CHAPTER – II

MINORITY RIGHTS UNDER THE INDIAN CONSTITUTION – HISTORICAL PERSPECTIVE

2.1 Concept of Minority

According to Encyclopedia Britannica minorities means “group held together by ties of common descent, language or religious faith and feeling different in these respects from the inhabitants of a given political entity”. Louis Wirth, who pioneered the study of Minority problems and offered a definition and classification, defines a Minority as, “A group of people 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 regards themselves as objects of collective discrimination. Moreover, minority status carries with it an exclusion from full participation in the life of the society”

J.A Laponce describes “Minority” as a group of persons having different race, language, or religion from that of majority of inhabitants.

Macmillan and Free Press have published the International Encyclopedia of Social Sciences. In the treatise, the word minority has been defined as follows: "In any society, it is a group which is different from the larger group, in terms of race, nationality, religion or language. Each group thinks it is distinct and looks down upon the other. As regards political power is concerned, the situation is different. The minorities are at the mercy of the larger group, which discriminates against the smaller group.”

According to Capotorti's definition for the United Nation "Minority" means a community:

a) Compactly or dispersedly settled on the territory of a state

b) Which is smaller in number than the rest of the population of a state

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1 Laponce J. A. The Protection of Minorities, University of California publication in Political Science, Volume 1960, p. 5.
2 Pan, Christoph/Beate Sibylle Pfeil, National Minorities in Europe, Handbook, Vienna, (Braumüller, Ethnos 63, 2003), Volume I and II.
c) Whose members are citizens of that state  
d) Which have ethnic, linguistic or cultural features different from those of the rest of the population  
e) Whose members are guided by the will to safeguard these features

According to the new Encyclopedia Britannica, “Minority is an aggregate of people who are distinct in religion, language, or nationality from other members of the society in which they live and who think of themselves and are thought of by others as being separate and distinct.” The Oxford Dictionary defines minority as the condition or fact of being smaller, inferior, or subordinate; smaller number or part; a number which is less than half the whole number.

First of all, it is the number count, or the statistical divide between two or more entities under consideration, resulting in majority/minority division. The minor, since it is numerically less, is perceived to be weak and has to be empowered separately through special measures to make it equal to the majority. In this power relation, the minor is supposed to be subordinate to the major.

Who is a minority? Who are the beneficiaries of minority rights? These questions and the possible responses thereto have been subject of number of studies and lengthy debates in many forums in which minority protection has been addressed. No definite answers have been found and no satisfactory universal definition of the term “minority” has proved acceptable. The difficulty in arriving at an acceptable definition lies in the variety of situations in which minorities exist. Some live in well defined areas, separated from the dominant part of population, while others are scattered throughout the national community. Some minorities base a strong sense of collective identity on a well-remembered or recorded history; others retain only fragmented notion of common heritage. In certain cases, minorities enjoy a considerable degree of autonomy while in others there is no.

According to anthropologists Charles Wagley and Marvin Harris\(^3\), minorities have following distinctive characteristics:

1. Minorities are subordinate segments of complex state society;

\(^3\) Dr M. P. Raju; *Minority Rights: Myth or Reality*, Media House, Delhi, 2002 Referred on p. 15.
2. Minorities have special or cultural traits held in low esteem by the dominant segments of society;

3. Minorities are self conscious units bound by special traits which their members share and by the special disabilities which they bring;

4. Membership in a minority is transmitted by a rule of descent which is capable of affiliating succeeding generations even in the absence of readily apparent special cultural or physical traits; and

5. Minority peoples, by choice or necessity, tend to marry within the group.

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

A Minority or a subordinate group is a sociological group that does not constitute a politically dominant plurality of total population of a given society. A sociological minority is not necessarily a numerical minority- it may include any group that is disadvantaged with respect to a dominant group in terms of social status, education, employment, wealth and political power. To avoid confusion, some writers prefer the terms “subordinate group” & “dominant group” rather than “minority” and “majority”.

In socio-economics, the term “minority” typically refers to a socially subordinate ethnic group. Other minority groups include people with disabilities, “economic minorities” people who are poor or unemployed, “age minorities” and “sexual minorities” whose sexual orientation is different.
2.2 Racial or Ethnic Minorities

According to the contemporary sociologist, minority is a group of people differentiated from others in the same society by race, nationality, religion or language who both think of themselves as differentiated group and are thought of by the others as fundamental group identification from within the group and those of prejudice from without and a set of behaviors- those of discrimination and exclusion from without.4

Every large society contains ethnic minorities. They may be migrant, indigenous or landless nomadic communities. In some places, subordinate ethnic groups may constitute a numerical majority such as Blacks in South Africa under apartheid. International criminal law can protect the rights of racial or ethnic minorities in number of ways.5 The right to self determination is the key issue.

2.3 Religious Minorities

Persons belonging to religious minorities have a faith which is different to that held by the majority. Most countries of the world have religious minorities. It is now widely accepted that people should have the freedom to choose their own religion, including not having any religion (atheism or agnosticism), and including the right to convert from one religion to another. However in some countries this freedom is constricted. For example in Egypt, a system of identity cards requires all citizens to state their religion – and the only choices are Islam, Christianity or Judaism. As another example, there are allegations of prejudice against Roman Catholics in the USA by Protestants.

A 2006 study suggests that atheists constitute a religious minority in the United States, with researchers concluding: “Americans rate atheists below Muslims, recent immigrants, gays and lesbians and other minority groups in

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4 International Encyclopaedia of Social Science, 365, in M. P. Raju; Minority Rights: Myth or Reality, pg 14, Media House, Delhi, 2002.
‘Sharing their vision of American Society.’ Atheists are also minority groups most Americans are least willing to allow their children to marry.⁶

2.4 Religious Minorities under the Constitution of India

If we see the provisions of the Constitution of India it talks about only two kinds of minorities’ i.e. Religious and linguistic minorities. India is a land of diversity consisting of different religions with Hindus in majority. According to the 2011 census out of 121 crore India’s Population, the religious composition of the population is as follows⁷:

<table>
<thead>
<tr>
<th>Religious Population⁸</th>
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<tbody>
<tr>
<td>Group</td>
</tr>
<tr>
<td>Hinduism</td>
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<tr>
<td>Islam</td>
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<tr>
<td>Christianity</td>
</tr>
<tr>
<td>Sikhism</td>
</tr>
<tr>
<td>Buddhism</td>
</tr>
<tr>
<td>Jainism</td>
</tr>
<tr>
<td>Other Religious / No religion*</td>
</tr>
</tbody>
</table>

Source: Census of India 2011

Thus we find that except Hindus all followers of other religion are minorities for a National Act or law, however in a state enactment the Hindus might also be in minority and national minorities might be in majority e.g. in Kashmir, Hindus are in minority and Muslims are in majority. Similarly Christians are in majority in some eastern states whereas Hindus and Muslims are in minority. In order to ensure the protection of religious minorities the state has been constituted under the principle of secular notion and several religious rights have

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* No religion category was added in the census in 2011 28.7 lakhs were classified as people belonging to ‘No religion’ in India in 2011 census.
been granted to the people and religious institutions under Article 25 and 26 with certain restrictions. A secular State does not mean an irreligious State, it only means that in matters of religion it is ‘neutral’, the State can have no religion of its own, and the State protects all religions but interferes with none. In a secular State, the State is only concerned with the relation between man and man; it is not concerned with the relation of man with God. The concept of secularism is one facet of the right to equality and implies that in matters of State, religion has no place, in other words State rights and benefits do not depend upon religion. Now ‘secularism’ has been elevated to the status of basic feature of the Constitution against which no law can be enacted and any State Government which acts against that ideal can be dismissed by the President.

