Chapter VII

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This doctoral dissertation aims at investigating into the constitutional-legal rights and safeguards of the religious minorities in India with particular reference to the role of the National Commission for Minorities (NCM) in the enforcement of these rights and safeguards. This study also explores the complexities of majority-minority relations and its implications for a secular democratic setup.

The presence of minorities in different societies is a familiar phenomenon. No society can be either completely homogeneous or totally uniform nor have attempts at homogenization been always successful. In spite of this, it is noticed that the numerically dominant majority in every society tries to impose its own social and cultural norms upon others. With the consolidation of liberal democracy, the power and influence of the majority have increased considerably. The dominant majority controls state and resources at its disposal. It tries to authoritatively allocate values and distribute resources to its own advantage.

Eventually, the smaller groups or non-dominant minorities in such societies and under such circumstances face the danger of marginalization and exclusion. They develop apprehension and a sense of insecurity and therefore demand adequate constitutional and legal safeguards and effective institutional arrangements for their implementation. As a matter of fact, this has been universally recognised as the legitimate and genuine demand of minorities living in territorial states. The growing concern for the recognition of universal minority rights and legal safeguards is a pointer to this fact. The minority rights and safeguards are still evolving and taking a
concrete shape under the UN system and other multilateral arrangements.

In a multireligious, multicultural and multiethnic India a variety of minority groups are found. However, before the advent of British rule the question of majority and minority did not exist. The natural division of the pre-modern feudal society was between the ruling class (the dominant minority) and the toiling masses (dependent majority). But the majority - minority problem cannot be attributed solely to colonial rule as emphasised by the champions of the culturally homogeneous India. The British no doubt exploited the communal differences. But the failure of the Indians themselves to accommodate the religious and cultural diversities was also responsible for the creation of this problem. With the advent of democracy majority-minority relations and the separate claims of minorities assumed added salience. Therefore, the majority - minority problem cannot be looked entirely in terms of the Machiavellian divide and rule policy carefully implemented by the British.

Religion has played an important role in group formation in India and therefore the religious minorities have always been on the centre stage of all socio-political discourses. The impact of religion is so profound in this part of the world that the religious identity of a person dominates his all other identities. There is an additional factor responsible for this characteristic of the Indian society. India perhaps is the only country where four major religions (Hinduism, Buddhism, Jainism, and Sikhism) are the native religions and besides there is a significant presence of the followers of Islam and Christianity and other non-native religions. The religion is found to be the single most salient factor determining the political and cultural identity of the citizens and the term “minorities” thus principally refers to religious minorities.
though there are sizable segments of ethnic, cultural and linguistic minorities.

It is paradoxical that the national struggle against British colonial rule was marked by the greatest degree of unity among Indians, on the one hand, and at the same time, development of cleavages between various communities, on the other. Not only the Hindu-Muslim problem but also the separate claims of the Depressed Classes, the Tribals, and other minorities became a big challenge for the leaders of the Indian nationalist movement. It is interesting to note that Dr. B. R. Ambedkar, the undisputed leader of the Depressed Classes, wanted that his community (Depressed Classes) should be treated as a separate community independent of the Hindu fold. Under the Cabinet Mission Plan of 1946, the Scheduled Castes were treated as a minority. However, Gandhi – Ambedkar pact signed at Poona in 1932, ensured that the former untouchables would be treated as part of the Hindu nation.

The Constituent Assembly of India engaged in a threadbare discussion over the claims of the minorities. Besides the Hindu revivalists, there were also the liberal secularists who visualized a culturally homogeneous, India in which the minorities were supposed to erase their separate identities and forego their group rights. The circumstances too were favourable to such elements as the movement for a separate state of Pakistan was gathering momentum. But the enlightened leadership of the Congress and the liberal members of the Constituent Assembly opted for liberty, democracy and fundamental rights. The Assembly no doubt rejected the demand for retention of separate electorates for the minorities but proposed various special provisions for them including reservation of seats in the Central and State legislatures, and public services on the basis of their ratio in country’s population. Under Article 299 of the Draft Constitution a
provision was also made for the appointment of special officers for minorities for the Union and one for each of the States of the Union to monitor the implementation of the safeguards provided to minorities under the Constitution. However, the same Constituent Assembly underwent a change of mood and adopted a different attitude towards the claims of minorities after 11 May 1949 as most of the provisions of the Draft Constitution relating to the minorities were either deleted or reformulated after reopening the debate on minority rights. No plausible reason except the 'changed circumstances' [i.e. aftermath of the partition] was given for such turnabout and it is not clear yet what led to the reversal of policy towards the minorities after May, 1949.

