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ASSESSMENTS AND CONCLUSIONS

The question of minority rights has always been a contentious issue all over the world including India. This issue was hotly debated during the drafting of the Indian constitution by the Constituent Assembly. The Sub Committee on fundamental rights and minorities in the Constituent Assembly gave a great deal of importance for the political and economic rights of minorities including the procedure for redress of rights in case of violations. With its report of 27 July 1947, the Sub Committee on Minorities proposed to establish for religious communities and for the Scheduled Castes and Scheduled Tribes separate electorates, and reservation in legislative bodies, ministries, and the civil, military and judicial services of the government since this was considered to be essential for the expression of political and legal rights of minorities. But separate electorates and reservation in the ministries and government services were ultimately given up in the name of unalloyed and pure nationalism. On August 1947, the Advisory Committee of the Constituent Assembly categorically stated in its report that separate electorate sharpened communal differences to a dangerous extent and have proved to be the main stumbling block to the development of a healthy national life. This was done despite the Sub Committee on Fundamental Rights admitting in explicit terms that ‘it is difficult to expect that country like India where most of the persons are communally minded; those in authority will give equal treatment to those who do not belong to their community’. As a result of this backtracking following the decision of Partition, minorities especially Muslims chance of getting fair share in national life including institution of governance got badly affected and left lurking. Otherwise all the guarantees of collective political and economic rights of religious
minorities promised in all previous resolutions and proposals of the Congress party were even written into draft constitution.

Judiciary as a Saviour

Judiciary is said to be the saviour of citizen's rights. The performance of Indian judiciary has been by and large satisfactory. Yet there are numerous instances and cases of public importance involving majority community where even judiciary has not been able to provide protection like for example the delay in the decision in the Babri Mosque issue. As an other example of judiciary's failing, Supreme Court judgment in St. Stephen's College case can be taken into consideration. Though it forcefully upheld the right of minority preferentially admit students of its community, but it also put obligation on the minority institution to admit at least 50% non-minority students for achieving the objective of national integration. All other institutions are exempted from any such obligation for having even a token minority percentage. Some right spirited persons have noted this with concern.

In another case, the Apex Court has also been taken to task for its flawed judgment finding no wrong with the ideology of Hindutva that denies legitimacy of minorities. It was rather sought to be equated with the Indian tenet of secularism, which has been designed to assure minorities of fair play and justice.¹

On October 25, 2004 in response to a PIL challenging the Presidential Order of 1950 and subsequent amendments confining the benefits of reservation for members of Scheduled Castes belonging only to Hindu, Sikh and Buddhist religion, the Supreme Court bench comprising chief justice R. C. Lahoti and justice G. P. Mathur failed to take the matter to logical conclusion stating "it is a matter of policy and legislation and the Courts should keep out of it". In its petition the Center for Public Interest Litigation had stated that exclusion of members of Scheduled Castes

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professing any religion other than Hinduism, Sikhism and Buddhism is discriminatory and violative of Articles 14, 15 and 16. Should it be the business of a Court of highest stature to turn its back on this important issue involving high constitutional principles?

In this regard it needs to be recalled that justice Kanakaraj while giving a ruling on the issue of entitlement to Scheduled Castes reservation benefits to a Dalit Christian convert observed that he failed to understand how a person socially categorized as a Scheduled Caste could be deprived of the benefits of constitutional protection because of a change in his religious faith. ‘What has religion got to do with social backwardness and ostracism practiced against certain groups of people for a number of years?’ asked the judge. The High Court judge observed that this case illustrated the need for a more practical and realistic approach to the problem of Dalit converts.

**Poor Record of Implementing International Norms**

India has been on the forefront in extending support to the creation of international regime of minorities’ protection. The duties and obligations accruing on India by virtue of its being a party to it are manifold. But its efforts in giving effect to these obligations in its internal jurisdiction have not been satisfactory and their practical realization has so far been minimal. The same is true with the implementation of constitutional and other legal provision. India has in fact failed to act on removing inconsistencies and inadequacies found in its constitution so as to bring them at par with international standards. It needs to take many legislative, administrative measures and political decision to improve its compliance of international human rights standard and minority rights obligations.