The National Commission for Minorities Act 1992 says that “Minority, for the purpose of the Act, means a community notified as such by the central government” – Section2(7). The Act, 1992 enabled the centre to notify minorities for the limited purposes of that Act only and in exercise of that power, the government had notified on 23-10-1993, five religious communities – Muslims, Christians, Sikhs, Buddhists and Parsis (Zoroastrian) to be regarded as minorities for the purpose of this Act. These five communities constitute 17% of the country’s population.9

As will be seen from the published results of the 2011 Census, Hinduism is by far the major religion of India. Thus, persons categorized as Hindus make up 79.80 % of the total Indian population. Furthermore, this is a figure which has been constantly decreasing since the Census of 1961, when the figure was 83.4 %.10 By far the largest religious minority in India consists of people belonging to Islam, to which 14.23% of people belong. This is a figure which, if we look at it from a historical perspective, has increased almost in proportion to the decrease in the number of Hindus. Thus, in 1961 only 10.7 % of the populations were Muslims. This means that the increase in Muslims within the last 60 years has been 2.7 % of the total population, whereas the decrease in the number of Hindus has been 2.9 %.

Second among the religious minorities are the Christians who in 2011 made up

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2.3% of the total population. Apart from a slight decrease of 0.1 %, this percentage has been more or less stable since 1961. The third religious minority is the Sikhs with 1.72 % of the total population. This figure has also been comparatively stable with slight increase of 0.1 since 1961. Fourth are Buddhists who made up 0.8 % of the total population, a slight increase of 0.1 % since 1961. The Buddhists found in contemporary India are mainly of two varieties. The largest is the so-called Neo-Buddhists who are actually untouchables or Dalits who since the first half of the 1950’s have converted to Buddhism under the influence of Dr. Ambedkar in order to try to escape from Hindu suppression. The other group consists of Tibetan Buddhist most of whom are refugees from the Chinese occupation of Tibet in 1951. Included among the group of others are the two small religious communities of Parsis and Jews. According to the 1991 Census 76,382 persons were registered as belonging to the old Zoroastrian faith, while in the same year only 5271 Jews were left in India. As the sixth minority, we find the Jains, who are adherents of an old indigenous religion, a little bit older than Buddhism.

Acting under this provision, on October 23, 1993 the central government notified the Muslim, Christian, Sikh, Buddhist and Parsis (Zoroastrian) communities to be regarded as “minorities” for the purpose of this act.

In several States (e.g. Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Uttar Pradesh and Uttarakhand), Jains have been recognized as a minority. The Jain community approached the Supreme Court seeking a direction to the central government for a similar recognition at the national level and their demand was supported by the National Commission for Minorities. But the Supreme Court did not issue the desired direction, leaving it to the state government to decide the issue (Bal Patil v. Union of India). In a later ruling

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12 With regard to the data of the 2001 Census, Parsis and Jews have been included under the rubric ‘others’. However, according to the Brief Analysis of Census 2001 Religion Data, the number of Parsis were 69,601 (http://www.censusindia.net/religiondata/Brief_analysis.pdf). According to non-official sources the number of Jews was about 4000 (http://www.answers.com/topic/demographics-of-india). Visited on 22nd December 2015.
13 There are six religions in India which have been awarded National minority, status – Muslims, Christians, Sikhs, Buddhists and Parsis.
14 AIR 2005 SC 3172.
however, another bench of the Supreme Court upheld the Uttar Pradesh law recognizing Jains as a minority (*Bal Vidya Mandir, Etah, U.P. v. Sachiv, U.P. Basic Shiksha Parishad, Allahabad, U.P. and Ors*).

**State Minorities Commission**

The State Minorities Commission Acts usually empower the local governments to notify the minorities e.g. Bihar Minorities Commission Act, 1991, Section 2 (c); Karnataka Minorities Commission Act 1994, Section 2(d); UP Minorities Commission Act 1994, Section 2(d); West Bengal Minorities Commission Act 1996, Section 2(c); A.P. Minorities Commission Act 1998, Section 2(d). Similar Acts of M.P. (1996) and Delhi (1999), however, say that Government’s Notification issued under the NCM Act, 1992 will apply in this regard - M.P. Act 1996, Section 2(c); Delhi Act 1999, Section 2(g); Section 2(d).

### 2.5 Gender and Sexual Minorities

While in most societies, number of men and women are roughly equal, the status of women as a subordinate group has led some to equate them with minorities. In addition, various gender variant people can be seen as constituting a minority group or groups, such as inter-sexual, trans-sexual, and gender nonconformists – especially when such phenomena are understood as intrinsic Characteristics of an identifiable group.

An understanding of Lesbian, Gay, Bisexual and transgender people as minority group or groups has gained prominence in the western world since the 19th century. The acronym LGBT is currently used to group these identities together. The phrase sexual minorities can also be used to refer to these groups, and in addition may include fetishists, Polyamorists and people who prefer sex partners of a disparate age. The term queer is sometimes understood as an umbrella term for all non-normative sexualities and gender expressions, but does not always seek to be understood as minority; rather, as with many Gay Liberationists of 1960s and 70s, it sometimes represents an attempt to uncover and embrace the sexual diversity in everyone.

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2.6 Minorities according to Law

Law defines a ‘minority’ as “A group numerically inferior to the rest of the population in a non dominant position.” In the politics of some countries a minority is an ethnic group that is recognized as such by respective laws of its country and therefore has some rights that other group lack. Speakers of legally recognized minority language, for instance, might have right to education or communication with the government in their mother tongue. Countries that have special provisions for minorities include China, Germany, India, Romania, Russia and the United Kingdom.

The issue of establishing minority groups, and determining the extent of privileges they might derive from their status, is controversial. There are some who argue that minorities are owed special recognition and rights, while others feel that minorities are unjustified in demanding special rights, as this amounts to preferential discrimination and could hamper the ability of the minority to integrate itself into mainstream society-perhaps to the point at which the minority follows a path to separatism.

Despite the difficulty in arriving at a universally acceptable definition, various characteristics of minorities have been identified, which, taken together, cover most minority situations. The most commonly used description of a minority in a given State can be summed up as a non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics which are different from those of the majority population. In addition, it has been argued that the use of self-definition which has been identified as "a will on the part of the members of the groups in question to preserve their own characteristics" and to be accepted as part of that group by the other members, combined with certain specific objective requirements could provide a viable option.

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 posses and which they distinguish them from the majority of the population. The protection applies equally to individuals belonging to such groups is justified in the interest of welfare of the community as a whole.
The Indian Constitution may justifiably be described as secular and multicultural but in a specific way. Difference is recognized but so also are the values of equal citizenship and equal rights. After protracted discussions in the Constituent Assembly, assimilation on terms of equality was offered to caste and class based minorities in the Constitution, but it was felt that to achieve this it would be necessary to recognize caste in the Constitution as a cause of inequalities and as a basis for affirmative action. At the same time, recognition and protection was offered to religious, cultural and linguistic minorities. Equal respect, fairness and non discrimination were to be the guiding principles of state policies towards minorities and no wall of separation was envisaged between State and religious activities.

A meaningful conception of minorities would include sections of people who, on account of their non-dominant position in the country as a whole, are targets of discrimination and therefore deserve special consideration.

The protection applies equally to individuals belonging to such groups is justified in the interest of welfare of the community as a whole.

2.7 Minority as per the Constitution of India

The question of who constitutes a minority, thus, has more to do with political and power relationships than with numerical characteristics. Ethnic groups which are subject to illegitimate discrimination in law or fact may be considered as minorities.

The architects of the Indian Constitution guaranteed to minorities all necessary rights and freedoms but have no where defined the expression “Minority”. There is no parliamentary legislation either defining a ‘minority.’ The Motilal Nehru Report (1928) showed a prominent desire to afford protection to minorities, but did not define the expression. The Sapru Report (1945) also proposed, inter alia, a Minorities Commission but did not define Minority.

The Constituent Assembly had set up Advisory Committee under the Chairmanship of Sardar Vallabhbhai Patel on the subject of Fundamental rights including rights of minorities, with the twin objectives of eliminating the chance of religion exploiting the State and vice-versa. The Advisory Committee appointed
five sub-committees. One was the minorities sub-committee headed by H.C. Mukherjee a Christian leader from Bengal.

