individuals. But, as P. N. Drost has pointed out, this reasoning does not take into account the essential differences between individual needs, desires and ambitions on the one hand and collective exigencies, propensities and aspirations on the other. The psychology of the individual is something totally different from the psychology of a group. The protection of religious, racial, linguistic and cultural groups against political and economic oppression requires legal measures entirely dissimilar from those necessary for the protection of the individual. The liberty of the people signifies something intrinsically different from the freedom of the individual. The security of the nation depends on conditions, which are not essential for the security of the person. Recognition and observance of human rights has not satisfied peoples or nations, which are either minorities in or dependencies of "alien" lands.[56]

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[56] P. N. Drost, op. cit.,p. 197.

It has therefore been suggested that provision of human rights alone would be inadequate for minorities and that it is necessary to rethink of minority rights in terms of groups.[57]

The distinction between individual's interests and group interests should not e carried too far. Sociologists remind us that a separate individual is an abstraction unknown to experience and so likewise is society, when regarded as something apart from individuals. It is not a matter to be stated as "either/or". Neither the individual nor the group is by itself adequate to comprise all the aspects of life of man in society.[58] Human rights and minority rights have little that is not common. It has been suggested that special provisions should be restricted only to specific groups, such as national communities, and that other groups such as racial or religious minorities, who merely seek equality with the majority, could be protected under an effective system of human rights.[59]

The Indian Constitution makes a compromise in that it is said to be at the same time both an individua-

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[57] V. A. Werck, "The Minority Problem and Modern International Law", VII, World Justice, (1965).

[58] Louis Wirth, Community Life and Social Policy, (1956), p. 22.

[59] P. N. Drost, op. cit., p. 201.

listic and collectivist document.[60] The fundamental and other rights vest in the individual citizen, irrespective of his group affiliation. The emphasis throughout is on him. At the same time it takes note of the existence of many differences in the population and provides for the collective rights as well. This has been done in general terms, as in the case of freedom of religion in Articles 25 and 26, and linguistic and cultural rights in Articles 29 and 30. But the most significant of its attempts in dealing with collective interests are the provisions relating to the backward classes, dealt with in Chapter V, below.

Constitutional guarantees and minority interests

The incorporation of a Bill of Rights is a common phenomenon in recent Constitutions. It is particularly relevant in the context of minorities.

But the attitudes to written guarantees differ. The traditional British view is to look upon them with suspicion.[61] The Indian Statutory Commission dismissed the suggestions put forward before it that the future Constitution of India should contain definite written guarantees

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[60] Sir W. I. Jennings, Some Characteristics of the Indian Constitution, (1953), pp. 22-23.

[61] Among the Constitutional lawyers holding this view are, A. V. Dicey, (Law of the Constitution, Papermac ed., 1961, p. 207); K. C. Wheare, (Modern Constitutions, Reprint 1958, pp. 54-57); and Sir W. I. Jennings, n. 60, pp.49-50,54.

to the minorities. They said that they were aware that such provisions had been inserted in many Constitutions, notably those of European states formed after the War, but that experience had not shown them to be of any great practical value. In their view, "abstract declarations are useless, unless there exists the will and the means to make them effective."[62] More recently, Jennings, drawing from his experience of India, Pakistan and Ceylon, has concluded that "one hould not attempt to deal with the problem of minorities by Constitutional guarantees in Bills of Rights. One should try to find out where the shoe is likely to pinch and to provide the necessary flexibility at that point."[63] His view is that such provisions are difficult to interpret, difficult to enforce, and limit parliamentary freedom to act.

The case for written guarantees, however, is very strong. In a country comprising minorities of every kind the necessity of an agreed set of fundamental freedoms is paramount. Granville Austin notes that in the Indian instance a declaration of rights was thought to be as necessary as it had been for the Americans when they

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62 Report of the Indian Statutory Commission, Vol. II, Cmd. 3569, (1930), Part I, Chapter V.

63 Sir W. I. Jennings, The Approach to Self-Government, (1956), p. 110.

established the first federal Constitution.[64] The case for written guarantees is well stated by the Nigerian Commission which recommended the inclusion of fundamental rights in the Constitution: "Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them, but they are of great value in preventing a steady deterioration in standards of freedom and the unobstrusive encroachment of a Government on individual rights."[65]

It is not surprising that great weight had always been attached to the question of written guarantees in India. In recommending the principles of a Constitution of India, the Committee appointed by the All Parties Conference stated —

> It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances. ... Another reason why great importance attaches to a declaration of rights is the unfortunate existence of communal differences in the country. Certain safeguards and guarantees are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of

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64 The Indian Constitution: Cornerstone of a Nation, (1966), p. 54.

65 Report of the Commission appointed to enquire into fears of Minorities and the means of allaying them, Cmnd. 505, (1958), p. 97.

> religious and communal rights to all communities than by including them among the basic principles of the Constitution.[66]

On the eve of Independence, the Sapru Committee once again reiterated the need to allay minority fears, "Having given the matter our best consideration," they said, "we have come to the conclusion that howsoever inappropriate the tabulation of fundamental rights may be in England and howsoever inconsistent it may be with the fundamental dogma of the British Constitution that the fundamental rights are incompatible with the sovereignty of Parliament, in the peculiar circumstances of India we are distinctly of the opinion that the framing of fundamental rights is necessary not only for giving assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, government and courts."[67] It would be sad, they said, if Constitutional jurists or lawyers under the spell of English law treated fundamental rights as nothing more than moral maxims or adages.[68]

It is true that everybody cannot afford to go

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66 Report of the Committee appointed by the Conference to determine the principles of the Constitution of India, (Nehru Report), (1928), p. 90.

67 Sapru Report, (1945), p. 257.

68 Ibid.

to court and in some circumstances it may not be practical to do so. But there is no denying the fact that the mere presence of the guarantees has the effect of restraining those tempted to tamper with them. The great amount of case law relating to fundamental rights that has come into existence since the commencement of the Constitution and a series of valuable decisions handed down by the Supreme Court and the High Courts have vindicated the incorporation of Fundamental Rights in the Indian Constitution.

There can be no doubt that in India the written guarantees have proved to be a success. Alan Gledhill has observed that India has taken the enforcement of fundamental rights more seriously than any other country and has provided the world with an object lesson.[69] Even such a sceptic of written guarantees as Jennings has been led to reconsider his views on the subject in the light of the Indian experience. In a publication to commemorate the Magna Carta, he recognises that the Bill of Rights in the Indian Constitution has been a "considerable success".[70]

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69 "Fundamental Rights", in J. N. D. Anderson (ed.), Changing Law in Developing Countries, (1963), p. 81, at p. 92.

70 Sir W. I. Jennings, Magna Charta and its influence in the world today, (1965), p. 41.

Law and social change

It is beyond dispute that in the present day society law plays a greater role than it did in the past. Ever increasing volume of legislation and overworked law courts are a characteristic mark of our age. The law assumes even a greater role in the welfare state.

Legislation is a powerful instrument by which the state seeks to exercise social control and cater for social needs. The importance attached to it by each society differs at different times. As A. V. Dicey has shown, legislation could either be a mere formal enactment of the ideas already accepted by the society, or anticipate future needs and create necessary public opinion for it.[71] In a welfare state, and in developing countries generally, it is a characteristic feature of law to take this initiative in seeking to solve social problems. In such circumstances law, as it seeks to resolve the conflict between the need of safeguarding the freedom of the individual and the necessity of imposing limitations on it in the larger interests of the society, has a "dynamic" role to play.[72]

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[71] A. V. Dicey, Law and Public Opinion in England, (Reissue, 1962).

[72] P. B. Gajendragadkar, "The Historical Background and Theoretic Basis of Hindu Law", in S. Radhakrishnan (ed.), The Cultural Heritage of India, Vol. II, (1962), at p.414.

India provides a fascinating example of what is sought to be done through legislation in dealing with social problems. One outstanding example is the reform of the Hindu society itself. Social disabilities, which have acrued for centuries, have been removed by one stroke of the law; and a series of enactments has been passed to streamline Hindu social institutions. It is true that legislation alone cannot be the answer to social ills and that it cannot succeed, unless it finds social acceptance. There are many instances in history where ambitious legislative schemes have failed, or have yielded only partial results. Yet, as K. M. Panikkar argues, it is of significance that society has never been the same again.[73] Legislation is a powerful instrument and much good can come through it, if used properly. Caution is, however, necessary, particularly in countries like India, where the law tends to be "the expression of the aspirations of the most articulate and 'advanced' groups, which hope to use its educational as well as its coersive powers to improve the unenlightened."[74] It must also be realised that, under the political conditions obtaining in India, there

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[73] Hindu Society at Cross Roads, (3rd ed., 1961), pp. 86-91.

[74] Marc Galanter, "Hindu Law and the Development of the Modern Indian Legal System", (Mimeographed typescript).

is nothing to stop the majority community from imposing its notions on minority communities quite legally, if it chose to do so.

The role of the judiciary is of paramount importance. Its role, particularly in countries like India, is more than the mere interpretation of the law passed by legislatures. In interpreting the Fundamental Rights, the questions of public good, resonableness of restrictions and those relating to policy, propriety or wisdom underlying legislative or executive action may come to be considered by the judges.[75] Where a nation's fundamental law envisages a far-reaching reconstruction of society, the judiciary is inevitably engaged in the delicate task of mediating between social actualities and avowed goals of the polity. They are both authoritative interpreters of these goals and assessors of the changing actuality in which these are to be realised.[76] Thus, Marc Galanter would have the courts see that the experiment of protecting and advancing the backward classes does not ossify in a scheme of communal quotas and thus postpone the achievement

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75 P. B. Gajendragadkar, Law, Liberty and Social Justice, (1965), pp. 11-13.

76 Marc Galanter, "The problem of Group Membership: some reflections on the judicial review of Indian Society", 4, J. I. L. I., (1962), p. 331.

of equality it is designed to promote.[77]

It is necessary to realise that the law is a double edged weapon, which, if used properly, is capable of much good, and, if used wrongly, is bound to cause much harm. The ends and means of the law must, therefore, be subject to a continuous review by society, especially in a society which includes minority groups. In this context some of the issues raised by Harold Laski merit a serious consideration of all concerned —

> ... To say that the law is useful is to ask at once to whom it is useful; and that is always a question to which the most various answers can be given. To say that it embodies reason is merely to raise the enquiry of whose reason it embodies. To say that it expresses the general ends of the society is to ask as conveived by whom? At every point in short, the ideal purpose of law is not necessarily identical with the actual purposes of law as these are experienced by those who receive the law.[78]

The Indian Supreme Court has pointed out that mere honesty of purpose is not sufficient to sustain a law enacted in contravention of any of the Constitutional guarantees. A law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law maker was satisfied that what he did was right or that he believes that he acted in a manner consistent with the

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[77] Marc Galanter, "Protective Discrimination for Backward Classes in India", 3, J.I.L.I., (1961), p. 39, at p. 69.

[78] A Grammar of Politics, (4th ed., 1937), p. vii.

contitutional guarantees of the citizen. The test of validity of a law alleged to infringe the fundamental rights or any act done in the execution of that law lies not in the belief of the maker of the law ar of the person executing it, but in the demonstration by evidence and argument before the courts that the guaranteed right is not infringed.[79]

B. A brief historical background of the protection of minority interests

General background

A discussion of the general historical background does not need an apology, when it is realised that there is an essential unity and continuity in the development of human institutions. K. M. Panikkar has observed how India has been influenced by wsstern ideas in the past and how Indians are in fact inheritors of the tradition of both India and the world, and how they can legitimately claim as their own what they have assimilated from others.[80] The same can be said of all countries. The developments in individual countries and in the inter-

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[79] State of A. P. v. P. Sagar, A.I.R. 1968 S.C. 1379, at pp. 1384-85.

[80] The State and the Citizen, (2nd ed., 1960), p. 42.

national community have always had a mutual influence on each other, and at present more so than ever before.

In tracing the development of human rights it is necessary to consider two levels: municipal law and international law. In the municipal positive law, significant developments started in the 17th century and the process is still continuing. For whatever reasons, (e.g. the Renaissance and canons of the church), this process began in the western hesisphere and made early progress there. In England the onslaught of the common law had paved the way for the enlarging of the subjects' rights and dimunition of the royal prerogative, which process received a sound legal basis by the end of 17th century. The Petition of Right of 1672, the Habeas Corpus Act of 1679 and the Bill of Rights of 1689 are fundamental. In America the Pilgrim Fathers expressed the principles of human rights in the Charter of New Plymouth drawn in 1620. The Charter of Providence came in 1636. In the 18th century the idea of the traditional rights of man took shape, aided by the developments in England, America and France. The idea of fundamental rights received expression in the declarations and constitutional developments of the American states of Virginia, Pennsylvania, Maryland, North and South Carolina, New Jersy and Delaware — all in 1777; Massachusetts in 1780, and New Hampshire in 1783. But by far the most important Constitutional development

is the American Declaration of Independence (1776) and the Bill of Rights (1791) in the first ten Amendments. On the European continest the French "Declaration des droits de l'homme et du citoyen" (1789) has been an epoch making document. It became part of the French Constitution in 1791 and of all subsequent Constitutions. In the 19th century the idea spread gradually over most European and South American countries, which one after another incorporated some fundamental rights of the individual in their Constitutions. These ideas spread with western civilisation, following trade and colonisation and more countries followed the European and American experiments. About the beginning of the first World War, the classic human rights had appeared in nearly all the wsitten Constitutions of the world. These rights were directed against encroachment of the state. The modern human rights embodying the concepts of social equality and economic security are of recent origin.

In the international law, three stages in the development are apparent. In the first period isolated ad hoc provisions were incorporated in various treaties; in the second, a concerted attempt was made by the League of Nations in the creation of a minority treaty system; and in the third, commencing from the end of the second World War, various international organisations, such as the United Nations and the European Commission, have carried

on the task.

International concern for the human rights began with the stipulations of religious liberty incorporated in various treaties in the period following the Reformation.[81] There has been no systematic evolution of minority law and its general development can be traced only through often unconnected and isolated treaty provisions in the western hemisphere. They were often a matter of convenience to the powers involved and were often dictated by the victor to the vanquished. Their aim was to shield minorities from the danger of oppression by the majority. They did not concern themselves with the positive rights of the groups involved but sought protection on humanitarian ground only.[82] The history of international law shows a number of treaties which included similar minority provisions: the Treaty of Augsburg 1555, the Treaty of Nymengen 1678, the Peace Settlement of Westphalia 1648, the Treaty of Ryswyck 1697, the Treaty of Oliva 1660, the Treaty of Kutchi Kainardji 1774, the Congress of Vienna 1815, the Treaty of Paris 1856, the Treaty of Vienna 1878, and the Treaty of Paris 1898. Their implementation was political in nature. The so called human rights provisions were

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[81] Moses Moskowitz, Human Rights and World Order, (1959), p.14.

[82] P. de Azcarate, op. cit., p. 14.

only obligations binding on the signatory powers and the individual did not derive any rights from them.

The minority system created by the League of Nations is the first attempt on such a scale at the international level. The principal powers decided to establish an international system of guarantees, which would impose certain obligations on the new or enlarged states for the protection of minorities in the interests of peace. The system was conceived on the basis of a number of conventions and other binding instruments laying down certain principles of government. The stipulations, affecting persons belonging to racial, religious, or linguistic minorities, constituted obligations of international concern and placed under the control of the League, with the Council of the League as supervising body. Disputes on minority clauses were to be referred to the Permanent Court of International Justice. These stipulations may be divided into three categories: i) five special "minority" treaties signed during the Paris Peace Conference by Poland (June, 1919), Yugoslavia (September, 1919), Czechoslovakia (September, 1919), Rumania (December, 1919), and Greece (August, 1920). The Polish Treaty was considered to be a model; ii) special chapters inserted in the General Treaties of Peace, and other treaties: the Treaty of St. Germaine (signed by Austria, September 1919), Neuilly-sur-Seine (by Bulgaria, November, 1919), Trianon (by Hungary, June, 1920),

Lausanne (by Turkey, July, 1923), the German-Polish Convention on Upper Silesia (May, 1922), and the Convention concerning the Memel Territory (May, 1924); and iii) declarations made before the Council of the League of Nations by Albania (October, 1921), Estonia (September, 1923), Finland (June, 1921), Latvia (July, 1923) and Lithunia (May, 1922).[83]

It may be pointed out that this attempt was almost exclusively concerned with national minorities. Save in very exceptional circumstances, (e.g. Jews), the minorities belonged to the same nationality as that of the majorities in other states. For a number of reasons, which it is not possible to discuss here, the above system eventually proved a failure. But, as Moses Moskowitz has pointed out, despite its shortcomings, it constituted the first major systematically implemented effort to limit the absolute power of the state over its citizens or subjects.[84]

The creation of international organisations since the second World War marks the third stage of development. Their efforts in seeking to achieve a universal

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[83] Report of the League of Nationas, See Appendix in P. de Azcarate, op. cit., pp. 164-165; also, United Nations, "The International Protection of Minorities under the League of Nations", E/ CN.4/ Sub.2/6 of 7th Nov., 1947.

[84] Op. cit., p. 15.

system of human riths have met with a large amount of success and the process continues the world over. The principal among these is the United Nations Organisation, whose present membership includes 126 countries.[85] Its Charter contains most ideal aspirations for the promotion of human rights. Its aim is "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion";[86] it seeks to promote "universal respect for an observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion";[87] and "all members pledge themselves to take joint and several action in co-operation of the Organisation for the achievement of the purposes set forth in Article 55."[88] It works through a number of organs on a wide front. In the context of our discussion mention may be make of its Commission on Human Rights and its Sub-Commission on Prevention of

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85 List of Member States and the dates of their admission are to be found in "Membership in the United Nations", published by the Office of Public Information,(March,1969).

86 Article 1 of the U. N. Charter.

87 Ibid, Article 55.

88 Ibid, Article 56.

Discrimination and Protection of Minorities, the Trusteeship Council, and the UNESCO.

The Universal Declaration of Human Rights, adopted on the 10th December, 1948, has been an epoch making document. Whatever is its legal status and effect, it has made a tremendous impact on both the international and municipal law. Its principles have been adopted in the Bills of Rights of most Constitutions which have been written since its proclamation, including the Indian Constitution.[89] Along with the Universal Declaration two International Covenants, one on Economic, Social and Cultural Rights, and the other on Civil and Political Rights, were also proposed.[90] These were visualised as instruments which would legally bind the States acceding to them. But the progress on these was slow. The draft Covenants were under consideration by the General Assembly since 1954, and were finally adopted by it on 16th December, 1966.[91] They require State parties to them to implement the rights and freedoms proclaimed in the Universal Declaration of

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89 For a discussion on the Fundamental Rights of the Indian Constitution in the light of the Universal Declaration, see A. Gledhill, "India's Fundamental Rights", in the Indian Year Book of International Affairs, 1952.

90 Y. U. N., 1947-48, p. 573.

91 Y. U. N., 1966 (published 1968), p. 406.

Human Rights.[92] So far each of the Covenants have been signed by 44 countries.[93] Further, reference may also be made to two Conventions: the International Convention on the Elimination of all Forms of Racial Discrimination, adopted by the General Assembly on 21st December, 1965,[94] and the draft "International Convention on the Elimination of All Forms of Religious Intolerance and Discrimination based on Religion or Relief" which is at present under consideration by the General Assembly.[95]

Another outstanding achievement has been the European Convention on Human rights, adopted by the Committee of Ministers of the Council of Europe in Rome in November, 1950. Its significance lies in the fact that it represents an advance on the work of the United Nations. It was the realisation that the Universal Declaration had no binding effect which led the countries of western Europe to work for the conclusion of the Convention. It

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92 The text of the two Covenants is to be found in Y. U. N., 1966, pp. 419-432.

93 Press Releases L/T/518 and L/T/519 dated 17th September, 1969, United Nations, Office of Public Information. (Not official records).

94 Y. U. N., 1965, p. 433; the text is at pp. 440-446 of the same.

95 The draft Declaration and the draft Convention have been under consideration since 1964. At its 24th Session on 16th December, 1969, the General Assembly, owing to lack of time, decided to defer consideration of this item to the 25th Session: Press Release GA/4165 dated 17th December, 1969, Part V, p.64 (Not official record).

deals with rights of a personal, civil and political nature. It is implemented by a European Commission for Human Rights and a European Court of Justice.

Today, more than ever before, there is increasing awareness of human rights throughout the world thanks to the efforts of numerous official and non-official organisationa. Mention may be made of civil rights movements, activities of groups of pacifists, church, educational and other groups, and organisations such as the International Commission of Jurists and Amnesty International. Establishment of national committees on human rights is encouraged. All modern Constitutions, including those of the socialistic bloc, now include a Bill of Rights, by whatever name called. Whatever be the political ideologies and methods, today there is a professed desire on part of all nations for the promotion of human rights. Their realisation in fact is, however, a matter which can be considered only with reference to particular circumstances in each case.

A brief historical background of the Indian Constitution

The Indian Constitution is the outcome of a compromise in which considerations of minority interests have played an important part. According to B. R. Ambedkar, among the many problems that the Constituent Assembly of India had to face, there were two which were admittedly

most difficult. The problem of minorities was one of them, the other being the problem of Indian States.[96] Various safeguards for the protection of minority interests have been built into the Constitution, although it does not specifically refer to minorities.[97] For an appreciation of the provisions of the Constitution it is necessary to see them in an historical perspective. For, every Constitution is a product of history, a product of the manner in which the country concerned emerged as an independent state, of the conflicts haich preceded that emergence and of the forces that have played on it.[98] This is very true of India.

The development of the rights and principles incorporated in the Indian Constitution can be traced in a series of documents sice the founding of the Indian National Congress and the struggle for independence. This is also a period during which the western idea of civil rights gradually took root in India. It may be mentioned that ancient Hindu polity never recognised 'civil liberty', as meaning the protection of the rights against the King or the state but only sought to protect the rights of an

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96 B. R. Ambedkar, States and Minorities, (1947), preface.

97 Except in Articles 29 and 30.

98 Sir W. I. Jennings, The Approach to Self-Government, (1956), p. 2.

individual against the encroachments of another individual. The King was viewed as deriving his authority from dharma and not from the people.[99] The rights in the Constitution, therefore, have a relatively recent history in India.

Perhaps the first explicit demand for fundamental rights appeared in The Constitution of India Bill, 1895.[1] At this time for a people under foreign rule the question of minority interests was of a much lesser importance than ensuring the interests of the country as a whole. The primary demand, therefore, was for equality with the rulers. A series of Congress resolutions between 1917 and 1919 repeated the demand for civil rights and equality with Englishmen. The mid-twenties gave rise to a new tone and form of demand, the purpose of which was to assure liberty to Indians. The seven fundamental rights in Mrs. Besant's Commonwealth of India Bill of 1925 mark an important development; several of these have found expression in the present Constitution.

The appointment of the Nehru Committee to draft a swaraj Constitution on the basis of a declaration of

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[99] B. B. Naik, Ideals of Ancient Hindu Politics, (1932), pp. 39-40.

[1] For a detailed discussion of the historical background, see G. Austin, The Indian Constitution, p. 52ff.

rights marks a most significant development. This Committee was set up at the instance of the Madras Session of Congress in 1927, following the announcement of the appointment of the Simon Commission. The Committee dealt with the question of minorities and emphasised the need for the incorporation of guarantees of Fundamental Rights in the Constitution.[2] The Rights of the Nehru Report are remarkably similar to the Fundamental Rights in the present Constitution;[3] ten of the nineteen sub-clauses are materially unchanged and three of the Rights are included in the Directive Principles. The preoccupation of the Committee with the protection of minoritits is particularly relevant: it thought that it was essential to guarantee certain fundamental rights to prevent "one community domineering over another."[4]

The Congress Resolution on Fundamental Rights and Economic and Social Change adopted by Congress at its Karachi Session in 1931, and known as Karachi Resolution, added a new dimension. For the first time it emphasised the positive obligations of the state in social and

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[2] Supra, pp. 52-53.

[3] G. Austin, op. cit., p.55.

[4] Nehru Report, (1928), p. 29.

economic matters, in addition to its prohibitions. The Karachi Resolution has made an unmistakable imprint on the Constitution, particularly in the Directive Principles.

The Sapru Committee's Report, which came in the eve of independence, is a major document. The standing committee of the Non-Party Conference, meeting in Delhi in November, 1944, set up a committee to " ... examine the whole communal and minorities question from a Constitutional and political point of view, put itself in touch with different parties and their leaders, including the minorities interested in the question."[5] The Report suggested a Constitutional scheme for India, and paid special attention to placating minority fears.

The deliberations of the Constituent Assembly of India are of great significance in understanding the Constitution it adopted. The Assembly, though indirectly appointed, was a highly representative body and included every shade of public opinion.[6] For the purpose of dealing with the Fundamental Rights the Assembly created an Advisory Committee in January 1947 on which all minority groups were represented. The Advisory Committee appointed three Sub-Committees, one each on Fundamental Rights, Minorities

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[5] Sapru Report, (Reprint, 1946), p. 1.

[6] For details of membership, see G. Austin, op. cit., pp. 13-14 and Appendix.

and on Tribal and Excluded Areas.

The Rights Sub-Committee having arrived at its tentative conclusions passed them on to Minorities Sub-Committee for suggestions, and after considering the suggestions received on the minority provisions, sent its Report to the Advisory Committee. The Rights Sub-Committee had sent a questionaire on the minority provisions in March 1947 to leaders of minority communities to determine what political, economic, religious, cultural and other safeguards they believed should be incorporated in the Constitution. Using these replies the Sub-Committee framed a list of minority rights and included it in its Report to the Advisory Committee. The Minorities Sub-Committee having considered the minority provisions and made few changes, sent its own Report to the Advisory Committee which incorporated the changes suggested by it. The Interim Report of the Advisory Committee on the subject of Fundamental Rights was submitted to the Constituent Assembly on 29th April, 1947. The Assembly debated it during the third Session, and again in November, 1948. The Rights appear in the Constitution in substantially the same form as they appeared in the Interim Report.

The scheme of minority protection in the Constitution is two fold. The first is the inclusion of a guarantee of a wide range of civil liberties in the chapter on Fundamental Rights. These include such provisions

of particular minority interest as non-discrimination, equality, the freedom of religion, and the protection of script and culture. The Directive Principles of State Policy in Part IV of the Constitution provide for an welfare ideal which the state ought to seek to achieve. The second is a scheme of political organisation which seeks to ensure the equality of political rights of all sections of the population and their adequate representation in national life. As will be seen in the next chapter, this includes special arrangements for the representation of certain backward classes in legislatures, the civil services, and other forms of special administration. The Preamble of the Constitution expresses its spirit and declares its objectives: viz., the achieving or all its citizens, majorities and minorities alike, justice, liberty, equality and fraternity.

IV. The principle of equality as a basis for the protection of minority interests

The subject of equality is of great relevance in any discussion minorities. In a great majority of cases the principal demand of minorities is for the removal of discrimination and for equal treatment with the majority. This is certainly true of the Indian minorities. Even in cases of minorities with militant views, equality with the majority is the minimum acceptable condition and

a primary stage in the realisation of their objectives. This principle is of special significance in the context of the Indian minorities, in view of the fact that the Indian Constitution has adopted it as the sole basis for the solution of the problem of minorities, and is the key-note of the entire Constitution.

It was noted in the previous section that in the Indian Constitution the protection of minorities was sought to be achieved by a guarantee of the Fundamental Rights and a scheme of political rights. It is important to note, however, that these are not special provisions for the minorities (who are not even defined), but are available to all persons equally. A remarkable feature of the Indian Constitution is that, despite the many divisions in the country, it does not categorise the population into groups. There is one common citizenship and no section of the population will be discriminated against or given a privileged position. The Constitution is an egalitarian document, which has for its goal the attainment of equality of status and opportunity for all its citizens.[7] It contemplates political, social, and economic equality for all citizens. The objectives of the Constitution are well-stated in the words of the Sapru

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[7] Preamble of the Constitution.

Committee, which anticipated the declaration of the Fundamental Rights. The rights of the Constitution would be, it said,

> ... not only a standing warning to the vested interests or to the privileged classes but also a standing invitation to the governments, administrators and guardians of the law that the period of privileges and inequality is over and that what the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberties, and security in the enjoyment of the freedom of religion, worship and the pursuit of the ordinary avocations of life.[8]

The principal provisions concerning equality are to be found in the chapter on Fundamental Rights. Article 14 states that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 15 bars discrimination against any citizen on grounds only of reiigion, race, caste, sex, place of birth or any of them, and this prohinition extends also to private acts with regard to public amenities. Article 16 provides for equality of opportunity in the matter of public employment, and bars discrimination on similar grounds. Articles 17 and 18, abolishing "untouchability" and "titles" respectively, togeter with the Directive Principles of State Policy,[9]

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[8] Sapru Report, (Reprint, 1946), p. 258.

[9] Part IV of the Constitution.

and the provisions for "protective discrimination"[10] form the basis for socio-economic equality. A common citizenship for the whole country, universal adult franchise, and opportunities for representation in the services of the state provide for equality in the political sphere.[11]

In the present context, it is noteworthy that India has chosen to be a democracy. Its implications on the problem of minorities are two fold. First, as Humayun Kabir has noted, there is no question of minorities except in a democracy. Democracy implies the recognition of the right of individuals and groups not to be regimented, not to be assimilated in the general mass against their will.[12] It is only when personal rule or group rule of a class is replaced by rule by the will of the majority, and only when all members fo the community participate in the functions, duties, and rights, as in a democracy, that the question of minorities assumes importance.[13] Secondly, the idea of equality is inherent in such a political system. There cannot be democracy without equality.[14] No

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[10] Articles 15, 16 and Part XVI of the Constitution. See Chapter V, infra.

[11] See Chapter II, infra.

[12] Humayun Kabir, Minorities in a Democracy, (1968), p. 33.

[13] Ibid, pp. 2-3.

[14] Jawaharlal Nehru, Glimpses of World History, p. 825, quoted by D. E. Smith in Nehru and Democracy,(1958),p.59.

doubt there is great controversy as to the extent of equality which is essential in a democracy. There are those who argue that all that is required is the equality of status of the individual, and others, to whom esuality is never real unless it extended to the socio-economic sphere.[15] The Indian Constitution has laid this controversy to rest by prescribing for equality in the wider sense. The equality that it seeks is not merely a negative equallty, in the sense of an absence of discrimination or an equality of status, but positive equality, with what R. H. Tawney calls "equal opportunities of becoming equal"[16] through the active support of the state. For, equality of opportunity is not simply a matter of legal equality; its existence depends not merely on the absence of disabilities, but also on the presence of abilities.[17] The establishment of a democratic system contained in the Indian Constitution and the regime of equality that it envisages is an assurance to the minorities of the protection of their interests.

However, it should not be imagined that the problems of minorities can be solved by a simple declara-

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15 J. A. Corry and J. E. Hodgetts, Democratic Government and Politics, (3rd ed., 1959), p. 31.

16 Equality, (4th ed., 1952), p. 105.

17 Ibid, p. 106.

tion of equality. While it may serve as a fundamental basis in securing minority interests, in its practical working there are difficulties of great magnitude, the most important of which is the difficulty in ascertaining the true meaning of "equality". There is no certain guide; the variables of its interpretation are endemic.[18] Those who have made a historical study of the concept of equality point out that the concept has become inoperative and ineffective when obliged to adhere to a fixed meaning.[19] Equality at best is a coherence of ideas,[20] or an attitude shared by men in different circumstances.[21] In applying it, a number of factors have to be taken into account. Thus, it has been observed that in the process of levelling up or down a highly heterogenous community as in India, it is not enough merely to declare all citizens equal in the eyes of the law. It was essential to enact, apart from the general provision of Article 14, a number of detailed provisions specifying the attributes of equality and permitting a degree of discrimination in certain

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[18] J. Stone, Human Law and Human Justice, (1965), p. 326.

[19] Richard McKeon, "Practical uses of a Philosophy of Equality", in L. Bryson and others (ed.), Aspects of Human Equality, (1956), p. 5.

[20] H. Laski, A Grammar of Politics, (4th ed., 1937),p. 153.

[21] Richard McKeon, op. cit., p. 6.

instances to speed up the process of real equalisation.[22]

The principle of equality does not work in a vacuum; it is necessary to harmonise it with the deals of justice and of liberty. Equality is not an end in itself but a means to secure the full development of human personality. The idea of justice gives it a sense of direction in its working. Equality must mean that the limited resources of the society are made available to all members of the community in a fair manner, according to need and merit. Harold Laski brings out this idea of equality effectively. To him equality meant —

> that no man shall be so placed in society that he can overreach his neighbour to the extent which constitutes a denial of the latter's citizenship. ...It means such an ordering of social forces as will balance a share in the toil of living with a share in its gain also. It means that my share in that gain must be adequate for the purposes of citizenship. It implies that even if my voice be weighed as less weighty than that of another, it must yet receive consideration in the decisions that are made. The meaning, ultimately, of equality surely lies in the fact that the very differences in the nature of men require mechanisms for the expression of their wills that give to each its due hearing.[23]
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> Equality means ... that adequate opportunities are laid open to all.[24]

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[22] C. H. Alexandrowicz, Constitutional Developments in India, (1957), pp. 56-57.

[23] A Grammar of Politics, p. 153.

[24] Ibid, p.154.

However, 'justice' itself is an abstract concept which is susceptible of varied interpretations in different societies, and also within the same society at different times.[25] For some, it seems sufficient to establish formal or legal equality, and practical or positive equality would follow in due course; but according to others, equality can never be real until it is achieved in fact.

The need for harmonising ewqality with liberty arises from the fact that men are not equal in natural endowment, whether it be health, stature or intelligence. Consequently, they are bound to differ in the growth of their personalities. The same is true of communities of men. A dead level of equality can be achieved only by severely restricting the freedom of some. It is, therefore, necessary to achieve a balance between equality and liberty. The ideal type of equality is not a regimented equality but one which allows maximum freedom for the development of all, while supporting the weak. The concept of equality must, therefore, take into account the existence of natural inequalities and differences.

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[25] For an interesting example , see the interpretation of racial equality by the U. S. Supreme Court: i) Plessy v. Ferguson, (163 U.S.)567), (1896), which laid down the rule of "separate but equal"; ii) Cumming v. Board of Education, (175 U.S. 528), (1899), which enunciated the doctrine of "substantial equality" and iii) Brown v. Board of Education, 347 U.S. 483, which declared the principle in (i) to be illegal.

Accordingly, equality consists of treating people alike in so far as they are alike, as well as treating them differently so far as they differ.[26] Social equality thus construed would have three implications:

> ... first, that so far as individuals share a common experience in life, they shall enjoy an equal opportunity for the formation and expression of public opinion, whether in political or any other field; secondly, that the occupations, sects, parties or other social divisions into which they fall shall have equal opportunities for making effective expression of their interests, knowledge, and valuations; thirdly that the unique personal needs shall be able to transcend the barriers of 'class' and make their distinctive contribution through personality to public policy.[27]

Thus, there is in each individual a unique personality, a member of a class or group, and a member of the wider community, of which the classes or other groups are sections.

The law-giver, therefore, needs to know fully the social circumstances and needs of all sections of the people before he can legislate for them in keeping with the principle of equality. A law is not necessarily equal because it applies to all equally.[28] Mahmud Ahmad, commenting on the minority proposals of the Nehru Report, points out that in India the mere uniformity of laws cannot ensure justice between communities, as in a number of

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[26] J. A. Hobson, Towards Social Equality, (1931), p. 26.

[27] Ibid, p. 5.

[28] R. H. Tawney, op. cit., p. 106.

cases the effect of such laws would not be the same on all communities. A particular law may affect one community most, while it may not affect another community at all, or affect it only nominally. As an instance he cites the case of the legislation on cow-slaughter and points out that though apparently this may apply to both the Muslim and the Hindu communities, in fact it affects only the Muslim community adversely, and the Hindu community not at all.[29] Hence, in seeking to achieve equality both the legislator and the judiciary must constantly be aware of the existence of differences among various sections of the populztion. They should keep in view the distinction between equality in law and equality in fact; for, as Mohammad Ghouse, citing Aristotle, has pointed out, "injustice arises not only whe equals are treated unequally, but also when unequals are treated equally."[30]

It is significant that few Articles of the Indian Constitution have been more heavily drawn upon than those providing for equality, especially Article 14.[31] This is not the place for entering upon a discussion on the maze of technicalities which inevitably

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[29] M. Ahmad, Nehru Report and Muslim Rights, (1930),pp.61-62.

[30] Mohammad Ghouse, "Minority Rights under the Indian Constitution", (1967) I S.C.J., p.67, at p. 78.

[31] H. M. Seervai, Constitutional Law of India, (1967), p.188.

surround its interpretation and it would also be quite impossible to consider here the innumerable decisions handed down by the courts; this task is best accomplished by textbooks.[32] But a reference must be made to a predominant factor in the application of the rule of equality: the rule of classification.

The rule of classification assumes great importance because, as we have seen above, all people are not similarly situated, and therefore, for the purpose of legislation it is necessary to distinguish between various gruups of people. The principles governing 'classification' have been laid down by the Supreme Court in a mumber of decisions. These were summarised by the Court in Ramakrishna Dalmia v. Justice Tendolkar[33] when it condidered the meaning and scope of Article 14. The following propositions were established in that case:

a) Article 14 forbids class legislation but does not forbid classification;

b) Article 14 condemns discrimination not only by substantive law, but by a law of procedure;

c) Permissible classification must satisfy two conditions, namely,

    i. it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and

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[32] See, Seervai, Ibid, pp. 188-281; D. D. Basu, Commentary on the Constitution of India, Vol. I (5th d., 1965). pp. 287-505.

[33] A.I.R. 1958 S.C. 538.

ii. the differentia must have a rational relation to the object sought to be achieved by the statute in question;

d) The differentia and object are different elements and it follows that the object by itself cannot be the basis of the classification;

e) In permissible classification mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough;

f) The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like;

g) Even a single individual may be in a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself;

h) The legislature is free to recognise degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest;

i) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show shat there has been a clear transgression of the constitutional principles;

j) In order to sustain the presumption of constitutionality the court may take into consideration matters of common report, the history of the times and may assume every state of facts which can be conceived;

k) It must be presumed that the legislature understands and correctly appreciates the need of its people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; and

l) While good faith and knowledge of the existing conditions on part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the

> presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminatory legislation. The principle must be borne in mind in deciding whether a law violates Article 14.

However, though the theory of classification appears to be simple, in its application it is beset with many difficulties. To appreciate the task faced by the courts one need only glance through a list of classifications which they have had to adjudicate upon.[34]

The efficacy of the scheme of equality envisaged in the Constitution depends on the spirit in which it is operated. It presumes the presence of good faith at all times on part of the government and at all levels of administration. For, the governmental powers are so extensive that it can legislate, quite legally, on any matter touching any group or community. The rule of classification is weighted in favour of the Constitutionality of statutes and it would not be a big hurdle in the path of an unscrupulous government. Further, inequalitycan result not only in the enactment of laws, but also in their administration. Legislation just on the face of it can yet be unequally administered.[35] It is often the abuse in

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[34] An exhaustive list is to be found in H. M. Seervai, op. cit., pp. 205-225.

[35] H. E. Groves, Comparative Constitutional Law: Cases AND Materials, (1963), p. 51.

the exercise of administrative discretion that is likely to tilt the scales of justice.[36]

Finally, for minorities in India the equality of civil and political rights is an assurance that their interests will be protected. The present work is an attempt to consider the position of minorities in that light by reference to the relevant provisions of the Constitution. It is not intended to discuss the entirely of their rights which they share with their fellow citizens. Attention is focused, in Chapters III, IV and V, on issues of special significance in areas of religious, linguistic and socio-economic interests to the respective minorities. This is preceded, in Chapter II, by a consideration of equality in the political sphere, which is a fundamental aspect of the Indian Constitution.

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[36] For a discussion on the law relating to the use of discretionary powers, see H. M. Seervai, op. cit., p.225ff.

Chapter II

EQUALITY OF POLITICAL RIGHTS

Any scheme for the protection of minorities must begin at the fundamental stage of political organisation. Where the interests of different minority groups are sought to be protected on the basis of the principle of equality, that equality must derive from, and extend to, the basic level of political interests. Citizens' rights can be broadly divided into two categories: civil rights and political rights. The former, in whose sphere most minority issues arise, are those which ensure for citizens freedom from the interference of the state in the private sphere. The latter pertain to the more basic issue of political organisation, on which the efficacy of all civil rights ultimately depends, and in that sense are of a higher order. The state is a political society for the preservation of social order and the promotion of common interests and common purposes of its members. The relative standing of all the members in terms of participation in the

life of that society, the rights they possess and the duties they owe, is, therefore, a matter of great importance. The general political situation in a country is thus a primary indicator of the status of minorities therein.

Definition of political rights

Political rights are commonly defined as those rights which give their possessors an influence in the formation of the will of the state and which afford them the legal possibility of participating in the creation and extension of legal norms.[1] These are restricted to persons who are citizens. They give the adult citizen the right to franchise, qualify him to hold public office, and entitle him to direct participation in political life.[2] This involves the process of government of the country in its various aspects.

An act of government is said to consist in the conversion of the desires or will of individuals and groups into the behaviour of others or all in the society in which they dwell. It falls roughly in two parts, definable, if not completely severable — i.e., the process

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[1] Hans Kelsen, General Theory of Law and State, (3rd imprint, 1949), p. 235.

[2] J. A. Corry and J. E. Hodgetts, Democratic Government and Politics, (3rd ed.,1959), p. 440.

of politics and the process of administration. The first comprises the origin, development and maturing of social will so that popular loyalties are marshalled in such a way as to establish a law or convention, socially accepted or simply acquiesed in. Administration is the use of this reservoir of social will and power by appropriate personal, mechanical, territorial and procedural methods, in order to render specific governmental services to those entitled to them and to enforce duty where the will or ability is lacking.[3]

The mode and extent of participation in the political life must necessarily vary according to place and system of government. In a democracy, a citizen is said to participate in this process by "practical politics" and "pressure politics". The former comprises such direct participation as activities involving political parties, elections, campaign propaganda, etc.; and the latter comprises the infinitely complex and varied activities of organised groups which represent interests of various types and which seek to influence the action of officials who achieve power through practical politics.[4] However, it

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[3] H. Finer, The Theory and Practice of Modern Government, (4th ed., 1961), p. 7.

[4] J. E. Russell, "Citizenship Responsibility of the Public School", in F. C. Gruber (ed.), Education and the State, (1960), p. 89.

should be noted that the latter is a feature which is peculiar to the Amrican type of democracy, and has relatively less significance in the British type with its reliance of a permanent civil service, which is the case in India.

Democracy and minorities

Democracy and the representative form of government works on the basis of the rule of the majority. However, the principle of the majority rule is by no means identical with absolute dominion of the majority, and the dictatorship of the majority over minority. As Kelsen points out, a majority presupposes by its very definition the existence of a minority. The right of the majority thus implies the right of existence to the minority. The principle of majority in a democracy is observed only if all citizens are permitted to participate in the creation of the legal order, although its contents are determined by the will of the majority. It would be undemocratic and against the rule of the majority to exclude any minority from the creation of the legal order.[5] The consequences of such exclusion are grave, as Harold Laski has

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[5] Hans Kelsen, General Theory of Law and State (3rd imprint, 1949), p. 287.

pointed out:

> Unless I enjoy the same access to power as others, I live in an atmosphere of contingent frustration. It does not matter if I shall probably not desire to take full advantage of that access. Its denial will mean thtt I accept an alloted station as a permanent condition of my life; and that in turn is fatal to the spontaneity that is the essence of freedom.[6]

Where the minority is allowed to participate in the process, there is always a probability of its influencing the will of the majority and thus preventing action opposed to its interests.

The above reference to the majority and the minority is, of course, a reference to the political majority and minority as understood in western democracies. In the context of the present chapter, however, the reference to minorities is made not in that sense, but is a reference to various minority groups considered in subsequent chapters. These are communal groups principally based on religion, language and caste. The important thing about them is that they have been, and still tend to be, included in permanent political minorities. The reason for this is obvious: whereas a political majority is changeable in its class composition and its doors are

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[6] Op. cit., p. 149.

always open, a communal majority has its doors closed.[7] This factor has been one of great concern to the minorities in India in the pre-independence days. Thus, B. R. Ambedkar spoke of the fear of minorities that, in the absence of a suitable compromise, they might be relegated to the position of 'subject races' in the face of an overwhelming permanent majority.[8] The communal aspect is something which could not be ignored in any scheme of minority protection in India.