India was expected to act upon removing the inadequacies and inconsistencies in our constitution and laws after it signed
and ratified the two international covenants in 1979, which made it accountable to the world community for their implementation. Since then the UN treaty monitoring bodies, especially the UN Human rights committee, have been pointing out the need to amend its laws, constitutional as well as statutory, for effective implementation of the universally accepted human rights norms. The government of India hardly cared for the 1992 UN Declaration on Minorities as it maintains that rights of religious and linguistic minorities are amply safeguarded under the constitution.

But the economic, social, cultural and political realities prevailing in the country for 60 years since independence have been such that amounts to betrayal of the promise of equality, liberty and justice to the people enshrined in the constitutional preamble. This cannot be attributed to the behavioural failure of the political class alone. Fault lies also with makers of the constitution and flaws left in it that makes subversion of justice possible by the political leadership. For example, the persistently inadequate representation of minorities such as Muslims in the Parliament and Assemblies and their exclusion from the benefits of affirmative action programmes including reservation and the plight of the Urdu language and script have been caused by non-protection of minority political and economic rights and inadequate protection of their educational, cultural and linguistic rights in the constitution. Their rights have been made more precarious by un-helpful judicial interpretations and an indifferent bureaucracy.

Keeping this in mind concerned citizens of the country in May 1998 on the occasion of 50th anniversary celebration of independence and UDHR called upon Indian Parliament “to constitute a Constitution Review Commission comprising eminent persons with commitment to human rights in which representation is given to all political opinions and sections of society”³

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The world community is conscious of the fact that simply making provision of legal-constitutional protection of weaker and vulnerable minorities hardly serves the purpose. What is required in fact is to make its objective happen on the ground in reality. But for achieving this objective what is first required is the knowledge of the actual condition of minorities in terms of security of life, property and honour, and of the degree and nature of their participation in the political process and their share in power, and national wealth and resources and their access to opportunities for educational and socio-economic development.

Minorities are subjected to discrimination everywhere in varying degrees and kinds. It is the Muslims who bear the brunt of discrimination most in almost all fields of life. Muslims are under represented not just in higher echelon of administration, they are so even in the police, para military forces and in class III and IV services of the union and the states governments. Their meager presence and deprivation can be seen even in the area of discretionary appointments and distribution of permits, licensees, loans and allotment of lands, shops and houses. The state in India enjoys vast powers at its discretion to extend patronage and confer benefits by way of appointing members and chairpersons of permanent, quasi-permanent and adhoc commissions and committees, boards and panels, judges, vice-chancellors, members and leaders of delegations etc. In all these spheres of discretionary appointments, the share of minorities has been throughout very poor. The study of discrimination and prejudice as is prevalent against minorities is rarely encouraged in official circles. The job is left to ill-equipped minority groups themselves, which is nothing but a testimony to the weakness of human rights activism working for promotion of minority rights.

By committing itself to international agreements and national constitution the Government of India is under obligation
to make the condition of its minorities known so as to ascertain the degree of practical realization of the underlying principles of non-discrimination, justice and fair treatment. But under the garb of secularism until 2001, it kept suppressing community wise data on socio economic and educational status that it had collected during census operations since 1951. During all these periods the same secular considerations, however, did not deter the Government to publish with fanfare the differential rate of growth of religious communities, especially Muslims. But data on literacy, poverty and other determiners of backwardness and cultural deprivation of the same community was kept secret for almost a half century after cross tabulation which would have otherwise enabled people to correlate higher rate of Muslim growth in population with its educational backwardness and poverty.