The main findings of this study may now be summarized as follows:

1. The Constituent Assembly began to approach the question of minority rights and safeguards with a very positive frame of mind which is evident from the Objectives Resolution (termed by Nehru as an expression of the underlying policy of the proposed Constitution) which promised to all the people of India, Justice — social, economic, and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association etc and adequate safeguards for minorities, backward and tribal areas, and depressed and other backward classes. The Questionnaire on Minority Rights, drafted by K. M. Munshi and circulated among the members of the Sub-Committee on Minorities also contained questions relating to political and economic safeguards besides religious, educational and cultural rights of minorities. However, the partition cast shadow on the legitimate claims of minorities as the economic and political safeguards were given an ignominious
burial by the Constituent Assembly and the minorities were given only educational and cultural rights. The absence of constitutional provisions for the protection of economic and political interests of minorities has contributed to their marginalization and exclusion in public services and policy-making bodies. This is more evident in the case of the Muslims (the largest minority in India) as has been highlighted by the Gopal Singh Panel Report and the Sachar Committee Report.

As a matter of fact, the minorities are finding it difficult to realize their cultural and educational rights in the absence of positive socio-economic and political rights. The necessity and significance of constitutional provisions relating to these rights for the non-dominant groups like minorities can be understood in the light of their positive impact on the Dalits in India.

2. The right to religious freedom as granted by the Constitution of India (articles 25-28) can be called as the bedrock of a secular democratic state as it fulfils the promise of equality and non-discrimination in matters of religion to all groups of people whether minorities or majority. However, the minorities are finding it difficult to enjoy these rights relating to religious freedom as a result of atmosphere of growing intolerance and violence against them.

The right to profess, practise or propagate one’s religion as provided by Article 25 of the Constitution has been whittled down because of the anti-conversion laws enacted by several states of the Indian Union. The Presidential Order of 1950 limiting the benefit of reservation in public services and legislatures only to the Hindu Scheduled Castes, and the subsequent amendments in the said Order in 1956, and in 1990 to include the Scheduled
Castes of the Sikh and Buddhist origin, respectively, and denying the same to the Muslim and Christian Dalits is in complete disregard to the promise of equality and non-discrimination in matters of religion as guaranteed by the Constitution. Moreover, the inbuilt punishment for converting to Islam or Christianity and the incentive in case of the Muslim or Christian Dalits returning to the fold of Hinduism/Buddhism/Sikhism is evident from the fact that the person can reclaim the attendant benefits denied to him by virtue of his or her earlier conversion to Islam or Christianity.

The issue of religious conversion assumes a unique significance in India as it is the majority which expresses concern over the conversion of Hindus (mainly Dalits) to other religions (mainly Christianity and Islam). Thus sharing the concern of the majority community over the alleged conversion of the tribals by the followers of non-indigenous religions (Christianity) and reflecting the hegemony of the majority, the Supreme Court of India has upheld the various Anti-Conversion Laws passed by the state legislatures. The manner in which these laws are being used or misused to harass the Christian missionaries working for social welfare is a cause of worry for the minorities in this country.

3. The Constitution of India which came into force on 26 January 1950 does not contain any additional or specific provision for ensuring either economic security or political representation of the minorities with the honourable exception of the Anglo-Indian community whose representation was guaranteed. However, the minorities are provided some constitutional guarantees to preserve and protect their distinct language, script and culture and their right to establish
and administer educational institutions of their own choice. In fact, these were the only safeguards conceded to the minorities by the framers of the Constitution. But as we noticed the provisions relating to these rights were changed at different stages in the Constituent Assembly and finally modified to such an extent that they seem to have lost their original purpose and object. This is evident from the fact that there is an apparent conflict between individual rights enshrined in Article 29 (2) and group rights guaranteed under Article 30 (1). The experience reveals that what was sought to be the special right of the minorities to protect their language, script and culture through autonomous educational institutions maintained by them has become a general individual right in many cases. Thus there is a need to restore the original object and spirit of these articles in the light of their pre-natal history.