The Congress Party was fully aware that in the circumstances obtaining in India, a simple type of democracy, giving full powers to the majority to curb or overrule minority groups would not be satisfactory or desirable, even if it could be established.[9] The answer obviously lay in removing certain areas of minority interests from the sphere of ordinary political majorities, and incorporating them as fundamental rights in a written Constitution. Various institutional checks and balances had to be built into the democratic system so as to achieve a balance of interests.

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[7] B. R. Ambedkar, Thoughts on Linguistic States, (1955), p. 35.

[8] Thoughts on Pakistan, (1941), pp. 40-41.

[9] Jawaharlal Nehru, The Unity of India, p. 406, cited in D. E. Smith, Nehru and Democracy, (1958), p. 52.

The Indian Constitution establishes a democratic system of government, designed to operate on the pattern of western democracies. The political power is derived from the people and is sought to be exercised in their name without having regard to their particular group affiliations. In the matter of participation in the political life of the country no distinction is made between one section of the people and another. It is sought to protect the interests of minorities, as indeed of all citizens, by the basic equality, which characterises the whole range of political rights. To evaluate the efficacy of this principle in safeguarding the political interests of minorities, it is proposed to examine three principal areas of political interests: citizenship, franchise and representation, and public services.

I. Citizenship

The concept of citizenship is firmly embedded in the Indian Constitution and is essential to it.[10] The Constitution draws clear distinctions between the rights of citizens and those of non-citizens. Certain rights are conferred only on the former, from which the latter

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[10] H. M. Seervai, op. cit., p. 125.

are excluded. Certain Fundamental Rights are available only to citizens;[11] only citizens can hold certain public offices;[12] and only citizens have the franchise which entitles them to fully participate in the political process of the country. Only citizens quality for the totality of the rights available under the Constitution.

The law relating to Indian citizenship is contained in Part II of the Constitution and the legislation enacted thereunder. Articles 5 to 8 thereof determine the acquisition of citizenship at the commencement of the Constitution; after that date the provisions of the Citizenship Act, 1955, apply. Under Article 5, at the commencement of the Constitution, every person domiciled in India, and a) who was born in that territory; or b) either of whose parents was born in that territory; or c) who has been ordinarily resident in that territory for not less than five years immediately preceding, became a citizen of India. Articles 6 and 7 determine the citizenship of persons who have migrated from Pakistan

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[11] e.g., Articles 15, 16, 19 and 29.

[12] The Office of the President of India (Article 58); the Attorney-General of India and the Advocate Generals of States (Article 76(1) read with Article 124(3); Article 165 read with Article 217(2)); Judges of the Supreme Court (Article 124(3)) and of the High Courts (Article 217(2)); and Governors of the States (Article 157).

to India, and vice versa, at the dates appointed. Article 8 confers citizenship on Indian nationals residing abroad on their complying with the registration formalities required under it. Article 10 provides that every person who is or is deemed to be a citizen of India under Part II of the Constitition shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

Article 11 enables Parliament to legislate with regard to the acquisition and termination of citizenship after the commencement of the Constitution, and generally to regulate the right of citizenship by law. Under entry 17, List I of the 7th Schedule, Parliament has exclusive power to make laws on "citizenship, naturalisation and aliens." However, this power has to be exercised "subject to the provisions of this Constitution."[13]

In exercise of its powers Parliament has enacted the Citizenship Act, 1955, which provides for the acquisition of citizenship by birth, descent, registration and naturalisation. Section 3 provides that, subject to limited exceptions, every person born in India on or after the 26th of January, 1950, shall be a citizen of India.

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[13] Article 245 (1).

A person born outside India on or after that date shall be a citizen of India by descent if his father is a citizen of India at the time of his birth.[14] Certain persons, who are not already citizens, can acquire citizenship by registration, in accordance with the rules laid down in that behalf, if they belong to one of the prescribed categories: viz., persons of Indian origin; women who are, or have been, married to citzens of India; minor children of persons who are citizens of India; and persons who are citizens of certain specified counties.[15] Section 6 provides for citizenship by naturalisation of foreign nationals, who are not qualified to be registered as such under Section 5.

For our purposes it is not necessary to go into the technical details pertaining to citizenship. To realise the nature and full implications of Indian citizenship it is necessary to look beyond the legal provisions into the general scheme of the Constitution. Some of its aspects may briefly be looked into.

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[14] Section 4.

[15] Section 5.

The citizen and the state

Perhaps the most significant aspect of Indian citizenship is the guarantee of fundamental rights in the Constitution. This ensures for the citizen the protection foom the interference of the state in the private sphere of his life. The state cannot legislate so as to take away or abridge these rights,[16] nor can this be done by means of a Constitutional amendment.[17] The 'state' is defined so as to include the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.[18] It is intended to include "every authority which has been created by law and which has got certain powers to make laws, to make rules or make bye-laws.[19]

Indian citizenship is conveived on a basis of equality of status and opportunity for all its members. The individual citizen is the centre of attraction znd the Constitution regards all citizens to be of equal

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[16]Article 13.

[17]Golak Nath v. State of Punjab, A.I.R.L967 S.C. 1643.

[18]Article 12.

[19]Dr. Ambedkar, C.A.D., Vol.VII,p. 610.

political value. In the scheme of the Constitution, therefore, minorities as minorities do not exist. In the matter of citizenship such factors of diversity as race, religion, language or caste are of no consequence, and neither privilege nor discrimination attaches to any of them. Of course, as we shall see later, there is a scheme of 'protective discrimination' in favour of the 'backward classes' in the Constitution; but its purpose is not to afford a privilege to that section of the population but rather to elevate them to the same level of equality of status and opportunity as the rest of the general public.

Structural aspect of the state

India is a Union of States of a quasi-federal nature. The administration of the country is carried on through Governments at the Centre and in each of the States. In 1956 the States were reconstituted on a linguistic basis. Despite this duality of government, the Constitution has achieved unity of authority. The legislative power is divided between the Centre and the States by means of Legislative Lists.[20] But provision has been made for enpowering Parliament to legislate with respect

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[20] Seventh Schedule of the Constitution.

to any matter enumerated in the State List in certain circumstances. Residuary powers of legislation rest with Parliament.[21] The Centre has power to intervene in the affairs of a State in the event of a Proclamation of Emergency.[22] There is an unified judiciary for the whole country with Supreme Court at the Centre and High Courts in each of the States.

Despite the federal structure of the state, there is no dual citizenship, as in the United States of America. The Constitution recognises only one form of citizenship for the whole country; there cannot be double citizenship, one for the Union, and the other for a State.[23] A citizen is entitled to move freely throughout the territory of India, reside and settle down in any part of the country, acquire and hold property, and carry on any trade, profession or calling.[24] However, a common Indian citizenship should not be confused with a common Indian domicile: it is possible to have a State domicile and legislation enacted on that basis would be valid.[25]

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[21]Article 248.

[22]Article 250.

[23]Hem Chandra v. Speaker, Legislative Assembly, A.I.R. 1956 Cal. 378 (381-82).

[24]Article 19.

[25]D. P. Joshi v. State of M. B., A.I.R. 1955 S.C. 334; also, Radhabhai v. State of Bombay, A.I.R.1955 Bom. 439.

In the present context, the view expressed by the States Reorganisation Commission underlines the truth of the matter:

> Whether the States are reorganised or not, they are and will continue to be the integral parts of a Union which is far and away the more real political entity and the basis of our nationhood. The Constitution of India recognises only one citizenship, a common citizenship for the entire Indian people with equal rights and opportunities throughout the Union.[26]

Secular democracy

In the religious context it is very significant that, despite the overwhelming majority of the population professing Hinduism, India has chosen to be a secular democracy, — a fact which is most reassuring to religious minorities. As we shall see later, it is not a legalistic secularism, but a liberal one. It does not say that differences based on religion should not exist, but that they should not count in the matter of citizenship. The secularist nature of the state is certainly an important aspect of Indian citizenship, and is not without its appeal. It has been suggested that, in the present circumstances of the world, and especially in India, there can be no better political organisation from the Muslim point of view

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[26] Report of the States Reorganisation Commission, (1955), p. 229.

than a secular state, and that they should instead of merely tolerating it in a passive way, actively and zealously support it.[27]

The foregoing consideration of course relates to the idea of a single citizenship, as envisaged in the Constitution. The vital question which now arises is whether this ideal coincides with the reality of the Indian situation.

Single citizenship and communalism

The greatest stumbling block in the attainment of the ideal of single citizenship in India, and consequently in the protection of minority interests, would undoubtedly be the growth of the very communalism wiich the Constitution seeks to eschew from the body plitic. 'Communalism' is something quite different from the promotion by a community of its legitimate interests, and can roughly be described as the seeking by a group to promote its self-interest at any cost, without having regard to, and often to the detriment of, the interests of others. The Constitution envisages that the issues of the Indian public life would be decided on their merit, without extraneous considerations influencing them, and

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[27] S. Abid Husain, The Destiny of Indian Muslims, (1965), p. 175.

therefore deliberately overlooks differences such as of class, race, religion, language, and caste.

However, ideals do not become facts the moment they are incorporated in a Constitution, irrespective of the past and present course ofeevents. As Jennings has cautioned, where such differences exist, there is always a danger that the communal aspect may at times predominate, to the consequent detriment of the communal minorities.[28] It would be idle to imagine that it has been, and is, not so in India. One hopes that it would be a temporary and passing phase, but its existence cannot be ignored.

It is evident to anyone who has followed the course of events in India that communalism of various kinds does exist in the public life of the country. Though democracy is said to ae a nagation of the caste,[29] caste nevertheless plays a predominant role in elections.[30] It cannot be denied that, in the demand for the formation of linguistic States, among the legitimate grounds there were also elements of fanaticism and intolerance of other linguistic groups. In certain areas there was "a kind

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[28] Sir W. I. Jennings, Indian Constitution, (1953), pp. 92-93; K. B. Krishna, on the other hand, views the Indian situation as being not a communal problem, but one of class struggle: The Problem of Minorities, (1939), pp. 296-297.

[29] K. M. Panikkar, Hindu Society at Cross Roads, (3rd ed., 1961), p. 88.

[30] M. N. Srinivas, Caste in Modern India, (1962), p. 72.

of border warfare" assuming the form of a dispute between alien powers.[31] Over a decade after the States reorganisation, border disputes are still a regular feature of the linguistic scene, and some State governments are dilatory in implementing the agreed proposals in respect of linguistic minorities therein. Religious communalism, particularly the Hindu-Muslim conflict, has had a profound influence on India. It is noted that this problem does not admit of rapid solution and will still have to be faced for a considerable time. It would take a careful and continuous policy calculated to convince Muslims that their religion, culture and economic prospects are in no danger.[32] There is reason for disquiet among Muslim and Christian communities at the hostility shown by certain political parties and organisations advocating the cause of Hindu nationalism.[33] It is clear that despite what the Constitution seeks to achieve, there are signs of strain on the idea of single citizenship.

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31 Report of the States Reorganisation Commission, (1955), p. 229.

32 A. Gledhill, The Republic of India, (2nd ed., 1964),p. 2.

33 See, "Chavan deplores doubts about loyalty of minority groups", The Hindustan Times, March 29, 1968, p. 8; "Swastika casts a shadow in Delhi", The Times, October 3, 1968.

But, despite the shortcomings of the system visible at present, it is hard to find a better alternative to the scheme of single citizenship. If communalism exists, it is not as a result of the Constitution, but in spite of it. The Constitutional scheme has merit in that it is an ideal which, though not fully realised at present, provides a goal to be achieved when conditions improve. Social and political conditions in India are changing and with the improvement in education and economic conditions it is hoped that a broad-based nationalism will replace the narrow communal outlook. To the minorities of all kinds the mere fact that the Constitution envisages a single citizenship, is in itself a reassurance and a matter for hope. To have provided them with special guarantees (as for instance, communal electorates) would have alienated their interests, and would have resulted in their isolation and stagnation. Isolation, whether forced or voluntary, is full of psychological and spiritual dangers to the minorities, as it creates a feeling of inferiority, a complex of persecution and a habit of self-pity.[34]

Citizenship is not a static, but a dynamic thing. The state is not an amorphous mass but an organic

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[34] S. Abid Husain, The Destiny of Indian Muslims, (1965), p. 163.

entity with free play for the individual and collective freedoms condusive to the maximum good of all. The Constitution cannot make good citizens. It can only provide the ideals and the machinery by which the democratic process can produce good citizenship. This the Indian Constitution has done.

II. Political participation

A. Universal franchise

The best way to protect a democracy, it is said, is to ensure democratic elections.[35] One of the greatest experiments in democracy is being carried out in India by universal adult suffrage, involving the largest electorate in the world. It is observed that the most striking feature of the Indian Constitution is "undoubtedly its acceptance of the fullest implication of democracy by basing it on adult franchise."[36]

The law relating to elections is contained in Part XV of the Constitution and the laws enacted thereunder. Article 326 provides that elections shall be on

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[35] Sir W. I. Jennings, The Approach to Self-Government, (1956), p. 105.

[36] K. M. Panikkar, Hindu Society at Cross Roads, p. 96.

the basis of adult suffrage, with every citizen over the age of 21 years entitled to be registered as a voter. Originally, the Fundamental Rights Sub-Committee of the Constituent Assembly had recommended that the right to vote should be included in the chapter of Fundamental Rights. But the Assembly took the present course on the recommendation of the Advisory Committee.[37] Article 325 provides that there is to be only one general electoral roll for every territorial constituency and no person is to be ineligible for inclusion in any such roll, or claim to be included in any special electoral roll, on grounds only of religion, race, caste, sex or any of them.[38] Any law which provides for elections on the basis of separate electorates for members of different religious communities offends against Article 15(1), and is void as being repugnant to the Constitution.[39]

The superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections to Parliament and to the Legislature of

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37 Interim Report of the Advisory Committee on Minorities, Fundamental Rights, etc., (presented on 29th April, 1947), in Reports of Committees, (First Series, 1947).

38 Article 325.

39 Nain Sukh Das v. State of U.P., A.I.R. 1953 S.C. 384(385).

every State, as also elections to the offices of President and Vice-President is vested in the Election Commission.[40] The Commission also appoints election tribunals for the settlement of election disputes.

Two issues deserve consideration with respect to the conduct of elections. It is evident that the intention of the makers of the Constitution was to create an independent and autonomous Election Commission which would be free from the control of provincial governments, "to prevent injustice being done to people of minority community, racially, linguistically and culturally."[41] K. V. Rao suggests that the objective of an autonomous Commission has completely failed. He suggests that it is neither free from the influence of the States nor free from the control of the Central Executive. It does not have an independent staff and therefore it borrows personnel from the State Government, which can exert its influence upon it. In matters of appointment, removal and emoluments, the permanent staff of the Commission is under the control of the Central Executive.[42]

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[40] Article 324(1).

[41] Dr. Ambedkar, C.A.D., Vol. VIII, p. 905.

[42] K. V. Rao, Parliamentary Democracy of India, (2nd ed., 1965), pp. 101-102.

The second concerns powers of Parliament and of the Legislatures of States under Articles 327 and 328 respectively to legislate with regard to electoral matters. It is surprising that a matter of such grave importance as the delimitation of constituencies is a subject of ordinary legislation, passed by an ordinary majority. Where there are divisions caused by such factors as race, religion, caste and language, delimitation is a most delicate task with almost infinite possibilities for abuse.[43] In the hands of a unscrupulous majority this would indeed be dangerous. In this, and in other election matters, such as the holding of bye-elections, and the checking of the electoral rolls, the Constitution makers have reposed too much confidence in the fidelity of the majority and have created more possibilities of abuse than in any other part of the Constitution.[44] There is a strong case for reconstituting the Election Commission on a more autonomous basis and entrusting it with the task of delimiting constituencies.

There can be no doubt that adult suffrage has had a far-reaching effect on Indian political life. The wisdom of enfranchising the illiterate masses was at

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[43] Sir W. I. Jennings, Indian Constitution, (1953), p. 28.

[44] K. V. Rao, op. cit., p. 103.

first in doubt. But successive elections have vindicated its wisdom. From the point of view of minorities of all kinds the vote is bound to be a very significant thing in the future, when a sort of parity develops between the political parties. The minority vote may then tilt the scales, as happens in the United States where Jewish votes exert considerable influence. It has already made a tremendous impact on the backward classes of India. Many social groups, previously unaware of their strength and barely touched by political changes, have suddenly realised that they are in a position to wield power.[45] It is now a common practice among political parties in India to set up candidates from different groups in the population to attract votes. It is to be hoped that a party system along western lines, where ideology of the party and not communal considerations count, will gradually develop, for minority groups are beginning to realise that their votes have value.

B. Representation in government

The only government which can fully satisfy the exigencies of the state is, according to J. S. Mill, that in which the whole people participate. Participation

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[45] K. M. Panikkar, Hindu Society at Cross Roads, pp. 96-97.

should be as great as the circumstances permit, and nothing less can be ultimately desirable than the admission of all to a share in the sovereign power of the state. But since this cannot be, on practical grounds, "the ideal type of a perfect government must be representative."[46] The idea of a representative government has found full expression in the Indian Constitution, whereby the business of the government is carried on by representatives elected by the people on the basis of the adult suffrage. The representative thus elected represents the entire constituency and not merely the people who voted for him. For the voter acts as a citizen, and not as a member of a sect, profession, or class; by defining constituencies on the territorial principle, it is seen that no sectional interest predominates the polls.[47]

Membership of the Legislatures is open to all citizens. No one is subject to disqualification on grounds of his community, nor is any special representation provided for any section of the population, apart from certain temporary measures for the 'backward classes'. Under Article 84, membership of Parliament is open to any

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[46] J. S. Mill, On Liberty and Considerations on Representative Government, R. B. McCalum (ed.), (1948), p. 151.

[47] Karl Mannheim, Freedom, Power and Democratic Planning, (1951), p. 151.

citizen who is of the prescribed age, and who possesses such other qualifications as may be prescribed by Parliament. The conditions of membership of State Legislatures are contained in Article 173, and are similar.

Thus, no provision has been made for any special representation of minority groups under the Constitution, apart from the representation they are able to secure through the normal political process. Quite understandably, quite a few voices have been raised calling in question the wisdom of such an arrangement. In view of the recognition of communal representation during the British period, the present arrangement seems to some as a bold venture into the unknown. Jennings is surprised that the reality of the communal problem in India should have been treated as unimportant, and not provided for in the Constitution.[48] K. V. Rao feels that the Constitution has solved the problem of minorities by ignoring it. According to him the existence of minorities in India is a political fact requiring the provision of positive safeguards, and the Constitution has failed in this respect.[49] B. R. Ambedkar, as we have seen earlier, was convinced that voting in

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[48] Sir W. I. Jennings, Indian Constitution, pp. 27-29.

[49] Op. cit., p. 231.

India would always be on a communal basis, and therefore, the communal minorities are destined to remain as permanent political minorities.[50]

The full implications of the Constitutional scheme of representation are yet to be manifest. For an appreciation of the ideal sought, it is necessary to consider the developments that led to the adoption of the scheme and the alternative methods of minority representation which were available. The latter may be taken up first.

The system of proportional representation

A system of proportional representation has the greatest attraction in this context. It is said to reflect better the diversity of views of the electorate and to be more sensivive to public opinion than the system of majority voting. Kelsen views this system as the greatest possible approximation to the ideal of self-determination within a representative democracy and hence "the most democratic electoral system."[51] In a system of majority voting with single member constituencies the effect

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[50] B. R. Ambedkar, Thoughts on Linguistic States, (1955), p. 34.

[51] H. Kelsen, General Theory of Law and State, (3rd Printing, 1949), p. 209.

is "invariably to give a preference to the prevailing majority."[52] Proportional representation, on the other hand, is based on multi-member constituencies and ensures that each minority community receives representation in proportion to its population.[53] Because of its tendency to multiply political parties it has an edge over the majority systems when the party structure is communal,not only from the minorities' point of view but also in the interest of the state. There are two main advantages of this system: first, by breaking the dominant groups into different political parties, it increases the bargaining position of the minorities and the chances of their collaboration with the dominant groups; secondly, by giving the minority political representation proportional to its numerical size, it avoids the ill-effects of majority systems which, by over-representing the largest groups, increase the feeling of oppression among minorities, particularly when they are small and diffused.[54]

It is therefore not surprising that the Nehru Committee recommended its adoption in the circumstances

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[52] Sir W. I. Jennings, Indian Constitution, p. 28.

[53] J. A. Laponce, The Protection of Minorities, (1960), see pp. 118-127.

[54] Ibid, pp. 117-118.

then prevailing in India. It said that this was —

> the only rational and just way of meeting the fears and claims of various communities. There is a place in it for every minority and an automatic adjustment takes place of rival interests. We have no doubt that proportional representation will in future be the solution to our problem.[55]

However, this recommendation was not accepted.

In the Constituent Assembly the representatives of the minorities tried to secure its adoption, but without success. The reasons for the rejection of this apparently attractive system were stated by B. R. Ambedkar. According to him this system was unacceptable for a number of reasons. In a country with a low percentage of literacy, he said, people would have difficulty in using a complicated ballot paper. Moreover, as India had adopted a system of parliamentary government, there should be a majority party to support the Ministry. Proportional representation would lead to fragmentation of the legislature and would make stable government impossible.[56] Sardar Patel opposed the introduction of any such system on the ground that it amounted to introducing communal electorates through the back door.[57]

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[55] Nehru Report, p. 36.

[56] C.A.D., Vol. VII, p. 1262; C. H. Alexandrowicz, Constitutional Developments in India, (1957), p. 205.

[57] C.A.D., Vol. VIII, p. 352.

It should be pointed out, however, that not all systems of proportional representation necessarily ensure proper minority representation. T. A. Laponce has illustrated how, under the method of the single transferable vote, a member of a minority community may in fact lose the seat to a member of the majority community in certain circumstances.[58] C. H. Alexandrowicz opines that the system of majority voting may in fact have an edge over the former. Whereas the system of majority voting acts as a mechanism of integration, the former helps to intensify diversity and contributes to political fragmentation.[59]

The system of proportional repressntation did not find a place in the Constitution except in its application to a limited extent to the Upper Houses.

Separate communal electorates

Communal electorates were first introduced in India in 1909 on the insistence of the Muslim minority, which maintained that its interests could be adequately safeguarded only by this constitutional device. The

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[58] Op. cit., p. 119.

[59] Constitutional Developments in India, (1957),p. 208.

principle was later extended to other communities and formed a predominant feature of the 1935 Act. Under this system a provision is made that a particular community shall be represented in a popular legislature solely by the members of its own body, with a guarantee as to how many communal seats there shall be. Thus Muslim candidates could only be elected by sepatate Muslim electorates to seats rserved for Muslims.

The important thing to note with regard to this system is that it was not favoured even by the British, who conceded the demand. This is evident from the Reports. The Montagu-Chelmsford Report emphasised the dangers inherent in the communal electorates:

> Division by creeds and classes means the creation of political camps organised against each other, and teaches men to think as partisans and not as citizens. ... We regard any system of communal electorates, therefore, as a very serious hinderance to the development of the self-governing principle.[60]

The Indian Statutory Commission concurred with all the objections raised in the above report and felt that communal electorates would be an "undoubted obstacle in the way of the growth of a sense of common citizenship."[61]

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[60] Quoted in D. E. Smith, Nehru and Democracy, (1958),p. 161.

[61] Report of the Indian Statutory Commission, Vol. II, (1930), Cmd. 3569, p. 56.

It is needless to say that the general opinion in the country was against communal electorates. The Nehru Committee considered separate electorates bad for the growth of a national spirit and still worse for a minority community. For, under such a system the chances were that a minority would always have to face a hostile majority, which could always by the sheer force of its numbers override the wishes of the minority. The Committee opined that separate electorates must be completely discarded as a condition precedent to any rational system of representation.[62] According to K. B. Krishna, the 1930 proposals provided an artificial protection to communities, whereas the real problem was that of a class struggle between the professional classes of different faiths and communities.[63] Most people would agree with him as to the effect of the separate electorates, though not with his view of the problem.

The case against communal electorates has been stated by the former Prime Minister, Jawaharlal Nehru.[64] He has based it on four grounds: first, they tend to isolate the minority communities from the rest of the country

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62 Nehru Report, (1928), p. 30.

63 The Problem of Minorities, (1939), p. 296.

64 D. E. Smith, Nehru and Democracy, pp. 160-161.

and thus impede the development of national unity; the system gives 'protection' at the cost of fellow-feeling with the majority; second, they tend to weaken the minorities by enabling them to lean on artificial props instead of developing self-reliance; third, they tend to divert attention from the real economic problems of the country; and finally, they are opposed to the basic principles of democracy. This analysis has led Nehru to conclude that communal electorates have caused prodigious harm to every department of Indian life.[65] According to Jennings, the difficulty with communal representation is that it encourages the very defect that it seeks to remedy. There is little doubt that communal representation in India before 1947 encouraged communalism.[66]

Not surprisingly, the idea of communal electorates did not find any favour with the Constitution makers. The Advisory Committee rejected this proposal with an overwhelming majority.[67]

Reservation of seats

The issue of reservation of seats for minorities in the Legislatures and on the Executive reveals a conflict

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65 Ibid, p. 161.

66 Sir W. I. Jennings, The Approach to Self-Government, (1956), p. 87.

67 G. Austin, Indian Constitution, (1966), pp. 149-150.

faced by the Constitution-makers. It shows an anxiety that the minorities should be adequately represented, and a fear of the dangers such a policy of reservation might bring in.

While the Minorities Sub-Committee recommended against separate electorates, it wanted reservation of seats for the minorities. This idea found support with the Advisory Committee and the Constituent Assembly. Accordingly, in the First Report, dated 8th August, 1947, it was proposed to provide for reservation on the basis of the total population of each community in the country. Muslims, the Scheduled Castes and Indian Christians got representation on the basis of their population. Anglo-Indians were to be nominated for some seats if their representation was inadequate. Parsis and Sikhs got no representation.[68]

In the Second Report, however, reservation for all minorities was dropped, except the reservations for the Scheduled Castres and Tribes, and nomination of Anglo-Indians. This was achieved by a compromise and with the concurrence of the minorities, who realised that it would

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68 Report of the Advisory Committee on the subject of certain political safeguards for minorities, dated 8th August, 1947.

be in the national interest.[69]

The question of minority representation on the Executive deserves some consideration. It may be recalled that the Sapru Committee had recommended statutory representation for minorities on the Executive, as it was not easy to suggest an alternative method to achieve the same end.[70] Under the British parliamentary system, the majority is under no obligation to bring the representatives of minority communities into the Cabinet. It was thought that in the Indian conditions this would be "full of menace to life, liberty and pursuit of happiness of minorities in general and Untouchables in particular. ... It would make the majority community a governing class and the minority community a subject race."[71]

This issue was raised by the minority representatives before the Minorities Sub-Committee. It rejected the idea of reservation of seats and thought that their interests would be better served by including an Instrument of Instructions in the Schedules of the Constitution, enjoining the President and the Governors, as far as

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69 Report of the Advisory Committee, dated 11th May, 1949, in Reports of Committees, (3rd Series, 1950), pp. 240-242.

70 Sapru Report, pp. 178-179.

71 Quoted in B. R. Ambedkar, States and Minorities, pp. 36-37, G. Austin, The Indian Constitution, (1966), p. 131.

possible, to appoint members of the important minority communities to the ministries.[72] The Advisory Committee concurred with this. But later this Instrument was removed from the Constitution and minority representation was left to convention. In the Assembly it was suggested that the posts of Governors and Chief Ministers should go by rotation to all communities, but this was not considered seriously.[73]

The most heartening thing in this context was the spirit of compromise and understanding that prevailed in the deliberations. The Report of the Advisory Committee (dated 11th May, 1949), indicates that leaders of the minority communities gave notices of resolutions seeking to recommend to the Constituent Assembly that there should be no reservation of seats in the Legislatures for any community.[74] Sardar Patel, Chairman of the Committee, felt that "if the members of a particular community genuinely felt that their interests were better served by the abolition of reserved seats, their views must naturally be given due weight." But this should be done after gauging public opinion among the minorities and full refle-

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[72] Report of the Minorities Sub-Committee to the Advisory Committee, dated 28th July, 1947.

[73] C.A.D., Vol.V, p. 222.

[74] Report of the Advisory Committee, dated 11th May, 1949, in Reports of Committees, (3rd Series, 1950), p. 241.

ction, "so that the change would be one voluntarily sought by minorities themselves and not imposed on them by the majority."[75] At the meeting of the Committee on 11th May, 1949, Dr. H. C. Mookerjee, a minority leader moved the resolution "that the system of reservation for minorities other than Scheduled Castes in Legislatures be abolished", which found the overwhelming support.[76] When later the Assembly took up the Committee's Report, there was almost complete support for the Committe's decision. Some difference of opinion expressed by some Muslim members on this issue should not, however, go unnoticed.[77]

This arrangement was seen as a matter of trust between the majority and the minorities and amicable sentiments found expression on both sides.[78] Dr. H. C. Mookerjee noted that the Report was "very generous to every one of the minorities."[79] Prime Minister Nehru thought of it "as an act of faith" for all, above all for the majority community, "because they will have to show after this that they can behave to others in a generous, fair and just way."[80] The Constitution as it finally

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75 Ibid.

76 Ibid.

77 K. V. Rao, op. cit., pp. 216-218.

78 Sardar Patel, C.A.D., Vol. VIII, p. 353.

79 Ibid, p. 289.

80 Ibid, p. 332.

emerged from the Constituent Assembly thus contained no special scheme for the protection of the political interests of the minorities, with the exception of certain provisions in respect of the Scheduled Castes and Tribes, and Anglo-Indians.[81]

The working of the compromise

One view of the performance of this scheme is that it has worked "reasonably well". Complaints by minority groups have not been, generally speaking, because they were under-represented, but because their representatives were creatures of the party in power.[82] This is a matter of political expediency against which there can be no Constitutional remedy. One point should, however, be made as regards judging the success or failure of the scheme by reference to the complaints made by minority groups. While the complaints may provide an index to the grievances, they do not necessarily reflect the whole situation, as there exists no machinary for ventilation of grievances, to which all groups can resort and because all minorities are not equally prompt in vocalising their grievances.

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[81] Considered below, see p.128 et seq.

[82] G. Austin, The Indian Constitution, p. 126.

The weight of opinion, on the other hand, is towards regarding the minorities as being not adequately represented. Factual studies are based, not unnaturally, on the Muslim community. Several writers have pointed out the fact that Muslims are not to be found in the Parliament and in State Legislatures in proportion to the percentage of their population.[83] This is generally true also of other minorities.[84] The position, however, is better in the indirectly elected Upper Houses.

One important feature of the Indian political scene hitherto has been the predominance of one political party, Congress. It has sought to serve as a common platform for all groups by its policy of trying to secure the representation of diverse interests. It has tries to "reconcile and aggregate" different interests by "balancing" the party ticket with sufficient mumbers of Muslims, other minorities, women, and Untouchables.[85] It has provided

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[83] See for instance, T. P. Wright, Jr., "Muslim Legislators in India", XXIII, Journal of Asian Studies, (1964), pp. 256-257; D. E. Smith, and S. K. Gupta, cited in T. P. Wright Jr., "The effectiveness of Muslim representation in India", in D. E. Smith (ed.), South Asian Politics and Religion, (1966), pp. 102-103; C. Sarkar, "Growth Towards Secularism", in G. S. Sharma (ed.), Secularism: its implications for Law and Life in India, (1966), pp. 216-217; Humayun Kabir, Minorities in a Democracy, (1968), p. 40ff.

[84] Humayun Kabir, Ibid, p. 40.

[85] Myron Weiner, "The Politics of South Asia", in G. A. Almond and J. S. Coleman (ed.), The Politics of the Developing Areas, (1960), p. 153, at p. 219.

for the sharing of important political positions, such as Governorships, membership of the Central and the State Cabinets and the Office of the President of India, with the representatives of minority groups. Even so, as Humayun Kabir, a long standing Muslim member of the Central Cabinet, has pointed out, even within Congress itself the minorities were not always fully or effectively represented. A Minorities Sub-Committee set up by the Congress indicated that, in spite of a general directive by the Congress Working Committee that minorities should get proportionate, and in any case at least 15 per cent of nominations for Parliament and State Assemblies, many States did not carry out this directive. The same was the position with respect of District Boards, Municipalities, Corporations and other local bodies.[86] These findings are still largely valid.[87]

The effectiveness of minority representation has to be judged not only by a quantitative test, but also by a qualitative one. This depends on the quality of leadership that different communities are able to produce, which in turn depends on their relative stage of advancement. Further, as T. P. Wright has pointed out,

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[86] Humayun Kabir, op. cit., p. 42.

[87] Ibid, p. 43.

a group's wishes may be as well or better fulfilled by politicians of the majority community, if the outcome of closely contested elections is heavily dependent upon the marginal effect of the minority's votes. Representatives of the minority's own community, on the other hand, may be discounted on the grounds of obvious partiality.[88]

The political scene in India has, of late, been changing rapidly through the loss of hegemony of Congress and the growth of other parties. The position at the 1952 General Elections, when all the minorities implicitly supported the Congress, has changed in the 1957 and 1962 General Elections. In the 1967 General Elections, the Congress was defeated in a majority of the States through a shift in the overall minority vote.[89] The causes of this shift apart, this is a development in the right direction. There is no reason why all the members of a community should hold the same political opinion or support one particular political party. The distribution of the vote according to the political platform, and not according to communal allegiance, is the development envisaged in the Constitution. However, at the same time, the

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88 T. P. Wright Jr., "The effectiveness of Muslim representation in India", in D. E. Smith (ed.), South Asian Politics and Religion, (1966), p. 103.

89 Humayun Kabir, op. cit., p. 39.

growth of communal parties in several States is bound to cause concern among the minorities. For, if communalism grows, it is they who are bound to suffer. This fear is particularly strong among the religious minorities, who are apprehensive of the militantly religious attitudes expressed in some quarters.

To sum up, in the present scheme of representation there is no Constitutional guarantee for securing adequate representation of minorities. It is a matter of trust between the communities and rests on the hope that true democratic precess will eventually be established. Whether, and when this will be fully achieved, only time can tell.

C. Special arrangements

The picture of political representation in India would not be complete without the mention of certain special arrangements which have been made in respect of certain backward classes of people. Though the Constitution, in general, does not distinguish between majorities and minorities, in this regard an exception has been made in respect of the Scheduled Castes, the Scheduled Tribes, and Anglo-Indians. This proceeds on the basis that 'special disabilities deserve special consideration', especially when such disabilities are the result, not of

any innate or intrinsic defect but of social conditions beyond the control of the individuals nnd groups concerned.[90] It was obvious that, without some special franchise concession, they would not be able to secure adequate representation of their political views. These measures are in no way a privilege created in their favour but are the means to secure for them the very equality which the Constitution seeks to achieve for all the citizens.

Three methods have been employed for this purpose: first, the provision for the reservation of seats for the Scheduled Castes and the Scheduled Tribes; second, special administration of tribal areas; and third, nomination of Anglo-Indians. The Constitutional provisions in this respect are contained in Part XVI, and in Schedules V and VI thereof. These may briefly be considered.

i. Reservation of seats

Article 330 provides for the reservation of seats in the House of People, and Article 332 in the Legislative Assembly of every State, for the Scheduled Castes and the Scheduled Tribes. The seats so reserved

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90 Humayun Kabir, op. cit., p. 47.

are to be, as nearly as may be, in proportion to their population in relation to the total population. Reservation is intended to guarantee a minimum number of seats to these Castes and Tribes, and it does not preclude their members from contesting elections from general seats.[91]

The above provision for reservation is subject to Article 334, which puts a time limit on it. The initial provision was made for ten years, with double member constituencies. In 1960 this was extended by another ten years,[92] and in the following year the double member constituencies were abolished. The present provision for reservation will lapse in 1970, unless further extended by Constitutional Amendment.

Scheduled Castes account for roughly one seventh of the electorate. But their geographical distribution is such that in so Lok Sabha constituency do they form more than a fourth of the voters, and at the Legislative Assembly level it is only in a few urban constituencies that their percentage goes much higher than this.[93] Now that all the reserved constituencies have single members, it is yet to be seen whether they can build up a strong

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91 V. V. Giri v. D. S. Dora, A.I.R. 1959 S.C. 1318 (1323-1327).

92 Constitution Eighth Amendment.

93 Lelah Dushkin, "Scheduled Caste Policy in India", Mimeographed typescript (1966).

enough base among general voters and are able to stand on their own in a contest with other candidates, when reservations have ceased.

Although the Constitutional provisions regarding reservations touch only the Parliament and the State Legislatures, in actual practice the reservations for them are made down to the lowest level of political organisation. In most of the States, where Village Panchayats are organised, provision is made by legislation for the reservation of seats.[94] Arrangements are made for reservations in Panchayat Samitis, Zila Parishads and other bodies.

According to the 14th Report of the Commissioner for Scheduled Castes and Scheduled Tribes, the number of Scheduled Caste and the Scheduled Tribe Ministers, Deputy Ministers and Parliamentary Secretaries in the Union Cabinet was 7 and 2 respectively. Among the State Cabinets, Bihar, Madhya Pradesh, Mysore and Uttar Pradesh had 3 Scheduled Caste members each, Madras and Punjab had two each, and most of the other States had one each.[95]

In the last General Election out of a total of 521 seats in Lok Sabha, 77 and 37 seats were reserved for

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94 Report of the Commissioner for Scheduled Castes and and Scheduled Tribes, 14th Report, (Published 1967): see Chapter 2, p. 7 et seq.

95 Ibid, p. 144.

the Scheduled Castes and the Scheduled Tribes respectively. In Rajya Sabha there is no provision for reservation. But there were 10 Scheduled Castes members and 2 Scheduled Tribes members out of a total of 240. In the States out of a total of 3,563 seats in State Legislatures and Legislatures of Union Territories, 503 and 262 seats were reserved for Scheduled Castes and Scheduled Tribes respectively under Article 332.[96]

ii. Special administration

The case of the Scheduled Tribes called for a different approach. Unlike the Scheduled Castes, who are spread throughout the country, the Scheduled Tribes are compact social units who inhabit in contiguous regions, forming compact pockets in different States, often in hill regions. They have a social organisation and culture of their own, differing among different Tribes and from that of the rest of the country. They are in varying stages of development.

The Constitution has put the administration of all such tribal areas on a different footing. Under Article 342, the President in enpowered to specify the tribes or tribal groups, which, for the purpose of the

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[96] Ibid, 16th Report, (Published 1968), p. 26.

Constitution, are deemed to be Scheduled Tribes. Article 244 provides a scheme of administration. A distinction is made for this purpose between various tribes. The provisions of the Fifth Schedule apply to the administration and control of Scheduled Areas and Scheduled Tribes in all States other than the State of Assam. In exercise of the powers conferred by this Schedule the President has declared Scheduled Areas in the States of Andhra Pradesh, Bihar, Gujarat, Madhya Pradesh, Maharashtra, Orissa, Punjab and Rajastan.[97] Provisions of the Sixth Schedule apply to the State of Assam.

The Fifth Schedule provides for the administration on the lines of Sections 91 and 92 of the Government of India Act, 1935, relating to "Excluded Areas" and "Partially Excluded Areas". Section 5 of the Schedule enpowers the Governor to exclude the application of laws made by Paliament and the State Legislature to the whole or a part of such Area, or permit its application subject to any exceptions or modifications that he may specify. Also, in consultation with the Tribes Advisory Council and subject to the President's assent, the Governor may make regulations for the peace and good government of such an Area.

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[97] Ibid, p. 28.

A Tribes Advisory Council is provided for in each State having a Scheduled Area therein and, if so directed by the President, in any State having Scheduled Tribes (but not Scheduled Areas) therein. This is to consist of not more than twenty members of whom, nearly as may be, three fourths shall be the representatives of Scheduled Tribes in the Legislative Assembly of the State.[98] Their duty is to advise the Governor on such matters of Tribal welfare and advancement as are referred to them by the Governor.

The Sixth Schedule deals exclusively with the Tribal Areas of Assam. It gives them the greatest possible autonomy. The Tribal Areas are divided into autonomous districts, and where there are different Tribes in such districts, they are divided into autonomous regions.[99] The administration is carried on through the District, and the Regional Councils, who have powers to make laws with respect to wide-ranging subjects (Section 3). The laws of the Legislature of the State on matters on which District and Regional Councils have power to make laws do not apply to such Areas, or apply subject to such exceptions or modifications as are thought fit by the Councils.

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[98] Section 4, Fifth Schedule.

[99] Section 1, Sixth Schedule.

The Governor is enpowered, with regard to Acts of Parliament and State laws not coming in the above category, to direct that they shall not apply or apply with such exceptions or modifications as he may specify (Section 12).

There are other Articles in the Constitution which generally form part of the provisions for special administration. Thus under clause (2) of Article 339, executive power is reserved to the Union to give directions to a State as to the drawing up and the execution of schemes declared in the direction to be essential for the welfare of the Scheduled Tribes in the State. The Commission appointed under this Article to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States submitted its report in 1961.[1] Under Section 3 of the 5th Schedule, Governors of States having Scheduled Areas are required to report to the President annually, or whenever required to do so, and the executive power of the Union extends to the giving of directions to the State as to the administration of such areas. Under Article 338, a special officer is put in charge of the Scheduled Castes and the Scheduled Tribes. It is his duty to investigate all matters relating to the

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[1] Report of the Scheduled Areas and Scheduled Tribes Commission, (1961).

safeguards provided for them and report to the President at intervals; such reports are to be laid before the Houses of Parliament. Article 164(1) provides that in certain States there shall be a Minister in charge of tribal welfare.

iii. Nomination

Under the Constitution, nomination is limited to the Anglo-Indian community. Article 331 provides that the President may, if he is of the opinion that the Anglo-Indian community is not adequately represented in the House of People, nominate not more than two members of that community. Article 333 makes similar provision with regard to the Legislative Assemblies of States, with the difference that no number is prescribed in this case and it is left to the discretion of the Governor to nominate such number of members as he considers appropriate.

Accordingly, during the year 1966-67 there were two Anglo-Indian members in the Lok Sabha and one each in the Vidhan Sabhas of Andhra Pradesh, Bihar, Kerala, Madras, Madhya Pradesh, Maharashtra, Mysore, Uttar Pradesh and four in West Bengal.[2]

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[2] Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 16th Report (1968), p. 29.

As in the case of reservation of seats, this measure is also intended to be of a temporary nature. Though initially it was meant for ten years, it has been extended for another ten by Constitutional Amendment, and will lapse in 1970 unless further renewed.

III. Public Services

This last area of our investigation is of the greatest importance, both with regard to participation in administration and from the practical viewpoint of the ordinary citizen. We have already referred to the former aspect earlier in the Chapter.[3] In a British type of democracy the scheme of government requires an established Civil Service, for it is not only an indispensable part of government, but "indeed, it is the really operative part of it."[4] It enables the participation of a far larger number of people compared with the limited number of elected representatives and in a sense affords greater leverage of power at all levels in the day to day administration. To the practical citizen a post in the Civil Service means power, prestige and economic gain.

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[3] See p. 89ff, *supra*.

[4] Ramsay Muir, quoted in F. A. Bland, *Planning the Modern State*, (2nd ed., 1945), p. 152.

In the Indian context, the great attraction of the Public Services to all sections of the population is well known. They exert a disproportionate pull on the youth of the country.[5] It is noted that whatever may be said about the pursuit of higher education or its own sake, most students do so in the hope of securing government appointments.[6] The scale of pay in government service, security of employment, power and prestige, and patronage, have all combined to make government services attractive and consequently desired.[7]

The provisions of Part XIV of the Constitution, together with certain fundamental rights, govern the recruitment and the conditions of service of the Services under the state. Some of these may briefly be looked into.

To remove the suspicion of any bias among different sections of the people, it was essential to provide for an autonomous and impartial agency to recruit the personnel for the Public Services. This has been done by the creation of a Public Service Commission for the Union, and a Public Service Commission for each of

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[5] Report of the Official Language Commission, (1956), p.186.

[6] S. Harrison, India: the most dangerous decades, (1960), p. 72.