Reflecting back on the origin of this Article 30(1) it is of utmost importance to note that the Sub-Committee on Minorities constituted by the Constituent Assembly Advisory Committee on Fundamental Rights and Minorities on 24 February 1947 prepared an interim report which dealt with the question fundamental right from the viewpoint of minorities and was submitted on 19 April 1947. The report recommended for the following:

- All citizens are entitled to use their mother tongue and the script thereof, and, to adopt study or use any other language and script of their choice.
- Minorities in every unit shall be adequately protected in respect of their language and culture, and no government may enact any laws or regulations that may act oppressively or prejudicially in this respect.
- No minority whether of religion, community or language shall be deprived of rights or discriminated against in regard to the admission into state educational institutions, nor shall any religious instruction be compulsorily imposed on them.
- All Minorities 'whether of religion, community or language' shall be free in every unit to establish and administer educational institutions of their choice, and they shall be entitled to state aid in the same manner and measure as is given to similar state aided institutions.
- Notwithstanding any custom, law decree or usage, presumption in terms of dedication, no Hindu on grounds of caste, birth or denomination shall be precluded from entering an educational institution dedicated or intended for the use of the Hindu community or any section thereof.
- No disqualification will arise on account of see in respect of public services or professions or admissions to educational institutions.
save and except that this shall not prevent the establishment of separate educational institutions for boys and girls.

When this report came to be considered by the Advisory Committee in its meeting held on April 22, 1947, Alladi Krishnaswami objected to clause (I), seeking to protect mother tongue was a matter nobody otherwise also could interfere with K.M. Munshi explaining the reason says that the clause was taken from the minorities rights in the Polish which was later incorporated in the Polish Constitution. He said that attempts were made in Europe and other places to prevent the minorities from using or studying their own language. This right had therefore come to be regarded as a classical right of minorities. In spite of Munshi's insistence, the clause was deleted. Clauses (II) and (III) were accepted with slight modifications. There was much discussion on Clause (IV) which provided for the right to establish and administer educational institutions and the right to state aid. One objection to the inclusion of this right was that such a right would perpetuate communal institutions and that the state should not give aid to such institutions however the objection could not persuade the committee and the clause as slightly modified in its form was supported by a majority vote. Clauses (V) and (VI) deleted as redundant. Another suggestion which if accepted would have shaken the very foundations on which minority was to be demanded and to conceded was G.B. Pant's suggestion that the rights recommended by the sub-committee could be more properly incorporated as directive principles which would be kept in view by the legislation but would not be enforceable in the court of law. While Munshi opposed if they were made non-justifiable, Sardar Ujjal Singh and Ruthnaswami opposed the proposal on the ground that a change of these right from the status of fundamental rights to the state of moral precepts would not be acceptable to the minorities.

The Advisory Committee ultimately came to recommend the following:

17 Constitutional Assembly Debates, Vol. 5, at p. 120.
18 Ibid., this objection was brought about by Rajkumari Amrit Kaur and she got the support of Alladi Krishnaswami Aiyer.
Minorities in every unit shall be protected in respect of their language and culture, and no laws or regulation may be enacted that operated oppressively or prejudicially in this respect.

No minority whether based on religion, community or language shall be discriminated in regard to the admission into state educational institutions, nor shall any religious instruction be compulsorily imposed on them.

- All minorities, whether based on religion, community or language, shall be free in any unit to establish and administer educational institutions of their choice.
- The state shall not, while providing State aid to schools discriminate against schools under the management of minorities whether based on religion, community or language.19

When these recommendations came before the Constituent Assembly on May I, 1947 for their acceptance, a suggestion came from a member, Mahvir Tyagi that the consideration of the whole problem should be postponed till it was known whether the country was to be partitioned and if so what treatment was to be meted out to the minorities in Pakistan or in any part of India which might organize themselves separately. To this, B.R. Ambedkar said that the minority rights were not relative. They were absolute and not subject to any consideration as to what Pakistan any other party might like to do with minorities within its own jurisdiction.

However, sub-clause (2) was referred back and the Advisory Committee for clarifying its scope in respect of state-aided institutions. The Advisory committee deleted the word 'nor shall any religious instruction be compulsorily imposed on them' for their reason that this had already been included in clause 16.20

Several members wanted amendments when the re-drafted sub-clause (20) came up before the Assembly. Ahmad Ibrahim's suggestion was that the

19  Id., at 103.
20  Id., at 104.
prohibition against discrimination should not be applied to state-aided educational institutions which were primarily established for the benefit of a particular community. Mohanlal Saxena, another member suggested that no aid should be granted to any educational institution which imparted religious unless the syllabus had the approval of the state. This amendment if granted would have greatly affected the autonomy of the institution receiving aid out of state funds. Mrs. Purnima Banerji suggested that within the purview of this clause, should be included state aided institutions so that it becomes obligatory on the institutions not to discriminate against any minority in matters of admission. All the three amendments were disapproved by the assembly on the ground that it was a simple non-discriminatory clause and the extension of the Principle to state-aided institutions was a principle which could be decided by future legislation.21

Thus after much discussion Article 23 of the draft Constitution read as following:

- Any section of the citizen residing in the territory of India or any part thereof having distinct language, script or culture of its own shall have the right to conserve the same.

- No minority whether based on religion, community or language, shall be discriminated against in regard to admission of any person belonging to such minority into any educational institution maintained by the State.

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

- The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that is under the management of a minority, whether based on religion or language.22

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22 Select Documents, Vol. III, 525-26 as quoted in Iqbal Ansari, Minority Educational Institutions (Institute of objective Studies, New Delhi, 2002).
Thus the drafting Committee made a distinction between the right of any section of the citizens to conserve its language, script or cultural and the right of a minority based on religion or language to establish and administer educational institutions of its choice, for the Committee replaced the word 'minority' with any section in the earliest part of the draft article 23 while it retained the word 'minority' in the latter part, While giving an explanation to the said Article Ambedkar explained that the term minority was used therein not in the technical sense of the word 'minority' as we have been accustomed to use it for the purpose of certain political safeguards, such as representations in the legislature, representations in the services and so on. The word is used not merely to indicate minority in the technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense, but which are nonetheless minorities in the culture and linguistic sense. For instance for the purpose of this Article 23, if a number of people from Madras came and settled in Bombay for certain purposes they would be, although not a minority in the technical sense, cultural minorities.

Similarly if a certain number of Maharastrians went from Maharashtra and settled in Bengal, although they might not be minorities in technical sense, they will be cultural and linguistic minorities in Bengal. The Article intends to give protection in the matter of culture, language and script only to a minority technically but also minority might be interpreted in the narrow sense of the term when the intention of this House was to use the word minority in much wider sense, so as to give cultural protection to those who were technically not minorities but minorities nonetheless.

In the draft Article two more articles of substantial nature were incorporated. By one amendment the words ‘language, script and culture' were replaced by the word' language, script or culture’ in clause (1). The reason for the amendment was discussed by B.N. Rao who pointed out that there were sections of people with a separate language and script but with no separate culture. There were also people who had separate culture but no separate language and script.

23 Constitutional Assembly Debates, Vol. 7 at p. 922.

24 Id., at 923.
To these he pointed out that the original clause (I) would not afford any protection. He exemplified by saying that the Muslims in Bengal did not differ from the Hindus there in language and script but had a distinct culture of their own, and the Andhras in Orissa had a script and language of their own but not a different culture from the majority of the inhabitants. The other amendment sought to prohibit discrimination against any minority in the matter of admission by the state aided institutions.

When the draft Article 23 came up for consideration before the Constituent Assembly, the Assembly witnessed a lot of debate of amendments were moved forward. One of the interesting provision suggested was the effect that any minority having a distinct language and script should be entitled to have primary education imparted to its children through the medium of that language and script. But the aforesaid amendments could not be materialized in the face of opposition from different quarters.

Ballabh Pant emphasized that primary education was important and must be made universal. But as it involved huge expenditures and that the state had limited resources what was desirable was that as a first step was to introduce primary education to the large number of illiterates of the country. He said that if there has to be two or three sets of teachers (to teach different languages) the country would not be able to introduce universal primary education or compulsory primary education. Many other also expressed similar views that there were practical difficulties to accept primary education in mother-tongue as a justiciable right.