It is encouraging to note that the Government of India has now not only made public such data as available with the Registrar General but has also appointed several committees to ascertain the degree and causes of under representation of minorities in all sectors of national life. The study of prejudice and discrimination against minorities needs the attention of the Government and commissions and the academic community. The fair practices in employment have unfortunately not been given chance to take roots in India. Just by providing for citizens right to non-discrimination, it is assumed that meritocracy already prevails in the country. Whereas the fact remains that traditional Indian social ethos has been more non-egalitarian, discriminatory and segregationist than in most other societies. Moreover sub group loyalties in India are stronger than any other loyalty or commitment. There is therefore, a need for a fair practices commission to ensure application of fairness in all employments, appointments and distribution of benefits.
NCM: Failing in Purpose

As an agency to look after the interests of Indian minority communities, the National Commission for Minorities has hardly been able to carry out any of its assigned functions in a successful and effective manner. The Commission, which has been established and empowered to investigate and report the condition of minorities and the working of the safeguards, has badly failed in this basic purpose. It has neither undertaken any study of minority under representation and its causes including prejudice and discrimination against them, nor has it impressed upon the Government of India to publish such studies and data. A closer look at the history of its formation and subsequent transformation that it underwent and it’s functioning since its final establishment under an act of Parliament in 1992 speak volumes for the Commission. The pre partition Congress assurance and Constituent Assembly’s draft article of 299 did talk about a monitoring institution, which was however discarded in the final constitution. The idea was revived in the late sixties and seventies and the Commission was first formed under the Janta Party government simply as a department of the Home and Welfare ministries.

While credit for initiating the establishment of Minorities’ Commission goes to the first non-Congress government, it did so only in name. At long last when because of political compulsions the first non-Congress Government at the Centre in 1977 wanted to demonstrate that it was sympathetically inclined towards minorities, it did establish a Minorities’ Commission only in name. Nowhere in the democratic world can one think of such an important commission to function as a department of a Ministry like Home or Welfare. When again under domestic political compulsions and the pressure of international opinion coming in the wake of Babri mosque demolition, the parliament enacted to establish a Commission in 1992. While doing so it took every step
to ensure that the Chairman and all the members of the Commission were appointees of the Government of India. But this was not insisted upon in the case of appointment of the chairman and members of National Human Rights Commission (NHRC), which was established a year later.

The mode of appointment of the team indeed becomes crucial for independent functioning of these Commissions. While human rights organizations and activists launched concerted campaign demanding such independence for NHRC, none of them cared for the National Commission for Minorities when a bill to this effect was in the making. What to expect from the hapless minorities? All minorities especially Muslims took mere fact of establishment of a Commission under an Act of Parliament as an accomplishment for themselves. Though the Act has such a major drawback, it does provide a wide range of powers and functions for the adequate working of the Commission. But its non-working and the indifference of Parliament and the people to its ineffectual functioning can be gauged from the fact that the Commission has not made public any Annual Report since 1996. That the reports have not been laid in either of the two houses of Parliament for so long as it ought to be has not stirred members of the Parliament. No honourable member even of the minority communities seems to be bothered to question about the non-submission of Commission’s Reports. Human rights organizations and even minority forum seem to be least concerned about the Commission. The Commission is unable to receive much needed attention perhaps also because it is dismissed by the right wingers of the majority community as a measure of minority appeasement. All this goes to show that minority concerns have been missing its due place in the national scheme of governance and hardly find patronage in India.
Minorities' Equal Treatments: A Far Cry

In spite of the indigenous origin of the bulk of Indian Muslims who hardly had any share in power during medieval period of so called Muslim rule, Hindu nationalists of various shades have helped develop the mindset that views Muslims as 'aliens' by virtue of their following a non-indigenous religion, whose patriotism and sense of belonging to Indian nation is made questionable. Partition of the country and continuing adversarial relation with Pakistan, especially over Kashmir, put the final seal on the perception of suspect loyalty of Muslims in the eyes of an average member of majority community in India. This 'otherness' of Muslims has acquired 'demonic' characteristics in certain regions of the country under a sustained Hindutva, campaign which holds Indian Muslims responsible for the imagined and some real sins of the medieval Muslim rulers and of partition; which not only provides justification for periodic violence against them, but which makes their socio economic 'exclusion' acceptable. The boycott of Muslims announced from housetops in the wake of Gujarat riots in 2002 is a case in point. It is this persisting phenomenon of Muslim victimization that makes a senior journalist like Vir Sanghvi admit 'Muslims are an incredibly disadvantaged minority' who besides being poor and educationally backward 'face appalling discrimination'.