[7] Report of the Backward Classes Commission, (1956), p. 139.

the States.[8] It is possible for two or more States to have a Joint Public Service Commission, if they so desire; the Union Public Service Commission may also agree to serve the needs of a State, if requested to do so.[9] The Commissions, for the most part are autonomous bodies.[10] The Union, and the State Public Service Commissions conduct examinations for appointments to their respective services and they are to be consulted on a number of issues concerning the Civil Services, including all matters relating to methods of recruitment, principles relating to appointments, promotions and transfers, disciplinary matters, legal costs incurred by civil servants and claims relating to pensions.[11] The President and the Governors in certain circumstances may waive such consultation, but such directives are subject to legislaive approval and amendment.[12] The President and the Governors are also required to submit memoranda giving instances, if any, where the advice of the Commission was not accepted and the reasons for such non-acceptance, when the annual reports of the

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[8] Article 315 (1).

[9] Clauses (2) and (3) of Article 315.

[10] For a discussion on the extent of their autonomy and and the efficacy of their recruitment, see K. V. Rao, op. cit., p. 334ff.

[11] Article 320.

[12] Article 320, proviso to Clause (3), and Clause (4).

Commissions are placed before the appropriate Legislature.[13]

The power to regulate recruitment and the conditions of service of persons appointed to public services of the Union or of any State is vested in the appropriate Legislature, but its exercise is subject to the provisions of the Constitution,[14] which lays down the principle of equality. All service posts are held subject to the doctrine of pleasure (Article 310) but certain procedural safeguards have been provided. Thus, under Article 311, a person cannot be dismissed or removed from service by an authority subordinate to that by which he was appointed, nor can he be dismissed, removed or reduced in rank, except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard.

The provisions referred to above provide a framework for disciplinary rules of the Services under the State. But the most important provision in this respect, and particularly in the context of the present chapter, is the fundamental right to equality contained in Article 16.

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[13] Article 323.

[14] Article 309.

Clauses (1) and (2) thereof state —

> There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
>
> No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

The principle enunciated by this Article is very clear, and the technicalities of interpretation need not detain us here. Briefly, the above two clauses confer a right on each individual citizen.[15] Article 16(1) does not confer a right to obtain public employment but confers a right to equality of opportunity of being considered for such employment. It covers not only the initial appointment but also its duration and includes all matters of employment such as the conditions of service and promotion.[16] Article 16 does not exclude selective tests or the laying down of qualifications of office.[17] Further, in matters of employment, as in other respects, the principle of equality is subject to the rule of reasonable classification.[18]

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15 Devadasan v. Union of India, A.I.R. 1964 S.C. 179(187).

16 Brijlal Goswami v. State of Punjab, A.I.R. 1965 Punj. 401 (404,405); Madhusudan Nair v. State of Kerala, A.I.R.1961 Ker. 203 (205,206); Ram Rattan Bakshi v. State of Punjab, A.I.R.1968 Punj.436; It also includes promotion to selection posts: General Manager,S.Rly. v. Rangachari, A.I.R.1962 S.C. 36.

17 H. M. Seervai, op. cit., p. 268ff.

18 All India Station Masters and Asst. Station Masters' Assn. V. General Manager, C. Rly., A.I.R.1960 S.C. 384.

The principle in Article 16 is subject to three exceptions. By Clause (3), power is reserved to Parliament to make laws regarding residence qualifications for appointment to a public Service in a State or Union Territory. It is designed to prevent parochialism in public employment by the Government of a State or by any local or other authority within a State or Union Territory. By virtue of this power the Parliament has enacted the Public Employment (Requirement as to Residence) Act, 1957.[19] Article 16(5) is an exception to the rule of equality in the religious sphere; though discrimination on religious grounds is generally forbidden, this Clause enables the appointment to an office in connection with the affairs of any religious or denominational institution or any membership of the governing body thereof, of a person professing a particular religion or belonging to a particular denomination. This is a logical consequence of the communal autonomy granted to religious denominations in Article 26.[20] But there is a more important exception in Clause (4) of Article 16, which provides for the reservation of seats in favour of the backward classes in the Public Services.

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[19] See Chapter IV, p.296 ff, infra.

[20] See Chapter III, p.166 ff, infra.

The scope of this Clause is very wide and it has been frequently challenged in courts. Protective discrimination *vis a vis* the right to equality of the individual citizen has given rise to difficulties in interpretation. This issue has been discussed in greater length in a subsequent Chapter.[21]

The Constitutional provisions with respect to public services provide a legal framework within which every citizen may claim his share in the power and the benefits of the state according to merit. But, though this is sound in principle, In India at present there is still a gap between the ideal and the reality. The fact is that all individuals are not so placed as to be able to take advantage of the equal opportunity in employment. There exists a gap between different communities, according to the relative stages of their advancement. Though the scheme of appointments is not based on communities, where equality is assumed, the appointments from each community should ultimately reflect roughly the proportion of its strength. The Constitution does not seek to prevent fair and adequate representation of all communities, but only the making of appointments on irrelevant communal grounds.

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[21] See Chapter V, p.350 ff, *infra*.

The Sapru Committee saw the fair and adequate representation of all communities in the Services of the country as a necessity on economic, social and political grounds.[22] This is still valid today. But the feeling among minorities is that this has not yet happened. The same feeling of discrimination is expressed with regard to licences, permits, and other matters relating to trade, commerce and indutry.[23] The verification of this grievance is not an easy task, as the relevant figures are hard to come by. Humayun Kabir has suggested that the Central Government should institute a scheme of annual returns to clear the picture, and if need be, provide for reservation, pending improvement in the situation.[24]

The long term solution of course lies in the educational and social advancement of the communities, and in the general increase of economic opportunities in the country. But, for the present, though actual appointments directly touch only a small proportion of each community, they nevertheless still remain a matter of great communal interest and prestige.[25]

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[22] Sapru Report, (Reprint, 1946), p. 123.

[23] Humayun Kabir, op. cit., pp. 42, 43.

[24] Ibid, p. 40ff.

[25] D. E. Smith, "Patterns of Religion and Politics", in D. E. Smith (ed.), South Asian Politics and Religion, (1966), p. 23.

To sum up, the Constitution has set up the political equality of all citizens as an ideal and has provided a framework for its achievement in all vital spheres of public life. The principle itself leaves little to be desire, but its full realisation in all aspects of the public life still remains a matter for expectation. Political equality can only be real if it exists hand in hand with equality in social, economic and other spheres. For, political equality is not an end itself, but a means to achieve the equal advancement of all the people. These conditions do not as yet fully exist in India. The consideration of whether, or what type of, democracy will best suit India is outside the scope of this work. The relevant point here is that the Constitution has provided for a scheme which, if worked in its proper spirit, should achieve the equality of all citizens.

Chapter III

RELIGIOUS INTERESTS

I. Equality through secularism

In the religious sphere the principle of equality operates through secularism. The term 'secularism' is used here in a broad sense and as a convenient expression for denoting the church-state relationship obtaining in India.

Before proceeding to consider the aspects of Indian secularism, it is essential to contrast it with its western counterpart. The idea of a secular state originated in Europe in the context of religious intolerance in the post-Reformation era. The rule then prevailing was cujus regio, ejus religio, with an established church as the official religion of the state. The treatment of groups professing other faiths differed from country to country and ranged from mere toleration

to active encouragement of emigration.[1] In some cases certain powers obtained a measure of religious freedom for their co-religionists in countries where they were in a minority by means of treaties.[2] With the growth of social and political liberalism a gradual transformation took place and a tendency towards separating the church from the state arose. This led to religious pluralism within a political community and the coexistence of groups with incompatible views. The civil and political rights were thus no longer subject to a religious test.

Secularism in its strict sense implies a rigid 'wall of separation' between the state and religion. Where this distinction is carried to the extreme, this gives rise to odd situations as the American experience shows. Under the Non-establishment Clause of the U. S. Constitution, the state is barred from aiding schools or providing transport to school children, if the school happens to be run by a religious society. Secularism in a liberal sense means the neutrality and impartiality of the state towards religion. D. E. Smith's definition indicates this type of secularism. According to him, a secular state is a

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[1] D. E. Smith, India as a Secular State, (1963), pp. 20-21.

[2] See p. 62ff, supra; As to different types of these treaties, see M. S. Bates, Religious Liberty : an Inquiry, (1945), p. 485.

state which guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion and does not seek either to promote or interfere with religion.[3] The principles underlying this idea have found acceptance in many nations around the world.

In seeking to apply the theory of the secular state to India great caution in necessary. Due to dissimilarities in background and prevailing conditions, comparisons are difficult, though attempts have been made.[4] In trying to judge the nature of the Indian state in the light of his definition, Donald E. Smith has found discrepancies which he hopes will be resolved in future. Marc Galanter, in a review of D. E. Smith's book, has pointed out the inadequacies if the theory of the secular state in its application to India,[5] and Ved Prakash Luthera has sought to disprove that India is a secular state.[6]

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[3] D. E. Smith, India as a Secular State, (1963), p. 4.

[4] e.g., C. H. Alexandrowicz, "The Secular State in India and in the United States", 2, J.I.L.I., (1960), p. 273.

[5] "Secularism, East and West", VII, 2, Comparative Studies in Society and History, (1965), p. 133.

[6] The Concept of the Secular State and India, (1964).

The debate as to whether India is a secular state is irrelevant to the interpretation of the Constitution. The Constitution itself does not say anything on the issue; it would not make much difference if it did. It is to be interpreted by what its provision say, and they are clear enough to be understood without reference to outside material[7] or concepts, and without having to define the nature of the state.

Leaving aside the theory of the secular state, the term 'secularism' is generally used in India as descriptive of a tolerant and liberal attitude towards religion. In relation to the Constitution this attitude was clearly revealed in the Constituent Assembly during discussions on the provisions concerning religious freedom and by the amicable coppromise arrived at between the communities. India was to be a secular state.[8] The working of Indian secularism in its comtemporary setting has been discussed at length in a seminar held by the Indian Law Institute some time ago.[9] According to J. D. M. Derrett, the important thing to be borne in mind in this regard is that whatever Indians accept, or think they

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[7] The Commissioner, H.R.E. v. Lakhsmindra, 1954 S.C.R. 1005 at 1028.

[8] e.g., see Pandit Lakshmi Kanta Maitra, VII, C.A.D. p.831.

[9] Secularism: its implications for Law and Life in India, (1966), ed. G. S. Sharma.

accept, nothing will emerge which is inconsistent with India's ancient and traditional values, and these are consistent with 'secularism' in a unique, Indian sense.[10]

Two broad aspects of this secularism may briefly be considered with reference to the Constitution.

Nature of the state in India

It is very significant that, although an overwhelming percentage of the population belong to a single religion, India does not have a state religion or a state favoured religion. Profession of any particular religion does not give anyone an advantage as regards membership of the state or in the enjoyment of civil liberties. At the same time, while being religiously neutral, the state is not hostile to religion. Indian secularism recognises the fact that religion cannot always, and need not necessarily, be banished from public life. What is required of the state is to observe neutrality with regard to religion and to treat all religions of a basis of equality. V. P. Luthera calls this 'jurisdictionalism', denoting a 'religiously impartial' or 'non-communal' (non-denominational) state.[11] Thus discrimination solely on religious

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10 J. D. M. Derrett, Religion, Law and the State in India, (1968), p.

11 Op. cit., p. 155

grounds is barred;[12] the state is restrained from levying taxes with the specific purpose of promoting or maintaining any particular religion;[13] and is prohibited from imparting religious instruction in educational institutions wholly maintained out of state funds, making it voluntary in others.[14]

The important features of Indian secularism have been summarised by P. B. Gajendragadkar, the former Chief Justice of India, thus:

> ... The essential basis of the Indian Constitution is that all citizens are equal, and this basic equality (guaranteed by Article 14) obviously proclaims that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights. The state does not owe loyalty to any particular religion as such; it is not irreligious or anti-religion; it gives equal freedom for all citizens and holds that the religion of a citizen has nothing to do in the matter of socio-economic problems. That is the essential characteristic of secularism which is writ large in all the provisions of the Indian Constitution.[15]

Extent of religious freedom

The Constitution seeks to guarantee the greatest possible religious freedom to individuals and religious denominations. This includes freedom of conscience and

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[12] see Articles 15, 16, and 29(2).

[13] Article 27.

[14] Article 28.

[15] Inaugural address, in G. S. Sharma (ed.), Secularism, p.4.

the right freely to profess, practise and propagate religion.[16] Article 26 secures to the religious denominations and sections thereof autonomy in religious affairs, the right to establish and maintain institutions for religious and charitable purposes, and acquire and hold property. By Article 30(1) the religious minorities are given the right to establish and maintain educationaliinstitutions of their choice and the state must not discriminate in granting aid on religious grounds.

The significance of the words "all persons are equally entitled" in Article 25 should not be missed. This, as P. K. Tripathi has pointed out, brings out the attitude of state neutrality in matters of religion without importing the doctrine of the "wall of separation".[17] It excludes the possibility of special status being given to any particular religion, or any community claiming one. This is relevant in the historical context, as the observations of the Nehru Committee would show. The Committee was convinced of the need to exclude any possibility of one community domineering over another, and to prevent the harrassment and exploitation of any individual or group by another. The answer to the communal problem was

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[16] Article 25.

[17] "Secularism: Constitutional provision and Judicial Review", in G. S. Sharma (ed.), Secularism, p. 172.

to grant the fullest religious freedom and provide for cultural autonomy.[18]

The religious freedom guaranteed by the Constitution is however subject to regulation and restriction by government on certain grounds. These powers fall into three categories. In the first category are those which are sought to be exercised in the interests of public order, morality and health.[19] These are generally known as the 'police powers' and may be said to be inherent in the state. The powers in the second category seek to regulate so-called 'secular activities' associated with religion, which include activities of an economic, financial and political nature.[20] Those of the third type are unique. They enable the government to intervene in religious affairs in the interest of social welfare and reform.[21] The actual scope of religious freedom, therefore, depends on the interpretation by the courts of the extent of these powers and also the manner in which the authorities would exercise them. In this chapter an attempt is made to consider various aspects of the freedom of religion as it concerns different minority groups.

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[18] Nehru Report (1928), p. 29.

[19] Article 25(1).

[20] Article 25(2)(a).

[21] Article 25(2)(b).

The concentration of vast powers in the hands of the government is, no doubt, disquieting, particularly when one realises that it can reform any religion beyond recognition without infringing the principle of equality. But where the legalistic principle of equality is of little avail, the minorities have reason to expect that their interests will be protected in consonance with the equality, which is inherent in the concept of justice and tolerance. For, as Ernest Barker has observed, the tradition even of a secularist nation can never entirely lack the presence of religious ideas which have largely shaped its character in the past and are not enitely gone from it in its present.[22] In these circumstances all religious communities in India are free to go along their own path, unhindered so long as their actions do not affect others. Indian secularism assures this, for, as various contributors to the seminar on secularism have pointed out, Indian secularism has at its basis the philosophy of tolerance, equality and non-discrimination which are condusive to co-existence and a certain measure of spiritualism;[23] it adopts a pragmatic approach[24] and humane

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[22] Sir Ernest Barker, National Chracter and the Factors of its Formulation, (4th ed., 1948), p. 14

[23] S. S. Nigam, "Uniform Civil Code and Secularism", in G. S. Sharma (ed.), Secularism (1966), pp. 159-160.

[24] P. B. Gajendragadkar, see n. 15 at p. 151, supra, at p. 6.

impartiality.[25] Above all it can be used as an all-inclusive ideological symbol to unite all sections for mutual progress in the larger community.[26]

II. Definition of Religious Minorities

The need to differentiate among people might not be obvious to a casual observer on account of the general nature of the guarantee of religious freedom in the Indian Constitution. But it must be realised that though all persons and religious denominations are 'equally' entitled to the enjoyment of this freedom, its practical implications differ widely among them. The existence of a multiplicity of religious communities side by side, with differences ofbackground, size, stages of advancement and outlook, is a factor which must not escape notice.

The need of having to define a religious minority, however, has been eliminated, except for the purposes of Article 30(1), by the terminology of the Constitution. The words "every religious denomination or any section thereof" used in Article 26 have a wider

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[25] G. S. Sharma, "Rule of Law, Legal Theory and Secularism", in G. S. Sharma (ed.), Secularism (1966), p. 195, at p. 197.

[26] A. R. Blackshield, "Secularism and Social Control in the West: The Material and the Ethereal", in G. S. Sharma (ed.), Ibid, p. 9, at p. 67.

connotation than the term 'minority' and as such include minorities. For the purpose of Article 30(1), which concerns the educational interests of religious and linguistic minorities, in the absence of any definition supplied by the Constitution, the courts have held that any community which is numerically less than fifty percent of the population of a State is a minority.[27] Thus Christians in Kerala, being less than 22 per cent of the population, are a minority and the Roman Catholic section of that community comes within the contemplation of Article 30(1).[28] It would seem that so long as denominational lines are clearly recognisable, the courts would be inclined to extend the benefit of this Article to any denomination that claims it, notwitstanding the fact that it may be a section of the majority community within the State. It has been held that the Brahmo Samaj in Bihar is a minority based on religion for the purpose of Article 30.[29] It was probable that in the instance cited above, the Roman Catholics in Kerala would still have been regarded as a minority, even if the Christian community as a whole were to be in excess of fifty per cent of the population of that State.

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[27] Re Kerala Education Bill, A.I.R. 1958 S.C. 956, at p.976.

[28] Aldo Maria Patroni v. E. C. Kesavan, A.I.R. 1965 Ker. 75 at p. 76.

[29] Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1963 Pat. 54, pp. 57-59.

The population according to the Census

According to the Census of India, 1961, five numerically important religions other than Hinduism are, Buddhism, Christianity, Jainism, Islam and Sikhism. The adherents of the remaining faiths have been collectively listed as "others". Hindus account for 83.5 percent of the total population, being 367 millions out of a total of 440 millions.[30] The following survey lists individual religions in the order of their numerical importance.

Muslims, who number 47 millions, are the second largest community in India and account for 10.69 per cent of the population. They are to be found in strength in all parts of India. Statewise figures of their population in the order of numerical strength are: Uttar Pradesh 108 lakhs,[31] West Bengal 70, Bihar 58, Maharashtra and Kerala 30 each, Assam 28, Andhra Pradesh 27, Jammu & Kashmir 24, Mysore 23, Madras 16, and Madhya Pradesh and Rajastan 13 lakhs each. This community has to be considered in the historical perspective of Hindu-Muslim tension, the creation of Pakistan, the Islamic concept of the church-state relationship, and its attempts to adjust as a minority community in the post-Indepencence era. According to A. Gledhill,

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30 Census of India, 1961, Part I, Paper I - Religion (1963); The figures cited in this chapter have been rounded up and do not include those of the Union Territories.

31 The expression 'lakh' signifies 1,00,000.

this is the only minority community in India which is likely to raise significant minority issues, the others being satisfied with mere religious toleration.[32]

Christians come next with a population of 11 millions and a percentage of 2.44. Of this, roughly 6 millions are Roman Catholics and the remainder is made up of various Protestant denominations. The largest concentration is in the south, with Kerala accounting for 40 lakhs, Madras 18 and Andhra Pradesh 14. Of other States, Assam has 8 lakhs, Maharashtra 6, Bihar and Mysore 5 each, and Orissa, West Bengal and Madhya Pradesh 2 lakhs each. This is a well-organised community, the Catholics having a well-established episcopal hierarchy and the Protestant denominations being federated in the Church of South India.

Relative size of the Sikh, the Buddhist, and the Jain communities is small. Sikhs number 8 millions, which is 1.79 per cent of the total. It is noteworthy that most Sikhs are found in one State, Punjab, which alone accounts for 68 lakhs. Among other States, Uttar Pradesh and Rajastan have 3 lakhs each, and Delhi has 2 lakhs. They are also found in small numbers in Jammu & Kashmir, Madhya Pradesh, Maharashtra and Bihar, but are well below one lakh in each of them.

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[32] A. Gledhill, "Constitutional Protection of Indian Minorities", I, J.I.L.I. (1959), p. 403, at p. 405.

Buddhists number just over 3 millions and constitute 0. 74 per cent of the total population. As in the case of the Sikhs, they are also mostly concentrated in one State. Maharashtra accounts for 30 lakhs of them. Madhya Pradesh and West Bengal have one lakh each. They are also found in Jammu & Kashmir, Assam, Punjab and Uttar Pradesh, but in each of these States they are below 50 thousand in number. It may be mentioned that their unusual strength in Maharashtra is due to the Neo-Buddhist Movement of mass-conversions among Harijans started by Dr. Ambedkar.

Jains constitute only 0.46 per cent of the population and two millions in number, largely concentrated in the States of Maharashtra, Gujarat and Rajasthan. The first has 5 lakhs and the latter two have 4 lakhs each. Among other States, Madhya Pradesh has 3 lakhs, Mysore 2, and Uttar Pradesh 1 lakh.

All those who have been collectively designated as "others" in the Census together constitute 0.37 per cent of the population and two millions in number. Among these, a special mention must be made of the Zoroastrians and Jews. These are very small and regionally concentrated, but are nevertheless thriving and vigorous communities. The former are known as Parsis, and are to be found principally in Gujarat and Maharashtra. They are a religious

as well as an ethnic community. With an estimated population of 120 thousand, they are "a drop in the sea of Indian humanity."[33] The Jewish community is to be found in Kerala, Maharashtra and West Bengal.

The implications of the definition of 'Hindu'

In ascertaining whether or not a group is a religious minority it would simplify matters if a distinction is made between religions of Indian origin, and those of non-Indian origin. Of the latter, there can hardly be any dispute as to whether Muslims, Christians, Parsis and Jews are religious minorities. The position with regard to the former is, however, different and has to be considered in the light of the definition of 'Hindu'.

The most interesting aspect in this regard is that the term 'Hindu' is not capable of precise definition. In the Constitution it is sometimes an all-embracing designation, while in other contexts its constituent sections are regarded as religious minorities.

Thus, Explanation II to Article 25 (which guarantees religious freedom, subject to state control of secular

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[33] P. K. Irani, "The Personal Law of the Parsis", in J. N. D. Anderson (ed.), Family Law in Asia and Africa, (1968), p. 273, at pp. 275, 300.

activities and social welfare and reform) defines a Hindu as including persons professing the Buddhist, Jaina and Sikh religions. Though these religions are distinct in doctrine and practise among themselves and from orthodox Hinduism, their inclusion for the above purposes is sought to be justifies on the ground that they have been always considered as Hindus and have been governed by Hindu law for many centuries.[34] So wide is the construction of the term that a person may be a Hindu for legal purposes though he is not a Hindu by religion. He may not believe in the religious efficacy of adoption, in Hindu rituals and scriptures, the existence of atma and salvation. But, as the Supreme Court has held, "the fact that he does not believe in such things does not make him any less the Hindu. ... He was born a Hindu and continues to be one until he takes another religion. .. Whatever may be his personal predelections or views on Hindu religion and its rituals."[35] J. D. M. Derrett points out that the real test, for the purposes of codified law, is to ascertain whether a person born in India is a Muslim, Christian, Parsi or Jew, and if he is not one of these, he is a Hindu.[36]

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[34] Report of the Hindu Religious Endowments Commission, (1962), p. 2.

[35] Chandrasekhara Mudaliar v. Kulandaivelu Mudaliar, A.I.R. 1963 S.C. 185(200).

[36] "The definition of a Hindu", (1966), II S.C.J., p. 67.

On the other hand, this wider meaning is restricted to the pecial purposes set out in sub-clause (b) of Article 25(2) and for no other.[37] This means that though Buddhists, Jains and Sikhs are Hindus for some purposes, they are considered non-Hindus for othrrs. Thus, they are not Hindus for the purposes of protective discrimination.[38] A Buddhist is not a 'Hindu' for a purely social purpose,[39] or in the matter of preferences.[40] Jains are not Hindus for purposes of the temple entry legislation.[41] Even as Hindus, their distinctive character can be a basis for distinguishing between them for purposes of legislation.[42]

In matters of autonomy in religious affairs and the rights of religious minorities, the courts have accepted denominational lines within Hinduism once their distinctive character is proved. Various denominations of Hinduism and its off-shoots such as Lingayats, Kabirpanth, Brahmo

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37 Manak Chand v. The State of Rajastan, I.L.R. (1961) 11 Raj. 63; Punjabrao v. Meshram, A.I.R. 1965 S.C. 1179(1184).

38 Marc Galanter, "The Religious Aspect of Caste", in D. E. Smith (ed.), South Asian Politics and Religion, p. 277 at pp. 300-301.

39 Narayan Waktu Karwade v. Punjabrao Hukam, (1960) 60 Bom. L. R. 776.

40 I.L.R.(1961) 11 Raj.63; A.I.R. 1965 S.C.1179 (see n.37).

41 State v. Puranchand, A.I.R. 1958 M.P. 352; Devarajiah v Padmanna, A.I.R. 1958 Mys.84.

42 Moti Das v. S.P.Sahi, A.IR. 1959 S.C. 942 (946,947).

Samaj, Prarthana Samaj, Arya Samaj and Nirmals could accordingly claim the benefit of rights under Articles 26 and 30, among others. Thus in a temple entry case involving the Gowda Saraswat community it was held that it was within their right to exclude the untouchables who did not belong to their own denomination or a section thereof.[43] The Brahmo Samaj is a minority based on religion and as such is entitled to claim the benefit of Article 30(1).[44]

The position with regard to the religious interests of the minorities, therefore is that all religious denominations and sections thereof are equally entitled to the rights guaranteed in the Constitution. In the ensuing discussion references to minorities, in general, must be construed in this wider sense, except when the context requires it otherwise.

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[43] State of Kerala v. Venkiteshwara Prabhu, A.I.I. 1961 Ker. 55.

[44] Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1963 Pat. 54.

III. Religious interests of the minorities

The definition of 'religious interests'

Religious liberty, M. S. Bates tells us, is not an isolated reality. It exists or is denied in the midst of a complex of institutions and practices; it is inseparable from measures of liberty in general and from certain specific liberties such as those of free expression and free association. Religious liberty is always supported by related liberties.[45] Not only does it exist amidst others, it is often difficult to distinguish it from them. For, "freedom of religion is not an undifferentiated or undimensional condition or concept, but is a constellation of overlapping and sometimes conflicting claims for specific freedoms, each trying to borrow the immense prestige of the general notion of religious liberty." [46]

An enumeration of what are considered to be religious interests has been attempted by some writers.[47]

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[45] M. S. Bates, Religious Liberty: an Inquiry, (1945), pp. 343-344.

[46] Marc Galanter, "Religious Freedoms in the United States: A Turning Point?", 1966, Wis. L. Rev. 217, at p. 217.

[47] See for example, Marc Galanter, Ibid, pp.220-264; M. S. Bates, op. cit., pp. 301-305, also 130-131; T. P. Wright Jr., "The Effectiveness of Muslim Representation", in D. E. Smith (ed.), South Asian Politics and Religion, p. 102, at pp. 105-106.

One soon realises how long such lists can be and also how thin the line separating the religious issues from secular issues is. It is obvious that the interpretation differs from one religion to another, in relation to time and place, and not infrequently within sections of the same religious community.

The task of separating religious issues from others is especially difficult in India, where the religious conceptions are so vast that they cover every aspect of life from birth till death. "There is nothing which is not religion".[48] This situation is further complicated by the fact that in India religion has been, and continues to be, a predominant factor in determining community allegiance.[49] Where religious minorities are also communal minorities, the separation of their rellgious interests from the secular interests is bound to be a difficult task.

In the following discussion it is proposed to examine the Constitutional position of the religious minorities with regard to some of their principal interests in the light of the case law.

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[48] B. R. Ambedkar, C.A.D., Vol. VII, p. 781.

[49] See p. 222, infra.

1. Autonomy in Religious Affairs

The greatest possible autonomy in religious affairs is undoubtedly the principal objective of every religious community. The term 'autonomy' in the context of a religious minority is capable of wide interpretation, so as to cover a multitude of activities having religious significance. In this sense all the issues discussed in this chapter form, in varying degrees, part of the question of autonomy. However, for the purpose of this section, the term is used in a narrower sense, in keeping with the distinction made in the Constitution between issues which are strictly religious and those which are merely associated with religion. Here it is sought to deal with the question of religious freedom in its most vital sphere as it relates to the issue of communal autonomy.

The specific Constitutional provision which provides for this autonomy is clause (b) of Article 26 which guarantees the right of every religious denomination or any section thereof "to manage their own affairs in matters of religion." The clause is of comprehensive scope which extends to the totality of religious freedom guaranteed by the Constitution. It is often sought to distinguish between the rights of an individual under

Article 25 and those of a denomination under Article 26, with emphasis on the former.[50] While the merit of this emphasis in particular circumstances is not denied, too much should not be made of this iistinction. Religious freedom at both these levels is greatly interdependent. Religious liberty has three aspects — i) individual autonomy in the choiceof a creed, ii) autonomy of a religious body in its collective activities, and iii) the legal equality of religious bodies.[51] The individual is almost always a member of a religious community, the tenets of whose doctrine he professes to follow, whose practices he performs and whose rules determining the conditions of his membership he observes. It is arguable, at least in the context of religious minorities, that the communal autonomy is of overriding significance.

The scope of the right of religious communities to manage their own affairs in matters of religion is determined by two inter-dependent factors: first, the meaning of the term 'religion' itself, and second, the scope of the state powers to regulate or restrict religious practices. The former raises the problem of the definition

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50 For instance, see, P. K. Tripathi, "Secularism: Constitutional Provision and Judicial Review", in G. S. Sharma (ed.), Secularism, (1966), p. 165, at p. 170ff.

51 M. S. Bates, op. cit., p. 301.

of religion and questions associated with it, such as who is the competent authority to decide as to what are "matters of religion", and on what criteria should sucha decision be based. The latter involves a determination of the particular circumstances in which the government should interfere in religious affairs in the interests of society at large.

The definition of religion

The Constitution does not define the term 'religion' and no universally acceptable definition exists. Most definitions are either inadequate, as they tend to emphasise particular aspects of religion, or are so wide in scope that they are of limited help in interpreting the Constitutional provisions. An exhaustive survey of such definitions has been carried out by P. H. Benson.[52] He has defined religion as a system of i) belief in an unseen order of higher power, ii) activities to influence this higher power psycholigically to meet human needs, and iii) experience accompanying these things. The higher power is either a psychological component within personality or else a supernatural being to whom psychological traits are imputed. Since beliefs, aims, activities,

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[52] Religion in Contemporary Culture, (1960), pp. 124-163.

needs and experiences are simultaneously involved in whatever occupies human beings, they are included in the definition.[53] Further, a religious movement must be organised to achieve its objectives, must develop a clear cut ideology and a practical programme of step by step procedures, must develop rules and regulations for orderly control of membership and its education and must develop procedures for worship and cultivation of spiritual growth of its members.[54]

The working definition of religion arrived at by J. D. M. Derrett is of special interest here as it is meant to refer to religion in India in particular. 'Religion' means merely —

> Recognition (conscious or unconscious) of a force or power outside man or men, not subject to the control of a man or men, which is nevertheless in a constant relation to a man or men,
>
> which recognition, as a fact, manifests itself in thought, action or abstention from action in order that a) a benefit may acrue, whether seen, unseen or both, whether in this life openly or secretly or in some other life of state of being, by reason of the thought, action, etc., or b) evil may be averted, whether seen, unseen or both, whether in this life, etc., or c) both benefit may acrue and evil may be averted.[55]

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[53] Ibid, pp. 162-163.

[54] Ibid, p. 605.

[55] Religion, Law and the State in India, (1968), pp.36-37.

According to him no system and no philosophy is a pre-requisite. No priests, no ritual, no temples, no scriptures are necessary. But the recognition can take many forms, and may, and usually does develop the aids supplied by all of these.[56]

Religion, as it is generally understood, has two elements: belief, and acts done in pursuance of that belief. The Constitutional guarantee contemplates both of these elements. The first authoritative pronouncement in this regard was made in 1954 by the Supreme Court when it was called upon to determine the legality of the Madras Hindu Religious and Charitable Enoowments Act, 1951, in Lakshmindra's case. Although the Court did not attempt to define religion, it indicated its scope for the first time. It said:

> A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as condusive to their 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 might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might even extend to matters of food and dress. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects acts done in pursuance of a religion.[57]

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[56] Ibid, p. 37.

[57] The Commissioner, HRE, v. Lakshmindra, A.I.R.1954 S.C. 282 (289,290).

The question as to what are "matters of religion" has come up before the Supreme Court on numerous other occasions and it has often reiterated the above view. Thus in Ratilal v. Bombay, in seeking to distinguish between religious practices and secular activities, it emphasised that religion is not merely an opinion, doctrine or belief but also includes its outward expression as its essential part. The Constitution protects acts done in pursuance of religious belief as part of religion, as practices and performances are as much part of religion as faith or belief in particular doctrines.[58] Article 26(b) clearly contemplates practices which are regarded by a community as part of religion, or in terms of Hindu theology, not merely its Gnana, but also its Bhakti and Karma Kandas.[59] Free exercise of religion means the freedom to entertain such religious belief as may be approved of by one's judgement or conscience and to exhibit that belief or ideas in such overt acts as are enjoined or sanctioned by his religion, including the right to propagate those views for the edification of

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[58] Ratilal Panachand Gandhi v. State of Bombay, A.I.R. 1954 S.C. 388 (392).

[59] Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255 (264).

others.[60] The same line aas taken in later cases like the Durgah Committee,[61] Saifuddin Saheb v. Bombay,[62] and others. Religion in its broadest sense includes all forms of faith and worship and all the varieties of a man's belief in a Superior Being or a Moral Law transcending the things that are Caesar's and demanding his affection and obedience.[63] However, though religion often is theistic, it need not necessarily be so. As the Supreme Court has pointed out in Lakshmindra's case[64] and again in Ratilal v. Bombay,[65] there are well-known religions in India like Buddhism and Jainism which do not believe in the existence of God or of any intelligent First Cause.

But the task of defining religion in the context of limitations placed on religious practices can never be simple. Whether on account of the lack of a body of doctrine or adequate organisation the religious sphere may be diffused and difficult to distinguish from the

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60 Mohammed Hanif Quareshi v. State of Bihar, A.I.R.1958 S.C. 731 (739).

61 A.I.R. 1961 S.C. 1402.

62 A.I.R. 1962 S.C. 853.

63 P.M.Brimadathan Nambooripad v. Cochin Devaswom Board, A.I.R.1956 T.C. 19 (22).

64 A.I.R. 1954 S.C. 282 (289).

65 A.I.R. 1954 S.C. 388 (392).

secular one. Obviously some line has to be drawn between the two for the purpose of securing good government of society. Hence we see that the Supreme Court has introduced an important qualification in defining religion by distinguishing between the essentials of religion and its non-essential accretions. In Durgah Committee it said:

> ... in order that the practices in question should be treated as part of religion, they must be regarded by the said religion as its essential and integral part, otherwise even purely secular activities, which are not an essential or an integral part of religion, are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly even practices, though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully crutinised; in other words the protection must be confined to such religious practices as are an essential or integral part of it and no other.[66]

The effect of this principle, which is now firmly established by numerous judicial pronouncements, is to create a limitation on the freedom of religion which the express provisions of the Constitution do not contain. The outcome, as J. D. M. Derrett points out, is to construe the guarantee as being "freely to profess, practise and

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[66] A.I.R. 1961 S.C. 1402, at p. 1415.

propagate the essentials of religion."[67]

The above exercise, however, involves an evaluative element and hence must be approached with great caution. Too much care cannot be taken in seeking to separate religion from superstition.[68] No person or community would follow a practice or perform an act if they considered it a superstition. Except by the voluntary co-operation of the persons involved, it should not be found necessary to interfere with those practices save in exceptional circumstances. It is also worth while to note that in the opinion of some sections of the people all religion is superstition. It would be unwise to impose the notions of one section of the people on another section, or, as Marc Galanter cautions, to make the majority's notions, in the context of increasing stste activity, into normative standards which would collide with the religious commands and prohibitions of the minorities.[69] The test of liberty is whether men are able to get along with those with whom they differ.

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[67] Religion, Law and the State in India, (1968), p. 447.

[68] For a discussion on this aspect in the light of relevant case law, see H. M. Seervai, Constitutional Law of India, (1967), pp. 483-484.

[69] "Religious Freedom in the United States: A Turning point?", 1966 Wis. L. Rev. 217 at p. 268.

In the process of determining the essentials of religion two more questions arise: first, who is the proper authority to decide what is essential, and second, what criteria is to be adopted. The position that has evolved is a compromise: an individual or a religious body cannot make a private definition of religion and impose it on the community in all circumstances; but even so the decision whether or not a particular act is part of religious practice should be make with reference to its own doctrines and beliefs.

The only authority who can assume responsibility for deciding what is essential is the Judiciary, since such a question is not to be decided either by a majority of votes in the Legislature or be subjected to the arbitrary powers of the Executive. But the courts themselves are human agents and are subject to human imperfections. The need to establish a common standard and procedure is, therefore, clear.

The Court's attitude was revealed in Lakshmindra's case. It held that what constitutes an essential part of religion is primarily to be ascertained with reference to the doctrines of that religion itself. Under Article 26(b) a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the

religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. In matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislature can take away.[70]

But before a practice can be accepted as religious, it must be proved to be so to the satisfaction of the courts. In arriving at its decision the court might examine the scriptures and doctrines of the particular sect, consult religious experts, probe into the historical background and take any other relevant evidence. Whether a particular practice, which has come into conflict with law, is essential, has to be decided in each instance. The tendency of the Court, as evidenced in the cowslaughter cases,[71] appears to be to regard a practice as non-essential, where alternatives are available. It has been held that the sacrifice of a cow on Bakr-Id day is not an essential part of a Muslim's religion, as there are alternatives of slaughtering other animals or making gifts in charity. Similarly social reform legislation

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70 A.I.R.1954 S.C. 282 at pp. 290-291; see also Ratilal v. Bombay, A.I.R. 1954 S.C. 388, at p. 391.

71 M. H. Quareshi v. Bihar, A.I.R.1958 S.C. 731; A. H. Quraishi v. Bihar, A.I.R. 1961 S.C. 448; see the case comment on these by J. D. M. Derrett at (1958)8, I.C.L.Q. pp. 221-224, and (1961) 10, I.C.L.Q., pp. 914-916. On the subject, see S. P. Sathe, "Cow-Slaughter: The Legal Aspect", in A. B. Shah (ed.), Cow-Slaughter: Horns of a Dilemma, (1967), p. 69.

cannot be impugned because it prevents a Hindu from marrying a second time in order to have a son to ensure his salvation, as it is open to him to adopt a son.[72] The Court should, however, be constantly aware of the pitfalls inherent in the question of alternatives. It has a decided advantage in the choice of experts who can influence the decision and there is a possibility that the views of the community concerned may not have been effectively stated by their spokesmen. Also, alternatives in many cases may not be practical, or be costly, or just not as good as the practice in question.

Once a practice has been held to be essential to a community, the fact that the exercise of that right might adversely affect rights of some of its members is of no consequence. In Sardar Syedna Taher Saifuddin Saheb v. State of Bombay — where the legality of the Bombay Prevention of Excommunication Act, 1949, was in question — it was pleaded on behalf of the respondents that the excommunication by the Head of the Dawoodi Bohra Community of a member has the necessary consequence of depriving the latter of the right of enjoyment of property. But the Supreme Court, reversing the decision of the

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[72] Ram Prasad Seth v. The State of Uttar Pradesh, A.I.R. 1957 All. 411.

Bombay High Court,[73] held that, in so far as the statute took away the right of excommunication on religious grounds, it violated Article 26(b). It pointed out that the right given under Article 26(b) has not been made subject to the preservation of civil rights. Hence, the fact that the civil rights of a person are affected by the exercise of the fundamental right under Article 26(b) is of no consequence. As the Act invalidated excommunication on any ground whatever, including religious grounds, it did not come within the saving provisions of Article 25(2).[74] It must be admitted that opinion on this issue was divided and the decision was not unanimous.

Autonomy and state powers of regulation

In estimating the scope of communal autonomy, it is helpful to define the scope of the governmental powers to regulate or restrict the practise of religion, as the two are related. Mention has already been made of the three categories of such powers.[75] These may now be briefly considered.

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[73] A.I.R. 1953 Bom. 183.

[74] A.I.R. 1962 S.C. 853, at p. 865ff.

[75] See p. 153, supra.

It will clarify matters if we start by considering the inter-relationship of Articles 25 and 26 in the present context. It might seem that the freedom guaranteed in the former Article is subject to the whole range of limitations mentioned, while the autonomy guaranteed by Article 26(b) is subject only to "public order, morality and health." This in fact is not the case. While trying to reconcile the rights in these two Articles, where there was conflict, the courts have extended the limitations contained in the former to the latter. Such a situation arose in Venkataramana Devaru v. The State of Mysore.[76] The issue involved was how to reconcile the denominational right of autonomy in Article 26(b) with the right of temple entry conferred on Harijans by a statute — the Madras Temple Entry Authorisation Act, 1947 — which had the sanction of Article 25(2)(b). The Supreme Court followed the rule of harmonious construction, observing that, when there are two provisions of equal authority with apparent conflict, they should be interpreted, if possible, so as to give effect to both. It held that Article 25(2)(b) conferred an unqualified right and must be available, whether it is sought to be exercised against an individual

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[76] A.I.R. 1958 S.C. 255.

under Article 25(1) or against a denomination under Article 26(b). It added that, though Article 25(1) deals with the rights of individuals, Article 25(2) is much wider in its contents and has reference to the rights of communities, and hence covers both Article 25(1) and Article 26(b).[77]

The first category of limitations — on grounds of public order, morality and health (which will be referred to as 'public order' for brevity) — must be considered in the context of the philosophy underlying them. Civil liberties imply, as the United States Supreme Court has pointed out, the existence of an organised society maintaining public order, without which liberty itself would be lost in the excesses of unrestrained abuses.[78] No well ordered society can leave to individuals an absolute right to make final decisions unassailable by the State as to everything they will or will not do.[79] No freedom can be absolute; unlimited freedom will derogate into licence in the hands of the unscrupulous, threatening to subvert the whole of it. In order to safeguard the equal rights of all the citizens, therefore, the state is entitled to define the

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[77] Ibid, at p.

[78] Cox v. New Hampshire, 312 U.S.569, at p. 1052.

[79] Board of Education v. Barnette, 319 U.S.624, 87 Law ed., 1640.

bounds of freedom which it guarantees. It is relevant to note that in the Indian Constitution these limitations are not in any way exclusive to the freedom of religion: they also frequently occur in Article 19 which guarantees the 'seven freedoms'. Their mention in the Constitution may even be regarded as superfluous, as even in their absence the state would undoubtedly have the implied authority to maintain them.

The concept of public order is variable with time and place. As one Member of the Constituent Assembly remarked, the full implications of this qualification are not easy to discover: they would depend on the changing social and moral conscience of the people.[80] For this reason no clear cut rules can be made to fit every occasion. To realise the variety and the scope of situations that might arise, one might usefully refer to the numerous decisions of the United States Supreme Court in this regard. Although the standards of public order differ between the two countries, the grounds on which these powers are exercised are essentially the same.[81] Particular reference may be made to what are known as the Jehovah's Witnesses Cases. Members of this sect had to

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[80] Hon. K. Santhanam, C.A.D., Vol. VII, p. 834.

[81] H. E. Groves, "Religious Freedom", 4, J.I.L.I., (1962), p. 191, at p. 195.

appear before the Court time and again on charges of insulting the religious feeling of others,[82] contravening traffic regulations,[83] distributing objectionable literature,[84] contravening child labour regulations,[85] and such like. An indication of the attitude of the Court can be had from the observations of Roberts J., in Cantwell v. Connecticut:

> The essential characteristic of these liberties is, that under their shield many types of life, character and opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and many creeds. There are limits to the exercise of these liberties. The danger in these times from the coersive activities of those who, in the delusion of racial or religious conceit, would incite violence and breaches of peace in order to deprive others of their equal right to the exercise of their liberties, is emphasised by events familiar to all. These and other trasgressions of those limits the state may appropriately punish.[86]

The Indian Supreme Court has had occasion to consider the concept of public order rather elaborately in Ramesh Thapar v. State of Madras.[87] It observed that 'public order' signified a state of tranquility which

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82 Cantwell v. Connecticut, 310 U.S.296; Chaplinsky v. New Hampshire, 315 U.S.586.

83 Cox v. New Hampshire, 312 U.S.569.

84 Ibid.

85 Prince v. Massachussetts, 321 U.S.158.

86 310 U.S. 296.