4. The role of the judiciary in the enforcement of constitutional safeguards to minorities is of crucial importance in India as it is the guardian of the Constitution and custodian of the rights and liberties of the people. The vulnerable sections of society like minorities look at it as their best friend and protector. An evaluation of the role of judiciary in protection of interest of minorities reveals that in most of the cases it has given a generous and sympathetic consideration to claims of minorities. It is more evident in the cases relating to cultural and educational rights of minorities. The Supreme Court has consistently upheld the rights of minorities to establish and administer educational institutions of their choice. It has been protecting the autonomy and the measures necessary for maintaining the minority character of these institutions. Thus the Supreme Court in the
St. Stephen’s College case has permitted the minority aided educational institutions to regulate admissions preferring their own community candidates up to fifty percent as the Court found it essential to maintain the minority character of the institution. The judiciary’s sympathetic approach to minority educational institutions is also evident from the fact that it has held that even in the name of national interest the minority institution cannot be forced to compromise with the interests of the concerned minority community. Thus in the Sidhrajbhai case the Supreme Court made it emphatically clear that state regulations allowable under Article 30 must be in the general interest of minority itself and not of the public or nation as a whole. Consequently the Supreme Court has liberated minority institutions from reserving seats for Scheduled Castes and Scheduled Tribes as it will not promote the interest of minority itself. A number of trend-setting judgments have been discussed in the chapter on judicial response to minority rights of this study that reveal that the judiciary has quite effectively protected the minority educational institutions from the undue interference of the political executive or any other authority for that matter. The intervention by the competent authority has been allowed only to save the institution from maladministration. However, it was in the Azeez Basha case that the Supreme Court seems to be deviating from its consistent approach to deal with the minority educational institutions. The Hon’ble Court quite strangely denied the historical character of Aligarh Muslim University by holding that the university is not a minority institution as it was not established by the Muslim community but by an Act of Parliament. The Judgment defies all human logic and is in complete disregard to the history and inherent character of the Aligarh Muslim University.
The Supreme Court has played a vital role in keeping intact the secular character of Indian Republic. It has declared secularism as the "basic feature" of the Constitution. It has also maintained a delicate balance between the values of secularism and fundamental right to freedom of religion. In a country where Hindus are said to be more than 80 percent of the total population, the judiciary has consistently upheld the freedom of conscience and the right to profess, practise and propagate religion of one's choice. Keeping in view the sensitivity of the people of India toward religious issues, the court has foiled all attempts of communalists to misuse religion for political gains and for disturbing communal harmony and peace. However, the Supreme Court judgment declaring Hindutva a way of life and allowing its use during elections has rightly been described as a 'severe blow to the principle of secular democracy'. Similarly the misuse of the so-called anti-conversion laws against the Christian and Muslim organisations by the administrative machinery of the State calls for an urgent judicial review of these laws.

The minorities living in abject poverty and suffering from socio-economic and educational backwardness have observed with pain that it is judiciary, which has frustrated the attempts of executive to provide the benefit of affirmative actions to religious minorities. The judiciary has not applied the principle of 'equality among equals and inequality among unequals' in relation to minorities while discouraging religion-based reservation in the country. It is important to note that the caste-based reservation has got judicial protection whereas the attempts of community-based reservation have received severe blow from the judiciary.
Thus judiciary is equally responsible for the socio-economic and educational backwardness of the minorities.

Although the minorities in general, express faith in judiciary, they also desire that it should play more active role in protecting them from communal riots, police atrocities, media trial and discrimination etc. Thus the positive intervention of the Supreme Court in cases of Gujarat riots 2002 has been appreciated by enlightened sections of the Indian society.