Ambedkar also said that although it is to impart primary education in mother-tongue but it could not be made a fundamental right enforceable through the court of law. The draft committee subsequently in the revision state divided article 23 into two separate articles: Article 29 and Article 30.

29(1) “Any section of the citizens residing in the territory of India or any part thereof having distinct language, script or culture of its own shall have the right to conserve the same.”

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26 Ibid., p. 258.
(2) “No citizen shall be denied admission into any education institution maintained by the state or receiving aid out of state funds on ground only of religion, race, caste, language or any of them.”

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

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

The clause was incorporated as clause 24 with some drafting changes in the Draft Constitution prepared by the Constitutional Advisor. The Drafting Committee revised the text of clause 24 twice, the most significant change being the re-drafting of sub-clause (1). The clause finally took the shape as Article 23 of the Draft Constitution. The Drafting Committee, at the revision stage divided Article 23 into two separate Articles - Article 29 and 30 as now contained in the existing Constitution.27

Due to the partition of country there was a strong feeling against the communal forces and hence no attempt was made on any occasion even to define the term “minority” in precise words. The feeling was so strong that the words “certain classes” were substituted for the word “minorities” wherever it occurred in the text of the Constitution. Not only is the use of the term minority in the Constitution very rare but also no group is mentioned explicitly as a minority therein. The term ‘minority’ is mentioned in only two Articles, 29 and 30.

The expression 'minority' has been used in Article 29 and 30 of the Constitution but it has nowhere been defined. The Preamble of the Constitution proclaims to guarantee every citizen 'liberty of thought, expression, belief, faith and worship'. Group of Articles 25 to 30 guarantee protection of religious, cultural and

educational rights to both majority and minority communities. It appears that keeping in view the constitutional guarantee for protection of cultural, educational and religious rights of all citizens, it was not felt necessary to define 'minority'. Minority as understood from constitutional scheme signifies an identifiable group of people or community who were seen as deserving protection from likely deprivation of their rights by other communities who happen to be in majority and likely to gain political power in a democratic form of Government based on election.

In the background of constitutional scheme, the provisions of the Act therefore instead of giving definition of 'minority' only provide for notifying certain communities as 'minorities' who might require special treatment and protection of their religious, cultural and educational rights. The definition of 'minority' given under the National Commission of Minority Act, 1992 is in fact not a definition as such but only a provision enabling the Central Government to identify a community as a 'minority' which in the considered opinion of the Central Government deserves to be notified for the purpose of protecting and monitoring its progress and development through the Commission.

2.8 Linguistic Minority

So far as linguistic minority is considered India has more than 1650 mother tongues, belonging to five different language families. They are rationalized into 216 mother tongues, and grouped under 114 languages by the 1991 Census: Austro-Asiatic (14 languages, with a total population of 1.13%), Dravidian (17 languages, with a total population of 22.53%), Indo-European (Indo-Aryan, 19 languages, with a total population of 75.28%, and Germanic, 1 language, with a total population of 0.02%), Semito-Harmitic (1 language, with a total population of 0.01%), and Tibeto-Burman (62 languages with a total population of 0.97%). Earlier the territorialities of provinces or States were done mostly for administrative convenience ignoring the ethnic, religious, social, and linguistic aspect of the society. The Constitution of India originally listed fourteen languages Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Malayalam, Marathi, Oriya, Punjabi, Sanskrit, Tamil, Telugu, and Urdu, into its Eighth Schedule in 1950. Since then, this has been expanded thrice, to include Sindhi, Konkani, Manipuri and Nepali, Bodo, Santhali, Maithili and Dogri. The Language Policy of
India relating to the use of languages in administration, education, judiciary, legislature, mass communication etc. is pluralistic in its scope. It is both language development oriented and language survival oriented. The language policy is intended to encourage the citizens to use their mother tongue in certain delineated levels and domains through some gradual processes, but the stated goal of the policy is to help all languages to develop into fit vehicles of communication at their designated areas of use, irrespective of their nature or status like major, minor, or tribal languages.

The concept of linguistic minority in India is a relational one, and no one definition captures the essence of all kinds of linguistic minorities that the national planning and language plans has thrown up in the country. In the British India, India was perceived to have 'English' 'the Indian vernaculars', 'provincial languages', and other 'dialects'. Then, the word 'minorities' meant mainly the religious minorities. This was inevitable because, for the British, the major power to contend with in the acquisition of Indian territories was the Mughal Empire, which happened to be a Muslim rule over the majority Hindu. Their world view was thus shaped by this dichotomy. The progress of the struggle for the independence of India since the partition of Bengal and even before this point in modern history, revolved around the world view that the India consisted of Hindu-Muslim societies.

The notion of linguistic minorities is largely the contribution of independent India. The British went after their administrative convenience. Moreover, several of the Indian territories they acquired and integrated were already multilingual under some princely rule or the other. They have established themselves in their chosen settlements long before their incessant acquisition of territories began. Their central trading posts had become multilingual, and the empire began spreading out from these factory towns. The English became the language of government; there was no compulsion on them to divide the territories on the basis of the dominant Indian languages used in each of these territories. Growing linguistic identity consciousness among the people of various presidencies and provinces became a focal point for the Indian National Congress in their attempt to mobilize popular support for the struggle for independence. The
Congress in many of its resolutions recognized the popular aspirations and thus they could not avoid creating linguistically organized States. Thus, focused linguistic majority-minority concept is mainly the result of the creation of linguistic states and choice/categorization of language(s) by the language policy of the Union and the governments of States and Union Territories.

Linguistic minority for the purpose of Article 30(1) is one which must have separate spoken language and that language need not have a distinct script. In India, a number of languages are spoken having no script of their own. But people speaking such a language having no script of its own constitute a linguistic minority for the purposes of Article 30(1). A linguistic minority is to be determined with reference to the language spoken by the community and not with reference to any other language which the community wants its children to study.

Ultimately, it is left to the minority to establish its minority status in order to avail the benefits of the Article 30. The task is difficult especially because the concepts of ‘religion’ and ‘language’ have not been adequately defined in the Article or the constituent assembly debates.

According to the 38th report of National Commission of Linguistic Minority, “In each State there is a language which is spoken by the majority of the residents of that State. All others who do not speak that language belong to linguistic minority.”

It is easy to categorize linguistic minorities. The classification of linguistic minority is not based on National level. Hindi as such is declared as the official language, it is as such spoken by less than 50% of the population; and in addition to this there are thirteen other officially recognized languages. Thus minority based on languages in the Indian constitution pertains mainly to a State and not at the National level.

According to Kerela Education Bill Case referred earlier minority has to be defined on the basis of state. Considering this fact Bengali, Punjabi, Malayalam, Sindhi, Tamil, Telgu and Marathi are linguistic minority in the union territory of Delhi.28

28 www.nclm.nic.in
There is anachronism in the definition of linguistic minority also. To put it simply, if five Maharastrians get together and start a Marathi medium school in Mumbai it will not be treated as a minority institution. But if five gujratis get together and start a Marathi medium school in Mumbai it will be treated as a minority school.

**Constitutional Safeguards**

In addition to Constitutional safeguards of Article 29 and 30 mentioned earlier, following the reorganization of the states on the linguistic basis, there emerged some safeguards on consensual basis for linguistic minorities. These were called consensual safeguards and are as listed under:

1) Translation and publication of important rules, regulations, notes etc into all languages, which are spoken by at least 15% of the total population at district or sub district level.

2) Declaration of minority languages as second official language in district where persons speaking such languages constitute at least 60% of the population.

3) Receipt of and reply to, representations in minority languages.

4) Institution through mother tongue of minority languages at the primary age of education;

5) Institution through secondary languages the secondary stage of education.

6) Linguistic minority pupils, and inter-school adjustments.

7) Provision for textbooks and teachers in minority languages.

8) Implementation of three languages formula.

9) No insistence upon knowledge of state’s official language at the time of recruitment.

10) Issue of pamphlets in minority languages detailing safeguards available to linguistic minorities.