87 1950 S.C.R. 594.

prevailed among members of a political society as a result of internal regulations enforced by the government which they have established. It noted the existence of various degrees of public order and distinguished between serious and aggravated forms of public disorder which endangered the security of the state, and relatively minor breaches of a local nature. The term 'public order' applied only to the former. This opinion was, however, revised later in Superintendent v. Ram Manohar[88] where it held that 'public order' had to be understood in its new connotations, including even disorders of only local significance.

The Indian Penal Code has provisions to deal with a variety of situations falling within the scope of 'public order' in chapters IV, VIII, XIV and XV. Among others, these include offences against the state; offences like unlawful assembly, rioting, affray, and the wounding of the feelings of any section of the people; and offences affecting public health, safety, convenience, decency and morals. Chapter XV specifically concerns offences relating to religion. Section 295 forbids the injuring or defiling of a place of worship with intent to insult the religion of any class. Section 296 punishes disturbance

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[88] A.I.R. 1960 S.C. 641.

of a religious assembly, Section 297 the tresspassing on burial places and places of worship, and Section 298 forbids the wounding of the religious feelings by words, gestures or exhibitions. Section 295-A was added to meet the cases of outraging the religious feelings of a class of citizens. Besides the Penal Code, supplementary provisions have been made in various other legislative enactments such as the Police Act, Dramatic Performances Act, the Official Secrets Act, and so on.

The powers of the government to act in the interests of the public order are large, and are being exercised on a big scale. Their necessity cannot be denied. However, as these powers are exercised, more often than not, by local officials, it must be ensured that decisions are not made arbitrarily. There is no definite yardstick which can be applied to all situations, but such actions should be capable of satisfying the test of 'clear and present danger' which the courts have evolved.

Regulation of secular activities

The power of regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice presents greater difficulties of interpretation. A modern state with welfare ideals tends to assume increasing responsibility on almost every aspect of life. In order to secure

the democratic freedoms it is necessary that the bounds of that action must be defined. This is not an easy task as it involves the necessity of defining religion. What is 'secular' depends largely on the interpretation of what is 'essential' to each religion, and as we have already seen, no definite standard can be laid down in this behalf.

The courts are aware of how difficult it is to dissociate the religious affairs of an institution from its secular affairs. The secular affairs of an institution are almost always directed for the furtherance of its religious affairs, for which alone the institution exists.[89] It is inevitable that they are inextricably mixed up.

Lakshmindra's case provides a good illustration of the conflict between government policy which sought to regulate secular activities and the right of a denomination to manage its own affairs in matters of religion. In 1951, the Madras Legislature passed the Madras Hindu Religious and Charitable Endowments Act, practically vesting the administration of religious and charitable institutions in a department of the Government, headed

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89 Lakshmindra v. The Commissioner, HRE, Madras, A.I.R. 1952 Mad. 613 (639).

by a Commissioner, assisted by a hierarchy of Deputy, Assistant and Area Commissioners. Section 21 gave the Commissioner the power to enter the premises of any religious institution or any place of worship for the purpose of exercising the powers conferred on him by the Act. Section 31 made it necessary for the trustee of an institution to obtain the permission of the Deputy Commissioner for the utilisation of surplus funds. Section 55 required the trustee to keep accounts of the receipts and expenditure of personal gifts. Under Section 56 the trustee could be called to appoint a manager for the administration of the secular affairs of the institution; in default of such appointment the Commissioner could make the appointment himself. By a notification issued under Chapter IV of the Act, the administration of an institution could be taken over, and vested in an executive officer appointed by the Commissioner. The validity of these and other provisions was challenged. The Supreme Court struck down a number of them as being unconstitutional. The attitude of the Court towards the interpretation of 'secular activities' is revealed in its following remarks:

> If the tenets of any religious sect of Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations

> to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b).[90]

Similarly, in Ratilal v. Bombay it was held that the right of a denomination to manage its own affairs in matters of religion included the right to utilise the trust property or its income for the religious purposes and objects indicated by the founder of the trust or established by usage obtaining in a particular institution. To divert the trust property or funds to such purposes as an authority created under a State Act or the court considers expedient or proper, although the original objects of the founder could still be carried out, was an unwarranted encroachment on the freedom of religious institutions in regard to the management of their religious affairs.[91]

On the other hand, autonomy in this respect is not absolute. Whereas religious ceremonies and observances may be matters of religion which cannot be interfered with, it is within the competence of the secular authorities

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[90] A.I.R. 1954 S.C. 282, at p. 290.

[91] A.I.R. 1954 S.C. 388, at p. 393.

to regulate the scale of expenditure in accordance with the law laid down by a competent legislature. It cannot be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure.[92] The state can certainly enact legislation to secure the better management of institutions by religious denominations, and if, having regard to denominational autonomy, it is reasonable, the courts would uphold it. Thus in Govindlalji v. Rajastan[93] the Supreme Court upheld the validity of the Rajastan Nathdwara Temple Act, which sought to regulate the secular affairs of that institution. It may be mentioned that while Article 26(b) gives the religious denominations autonomy in matters of religion, the other rights conferred by that Article are subject to regulation according to law. In Sardar Sarup Singh v. State of Punjab it was held that the election of officers under the Punjab Sikh Gurudwaras Act, 1925, was not a matter of religion within the meaning of Article 26(b).[94] A great deal of legislation of this category has been enacted by the Union and the State Legislatures seeking to secure the better

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92 A.I.R. 1954 S.C. 282, at p. 291.

93 A.I.R. 1963 S.C. 1638.

94 A.I.R. 1959 S.C. 860.

management by the religious denominations, especially those of the Hindu Religion, of their religious affairs.

The distinction between matters of religion and those of secular administration may, at times, appear to be a thin one. In such cases of doubt, the Court is bound to take a common sense view and be actuated by considerations of practical necessity.[95] No two instances can be exactly the same, and hence a decision has to be made having regard to the circumstances in each case.

Social welfare and reform

The powers vested in the government on this account are unique and bound to have far reaching consequences. By these, the government is enabled to take the initiative in putting an end to those religious practices and dogmas which it considers undesirable and which it thinks come in the way of progress. An outstanding example of the state action in this behalf is undoubtedly the temple entry legislation which has been passed by various States. Another is the codification of the personal laws. These are discussed at a later stage. It may be relevant to note that much of the legislation in this category pertains to the Hindu religion.

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[95] Ratilal v. Bombay, A.I.R. 1954 S.C. 388, at p. 392.

Venkataramana Devaru's case[96] is an important decision in this respect and can serve to indicate the attitude which the courts are likely to adopt in cases of conflict between denominational autonomy and social reform legislation. In that case the Supreme Court held that the denominational right of autonomy under Article 26(b) must give way so as to give effect to the rights of individuals under Article 25(2)(b). At the same time an effort was made to respect the denominational rights without substantially affecting the rights of others, and to construe Article 25(2)(b) so as to give effect to Article 26(b). The result was a compromise, whereby Harijans would be entitled to enter the temple, subject to limitations of time and place, so as to minimise the effect on the right of the denomination to manage its own affairs.

Sardar Syedna Taher Saifuddin Saheb v. State of Bombay[97] provides another instance of this conflict, but with a different result. Here the Bombay Prevention of Excommunication Act, 1949, was challenged on the ground that it took away the right of excommunication from the Head of the Dawoodi Bohra Community, thereby interfering

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96 A.I.R. 1958 S.C. 255.

97 A.I.R. 1962 S.C. 853; See the case comment by J. D. M. Derrett, "Freedom of Religion under the Indian Constitution: Excommunication", in 12, Int. & Comp. L. Q., (1963), p. 693.

with the right of that community to manage its affairs in matters of religion. The Court held the Act to be invalid. Das Gupta J., speaking for the majority, said that the mere fact that the Act sought to prevent the loss of civil rights resulting from excommunication did not make it a law "providing for social welfare and reform." He said that, while the barring of excommunication on grounds other than religious ones might be a measure of social reform, its barring even on religious grounds cannot be considered as promoting social welfare.[98] Ayyangar J., held that the Act, by depriving the Head of the power and the right to excommunicate struck at the very life of the community by rendering it impotent to protect itself against dissidents and schismatics. He added,

> In my view, by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislature to "reform" a religion out of existence or identity. Article 25(2)(a) having provided for legislation dealing with "economic, financial, political or secular activity which may be associated with religious practices", the succeeding clause proceeds to deal with other activities of religious groups and these also must be those which are associated with religion. Just as the activities referred to in Article 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Article 25 (2)(b) is not intended to cover the basic essentials of the creed of a religion which is protected by Article 25(1).[99]

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[98] A.I.R. 1962 S.C. 853, at p. 870.

[99] Ibid, pp. 875-876.

The points of distinction between the above two cases are perhaps that in the former the rights of a considerable section of the community, the Harijans, were involved, while excommunication as in the latter case would affect not more than a few individuals. In view of the emphasis placed on Harijan welfare in the Constitution, the Court was obliged to give effect to their claims. The second point is that in the latter case, but not in the former, it was successfully pleaded that the practice in question was an essential and integral part of religion. Between them, the above two cases may be said to represent the position with regard to communal autonomy and reform.

To sum up, the Constitution guarantees autonomy in religious affairs to every religious community or any section thereof. The interpretation of what is 'religious' is left to each community, which alone has the right to decide what constitutes part of its religion and to act accordingly. But in certain cases the state is entitled to limit this autonomy by legislation authorised by the Constitution. In such circumstances the autonomy would be limited to the essential aspects of religion. It is for the courts to decide, after considering any relevant evidence, whether or not a practice in question is essential

to religion. Though the autonomy at times may be limited, in so far as it seeks to protect essential practices of religion, it can nevertheless be said to be substantial.

2. The Propagation of Religion

It is said that there is a strong altruistic dynamic in religion which seeks to help others by sharing with them the oppottunities and benefits of a new way of life.[1] The right to propagate one's religion is now generally accepted as part of the freedom of religion. This right, including the right to change one's religion, has been incorporated in the Universal Declaration of Human Rights[2] and in the International Covenant on Civil and Political Rights.[3] It has received legal recognition in many Constitutions of the world. In India, the right to 'propagate' religion is guaranteed by Article 25(1) of the Constitution.

In the Indian context, this right is of special significance to minorities. Although it is expressed in general terms and is available to "all persons", in effect

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[1] P. H. Benson, Religion in Contemporary Culture, (1960), p. 607.

[2] Article 18.

[3] Article 18.

it mainly concerns two of the minority religions, - Christianity and Islam. This is due to the fact that other religions in India, and especially Hinduism, are of a non-proselytising nature in the accepted sense of that term. There are exceptions like Buddhism, and conversions to oher religions are not unknown. But, as we shall see later, conversions in this class escape some of the consequences which follow a conversion to either of the above "non-Indian" religions. The general Hindu attitude to propagation resulting in conversion from one religion to another is decidedly a negative one. While there is increasing activity within Hinduism with regard to 'propagation', this is concerned mostly with the expounding of the doctrines to the general Hindu public and with shuddhi movements aimed at bringing converts to other religions back to the Hindu fold. The attitude as regards the right to propagate religion is, therefore, of a mixed nature, ranging from the liberal to the extreme.[4] A vast majority of Hindus subscribe to the former, while a number of extremist organisations are actively seeking to curtail this freedom.

The right to 'propagate' religion was included in the Constitution as a result of pressure from the minorities,

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[4] For a discussion of various viewpoints on this subject, see D. E. Smith, India as a secular state, (1963), pp. 163-176.

especially the Christian community. The Christian community had voiced its interest in this regard on various occasions and particularly just prior to Independence. Thus in October, 1945, a joint committee of the Catholic Union of India and the All India Council of Indian Christians passed a resolution declaring that, "in the future Constitution of India, the free profession, practise and propagation of religion should be guaranteed, and the change of religion should not involve any civil or political disability".[5] In the Sapru Report, which came on the eve of Independence, Mr. Ruthnaswamy, a Christian member, urged in a note the inclusion of the word 'propagate' in the place of 'preach'.[6] When the Constituent Assembly was established, Christian memers of the Assembly and of the Advisory Committee on Minorities and Fundamental Rights pressed for the inclusion of the word 'propagate' in the draft Article 19 and were successful.

The Constituent Assembly debates indicate that the passage of this provision was not a smooth one. There were misgivings and objections and several amendments were proposed.[7] But the general mood of the Assembly was one of accommodation. The fears were allayed by speakers such

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[5] National Christian Council Review, 1946, Vol.66, p.3, cited in Ibdi, p. 181.

[6] At p. 339.

[7] See C.A.D., Vol. VI, debates for 3rd and 6th July, 1948.

as Mr. K. M. Munshi, whose speech sheds much light on the issue:

> In the present set-up that we are now creating under this Constitution, there is a secular state. There is no particular advantage to a member of one community over another; nor there is any political advantage by increasing one's fold. In those circumstances the word 'propagate' cannot possibly have dangerous implications which some members think it has. Moreover, I was a party from the very beginning to the compromise with minorities, which ultimately led to these clauses being inserted in the Constitution, and I know it was on this word that the Indian Christian community laid the greatest emphasis; not because they wanted to convert people aggressively, but because the word 'propagate' was a fundamental part of their tenet. Even if the word was not there, I am sure, under the freedom of speech which the Constitution guarantees it will be open to any religious community to persuade other people to join their faith. So long as religion is religion, conversion by free exercise of the conscience has to be recognised. The word 'propagate' in this clause is nothing very much out of the way as some people think, nor is it fraught with dangerous consequences.[8]

In the final form in which the Article was passed, the word 'propagate' was included, made subject only to the general limitations contained in that Article.

While the Constitution has now settled the legal position as to propagation, the debate has not entirely ceased. In some quarters of Hindus a distinction is still sought to be made between 'propagation' and the making of converts. Indian Christians, on the other hand, hold this distinction as artificial and believe that the right to

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[8] C.A.D., Vol.VI, 6th July, 1948, pp. 837-838.

'propagate' cannot be real if it did not include the right change one's religion. The weight of legal opinion is on the latter's side and the official position, in general, has been one of reassurance to the minorities.

The minority communities, however, have not been without some anxious moments since the Constitution was enacted. In 1954 a Bill entitled ' Indian Converts (Regulation and Registration) Bill' was introduced in Parliament by a Congress member. Its basic provisions were: persons and institutions engaged in converting people should secure a licence from the district magistrate; a register of conversions should be maintained; the prospective convert should make a declaration of intent to the district magistrate one month before the actual date of conversion and that particulars of his conversion should be provided within three months. Its introduction was opposed by a Muslim member on the ground that making a conversion conditional upon the discretion of the district magistrate is tantamount to virtual denial of the right, but his plea was not successful. However, when the Bill came up for discussion it was opposed by the Government and the Prime Minister allayed the fears of the minorities. "We must not do anything," he said, "which gives rise to any feeling of oppression or suppression in the minds of our Christian friends and fellow-countrymen in this country." The Bill was rejected

by an overwhelming vote.

Another Bill, 'the Backward Communities (Religious Protection) Bill', introduced in 1960 by a member of the Swatantra Party sought "to provide for more effective protection of the Scheduled Castes, Scheduled Tribes and other backward communities from change of religion." The Bill sought to regulate conversions among these classes from Hinduism to "non-Indian religions". These were defined as Christianity, Islam, Judaism and Zoroastrianism. The Bill was, however, rejected.[9]

Perhaps the greatest storm was caused throughout the country on the appointment of the Christian Missionary Activities Inquiry Committee (known as Niyogi Committee, after its Chairman) by the Government of Madhya Pradesh in 1954. The radical recommendations of its report[10] were never implemented, but it has been noted that "this official document is significant as an expression of the extremist Hindu sentiment which is sometimes found where it would not be expected."[11] The Christian community as a whole was much agitated and protests were heard all over

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[9] See, D. E. Smith, India as a Secular State, pp. 185-186.

[10] Report of the Christian Missionary Activities Inquiry Committee, (1956), 2 Volumes.

[11] D. E. Smith, op.cit., (n.9), p. 201. For details of the Committee, etc., see p. 207ff.

India. The Catholic Bishops' Conference of India published a reply stating the Christian position on conversions.[12] Much support was also found in various sections of the Hindu public. Though the Report was finally cnnsigned to oblivion, it is not entirely forgotten by the Christian community. References to a "one sided, unfair" inquiry can be found in a publication of a decade later.[13] However, it must be emphasised that this inquiry was limited to only one State in India and can be said to be an exception to the liberal official policy generally.

Conversions and civil rights

Any law which deprives a convert of any of the rights which he had before conversion would be discriminatory and inconsistent with the guarantee of full religious freedom. The principle that a person should not lose his civil rights on conversion is generally accepted. Thus the Caste Disabilities Removal Act, 1850, protects a convert from the loss of his civil rights, and in particular, removes the disability to inherit property imposed upon him by his former personal law. A suggestion was

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12 Truth Shall Prevail, (1957), Bombay.

13 Indian Catholic Reference Book, Catholic Assiciation of Bombay, (1964).

made to the Sapru Committee that a guarantee to this effect should be incorporated in the future Constitution.[14] However, the Constitution does not contain any such guarantee and it is evident taat at least in two important areas conversions would adversely affect the rights of converts.

The first such area is the Hindu Code legislation enacted in the mid-fifties, a number of whose provisions have the effect, whether intended or not, of discouraging conversions. Thus, the Hindu Marriage Act, 1955, makes the conversion from Hinduism one of the grounds for divorce;[15] the Hindu Adoptions and Maintenance Act, 1956, deprives a Hindu wife of the right to separate residence and maintenance on conversion;[16] the Hindu Succession Act, 1956, disqualifies the children of a convert, and his descendants, from inheriting the property of any of their Hindu relatives.[17] These and other consequences which follow a conversion under this legislation have been summarised by J. D. M. Derrett, thus:

> ... the penalties for changing one's religion, not from Sikh to Jaina, or from Hindu to Sikh or from Hindu to Buddhist (for these are not distinguished) but from Hindu to Christian, are many and varied. The

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[14] Mr. Rallia Ram, Sapru Report, p. 339.

[15] Section 13(1)(ii).

[16] Section 18(3).

[17] Section 26.

> spouse may obtain a divorce; children of the convert cannot inherit from the latter's relations; the convert is disqualified from being the guardian of his own child; he cannot give or take in adoption, nor prevent his wife from giving his child away in adoption or from taking a child in adoption; and he loses not merely all rights of maintenance which the Hindu law would otherwise give him but even alimony obtained in divorce proceedings. The 'secular state' thus seems to take away with one hand the virtue of the apparently liberal beliefs offered with the other.[18]

The explanation for this discrepancy, according to him, is that the system is a personal law and only those who belong to the religious community can take advantage of it. But still it remains odd that a system which has no roots in Hinduism, and which does not claim to be a religious legal system as such, should contemplate such drastic effects in cases where persons subject to it by being Hindus cease to be Hindus by conversion to another religion, not accepted as 'Hindu' religion for the purpose of the application of these statutes.[19]

The second area where converts have been at a disadvantage concerns the benefits offered to the Scheduled Castes. Since more often than not the test of backwardness is the membership of a caste,[20] it is important to remain

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[18] J. D. M. Derrett, Religion, Law and the State in India, (1968), pp. 332-333.

[19] Ibid, p. 333.

[20] See Chapter V, infra.

a Hindu to qualify for certain benefits. The Constitution (Scheduled Castes) Order of 1950 provides that "no person professing a religion different from Hinduism shall be deemed to be a member of a Scheduled Caste."[21] For this purpose even Buddhists, Jains and Sikhs are regarded as non-Hindus on the ground that they do not believe in the caste system. Conversions to Christianity or Islam have the effect of removing the converts from their castes. Thus in Michael v. Venkataswaran the religious requirement was upheld against a Pariyan convert to Christianity, who wished to contest a reserved seat. Though he himself and his caste-fellows still considered him to be a member of the caste, the court held that as a general rule, "conversion operates as an expulsion from the caste. .. a convert ceases to have any caste;"[22] The Supreme Court reaffirmed this principle in S. Rajagopal v. C. M. Armugam, where it had been called upon to decide whether a christian convert on reconversion to Hinduism regained his former caste.[23] The Court did not consider the question whether reconversion had the effect of reverting him to the old caste automatically. It held that the burden of proof lay on

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[21] Para 3.

[22] A.I.R. 1952 Mad. 474, at p. 478.

[23] A.I.R. 1969 S.C. 101, at p. 108.

the appallent and that in the circumstances he had failed to satisfy the Court.[24] Where the Madras Government had extended the school-fee concession to Harijan converts, it was held that it could be restricted to one generation of converts only without offending the provisions of equality. The concessions were merely an indulgence on part of the state, as by conversion they had "ceased to belong to any caste, because the Christian religion does not recognise a system of castes."[25]

It has to be recognised that where measures are designed to improve the social and economic conditions of the backward classes, religious affiliations have little relevance, and conversion is not likely to have any effect on them. In Gurmukh Singh v. Union of India,[26] where the exclusion of Sikh Bawarias from the Scheduled Castes was questioned, as Hindu Bawarias had been included, the court conceded that the Scheduled Castes were to be designated on the basis of their backwardness, though it held that the Presidents Order could not be reviewed. In Jasani v. Moreshwar Parasram[27] the Supreme Court seems to have accepted the view that conversion need not necessarily alter

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24 Ibid, pp. 109-110.

25 In re Thomas, A.I.R. 1953 Mad. 21 (22).

26 A.I.R. 1952 Punj. 143.

27 A.I.R. 1954 S.C. 236 (244-245).

the convert's caste status, if the new religion permits it, and the old caste regards the convert as one of themselves despite conversion. The Mysore High Court has held that a Samgar candidate for election still retained his caste despite accepting and following the tenets of Arya Samaj,[28] and the Patna High Court has held that members of Oraon tribe embracing Christianity do not cease to be Oraons and are entitled to the rights and privileges of tribals.[29] However, there can be no denying that the "Hinduism" test of Scheduled Castes, and the caste criteria for backwardness operate to penalise many a convert and deny him the benefits which his condition of backwardness entitled him to receive before conversion. The adoption of a purely economic and social criteria seems to be the only satisfactory method to overcome these difficulties.

The Indian attitude to conversions has been described by one writer as "anachronistic".[30] There is no doubt that the anomalies cited above have a tendency to discourage conversions and to maintain the status quo. For the freedom of conscience guaranteed in the Constitution to be real a way will have to be found to overcome

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28 Shyamsunder v. Shanker Deo Vedalankar, A.I.R. 1960 Mys. 27 (31, 33).

29 Kartik Oraon v. David Munzni, A.I.R. 1964 Pat. 201.

30 Marc Galanter, "The Problem of Group Membership: Some Reflections on the Judicial Review of Indian Society", 4, J.I.L.I., (1962), p. 331, at p. 355.

these difficulties. The anomalies of the Hindu Code legislation may perhaps be ironed out when a uniform Civil Code is adopted. As to those pertaining to "protective discrimination" there is now an increasing tendency to adopt alternative criteria for backwardness, besides the fact that this measure itself is meant to be of a temporary nature.

3. Education

It is the right of every society to choose the type of education it considers appropriate for its younger generation. This is of vital importance to all minorities who seek to transmit to their children the common fund of their particular traditions and cultural values. In the case of religious minorities there is also a desire to create a favourable atmosphere for the promotion of their particular religious values. It is relevant to note that much of the pioneering work of education in India was done under the auspices of various religious bodies. The Indian Constitution has shown its awareness of the needs of the minorities by granting them cultural freedom[31] and recognising their educational rights. Article 30(1)

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[31] Article 29.

guarantees the right of religious minorities "to establish and administer educational institutions of their choice." The state is debarred from discriminating against any educational institution on the ground that it is under the management of a minority.[32]

The essential problem, however, is to determine the substance of this right in the light of governmental policy on education and the vicissitude of its administration. In general, it has been the policy all over India to encourage private agencies to develop their educational institutions at all levels. At the same time, there has been an increasing tendency to exercise greater control, which in some cases has severly curtailed the right of private management. Government controls in the form of the powers of inspection, granting of recognition, qualifications of teachers, audit of public funds, etc., have been in existence for some time. These are gradually being enlarged with requirements such as the inclusion of government nominees on school boards, appointment of headmasters by seniority, restrictions on the selection of the teaching staff and various service regulations. There has not been a consistent all-India policy in this

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[32] Article 30(2).

respect. Education being a subject on the State List,[33] conditions vary from State to State. A general picture in this regard will, therefore, have to be constructed by reference to the case law.

The Supreme Court has had occasion to consider the educational rights of the minorities in some detail in Re Kerala Education Bill, 1957,[34] when the President referred to it a Bill passed by the Kerala Assembly for its advisory opinion. The Bill included a number of provisions affecting the rights of private management. Among the controversial provisions were some of the following: all teachers' salaries were to be paid directly by the government, and all fees collected by the management remitted to the government; appointment of teachers had to be made only from a state register prepared by the government; government could take over the management of any school for five years if the manager neglected to perform his duty; government could take over any category of aided schools, if it was thought necessary in order to standardise general education. The acceptance of these and other regulations was made a condition for recognition and the receipt of state aid.

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[33] Seventh Schedule, List II, entry 11. There are certain exceptions as to Central Institutions and Union agencies, (entries 63 to 66 of List I, and entry 25 of List III).

[34] A.I.R. 1958 S.C. 956.

The Court held that clauses 14 and 15 of the Bill, which enpowered the government to take over aided schools, were unconstitutional. However, it rejected the contention that the Bill, as a whole, constituted an attack on the right of minorities to establish and administer educational institutions of their choice. There was nothing in the Bill which discriminated against minorities; if any private school solicited state aid, it must be willing to submit to reasonabe regulations. It said that the right to administer could not obviously include the right to maladminister. A minority surely cannot ask for aid or rrcognition for an educational institution run by it in unhealthy surroundings, with incompetent teachers, possessing no semblace of qualification, and which did not maintain even a fair standard of teaching or which taught matters subersive to the welfare of the scholars. The Constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the state to insist that, as a condition for a grant in aid, the state may prescribe reasonable regulations to ensure the excellence of the institution to be aided. Reasonable regulations may certainly be imposed by the state for aid or even for recognition.[35]

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[35] Ibid, at p. 982.

The Court found, however, that, though the provisions of the Bill in general were reasonable, they had made "serious inroads on the right of administration and appear perilously near violating that right."[36] It was necessary to ensure that the regulations did not interfere with the substance of the right guaranteed to minorities. The government ougnt not to restrict that right by indirect means, as for instance by denying aid or withholding recognition. No educational institution in modern times could afford to subsist and efficiently function without some state aid, and hence the conditions in that regard must not be such as to amount to a surrender of the minorities' Constitutional right of administering educational institutions of their choice.[37] As to recognition, without it the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and exercise the rights under Article 30(1) effectively. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions, which will effectively serve the needs of their community and the scholars who resort to their institutions. It is true that there is no such thing

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[36] Ibid, p. 983.

[37] Ibid, p. 980.

as a fundamental right to recognition by the state, but to deny recognition to educational institutions, except upon terms tantamount to the surrender of their Constitutional right of administration of the educational institutions of their choice, is in truth and effect to deprive them of their rights under Article 30(1). The legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights, which it could not do directly.[38]

The Supreme Court has further clarified the position in Sidhrajbhai Sabbaj v. State of Gujarat.[39] The right of minorities under Article 30(1) is an absolute right which is not made subject to reasonable restrictions as the rights in Article 19. It is intended to be a real right for the protection of minorities. Regulations in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like can be made. Such regulations made to secure the proper functioning of institutions in matters educational are not restrictions on the substance of the right which is guaranteed. Regulations which may lawfully be imposed either by legislative or executive action as a condition of

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[38] Ibid, at p. 985.

[39] A.I.R. 1963 S.C. 540.

receiving grant or recognition must be directed to making the institution effective as an educational institution, while retaining its character as a minority institution. Such regulations must satisfy a 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 for the minority community or other persons who resort to it. In this case it was held that the rules made by the Bombay Government as to the recognition of private training institutions, the requirement as to reservation of 80 per cent of seats for government nominees, and the threats to withhold grants-in-aid and recognition constituted a violation of the rights guaranteed in Article 30(1).[40]

In K. O. Varkey v. State of Kerala, the High Court struck down a number of the Kerala Education Rules, 1959, as being ultra vires Article 30. From the fact that the minority had submitted to those rules in the past, it could not be inferred that they had waived the right under Article 30 by non-assertion.[41] It was doubtful if a fundamental right given to a community with fluctuating

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[40] Ibid, paragraphs 10, 15 and 16, at pp. 545, 547.

[41] A.I.R. 1969 Ker. 191 (195).

membership could be waived so as to bind its future members.[42]

The rights guaranteed in Article 30 can be claimed by any religious denomination which can prove its distinctive character. The term 'religious minority' for this purpose is widely interpreted.[43] The admission of outsiders to a minority educational institution does not derogate from its character as such. Such an eventuality is clearly contemplated by Articles 29(2) and 30(1) read together.[44] The Patna High Court has held that a school managed and administered by the Brahmo Samaj is entitled to protection under Article 30(1), even though the majority of the students were not of Brahmo faith and no instruction in that faith was given.[45] The words "educational institutions" are of very wide import and hence it is within the competence of a minority to establish a university also.[46]

Not only has a minority the right to establish and administer educational institutions, but the institutions must be of their own choice. In the Bombay Education

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[42] Ibid, pp. 195-196.

[43] See p. 155ff., supra.

[44] A.I.R. 1958 S.C. 956, at p. 978.

[45] Dipendra Nath Sarkar v. State of Bihar, A.I.R. 1962 Pat. 101.

[46] Azeeb Basha v. Union of India, A.I.R. 1968 S.C. 662(670).

Society's case the Bombay High Court held that it is not open to the State to dictate to a minority what the nature of its educational institution should be. It is for the minority itself to decide what is best to conserve the rights given to it under Article 29(1).[47] In appeal, the Supreme Court upheld this view. It said that the power of the State to determine the medium of instruction must yield to the fundamental right of the minority to impart instruction in their own institutions to the children of their own community in their own language.[48]

The Fundamental Rights in Articles 29(1) and 30(1) are, however, two separate and distinct rights although it is possible that they may meet in a given case. In a recent decision the Supreme Court has held that the right guaranteed in Article 30(1) cannot be limited by introducing in it considerations on which Article 29(1) is based. The latter Article is a general protection which is given to minorities to conserve their language, script or culture. The former is a special right to minorities to establish educational institutions of their choice. This choice is not limited to institutions seeking to conserve language, script or culture and the choice is

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47 Bombay Education Society v. State of Bombay, A.I.R. 1954 Bom. 468 (476).

48 State of Bombay v. Bombay Education Society, A.I.R. 1954 S.C. 561 (568)

not taken away if the minority community having established an educational institution of its choice also admits members of other communities. The court held that this is a circumstance irrelevant for the application of Article 30(1) since no such limitation is expressed and none can be implied.[49]

Whether the right of administration given to a minority is violated is a matter to be decided in the context of particular circumstances. It was held that the provisions of the Bihar University Laws (Amendment) Act, 1965, seeking to regulate the constitution of governing bodies were unconstitutional. If a governing body, as required by the Act, is imposed on an educational institution run by Muslims, its character as an institution for imparting modern education to Muslim students would disappear. Under the statute most of the members of the governing body need not necessarily be Muslims and the governing body would be like that of any other educational institution. The effect would be the total destruction of the character of the institution as an institution administered by a minority community. The State cannot, in the guise of regulatory measures, take away the character of such an institution.[50] On the

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49 Rev. Fr. W. Proost v. State of Bihar, A.I.R. 1969 S.C. 465 (468-69, 470).

50 Muslim Anjuman-e-Taleem v. The Bihar University, A.I.R. 1967 Pat. 148 (149).

other hand, the service rules, framed under the Punjab University (Amendment) Act, 1962, which sought to give representation to teachers on governing bodies were held not to violate the rights of the Sikh community. Even if non-Sikh members could be elected to the governing body of Khalsa College, the presence of two representatives in a total of, say, 29 persons would not in any manner alter the real and true composition of that body. Moreover, it is open to the Governing Body not to appoint any person who is not a Sikh as a teacher.[51]

In Aldo Maria Patroni v. E. C. Kesavan, where a Director of Public Instruction made an order abrogating the appointment of a Headmaster in a Catholic school on the sole ground that he was junior in service, the Kerala High Court struck it down as being unconstitutional. It held that the right to choose a Headmaster was perhaps the most important facet of the right to administer a school; the imposition of a trammel thereon —except to the extent of prescribing the requisite qualifications and experience— could not but be considered a violation of the guaranteed rights.[52]

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[51] Khalsa College, Amritsar v. State of Punjab, A.I.R. 1968 Punj. 403 (405).

[52] A.I.R. 1965 Ker. 75 (77),

The term 'administer' has been held to be wide enough to take the enfocement of discipline with regard to dress and other matters. Thus a direction that a teacher, an expelled nun, should not wear the religious habit of a nun could not be questioned.[53] A Christian institution receiving state aid was within its rights in forbidding the performance of a non-Christian religious ceremony within its precincts. Although it could not interfere with the beliefs and profession of religion, it could control the outward manifestation of it within the boundaries of ts property.[54]

A minority's right to establish educational institutions, however, is not an exclusive right. It does not mean that the minority in a village has an exclusive right to conduct a non-denominational school in the village, unmolested by any competition from the majority population of the village. The setting up of a rival school by a member of the 'majority' community does not violate any of the rights of a minority.[55] If, as a result of such competition, a school established by a minority cannot get enough students to qualify for a

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53 Puthota Chinnamma v. The Regional Dy. Director of Public Instruction, A.I.R. 1964 A.P. 277.

54 Sanjib Kumar v. Principal, St. Paul's College, A.I.R. 1957 Cal. 524.

55 Joseph Callian v. State of Kerala, A.I.R. 1962 Ker. 33.

grant from the government, there is no question of discrimination by the State on grounds of community.[56]

In Azeez Basha v. Union of India,[57] the Supreme Court has held that the words "establish and administer" in Article 30(1) must be read conjunctively. Here the Aligarh Muslim University (Amendment) Act, 1965, had been challenged as unconstitutional. The Court held, on facts, that the Aligarh University had been established by the Central Legislature, and not by the Muslim minority, and hence Article 30(1) did not apply. A minority has the right to administer educational institutions of its choice, provided it has established them. 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.[58] This seems to be somewhat a narrow view, especially since it was admitted that the institution in question came into being as a result of the efforts of the Muslim minority though its formal establishment was by an Act of Central

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[56] Jose Callian v. Director of Public Instruction, A.I.R. 1959 Ker. 331 (332).

[57] A.I.R. 1968 S.C. 662.

[58] Ibid, pp. 669-670.

Legislature. Leaving aside the merits of the impugned legislation in this particular case, it seems more appropriate, in principle, to decide the status of such an institution with reference to its real connection with a particular community.[59]

The question of religious instruction in schools

While on the subject of education, a reference may also be made to the issue of religious instruction in schools, in particular, government schools. It may be noted that private schools run by any community, recognised by government and receiving aid out of state funds, are entitled to impart religious instruction, subject only to obtaining guardians' consent as laid down in Article 28(3).

As to government schools, Article 28(1) lays down that no religious instruction shall be provided therein. While this is still the rule, a debate has been going on for some time as to the desirability of introducing some form of moral instruction to take its place.[60] The need for moral and spiritual instruction is not denied by any religious community. Such instruction

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[59] For a critique of this case, see, Mohammad Ghouse, "A Minority University and the Supreme Court", 10, J.I.L.I. (1968), p. 521.

[60] A detailed discussion on the subject is to be found in D. E. Smith, India as a Secular State, p. 347ff.

would also be within the framework of the Constitutio, though at times it would not be easy to distinguish it from religious instruction. This problem can be overcome, if necessary, by amending the Constitution once general agreement is reached. The most crucial issue, however, is to find agreement between all the religious communities as to what the content of such instruction ought to be, and the manner of its presentation.

The minority communities who recognise the need for such instruction to the extent of gladly welcoming religious instruction, are at the same time apprehensive of the danger of such instruction being inconsistent with their particular religious beliefs. In their opinion, religion, spirituality and morals cannot be divorced from each other. Hence the University Education Commission's recommendation for the teaching of universal religion did not find favour with Indian Christians and Muslims. That commission sought to take "the Indian view of religion", seeking to "harmonise all faiths in one universal synthesis."[61] But this view does not coincide with those of the above communities, who also find that certain types of common worship is objectionable. A Committee appointed subsequently, the Committee

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[61] Report of the University Education Commission, Simla, (1950), see Chapter 8.

on Religious and Moral Instruction, has taken a different approach. They have suggested that every citizen should seek to understand the basic principles and values of religions ther than his own with a view to promoting a spirit of tolerance through the understanding of differences. They have recommended a comparative and sympathetic study of the lives and teachings of the great religious teachers, their ethical systems and philosophies, and the inculcation of good manners, social service and true patriotism.[62]

The task of impremented any scheme of religious or moral instruction amid the existing diversity of religious beliefs would not be easy. The Muslim view appears to be that it would be an "undesirable and unsafe" policy to entrust the direction of religious education to the government, even if it were Constitutionally possible, and that the common religious and moral instruction which is being considered is also "unacceptable and impracticable." Their view is that religious education for Muslim children in government schools must be conducted by Muslims themselves.[63] General public opinion among Muslims is said to be in favour of making religious

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62 Report of the Committee on Religious and Moral Instruction, New Delhi, (1960), p. 16.

63 S. Abid Husain, The Destiny of Indian Muslims, (1965), p. 210.

instruction in Islam for Muslim children compulsory. They also demand the eradication of Hindu religious mythology and anti-Muslim historical references from state text-books and the elimination of Hindu rituals and public ceremonies from state education.[64] In a general context, they resent "a system of education and a course of study ....that teach a creed which is opposed to the basic concepts of Islam, which cuts across the fundamental doctrines of Divine Unity and Apostleship, preach openly pantheistic and polytheistic beliefs and force Muslim children to learn the mythology of another religious community, after believing in which no Muslim can remain a Muslim by any stretch of imagination."[65]

These strong sentiments represent, perhaps, just one shade of Muslim opinion.[66] But they serve to illustrate the point that in the present circumstances much effort will be needed before a course of moral instruction acceptable to all can be found. The desirablity of introducing some such course is now greater than ever. But it would

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64 T. P. Wright Jr., "The Effectiveness of Muslim Representation in India", in D. E. Smith (ed.), South Asian Politics and Religion, (1966), p. 102, at p. 105.

65 A. H. A. Nadvi, quoted by Z. H. Faruqui in "Muslims and the Secular State", in D. E. Smith (ed.), Ibid, at p.144.

66 T. P. Wright Jr., distinguishes various sections of the Muslim community as "modernist", "secularist", "traditionalist", and "fundamentalist": "Muslim Education in India at Cross Roads", 39, Pacific Affairs, (1966), at pp. 61, 63.

be unwise to force the pace irrespective of the susceptibilities of any religious community. A gradual transformation in outlook is meanwhile taking place among all communities and perhaps it may be possible to arrive at such an agreement in the not too distant future.

4. Safeguard of communal interests

A predominant feature of religion in India is that it has created a strong sense of community among members of each religious persuation, the significance of which reaches far beyond the immediate sphere of religion. That communities polarise around and identify themselves with a religion is a historical fact. Despite what the Constitution seeks to achieve, the communal consciousness among religious groups is strong as ever. As D. E. Smith has observed, religion provides each group with a focal point of identity and social solidarity and large areas of culture are intimately associated with it. Thus, though a member of the Muslim community may be an atheist, the social institutions, personal laws, customs, traditions, history, art and literature, which have helped to mould his individual and social existence have been closely related to Islam. Religious symbols represent group interests and group self-esteem and continue to be emotionally powerful in unifying the

group in the face of real or imagined threats from outside.[67] Though ideally in a democracy there is no place for purely communal groups of any kind, for the present at least the aspect of religious communities cannot be ignored. It is, therefore, necessary to ensure that the legitimate interests of all such groups are protected.

The most prominent among all communal interests must undoubtedly be the preservation of law and order assuring all communities security of life and property. The Muslim minority is particularly vulnerable in this respect. Unfortunately, tension between Hindu and Muslim communities still persists leading to open clashes at least excuse and resulting in the loss of life and property. Events in the recent past have shown that incidents of this kind are on the increase both in number and in scale.[68] This is bound to create a sense of insecurity in the

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[67] D. E. Smith, "Emerging Patterns of Religion and Politics", in D. E. Smith (ed.), South Asian Politics and Religion, (1966), at p. 22.

[68] eg., in August 1967, more than 150 lives were lost in Bihar (The Times, November 3, 1967, p.5); in the first four months of 1968, there were more than 200 cases of communal riots (The Times, June 12, 1968, p.6); in September 1969, over 100 people lost their lives in Gujarat (The Times, September 22, 1969, p.6). A Report published by the Ministry of Home Affairs, Government of India, in June 1969 (but which is not yet available in London), has reported a steady rise in deaths due to communal clashes since 1966. The total of deaths in the first quarter of 1968 equalled the total of those killed over the previous eight year period. By far the greater number of those who lost their lives were Muslims: The Times, leader article, September 22, 1969.

Muslim community, and in a lesser degree among minorities generally. It is necessary to take urgent steps to reverse this trend and to reinforce the safeguards.[69] Everything possible must be done towards achieving communal harmony.

In the context of the present chapter, however, we must confine our attention to interests which are of special religious significance. It is apparent that the task of separating religion from non-religion, which is already difficult on account of the nature of religion in India, is further complicated in the communal context. Where communal interests come into conflict with the declared goals of the Constitution, the task of reconciling the two is, therefore, a delicate one.

The range of communal interests is very wide and it is not within the scope of this chapter to go into them in detail. A discussion on a number of these issues concerning particular communities is to be found in D. E. Smith's book.[70] In the following pages it is proposed to merely touch upon three of the issues, viz., the personal laws, language and culture, and property and institutions, with a view to giving an idea of the communal aspect of religion in a minority context.

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[69] For suggestions in this regard, see Humayun Kabir, Minorities in a Democracy, (1968), p. 55ff.

[70] India as a Secular State. See Part IV on minorities, especially chapter 14.

Personal Law

Every Indian is governed, in a greater or smaller degree, by a 'personal law' which applies to him in matters concerning the family. This law is determined and interpreted by reference to the religion he professes or is presumed to profess. Thus Hindus, Muslims, Christians, Parsis and Jews are subject to their respective personal laws, codified or uncodified, with regard to matters such as marriage, divorce, inheritance and succession. In the context of the present chapter we must consider the religious and communal significance of these laws to the minorities vis a vis the objectives of reform and the Uniform Civil Code contemplated in the Constitution.

Though reform and codification are not new features introduced by the Constitution, there can be no doubt that it has given the movement a sense of direction and urgency. The earlier attempts at codification, beginning in the nineteenth century, have been few and far between.[71] The Caste Disabilities Removal Act (1850), the Hindu Widows' Remarriage Act (1856), the Hindu Inheritance (Removal of Disabilities) Act (1928), the Hindu Women's Right to Property Act (1937) and the Hindu Married Women's Right to Separate Residence and Maintenance

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[71] Ibid, p. 266ff.

Act (1946), scanning a century of reform, hardly touched the fringes of Hindu personal law. In a decade following the assumption of government by the Crown in 1858 a concerted attempt to codify the law was made. The Code of Civil Procedure (1859), the Penal Code (1860), the Code of Criminal Procedure (1861), and the Indian Contract Act (1872) took over areas formerly governed by "justice, equity and good conscience". The Special Marriages Act, 1872, applied to anyone who availed of it and the Indian Succession Act, 1872, (reenacted with amendment in 1925), applied to all except Hindus and Muslims. But the movement was not carried further and important areas of personal laws were left untouched. Some legislation pertaining to individual communities was passed, Thus, the Indian Divorce Act (1869) and the Indian Christian Marriage Act (1872) governed Christian marriage and divorce (with exceptions for the Catholic community with regard to matters governed by Canon Law). The Parsi community[72] was governed by the Parsi Marriage and Divorce Act, 1865, (now replaced by the Act of 1936). Until the introduction of the Constitution no coherent attempt had been made to deal with the problem as a whole.

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[72] As to law relating to Parsis, see P. K. Irani, "The Personal Law of the Parsis in India", in J. N. D. Anderson (ed.), Family Law in Asia and Africa, (1968), p. 273.