The minorities have also questioned the wisdom and competence of judiciary in matters of interpretation of their personal laws. In fact, the Supreme Court of India has been directing the Government to implement a Uniform Civil Code for all. The minorities feel that it will lead to doing away with all personal laws, and that it is an undue interference in the cultural and religious practices of minorities. Even the court's sincere attempt to Islamize the procedure of divorce in the light of the Quran to rescue Muslim women from the tyranny of the finality of the pronouncement of instant unilateral divorce has not found favour with the Muslim community. Thus they have been adopting agitational means against the decision of the court and have been successful in maintaining the continuance of the practice of triple divorce which goes against the procedure of divorce as clearly mentioned in the Quran. The Christian community also opposed the Christian Marriage Bill 2000 on the ground that it was against the Christian personal law.

In a nutshell, it can be said that the judiciary is considered by the minorities as the most trusted organ of the government consistently preserving their rights and interests. On occasions, they have felt uncomfortable with the decisions of the judiciary.
yet they consider it their saviour and friend at the time of crisis. Indeed some decisions of the court have seriously and adversely affected the interests of minorities but one can understand that striking a delicate balance between the ideals of secular democracy based on quality and justice for all, on the one hand, and living up to the expectations of minorities with additional safeguards, on the other hand, is a daunting task. Therefore, the evaluation of the role of judiciary in preservation of constitutional rights of minorities should be made keeping in view the inherent diversities of India and its attending challenges.

5. There is no denying the fact that the institutional arrangements for the enforcement of constitutional and legal safeguards for the minorities are as important as the safeguards themselves. The minorities were aware of this fact and this was the reason that one of their persistent demands included the appointment of Minorities Officers (at the centre and in the provinces) or an official body to monitor and report the working of the minority safeguards. However, as in the case of the demand for economic safeguards, the demand for the appointment of Minorities Officers was also dumped by the Constituent Assembly working under the dictation of the Congress leaders.

It was only in 1978 that the Government of India under the Janata Party realized that ‘despite the safeguards provided in the Constitution and the laws in force, there persists among the minorities a feeling of inequality and discrimination’. Consequent upon that the Government set up a semi-governmental organization called the Minorities Commission at the centre. The Commission was assigned some very important functions but the powers given to it were not commensurate to its responsibilities.
Moreover, it enjoyed neither statutory basis nor constitutional status. Thus the Commission faced many difficulties in discharging its duties as it was not taken very seriously even by the departments and agencies of the government. The biggest lacuna of the Commission was that it was not conferred the powers of inquiry and investigation which was very much essential for discharging its duties.

The Minorities Commission as originally set up in 1978 was attached to the Home Ministry but in 1984 it was shifted to the Ministry of Social Welfare thereby degrading the political status and reducing its role to that of a welfare agency dealing with matters relating to the rights of minorities. In fact, keeping in view the nature of problems faced by the minorities in this country, the Commission’s attachment to the Home Ministry would have been more relevant and useful.

The Minorities Commission became a statutory body with the enactment of the National Commission for Minorities Act, 1992, and renamed as the National Commission for Minorities (NCM). The debate that followed the introduction of the bill in the Parliament to accord a statutory status to the Commission mirrors the communal divide in the country and reflects the hostility of the rightist forces towards the minorities.

The according of a statutory status to the National Commission for Minorities did not make much difference either in its functioning or in the attitude of the government towards the minorities. Despite persistent demands by the concerned individuals and bodies the Commission was not conferred the much needed powers of inquiry and investigation. The new statutory Commission was like an old wine in a new bottle. A Bill
to grant it [the NCM] the constitutional status is pending in Parliament. Its fate hangs in balance because in India crucial issues are decided in the light of the political interest of the ruling class, not on merit.

6. An appraisal of the working of the NCM from 1978 to 2006 on the basis of its Annual Reports reveals that despite many weaknesses it suffers from, it has made an impact in India. With its limited resources and powers, it has tried to discharge its assigned duty of monitoring the implementation of the constitutional and legal safeguards of the minorities. In its several annual reports, the NCM has drawn the attention of the competent bodies towards the violation of fundamental rights of the minorities guaranteed under Articles 29 and 30 of the Constitution. The Commission undertook special studies and on the basis of these studies it consistently held that the autonomy of the minority-run educational institutions must be maintained. In its guidelines for the minority educational institutions it also held that there should be no reservation of the Scheduled Castes or Scheduled Tribes in these institutions. It also acknowledged and recommended the restoration of maintaining minority character of the Aligarh Muslim University. The NCM was also very critical of the fact that the minority educational institutions faced delay or denial of their recognition by government departments.