11) Setting up of proper machinery at the state and district levels.
2.9 Constitutional Assembly Debates on Minority Rights

In the Assembly’s deliberations, the minorities question was regarded as encompassing the claims of three kinds of the communities: religious minorities, Scheduled Castes, and backward tribes, for all of whom safeguards in different forms had been instituted by the British and by Princely States in the colonial period. The representatives of most group claiming special provisions in some form emphasized that the group was minority of some kind. So close was the identification of the term ‘minority’ with the notion of special treatment for a group that even those opposed to the continuation of the colonial system of minority safeguards employed the same language to justify their stand. For instance, it was argued that the ‘so–called minorities’ were not the ‘real minorities’. The latter were variously identified as ‘the agriculturist’, ‘the rural people’, ‘the backward provinces’, even ‘the masses’. The claim was that these were the groups that ought to receive special treatment rather than the communities hitherto favored by the British.

Most representatives of the Scheduled Castes in the Constituent Assembly also claimed minority status but cultural distinctness from the majority community did not usually figure in this claim. Rather, such claims emphasized that untouchables were culturally part of Hindu community, or least that they were different type of minority from the religious minorities. It was stressed that they were a ‘political minority’, that the term ‘minority’ in their case did not connote numerical disadvantage but rather, entitlement to special treatment on account of social and economic ‘backwardness’. Not all representatives of the scheduled castes claimed minority status for the community and the concomitant ‘political safeguards.’ Some argued, in keeping with the dominant nationalist opinion, that the reserved quotas in legislatures and public employment were undesirable and that the solution to the problems of these groups lay in the removal of economic and social disabilities.

30 Constituent Assembly Debates Vol. I, pp. 139, 284
The strongest opposition to minority safeguards during the Constituent Assembly debates stemmed from concern regarding their implications for national unity and was usually accompanied by a particular understanding of the history of minority safeguards. Such safeguards were regarded as instruments of a colonial ‘divide and rule’ policy, deliberately fashioned by the duplicitous colonial rulers to create strife between different sections of the nation, to deny that India was a nation and to delay the transfer of power once it became inevitable. These strategies were seen to have enabled the legitimization and the perpetuation of colonial rule and to have culminated in the dismemberment of the country.33

A second concern pertained to the implications of minority safeguards for the emergence of a common national identity. Nationalist opinion, for all its appeals to an eternal India, recognized that the new State had to create a common national identity that would unite its citizens, transcending group identities based on ‘caste, creed, and religion’ that divide them. Minority safeguards implied the recognition of group identities in the political realm that it was felt, would promote particular group identities at the expense of wider national identities among citizens necessary for securing the political integrity of the nation.34

The distribution of minorities in South Asian states was such that the members of almost all religious denominations were present in one state or the other which created a peculiar chemistry of minority consciousness. The Muslims, Sikhs, Christians, Buddhists, Jains and Parsees in India; the Hindus and Christians in Pakistan and Bangladesh and Muslims and Christians in Sri Lanka have minority status. Such a situation led to reciprocity in the treatment of minorities and safeguarding of their rights. The idea of reciprocity had found articulation during the debate over minority rights in the Constituent Assembly in India. Participating in the debate, Mahavir Tyagi who later became a member of the Nehru’s Cabinet had suggested that consideration of minority rights should be postponed until Pakistan’s stand on this question became clear. Responding to it, Dr. B.R. Ambedkar, the architect of the Indian Constitution, had asserted that the rights of the minorities should be absolute rights. They should not be subjected to

34 Constituent Assembly Debates Vol. II, p. 224.
any consideration as to what another party may like to do to the minorities within its jurisdiction.\textsuperscript{35}

‘Minority’ as a concept has not been adequately defined in the Indian Constitution. Although mentioning the cultural attributes of religion and language, the Constitution does not provide details on the geographical and numerical specification of the concept. Even the specifics of language and religion are not mentioned. In the Constituent Assembly Debate on Draft Article 23, B.R. Ambedkar\textsuperscript{36} said,

It will be noted that the term minority was used therein not in the technical sense of the word ‘minority’ as we have been accustomed to use it for the purposes of certain political safeguards, such as representation in the Legislature, representation in the Services and so on. The word is used not merely to indicate the minority in the technical sense of the word, it is also used to cover minorities which are not minorities in the technical sense, but which are nonetheless minorities in the cultural and linguistic sense. The Article intends to give protection in the matter of culture, language and script not only to a minority technically, but also to a minority in the wider sense of the terms as I have explained just now. That is the reason why we dropped the word “Minority” because we felt that the word might be interpreted in narrow sense of the term when the intention of the house was to use the word “Minority” in much wider sense, so as to give cultural protection to those who are technically not minorities but minorities nonetheless.

It seems from above explanation that the scope of Article 23 of the draft, now Article 29, was broaden by dropping the word “Minority” to include all such minorities that were not minority in technical sense but were minority nonetheless. The later part of Article 23(1) of draft Article, which corresponds to Article 30, was confined to those minorities which were minorities in technical sense.

\textsuperscript{35} Constituent Assembly Debates, Vol. II:
\textsuperscript{36} Constituent Assembly Debates, Vol. II, pp. 922-923.
The Constitution of India uses the word ‘minority’ or its plural form in Articles – 29 to 30 and 350A to 350 B - but does not define it anywhere. Article 29 use the word “minorities” in its marginal heading but speaks of “any sections of citizens ..... having a distinct language, script or culture”. This may be a whole community generally seen as a minority or a group within a majority community. Article 30 speaks specifically of two categories of minorities – religious and linguistic. The remaining two Articles – 350 A and 350B relate to linguistic minorities only.

The Drafting Committee incorporated two more amendments of the substantial nature. By the first Amendment the “language, Script and Culture” in Clause (1) was replaced by “Language, Script or Culture”. By the Second Amendment, it was sought to prohibit discrimination against any minority in the matter of admission by State and added institutions as well as State owned institutions.

After drafting the Constitution, the draft Article 23 was presented for consideration before the Constituent Assembly. During the debate a number of amendments were moved and Assembly witnessed a long debate on sufficiency, adequacy or scope of rights. Amendments moved by Dr Ambedkar and Thakurdas Bhargava were accepted and adopted and remaining were rejected. Which such amendments Article 23 of Draft constitution was accepted by the Constituent Assembly.

Subsequently, at the revision stage, the drafting committee divided Article 23 into two Articles i.e. Article 29 and Article 30 which are referred under Constitutional Provisions of this chapter.

**Constitutional History of Article 29**

The constitution makers granted to the religious and linguistic minorities right to conserve their language, script and culture and also provided them the right to establish and administer educational institutions of their choice. State was not to discriminate in giving grants on grounds of religion, language, etc, though the institutes maintained by the State or receiving grants from the State were not to discriminate any citizen on the ground of religion, race, language, caste or any of
them. By granting autonomy, it was hoped, that minorities while preserving their Culture and Language and through their educational institution will contribute to the growth and development of the nation. Minority rights impose no obligation or burden on the State to finance any education project to safeguard minority rights.

Succinctly, it is left to the minority to establish its minority status in order to avail the benefits of the Article 30. The task has not been difficult as State has been considered as unit to decide minority status and the group numerically less than 50% of the population of the State has been considered as minority. This parameter has been applied for both linguistic and religious minority. There has been no difficulty in establishing minority status even though the concepts of ‘religion’ and ‘language’ have not been adequately defined in the Articles or the Constituent Assembly Debates.

In Constitution of India there are two Articles that deal with minorities’ rights i.e. Articles 29 and 30. But the Constitution neither defines minority nor does it prescribe sufficient guidelines to determine a group minority. Makers of constitution and members of constituent Assembly left it to the wisdom of the courts to do so.

2.10 Minority as Per Judicial Trends

All democratic states ensure constitutional protection for minority rights. They can, however, be enforced only by an independent judiciary, comprising judges with a broad, liberal outlook when politicians, the executive and the legislature trammel on the rights of minorities.

The expression ‘religious minority’ means ‘that the only and principal basis of the minority must be adherence to one of the many religions and not a sect or part of the religion.’