With the introduction of the Hindu Code legislation in the mid-fifties,[73] a major step was taken in the direction of a Uniform Civil Code envisaged by Article 44 of the Constitution. It is significant that the personal law of the majority community, accounting for 85 per cent of the total population, has been amended and brought on the statute book. Though it still remains a personal law, applied by reference to the religious affiliation, it seems a natural first step towards the codification of other personal laws and bringing them in line with each other preparatory to an uniform Code. The anomalies arising out of a multiplicity of personal laws will have to be removed.[74] Whatever may be the method used in bringing this Code about, the question now seems to be not 'whether', but rather 'when' it will come. It is generally accepted that it is bound to come sooner or later.

This situation has given rise to some concern among the minority communities as to the possible changes in their laws. The personal law of the majority community having been changed, it is now their turn to take stock

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[73] Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956).

[74] On this subject, see J. D. M. Derrett, Religion, Law and the State in India, (1968), pp. 542-545.

of the situation, and also for the government to decide what attitude it shall adopt in this regard. In this context the Muslim community is in a particularly grave predicament. Though other communities are also natuaally concerned to some extent, as the Christian Community was with regard to the proposed legislation on marriage,[75] they are, on the whole, prepared to accept a Uniform Code.[76] The Muslim community is as yet not prepared for this. On account of a number of factors, such as the size of the community, the intensity of feeling and historical considerations, the question of personal laws at present is essentially a Muslim problem and needs to be dealt with as such.

It is not necessary to elaborate on the fact that Muslims have always felt very strongly on this issue. The retention of the personal law has been one of their demands since pre-Independence days. In 1931 they asked for, and got in the form of a resolution, an assurance from the Working Committee of the Congress that their personal law shall be protected by specifit provisions to be embodied in the future Constitution.[77] In the Constituent Assembly the Muslim members emphasised that

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[75] See the Report on the Law Relating to Marriage and Divorce amongst Christians in India, (1960), Law Commission of India, 15th Report.

[76] D. E. Smith, India as a Secular State, pp. 422-423.

[77] Ibid, pp. 420-421.

it was part of their religion, and that they would in no circumstances give it up.[78] Retention of the personal law still continues to be a religious demand of the Muslim community.[79]

The need for the reform of the Muslim personal law is all too clear. As J. D. M. Derrett has pointed out, in the context of the Hindu Code, Muslims have as much need, from an academic and practical viewpoint, to have their personal law (or rather laws) reformed and perhaps codified.[80] It is also clear that the powers of the government are quite wide enough to carry this reform through if it is prepared to undertake this bold venture. It seems unlikely that amending and codifying the personal law would be held by the courts to be repugnant to an essential part of religion.[81] The reluctance on the part of the government, perhaps, stems from the needs of political expediency, a desire not to offend the susceptibilities of a minority community, or may

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[78] Maulana Hasrat Mohani, C.A.D., Vol.VII, p. 759.

[79] T. P. Wright Jr., "The Effectiveness of Muslim Representation in India", in D. E. Smith (ed.), South Asian Politics and Religion, (1966), at p. 105.

[80] Religion, Law and the State in India, p. 322.

[81] In Badruddin v. Aisha Begum, (1957 All. L.J. 300), it was held that polygamy is not an essential part of a Muslim's religion. As to Hindu law, in the similar context, see State of Bombay v. Narasu Appa Mali, (1951) 53 Bom. L.R.779, and Srinivasa v. Saraswati, A.I.R.1952 Mad. 193.

even be a deliberate plan to induce the minority concerned to initiate the change itself.

The main argument put forward against the change of Muslim personal law has been that "in Islam, Law is Religion and Religion is Law, because both have the same source and an equal authority, being both contained in the same divine revelation — a revelation which covers the whole sphere of man's thought and action."[82] But this argument has now lost much of its force in view of the vast changes in the law that have taken place in most Muslim countries, including Pakistan. The law in contmporary Islam is by no means exclusively Islamic.[83] Very little of the Muhammadan law actually depends on the Koran; only a fraction of it, as originally interpreted, is actually in force in India (the rest having been abolished), and of that fraction a great part has been modified deliberately or accidentally by the judiciary since the East India Company undertook

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[82] Lord Bryce, quoted by S. S. Nigam, "Uniform Civil Code and Secularism", in G. S. Sharma (ed.), Secularism, p. 153, at p. 155.

[83] For a detailed discussion on this subject see, N. J. Coulson, "Islamic Law", in J. D. M. Derrett (ed.), An Introduction to Legal Systems, (1968), p. 54. As to changes in family law in Pakistan see, by the same author, "Islamic Family Law: Progress in Pakistan", in J. N. D. Anderson (ed.), Changing Law in Developing Countries, (1963), p. 240.

directly to administer it.[84] The Muslim Personal Law (Shariat) Act, 1937, is not uniform in its application to all Muslims in India. Various sections of the Muslim community in different parts of India are governed by laws which differ from each other, being derived from local custom and usage, and in some cases by law resembling uncodified Hindu Law.[85]

Within the Muslim community itself the attitude towards reform varies among different sections, with shades of opinion ranging from conservative to progressive. Among those who hold the former are the ulama with a following of the greater part of the community. Fazlur Rahman attributes the conservative tendencies and the lack of initiative of the community to the fact that Muslims have always been a minority in the sub-continent, a fact which compelled them to emphasise and cling tenaciously to relatively external expressions at the expense of inner growth, and also to the fact that the quality of the ulama is generally lower than in the more

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[84] J. D. M. Derrett, Religion, Law and the State in India, p. 514. Chapter 15, entitled "The Future of Muhammadan Law in India" is of special interest in the present context. Other references to personal law, in general, can be found at pages 39ff., 51ff., and 438ff.

[85] Ibid, pp. 521-522.

progressive Muslim countries.[86] In the latter category are the Muslim intelligentia who, as a whole, are said to be in favour of reform.[87] The progressives, with A. A. A. Fyzee and M. C. Chagla among them, see the need for a correct linguistic assessment of Quranic injunctions and its re-interpretation and application to the conditions of modern life according to the needs and appeals to the mind of the twentieth century Muslim. This, coupled with the acceptance of religious pluralism under the sovereignty of a secular state is seen as a solution by Fyzee. He sees the need to disentangle law from religion in Islam in distinguishing subjective ethical norms from objective rules; this, according to him, would make the acceptance of even secular law possible.[88]

This dilemma presents two alternatives: the government could force the pace and codify the law irrespective of opposition, as was done in the case of the Hindu Code; or, it could wait for the community itself to take the initiative. In the existing circumstances the second course seems to be the wisest. On

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86 Fazlur Rahman, "The Controversy over the Muslim Family Laws", in D. E. Smith (ed.), South Asian Politics and Religion, (1966), p.414, at p. 427.

87 Z. H. Faruqi, "Indian Muslims and the Ideology of the Secular State", in Ibid, p. 138, at p. 194.

88 A. Ahmad, Islamic Modernism in India and Pakistan, (1967), pp. 256-257.

an issue where the communal emotions, rather than the rational arguments, are likely to prevail, it is essential that nothing should be done which would cause undue alarm and a sense of insecurity in the community. Meanwhile, the government could create conditions for a favourable public opinion towards reform in the community by means of education, debate, and the bringing together of Muslim jurists who would examine the whole question. At the same time some of the abuses resulting from the personal law can be dealt with by legislation without actually interfering with the personal law.[89] It is important that the Muslim community itself should recognise the urgency of the situation and take the opportunity afforded it.

Language and Culture

Karl Vossler suggests that the function of language in relation to religion can never be more than the expression of an opinion. Nevertheless, pious minds are always inclined to look upon language, like everything else, as a special gift and a tool of divinity.[90] A commumity of religion and of language not too infrequently coincide, in which case that language would be held in

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[89] J. D. M. Derrett, n. 84 at p.231, supra, pp.538-542,546ff.

[90] The Spirit of Language in Civilisation, (1932), pp.25-26.

greater respect and have a religious significance. This is the case with regard to Muslims in relation to Urdu and to a lesser extent the case of Sikhs as to Gurmukhi.

The Muslim's attachment to Urdu springs from the fact that it has been associated with the scriptures, particularly when the Arabic script is used, and also from the fact that it is used by the greater part of the community. It has been the language through which generations of Muslims have received their education. These facts, coupled with the fear that some sections of the majority community seek to discourage Urdu on account of its Islamic connections and replace it with the language of the majority, have tended to increase its religious significance to the Muslim ommunity.

The case of the Sikhs is on a different footing. Here the question involved is one of using the Gurmukhi script, the script used in the sacred writings of the Sikhs. However, it has come to possess a greater significance in a political context. During the controversy on the Sikh demand for a Punjabi Suba, it was insisted that Punjabi written exclusively in Gurmukhi should be used.[91] Kushwant Singh has suggested that the only chance of survival for the Sikhs is "to create a State

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[91] D. E. Smith, India as a Secular State, p. 450.

in which they form a compact group where the teaching of Gurmukhi and the Sikh religion is compulsory."[92] It may be noted that with the creation of the new States of Punjab and Haryana the demand for a new State has been conceded, but there is no compulsion as to the learning of the religion or the language.

Muslim fears with regard to Urdu have not been without justification. Post-Independence policy in some States, particularly Uttar Pradesh, Bihar, Madhya Pradesh and Rajastan, was to discourage Urdu, leading to its virtual elimination as a medium of instruction in schools.[93] Perhaps the long Hindi-Urdu controversy , with the alignment of communities behind each, has something to do with these anti-Urdu tendencies. However, since the States Reorganisation in 1956 and the Constitution Seventh Amendment providing for primary education in the mother tongue, the position of Urdu is now on a secure footing. A Commissioner for Linguistic Minorities has been appointed to look after the welfare of all linguistic minorities.[94] But, as we shall see later, all the problems are not

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[92] K. Singh, A History of the Sikhs, Vol. II, (1966),p.305.

[93] D. E. Smith, op. cit., (n. 91, supra), p. 425.

[94] See Chapter IV, infra.

overcome by these measures, and a great deal depends on the willingness of the State governments to actually implement the policies that have been laid down.

There are more questions facing the Muslim community than merely securing the preservation of Urdu. It has been asked whether it is a wise policy for Indian Muslims to isolate their community by insisting on education in Urdu, and whether it would be in its interest to receive instruction in Urdu instead of the dominant language if they wish to succeed in business, the professions, the Public Services and politics.[95] Butthese are questions which the Muslim community alone is in a position to decide and no attempt should be made to pressurise them in any way. As yet, the Muslim demands with regard to Urdu continue. The preservation of Urdu language and Arabic script and its use in education, government, and courts, the correct census of Urdu speakers, and the fair treatment of Urdu Muslim newspapers have been listed as some of the demands in this respect.[96]

The question of culture is somwwhat more complicated. Some concern has been expressed by the minority communities, particularly Muslims and Christians, at the

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[95] D. E. Smith, op. cit., (n. 91, supra), p. 430.

[96] T. P. Wright Jr., "The Effectiveness of Muslim Representation in India", in D. E. Smith (ed.), South Asian Politics and Religion, at p. 106.

tendency to equate Indian culture with Hindu culture exclusively.[97] Muslims feel that the composite character of the Indian culture is not being acknowledged and that their contribution to the national culture is often ignored.[98] It is noted that there is a tendency to regard Indian culture as synonimous with the religious practices of the majority community and that consciously or unconsciously, those who wield authority seek to impose these outward forms of religion of the majority on others.[99]

However, it should be realised that the administration of a cultural policy is bound to be difficult in India in view of the close association of culture of the particular communities with their religion, and the unequal size of the communities. To some extent it is inevitable that the Hindu culture should have an all-pervading influence on the cultural scene, if alone on account of the sheer size of that community. It is essential that the minority communities should not force themselves into cultural isolation. There is room for all communities to be left open to the cultural influences of others, without having to compromise their religious beliefs or without having to give up their own culture.

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97 For a detailed discussion on the subject see, D. E. Smith, op. cit., (n. 91, supra), Chapter 13, "Hinduism and Indian Culture", p. 372.

98 S. Abid Husain, National Culture of India, pp. 11-13,176.

99 D. E. Smith, n. 97, at p. 376.

Cultural freedom is a fundamental right which is guaranteed by the Constitution to every community and sections thereof. The cultural policy of the Union Government so far has been one of active encouragement to all communities in their cultural activities. Where lapses have occured, or continue to occur, the blame must lie elsewhere than on the Constitution or the Central policy. It is a matter to be pursued by the sections concerned through the democratic or legal processes open to them.

Property and Institutions

It has been noted that the freedom of property intrudes substantially into all discussion of the freedom of religion, more than one might expect.[1] It is of interest to note that, of the four denominational rights guaranteed in Article 26, three deal with property and institutions. Clause (a) thereof guarantees the right to establish and maintain institutions for religious and charitable purposes, clause (c) the right to own and acquire movable and immovable property, and clause (d) the right to administer such property in accordance with law.

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[1] J. D. M. Derrett, "The Reform of Hindu Religious Endowments", in D. E. Smith (ed.), South Asian Politics and Religion, (1966), p. 311. See also, Chapter 14, Religious Endowments, Public and Private", in Religion, Law and the State in India, (1968), p. 482.

An important distinction has been made between the right of communal autonomy in religious affairs guaranteed in clause (b) of Article 26 and the other rights guaranteed therein. Whereas the former is an absolute right, the latter are to be exercised in accordance with the law in force. The former is a fundamental right which no legislature can take away, while the latter can be regulated by laws which the legislature can validly impose.[2] In the right to property there is always a secular element which is supplied by the law of the country, and no religious denomination would be allowed the claim to be governed by a law derogating from it.

Accordingly, the property of the Christian religious institutions is as much subject to law as any other property privately held in the country and the State Legislature is competent to make laws with regard to it.[3] The government could validly inquire into the financial affairs of Christian Missions to determine how much foreign money comes in as aid and no objections could be taken to such an inquiry. But the Missions

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[2] Sarup Singh v. State of Punjab, A.I.R. 1959 S.C. 860(865).

[3] The State of M. P. v. Mother Superior, Convent School, A.I.R. 1958 M. P. 362 (365).

are at complete liberty to utilise the funds to their best advantage without having to account to anyone unless the money is used in a way which promotes a breach of public order, morality and health. The internal administration of institutions is not a concern of the government. It is a matter for the denomination alone to decide.[4] It is not necessary to go into the details regarding the management of institutions here as the question has already been discussed above, in the context of educational institutions.

While the right of religious denominations to hold and acquire property is guaranteed, it does not prevent, or was not intended to prevent, property belonging to a religious body being acquired by authority of law.[5] The acquisition of a Devadayam inam under the Orissa Estates Abolition Act was held not to be an interference with the rights guaranteed under Article 26. There was only a change in the form of the property, from immovable property into money, and the fundamental rights were in no way affected.[6] The West Bengal Foodgrains (Intensive Procurement) Order, 1952, which authorised

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[4] Francis v. Madhya Pradesh, 1957 M.P.L.J.1 (Nag.).

[5] Suryapal Singh v. Govt. of U. P., A.I.R. 1951 All. 674, at p. 690.

[6] Chintamoni Pratihari v. State of Orissa, A.I.R. 1958 Orissa 18, at p. 19.

the State to acquire the entire produce of land dedicated to a deity or in trust was not an infringement of the rights conferred by Articles 25 and 26.[7] Section 55 of the U. P. Muslim Waqfs Act, 1960, did not interfere with the freedom of religion of a mutawalli, as his duties were held to be that of a purely secular character.[8]

The power of the government to regulate matters pertaining to property and institutions is enormous. A great deal of legislation dealing with religious trusts and endowments already exists and more is being enacted. It is true that most of the legislation so far enacted pertains to the Hindu community in particular. But the trusts and endowments of the minority communities have not escaped notice. The Muslim waqfs are now regulated by the Muslim Waqfs Act, 1954. Its last amendment, in 1964, has considerably broadened the scope of regulation by bringing within the ambit of registration a large number of institutions which were formerly excluded, and by bringing them under the control and administration of state boards.[9] General acts, dealing with the

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[7] Ram Krishna Kamar v. Junior Assessor, A.I.R. 1954 Cal. 241.

[8] Hafiz Mohammad v. U. P. Sunni Central Board of Waqf, A.I.R. 1965 All. 333.

[9] Z. H. Faruqi, "Indian Muslims and the Ideology of the Secular State" (n. 87 at p. 232), pp. 144-145.

trusts and endowments of all communities are in force in some States.[10] Thus, the Bombay Act deals with all religious and charitable trusts, whether managed by Hindus, Jains, Buddhists, Parsis, Christians or Muslims.

A plea for uniform legislation on trusts and endowments pertaining to all communities was made by the Hindu Religious Endowments Commission. It suggested that legislation could be enacted along the lines of Religious Trusts Bill, 1960, with special provisions for individual communities, where necessary.[11] The purpose of legislation, it was suggested, was not to affect or modify the observances, rituals and ceremonials associated with worship but only to ensure proper management and utilisation of the funds of religious institutions. It was not intended to interfere with the internal administration of institutions in any way which would entirely be vested in the particular religious denomination.[12] However, nothing emerged from this proposal.

There is no doubt that in matters of property and institutions the tendency is one of increasing state

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[10] e.g., Bombay Public Trusts Act, 1950; Madhya Pradesh Public Trusts Act, 1951; and, Rajastan Public Trusts Act, 1959.

[11] Report of the Hindu Religious Endowments Commission, (1962), pp. 30-31.

[12] Ibid, p. 29.

regulation. It is clear that the government is enpowered to legislate with regard to all or any of the religious communities when it chooses, without infringing the rule of equality. The classification of institutions and endowments according to religion has been held not to be arbitrary or unreasonable when the object sought to be attained is one of better administration and management of institutions. Article 14 does not prevent the legislature from taking up one set of institutions for legislative consideration at one time and enacting laws in respect of them, reserving others for consideration at a future date.[13] One could expect increasing activity in this sphere with a view to bringing the laws relating to all communities in line with each other.

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[13] P. M. Bramadathan Nambooripad v. Cochin Devaswom Board, A.I.R. 1956 T.C. 19, at p. 21.

Chapter IV

LINGUISTIC AND CULTURAL INTERESTS

I. General Background

Language groups and their strength

No other single factor contributes more to the diversity of India than its languages. According to the Linguistic Survey of India, 179 languages and 544 dialects are spoken there.[1] India is thus truly a land of linguistic minorities.

From a genealogical point of view, Indian languages can be divided into four groups: first, the Indo-Aryan or Indo-European group from which nine major languages of North India are derived; second, the Dravidian group consisting of four great languages of South India — Tamil, Telugu, Kannada and Malayalam; third, the Austro-Asiatic group represented by tribal and Adivasi languages of Central India; and the fourth, the Sino-Tibetan group which

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[1] V. K. Narasimhan (ed.), The Languages of India: A Kleidoscopic Survey, (1958), p. 87.

mainly comprises the dialects of the Assam area.[2]

In terms of relative size of the groups speaking these languages the picture is interesting, with about a score of the languages accounting for the bulk of the total population. Fifteen of the major languages falling into the first two categories between them account for ninety per cent of the population of India.[3] 116 of the languages are merely tribal tongues belonging to the Sino-Tibetan family; those who speak them account for less than one per cent of the population.[4] The major languages in the order of their numerical strength[5] are, Hindi (with associate languages like Urdu, Hindustani and Punjabi) with 42 per cent,[6] Telugu 9, Marathi, Tamil and Bengali 7 each, Gujarati 5, Kannada, Malayalam and Oriya 4 each, and Assamese two per cent of the total population.

A note of caution in respect of percentage figures seems appropriate here. It would be unrealistic

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[2] Ibid, p. vii and pp. 88-90.

[3] S. K. Chatterji, "Linguistic Survey of India: Languages and Scripts", in S. Radhakrishnan (ed.), The Cultural Heritage of India, Vol. I, (1958), p. 53, at p. 54.

[4] B. N. Prasad, "The Languages in India", in V. K. Narasimhan and others (ed.), The Languages of India, (1958), p.87.

[5] The figures have been rounded and are meant to give a general idea.

[6] This figure is disputed: see Shri Frank Anthony in the Report of the Committee of Parliament on Official Language, (1958), p. 97.

to make comparisons involving linguistic groups, however small, without considering the actual numbers involved. It may be borne in mind that one per cent of the population of India amounts to over five million people.

Unique nature of the Indian problem

Comparisons are often sought to be made between the language problems in India and those elsewhere, particularly in countries like Canada, Belgium, Switzerland, Pakistan and Russia. It must be stated at the outset that these comparisons are of no practical value and would be potentially dangerous as sources of a solution. For, the conditions in these countries bear little resemblance to those in India, whether in relation to the language issue as a whole or to minorities in particular. In the case of the countries mentioned, with the exception of Soviet Russia, the languages are limited to two or three and there is a polarisation into major camps capable of safeguarding their own interests. Widespread educational advancement means that a great number of the people are bilingual and trilingual. In the case of Pakistan the two language zones are separated by over a thousand miles of Indian territory. Though an analogy with Russia may be somewhat more realistic on account of its multiplicity of languages, the comparison ends there; for Russian has always been the dominant language and most other languages

are undeveloped, and have never been in use as literary languages. One common script, the Cyrillic, puts matters on a different plane altogether. In most countries language groups coincide with 'nation groups', while in India the idea of a language group as a 'nation' or 'sub-nation' has been vigorously repudiated.[7] India has a score of major languages with different scripts, each endowed with a rich literature of its own.

The complexities of the Indian problem have been highlighted by W. H. Morris-Jones, thus:

> India has not one language problem, but a complex of language problems. It has them, moreover, in a situation of political and social revolution. Its difficulties are so unlike those of any other country in the world that direct comprehensive comparisons are worthless. It is not a question of establishing an equilibrium between two equally prominent languages, as in Belgium and Pakistan; nor of giving equal status to two or three languages spoken by unequal numbers of citizens as in Canada and Switzerland. The experience of the Soviet Union is of limited relevance for the reasons that Russian is the mother tongue of the great majority of the people and that it was already the established language of imperial administration and the cultural hegemony within the territories of the State. Turkey and Japan have had to reform and modernise — borrowing words and changing scripts — but they had one language to deal with. In some African States English is in effect the official language, while also serving as 'link' language across tribal areas and medium of bulk of education, but in these areas there are no developed indegenous languages with their own literary traditions.[8]

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[7] Report of the Linguistic Provinces Commission (Dar Commission), (1948), pp. 210-211.

[8] "Language and Region within the Indian Union", in Philip Mason (ed.), India and Ceylon: Unity and Diversity,(1967), p. 51, at p. 53.

While examples of foreign practise have been cited in the Indian official reports, they have been careful to warn of the dangers in drawing comparisons. "The arrangements for safeguarding the interests of linguistic minorities in other countries were adopted", noted the States Reorganisation Commission, "against their own particular backgrounds. We must be careful, therefore, in applying such precedents to our own problems".[9] The Official Language Commission, after an extensive condideration of foreign practise, concluded that the problem of languages, as it arises in India, is of "peculiar difficulty and complexity" and that, "in view of the number of languages the problem does not admit of the easy solution that has been successfully employed in other countries".[10]

Apart from the multiplicity of languages, a crucial factor in the minority context has been the political division of the country on the linguistic basis. In 1956, India was divided into 15 States principally coinciding with the language regions forming contiguous and compact units. Two more have been added since. For a perspective of the problem of linguistic minorities

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9 Report of the States Reorganisation Commission, (1955), p. 206.

10 Report of the Official Language Commission, (1956), p. 16

arising from it, it is necessary to trace the developments leading to the reorganisation of States, and consider the course of events touching the language question since.

A brief historical background

The political organisation of the country prior to Independence had been haphazard. Boundaries of provinces were not based on any rational criteria and were fixed by chance and convenience. Compact language groups were often broken up between different provinces. The heterogenous character of the provinces created problems, and various Commissions had been appointed from time to time to re-align the boundaries and deal with the problems. The Philip-Duff Committee, the Attlee Committee, and the O'Donnell Committee, among others, may be cited. The Montagu-Chelmsford proposals did in fact include a suggestion for reorganisation, but this did not materialise.

The present language policy has its origin in the Congress policy of early twenties onwards. With the growth of Independence movement Congress saw the need to appeal to the masses in a medium that they would understand and which would prove effective. For that purpose it set up its own administrative regions on a linguistic basis and in 1920 at the Nagpur Session declared the linguistic re-distribution of provinces as a clear

political objective. It was fully endorsed by the All Parties' Conference in 1928, where it was said that "the mere fact that the people living in any particular area feel that they are a unit and desire to develop their culture, is an important consideration, even though there may be no sufficient historical or cultural justification to their demand".[11] Congress reaffirmed its adherence to the linguistic principle at its Calcutta Session in 1937, in the Wardha Resolution of 1938 and in the election manifesto of 1945-1946. The Sapru Committee reiterated the position, and suggested that though it may not be possible to re-align the boundaries before the Constitution , it should indicate the machinery and prescribe the procedure for a re-alignment on a linguistic basis.[12]

The convening of the Constituent Assembly marks a new phase in the development. On November 27, 1947, the Prime Minister on behalf of the Government accepted the demand for the linguistic provinces. In 1948, the President of the Constituent Assembly appointed the Linguistic Provinces Commission (known as the Dar Commission, after its Chairman) which submitted its Report on the eve of the Jaipur Congress.

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[11] Nehru Report, (1928), p. 63.

[12] Sapru Report, (1945), (Reprint, 1946), p. 296.

The Dar Commission's task was to examine and report on the feasibility of creating the new provinces of Andhra, Karnataka, Kerala and Maharashtra. Being the first Commission of its kind, it had to lay down general principles for the creation of new linguistic provinces. In doing so it recognised for the first time that the criterion of language alone was inadeqate for that purpose. Among other requisites were the geographic contiguity of a region without pockets and corridors of other languages intervening, its financial self-sufficiency, administrative convenience and the inherent capacity of a region for future development. It was necessary to have a large measure of agreement with regard to the formation of a new province amongst the people speaking the same language, and such a province could not be forced by a majority upon a substantial minority of people speaking the same language.[13]

The Commission realised that the Constitution of India would have to be promulgated with the internal boundaries unchanged because the peace and calm necessary for scientific and unbiassed consideration of the problem did not then exist. The redrawing of the map of India

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[13] Dar Commission Report,(1948), in Reports of Committees, (3rd Series), 1950, p. 183.

was essential, but such a step had to be postponed to a future date, when conditions would be more suitable.[14] But language alone could no longer be the sole test:

> In any rational and scientific planning that may take place in regard to the provinces in India in the future, homogeneity of language alone cannot be decisive or even an important factor. Administrative convenience, history, geography, economy, culture and many other matters will also have to be given due weight. ... Homogeneity of language will enter into consideration only as a matter of administrative convenience and not on its own independent force.[15]

The Lingustic Provinces Committee, appointed by the Jaipur Congress to consider the Dar Commission's Report and "the new problems that have arisen out of the achievement of Independence",[16] also thought that the time was not yet ripe. It noted that, "at the present moment of our history when some of the smaller states have been merged into a province, a neighbouring province has objected with such violence and language that one would have almost thought that two countries were on the verge of war. These are evil symptoms and we have to be very careful lest we do anything to encourage them."[17]

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[14] Ibid, p. 184

[15] Ibid, pp. 211-212.

[16] Indian National Congress, Report of the Linguistic Provinces Committee appointed by the Jaipur Congress, (known as J. V. P. Report, after its members), 1948, (2nd impression, 1953), p. 1.

[17] Ibid, p. 7.

The agitation for linguistic provinces, however, kept growing and reached the danger point when a Andhra leader died for the cause. This led to the creation of the province of Andhra in 1953, and was soon followed by the appointment of the States Reorganisation Commission. On the basis of its Report, the country was divided into 15 States in 1956. Two more have been added since by bifurcating two of the States.

The Official Language Commission was appointed by the President under Article 344 in 1955, and submitted its Report in 1956. A Committee of Parliament on Official Language was set up to consider this report, which submitted its Report in 1958. The second Commission under Article 344 which was due in 1960 was not appointed. In 1963, the Official Language Act was passed and it came into force in 1965, bringing in its wake widespread language riots in various parts of the country.[18]

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[18] Amended by the Official Language (Amendment) Act, 1967, (Act 1 of 1968).

II. Linguistic Minorities and the Linguistic Issues

The minority problem in a political setting

Language in India has always been a dividing factor and, in a political context, an explosive issue. "Tempers are frayed and heads broken" on this vexed question.[19] The language issue has set going more riots, more fasts and more trouble for the Central Government than any other issue in India's years of independence.[20] It touches everyone in a variety of ways: instruction in the mother tongue in schools, the medium of instruction in universities, civil services with their prestige and money, cultural and historical pride of linguistic groups, and, in the case of Muslims and Sikhs, the religious sentiment. The political organisation, particularly that on a linguistic basis, has a profound influence on these interests on account of the vast amount of patronage at the disposal of the governments in power.

For the purpose of the present chapter it is necessary to distinguish between two aspects of the language question, of which one is constantly in the limelight

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[19] Report of the Committee on Emotional Integration, (1962), p. 47.

[20] The Times, leader article, November 14, 1967.

and the other almost in oblivion. The first concerns the wider issues such as the question of the official language, the language of inter-State communications, the language medium of examinations of the Union Public Service Commission, medium of instruction in the universities and the languages of the law courts. These are familiar to all from the intense controversy surrounding them. The other is the problem of linguistic minorities, of which little is known, except to those immediately affected by it. The problems pertaining to these two aspects arise at different levels of administration and are of a different order. The issues in the first category concern the language policies of both the Union and the State governments. The problem of linguistic minorities, on the other hand, arises only in the context of a linguistic State, and is largely governed by the language policy pursued by the government of that State. As such, the issues mentioned earlier concern the linguistic minorities only remotely and are, therefore, outside the purview of our discussion.

Before proceeding to consider the linguistic minorities in the States, it is necessary to dispose of the allusions to minority problems that have sometimes been made in the context of the official language of the Union. It has been argued that the adoption of one of the regional languages, Hindi, as the official language of the

Union puts the people from non-Hindi areas at a disadvantage and would lead to their becoming second class citizens.[21] During the debate in Parliament on the Report of the States Reorganisation Commission a Member from the South suggested that, Indians having derived their origins from different racial groups, the imposition of the language of one of those groups as the official language on the rest of the country amounted to a domination of one group on others.[22] Similar fears were also expressed by Shri Frank Anthony in his minute of dissent in a Parliamentary Report.[23] Nor has the anxiety felt in non-Hindi areas gone unnoticed. This is evident from the terms of reference of the Official Language Commission, which was required to consider "the just claims and interests of persons belonging to the non-Hindi speaking areas" while making recommendations.[24] There is reason to believe that the concern of the non-Hindi speaking people is not unjustified. However, it would be unrealistic to designate these two groups as the majority and the minorities. Even if Hindi were to be the sole official language, thus

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21 Dr. Chatterji's dissent in the Report of the Official Language Commission, (1956), p. 276. The case in favour of Hindi as the official language has been elaborately argued by Ram Gopal, Linguistic Affairs of India, (1966).

22 Shri N. S. Nair, L.S.D., December 21, 1955, Col. 917-918.

23 Report of the Committee of Parliament on Official Language, (1958), see p. 82ff.

24 Report of the Official Language Commission, p. 105.

placing non-Hindi areas at a certain disadvantage, the fact is that these States, as a bloc, are, and always will be, in a position to bargain at the political level. The question of linguistic minorities in the real sense, therefore, does not arise at the national level.

States and minorities

The problem of linguistic minorities arises at the State level. This was one of the reasons which had prompted the Dar Commission to advise a postponement of the creation of linguistic provinces. It noted that such provinces could be carved out only at the cost of creating fresh minority problems. For, "nowhere will it be possible to form a linguistic province of more than 70 or 80 per cent of the people speaking the same language, thus leaving in each province a minority of at least 20 per cent of the people speaking other languages."[25] The J. V. P. Committee also thought that it was "impossible to have clear and rigid demarcations of linguistic areas", and was convinced that trouble was inevitable in attempting to demarcate areas according to the linguistic principle.[26]

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[25] Dar Commission Report, p. 210

[26] J. V. P. Report, p. 7

As was foreseen, the creation of linguistic States has created minorities on an unprecedented scale. The States Reorganisation Commission noted that, even if the linguistic principle were rigidly applied, it would by no means solve the problem of minorities. But in the reorganisation carried out, language was not an exclusive factor and this has had the effect of swelling the ranks of the minorities considerably. According to the Commission's findings and as stated in Parliament, substantial minorities existed even in those States which were considered unilingual. Their proportion was as much as 50 per cent in Assam and varied from 6 to 30 or 35 per cent in other States.[27]

Linguistic minorities arise due to the fact that, "i) not all the language groups are so placed that they can be grouped into separate States, ii)there are a large number of bilingual belts between different zones, and iii) there exist areas with a mixed population, even within unilingual areas."[28] In the first category are the compact groups speaking languages and dialects of their own within different States, as for instance, the tribal communities. In the second category are the

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[27] Pandit G. B. Pant, L.S.D., December 14, 1955, col. 11.

[28] Report of the States Reorganisation Commission, (1955), paragraph 758.

permanent residents of border areas, who happen to be included in the State whose predominant language is different from their own. The claims and counter-claims of the border areas and the 'treatment' of their inhabitants have been a constant source of inter-State quarrels, and in some cases special border Commissions had to be appointed to resolve matters.[29] And, in the third category are the migrants, who take up voluntary residence in a different State, like the Tamils in Bombay. This last category has been referred to as 'relative minorities.'[30]

It is difficult to assess the exact number of the linguistic minorities as it is liable to constant change. There is only one citizenship for the entire country and the Constitution guarantees the right of every citizen to "move freely throughout the territory of India", and to "reside and settle in any part of the territory of India".[31] Due to the tremendous changes taking place in the country, there is bound to be a shift in the population, resulting in the people of all languages residing in all States in due course.[32] Further, the minorities'

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29 e.g., see the Report of the Commission on Maharashtra-Mysore-Kerala Boundary Disputes, Vols. 1 & 2, (1967).

30 G. Austin, The Indian Constitution, (1966), p. 287.

31 Article 19(1), clauses (d) and (e).

32 Shri J. R. Mehta, L.S.D., December 20, 1955.

situation is also bound to alter in the event of any readjustments of borders. Under the Constitution, Parliament is enpowered to increase or decrease the area of a State, alter its boundaries, and divide or merge States by means or ordinary legislation.[33] The States Reorganisation Act, 1955, is an example of such legislation.

For Constitutional purposes, in determining whether a particular linguistic group is a minority in a State, the courts have adopted a simple numerical test.[34] However, in general administration the size of a linguistic minority has a bearing on the facilities that may be afforded to it. Government of India have accepted the States Reorganisation Commission's recommendation that, where a minority constitutes 30 per cent or more of the population, the State should, for administrative purposes, be recognised as bilingual and that where a minority group constitutes 70 per cent or more of the population of a district, the language of the minority group, and not the State language, should be the official language of that district.[35] This policy is now being implemented.

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[33] Article 3.

[34] Re Kerala Education Bill, A.I.R. 1958 S.C. 956, at p.976; also, Aldo Maria Patroni v. E. C. Kesavan, A.I.R. 1965 Ker. 75 (76).

[35] Memorandum, (1956), paragraph 8.

III. Protection of the Interests of Linguistic Minorities

Speaking in the debate on the Report of the States Reorganisation Commission, the then Home Minister emphasised that it was necessary to provide adequate safeguards to linguistic minorities to ensure "unfettered scope for advancement for every citizen, so that everyone living in a State, whatever his language, may have equal opportunities of self-expression and self-realisation and self-development."[36] There is general agreement on this issue. However, there has been less agreement as to the nature of these safeguards and the form they should take.

The greatest reassurance the linguistic minorities can have is a scheme of Constitutional guarantees ensuring that their interests will be protected. For, it is said that cultural communities which cannot count on the strength of their numbers must depend on the force of law, if they wish to have their legitimate claims recognised.[37] Such guarantees by themselves do not amount to much, as it is unlikely that the minorities will have the capacity, resources and energy to move the courts; but they will at least have the satisfaction of knowing

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[36] Pandit G. B. Pant, L.S.D., December 14, 1955, Col.14.

[37] J.J. Bertrand, Speech in the Quebec Legislature, May 8, 1963, in F. R. Scott and M. K. Oliver (ed.), Quebec States Her Case, (1964), p. 125.

that the courts are there as the ultimate sentinels of their rights.[38]

The provisions of the Indian Constitution pertaining to linguistic minorities are few and far between, and have often proved inadequate and ineffective. Although the Constitution had anticipated the reorganisation of States, no great attention was paid to the inclusion of specific minority safeguards apart from four Articles. Of these, two (Articles 29 and 30) pertained to the cultural and educational rights, and the other two (Articles 347 and 350) pertained to the official recognition of a minority language, and the use of a minority language in making representations to public authorities. The issue of minority safeguards was strongly urged before the States Reorganisation Commission by both the proponents and the opponents of linguistic States, who asked for a strengthening of the Constitutional safeguards.[39] However, despite much talk on the need to provide additional guarantees, the only addition came by the inclusion of Article 350-A, which sought to provide for instruction in mother tongue in primary schools, and

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[38] Shri Frank Anthony, L.S.D., December 20, 1955, Cols. 766-767.

[39] Report of the States Reorganisation Commission, p. 207.

Article 350-B which provided for a Commissioner for Linguistic Minorities. There appears to have been a fear that the setting up of an elaborate system of guarantees might complicate, rather than solve, the problem and tend to perpetuate separatism.[40]

Thus, in seeking to protect the interests of linguistic minorities, the Constitution relies on a general scheme of fundamental rights, apart from few specific provisions to ensure that the minorities are not denied the rights which the majority enjoys. Emphasis is placed on the fact that there is one common citizenship for all the Indian people, with equal rights and opportunities throughout the Union.[41] If the spirit of the Constitution is adhered to, there is little or no need for any concern among linguistic minorities or indeed among any minorities.

However, there are signs in different Indian States that not infrequently narrow regional considerations override the wider national outlook. Linguistic fanaticism is widespread and is causing alarm among linguistic minorities in various parts of the country. Private armies

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[40] Ibid, p. 208

[41] Ibid, p. 229. See n. 26 on p. 101, supra.

of local extremists have been operating in some cities demanding a preference for the 'sons of the soil' and the exclusion of the 'outsiders'. A well-known example of this phenomenon is the 'Shiv Sena' of Bombay.

The danger of the growth of such an attitude was in fact anticipated by the Dar Commission, who thought that the principle of government of a province by a linguistic group was basically wrong, on account of the various problems it would create, and, above all, on account of the danger of a 'sub-national' bias.[42] Nationalism and sub-nationalism were two emotions which grew at the expense of each other. In a linguistic State sub-nationalism would always be a dominant force, would always evoke the greater emotional response, and undermine nationalism. The Commission thought that,

> the moment a province is alloted to a majority linguistic group as such and that group forms a majority government in it, it begins to regard that area as exclusively belonging to that particular linguistic group, and to treat all persons not belonging to the majority linguistic group and speaking a different language as outsiders and aliens. And by a natural reaction, people not speaking the majority language resent the intolerance of the majority or have their own affinities with a separate linguistic group elsewhere and thus a vicious circle of mutual hostility begins and a minority problem comes into existence.[43]

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[42] Dar Commission Report, p.

[43] Ibid, p. 207.

The Commission further warned that, if the majority group in such a province came to regard the territory of the entire province as exclusively its own, the time could not be far distant when it would come to regard the minority living in that province and the people living outside it as not its own; and once that stage was reached, it would only be a question of time for that sub-nation to consider itself a full nation.[44] It, therefore, firmly repudiated the idea of a linguistic group being a 'sub-nation'.

The States Reorganisation Commission also was aware that States based on languages tended to be intolerant, aggressive and expansionist in character.[45] It, therefore, took care to repudiate once again the idea of a 'sub-nation' and its extension, the 'homeland' theory. According to the latter, an area would claim to be the homeland of all people speaking a particular language, wherever they might be domiciled, would promote loyalty to that homeland, overriding loyalty to the area of domicile, and would have claims on them, wherever they may be. The Commission emphasised that the acceptance of such theories would cut at the very root of the national idea and would deepen the majority-minority consciousness,

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[44] Ibid, pp. 210-211.

[45] Report of the States Reorganisation Commission, p. 39.

thereby aggravating the minority problem.[46] As events have shown, and as some writers have pointed out, the sub-national idea and regional competetion are far from being absent from the country.[47]

The protection of linguistic minorities in India is sought to be achieved by a combination of the Constitutional guarantees and various political arrangements, placing greater reliance on the latter. Constitutional provisions relating to linguistic minorities offer little help, apart from laying down principles and general guide-lines. The specific details of the minority policy are the outcome of agreements and decisions arrived at in a series of ministerial meetings. The present policy was evolved from such sources as the Provincial Education Ministers' Conference, 1949, the recommendations of the States Reorganisation Commission, the Government of India Memorandum, 1956, the Meeting of the Ministerial Committee of the Southern Zonal Council, 1959, the Conference of Chief Ministers of States and Central Ministers, 1961, and policy statements of the ruling Congress Party. The outcome of these meetings and conferences can at best be described as 'gentlemen's agreements', with no legal

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46 Ibid, p. 44.

47 e.g., see G. Austin, The Indian Constitution, p. 306, and the chapter on "Regional Elites" in S. Harrison, India: the most dangerous decades, (1960).

consequences for their breach by a State. Except in some cases, the relevant provisions of the Constitution are not precise enough successfully to support legal action against an offending government. The protection of the interests of the linguistic minorities, therefore, depends to a great extent on the good faith of State Governments.

The principal minority issues are discussed in the following pages in the light of the Constitutional provisions and the government policy.

1. Conservation of minority language and culture

The issue of minority language and culture comprises an array of specific issues such as education, employment, and the use of the minority language for official purposes. But at the same time it is also an issue in its own right in the generality of which specific issues merge. A discussion of the general issue will serve as a background and put the individual issues in their proper perspective.

The Indian Constitution recognises the fact of linguistic and cultural diversity and the need for its preservation. Article 29(1) states —

> 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.

However, what is not certain is the exact nature of this guarantee and the method by which it is to be secured. The Article is vague and its interpretation difficult. It is apparent that it does not confer any tangible right on the minorities. There is no corresponding duty or obligation cast on the state to help minorities to realise that right. For instance, there is no legal obligation on part of the state to lend financial or other support to minorities for that purpose. The government, while making grants to the institutions of the majority language group, may legally withhold the same from minorities' institutions so long as the equality provisions are not infringed. Nor is it certain as to what is meant by the right to 'conserve'. The definition of 'culture' raises futher difficulties, and so do the qualifications, such as the numerical strength and the territorial test, which a group must possess before it can claim the right under Article 29.

There is also hardly any unanimity as to either the need for the preservation of minority language and culture or the extent to which it should be protected. The questions of the importance of language and of culture and their inter-relationship are subjects of controversy.

For instance, Karl Vossler, while accepting that language furthers social intercourse in communities of men, denies that it plays any fundamental role in founding and maintaining these communities.[48] He points out that language societies arise late, are impure and unstable; that men first come together under the pressure of natural needs, and only after these primitive communities have been formed can language arise as an attempt at spiritual trasfusion and elevation of social existence. For him, language is neither the root, nor the trunk, but the flower and the fruit of social life, and therefore super-social.[49] The argument is carried further by those who do not accept that there is any vital connection between language and culture. Sir Ernest Barker points out that, while the vogue of a culture may be connected with the dissemination of a language, a culture or civilisation, whether it is only material or more than material, is something distinct from both race and language. It may be diffused over an area and practised by a group in which different languages are spoken and different races are mixed.[50] In the Indian context it has been pointed out that equating language and culture would be superficial and artificial, because

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48 The Spirit of Language in Civilisation, (1932), p. 187.

49 Ibid.

50 Sir Ernest Barker, National Character and the Factors of its Formulation, (4th ed., 1948), p. 22.

Indian culture has never been identified with language. India has existed with a single culture in spite of various languages, so equating language with culture would not only be wrong, but perverse.[51] Social and cultural differences exist in spite of the language and they depend more on religion and caste than on language.[52]

The concept of culture is even more indefinite and the task of defining it is phenomenal. How are the minority cultures to be ascertained and by what test are they to be differentiated from the rest? By its very nature, culture is elusive. It is said to be a sense of ultimate values possessed by a particular society which it has expressed in its collective institutions, which its individual members express in their dispositions, feelings, attitudes and manners as well as in significant forms which they give to material objects.[53] In a general sense, it is a social heritage of moral, spiritual and economic values, expressing itself in distinct way of life of a group of people living as an organised community, and covers the language, habits, ideas and even vocational pattern of a society.[54] A spokesman of the Anglo-Indian

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[51] Acharya Kripalani, L.S.D., December 14, 1955, col.37-38.