In order to circumvent criticism, data on the low percentage of Muslims in the civil services is easily explained in terms of relative educational backwardness of Muslims. But how to explain the fact that all the forty seven labourers initially employed by the Archeological Survey of India for digging the earth to find out the traces of alleged temple in Ayodhya at the Babri Masjid site were Hindus, and that it was under court's direction sought by the counsel for the Muslim party that some Muslim labourers were also recruited. Again how to explain gross under-representation of Muslims in positions at the top and at bottom levels filled not
through merit based objective tests, but under political discretionary powers.

The denial of benefits of reservation to Christianity and Islam deserves to be reviewed as the existing law is based on discriminatory categorization of religions into indigenous (Indian) and non-indigenous (non-Indian) religions, which is the foundational principle of Hindutva view of nationhood.

Special constitutional provisions like reservations in public services were made for dalits to redress the wrong done to them for thousands of years during which they were denied all opportunities for a dignified life and for development. The Presidential (Scheduled Castes) Order of 1950 declared “no person who professes a religion different from Hinduism shall be deemed to be a member of a scheduled caste”, it did so without taking into cognizance the fact that change of religion and faith did not remove the deprivation that members of these castes had suffered over a long period in the past. These benefits were further extended in 1956 to persons of S.C origin among Sikhs and later in 1990 to Buddhists. However, Dalits who embraced Christianity or Islam continue to be denied these statutory benefits. In the event of a Muslim Christian Dalit reconverting/returning to Hindu religious fold, he is again entitled to benefits of reservation that he was denied as Muslim or Christian. Thus the law instead of being based on a secular criterion like socio-cultural deprivation caused by accumulated historical denial of rights, treats present religious affiliation as a crucial determiner of S.C status, thus discriminating against religions of non-indigenous origin like Islam and Christianity.

The plea that since Christianity and Islam claim to be egalitarian religions, the status of a person of Dalit origin undergoes a total change after conversion to these religions, which is taken as an excuse for the removal of ground for reservation, is fallacious. State’s affirmative action of such
deprived persons is derived not from their present condition but from their historical deprivation rendering them unfit for equal competition. Is it rational to expect that conversion to Christianity or Islam will give such a boost to the talents of the Dalit convertees that they can be expected to compete with historically privileged sections as equals? Buddhism and Sikhism also claim universal brotherhood of humans. But conversions to these egalitarian religions are not taken into account for the purposes of entitlement of benefits of reservation. Moreover law and policy should not be based on abstract claims of religions but on socio-cultural realities of communities. Change of faith in such cases does not necessarily lead to a change in their deprived community life.

The government of India under international human rights regime is required to submit periodic reports on measures taken to end discrimination in its internal jurisdiction and it cannot fulfill this obligation without actually initiating corrective legislative action in the matter of above discriminatory laws and without ensuring effective equality in other socio-economic fields.

The face of Criminal Justice Administration

The failure in prevention of recurrent anti minority crimes brings to the fore the real face of criminal justice system in India. It has not been completely effective either in protecting the rights of the innocent or punishing the guilty and compensating the victims. The most reprehensible part generally played in the crime against Muslim and other minorities remains the partisan role of the state’s law enforcement machinery i.e. the administration, the police and the justice system. The most glaring example of abdication of authority and terrorization by state's agencies is the case of massacre of 42 Muslims who were picked up from their homes by the state of Uttar Pradesh’s Provincial Armed constabulary (PAC) in Hashimpura, Merrut on
22 May 1987 and shot dead, dumping their dead bodies in the Ganga Canal in Muradanagar, Ghaziabad. The trial of the accused has yet to start, and claim of adequate compensation for the victims is yet to be decided by the Lucknow Bench of the High Court.

The Muslim community's fears of persecution have been strengthened by their view that judicial forums have been unable to punish the perpetrators of violence and hate preachers. The fact that prosecutors became defenders of the accused on communal grounds and that the judicial officers allowed miscarriage of justice, came in for severe strictures in the Best Bakery case related to Gujarat 2002 carnage by the Supreme Court of India. The creed of Hindutva followed by the RSS, V.H.P and Bajrang Dal has heightened these fears.