Though the term minority is not defined in the constitution, the supreme court of India settled this by judicial interpretation. In Re Kerala Education Bill 37 where the Supreme Court, through S.R. Das C.J., suggesting the techniques of arithmetic tabulation held that “minority means a ‘community’ which numerically

less than 50 percent” of total State population”. In *A. M. Patroni v. Kesavan*, a division bench of the Kerala High Court held that the word “Minority” is not defined in the constitution and in the absence of special definition, any community religious or linguistic—which is numerically less than 50 percent of the population of the State concerned, is entitled to fundamental right guaranteed by Article 30 of the constitution.

The question arises regarding what is the test to determine minority status based on religion or language of a group of persons residing in State or Union territory. The Article 30 for the first time came up for interpretation before the seven judge Constitution Bench constituted to consider the reference made by President under Article 143 in the *Kerala Education Bill, 1957*. It held, “The existence of minority community should in all circumstances and for purposes of all law of that State be determined on the State basis only when the validity of law extending to whole State is in question or it should be determined on the basis of the population of the particular locality, for the bill in practice before us extends to the whole of State of Kerala and consequently the minority must be determined by reference to the entire State. By this test Christians, Muslims and Anglo Indians will certainly be minorities in the State of Kerala.”

In other words it can be said that the Supreme Court suggested the technique of arithmetical tabulation of less than 50 per cent of population for identifying a minority. This population was to be determined in accordance to the applicability of the law in question. If an Act is applicable nationwide then the minority group would be decided on the national figures and in the case of the Act being applicable in a State, the minority group would be decided on the State figures.

It has been argued by few scholars that the proposition lay down by the court to determine the minority has many snags. One is that, the population of state may be so fragmented in linguistic, religious or cultural groups that no group may

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38 A.I.R. 1965 Ker 75 at p. 76.
39 In *Bal Patel v. Union of India*, (A.I.R. 2005 SC 3172) the court held that the Central Government has to exercise its power for identification of minority group not merely on the recommendation of the Commission but on consideration of the social, cultural and religious condition of the community in such State.
40 AIR 1958 SC 956.
fall under the protection of Articles 29 and 30 without there being a single majority community against which minorities may claim protection. Second is that, certain communities which may be in majority in a particular state like Sikhs in Punjab or Muslims in Jammu and Kashmir or Christians in Nagaland, may be minority in relation to the entire population of India. Can they be majority from one point of view and in minority from the other? Suppose, there are a number of educational institutions set up by Christian minority, spread all over the country, then applying the test formulated by the Supreme Court, the educational institutions situated in Nagaland would not be entitled to the protection of Articles 29(1) and 30(1) but the same would have the protection as minority in Gujarat. Thus the test laid down by the court does not specify minority.

In *D.A.V. College, Jullunder’s Case*, the Constitutional Bench of the Supreme Court observed: ‘Though there was a faint attempt to canvas the position that religious or linguistic minorities should be minorities in relation to the entire population of the country, in our view, they are to be determined only in relation to the particular legislation which is sought to be impugned, namely that if it is the State legislature these minorities have to be determined on the basis of the population of the State’.

Arya Samaj claimed to be a linguistic minority in Punjab. Since they are a minority in Punjab, they automatically got a minority status under Article 30 (1). The Court observed: ‘A linguistic minority for the purpose of Article 30 (1) is one, which must have a separate spoken language. It is not necessary that the language must have a distinct script for those who speak it to be linguistic minority’.

The Calcutta High Court was required to deal with this issue in the case of Shree Jain Swetamber Terpathi Vidyalaya. The Court held that Jains professed a faith different from the Hindus and were a religious minority entitled to benefits of Article 29 and 30.

Claiming rights being linguistic minority have its own limitations. For example Gujaratis are a minority in Maharashtra where as Maharashtrians are a minority in Gujarat. Prior to reorganization of the Bombay State, Ahmedabad was

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41 AIR 1971 SC 1737.
42 AIR 1982 CAL 101.
part of it and Gujaratis were a minority there. Hindi speaking sections of people called "bhaiyas" are a minority in Maharashtra. Marwaris and U. Pians, called "Hindustanis", are a linguistic minority in Calcutta. But as soon as a "bhaiya" goes back from Mumbai to his home State Uttar Pradesh or Bihar, or a Marwari or "Hindustani" goes back from Calcutta to Rajastan or Uttar Pradesh he reverts to his status as a member of a majority community. A Tamilian or a Bengali while living in New Delhi is a member of a linguistic minority but as soon as he goes back to live in Tamil Nadu or West Bengal he becomes a member of the majority community. All this follows from the Supreme Court decision in the two cases, *D.A.V. College, Bhatinda v. State of Punjab*43 and *D.A.V. College, Jullunder v. State of Punjab*44 decided on the same day by the same Constitution Bench, holding that Arya Samajist Hindus (claiming Hindi in Devanagri as their language) were a religious as well as linguistic minority in the Sikh-majority state (having Punjabi in Gurmukhi as the State language).

The same person who while living in one city is a member of a linguistic minority becomes a member of the linguistic majority on coming back to his forefathers' land. Thus the label of "minority" and "majority" is not permanently affixed to a person: it depends on his current abode and on the latest political boundaries pertaining to that abode. Surely a Tamilian or a Bengali while living in New Delhi does not become relatively backward compared to his kith and kin in his home state. It cannot therefore be contended with any justification that the minorities were favoured by way of affirmative action in order to make them equal to others who were better placed educationally. The Article 30(1) empowers them with a right to establish and administer educational institution of their choice so that their children are not deprived of their culture and religion.

As far as language is concerned, the case of *D.A.V. College, Jullunder v State of Punjab*45 is considered important. In this case, the Court observed, ‘A linguistic minority for the purpose of Article 30(1) is one which must at least have a separate spoken language. It is not necessary that language should also have a distinct script for those who speak it’.

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44 AIR 1971 SC 1737.
45 AIR 1971 SC 1737.
2.11 Protection under Article 30(1) not available to Denominations or Sects

Hindus may be in a majority in Uttar Pradesh but Arya Samajis a sect are in a minority there. Thus, can Arya Samajis claim the benefit under Article 30 (1) on the basis that it is a minority? So also Christians may be in a majority in Meghalaya but Protestants are in a minority. Can they claim benefits under Article 30 (1) despite being part of the Christian fold. A highly contentious issue there has not been a single judgment of the Supreme Court directly dealing with it. The Supreme Court held in *Bramchari Sidheswari Shai v State of West Bengal*46 that the Ramakrishna Mission a Hindu sect under Article 26 of the Constitution cannot be considered a religious minority under Article 30. This makes it clear that Court decision of granting protection of Article 30 (1) is available only to religious groups.

Thus whether Auroville (Emergency) Provisions Act, 1980 violated Article 30 (1) came up before the Supreme Court in *S.P. Mittal v. Union of India*.47 Aurobindo society claimed to be a religious denomination or sect. The Court held that the Society was not entitled to protection under Article 30.

In the case of *Arya Samaj Education Trust v Director of Education*48 the court held that Arya Samaj was not entitled to protection under Article 30. The Court went into the historical context and assessed the Report of the Minority Sub-Committee to the Constituent Assembly and the debates thereafter, came to the conclusion that the words ‘based on religion’ in Article 30 (1) were always meant to include religious groups and not sects or denominations. Excerpts from the report as quoted in a Delhi High Court judgment –

“The word ‘minority’ used in the expression minorities based on religion used in Article 30 (1) connotes only those religious minorities which had claimed separate rights from those of the Hindus prior to the Constitution such as the Muslims and the Sikhs. The Christians did not seem to have claimed separatist’s rights but they were nevertheless a distinct minority based on a religion, which at no stage was regarded as a part of Hinduism. Because of the political origin of the

47 AIR 1983 SC 1
48 AIR 1976 DEL 207.
sense in which the word ‘minority’ was used in India, it was never meant to be applied to a part or a section of the Hindus such as the Arya Samaj and several other Hindu sects. No section or class of Hindus was ever referred to as a minority”.

In *T.M.A Pai Foundation v State of Karnataka*\(^{49}\)

The eleven judges Bench of the Supreme Court delivering the judgment in the above case held by majority that,

- The term minority in Article 30(1) covers linguistic and religious minorities.
- For the purpose of determining the ‘minority’ the unit will be the State and not the whole of India. Minorities have to be considered State wise.