[52] Shri Kelappan, Ibid, December 23, 1955, Cols. 1254-55.

[53] S. Abid Husain, National Culture of India, (2nd ed.,1961), p. 3.

[54] Report of the States Reorganisation Commission, p. 47.

community spoke of their culture as a social inheritance of beliefs, habits, moral and aesthetic standards, manners, institutions and the whole complex web of a community's inner and outer life.[55] The problems posed by these diverse elements of culture in its definition seem insoluble.

Yet, linguistic and cultural diversity is a fact that has to be recognised. And, although very real difficulties exist in demarcating the cultures, we are not entirely without guide-lines. Group cultures in India are said to be principally linguistic or religious,[56] and in the case of Muslims, Sikhs and Anglo-Indians, both. Whatever the dispute with regard to the inter-relation between language and culture, it is evident that language is a most important mark of group identification and a delineator of group boundaries,[57] and is, therefore, a good index to minority culture. However, two tests have been suggested by the States Reorganisation Commission which the claims based on cultural homogeneity should normally satisfy. First, the people claiming a distinctive culture must constitute a recognisable group and it should include a number of persons sufficient by

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[55] Shri Barrow, L.S.D., December 23, 1955, Cols.1785-86.

[56] S. Abid Husain, The Destiny of Indian Muslims, (1965), p. 215.

[57] W. H. Morris-Jones, op. cit.

themselves to claim, conserve and develop stable traditions or the characteristics of their culture; and second, such cultural individuality should be capable of being expressed in terms of a defined and sizable geographical entity.[58] Further, such groupings should not hinder the social and cultural evolution in a changing world and should not lead to cultural isolation or cultural conflict.

The general consensus in the country under political leadership has always favoured the all round growth of diverse cultures. It evolved with the language policy of the Congress Party. The All Parties' Committee in 1928 saw the granting of cultural autonomy to all groups as the only method of giving a feeling of security to the minorities as an alternative to separate electorates.[59] It considered a proposal to create communal councils to protect the interests of each community, which would receive grants from Central and State governments.[60] The Congress Party reiterated its language policy in 1945-46 by an assurance that the language, culture and script of different linguistic areas would be protected.[61]

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[58] Report, p. 47.

[59] Nehru Report, p. 28.

[60] Ibid, pp. 30-31.

[61] Manifesto of the I. N. Congress, 1945-46; L.S.D., December 17, 1955, col. 412.

During the discussion of the States Reorganisation Commission's Report in Parliament the issue of linguistic and cultural diversity figured very prominently. It was urged that it would be unrealistic to disregard the fact of diversity and hence the unity of the country should not be sought to be imposed externally, but rather a fundamental unity should be brought about which recognised the diversity of language, culture, and tradition of the Indian people.[62]

An important question that arises is what the relative role of the various cultures should be. What should be the role of regional cultures or sub-cultures in relation to the larger national culture? Are the smaller cultures to lose their identity by merging into a single monolithic national culture or should their continued identity and diversity be encouraged? S. Abid Husain points out that, Indian nationhood and national culture are a deliberately balanced system of unity in diversity. A wrong handling of the cultural problem would disturb this balance entailing a disintegration, endangering the democratic system and leading to internal and external tyranny.[63]

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[62] Shri. A. K. Gopalan, L.S.D., December 14, 1955, col. 55.

[63] National Culture of India, p. x.

It has been noted that cultural intolerance is widespread and deep rooted at various levels. It appears in the form of patriotism in many who believe that in order to achieve unity in the whole of India (or a region) there should be one language and one culture, obviously the language and culture of the majority. Unfortunately, this can only be achieved by "blotting out of existence, or at least keeping down to a subordinate position, the languages and cultural traditions of the minorities."[64] Shri Frank Anthony's dissent from the Report of a Parliamentary Committee on Official Language is revealing. He says that if the fanaticism of the Hindi extremists were to triumph, the same spirit of intolerance, of domination that has already exhibited itself against the languages of the Anglo-Indians, the Muslims, the Sikhs, the Tribals and others will also express itself in an equally oppressive manner against all the non-Hindi linguistic groups.[65] He speaks of the tendency of Hindi protagonists to behave as if they are a chosen race, to consider Hindi as a synonim for patriotism, and even to make it a religious symbol.[66] A discussion of this issue is beyond our province

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[64] Ibid, p. 12.

[65] Report of the Committee of Parliament on Official Language, (1958), p. 94.

[66] Ibid, p. 92.

but its implications on the minority issue under discussion cannot be ignored.

A perusal of the Linguistic Commissioner's Reports shows clearly that in all the States the linguistic minorities are under disabilities of one kind or another, whether on account of genuine difficulties in administration, or as a result of the deliberate policy pursued by the State governments. It is not necessary to refer to individual cases at this point. What is relevant to note here is that there is very little the minorities can do. Article 29 is of little consolation, and the existing machinery for the assertion of their rights is not effective enough. The preservation of the language and culture of the minorities, therefore, derives more from the good sense of the majority than from the authority of the Constitution.

2. Education

Of the educational rights of linguistic minorities, three issues may be considered: the principle of non-discrimination in admission to educational institutions, the right to establish and maintain private schools, and instruction in the mother tongue. The two former need only a brief consideration here, as some of their aspects have already been dealt with in the previous chapter.

i. Non-discrimination in admission to educational institutions

Article 29(2) bars discrimination based solely on grounds of language —

> 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.

This Article is similar to Article 15, with the omission of the grounds of sex and place of birth, and the addition of the ground of language. It has been suggested that the omission of this clause altogether would not have made any difference at all, as with the coming into vogue of intruction in regional and mother tongues, 'language' would automatically bar admission and other language groups would not have a place therein.[67] But it should be realised that despite the similarity of form between the two Articles, there is considerable difference in their application. Whereas Article 15 is of general application to a variety of issues arising in the public life, Article 29(2) is designed specifically to deal with the issue of admission to educational institutions. As such, in an educational context, Article

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[67] K. V. Rao, Parliamentary Democracy of India, (2nd ed., 1965), p. 220.

29(2) prevails over Article 15(1).[68]

However, despite its associations with minority rights, Article 29(2) is in no way an exclusive 'minority right'. From the words of the Article it is clear that it is meant to be of general application. Its association with minority rights appears to be incidental. In the Bombay Education Society's case the Supreme Court firmly rejected the contention that the benefit of Article 29(2) was restricted to minorities, pointing out that other citizens have as much need of protection in this matter and that to accept such a contention would amount to the creation of a privilege in favour of the minorities while denying the same rights to others.[69]

The above case arose out of an Order of the Bombay Government in 1954, restricting admission to the English medium schools in the State to pupils whose mother tongue was English, i.e., the members of the Anglo-Indian community and others of non-Asiatic origin. Two of the aggrieved parents, who did not fall in this category, along with the Bombay Education Society successfully challenged the Government Order under Article 29(2)

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[68] State of Bombay v. Bombay Education Society, A.I.R. 1954 S.C. 561; Joseph Thomas v. State of Kerala, A.I.R. 1958 Ker. 33 (34).

[69] A.I.R. 1954 S.C. 561 (566).

in the Bombay High Court.[70] The State thereupon appealed to the Supreme Court, which again found in their favour. The Court said that although the object of the Order was to promote advancement of the national language, the object was sought to be achieved by denying to all peoples, whose mother tongue was not English, admission into any school where the medium of instruction was English offended against the fundamental right guaranteed to all citizens by Article 29(2).[71]

Article 29(2) embodied two important principles. One is the right of every citizen to be admitted to any educational institution maintained by the State or receiving aid out of State funds. Once the State gives its grant and puts its imprimatur upon the school, the Article immediately comes into operation and the right of the citizen arises.[72] The other is that an educational institution recognised and receiving state aid cannot restrict admission to members of a particular religion, race, caste or language.[73]

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[70] A.I.R. 1954 Bom. 468.

[71] A.I.R. 1954 S.C. 561 (568).

[72] A.I.R. 1954 Bom. 468 (474).

[73] Ibid. Also, Re Kerala Education Bill, A.I.R.1958 S.C. 956 (976).

The right of admission to educational institutions is a fundamental right and the denial of such admission to any individual citizen according to a classification on the forbidden grounds is unconstitutional. Thus, in State of Madras v. Champakam Dorairajan it was held that the Communal G. O. fixing proportionate seats in State colleges to different communities based on such grounds constituted a clear violation of the right guaranteed under Article 29(2).[74]

Article 29(2), however, does not forbid discrimination based on grounds other than those mentioned in the Article. Thus, it is permissible to restrict admission on grounds of sex and to provide separate facilities for women.[75] Restriction based on the place of residence has been upheld,[76] and the charging of a capitation fee to non-residents has been held not to violate the provisions of Article 14 read with Article 29.[77] Reservation of seats for students of transferred areas of a State does not violate Article 14.[78] The non-admission of a person to a college on the ground of his not being in government

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74 A.I.R. 1951 S.C. 226 (227,228).

75 The University of Madras v. Shanta Bai, A.I.R. 1954 Mad. 67 (70).

76 Joseph Thomas v. State of Kerala, A.I.R.1958 Ker.33 (34).

77 Rustom Mody v. State of M. B., A.I.R.1954 M.Bh. 119.

78 A. Muralidhar v. State of A.P.,A.I.R. 1959 A.P. 437.

service does not violate Article 29(2).[79] Moreover, the right of admission to an educational institution is not an absolute right. The Constitution does not guarantee to a student a right to be admitted to an educational institution, for no such right exists. In Vikruddin v. Osmania University the Hyderabad High Court held that persons have no right to be admitted as members of a college as a matter of course; they must be approved by the college or by those to whom such power is delegated. If an authority has exercised discretion bona fide in accordance with the rules of the institution and not been influenced by extraneous or irrelevant considerations and such discretion has not been exercised arbitrarily or illegally, the courts would not interfere to enforce such a claim.[80]

A further discussion of this Article, in the context of the reservation of seats for backward classes, is to be found in the next chapter.[81]

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79 Dr. Narayana Swamy v. State of Mysore, A.I.R. 1968 Mys. 189.

80 A.I.R. 1954 Hyd. 25 (27).

81 See Chapter V, p. 355 et seq.

ii. Right to educational institutions

The principal means by and through which the minorities can effectively exercise their right under Article 29(1) to conserve their language, script and culture are the educational institutions. The right to establish and maintain educational intitutions of their choice is, therefore, a necessary concomitant of that right.[82] This is guaranteed by Article 30 to all minorities, whether based on religion or language, and the State, in granting aid, is not to discriminate against such institutions on the ground that they are under the management of a minority.

One aspect of this 'right' in the light of the principle of equality must not escape notice. Article 30 confers a 'right' on the minorities, in the sense that they are not restricted from doing so, are are therefore free to establish and maintain educational institutions if they want to, and can afford to do so. There is no corresponding duty imposed on the state in this respect. The resulting situation, of the private schools vis a vis state schools, is interesting. It is asked, "what equality is there when a member of the minority has to start his

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[82] Re Keral Education Bill, A.I.R. 1958 S.C. 956, (976).

own school while his compatriot will be educated in the state-run schools?"[83] The capacity of the minorities to establish their own institutions for the preservation of their language and culture depends to a large extent on their economic strength, which varies from one community to another. But there is no easy solution to this problem. What is to be done to encourage minorities in this respect is a matter for the broader cultural policy of the Union and the State governments. What can be done in the immediate context is to ensure an equitable system of grants to all minority schools and to supplement the facilities available to linguistic and cultural groups through the state schools wherever possible.

It must be pointed out that past experience in regard to educational and cultural needs of the minorities has not been wholly satisfactory. To some extent the danger of different States using education as a vehicle of regional particularism to revive and exalt the past achievements of the dominant language group, and of pursuing policies of their own without regard to the interests of the nation as a whole, without co-ordination and unity of purpose, had been foreseen by the States

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[83] K. V. Rao, op. cit., p. 222.

Reorganisation Commission.[84] G. B. Kanungo observes how this has increased with the growth of regionalism, and how the majority's language has become the cornerstone of nationalism in States, as they seek to pursue education to the highest level through the regional medium. He points out that following the formation of linguistic States the right of minorities to intruction in mother tongue has been largely overlooked and that they are compelled to get their education through the regional language, which is the language of the majority.[85] Not infrequently the educational and cultural needs of the minorities have been sacrificed on the altar of administrative convenience.[86] In the absence of clear legal obligations on part of the government the only course open to the minorities was to secure a "generous approach by the administration at the Centre and in the States."[87]

The right which Article 30 guarantees to the minorities is the right to establish institutions "of their choice". This includes the right to choose the medium of instruction. The Supreme Court noted in the

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[84] Report, p. 39.

[85] G. B. Kanungo, The Language Controversy in Indian Education, (1962), pp. 57-58.

[86] Report of the Committee on Emotional Integration, (1962), p. 61.

[87] Ibid.

Bombay Education Society's case that to hold otherwise would be to deprive Articles 29(1) and 30(1) of the greater parts of their content. The power of the state to determine the medium of instruction must yield to these fundamental rights to the extent it is necessary to give effect to them and cannot be permitted to run counter to them.[88] The Gujarat High Court has similarly held that the Gujarat University has no power to lay down any particular language media of instruction on educational institutions and colleges established and/or administered by minorities, whether religious or linguistic. Neither the State Legislature, nor the University has power or competence to interfere with their free choice by directing them to have Gujarati or Hindi or any other language or languages as media of instuuction to the exclusion of the language or languages of their choice.[89] Mere threat to the right, and not the actual infringement of it, is sufficient to move the court.[90]

However, the private aided schools have to comply with the reasonable requirements laid down by the government. Thus, according to the Resolution adopted

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88 A.I.R. 1954 S.C. 561 (568).

89 Shri Krishna Rangnath v. Gujarat University, A.I.R. 1962 Guj. 88 (122).

90 Ibid.

by the Provincial Education Ministers' Conference, 1949, secondary schools can be required to arrange for instruction in a language different from their own, if it is desired by one third of the pupils of whom it is their mother tongue, and there are no adequate facilities in the area.

As to the affiliation of private institutions, the policy of the Central Government stipulates that, as a corollary to Article 30, minority institutions would be permitted to seek affiliation to bodies outside the State where it becomes necessary or convenient, without having to suffer any disability as to grants-in-aid and other facilities merely because they cannot be fitted into the educational administration of the State.[91]

iii. Instruction in the mother tongue

The principle of instruction in the mother tongue of the child is recognised as basic throughout the world. But the Constitution of India, as enacted, did not contain any such right, though the Congress policy had always inclined in that direction. Jawaharlal Nehru, writing in 1937, spoke of the need of instruction in the mother tongue for all at the primary stage, and where numbers warranted

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[91] Memorandum, (1956), paragraph 5.

it, even at the secondary stage.[92] The Government of India accepted it at an early stage and the Ministry of Education passed a resolution on the subject on 10th August, 1948.[93] However, the idea was only given Constitutional form in 1956, following the reorganisation of States in the addition of Article 350-A by the Constitution (Seventh Amendment) Act.

Article 350-A states —

> 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 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.

It is obvious that the Article is of a doubtful legal force. Its language is deliberately vague, perhaps not unjustifyably so in view of the practical difficulties that can be expected in its implementation. The only certainty in the Article is the President's power to issue directives to States, which is a weighty safeguard if exercised. But ordinarily it would not be reasonable to expect it to be so exercised except in extreme cases and as a last resort. A further point to be noted

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92 Jawaharlal Nehru, The Question of Language, (1937), p.19.

93 Gazette of India, August 14, 1948, Part I, Section 1, at p. 1000; L.S.D., December 17, 1955, col. 411.

is that the Article covers only the primary stage of education and does not contemplate the secondary stage. In effect, the Article amounts only to a Constitutional recognition of an important right without providing the means to enforce it. In its present form it does not amount to much more than a weighty directive principle.

The details of the present policy as regards the instruction in the mother tongue at primary and secondary levels have evolved over the past twenty years. The development of this policy and the progress of its implementation may be traced at these two levels separately.

Primary education

The basis of the present policy was laid down in a Resolution of the Provincial Education Ministers' Conference in 1949. The Resolution, approved of by the Central Advisory Board of Education and the Government of India, stated that —

> The medium of instruction and examination in the Junior Basic Stage must be the mother tongue of the child and, where the mother tongue is different from the Regional or State language, arrangements must be made for instruction in the mother tongue by appointing at least one teacher, provided there are not less than 40 pupils speaking the language in the whole school or 10 such pupils in a class. The mother tongue will be the language declared by the parent or guardian to be the mother tongue.

The regional or the State language, where it is different from the mother tongue, was to be introduced not before the third standard and not after the end of the Junior Basic Stage. It was also recommended that, in order to facilitate the change over in the regional language, children should be given the option of answering questions in their mother tongue in the first two years after the Junior Basic Stage.[94]

The States Reorganisation Commission regarded this question as the "core" of the minorities' problem. It recognised that the linguistic minorities did not have the resources required to establish and maintain their own educational institutions and therefore urged that a positive duty should be cast on the State to provide the facilities by a Constitutional Amendment.[95] When the Government of India published its Memorandum in 1956, Article 350-A was already at the draft stage and the Memorandum passed over the subject by following the line laid down in the 1949 Conference.[96]

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94 This Resolution and the Minutes and Dicisions of successive Ministerial Meetings mentioned earlier can be found in Appendices I to IV to the Report of the Commissioner for Linguistic Minorities, 8th Report, (1968).

95 Report, p. 209.

96 Clause 2 of the Government of India Memorandum, (1956).

The Ministerial Committee of the Southern Zonal Council, 1959, while generally following the principles enunciated earlier, made specific recommendations with regard to pupil strength and school facilities. It recommended that,

> all Primary schools shall entertain applications from parents belonging to the linguistic minority groups for admission of their children and for their instruction in the mother tongue for a period of three months ending a fortnight before the commencement of the school year. These applications should be entered in a register. Departmental arrangements should be made to see that no such applicant is refused admission for the reason that the number is insufficient in a particular school where the application is made; and wherever necessary, inter-school adjustments are made in the matter of admission of the minority pupils.[97]

The Conference of Chief Ministers of States and Central Ministers, 1961 (hereinafter referred to as the Chief Ministers' Conference), accepted in principle the decisions of the Southern Zonal Council. It declared that the main objective must be to see that the facilities already available should not be reduced and where possible, further facilities provided.[98]

With regard to the implementation of the above policy, the Linguistic Commissioner has reported that all the States, with the exception of Madhya Pradesh and Punjab,

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[97] Clause 2(ii) of the Resolution.

[98] Clause 3 of the Statement.

have agreed in principle to do so fully. The Orders of the Madhya Pradesh Government stipulated that primary education would be available through the medium of 15 languages mentioned in the Eighth Schedule only,[99] whereas the Punjab Government has persistently maintained that the provisions of Article 350-A are only "directory" and not "mandatory". The Commissioner's efforts, including a recommendation for the issue of a Presidential directive as regards the latter, have so far not succeeded in bringing these States in line with others.[1]

A Statewise survey made by the Commissioner indicates that the all-India policy enunciated above is generally being followed throughout. However, there are frequent instances of divergence in practise among the States. Non-implementation of the various agreed proposals is not uncommon. Thus, there are instances where there is no provision for instruction in mother tongue even where there are more than the prescribed number of pupils.[2] Though the principle of advance registration has been agreed to by all the States, the actual maintenance of such registers has been reported from only nine

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[99] The number of languages on the Eighth Schedule incressed to 15 by the addition of Sindhi by the Constitution (21st Amendment) Act, 1967.

[1] Report of the Commissioner for Linguistic Minorities, 8th Report, (1968), p. 6.

[2] Ibid, p. 6.

of the States.[3] Similarly, not all the State governments have issued Orders regarding the continuation of facilities without dimunition, though such a step had been agreed to by all of them.[4] From a comparison of the Statwise figures of the number of minority schools and pupils with earlier figures, it emerges that in some instances there have been considerable improvements in facilities, while in others there has been a marked decline. It is not possible to assess the situation fully, as in most cases particulars of reduction of facilities have either not been supplied or are inadequate for the purpose.

Secondary education

The question of instruction in the mother tongue at the secondary level is in a different category altogether, and is not covered by the Constitutional provision. It is nevertheless an important issue both to the minorities and in the context of higher education generally.

The Provincial Education Ministers' Conference recommended that in the secondary stage, if the number

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[3] Ibid, p. 7.

[4] Ibid, p. 8. A tabulated summary of these and other details can be found in Appendix VI of the Report, p.151.

of pupils, whose mother tongue is other than the regional or the State language, is sufficient to justify a separate school in the area, the medium of instruction in such a school may be the mother tongue of the pupils. Such schools, if organised and established privately would be entitled to recognition and grants-in-aid. The government would provide similar facilities in all Government, Municipal and District Board Schools, where one third of the pupils request instruction in their mother tongue. The aided schools would be required to arrange for such instruction, if there are no adequate facilities in the area. The regional language would be a compulsory subject throughout the secondary stage.

The 'one third' quota, however, was later thought to be unsatisfactory, both from the point of view of minorities and the government, since in large schools separate sections might be necessary, even if the ratio was less than one third, and in small schools even a ratio of above one third might be impractical. Consequently the Ministerial Committee of the Southern Zonal Council in 1959 unanimously decided that where such facilities did not exist, a minimum strength of 60 pupils in the last four standards of the Higher Secondary course and 15 pupils in each such standard would be necessary, provided that for the first four years a strength of 15 pupils in a class would be

sufficient.[5]

The Chief Ministers' Conference accepted this decision in principle. The Conference, however, pointed out that the mother tongue formula could not be fully applied for use as the medium in the secondary stage of education, as this stage gives a more advanced education to enable stadents to follow a vocation after school leaving age and also prepares them for higher education in Universities. The languages used should, therefore, be modern Indian languages mentioned in the Eighth Schedule as well as English.[6] It adopted a simplified 'Three-language Formula', providing for the study of the mother tongue as a language subject. The Committee of the Zonal Councils for National Integration, which met in the same year, invited the attention of all the State Governments to early implementation of the decision of the Chief Ministers' Conference.

For the implementation of these proposals, all the State Governments, excepting those of Madhya Pradesh, Uttar Pradesh, Bihar and Maharashtra, have issued Orders for providing secondary education through the medium of minority languages.[7]

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[5] Decisions, paragraph 5, item 3.

[6] Item 3(b) of the Statement.

[7] Report of the Commissioner for Linguistic Minorities, 8th Report, p. 37. For Statewise position, see pp.38-42 thereof.

A passing reference to the 'Three-language Formula' may be made here. The formula, as adopted by the Chief Ministers' Conference, envisages the study of, i) the regional language and the mother tongue, when the latter is different from the regional language, ii) Hindi, or, in Hindi-speaking areas, another Indian language, and iii) English or any other modern European language.[8] The practise in this regard is, however, far from being uniform. Different States have adopted different formulae of their own, giving rise to various problems,[9] and many State governments have misapplied the formula in various ways.[10] It may be noted that in the case of pupils belonging to linguistic minority groups the above formula actually becomes 'four-language formula', as the study of the regional language is made compulsory. To relieve this burden the Education Commission has recommended that the regional language should be made optional and the formula modified as follows: i) the mother tongue or regional language, ii) the Official Language of the Union or the Associate Official Language of the Union

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[8] Paragraph 9 of the Statement issued by the Chief Ministers' Conference.

[9] For a detailed discussion on the subject, see the Linguistic Commissioner's 7th Report, (1965), pp. 184-194. For different formulae, see Appendix X of the 8th Report, (1968).

[10] Report of the Committee on Emotional Integration, (1962). p. 53.

so long as it exists, and iii) a modern Indian or foreign language not covered under (i) and (ii), and other than that used as the medium of instruction. However, no decision has so far been taken on this proposal.[11]

3. Employment

The fact that employment in the Public Services is much sought after in India has already been noted.[12] There can be no doubt that the formation of linguistic States has tilted the scales in favour of the predominant language group in each case and thus imperilled the chances of minority groups. The Dar Commission has noted that the conflict between linguistic groups originated in a desire for power, which in its lower sense, was a desire for jobs and offices.[13] The agitation for linguistic States was at least partly inspired by local claimants for government jobs.[14] It has been said that it was the middle class job hunter and the middle class politician who sought to benefit by the establishment of a linguistic State, "which creates for them an exclusive preserve of jobs, offices, and places by shutting out, in the name of

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11 The Linguistic Commissioner's 8th Report, p. 116.

12 See p. 138, supra.

13 Dar Commission Report, p. 186.

14 S. Harrison, India: the most dangerous decades, (1960), p. 90.

promotion of culture, all outside competitors."[15]

The States Reorganisation Commission which considered this issue reported that the "recruitment to service is a prolific source of discontent among linguistic minorities."[16] Two principal ways in which some of the States sought to make the State Services a preserve of the predominant language group have been the placing of domiciliary restrictions and prescribing a high test of proficiency in the regional language or making it the medium for competitive examinations.

Domiciliary requirements

The Commission noted that a number of States sought to confine their services to 'permanent residents', with the qualifying length of residence varying from 3 to 15 years.[17] Domiciliary rules were applied not only to determine eligibility for appointment to services, but also to the award of contracts and rights in respect of fisheries, ferries, toll bridges, forests and excise shops. The conditions for the acquisition of domicile have included a) ownership of a homestead in the State,

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15 Krishna Mukherji, Reorganisation of Indian States, (1955), p. 31: quoted in Ibid, p. 91.

16 Report, p. 212.

17 Ibid, pp. 212-213.

b) residence in such a homestead for ten years, c) a clear intention to live in the State till death, and d) renunciation of the old domicile. The fact of the domicile was to be determined after considering such circumstantial evidence as whether the applicant had landed property or interests in his native place, and whether he paid periodic visits to that place.[18]

Such restrictions are clearly against the spirit of the Constitution, which provides for a single citizenship for the whole of India, and the Government felt the need to rectify the situation.[19] Accordingly the Public Employment (Requirement as to Residence) Act was passed in 1957, and came into force in March 1959. By s. 2 it repealed existing laws prescribing the requirements as to residence which were in force in any State or Union Territory. Section 3 enabled the Central Government to make rules in respect of certain classes of public employment in certain areas, prescribing requirements as regards residence. Rules made by the Central Government must be laid before each House of Parliament and are subject to its modicications (s. 4); s. 3 and the rules made thereunder are to cease to have effect on the

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[18] Ibid, p. 230.

[19] Government of India, Memorandum, (1956), paragraph 16.

expiration of five years from the commencement of the Act. Sections 4 and 5 were amended by the Public Employment (Requirement as to Residence) Amendment Act, 1964, and the original period of five years in s. 5 was substituted by ten years. It would seem that the legislation has achieved its purpose. Except in a few minor instances, no cases of a direct breach of the Act by States have been reported by the Commissioner.[20]

Language medium of examinations and proficiency tests

The requirement of a high standard of proficiency in the State language can be even more effective than enforcing domiciliary requirements.

It is generally not disputed that public servants should be conversant with the official language or languages of a State. But the question is at what stage should competence in it be required of a candidate whose language is different: should it be a condition precedent for entry into the public services, or a condition of confirmation in the service, or a condition in the matter of promotion. The proposals made by the States Reorganisation Commission and accepted by the Government of India in its 1956 Memorandum lay down the guide-lines in this regard.

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[20] The Linguistic Commissioner's 8th Report, Chapter IV.

The Commission, while accepting that all public servants should be conversant with the official language of a State, felt that candidates belonging to one language group should have no initial advantage over those belonging to other language groups. It was, therefore, both desirable and practicable that for State Services, apart from the main language of the State, the candidates should have the option to elect, as medium of examination the Union language — English or Hindi — or the language of the minority, consisting of about 15 or 20 per cent or more of the population of the State. A test of proficiency in the State language should be held in that event, after selection, and before the end of probation. In the case of subordinate services, however, the State language could continue to be the medium of examinations.[21] The Government of India accepted these proposals and recommended to the State governments that they should "as far as possible be accepted." It further recommended that "where cadre included in a subordinate service is treated as a cadre for a district, any language which has been recognised as an official language in the district should also be recognised as a medium for the purpose of competitive examinations in the district."[22]

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[21] Report of the States Reorganisation Commission, p.213.

[22] Memorandum, (1956), paragraph 13.

The Committee of the Southern Zonal Council decided that it should be open to any candidate belonging to linguistic minorities to apply for a post, notwithstanding that, at the time of such application, he does not possess adequate knowledge of the regional language. The selection of such candidates should be subject to the condition that he passes the regional language test during probation; and, where the medium of examination for recruitment is the regional language, the linguistic minority candidates could offer any of their regional languages plus Urdu, English and Hindi.[23]

The Chief Ministers' Conference merely re-stated the proposals of the States Reorganisation Commission with the omission of a reference to the minority's language. They said that, besides the official language of the State, an option should be given of using English or Hindi as a medium of examination. A test of proficiency in the State official language should be held after selection and before the end of probation.[24] The provision of English and Hindi as additional media was presumably considered an adequate safeguard to minorities, since under the three language formula they would be

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[23] Decisions, Paragraph 12.

[24] Statement, Paragraph 16.

obliged to study them.

According to the Linguistic Commissioner's Report, English continues to be the sole medium of examination for the State Services in the States of Assam, Orissa, West Bengal, Andhra Pradesh, Kerala, Madras, Mysore, Gujarat, Maharashtra and Punjab. In Madhya Pradesh, Uttar Pradesh, Bihar and Rajastan both English and Hindi are offered as media. In all the States, except Uttar Pradesh, Orissa and Punjab, the language is no bar for recruitment, and the above policy is generally being followed.[25]

In a complex issue as employment it is not possible to generalise. Each complaint has to be judged on its own merit. For, as the States Reorganisation Commission has pointed out, in the matter of employment, promotion, disciplinary and other matters for the minorities ultimately "there is no real safeguard other than to trust, the administrative purity, efficiency and fairness."[26]

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[25] 8th Report, pp. 92-95.

[26] Report, p. 214.

4. The use of minority languages for official purposes

In view of the deep permeation of offical activities within the life of a modern community, the selection of languages as 'official language(s)' becomes a matter of deliberate choice, and therefore of greatest interest and concern to linguistic minorities.[27] According to the States Reorganisation Commission, it forms, along with the issue of education, the 'core' of the problem of linguistic minorities.[28]

The question of the Official Language of the Union, which is a subject of fierce controversy, does not concern us here. In the context of the minorities it arises as a local problem in relation to the administration of a State. It may be recalled that the States are multilingual with a considerable proportion of minorities speaking languages other than that of the predominant group. The position of these minority groups has to be viewed in the light of Article 345, which deals with the official language of a State, and Articles 347 and 350, which seek to protect the linguistic interests of the minorities.

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[27] Report of the Official Language Commission, (1956), p. 11.

[28] Report, p. 209.

Under Article 345, a State may by law adopt any one or more of the languages in use in the State, or Hindi, as the language or languages to be used for all or any of the official purposes of thet State. This is to be read with Article 347 which states —

> On demand being made in that behalf, the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

Article 350 entitles a person to make a representation for the redress of any grievance to any officer or authority of the Union or of a State in any of the languages used in the Union or in the State, as the case may be.

Articles347 and 350 are at best statements of priciples and are, therefore, relevant only to the extent to which they are translated into practise. The States Reorganisation Commission suggested that the Central Government in consultation with the State Governments should evolve a clear code to govern the use of different languages at different levels of State administration and and ensure that this code is followed.[29] It suggested

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[29] Report, p. 212.

that the States may be classed as 'unilingual' or 'bilingual', according to the percentage figures of population speaking different languages. A State would be unilingual where 70 per cent or more of the population speaks one language and, where a minority constitutes 30 per cent or more, it would be considered bilingual. The same test would apply at the district level. It was recommended that in bilingual districts, municipal areas or other smaller areas such as taluks, where the minorities constitute 15 to 20 per cent of the population, documents which are used by people at large, such as government notices, electoral rolls, ration cards, etc., should be in both languages, and it should also be permissible to file documents in the courts in the minority language. Minority languages should be given recognition for local election purposes.[30] These proposals were agreed to by the Government of India.[31]

The Committee of the Southern Zonal Council decided that, for the purpose of recognition of minority languages for specific purposes, every municipal town and the non-municipal area of every taluk should be treated

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[30] Ibid.

[31] Memorandum, paragraphs 8 and 9.

as separate local areas and that a list of all such local areas, where 20 per cent of the people spoke a language other than that of the State, should be prepared for each State. It suggested that following steps should be taken in respect of every such local area —

> All important Government notices and Rules, Electoral Rolls etc., should be published in the minority language or languages.
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> Forms etc., to be used by the public should be printed both in the regional language and in the minority language.
>
> Facilities for registration of documents in the minority languages should be provided.
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> Correspondence with government offices in the minority language should be permitted.
>
> Permission should be given to file documents in the minority languages in the courts in the areas.
>
> An endeavour should be made to secure, in so far as this may be found practicable with due regard to administrative conveniences that the officers posted to work in such local areas are persons who possess adequate knowledge of the minority language.[32]

The Chief Ministers' Conference generally reiterated the earlier proposals with certain modifications. They recommended that in communications with the public, languages other than official language should be used with the objective that the great majority of the people should understand what they are told. With regard to the

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[32] Decisions, paragraph 8, item 6.

official language at the district level, they said that where 60 per cent of the population speaks a language other than the official language of the State, that language should be recognised; however, for that purpose recognition may be given only to the major languages specified in the Eighth Schedule with certain exceptions in regard to certain hill districts. In a district or a smaller area like a municipality or tehsil, it was desirable to get important government notices and rules published in the language of the minority as well, where they constitute 15 to 20 per cent of the population. Lastly, the administration should accept public petitions and representations in other languages and arrangements should be made for replies to be sent in the same language, as far as possible. The Conference also recommended that arrangements should be made for the publication of translations of the substance of important laws, rules, regulations, etc., in the minority languages.[33]

It is apparent that the issue of official languages affords the greatest possibility of divergence between theory and practise. It is not easy to get a clear picture of the situation, as much depends on local conditions, which greatly vary from one place to another.

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[33] Statement, paragraphs 11 to 14.

Heat and passion generated in some places (as for instance in disputed border areas), practical difficulties in the implementation of the agreed proposals, and in some instances the deliberate policies of State governments are among the factors which should be taken into account. A survey of the complaints received by the Linguistic Commissioner shows that they range over a very wide field and include those pertaining to the language of applications, radio programmes, electoral rolls, registration offices, sign-boards, language of courts, languages of Panchayat and local bodies, gerrymandering of wards, non-reporting of the speeches made in minority languages, and the posting of officers without adequate knowledge of local languages.[34] In view of the practical difficulties, each of such cases has to be judged on its own merits. Thus, with regard to the preparation of electoral rolls, it has been pointed out that "it is expensive and wasteful to require the duplication of an electoral roll in another language simply because in a particular area there is a substantial minority speaking that language." After considering such factors as literacy among the minorities and similarity of script it has been found that the preparation of the roll in a second

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[34] See the Linguistic Commissioner's Reports, 7th Report, (1965), pp. 63-79; 8th Report, (1968), pp. 79-100.

language is necessary only for certain small areas in some States.[35]

As to administration, there is hardly any uniformity of practise among the States in this regard. The rule as to the publication of notices etc., in a minority language is not yet being implemented fully. Only about half a dozen of the States have prepared the lists of such local areas and have implemented the proposals, while others have yet to prepare them. Some of the States have implemented the proposals with regard to certain areas of the State, while others have pleaded their inability to prepare such lists as the Census figures below the district level were not available.[36] As to sending replies to petitions and representations in the same language in which they are received, only a few States have agreed to do so, advantage being taken of the qualifying proviso 'whenever possible'. Some send such replies only in certain specified languages. Rajastan sends them in either Hindi or English along with a translation of it in the language concerned. Three of the Southern States, Andhra Pradesh, Madras and Mysore, have restricted the application of this rule to the local areas where the minorities consist of 15 to 20

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35 Report on the Third General Elections in India, Vol.I, (1966), pp. 121-122.

36 Linguistic Commissioner's 8th Report, pp. 72-75.

per cent of the population.[37]

Results are not very encouraging either with regard to the publication of the substance of important laws, rules, regulations etc., in minority languages. The four southern States and Assam have made some progress in this regard. Two of the States, Madhya Pradesh and Punjab, have refused to do so, while Gujarat and Bihar have issued no orders, though they have agreed in principle. Only partial progress has been reported from other States.[38]

From the Commissioner's Report it is clear that very much remains to be done towards the full implimentation of the agreed proposals as regards the use of minority languages for official purposes.

IV. Agency for the enforcement of safeguards: need for a review

It is evident from the above discussion that the policy governing minority safeguards leaves much to be desired. It is apparent that the Constitutional provisions are not adequate; that, while generally there is agreement on principles, there is lack of uniformity

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[37] Ibid, pp. 75-77.

[38] Ibid, pp. 78-79.

in practise, and not infrequently, divergence from the principles themselves. Moreover, there is no effective Central agency to ensure the proper implementation and co-ordination of the policy. This needs to be put on a sounder basis than it is now.

One argument against the provision of any elaborate or special safeguards to minorities has been that they tend to keep alive the minority consciousness and perpetuate the problem. This fear was expressed by the States Reorganisation Commission which said that any over-emphasis on minority rights or an elaborate system of guarantees would complicate rather than solve the problem.[39] While the substance of this argument is not denied, it is submitted that the problem cannot be wished away by ignoring it. When a problem exists, there is no alternative to providing safeguards for those who might be adversely affected thereby. While these may be designed as a temporary measure and cease when the problem no longer exists, they must nevertheless be adequate and effective during the time of their operation. This cannot be said of the present sefeguards for linguistic minorities. Further, though one hopes for a time when the wider national outlook may replace the majority-minority consciousness,

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[39] Report, pp. 207-208.

the indications are that this problem will be there for the foreseeable future. The need for a review of safeguards is, therefore, clear. There are two aspects of this issue: first, the provision of adequate safeguards and second, the machinery for their implimentation.

As to the first, it is evident that the existing Constitutional provisions by themselves do not provide an adequate basis for the protection of the interests of linguistic minorities. The need for strengthening of these provisions has often been voiced, and has to be looked into. Perhaps it would be possible o give a Constitutional form to some of the principles which have been agreed to by the States and which are now part of the all-India policy. However, inadequacy of Constitutional provisions is a relatively lesser problem in the present context. It is not practical to enact Constitutional provisions for every contingency that may arise. In a complex situation, such as that of linguistic minorities, discretion must necessarily reside with the State authorities, to be exercised by them according to the local needs and circumstances. As far as the principles of minority safeguards are concerned, those contained in the Constitutional provisions, together with those agreed upon by the States, are adequate for the purpose at present.

The shortcomings of the minority policy arise from its implementation and the machinery for the enforcement of safeguards. It is true that in India there is an independent judiciary for the enforcement of the citizens' rights. But, as mentioned earlier, it is not for everybody to go to the court; nor is it practical to do so on every issue. While there have been important issues, which have been fought and won in the courts, there remain many more for which the courts cannot provide an adequate remedy. A permanent body is, therefore, needed to look after the interests of linguistic minorities, with adequate powers and authority for the purpose, working under the direction of the Central Government.

There is, of course, the Linguistic Commissioner, provided for by Article 350-B, to look after these interests. But, despite the gallant efforts by successive Commissioners, this institution has proved wholly inadequate for the purpose. It is not denied that in many individual cases his efforts have succeeded; nevertheless, there cannot be any doubt as to the overall ineffectiveness of this office. His 'duty' is "to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution."[40] It is already seen

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[40] Article 350-B.

that these safeguards themselves are vague. He does not possess adequate powers and authority to rectify matters which his ivestigations reveal or which are brought to his notice. As Ram Gopal has pointed out, the Commissioner, strictly speaking, has no power to deal with any undertaking or safeguard outside the Constitution, nor could such an undertaking or safeguard be legally enforced.[41] The States have been too slow in furnishing the information sought for by him, and not infrequently have turned a blind eye to his recommendations. Administratively, there is no effective co-ordination between the various persons concerned. Though there is a Special Officer in each State concerned with the implementation of safeguards and maintaining liason with the Commissioner, the Commissioner has so far been receiving relevant information from only two of the State governments.[42] The latest Report of the Commissioner, published in 1968, pertains to the year ending June 1966 and much of its information relates to the year 1964-65. In many cases even this information is not available. The usefulness of these Reports perhaps lies in serving as an index to the grievances of linguistic minorities and nothing more.

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[41] Linguistic Affairs of India, (1966), p. 124.

[42] 8th Report, p. 112, paragraph 583.

The need for an effective Central Agency is, therefore, clear. Such an idea is certainly not new. It has been put forward in various forms many times, but ignored as often. Thus a proposal for a Central Ministry for Minority Affairs was put forward before the States Reorganisation Commission, but it rejected the idea on the ground that the role of the Central Government in linguistic minority affairs was a limited one, and therefore a Ministry not justified.[43] The question of a Ministry apart, it is difficult to understand the Commission's interpretation of the role of the Central Government. Obviously, the ultimate resposibility for the minority safeguards must lie with the Central Government. This was the consensus among the Members of Parliament during the debate on the Commission's recommendations. Acharya Kripalani told the House that "it is for the Central Government to see that no harm is done to minority groups and to see that no individual in a minority group is denied common rights."[44] Another Member, Shri M. A. Ayyangar, wanted the Constitution to be amended so tht the linguistic minorities would be in in the charge of the Central Government.[45]

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[43] Report, p. 214.

[44] L.S.D., December 14, 1955, Cols. 42-43.

[45] Ibid, December 17, 1955, Col. 379.

In what form this control should be exercised is a matter for debate. In the opinion of the States Reorganisation Commission, the Governor of a State should look after the minority interests as a representative of the Centre,[46] but this idea did not find favour. It is suggested that the establishment of a Commission to look after minority interests may be further investigated. The need for a Statutory Commission, which was to be a non-political and quasi-judicial advisory body, was pressed before the States Reorganisation Commission.[47] In Parliament at least two members strongly supported the proposal.[48] Pandit Bhargava spoke of the need to take the minority safeguards from the sphere of the executive and vest it in a permanent Commission on the analogy of the Election Commission.[49] The outcome, however, was the provision for a Linguistic Commissioner, in Article 350-B, as suggested by Shri. V. V. Giri.

A re-appraisal of the situation is now due. The old arguments that the existence of a Commission might spoil relations between the minorities and the dominant language group[50] do not have much force. If the mutual relations are good and there is goodwill on both sides, there

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46 Report, p. 216.

47 Ibid, p. 217.

48 Pandit Bhargava, L.S.D., December 20, 1955, Cols.703-704; Shri Frank Anthony, Ibid, Cols. 766-767.

49 Ibid.

50 Report of the States Reorganisation Commission, pp.214-215.

is no reason why the existence of a Commission should spoil it. On the other hand it would be a safeguard if relations should worsen. It is not suggested that the Commission should be legalistic in its dealings and enforce only 'strict justice'. As the States Reorganisation Commission has pointed out, "no guarantees can secure a minority against every kind of discriminatory policy of a State government" and "there can be no substitute to a sense of fairplay on the part of the majority and a sense of obligation on part of the minorities."[51] The existence of a Commission is in no way prejudicial in this context. Its value will depend on the need for it. It will be a reminder to the State governments of their obligations to the minorities and will impart a sense of security to the minorities.

This is not the place to consider all the attributes which such an agency must have. But it must certainly have adequate powers and judicial authority, which are lacking in the present arrangement. Such an agency may be created, perhaps, by reorganising the office of the Commissioner for Linguistic Minorities and investing it with necessary powers and authority.

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[51] Ibid, p. 216.

Chapter V

SOCIO-ECONOMIC INTERESTS

The first and foremost of the difficulties faced by democracy is said to be the persistence of great social and economic inequalities.[1] Perhaps nowhere else do they stand out in such sharp contrast as in India. The removal of these inequities has been a major concern of the freedom fighters, social reformers and governments alike. The Nehru Committee urged the need to undertake vast programmes for social advance as a strong argument for responsible government: "We cannot believe that a future responsible government can ignore the claims of mass education, or the uplift of the submerged classes or the social and economic reconstruction of the village life in India."[2] These sentiments were even strongly voiced in the Constituent Assembly, when the relevant

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[1] Morris Ginsberg, The Psychology of Society, (9th ed., 1964), p. xix. Also, J. A. Hobson, Towards Social Equality, (1931), p. 4.