It is a travesty of justice that all those brazenly indulging in hate speech like Bal Thakeray and those involved in the conspiracy and acts of violence during December 1992–January 1993 including 49 persons charge sheeted by the CBI in Babri Masjid demolition case and those police officials named by Justice Sri Krishna Commission for rioting in Mumbai in 1992-93 and those responsible for massive killings in Gujrat, in recent past have yet to be punished, a large number of Muslim arrested under the lapsed TADA are still languishing in jails. The proceeding in the law courts related to Hashimpura (Meerut) U.P. killings of Muslims in 1987 is a classic example of how the minority victim groups cannot hope to get justice from the system.

Moreover, the social numerical composition of the police force with near absence or negligible presence of minorities and prejudiced attitudes of police towards Muslims have all made the system non-working.
**Urdu and the Cultural Rights**

While under Article 29 of the Constitution it is laid down that the right of sections of citizens to conserve their culture, language and script (Article 29) and the rights of religious and linguistic minorities to administer educational institutions of their choice will be guaranteed. Yet there is no obligation of the state to create conditions favourable for preservation of distinct identity of minorities. Moreover, the right of minority languages under Articles 345, 347 and 350 (A) to be used for official purposes as well as for imparting primary education is discretionary, not mandatory. As a result of such inadequate constitutional protection the Urdu language in Persian script has immensely suffered because of political hostility against it in the Hindi region. How can Indian Muslims conserve their culture if their mother tongue is banished from the primary school attended by their children as has been done in many parts of India?

It is notable for example that the Congress in the United Province moved quickly to make Hindi written in the *Dev Nagri* script the language of provincial legislature as against earlier commitment that both Persian and *Dev Nagri* script of Hindustani would be promoted. Since Urdu was spoken largely in U.P, the decision to make *Dev Nagri* the official language sealed the fate of Urdu as the national language. And all this was done before the Constituent Assembly could take a decision on the official language.6

**Making the Case for reservations for Muslims**

Both the pursuit of equality and the promotion of diversity, the two major concerns of contemporary times, vigorously expressed in the Durban Declaration and Programme of Action 2001 and the UNDP's Human Development Report 2004, validate affirmative action for 'inclusion' of Muslims in India who seem to have been 'excluded' knowingly or unknowingly in varying
degrees since independence, resulting in their marginalization in the national life as indicated by a number of studies. It includes reports of the Andhra Pradesh Commissioner for Minority Welfare and more recently at the national level by Justice Sachchar Committee. The causes of their under representation in institutions of national governance and wealth and low literacy rate are due to both their accumulated historical backwardness and the current social practices of sections of power-wielding majority enjoying tacit and some times stated policy backing of 'secular' governments since independence.

The study by commissionerate of minority welfare on the socio-economic and educational level of Muslims of Andhra Pradesh finds 65% Muslims living below poverty line with a monthly income of less than a thousand rupees. Muslim's general literacy rate is found to be 18% and female literacy rate is just 4% as compared to 44 per cent general literacy. The first official study that was carried out on the subject by the panel headed by Dr. Gopal Singh (1981) revealed so uncomfortable a scenario of abysmal Muslim achievement that the secretary of the panel Dr. Rafiq Zakaria was asked by the prime minister Mrs. Indira Gandhi not to Publicise it. Lately findings of Prime Minister High Level Committee headed by Justice Sachchar reinforce the view that Muslims have suffered decline and in some sectors they are worse off than the Indian Scheduled Castes. Given this state of things the situation calls for adopting a wide range of affirmative action programmes including reservation for Muslims as a backward religious minority whose members mostly comprise historically backward occupational groups. The creamy layer of the community to be determined on the composite basis of education, occupation and income will have to be excluded from the benefits of such reservations. The objection is often raised on any proposal for reservation for Muslims on the ground that it is anti-secular and that it will require amendment of the constitution.
as article 16(4) enables the state to make reservations for "classes" of people and not "communities".