The Cabinet has reportedly approved a proposal\(^{50}\) to define minorities State-wise in line with several Supreme Court judgments, most notably that in *T.M.A. Pai case*. For the purpose of this legislation, minority will be specified as such in relation to a particular State/Union Territory by a presidential notification issued after consultation with the State Government; this will be in addition to the five minorities (Muslims, Christians, Sikhs, Buddhists, and Parsis) referred to in the National Commission for Minorities Act, 1992.

The Constitution does not define a minority or provide details relating to the geographical and numerical specification of the concept, it is clear that the constitutional scheme envisages this to be determined at the national level. Over the years, judicial pronouncements have given a restricted meaning to minority rights by limiting them to education and defining minorities at the State level in terms of protection under Article 30 which provides religious or linguistic minorities the right to set up educational institutions of their choice. The legitimization of a restrictive conception of minority rights can also be noticed, in this context, in the Central Government’s proposal to adopt a State specific notion of minorities.

\(^{49}\) (2002) 8 SCC 481.

\(^{50}\) May 2007
In \textit{T.M.A. Pai Foundation \\& Others vs. the State of Karnataka and Ors.}, the Supreme Court deliberated on the various contentions that the Centre, State, or a particular region within a State may be considered as the basic unit for protection of the right of minorities to set up minority educational institutions, and whether a minority in a State would lose its minority status if within a particular region of the State it happened to be in a majority. The Court has set out the principle that minority status should be determined in relation to the population of the State and not to India as a whole. It ruled that as the reorganization of the States in India had been effected on linguistic lines, for the purpose of determining a minority, the unit would be the State and not the whole of India. Thus, religious and linguistic minorities, who have been placed on a par in Article 30, have to be considered in terms of the State concerned.

The concept of minority is still evolving, the issue resurfaced in \textit{Bal Patil v. Union of India’s case} and \textit{Anjuman Madarsa Noorul Islam Dehra Kalan, Ghazipur v. State of Uttar Pradesh, case}; these two judgments have further complicated the question of definition of minorities, as both these judgments relate, for the most part, to definitional issues. Bal Patil questioned the identity of Jains as a religious minority while in \textit{Anjuman Madarsa Noorul Islam Dehra Kalan, Ghazipur v. State of Uttar Pradesh, Hon’ble S.N. Srivastava J.} ruled that Muslims, by virtue of their numbers, cannot be considered a minority in Uttar Pradesh.

A study of court cases reveals a continuous struggle between the State and minorities on these issues. For instance, the Patna High Court announced Arya Samaj that \textit{Arya Pratinidhi Sabha v. State of Bihar}, a minority distinct from the Hindus. However, in 1976, Delhi High Court in \textit{Arya Samaj Education Trust v. Director of Education} decided against providing benefits of Article 30 to denominations and sects.

\begin{footnotesize}
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\item \textsuperscript{51} (2002) 8 SCC 481.
\item \textsuperscript{52} (2005) 6 SCC 690; AIR 2005 SC 3172.
\item \textsuperscript{53} Decided on 5/4/2007 by the High Court of Judicature of Allahabad.
\item \textsuperscript{54} Ibid.
\item \textsuperscript{55} AIR 1958 Patna 359.
\item \textsuperscript{56} AIR 1976 DEL 207.
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Similarly, in 1962, Brahmo Samaj of Bihar made this claim, which was accepted by the High Court in Dipendra Nath Sarkar v State of Bihar. The court, however, did not accept such a claim in the cases of Chaudhari Janki Prasad and others v. State of Bihar and S. P. Mittal v. Union of India.

The ambiguous definition of religion has potential for controversy. The principal rationale for State-specific minorities rests on the idea that the linguistic reorganization of States necessitates that they be treated as the basic unit for determination of minorities. As both linguistic and religious minorities are covered under Article 30, both sets of minorities have to be State-specific. The linguistic reorganization of States meant that, for the purpose of Article 30, linguistic minorities had to be determined in relation to the State because their language was not one of the official languages; other minorities are those whose mother tongue is an official language but who live outside the State(s) where the language is official. In this sense, the linguistic reorganization of States has a definite bearing on linguistic minorities because protection under Article 30 is available not only to the linguistic minorities sharing the major languages of the States, but also to speakers of the numerous languages that are not represented by any particular State on its own.

As regards religious minorities, linguistic reorganization should not really matter in the exercise of their right to set up educational institutions of their choice or seek admission in such institutions or the exercise of other minority rights. In comparison to linguistic minorities, for whom the official language matters, there is no congruence between religious identity and State boundaries. For protection under Article 30, linguistic minorities make claims upon the States rather than the Centre, but this need not be so for religious minorities who are dispersed throughout India and whose identity is not linked to specific State(s). In this context, defining minorities at the State level would limit the notion of minorities, entailing as it does the adoption of an essentially statistical conception of minorities. Thus, a religious group, which is numerically smaller than the rest of the population of the State to which it belongs, would be entitled to be termed a

57  AIR 1962 Patna 101.
58  AIR 1974 Pat. 187.
59  AIR 1983 SC 1.
minority in that State even though the group may be numerically in a majority in India as a whole and hence not lacking in power or voice in the decision-making structures. This will doubtless add to the list of minorities and extend the benefits of minority entitlements to these groups, even as it will deny the same benefits to groups that are minorities in accordance with nationally and internationally accepted definitions of minorities.

2.12 Constitutional Provisions related to minority rights

The Constitution of India has afforded protection to the minorities in the country. The framers of the Constitution were quite conscious of the importance of these provisions. They very well understood that, in pluralistic society rights of minorities and weaker sections need to be safeguarded. The idea of giving some special right to the minorities is not to treat them as a privileged section of the population but to give to the minorities a sense of security. Special rights for minorities were designed not to create inequalities but to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing autonomy in the matter of administration of these institutions.\(^{60}\)

In India, the safeguards for minorities under the constitution of India are in form of fundamental rights. Firstly the constitution nowhere discriminates among the citizens of India on the grounds of religion, race, caste, etc and secondly, the rights conferred under Articles 25 to 30 are fundamental rights. The State is duty bound to protect the fundamental rights. If fundamental rights are infringed the remedy lies under Articles 32 and 226. A person can directly approach the Supreme Court or the High Court in case of violation of fundamental rights. So the true spirit and intention of the Constitution is to provide a very formal and water tight arrangement for safeguarding the interest of minorities.

There are some Articles in the Constitutions of India that exclusively safeguards minority’s rights, whereas, there are certain Articles though not specifically meant for minorities but they strengthen minorities’ rights.

The following two Articles, 29 and 30 are placed under the heading: “Cultural and Educational Rights”. These Articles are the only ones in whole of the Constitution which specifically use the term ‘minority’.61

It is thus evident, that the Indian Constitution establishes that the Indian State shall be secular, in the sense that it is not allowed to give preference to any particular religion. At the same time it gives full freedom to all religions to run their own affairs and offer to religious and linguistic minorities the special protection to run their own educational institutions funded or partly funded by the state.

Minorities in India have had to face adverse discrimination and, therefore, do not stand on equal footing with others, which made the framers of the Constitution, through Article 29 and Article 30, accord special rights to the people who form religious or linguistic minority in India.

On the outset it is desirable to delineate Articles 29 and 30 of the constitution of India, with relevant subject matter for the purpose of this study. The need for defining minorities stems from Articles 29 and 30, which guarantees minorities following privileges:

2.13 Cultural and Educational Rights

2.13.1 Article 29. Protection of interests of minorities

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

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

61 Swamy, Dr. N. Maheswara (2005), Supreme Court Judgment on Reservation and Admissions in Educational Institutions, ASIA Law House, Hyderabad, p. 21.
2.13.2 Article 30. Right of minorities to establish and administer educational institutions-

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. \([1A]\) In making any law providing for the compulsory acquisition of any property of any educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.\(^{62}\)

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

Article 29, is the most comprehensive Article, declaring that “any section of the citizens residing in the territory of India or any part there of having a distinct language, script or culture of its own shall have the right to conserve the same.” Thus the Article establishes an overall right of any group of citizens to maintain their language, including script, and culture. Article 30, Clause 1, is more specific and establishes that all “minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.” Furthermore, Clause 2 says that “the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under management of minority, whether based on religion or language.” Although Article 29 uses “Culture” instead of “religion”, it seems obvious that these two Articles are very closely related, since the safest way to maintain and protect the language, Culture, or religion of a group or minority is through the establishment of separate educational institutions.