[2] Nehru Report, p. 11.

Constitutional measures were being discussed. "After all why are we having this liberty for?", asked Dr. Ambedkar, and answering the question himself he said, "we are having this liberty in order to reform our social system, which is so full of inequalities, discriminations and other things which conflict with our Fundamental Rights."[3] Dr. Radhakrishnan said that India must have a 'socio-economic revolution', designed to bring about not only 'the real satisfaction of fundamental needs of the common man', but go much deeper and bring about a 'fundamental change in the structure of Indian society'.[4]

The attainment of social and economic justice with equality of status and opportunity for every citizen is a major objective of the Constitution.[5] All its resources are to be directed towards this end. But in their realisation two problems will have to be overcome, and the success of the Constitution and of democracy in India depend on this.

The first problem is that of under-development of the country as a whole. The characteristics of a modern society are said to be, among other things, " a comparatively high degree of urbanisation, widespread

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[3] VII, C.A.D., p. 781.

[4] II, C.A.D., see pp. 269-273.

[5] Preamble.

literacy, comparatively high per capita income, extensive geographical and social mobility, a relatively high degree of commercialisation and industrialisation of the economy, and extensive and penetrative network of mass-communication media, and in general by widespread participation and involvement by members of the society in modern social and economic processes."[6] The state of Indian society, in general, is different. The characteristiss of modernism, though, need not be the same everywhere: they must necessarily vary according to circumstances, social values and ideals of each society. However, India's efforts since independence have, in general, been directed towards the creation of the conditions mentioned above. Vast resources, both human and economic, have been mobilised and ambitious Five Year Plans have been conceived and executed with this end in view. Undoubtedly, considerable progress has been made since independence towards obtaining a better standard of life for the common man. An evaluation of the specific ends and means in this respect is, however, outside the scope of our discussion.

Our concern is with the second problem, which is intimately linked with the first: the problem of socio-economic inequalities which must be removed, if all

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[6] J. S. Coleman, "The political systems of the developing areas", in G. A. Almond and J. S. Coleman (ed.), The Politics of the Developing Areas, (1960), p. 532.

members of Indian society are to benefit equally under the Constitution. The existence of social and economic disparities is too notorious to require much elaboration. There are many sections of the Indian society which on account of social disabities, poverty, or for other reasons have always been, and still are, at the lower end of the social scale. These are generally referred to as 'backward classes'. On account of their backward condition in relation to the genral population, they are at a disadvantage, and for them 'citizenship', 'liberty' and 'equality' are empty phrases, which have no meaning. If national citizenship is to be a reality, these people will have to be brought into the mainstream of national life, and placed on a footing of equality with the rest of their contrymen. In this chapter it is proposed to consider the measures incorporated in the Constitution for this purpose.

I. Definition of 'Backward Classes'

The term 'backward classes' is used in the Constitution both in a general sense denoting all backward sections of the community and also to indicate particular communities. In this chapter it is used in the former sense, except where the context requires it otherwise.

The backward classes envisaged in the Constitution comprise three categories and may generally be said to represent three different types of socio-economic development. In the first category are those who are known as 'Scheduled Castes'. These are sections of the population, which for a long period of time have been subject to severe social disabilities associated with the caste system, as for instance untouchability; their alternative title, 'depressed classes', is descriptive of their condition. In the next category are the 'Scheduled Tribes', who mostly live in hill regions as compact social units, whose cultural and socio-economic interests need special protection. And thirdly, there are the 'other backward classes' who, in effect, constitute an amorphous mass in the Indian population, whose backwardness derives from a multiple of causes, chief among them being the lack of economic and educational opportunities. The distinction between the above three categories becomes relevant on account of different measures taken to suit different circumstances. While all three categories are singled out from the genrral population for special treatment, additional measures are aimed at the Scheduled Castes and the Scheduled Tribes to overcome their special disabilities.[7]

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[7] The Supreme Court has recognised this distinction in Heggade Janardhan Subbaraya v. State of Mysore (A.I.R. 1963 S.C. 702) in favour of the Scheduled Castes and the Scheduled Tribes, (pp. 702, 703).

Scheduled Castes

The term 'Scheduled Caste' is a legal designation first adopted in 1935, when the lowest ranking castes were listed in a schedule appended to the Government of India Act, 1935, for the purposes of statutory safeguards and other benefits. A movement for the improvement of their condition had been steadily building up with the active support of various organisations and since 1920 it gathered momentum, when the Congress Party made the abolition of untouchability one of its principal objectives and Mahatma Gandhi took control of the campaign.[8] These castes have since been variously described as 'depressed classes', 'Harijans' and 'Scheduled Castes'. The concept of a scheduled caste is, however, relevant only in the context of statutory provisions, government action, and politics. Outside of this, it only means a diverse population, divided into numerous communities with a diversity of traditions, culture, and problems, and distributed throughout India, forming a minority in India as a whole and in every unit formed by the Constitution.[9]

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[8] See the Nehru Report, p. 59.

[9] Lelah Dushkin, "Scheduled Caste Policy in India", Memiographed typescript, (1966).

The mode of designation of the Scheduled Castes is laid down in Article 341 —

> The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall, for the purposes of this Constitution, be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be.

Parliament is enpowered to include in or exclude from the list of Scheduled Castes so specified any caste, race or tribe, or any parts or groups thereof, by law enacted for the purpose.[10]

Scheduled Tribes

These are generally referred to as 'Adivasis'. While being backward in every respect like the Scheduled Castes, they are concentrated in certain areas in different parts of the country, have a tribal organisation, and distinctive cultures of their own.[11] The mode of designation of the Scheduled Tribes is similar to that of the Scheduled Castes, and is contained in Article 342. Certain areas with a concentration of tribal population are designated

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[10] Article 341(2).

[11] On the subject generally see G. S. Ghurye, The Scheduled Tribes, (2nd ed., 1959).

as Scheduled Areas (formerly known as 'excluded areas') and special arrangements have been made for their administration in Schedules V and VI of the Constitution.

Although the mode of designation of the Scheduled Castes and of the Scheduled Tribes is in itself a simple affair, the practical difficulties involved in differentiating between various castes and tribes is not to be underestimated. The task, essentially, is one of establishing the facts: before the issue of a public notification it is necessary to establish the fact of backwardness of the groups involved; the task facing the courts when such an Order is in dispute is, by and large, to establish the fact that the caste of a party before it is, or is not, the one specified in the relevant Order. Before a notification is issued, an elaborate enquiry is made, and it is within the authority of the President to specify the castes, races, or tribes, with reference to different districts or sub-areas of a State and having regard to different stages of their development.[12] After the President has specified the groups, it is only Parliament that is competent to include in or exclude from the list of tribes or castes specified in the notification.[13] The High Court

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[12] Bhaiya Lal v. Har Kishan Singh, A.I.R. 1965 S.C. 1557 (1560).

[13] Chandappa v. Laxman Naik, A.I.R. 1967 Mys. 182 (184,185).

has no power to contradict Presidential Order.[14]

The first lists issued were under the Constitution (Scheduled Castes) Order, 1950, the Constitution (Scheduled Tribes) Order, 1950, and the Constitution (Scheduled Castes) Part C States Order, 1951, and these continue to be the bases. The actual number of the population and of the castes and tribes involved is variable, depending on the periodical modifications to the lists. The lists were modified in 1956 on the recommendation of the Backward Classes Commission (appointed under Article 340) by the enactment of the Scheduled Castes and Scheduled Tribes (Amendment) Act, 1956, and again by the Scheduled Castes and Scheduled Tribes Lists (Modification) Order, 1956, issued under the States Reorganisation Act, 1956. The lists were revised again on the creation of the new States of Maharashtra and Gujarat by the Bombay Reorganisation Act, 1960. Separate orders were also made at different times for Jammu and Kashmir, Andaman and Nicobar Islands, Dadra and Nagar Haveli and Pondichery.[15] According to the 1951 Census, the population of the Scheduled Tribes was 19,147,054 which was 5.3 per cent of the total population. After the Scheduled Tribes Lists (Modification)

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[14] Siddappa v. Chandappa, A.I.R. 1968 S.C. 929 (932).

[15] The Report of the Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes, (1965), p. 28. A full list of all Orders is to be found in Appendix I of this Report.

Order, 1956, this rose to 22,511,854 or 6.23 per cent. The increase of 34 lakhs was due to the addition of groups omitted in the earlier list.[16] According to the 1961 Census, the combined population of the Scheduled Castes and the Scheduled Tribes is over 94 millions, the former being over 64 millions (or about 15 per cent) and the latter close to 30 millions (or about 7 per cent).[17]

One of the difficulties in employing the criterion of caste to determine backwardness, apart from the question of its desirability, is the difficulty in identifying caste boundaries. This problem was commented upon by the Punjab High Court in Deedar Singh Cheeda v. Sohan Singh.[18] The Court noted that the distinction between castes had assumed imprrtance in recent years as a result of special concessions given to some castes under Article 341. The results of researches made by various authors in this respect did not seem to the Court to carry precise, exact and distinctive meanings, excluding the possibility of some individuals using their criteria interchangeably. In its opinion the position with regard to castes had all along been somewhat confused and imprecise.[19]

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16 Report of the Scheduled Areas and Scheduled Tribes Commission, (1961), p. 7.

17 Detailed figures are cited in the Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 16th Report, (1966-67), p. 3.

18 A.I.R. 1966 Punj. 282.

19 Ibid, p. 288.

The task of deciding whether or not an individual is a member of a particular caste rests ultimately with the courts, to be decided by reference to the facts in each case. Generally, it is held that caste is the result of birth and not of choice or volition. Thus, where it was alleged that a member of the Muka Dora tribe had ceased to be such by conversion to a higher caste, it was held that the mere performance of a ceremony and following the customs and manners of a higher caste was not sufficient to show that he had ceased to be a member of his former caste. In order to prove that he had ceased to be a member, there should be first of all, evidence of intention, the reactions of the old body and that of the new body.[20] This principle was confirmed in appeal by the Supreme Court.[21] The decisions relating to the effect of religious conversions have already been referred to in an earlier chapter.[22]

Other backward classes

The method of designation of this class is markedly different from that of the two earlier categories and is fraught with difficulties. In the absence of any

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[20] D. S. Dora v. V. V. Giri, A.I.R. 1958 A.P. 724.

[21] V. V. Giri v. D. S. Dora, A.I.R. 1959 S.C. 1318.

[22] Chapter III, pp. 201-204, supra.

distinctive characteristics possessed by the former and the heterogenous and uncertain characteristics of backwardness, this class is not easily ascertainable. This, as we shall see later, leaves room for manoeuvre for various groups seeking to be designated as one of the backward classes, on account of the benefits that acrue on such a classification.

The relevant Constitutional provision is to be found in Article 340(1), which states —

> 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 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 and the conditions subject to which such grants should be made, ... etc.

The Commission so appointed is to investigate the matters referred to them and present to the President a report setting out the facts as found by them and make such recommendations as they think proper; and the President is to cause a copy of that report together with a memorandum explaining the action taken thereon to be placed before each House of Parliament.[23]

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[23] Article 340, Clauses (2) and (3).

The Backward Classes Commission was appointed in 1953, and one of the tems of reference was to report whether any section of the people, in addition to the Scheduled Castes and the Scheduled Tribes, should be treated as socially and economically backward classes. The Commission reported in 1955 and laid the blame for backwarness squarely on the caste system. In his forwarding letter, the Chairman of the Commission stated that "in the present context 'classes and sections' means nothing but castes and no other interpretation is feasible."[24] The Commission compiled a list of over 2000 backward groups and recommended various measures for their economic, educational, social, cultural and political advancement. It has been estimated that 913 of the 2399 groups listed had a total of 116 million members or 33 per cent of the then population of India, not including the members of the Scheduled Castes and the Scheduled Tribes.[25]

The Commission recommended that "as long as social welfare and social relief have to be administered through castes, classes, or groups, full information about these groups should be obtained and tabulated."[26]

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[24] Report of the Backward Classes Commission, (1956), p. xiii.

[25] Marc Galanter, "Protective Discrimination for Backward Classes in India", 3, J.I.L.I., (1961), p. 39, at p. 53.

[26] Report, p. 159.

However, the Government of India, after long consideration of the Report, decided not to draw up any all-India list of the backward classes other than the already existing lists of the Scheduled Castes and of the Scheduled Tribes. They have left it to States to draw their own lists, choosing their own criteria for defining backwardness, though they have indicated their preference for the economic criterion to that of caste in defining it.[27]

Thus, differing from the case of the Scheduled Castes and the Scheduled Tribes, there is neither a central authority nor a defined procedure for designating the 'other backward classes'. The matter now rests in the hands of State governments and, not unnaturally, there is neither unanimity as to the criteria of backwardness nor uniformity in the percentage of the population of different States declared as backward. Article 340 lacks any legal force in the determination of backward classes, and accordingly the lists issued by the Backward Classes Commission are of no consequence. The President has no authority under the said Article to issue any instructions, which have a binding force on the States, nor is the Memorandum issued by the Government of India pursuant to the Report of the Backward Classes Commission so binding.[28] In

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[27] Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 14th Report, 1964-65, (1967), p. 155.

[28] Desu Rayudu v. A.P. Public Service Commission, A.I.R. 1967 A.P. 353.

consequence, the classes enumerated by the said Commission as socially and educationally backward classes, even though accepted by the President, will not for the purposes of the Constitution mean socially and educationally backward classes.[29] It is the Union or the State government who have to take action in this respect and not the President.[30]

In view of the wide divergence in practise in designating backward classes it is impossible to get a clear overall picture in this respect. But though not easily ascertainable, they nevertheless for a very sizable proportion of the total population. The criteria for the determination of backward classes is considered at greater length at a later stage.[31]

II. Measures for the removal of backwardness

The task facing India, as mentioned above, is one of securing a general advancement of the people as a whole, while at the same time bringing the relatively backward sections of the community in line with their fellow countrymen. But while this objective is simple

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29 Ramakrishna Singh v. State of Mysore, A.I.R. 1960 Mys. 338 (343-345).

30 M. R. Balaji v. State of Mysore, A.I.R. 1963 S.C. 649, at p. 656.

31 See p. 355 ff., infra.

and clear, the best means of achieving it are far less certain. The problem of backwardness is a complex issue, to which no simple answer can be found. The Backward Classes Commission, for instance, was able to offer only general suggestions —

> It should be remembered that in modern conditions of life, isolated treatment of anh one cause of backwardness will not bring about the desired result. An integrated plan for the removal of all causes of backwardness, accompanied by ameliorative measures, will alone be able to remove this malady, inherent in our society. Economic improvement, removal of social inequality, educational advancement and representation of these classes in spheres of power, prestige and authority should form the main features of such a plan.[32]

Different types of backwardness are mutually interdependent and the remedy calls for an integrated plan of action.

One important feature of the Indian Constitution in this respect is the obligation it has cast on the state for achieving a welfare state. The provisions in this regard are contained in the chapter on 'Directive Principles of State Policy'. These are not enforceable in a court of law, "but the principles therein laid down are nevertheless fundamental in the governance of the county and it shall be the duty of the State to apply these principles in making laws."[33] The state is committed

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[32] Report, p. 51.

[33] Article 37.

to promoting the welfare of the people by securing and protecting a social order in which social, economic and political justice is to inform all the institutions of national life (Article 38). It is bound to devote its energies towards securing adequate means of livelihood, a fair distribution of the material resources, fair operation of the economic system, and the welfare ofthe workers and of children (Article 39). Some of the other Articles deal with other aspects of the welfare ideal, such as, the right to work, to education and to public assistance (Article 41), humane conditions of work (Article 42), a living wage (Article 43), free and compulsory education for children (Article 45), and the improvement in the standard of living and public health (Article 47).

In the context of the present chapter, Article 46 is of particular relevance as it shows a deep concern for the backward sections of the community —

> The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Briefly, the directive principles visualise a social and economic order based on equality of opportunity, full employment, provision of adequate means of livelihood and social security benefits for all citizens.

However, one of the major difficulties in the scheme is the scarcity of resources. There can be no doubt that the outstanding cause of all backwardness is economic. In the numerically second largest country in the world, the standard of living of the people as a whole is one of the lowest in the world. Studies of the Planning Commission have indicated that about 60 per cent of the population is below the minimal income level of Rs. 100 per month per household and the Report of the Second Agricultural Labour Enquiry Committee has revealed that the economic condition of the landless agricultural workers, who form a sizable proportion of the rural population, has hardly shown any improvement over a period of ten years.[34] Speaking at a seminar organised by the Planning Commission in 1963, the then Prime Minister Nehru spoke of the magnitude of the problem and the extra-ordinary measures required in terms of obligations to the weak, handicapped and the backward. The Government, he said, had decided to extend the special facilities as far as possible to all people who lacked them. "Then we looked at the picture again from the ecomomic point of view and found that 80 per cent of our people would

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[34] Shriman Narayan, Socialism in Indian Planning, (1964), p. 134.

qualify for these privileges. Now if we are going to give special privileges to 80 per cent it really means the whole lot of them: 100 per cent."[35] In his opinion, what was necessary was a scheme of social engineering, and planning with a view to raising the whole level of life in the country, while special institutions dealt with particular issues.[36]

A detailed evaluation of all the aspects of the general welfare measures aimed at removing backwardness is not possible within the limited scope of this work. Such a task must be left to be discussed in reports and specialist studies undertaken for that purpose.[37] In this chapter attention is focused on the role of law as an instrument for the removal of social and economic inequalities.

The Constitutional provisions with regard to the backward classes fall roughly into three categories. In the first one are those which seek to secure their political interests by special measures, including the provision for special administration, tribal and regional autonomy, reservation of seats and the appointment of

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35 Planning Commission, Social Welfare in India's Developing Economy, (1963), p. 2.

36 Ibid.

37 For instance, on the economic aspect, see R. D. Agarwal, Economic Aspects of Welfare State in India, (1967).

special ministers and officers to look after their interests; secondly, there are those provisions incorporated in the chapter on Fundamental Rights, which seek to abolish certain social disabilities; and lastly, there are those which provide for 'protective discrimination' in favour of these classes.

Of these, the political interests have already been discussed.[38] The discussion in this chapter pertains to measures in the two latter groups. Both these are unique experiments in achieving an egalitarian society within a democratic set-up and are thus an index to the socio-economic philosophy of the Constitution.

III. Removal of social disabilities

The Constitution-makers were aware that a declaration of Fundamental Rights would be quite meaningless to some, unless cetain aggravated forms of social disabilities were removed at the same time. This is sought to be done by the incorporation of specific Articles in the Constitution.

Article 17 states —

> "Untouchability" is abolished and its practise in any form is forbidden. The enforcement of any disbility arising out of "Untouchability" shall be an offence punishable in accordance with law.

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[38] Chapter II, p. 128ff., *supra*.

No citizen is to be discriminated against on grounds of his caste in the use of public facilities (Article 15), in public employment (Article 16), and with regard to admission to educational institutions maintained by or receiving aid out of state funds (Article 29(2)). As a further corollary to the above, Article 25 provides for the throwing open of the Hindu Religious Institutions of a public character to all classes and sections of Hindus. Article 23 prohibits traffic in human beings and all forms of forced labour. Though as a rule the Fundamental Rights protect the individual against state action, three Articles, viz., 15(2), 17 and 23, also protect the individual against the actions of private citizens.

Social inequalities and the caste system

Without doubt, the caste system is the most significant factor on the Indian social scene and plays a dominant role in it. According to M. N. Srinivas, caste is the one institution in India, which cuts across religious, regional and class divisions and which he refers to as "that classic expression of inequality."[39]

The practise of "untouchability" is intimately linked with the caste system. The origins of the caste

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[39] Caste in Modern India, (1962), p. 88.

system are shrouded in mystery, but it is generally believed that it derived from a four-fold organisation of society based on varna and a broad division of labour. These divisions crystallised into the hierarchical castes, Brahmana, Kshatriya, Vaishya and Sudra, which took precedence in that order.[40] The "untouchables" existed at the bottom of this social scale, and were sometimes referred to as the "fifth class".[41]

The ritual status of the forr castes in society followed the order of their precedence, and all other issues, including their respective positions in legal and social spheres, were tied to this. Thus caste is a conspicuous factor in Manu's law on defamation. The penalties prescribed varied according to the caste status of the persons involved. In the case of the Sudra the punishment was excessively harsh and included such measures as the thrusting of a red hot iron rail into his mouth, cutting off his tongue, and pouring hot oil into his mouth and ears.[42] The Brahmana was only required to perform the same penance for killing a Sudra as for

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[40] For a general discussion on the subject, see J. D. M. Derrett, Religion, Law and the State in India, pp.172-182.

[41] Ibid, p. 176. For a discussion on the theories of the origin of untouchability, see B. R. Ambedkar, The Untouchables, (1948), Chapters 3-6.

[42] B. Prasad & others, "Law and Legal Institutions", in R. C. Majumdar (ed.), The History and Culture of the Indian People, Vol. II, (1951), p. 335, at p. 338.

killing a cat, a frog, a dog or a crow.[43] Whether or not these penalties were actually carried out is a different matter. What is important is that a lower caste status always carried a heavier burden. Economic status generally coincided with the ritual status of a caste.[44] The Backward Classes Commission appointed to investigate into the condition of those classes squarely laid the blame for their backwardness on the caste system.[45]

The Constitution seeks to remove this co-relationship between caste and socio-economic status. The acceptance of the principle of democracy is in a sense a negation of caste.[46] The proper operation of the democratic principle requires that there should be social mobility based on merit. It is rightly pointed out that, in an ideal mobile society, individuals must be distributed according to their capacity and ability, and placed in their proper place regardless of the position of their fathers.[47]

The future of the caste system is thus a topical issue on which the attitude of the state needs to be

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[43] R.K.Mookerji and R.C.Majumdar, "Social Condition", in Ibid, p. 542, at p. 544.

[44] M. N. Srinivas, Caste in Modern India, pp. 90, 92.

[45] Report, p. xiii.

[46] K. M. Panikkar, Hindu Society at Cross Roads, pp.17, 88.

[47] P. A. Sorokin, Social and Cultural Mobility, (Reprint, 1964), p. 530.

defined. There are those, politicians and idealists among them, who blame all evils of the society on the caste system and advocate a "casteless society". On the other hand there are others, who deprecate any drastic action to tamper with this age old system. They distinguish between the system as such and the evils associated with it and recommend that action be directed only against the latter. M. N. Srinivas points out that the caste system provides an individual with some of the benefits of a welfare society; that his earliest friends are drawn from his caste; and that it provides a certain amount of cultural homogeneity. He suggests that the vast majority do not regard caste as evil and would probably find it impossible to envisage a social system without it. It is only a small minority, which is numerically insignificant, which sees caste as a menace to national life and thinks that it ought to go.[48]

Caution in formulating the state policy is necessary, particularly when there is a divergence between views of the small elite band of policy-makers and the general public. K. V. S. Iyer warns the former against drawing a parallel between a classless society and a casteless society, pointing out that the former is a

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[48] Op. cit., p. 70.

Western politico-economic idea, while caste is a socio-religious idea.[49] He suggests that the caste system should be left to itself to live or die, according to its own vitality and according to the degree of support it receives from each individual and society as a whole. The state should remain neutral to caste and permit legislation only under certain circumstances, viz., where the prevailing custom is shown to be inhuman, immoral, opposed to decency according to international standards or is injurious to public health.[50] The final decision must necessarily lie with the people, for even where the removal of evils alone is concerned, nothing effective can be done without their co-operation.

According to K. M. Panikkar, evil lies not so much in the caste system as a whole as in the fragmentation of groups into sub-castes. It is this that leads to so-called "casteism". There are over three thousand major units, rigidly exclusive, each claiming superiority, normally permitting neither inter-marriage nor inter-dining, who are like aliens to each other in social life.[51] But the remedy for this does not lie in a direct frontal attack on caste, for caste is too elusive to direct legislation and does not lend itself for such attack. The

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[49] K. V. S. Iyer, Democracy and Caste, (1956), p. 68.

[50] Ibid, pp. 5-6.

[51] Hindu Society at Cross Roads, p. 36.

answer must be found in a general course of action with a view to loosen its rigidity.[52]

The Constitution has wisely left the question of caste alone and concentrates mainly on the removal of evils associated with it. Meanwhile the historic process by which each caste group tries to move up in the caste hierarchy continues, tending to perpetuate the system, which occasioned the need for such upward movement.

Abolition of untouchability

The commitment of the Constitution to the abolition of untouchability is an outstanding example of the use of law in reforming society. Article 17 abolishes untouchability and prohibits its practise in any form. The enforcement of any disability arising from it is made punishable by law. The principal enactment in this regard is the Untouchability (Offences) Act, 1955. It makes illegal the imposition of disabilities on grounds of untouchability in regard to, among other things, temple entry, access to shops and restaurants, the practise of occupations and trades, use of water resources, places of public resort and accommodation, public conveyances, hospitals, educational institutions, residential premises, holding of religious ceremonies and processions,

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[52] Ibid, pp. 16-17.

and the use of jewellery and finery. Denial of any of the rights and the refusal to sell goods or render services is punishable by fine or imprisonment and the power of civil courts to recognise any custom, usage, or right which would result in the enforcement of any disability is withdrawn. There is also legislation enacted by different States on the subject, including several Acts dealing with temple entry.

The object of this legislation is to remove the injustice perpetrated against a section of the people and to elevate them to the same legal status as their fellow countrymen. As the Supreme Court pointed out in a temple-entry case, the right to enter temples symbolises the right of Harijans to enjoy all social amenities and rights. Social justice is the main foundation on which the democratic way of life envisaged in the Constitution rests.[53]

The difficulty in the enforcement of untouchability law lies in the fact that "untouchability" forbidden by law is confined to discriminations against certain not readily defined classes of persons. As Marc Galanter has pointed out, the meaning of "untouchability" prohibited

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[53] Yagnapurushdasji v. Muldas, A.I.R. 1966 S.C. 1119 (1135).

by the Constitution is to be determined by reference to those who have traditionally been considered as "untouchables". It is ascribed by birth rather than attained in life.[54] It does not include every instance in which one person is treated as ritually unclean or polluting. It does not include such temporary and expiable states of uncleanliness as that suffered by women in child-birth, mourners, etc.,[55] or which follows expulsion or excommunication from caste.[56] It does not include treatment as untouchable because of a difference of religion or membership of a different or lower caste. It includes only those practices directed against "those regarded as 'untouchables' in the course of historic development" and "relegated beyond the place of the caste system on grounds of birth in a particular class."[57]

A crucial test for the policy of abolition of untouchability has been the temple entry legislation. Some such legislation had been enacted even prior to independence, especially in the Province of Madras. With the coming into force of the Constitution, Article 25 specifically provided for the throwing open of the Hindu religious

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54 Marc Galanter, "The Religious Aspect of Caste", in D. E. Smith (ed.), South Asian Politics and Religion, p. 277, at p. 292.

55 Devarajiah v. Padmanna, A.I.R. 1958 Mys. 84.

56 Hadibandhu v. Banamali, A.I.R. 1961 Orissa 33.

57 Devarajiah's case (n. 55), at p. 85.

institutions of a public character to all sections of Hindus. But the scope of its operation has been narrowed by the Untouchability (Offences) Act, 1955, which only provides punishment for the exclusion of untouchables from places "open to other persons professing the same religion or belonging to the same religious denomination or section thereof."[58] The scope of the rights conferred on the untouchables by the Act depends on the meaning of the phrases "the same religion" and "the same religious denomination or section thereof." Thus in State v. Puranchand it was held that the exclusion of untouchables from a Jain temple is not forbidden, so long as the ground for exclusion is that they are non-Jains, and not because of their caste.[59] Similarly, in State of Kerala v. Venkiteshwara Prabhu the Kerala High Court ruled that their exclusion from a temple belonging to the Gowda Saraswat Community was not an offence, because they did not belong to the same denomination or a section thereof.[60]

It should not be imagined, though, that social discrimination is limited to the untouchables. Where untouchables were protected by law, it was found that other

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[58] Section 3(1).

[59] A.I.R. 1958 M.P. 352.

[60] A.I.R. 1961 Ker. 55.

sections of Hindus could be excluded from temples with impunity. Some States have either enacted or extended the legislation to remove this anomaly. Thus the Bombay Hindu Places of Worship (Entry Authorisation) Act, 1956, makes it an offence to prevent "Hindus of any class or sect from entering and worshipping at a temple to the same extent and in the same manner as any other class or section of Hindus." This Act is in force in Gujarat, Maharshtra and other areas of old Bombay State. Legislation also exists in some States enabling the Scheduled Castes to gain access to all Hindu temples. Thus the Madras Temple Entry Authorisation Act, 1947, covers the areas of Madras, Andhra Pradesh, and parts of Mysore. This Act, along with the Travancore-Cochin Temple Entry (Removal of Disabilities) Act, is in force in Kerala. The Uttar Pradesh Temple Entry (Declaration of Rights) Act, 1956, is in force in the State of Uttar Pradesh.[61]

The untouchability law has yet to prove its efficacy. After observing its operation in the early years of the Constitution, Sir W. I.Jennings noted that India has not been very successful in its attempt to avoid discrimination on grounds of caste. He added, "it illustrates the fact that one cannot change deeply imbedded

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61 Report of the Commissioner for Scheduled Castes and Scheduled Tribes, 14th Report, p. 20.

social ideas by Constitutional guarantees. It has been said that one cannot make people good by Act of Parliament. It should be added that one cannot overthrow a social system by drafting a Constitution. There seems to be no real change in the attitude of the caste Hindus to the Scheduled Castes."[62] This observation still largely holds good today. Perhaps too much should not be expected too soon, and may be decades, rather than years, must elapse before the objective is fully realised. The experience of Japan illustrates this aspect well. There the discrimination against certain castes was abolished over 80 years ago, but it still subsists in practise.[63]

According to the Commissioner for Scheduled Castes and Scheduled Tribes, up to 1964 only 4540 cases of untouchability were registered, of which 1055 resulted in convictions, and the rest were acquitted, compounded, or were pending.[64] During the year 1967-68, the Commissioner's Organisation received a total of 2981 complaints of various types (untouchability, harrassment, land and housing problems, service matters, and other matters relating to education, drinking water, shops etc.), of which

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62 Sir W. I. Jennings, The Approach to Self-Government, (1956), p. 110.

63 J. H. Hutton, Caste in India, (3rd ed., 1961), p. viii.

64 14th Report, p. 19. This doesnot include figures from some States. Figures for subsequent years not available.

only 88 related to untouchability.[65] Obviously, this does not reflect the true picture. Only a tiny fraction of such instances do ever get reported and the vast majority of them go unheard.

There are strong indications that the practise of untouchability and discrimination based on caste are still widespread. The situation is particularly bad in rural areas.[66] Surveys conducted by the Commissioner's Organisation in different parts of the country have shown that untouchability continues to persist in various forms. Facilities such as the access to temples, tea-stalls, restaurants, barber shops, service by washermen, use of drinking water wells are still being denied to the Scheduled Castes.[67] The prevalence of this state of affairs has been corroborated in the report of the Parliamentary Committee on Untouchability, laid before Parliament in April 1969.[68]

However, to write of this legislation as a total failure would be as unrealistic as to claim that it is a total success. The fact is that, while the early optimism

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65 16th Report (1968), p. 33.

66 14th Report (1967), pp. 14-17.

67 16th Report, see Chapter 3 on Untouchability, at p. 22ff., and Chapter 11 on specific surveys, at p. 45ff.

68 Cited in an article by Narayan Swamy entitled "Plight of Untouchables" in The Times, October 13, 1969, Supplement on India, p. VI. The Report is not yet available in London.

has been proved to be somewhat misplaced, there are signs that it has initiated a process of change, which is bound to accelerate. It has been observed that the anti-untouchability laws are beginning to have effect, as educated and better-off Harijans are trying to get the law enforced and that this tendency is bound to grow with the improvement in their educational and ecomomic conditions.[69] The institution of caste itself is undergoing change. While on the one hand there are signs of growing caste-consciousness, such as the proliferation of caste-banks, hotels, co-operative societies, charities, marriage-halls, conferences and journals in Indian towns, there are other indications of a change taking place in terms of endogamy, inter-dining and occupational diversity by means of horizontal consolidation. The sub-divisions within the caste are becoming less relevant.[70]

Legislation is not a complete cure for untouchability and caste-discrimination. But it is a necessary component in the general course of treatment aimed at removing these evils. It is necessary to enforce it firmly, but not regardless of the susceptibilities of the general public. It must be seen that its rigid enforcement does

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[69] M. N. Srinivas, op. cit., p. 73.

[70] Ibid, p. 89. See also Taya Zinkin, Caste Today, (1962), Chapter IV, "The beginnings of breakdown" and Chapter V, "The law, ideals and politics", p. 38 et seq.

not lead to hostility between groups, and to undue social tension and violence. Compliance of the law should result from its willing acceptance rather than coersion. Reform and improvement in the general standard of living should proceed hand in hand, with particular emphasis on education and economic advancement. Occupational mobility, which would enable the Scheduled Castes to give up their traditional 'unclean' occupations, it is thought, would do much towards removing untouchability.[71] Industrialisation and an expanding economy is expected to lessen the inter-caste tensions, and it is opined that the establishment of a single factory would do more to ease inter-caste relations in a locality than an equivalent sum of money spent on propaganda to that end.[72]

IV. Protective Discrimination

By far the most significant and positive step taken so far towards advancing social equality has undoubtedly been the introduction of a system of protective discrimination in favour of the backward classes. While general development and welfare programmes are aimed at the population as a whole, special concessions are given

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[71] 16th Report of the Commissioner, pp. 13, 23.

[72] M. N. Srinivas, op. cit., pp. 75-76; also p. 104.

to certain backward classes, for which others are made ineligible. Both in terms of the number of benefits and magnitude of the groups eligible for them, the Indian system is unique in theworld.[73] In authorising preferential treatment on the basis of membership of backward groups, it is pointed out, India is experimenting with a method of ameliorating group differences that has been little used, and very possibly Constitutionally prohibited, in dealing with minority problems in the United States.[74]

The necessity for such a measure arose from the justified fear that the general welfare measures would not otherwise reach people at the lower end of the social

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[73] Lelah Dushkin, "Scheduled Caste Policy in India", memiographed typescript, (1966), p. 2.

The total outlay on the welfare of backward classes during the Third Five Year Plan amounted to 113.87 crores of rupees. Of this, Rs. 60.43 crores were earmarked for Scheduled Tribes, Rs. 40.40 crores for Scheduled Castes, and Rs. 9.04 crores for other backward classes. During the year 1961-62, scholarship grants to Scheduled Castes, Scheduled Tribes and other backward classes amounted to Rs. 167.91 lakhs, 30.95 lakhs, and 87.70 lakhs respectively, - a total of Rs. 286.56 lakhs: Figures cited in Tables 56 and 57 in R. D. Agarwal, Economic Aspects of Welfare State in India, (1967), pp. 203-204. The Fourth Five Year Plan involves an outlay of Rs. 180 crores, of which Rs. 100 crores are earmarked for Scheduled Tribes, Rs. 66 crores for Scheduled Castes and Rs. 14 crores for other schemes: Fourth Five Year Plan, (1966), p. 372. (The expression 'lakh' and 'crore' signify 100,000 and 10,000,000 respectively).

[74] Marc Galanter, "Protective Discrimination for Backward Classes in India", 3 J.I.L.I., (1961), p. 39, at p. 41.

scale. The Backward Classes Commission reporting in the mid-fifties commented, —

> In the prevailing conditions of India, and particularly because of her caste ridden society, some of the general uplift measures do not reach the weaker section of the population, and even where they do reach the lower strata of society, they trickle down in very small proportions. It is generally the strong and most vocal that manage to snatch most of the help. It is therefore necessary that special provision should be made specifically for those communities that are extremely backward.[75]

This was despite the fact that the scheme had been already in operation for nearly five years when the Commission reported.

Thus it was clear from the beginning that a mre declaration of the legal status of equality was not sufficient. Without some positive steps to improve the soci-economic condition of the backward classes this would have meant a perpetuation of inequality. So a scheme of special benefits was instituted in their favour. The purpose was to accelerate their advance towards social equality through a short-cut which sought to eliminate the painfully slow climb up the social ladder. The argument in favour of such a policy was that, despite its shortcomings and risks, it was the only realistic way to proceed.[76]

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[75] Report of the Backward Classes Commission, (1956), p. 148. See also the forwarding letter, p. xxi.

[76] Lelah Dushkin, op. cit., p. 5.

The main areas where this policy is pursued are education, the public services and political representation. These are what Sorokin calls 'channels' (or 'staircases', 'elevators') of vertical mobility, which permit individuals to move up (and down) from stratum to stratum.[77] The principal Constitutional provisions in this regard are contained in Articles 15(4), 16(4) and in Part XVI thereof. Clause (4) of Article 15 states —

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

Clause (4) of Article 16 has similar provision with regard to public employment —

> Nothing in this Article shall prevent the State from making any provision for the reservationof appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in services under the State.

Article 335 enjoins on the State to pay particular attention to the claims of the Scheduled Castes and the Scheduled Tribes in the matter of public employment. Articles 336 and 337 provide for the interests of the Anglo-Indian community as regards services and education. Articles 330 to 333 deal with the political representation of these communities.

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77 P. A. Sorokin, Social and Cultural Mobility, (Reprint, 1964), p. 164.

The system of protective discrimination is envisaged as an exceptional and temporary measure for the purpose of mitigating the inequalities between the communities and is intended to disappear with these inequalities. A definite time limit has been prescribed with regard to political representation. Originally this was introduced for a ten year period, but was extended for a further period of ten years by the Constitution (Eighth Amendment) Act, 1959. Unless renewed again this will cease in early 1970. But no such time limit has been prescribed in the Constitution as regards reservation of seats in educational institutions or posts in public services for the backward classes genrally. It is a matter of discretion for the Union and the State governments. Protective discrimination is not mandatory, but only permitted.[78] It does not confer a fundamental right on the backward classes to such arrangements.[79] The government may constitutionally omit to make any such preferences, or make as few as it wi$hes.[80] The state is

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[78] B. S. Kesava Iyengar v. State of Mysore, A.I.R. 1956 Mys. 20(23); Rajendran v. Union of India, A.I.R. 1968 S.c. 507; Chamaraja v. State of Mysore, A.I.R. 1967 Mys.21(23).

[79] K. V. Rao, Parliamentary Democracy of India, (2nd ed., 1965), p. 230.

[80] Marc Galanter, "Protective Discrimination for Backward Classes in India", 3 J.I.L.I., p. 39, at p. 44.

entitled to make such provision by executive action and it is not necessary to enact legislation for this purpose.[81]

Criteria for eligibility of benefits

A notable feature of the scheme of protective discrimination is that, in this context, the Constitution shifts the emphasis from the individual citizen to a group. The provision for protective discrimination is the only exception to the Constitutional ban on the use of communal criteria by government.

To be eligible for special benefits, a group must be one of the "socially and educationally backward classes of citizens." The test of social and educational backwardness is expressly mentioned in Articles 15(4) and 340(1), and is implied in Article 16(4). In Triloki Nath v. State of J. & K. the Supreme Court rejected the contention of the State that the difference in the phraseology in Article 15(4) and 16(4) meant that, for the purpose of Article 16(4) the sole test of backwardness was one of inadequacy of representation in the services of the State. It said that to accept it would mean the creation of a privilege in favour of those sections of the people who, thogh socially and educationally advanced,

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81 Mangal Singh v. State of Punjab, A.I.R. 1968 Punj. 306, at p. 309.

have taken to other avocations and exclude those who are really backward. To attract Article 16(4), therefore, it was necessary to satisfy two conditions, namely, (i) a class of citizens must be socially and educationally backward, and (ii) the said class is not adequately represented in the services under the State.[82] This test of backwardness is a factor common to all the three categories of backward classes contemplated in the Constitution. In Balaji's case the Supreme Court has held that the bracketing of socially and educationally backward classes with the Scheduled Castes and the Scheduled Tribes in Articles 15(4) and 338(3) showed that in the matter of backwardness they were comparable to the latter.[83] Similarly, the expression 'backward classes' in Article 16(4) includes the Scheduled Castes and the Scheduled Tribes, though they are not expressly mentioned therein.[84] But his should not obscure the fact that the Scheduled Castes and the Scheduled Tribes are more easily ascertainable on account of their distinctive characteristics and that, as laid down in Heggade Janardhan Subbaraya v. State of Mysore,[85] separate arrangements can be made for reservation of seats in their favour.

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82 A.I.R. 1967 S.C. 1283, at p. 1286.

83 A.I.R. 1963 S.C. 649, at p. 658.

84 Rangachari v. General Manager, S. Rly., A.I.R. 1961 Mad. 35, at p. 39; Desu Rayudu v. A.P. Public Service Commission, A.I.R. 1967 A.P. 353.

85 A.I.R. 1963 S.C. 702.

Determination of 'class'

The provision for protective discrimination by reference to 'backward classes' raises the questions as to what is meant by a 'class' and the test of its social and educational backwardness. No categorical answers are to be found to these questions.

In its ordinary connotation the expression 'class' means a homogenous section of the people grouped together because of certain likeness or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like.[86] But a simple answer to the question "what is a 'backward class'" would be that it is a section of the population, which, at the discretion of the state, is entitled to 'protective discrimination'. In G. Vishwanath v. Govt. of Mysore it was pointed out by the Court that it is the State which has to determine who the socially and educationally backward classes are. Though the State's decision is open to judicial review, in the nature of things, the State is in a better position in this respect and the law presumes that in passing an order the State has acted in the

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86 State of A. P. v. P. Sagar, A.I.R. 1968 S.C. 1379, at p. 1382; Triloki Nath v. State of J. & K., A.I.R. 1969 S.C. 1, at p. 3.

interests of society. It is not sufficient to show that the impugned order is not the very best that could have been passed but it must be further proved that the same directly or indirectly contravenes one or the other of the Constitutional provisions or is a fraud on the Constitution.[87] Ordinarily, the decision of the State Government to the effect that a particular class or caste is socially and educationally backward will prevail, subject of course, to the right of a party to satisfy the High Court that the test of backwardness adopted by the Government was based on irrational or irrelevant grounds.[88] The basis on which classification of backward classes may be made would vary from State to State.[89]

Among the criteria frequently used for determining backward classes have been caste, religion, education, and economic conditions. Of these, caste is by far the most prominent, and, despite the fact that it is one of the grounds on which discrimination is forbidden in Articles 15(1) and 16(2), it still is the criterion most widely used for this purpose. Perhaps this is not surprising in the light of the observations of the

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87 A.I.R.1964 Mys. 132 (135).

88 Chait Ram v. Sikandar Choudhary, A.I.R. 1968 Pat. 337 (339).

89 Ramakrishna Singh v. State of Mysore, A.I.R. 1960 Mys. 338 (345).

Backward Classes Commission on this subject, referred to above.[90] The legal position as to the use of different criteria is best illustrated by reference to judicial opinion with regard to the criterion of caste.

The position in this respect was stated by the Supreme Court in M. R. Balaji v. State of Mysore,[91] and clarified in two subsequent cases. In that case an Order of the Mysore Government reserving seats for backward classes in educational institutions under Article 15(4) was challenged on the ground, inter alia, that the classification made on the sole ground of caste was unconstitutional. The Court ruled that the impugned order made a classification based only on caste without regard to other relevant factors and that such a classification was not permissible under Article 15(4).[92] Article 15(4) referred to backward classes and not backward castes; indeed the test of caste would break down as regards backward communities which had no caste.[93] But caste could be one of the relevant factors in determining social backwardness. "Social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may

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90 P. 329, supra.
91 A.I.R. 1963 S.C. 649.
92 Ibid, at p. 663.
93 Ibid, at p. 659.

belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens."[94] The Court 'clarified' this decision in Janardhan's case[95] by saying that it had not in any way invalidated the reservation for Scheduled Castes and Scheduled Tribes, for whom separate reservation can be made. The decision in Chitralekha v. State of Mysore 'explained' a part of the decision in Balaji's case pertaining to the relevance of caste in determining backwardness. It said that though caste was a relevant test in determining social backwardness of citizens, it was not obligatory to apply that test and a determination of social backwardness was not void merely because it ignored caste, if such determination was based on other relevant criteria.[96] The line laid down in these decisions has been followed in subsequent decisions.