The drafting history of article 16(4) shows that initially it was suggested in the Sub-Committee on Minorities by Sardar Ujjal Singh as a special measure empowering the state to provide for reservation for minorities not adequately represented in public services. The discussion on the appropriate phrasing of this provision on the Advisory Committee on 21-22 April 1947 centered around using an inclusive term which could cover inadequately represented backward sections of the majority along with the minority. K. M Pannikar owned responsibility for this change from 'minority' to 'classes' for this purpose. Persistence over demand for express mention of minorities made Sardar Patel authoritatively pronounce that "classes include minorities.

It is well that the intention of the framers of the constitution has been appreciatively and illustratively noted in the Supreme Court judgment delivered by chief justice M. N. Venkatachaliah, A.M. Ahmadi and B. P Jeevan Reddy, J.J on reservation for backward classes in the following words.

It is significant to notice that throughout his speech in the Constituent Assembly, Dr Ambedkar was using the word communities (and not castes) which expression includes not only the castes among Hindus but also several other groups. For example, Muslim as a whole were treated as a backward community in the princely state of Travancore.... The word community is clearly wider than caste and backward communities meant not only the castes wherever they may be found – but also other groups, classes and sections among the populace. (Para 80 (c) of the judgements)

Further in Para 83, the learned judges significantly pointed out that "besides castes (whether found among Hindus or other) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular state the Muslim community as a whole may be found socially backward"
Accepting the plea of the representatives of minorities, the National Commission to Review the Working of the Constitution (NCRWC) opined that 'classes' in article 16(4) is an inclusive term. The Commission has stated in its report that 'under the existing provision of articles 14, 15 and 16 it is open to the state to make reservations (for minorities) if it is of the opinion that such reservation is necessary and justified'.

It needs to be borne in mind that any special measure for minorities, like the provision of article 30, is not violative of the secular principle of the state. Secularism is required to ensure equality of treatment of all citizens, irrespective of religious affiliation. The international human rights standards starting from 1935 Albania school opinion by the Permanent Court of International Justice to official explanation of the UN Declaration on the Rights of Persons Belonging to Minorities by Prof. Asbjorn Eide, and the Durban Declaration and Programme of Action (POA) 2001, emphasise the necessity of special measures to make the minorities effectively enjoy equality, which mere formal legal equality cannot ensure. Pursuant to the Common Minimum Programme of the present UPA Government, a National Commission For Religious & linguistic Minorities and a High Level Committee on the Status of Muslims were constituted.

Whereas the terms of reference of the National Commission required identification of socially and economically backward sections among minorities for extending benefits of welfare measures including reservations, the Prime Minister's High Level Committee was directed to treat the entire Indian Muslim community as a single group worthy of extending benefits of affirmative action programs.

It is now clear that political legal advisors of the two panels have decided against separately providing for reservation in education and public employment for any religious minority such as Muslims on the plea that any such religion based reservation
will be anti secular and communally divisive. The official scheme seems to get certain sections of minorities identified by the Commission as socially and economically backward, who may be extended the benefit of reservations, whereas special affirmative action will be provided for socio-economic and educational advancement of Muslims\textsuperscript{12}.

Even if the scheme is accepted as politically constitutionally correct in terms of secularism, will the provision of any special quota for backward sections among religious minorities and special allocation of funds for welfare of backward religious minorities not be objected to on the same ground?\textsuperscript{13}

As the largest, most populous and most resourceful South Asian state and the home of diverse religious communities, India is expected to provide a role model for other South Asian neighbours in particular and the world in general in evolving a workable inclusive democracy committed to promotion of multiculturalism. However, this vision of a viable, pluralistic society with equal rights and opportunities for all is still a distant dream.

Endnotes
4. See a recent Report on ‘the social, economic and educational status of the Muslim community of India’ submitted by Prime Minister’s High Level Committee under the Chairmanship of Justice Rajender Sachchar, Cabinet Secretariat, New Delhi, 2006


10. Ibid.


12. Ibid.

13. Ibid.