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

\(^{62}\) Clause 1A was inserted by The Constitution (Forty Fourth) Amendment Act, 1978.
“any section of the citizens residing in the territory of India” and this may as well include the majority. However, India is a colourful conglomeration of numerous races, religions, sects, languages, scripts, culture and traditions. The minorities, whether based on religion or language, are quite understandably keen on preserving and propagating their religious, cultural and linguistic identity and heritage. Article 20 guarantees exactly that. There may appear to be some overlapping in language and expressions employed in article 15(1) and 29(2). However, Article 15(1) contains a general prohibition on discrimination by the State against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them; whereas Article 29(2) affords protection against a particular species of State action, viz, admission into educational institution maintained by the State or receiving aid out of State funds.63

It can be well concluded from Article 30, Clause 2, that if the State gives aid to educational institutions, it is also obliged to support institutions managed by religious or linguistic minorities.

From the careful perusal of the above Articles of the Constitution of India it is found that expression minorities has been used at four places in the Constitution of India. It has been used in the head note of Article 29 and 30 and in sub clause (1) and (2) of Article 30. Minorities in Article 30 has been used in two senses in Article 30, one based on religion and other based on language.

‘Linguistic minority’ for the purpose of Article 30(1) is one which must have separate spoken language and that language need not have a distinct script.

These provisions were to give religious and linguistic minorities’ security and confidence, and develop their own culture by bringing up their children in the manner and with the ideals they preferred that the Constitution of the country embodied a special provision in the list of Fundamental Rights.

2.14 Need for Minority Rights

‘The protection of the rights of minority is a *sine qua non* in a healthy democracy. The very basis of the minority protection is that the political non dominant i.e. a group small in number, need to be protected against interference of

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majority in their cultural and linguistic development. This differential treatment is necessary to preserve the basic characteristics which they possess and which distinguish them from majority of the population. Interest of minorities, their culture and individuality of minority need to be protected without jeopardizing the interest of majority at large.\textsuperscript{64}

Jawaharlal Nehru writing a note on Minorities in ‘Young India’\textsuperscript{65} stated, “the history of India and of the many countries of Europe has demonstrated that there can be no stable equilibrium in any country so long as an attempt is made to crush a minority or force it to conform to the ways of the majority .... therefore we in India must make it clear to all that our policy is based on granting this freedom to the minorities and that under no circumstance will any coercion or repression of them be tolerated ...... We can also lie down as our deliberate policy that there shall be no unfair treatment of any minority”. Unlike our neighbouring countries, India did not give favoured status to the religion of the majority of its people, because the leaders feared that this would automatically reduce all others to the status of second-class citizens in their own country.

The Karachi Charter on Fundamental Rights of 1931 acknowledged the rights of the minorities to their religion, the freedom to profess and practise any religion, and laid down that the state should be neutral in religious matters. The members of the Constituent Assembly felt that the minorities’ rights to their religion should be recognised. The Sub-Committee on Minorities gave many recommendations favouring them. The Advisory Committee on Fundamental Rights headed by Sardar Patel accepted most of the recommendations. In February 1948, the provisions were incorporated into the draft constitution under the title “Special Provisions Relating to Minorities”. But later changes were made in the matter of political rights. Tabling the report of the Advisory Committee in the constituent assembly on May 25, 1949 Sardar Patel said, “Our general approach to the whole problem of the minorities is that the State should be so run that they should stop feeling oppressed by the mere fact that they are minorities and that, on

\begin{thebibliography}{9}
\bibitem{64} Dr M. P. Raju; \textit{Minority Rights, Myth or reality}, Media House Delhi, 2002, p. 11,
\bibitem{65} May 15, 1930.
\end{thebibliography}
the contrary, they should feel that they have as honourable a part to play in the national life as any other section of the community”.

The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered Section of the population but to give to the minorities a sense of security and a feeling of confidence. The great leaders of India since time immemorial had preached the doctrine of tolerance and catholicity of outlook. Those noble ideas were enshrined in the Constitution. Special rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing to the minorities autonomy in the matter of the administration of these institutions. The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true, genuine equality, an equality not merely in theory but also in fact. The majority in a system of adult franchise hardly needs any protection. It can look after itself and protect its interests. Any measure wanted by the majority can without much difficulty be brought on the statute book because the majority can get that done by giving such a mandate to the elected representatives. It is only the minorities who need protection, and Article 30, besides some other Articles, is intended to afford and guarantee that protection.

India is the second most populous country of the world. The people inhabiting this vast land profess different religions and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic innate unity. It is a mosaic of different religions languages and cultures. Each of them has made a mark on the Indian polity and India today represents a synthesis of them all. The closing years of the British rule were marked by communal riots and dissensions. There was also a feeling of distrust and the demand was made by a Section of the Muslims for a separate homeland. This ultimately resulted in the partition of the country. Those who led the fight for independence in India always laid great stress on communal amity and accord. They wanted the establishment of a secular state wherein people belonging to the different religions should all have a feeling of equality and non-
discrimination. Demand had also been made before the partition by sections of people belonging to the minorities for reservation of seats and separate electorates. In order to bring about integration and fusion of the different sections of the population, the framers of the Constitution did away with separate electorates and introduced the system of joint electorates, so that every candidate in an election should have to look for support of all sections of the citizens. Special safeguards were guaranteed for the minorities and they were made a part of the fundamental rights with a view to instill a sense of confidence and security in the minorities. Those provisions were a kind of a charter of rights for the minorities so that none might have the feeling that any section of the population consisted of first class citizens and the others of second-class citizens. The result was that minorities gave up their claims for reservation of seats.

Sardar Patel, who was the Chairman of the Advisory Committee dealing with the question of minorities, said in the course of his speech delivered on February 27, 1947:

“This Committee forms one of the most vital parts of the Constituent Assembly and one of the most difficult tasks that has to be done by us is the work of this committee. Often you must have heard in various debates in British Parliament that have been held on this question recently and before when it has been claimed on behalf of the British Government that they have a special responsibility--a special obligation--for protection of the interests of the minorities. They claim to have more special interest than we have. It is for us to prove that it is a bogus claim, a false claim, and that nobody can be more interested than us in India in the protection of our minorities. Our mission is to satisfy every interest and safeguard the interests of all the minorities to their satisfaction.”

In his Judgment in the *St. Xavier College, Ahmedabad v. The State of Gujarat*, Justice K. K. Mathew quotes from Urmila Haksar, “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

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66 *Constituent Assembly Debates*, Vol II
differential treatment in order to preserve basic characteristic which they possess and which distinguish them from the majority of the population”.

In this case, Justice H.R. Khanna categorically stated that, “the provisions of the minority rights were a kind of Charter of Rights for the minorities so that none might have the feeling that any section of the population consisted of first-class citizens and the others of second-class citizens”.

The Supreme Court observed, “the fundamental right of the religious and linguistic minorities to establish and administer educational institutions of their choice is the only legal barrier to confine the bursting expansionism of the new Educational Leviathan. Great diversity of opinion exists among the people of this country concerning the best way to train children for their place in society. Because of these differences and because of reluctance to permit a singly iron cast system of education to be imposed upon a national, compounded of several strains, the Constitution has provided this right to religious and linguistic minorities”.

In the T.M.A. Pai’s case the 11 Judges Constitution Bench headed by Justice B.N. Kripal ruled that minorities have an unfettered right to establish an educational institution of their choice but added that the State could bring regulatory measures, for ensuring educational standards and maintaining excellence thereof. At the same time the Bench has given complete power to the management in the case of unaided educational institutions.

Honourable Judges, in the various judgments have not only recognised the rights of minority but have time and again upheld their constitutional validity.

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68 (2002) 8 SCC481.