Thus, in Nanda Kishore Sharma v. State of Bihar, the Patna High Court held that the Orders of the State Government, reserving seats in medical colleges were illegal as the classification of the backward classes was made solely on considerations of caste.[97] The Supreme

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94 Ibid, at p. 659.

95 A.I.R. 1963 S.C. 702.

96 A.I.R. 1964 S.C. 1823, at p. 1833.

97 A.I.R. 1965 Pat. 372, at p. 373.

Court struck down similar orders of the Government of Andhra Pradesh as the classification therein proceeded on the bases of caste and community.[98] In Triloki Nath v. State of J. & K., the Supreme Court again reiterated that the expression 'backward class' is not to be used as synonymous with 'backward caste' or 'backward community' and held that for the purpose of Article 16, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted.[99]

What the Constitution prohibits is a discrimination based solely on caste, when there is no nexus between it and backwardness. If, however, a group of persons, clearly identifiable by their caste, is really backward socially and educationally, and is, on that basis, given the benefit of certain reservations, the ineligibility of a person belonging to another caste to secure those reservations is clearly not based on the ground of caste but is a consequence of a reservation properly made in favour of a backward class.[1] The principle that a classification of a community as backward, solely on considerations of caste, is invalid does not apply to

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[98] State of A.P. v. P. Sagar, A.I.R. L968 S.C. 1379.

[99] A.I.R. 1969 S.C. 1, at p. 3.

[1] S. A. Partha v. State of Mysore, A.I.R. 1961 Mys.220(230).

those cases where, though the backward community is described conveniently by its caste name, it is nevertheless socially and educationally backward. In such cases, the classification is not based solely on caste but on the fact that the community is indisputably backward, socially and educationally, but is more conveniently described by its caste.[2] In Rajendran v. State of Madras[3] the Supreme Court, following Balaji's Case[4], has reiterated this principle: "a caste is also a class of citisens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens."[5]

Whether a particular section of the population is a backward class for the purposes of protective discrimination has to be decided by reference to particular circumstances. In State of Kerala v. R. Jacob[6] the Kerala High Court upheld an order of the State Government reserving seats in medical colleges for i)Ezhavas, Muslims, and Latin Catholics (including Anglo-Catholics) and

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[2] Chait Ram v. Sikandar, A.I.R. 1968 Pat. 337 (339).

[3] A.I.R. 1968 S.C. 1012.

[4] A.I.R. 1963 S.C. 649.

[5] Rajendran v. State of Madras, A.I.R. 1968 S.C. 1012,

[6] A.I.R. 1964 Ker. 316.

ii) the children of outstanding sportsmen, but struck down the reservation in favour of the children of medical practitioners, on the ground that it was based on a classification which had no rational relation to the object to be secured. Where a means-cum-caste or community test was adopted and a particular aggregate annual income was set for the determination of a backward class, it was held that, merely because the income of a person is less than such income limit, he will not be entitled to claim that he belongs to backward class on the basis of the test of income.[7]

Test of backwardness

Perhaps the greatest difficulty in administering the policy of protective discrimination is the lack of defining criteria for ascertaining backwardness. There is an infinite variety in conditions of backwardness throughout the country, which necessitates decisions to be made by reference to local areas. Hence no general standard can be laid down.

The Backward Classes Commission thought that

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[7] Laila Chacko v. State of Kerala, A.I.R. 1967 Ker. 124, at pp. 126-128.

the backward classes are those,

> who do not command adequate and sufficient representation in government service...; those who do not command a large amount of natural resources such as, land, mines, forests, money or industrial undertakings; those who live in insanitary surroundings and in ill-ventilated houses; those who are nomadic; those who live by begging and other unwholesome means; those who are agricultural labourers or those who practise unremunerative occupations without any means to enter better paying professions; and those who on account of poverty, ignorance and other social disabilities are unable to educate themselves or produce sufficient leadership, ...; (they are) the communities, classes or social groups who occupy an inferior social position in relation to upper classes and who answer the above discriprition...[8]

The Commission adopted, for general guidance, the criteria of low social status linked to caste, lack of educational development, inadequate representation in government service, and inadequate representation in the field of trade, commerce and industry.[9] As can be seen, this by no means solves the problem. The Government of India have left it to the State Governments to choose their own criteria for backwardness, at the same time indicating a preference for the economic factor.

Factors which are responsible for backwardness are many and interdependent, among which three main kinds can be named: social, educational and economic.

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[8] Report, p. 46.

[9] Ibid.

Social causes for backwardness derive from the stratification of society. According to Sorokin, social stratification of a given population into hierarchically superposed classes leads to the existence of upper and lower social layers. Its basis and very essence consists in an unequal distribution of rights and privileges, duties and responsibilities, social values and privations, soial power and influences among members of the society.[10] It is clear that in India this stratification is mainly institutionalised through caste. It is pointed out that gradations of caste extend to the lowest level, leading to hierarchical grouping even among those considered backward and consequently the existence of dominant castes among them. It is interesting that while some of these castes claim the equality gruaranteed to them, they have an vested interest in denying it to those who are lower than themselves.[11]

Secondly, lack of educational development shuts off from a community many of the opportunities for advancement in the social and economic sphere. An analysis of the social composition of students in institutions of higher education could be an index to the relative development of various communitits. It is indicated by

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[10] P. A. Sorokin, op. cit., p. 11.

[11] M. N. Srinivas, op. cit., p. 105.

surveys that traditionally privileged groups are very strongly represented, while the under-privileged are poorly represented in such institutions.[12]

Thirdly, the economic factor is perhaps the most vital of all. In the ultimate analysis poverty is the primary cause of all backwardness. In this respect one can with advantage refer to American writers, who have considered the economic basis of discrimination in that country.[13] C. S. Johnson has pointed out how the low economic status of the American Negro has threefold consequences which work against national integration: i) by perpetuating the low economic status with all its implications of poorer health, education, and family life; ii) these conditions in turn providing a further justification to the majority for further segregation and discrimination, being convinced of their inferiority; and iii) this in turn sapping the ambition of the Negro Youth, with all its consequences.[14] Though social conditions in different countries are different, there can be no doubt as to the general validity of these observations. With regard to Harijans, in particular, it is observed

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[12] Ibid, p. 93.

[13] e.g., Simpson and Yinger, Racial and Cultural Minorities, (3rd ed., 1965), p. 497.

[14] "The integration of racial minorities in American society", in L. Bryson and others (ed.), Conflicts of Power in Modern Culture, (1947), p. 267, at p. 273.

that, so long as they are not economically independent, the rights which the Constitution guarantees them will not be translated into practise.[15]

In Balaji's case the Supreme Court considered the test of backwardness in some length. It held that the concept of backward classes was not relative, in the sense that any class which was backward in relation to the most advanced class in the community must be included in it.[16] The backwardness must be both social and educational and not either social or educational.[17] Caste was a relevant factor in determining social backwardness. Occupations followed by certain classes (Which are looked upon as inferior) may contribute to social backwardness; and so may the habitation of people. The problem of social backwardness is mainly a problem of rural India.[18] But a division of backward classes into backward and more ackward classes was not called for. This in substance amounted to a division of the population into the most advanced and the rest, the rest being divided into backward and more backward classes and this

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[15] M. N. Srinivas, op. cit., p. 104.

[16] A.I.R. 1963 S.C. 649, at p. 658.

[17] Ibid.

[18] Ibid, p. 659.

was not warranted by Article 15(4).[19] The Court was doubtful of the literacy test adopted in the impugned order, and held that, even if it were correct, to classify any class as backward on that basis, the average of that class must be "well below" the average of 6.9 per thousand. The Order was void in that it classified communities which were just below 6.9 per thousand as backward.[20] Backwardness, social and educational, is ultimately and primarily due to poverty.[21]

Where an Order of the Mysore Government defined socially and educationally backward classes on the basis of i) the annual family income of the family of a student and ii) the nature of occupation of parent or guardian, it was held that the student had to prove that the occupation in question fell within the category of "any other occupation involving manual labour". The occupation of a Purohit did not fall within this category.[22] The occupations contemplated by such an Order were not casual or temporary occupations but the habitual occupations of families. Hence a school teacher who took to agriculture after his retirement was not a member of the backward

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[19] Ibid, p. 661.

[20] Ibid, p. 660.

[21] Ibid, p. 664.

[22] Sudha v. Selection Committee for Admission to Medical Colleges, A.I.R. 1967 Mys. 221, at p. 222.

classes.[23] In a case where caste and poverty were relevant considerations, it was held that a student's income certificate was not adequate and that of his father was required, although the father and son were separated.[24] Poverty played a great part in backwardness and customs, usages, caste and occupation were relevant factors.[25] But caste cannot be the sole or dominant criterion.[26]

The scope and extent of protective discrimination

Generally, the disputes that arise before courts are not as to whether special provision for backward classes should be permitted, but concern the tests to be adopted in determining backwardness, and the scope and extent of such special provision. The problem of determining backwardness has already been considered in the preceding section.

In interpreting the provisions relating to protective discrimination two aspects must be constantly kept in view: first, that they are exceptions to the fundamental right of non-discrimination and second, that they are nevertheless means of achieving an egalitarian society

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23 B. Subhas Chandra Shetty v. State of Mysore, A.I.R. 1969 Mys. 48 (50-51).

24 Abhay Kumar v. Principal, D.M.College, A.I.R. 1968 Pat. 504 (506).

25 Hariharan Pillai v. State of Kerala, A.I.R. 1968 Ker. 42.

26 Ibid; Desu Rayudu v. A.P. PSC.,A.I.R. 1967 A.P. 353.

in keeping with the Preamble and the Directive Principles of the Constitution. Though apparently there is dichotomy of principles, there is unity of purpose. The task is one of achieving a balance between the two conflicting principles. This is illustrated by reference to the judicial interpretation of Articles 15 and 16.

Article 15, as originally enacted, did not include the present clause (4) permitting special provision for backward classes. Its inclusion was brought about by the decision of the Supreme Court in State of Madras v. Shrimati Champakam Dorairajan.[27] This was an appeal from the decision of the Madras High Court in Shrimati Champakam Dorairajan v. State of Madras,[28] where the High Court had held that the Communal G. O. of the State Government, fixing proportionate numbers of seats for different communities in medical and engineering colleges violated Articles 15(1) and 29(2) and therefore was void. The Supreme Court upheld this decision. Both the High Court[29] and the Supreme Court[30] thought it significant that these Articles did not contain a provision analogous

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[27] A.I.R. 1951 S.C. 226.

[28] A.I.R. 1951 Mad. 149.

[29] Ibid, at p. 167.

[30] A.I.R. 1951 S.C. 226, at p. 228.

to Article 16(4). The Supreme Court rejected the argument that, having regard to the Directive Principles, and particularly Article 46, the State was entitled to maintain the Communal G. O. It held that Directive Principles cannot override Fundamental Rights, but have to conform and run subsidiary to them. Accordingly the appeal could not be sustained. To overcome the situation created by this decision, Parliament amended the Constitution. Clause (4) was added to Article 15 by the Constitution (First Amendment) Act, 1951.

Both clauses, clause (4) of Article 15 and clause (4) of Article 16, are exceptions to the general rule that the state shall not discriminate between its citizens. But while Article 16(4) specifically concerns reservations for backward classes in government services, Article 15(4) is of much wider application. It enables the state to make "any special provision" for the advancement of any socially and educationally backward classes of citizens. However, it is noteworthy that this clause has been most frequently invoked before the courts in connection with the reservations of seats in educational institutions. Though both the clauses concern different aspects of a special provision, there is common ground in the matter of their interpretation.

The question as to the extent of reservation which is permitted under Articles 15(4) and 16(4) has come up before the courts on several occasions. In Balaji's case[31] the Supreme Court considered the nature of these Articles. It pointed out that Article 15(4) was a special provision, in derogation of the fundamental rights of citizens under Article 15(1) and 29(2), to both of which Article 15(4) was a proviso. It would be unreasonable to construe this special provision as justifying a total reservation of seats as contended by the State.[32] It had to be seen that the national interest did not suffer by the exclusion of students with superior qualifications and merit. It struck down the impugned order, which had reserved 68 per cent of the seats for the backward classes. It held that generally speaking the reservation must be less than 50 per cent, but did not lay down any hard and fast rule.[33] In Ramesh Chander Garg v. State of Punjab a reservation of 60 per cent of seats was held invalid.[34]

It is the fundamental right of a citizen, whether he belongs to a backward community or not, to secure

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31 A.I.R. 1963 S.C. 649.

32 Ibid, at p. 662.

33 Ibid, at p.663.

34 A.I.R. 1966 Punj. 476.

admission to any educational institution maintained by the state without being discriminated against. The rule should be applied in such a way as to protect the interests of students of the backward classes without at the same time causing prejudice to students of other communities.[35] In a case from the State of Mysore it was revealed that, in the notification issued by the Government, the list of backward classes included 95 per cent of the population of the State and excluded only a few communities, viz., Brahmins, Kayasthas, Banias, Anglo-Indians and Parsis, from getting the benefit of seats reserved for all other communities of the State. It was held that it was a discrimination against the communities who had been excluded and who represented only five per cent of the population, than a provision in favour of backward classes. The object of Article 15(4) was not to enable the state to discriminate against a small section of the population or to permit a provision being made for comparatively backward classes, i.e., classes who, compared with the most advanced classes, were backward. The Order was therefore unconstitutional.[36]

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[35] Puppala Sudarsan v. The State of Andhra Pradesh, A.I.R. 1958 A.P. 569 (571).

[36] Ramakrishna Singh v. State of Mysore, A.I.R. 1960 Mys. 338 (348-352).

In Abdul Latiff v. State of Bihar an order of the State government giving preference to Scheduled Castes and Scheduled Tribes in the settlement of excise shops was held unconstitutional, in as much as the effect of the order was not merely to give preference to candidates belonging to Scheduled Castes and Scheduled Tribes, but to exclude candidates from all other communities in cases where there was a single candidate from the former. The Patna High Court pointed out that, as a matter of construction, it is manifest that Article 15(4) is not an independent or substantive enactment, but is an exception or a qualification to the main guarantee under Article 15(1). It is therefore not permissible to interpret Article 15(4) in such a way as to destroy or nullify the meaning of the guarantee under Article 15(1). It is because the interest of the society as a whole is served by promoting the advancement of the weaker elements that Article 15(4) authorises special provision to be made. But if a provision, which is in the nature of an exception, completely excludes the rest of the society that clearly is outside the scope of Article 15(4).[37]

On the other hand, the provisions relating to protective discrimination should not be so interpreted

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[37] A.I.R. 1964 Pat. 393, at pp. 394, 395.

as to be detrimental to the interests of backward classes. In V. Raghuramulu v. State of A.P. it was held that a circular of the State Government, fixing a maximum of 15 per cent of the total number of places in any faculty to be reserved for backward classes, proceeded on the assumption that in no event could a larger percentage be secured by those classes in open competetion. Where such an assumption was belied, the reservation, far from conferring a right, abridged a fundamental right. However, the Court did not declare the whole Order void, but directed that it should be applied to instances where the underlying assumption was found to exist.[38] This rule was followed in Ramakrishna v. State of Mysore.[39]

The rule reserving seats for backward classes ought not be so worded as to prevent them from getting a larger number of seats on their merit, because, in that event, it would contravene their right under Article 29(2). But the rule should not be so worked as to divide the matter into two compartments, viz., that some students belonging to backward classes were to be allowed to compete for the general pool and some for reserved seats, as that would cause great hardship to students belonging

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[38] A.I.R. 1958 A.P. 129.

[39] A.I.R. 1960 Mys. 338 (352).

to other communities. All seats should be pooled, guaranteeing a minimum number of seats to backward classes.[40] The issue again came upe before the Kerala High Court in R. Jacob Mathew v. State of Kerala. The Court reiterated that, notwithstanding the fact that a class has been treated as backward and given protection under Article 15(4) by providing a particular percentage for that group, it does not take away the right of any member of that group from competing on the general merit basis and securing as many seats as possible. These seats are obtained by them in their individual right under Article 29(2) and not as members of a backward class. The Court said that to hold otherwise would means that the provisions of Article 15(4), which are really intended for the advancement of the weaker sections of citizens, are really invoked for the purpose of causing prejudice to the members of that class.[41]

The scope of Article 16(4) was considered by the Supreme Court in Venkataramana v. State of Madras,[42] where a Chmmunal G. O. of the Madras Government reserving posts for different communities was challenged. The Court held that the reservation of posts in favour of any

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[40] P. Sudarsan v. State of A.P., A.I.R. 1958 A.P. 569.

[41] A.I.R. 1964 Ker. 39 (64).

[42] A.I.R. 1951 S.C. 229.

backward class cannot be regarded as unconstitutional. But the ineligibility of a Brahmin for any of the posts reserved for any of the other communities was based only on the ground of his being a Brahmin. This was not sanctioned by Article 16(4) and was therefore an infringement of a citizen's right under Article 16. Accordingly the Communal G. O. was declared void and illegal.[43]

The extent of reservation that can be made under Article 16(4) was considered by the Supreme Court in T. Devadasan v. Union of India[44] in the light of the decision in Balaji's case.[45] In the latter the Supreme Court had observed that in this matter what was true of Article 15(4) was equally true of Article 16(4). There was no doubt that the Constitution makers assumed that, while making adequate reservation under Article 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would by eliminating general competition materially affect efficiency. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would

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[43] Ibid, at p. 229.

[44] A.I.R. 1964 S.C. 179.

[45] A.I.R. 1963 S.C. 649.

be liable to be challenged as a fraud on the Constitution.[46] Devadasan's case involved a Memorandum of the Government of India, whereby a certain percentage of vacancies were reserved for Scheduled Castes and Scheduled Tribes, adopting the principle of "carry forward" in the second and third year. The actual effect of this rule was that, in the year in question, over 64 per cent of vacancies were reserved for them. The Supreme Court held that Article 16 conferred a right on each individual citizen and that, in order to effectuate that right, each year of recruitment must be considered by itself. The reservation for backward communities each year should not be so excessive as to create a monopoly or to interfere unduly with the legitimate claims of other communities. Article 16(4) was a proviso or explanation to Article 16(1) and it cannot be so interpreted as to nullify or destroy the main provision.[47] The Court said that, generally speaking, reservation ought to be less than 50 per cent. As, in the present case, it was as high as 64 per cent the "carry forward" rule was unconstitutional.

The question as to the nature of posts to be reserved came up before the Supreme Court in General

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[46] A.I.R. 1963 S.C. 649, (664).

[47] A.I.R. 1964 S.C. 179, (187).

Manager, S. Rly. v. Rangachari, where the issue was whether selection posts were within the scope of reservation under Article 16(4). The Court held that it would be unreasonable to treat 'posts' as a term of art and equate it with 'ex-cadre' posts. The 'posts' were 'inside' the service and not outside. The condition precedent for the exercise of the power conferred by Article 16(4) was that a backward class of citizens should not be adequately represented in the service. This may refer either to numerical inadequacy or to the qualitative inadequacy of representation. Socially and educationally backward classes required adequate representation not only in the lowest rung but also it was necessary that they should aspire to secure representation in selection posts as well.[48] The Punjab High Court followed this broad and liberal construction of the words 'appointments' and 'posts' in Suresh Kumar v. Union of India in holding that it was within the powers of the State under Article 16(4) to provide for reservation of appointments and also to provide for reservation of selection posts. This construction was necessary to give effect to the intention of the Constitution-makers to provide for adequate representation of backward classes in the services.[49] At the same time,

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[48] A.I.R. 1962 S.C. 36.

[49] A.I.R. 1966 Punj. 443.

there is nothing to prevent the allocation of seats reserved for Scheduled Castes and Scheduled Tribes to other backward classes of citizens, when there are no qualified candidates belonging to the former category or in preferring a candidate belonging to a more backward class to another candidate of a backward class which has got better representation in services.[50]

Article 16(4) cannot, however, be utilised to demote a person lawfully appointed in order to make room for a candidate belonging to the backward classes. Thus, in Sudama Prashad v. Divisional Supt., W. Rly., where the petitioner was reverted from an officiating post for the sole purpose of promoting a candidate belonging to the Scheduled Caste, it was held that the said order violated Article 16 and was set aside.[51]

Finally, the provisions relating to protective discrimination must always be interpreted in their proper perspective by reference to the objectives to be achieved. The Supreme Court's observations in Balaji's case[52] in this regard are of general validity. It emphasised that in taking executive action to implement the policy of

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[50] B. S. Kesava Iyengar v. State of Mysore, A.I.R. 1956 Mys. 20(25).

[51] A.I.R. 1965 Raj. 109 (111-114).

[52] A.I.R. 1963 S.C. 649.

Article 15(4), it is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Article 46 and the Preamble of the Constitution. It is for the attainment of social and economic justice that Article 15(4) authorises the making of special provision for the advancement of backward classes, even if such provision may be inconsistent with some of the fundamental rights. The context, therefore, requires that executive action taken by the State must be based on an objective approach, free from all extraneous pressures. The said action is intended to do social and economic justice and must be taken in a manner that justice is seen to be done.[53]

A critique of the policy: need for a reappraisal

The policy of protective discrimination has now been in operation for twenty years. Though this cannot be considered a long period of time in the life of a nation or in terms of social change, it is long enough to assess the efficacy of this policy and the trend of its results. Some of the questions which need answering are, whether the policy has fulfilled its expectations; whether it ought to be continued; and if so, on what basis and for how long.

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[53] Ibid, pp. 663-664.

Among its drawbacks which have become apparent in the light of past experience three may briefly be touched upon. First of all, it should be realised that what this scheme is designed to do is really small in relation to the larger problem of backwardness generally. It has been pointed out that, as it is, it hardly touches the fringes of the real problem, and it is asked how such a policy can hope to improve the lot of millions who are hardly touched by it.[54]

Secondly, the adoption of the criterion of group membership for eligibility of benefits has resulted in an increase of caste and communal consciousness, a factor which it was meant to remove. It has created a vested interest in the survival of caste, and it may be said that a new caste, the Scheduled Caste, has been given Constitutional blessing. The necessity of having to compile caste or class lists has led to difficulties in its operation. Different groups, often relatively advanced than the rest, vie with each other to be classified as backward, and in some instances have been successful in doing so by exerting political pressure.

Third, and perhaps the most important, criticism is that protective discrimination has not been effective

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[54] Lelah Dushkin, op. cit.

enough, even within its limited sphere. The benefits distributed through it have often been dissipated by spreading them over a very large population. It must be borne in mind that the policy was meant to be of an exceptional character. But instances are not lacking where the exception has become the rule, and in one State as much as 95 per cent of the population was declared as backward.[55] So expanded has the term 'backward classes' become that, some States have felt it necessary to subdivide them into 'backward' and 'more backward' (Mysore), and 'backward' and 'most backward' (Madras).[56] One factor which strongly emerges from the various Reports is that, among those classified as backward classes, there are some who are in an extreme state of backwardness and that generally help has not reached those people in the greatest need. The Backward Classes Commission has pointed out that these are left out of the race, while the more vociferous and dominant among the groups manage to corner the benefits.[57] The Scheduled Areas and Scheduled Tribes Commission has pointed out that at the base of the different levels among tribals was a class which was in an

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[55] See p. 373, supra.

[56] Report of the Committee on Emotional Integration, (1962), p. 84.

[57] Report, p. 148. See also pp. xx-xxiii.

extremely underdeveloped stage, and at the top was a class which could very well afford to forgo any further help.[58] The Advisory Committee on the Revision of the Lists noted that "a lion's share of the various benefits earmarked for the Scheduled Castes and the Scheduled Tribes is appropriated by the numerically larger and politically well organised communities. The smaller and more backward communities have tended to get lost in democratic processes, though most deserving of special aid..." The Committee recommended that the distribution of benefits needed to be focused on more backward and smaller groups on a selective basis.[59] The continuation of this state of affairs with regard to backward classes, and in particular Scheduled Castes and Scheduled Tribes, has been confirmed more recently by the Commissioner for Scheduled Castes and Scheduled Tribes.[60]

Nevertheless, despite shortcomings in its operation, the principle of protective discrimination has much to commend itself. Special circumstances of backwardness in which a sizable proportion of the population lived

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58 Report of the Scheduled Areas and Scheduled Tribes Commission, (1961), forwarding letter.

59 Report of the Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes, (1965), p. 8.

60 16th Report, (1968), pp. 10-11, 76.

could be overcome only by special measures designed to meet them. Although the present scheme has not achieved the degree of effectiveness hoped for, nonetheless it has proved a useful weapon in breaking the traditional co-relationship between castes and communities on the one hand and backwardness on the other. Thousands of people, who otherwise would not have had opportunities of higher education and decent jobs, have been helped to secure these, while special projects have been implemented to improve the lot of backward communities as a whole. Further it is evident that, apart from distributing material benefits, this schemehas helped to create in them an awareness of a better life and hope for the future.

However, the continuation of this policy calls for careful consideration in the light of past experience and the objectives. It must be ensured that this scheme, which was designed as a temporary measure, does not become a permanent feature. That would neither be in the interests of the groups involved nor those of the country generally. It would only promote in the former, complacency and a false sense of security. Vested interests among the groups are bound to arise, creating a sense of grievance among the general public. The result would be mutual isolation and the keeping alive of the consciousness of existing divisions. Ideally, the scheme must be brought to an end at the earliest possible

opportunity.

But while the temporary nature of the scheme cannot be over-emphasised, a glance at the existing socio-economic conditions leads to the inevitable conclusion that there is no real alternative to it in the immediate future. The condition of the really backward people has hardly shown any appreciable improvement over the years and it is only proper that special attention should be given to them and continue till it is done. On account of the rapidly chaniing conditions, it is hard to predict the length of time necessary for this purpose. Considering that backwardness is a matter of generations rather than years, a further period of 15 to 20 years seems a fair guess. But should the circumstances warrant it at the end of this period, it oughtto be continued further.

To make the policy more effective some changes in its implementation are necessary. At present it is characterised by an element of uncertainly as to its future. Although the scheme is understood to be of a temporary character, the Constitutional provisions themselves are silent in this respect, except those relating to political reservations. With regard to political reservations the striking factor is the abruptness with which it is meant to cease at the end of the prescribed period. The success of the scheme depends on making it evident

in unmistakable terms that it is a temporary measure and in providing for its phased withdrawal. The government must, in consultation with various agencies acquainted with the situation, announce an integrated plan lasting over a number of years, and declare therein the programme for its automatic and graduated reduction year by year. Together with the scaling down of the benefits, attempts should be made to increase the self-reliance of the people involved. The present system is less conducive to this and it is not unlikely that in some fields the ability of the backward classes to stand on their own feet will be just as much at the end as it was in the beginning of the scheme. The case of the political reservations serves as a good illustration in this respect. In the last General Elections only one member of the Scheduled Tribes was elected to Parliament from a general seat, but not a single person belonging to the Scheduled Castes was so elected, apart from the seats reserved for them.[61] Their position in the forthcoming General Election can only be imagined, should reservations for them cease totally in 1970. In the circumstances, a gradual reduction in the number of seats reserved, together with efforts to induce political parties to accept members of these communities as their official candidates seems to be the

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[61] Report of the Commissioner for Scheduled Castes and Scheduled Tribes, (16th Report, 1968), p. 26.

best course.

In the allocation of benefits, proportionately greater emphasis should be placed on educational development than on the representation in public services and in politics. It is not suggested here that the last two are not important, or that the backward classes are already adequately represented therein. In fact, an analysis of the representation of Scheduled Castes and Scheduled Tribes in services shows that they are still under-represented therein, particularly in the upper echelons of service.[62] This is also true of other groups. Humayun Kabir has drawn attention to the inadequate representation in the services of the religious minority communities, and has suggested that all backward classes, who are not adequately represented in the services should be provided with reservations for a period of 25 years. He has suggested that representation in the services should be the test of backwardness.[63] But while it is realised that all sections of the population ought to be adequately represented in all vital spheres of national life, the question is whether reservation of seats is the best method to achieve

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[62] See the statistical tables in the Commissioner's 14th Report, pp. 145-146.

[63] Minorities in a Democracy, (1968), pp. 50-51.

this result. This cannot be, in the long term interest of the country or the communities themselves. It must therefore be used only sparingly to make good the glaring deficiencies in representation. The long term solution must be through the educational advancement of the communities concerned.[64] If educational development of these communities is ensured, the question of their due place in society will resolve itself.

Assessing backwardness remains a complex problem. Nevertheless, there is a strong case for adopting the economic factor as the principal criterion in giving assistance. Poverty is the main cause of all backwardness. Once it is removed, increasing economic independence, along with educational development, would enable backward communities to compete successfully with the rest.

At present the eligibility for benefits is mainly restricted to members of particular groups. Its drawback is that it does not take into account the different stages of advancement within the same caste or community, with the result that aid is given to some who do not need it, while the really backward among them may not receive enough of it. There is a case for eliminating the criteria of caste and community and for laying down

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[64] See also, Humayun Kabir, Ibid, p. 52.

principles for determining backwardness whereby no one who is socially and educationally backward is left out of the special protection.[65] It would be advantageous to adopt the smaller family group as a unit, in preference to the larger and unweildy caste or community group. Aid could be withdrawn by stages, beginning with the 'other backward classes', and then the Scheduled Castes and Scheduled Tribes. So long as reference to caste groups continues, it may serve to indicate the possibility of backwardness in some of its sections, but the actual determination itself must be made by reference to the conditions of individual family groups. Any family, irrespective of the caste or community it belongs to, should be eligible to receive aid if it is below a certain economic level. To ensure the effectiveness of protective discrimination, the help given should be graduated so that those in greater need would receive a larger share of it.

In conclusion, it may be emphasised that the two issues discussed in this chapter, the removal of social disabilities and protective discrimination, are but two facets of a much larger problem of under-development.

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[65] V. Narayanan Nair, "Protective Discrimination — The Supreme Court Retreats?", (1969) II S.C.J., p. 33, at pp. 41-42.

Their significance in the context of the present work lies in the fact that in both these respects law is used as an instrument in bringing about socio-economic equality. It seeks to provide a framework within which backward sections of the community have a fair chance of being raised to the general level of their compatriots. But beyond this immediate task its role is necessarily limited. The real solution lies in the general all-round development of the country as a whole on the basis of the ideals visualised in the Directive Principles of State Policy.

Chapter VI

CONCLUDING REMARKS

In the preceding chapters various minority issues have been considered at length in the light of the principle of equality. It would be unnecessary to summarise them again in the present chapter. This chapter is, therefore, limited to a few brief general observations bearing on the subject.

In any general assessment of the position of minorities in India two questions are bound to arise: first, whether the scheme of minority protection incorporated in the Indian Constitution is sound in principle, and second, whether it works in practice.

The answer to the first question is in the affirmative. The Constitution within its framework seeks to provide the widest scope for the realisation of the aspirations of minorities. The fact that it does so on the basis of equal citizenship, rather than by providing for different groups separately, is a positive aspect, which has much to commend itself. The creation of

statutory barriers to protect minority interests was bound to lead to isolation and stagnation of the groups involved. The present scheme must pay dividends in the long run. It is not suggested that the Constitution is a perfect document or that a more ingenious scheme of minority protection could not have been devised. There are always alternative solutions to human problems, and a choice has to be made with reference to means and ends in view. In the circumstances existing in India the present scheme appears to be in the best interests of all concerned and deserves a fair trial.

The second question needs to be considered in two parts, on the basis of past performance and as regards the outlook for the future. It is apparent that no categorical answer, not being a personal opinion or a conjecture, can be given.

In judging the past it must be borne in mind that solutions to complex human problems cannot simply be branded as either a success or a failure. These terms are relative to circumstances and also vary according to differences in aims, objectives and opinions of people. The truth lies, more often than not, near the centre. With reference to the Indian scheme it may be said that, by and large, it is a reasonable success. Many shortfalls do, however, still exist in respect of several issues,

as the reader would have had occasion to note in the course of reading through this work. But it should also be noted that the period under consideration has been one of far reaching change in the country as a whole and among minority groups themselves. Nor are the shortcomings particularly restricted to minority issues alone, and hence some concession has to be made to the novelty of the Constitution itself. Further, the problem of linguistic minorities is altogether new and has yet to overcome its 'teething troubles', while the experiment in respect of the backward classes is as yet unfinished. An objective assessment of the past two decades must, therefore, wait for some years.

The question whether the Constitutional scheme can be expected to protect minority interests in the future can be answered only by an expression of hope that it will. It is not sufficient merely to incorporate rights in the Constitution; it is also necessary to ensure that the Constitution is made to work at all times in the spirit in which it was intended to work. As has been pointed out in a linguistic context, trouble often arises not because of the inadequacy of Constitutional safeguards, but the failure of those who were expected to make them work.[1] This is generally true in respect of all minorities.

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[1] S. R. Chowdhury, "Cultural and Educational Rights of Indian Minorities as Judicially interpreted", Public Law, 1961, p. 271, at pp. 273-274.

It has been observed that basically the problem of dealing with minorities is to ensure that ordinary human relationship exists in contacts between the dominant group and the minorities and that the intercourse between them is not tinged with such emotions as fear, anger, suspicion or hate. This cannot be achieved without the co-operation of all parties and whether it is forthcoming must depend less upon Constitutional provisions, legislation and government coersion, than upon public opinion.[2] This depends on all Indians, majorities and minorities.

Broadly, two things are essential for this purpose: first, the creation of a sense of security among minorities that the rights guaranteed to them in the Constitution will not be tampered with, and second, the creation, in the country as a whole, of conditions conducive to the proper working of the democratic system. These aspects may be touched upon briefly.

Amendment of the Constitution

Jennings has rightly observed that it is not possible to prevent a government, supported by a majority, from interfering in accordance with law with the liberty and property of a minority and that it is not desirable

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[2] A. Gledhill, "Constitutional protection of Indian minorities", I, J.I.L.I., (1959), p. 403, at p. 404.

that an attempt should be mdde. Nevertheless, there are certain rights which are commonly recognised as essential for effective social life and which, being considered to be inherent in the idea of justice, should be protected even against a majority.[3] Incorporation of written guarantees implies that they should be removed from the sphere of ordinary legislation and be inviolable, except in grave emergencies and with the consent of all concerned. This means that a flexible Constitution and minority rights cannot go together. The subject of Constitutional amendment is, therefore, of great relevance in the minority context.

The procedure for the amendment of the Indian Constitution is prescribed in Article 368. The Constitution can be amended by the passing of a Bill for that purpose in each House of Parliament by a two-thirds majority of those present and voting and an absolute majority of each House. Amendments to certain provisions, i.e., those relating to the federal structure, require ratification by not less than half the total number of States. There are, however, a number of provisions of the Constitution which can be altered by a simple majority of the

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[3] Sir W.I.Jennings, The Law and the Constitution, (5th ed., 1959), p. 255.

Parliament and such alterations are not deemed to be amendments to the Constitution. These include provisions relating to citizenship (Article 11), delimitation of constituencies (Article 81), Parliamentary powers (Article 105(3)), language to be used in Parliament (Article 120), Constitutions of Centrally administered areas (Article 240), law of elections (Article 327), language of courts (Article 348), and the administration of Scheduled Areas and Tribes (Schedules V and VI). Parliament can also by a simple majority, but in consultation with States or on their request, alter the provisions concerning the creation of new States or the reconstitution of existing ones (Articles 2, 3 and 4), and the creation of Upper Chambers in the States (Article 169(3)).

Thus it is evident that theoretically there is nothing to stop any group commanding a majority of two-thirds in Parliament from altering the provisions of the Constitution in the manner desired by them. The Constitution does not provide for any consultation with the minorities, or require their consent, in matters affecting their interests. This means that minorities, who are in all cases less than one-third of the population and who generally command even a lesser proportion of membership in Parliament, can have no say even in matters of utmost importance to them. K. V. Rao has summed up this situation

by posing the following questions: "Are the one-third to suffer and lose these freedoms if the two-thirds decide it otherwise? Are not these rights so fundamental that nobody should be allowed to touch them? Are the Muslims, for instance, to lose their religion or citizenship, or the tribals to lose their cultural or educational rights, if the Hindus (certainly they are more than two-thirds in the Parliament) decide it so? Are the minorities to live perpetually at the mercy of the majorities? If that is so, a written Constitution is as good as any worthless piece of paper."[4] He feels that the minorities, political, social, religious and others, could have been given greater protection by making some other provisions for the alteration of fundamental rights than the one by a "brute majority", by associating them with it.[5]

The position obtaining till 1967 in respect of the amendment of Fundamental Rights had been that laid down by the Supreme Court in Shankari Prasad v. Union of India,[6] decided in 1951. In this case the Court held that it was within the competence of Parliament to amend the Constitution so as to abridge or take away the

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[4] K. V. Rao, Parliamentary Democracy of India, (2nd ed., 1965), p. 344.

[5] Ibid, p. 347.

[6] A.I.R. 1951 S.C. 458.

Fundamental Rights. This decision was reaffirmed in Sajjan Singh v. State of Rajastan,[7] in 1965. But in Golak Nath v. State of Punjab,[8] decided in 1967, a narrowly divided Supreme Court overruled Shankari Prasad's case and by a majority of six to five held that Parliament did not have power to amend the Constitution so as to take away or abridge Fundamental Rights. The majority view was that Fundamental Rights guaranteed by the Constitution were transcendental and therefore must not be allowed to be whittled down by any majority in Parliament. Among other things, the Court held that Article 368 was merely procedural and that it did not contain authority for amending the Constitution so as to take away or abridge Fundamental Rights. Even if Article 368 did contain such power, it must be controlled by Article 13(2). The Court said that the power of amendment envisaged only minor alterations and not any major change. And, if at all the provisions guaranteeing Fundamental Rights must be amended to curtail those rights, this could be done only by a Constituent Assembly convoked by Parliament by enacting a law for that purpose.

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[7] A.I.R. 1965 S.C. 845.

[8] A.I.R. 1967 S.C. 1643.

Following this decision a Bill was introduced in Parliament to amend Article 368 so as to supercede it. Not surprisingly, this issue has occasioned much controversy. Shri Frank Anthony, an acknowledge spokesman for minorities, has deprecated the Government's habit of getting round unfavourable decisions by amending the Constitution. He feels that any move to set aside the present decision will imperil the position of minorities. According to him, "... in the rapidly changing milieu of growing revivalism and increasing intolerance, it would be one of the easiest things for a combination in Parliament, cutting across party lines, to derogate from or efface the Fundamental Rights given to the minorities in respect of education, language and culture. The State Legislatures seldom apply their minds to legislation processed through Parliament. ... By this proposed amendment to Article 368, the minorities (linguistic, educational and cultural) will have a sword of death placed over them and which can be released at any time by a bare majority in Parliament."[9]

On the other hand, the said decision has much wider implications than merely those relating to minorities. On these grounds, the opinion is clearly weighted

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[9] "Bid to amend Article 368: threat to minorities", in The Pioneer, December 11, 1968.

in favour of those who hold that the majority view is untenable.[10] H. M. Seervai points out that if a law made by Parliament to amend Part III of the Constitution is void as contravening Article 13(2), a law passed by the same Parliament convening a Constituent Assembly and authorising it to do that very thing must be equally void.[11] S. P. Sathe observes that, while the abstract ideals of liberty, justice, equality and fraternity are transcendental, the legally enforceable rights as at present guaranteed under the Constitution cannot be called transcendental as they are liable to different interpretation according to time and place.[12] He also points out that there are rights, which though outside Part III, are no less fundamental to the democratic process, such as right to vote, or the right to inter-State trade and commerce; also, in future a number of Directive Principles are likely to claim recognition as Fundamental Rights.[13] Further, irrespective of whether Parliament has the legal competence to amend the Constitution or not, in future it will not be easy to have an amendment passed. Since the last General Election no single party commands a special

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10 For a discussion on this subject, see H. M. Seervai, Constitutional Law of India, Chapter XXX, p.1088ff., and S. P. Sathe, Fundamental Rights and Amendment of the Indian Constitution, (1968).

11 H. M. Seervai, Ibid, p. 1109.

12 S. P. Sathe, n. 10, supra, p. 48.

13 Ibid, pp. 52-53.

majority to support an amendment, and the trends indicate that this state of affairs is likely to continue.[14]

Although superficially the decision in Golak Nath's case appears to be an attractive way of providing a sense of security among minorities, in practical terms this is in fact not so. Sooner or later this decision is bound to be superceded. But even if it is not, the minorities can draw little consolation from the fact that Parliament has no power to amend the Constitution so as to abridge or take away the Fundamental Rights. A Constituent Assembly specially called for that purpose would have a similarly unfavourable majority, and if the minorities have no reason to trust Parliament there is no reason why they should trust such an Assembly.

Hence a scheme to protect minorities must depend for its success on something other than the letter of the Constitution: it must depend on its spirit. The Constitution will work best in the same atmosphere of mutual trust and goodwill between the majority and the minorities as pervaded at the time of its framing. Rather than tying the hands of the majority by a rigid

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[14] S. P. Sathe, Ibid, pp. 60-61. See also, by the same author, "Amendability of Fundamental Rights: Golak Nath and the proposed Constitutional Amendment", in (1969), I S.C.J., p. 33, pp. 38-39.

interpretation of the Constitution, there must be freedom of action consistent with the spirit and the ideals of the Constitution. At the same time it is necessary to provide for some form of consultation with minorities with regard to amendments touching matters of their interests, a feature missing in the present system. The sense of security among minorities will depend on the sensitivity which future governments and political parties show on minority issues, the restraint they exercise in amending the Constitution, and the practical steps they take to create and maintain confidence among them.

The future of democracy

Apart from the creation of a sense of security among minorities, the success of this scheme requires, secondly, the proper working of the democratic process. Under the Constitution the scheme for minority protection is intimately linked with the experiment in democracy and it stands to gain or lose with the success or failure of democracy in India.

Democracy presupposes many things which still do not exist in India in the required degree, for instance, widespread education and adequate economic resources. It assumes that each individual knows what he wants and that his decisions on public issues will be made on merits of

the case rather than on sectarian considerations. Universal adult franchise will have no meaning, if votes are cast on the basis of religion, language, caste or other factors.

Perhaps the greatest impediment to democracy in India is the growth of sectarian feeling in the country. It is known by different names such as communalism, regionalism, casteism, etc., and appears in different guises. Its characteristic mark is the intolerance shown by particular groups towards 'outsiders'. The latter, through fear or insecurity, may react in various ways, thus setting off a chain reaction, which is bound to have repercussions on the social and political life of the country. The signs of religious communalism can be seen in the tension which exists between religious communities which comes to surface at the least excuse, and in the growth of organisations and political parties advocating extremist views. In the linguistic sphere, regional fanaticism has expressed itself in the creation of private armies of local people in several State capitals to intimidate those from outside the State. The persistence of caste divisions has already been referred to in the previous chapter. The result is that, wherever group consciousness is strong, it is the minority which suffers most.[15]

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[15] Humayun Kabir, Minorities in a Democracy, (1968), p. 10.

If democracy is to succeed, it is necessary to arrest the growth of this sectarianism and remove its traces. It requires unity in the body politic, wherein the ideals of the Constitution, those of the government and those of the people should coincide. There must exist a favourable social climate at the grass-roots level. In its absence equality will have no meaning as, despite what the Constitution and the Government say, sections of the population would be subjected to discrimination through social pressure and practically excluded from full participation in the life of the community. The experience in the United States has borne out this fact.[16]

Effective communication is an essential condition in a democratic system and it is necessary to ensure that proper channels exist for ventilation of grievances, real or imaginary, and for representations to be made. Until the normal democratic channels have adequately developed, there is need to provide for some form of special machinery for the minorities for this purpose. The Organisations of the Linguistic and of the Scheduled Castes Commissioners cater for this need in their respective spheres. There is scope for a similar provision

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[16] R. M. MacIver, The Web of Government, (Revised ed.,1965), pp. 320-321.

for the religious minorities, though in a different form. Perhaps a non-official body with representatives of different communities and working in liason with governments would be best. All these special bodies must be of a temporary character. It is assumed that, when conditions of democracy have improved, there would be no need for special bodies to look after particular interests.

Finally, the achievement of a greater degree of unity among the entire people, otherwise known as 'national integration', is an urgent task before the country. The unity which must be sought is not a dull uniformity in disregard of the existing differences, but the development of a common outlook in spite of them. It implies the growth of a broad-based nationalism which will transcend particular group consciousness in matters of common interest. The achievement of this unity in diversity and the realisation of the ideals set forth in the Constitution will be a continuous task facing all Indians, majorities and minorities. The Constitution only provides the necessary framework.

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