7. One of the major problems faced by the minorities in independent India has been the regular occurrences of communal disturbances. The Commission took cognizance of the communal riots and suggested very appropriate long and short term measures for curbing communal violence.
The Commission also tried to expand its territorial and functional jurisdictions by recommending that Jammu & Kashmir should be included in the jurisdiction of the Commission and Jains at national level and the Hindus in the States and Union Territories wherein they constitute less than 50 percent of any other community, should be treated as minority. Thus it took up the cases of Kashmiri Pandits and suggested corrective measures.

8. It does not mean that the Commission has not failed in discharging its duties. In fact, on many an occasion the minorities felt that the Commission did not do the needful. For example, the minorities at the time of communal riots face the partisan behaviour of the police and local administration but the Commission remains conspicuous by its absence.

The victims of the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987 and Prevention of Terrorist Activists Act (POTA), 2002 are mostly from the minority communities. The victims could not feel at any point of time that there was a body to protect them from cruelty and sufferings. The Commission was also not able to collect and keep data on the members of minorities killed in police firings, encounters and in police custody. The non-submission of Annual Report for the year 1992-93 is another example of malfunctioning of the National Commission for Minorities. In fact, the Commission’s report for the year 1992-93 would have been the most important and authentic document on the circumstances leading to the demolition of the historic Babri Masjid at Ayodhya on 6 December 1992, which also sparked large-scale Hindu- Muslim communal riots throughout the country. However, the National Commission for Minorities had nothing to report about the most
visible manifestation of fascism and the deliberate 'lapse' on the part of the Government and its agencies. This is also an example of politically motivated nature of the work of the Commission.

Notwithstanding all these, it cannot be denied that in the given situation no extraordinary achievement can be expected from the Commission. In fact it is the government which has failed the Commission by its own indifference, apathy and sometimes by contempt for the recommendations and suggestions made by the Commission. There is a need to suitably amend the law relating to the Commission to make it more effective, independent and autonomous.

It has been observed that the appointment of the incumbents of the Commission is also politically motivated. Thus many times, these incumbents are neither well versed in the law relating to minorities nor interested in the affairs of the minorities. Therefore, it is suggested that the chairman and members of the Commission must be selected by a search committee as in the case of the National Human Rights Commission. Its regional offices should be set up to achieve coordination as suggested by the Commission in its various annual reports and also the Minorities Commissions should be set up in all States and Union Territories.

9. One of the most important problems confronted by the NCM is that its annual reports are not tabled before Parliament on time. Thus as suggested by Tahir Mahmood, a mandatory time frame of six months from the date of submission should be specified in the NCM Act, 1992 for tabling of all its reports before Parliament or state legislatures, as the case may be, and it should be provided
that on the expiry of the period every report would be treated as a public document.

There is growing unrest among the minorities against the recurring custodial and encounter deaths at the hands of the police personnel. There have been many incidents of alleged fake encounters and custodial deaths of members of the minorities. As the minorities are losing their faith in the police and intelligence agencies and complain against their biased and partisan behaviour, it is suggested that besides providing power of inquiry to the Commission, the Government should also issue an order to all state governments to report every custodial death and encounter killing to the Commission if the victim happens to be a member of a minority community.

Bestowing a constitutional status upon the NCM will be highly desirable. However, if the government fails in its endeavour to accord a constitutional status to the Commission, it should at least invest the Commission with the same powers and privileges that have been given to the National Human Rights Commission which is also a statutory body like the National Commission for Minorities.

10. The constitutional and legal safeguards for the minorities seem to be constantly under threat because of the growing menace of majoritarian fascism and xenophobia in India. Inspired and motivated by a mythical cultural unity of India the Hindu nationalists are hell bent upon the cultural homogenisation of India. They disapprove of cultural diversities and brand any special safeguards for the minorities as their “appeasement” on the part of the ruling parting for securing their votes. Thus, they openly call for assimilationist policies by the State.
Taking advantage of Article 44 of the Constitution they call for imposing a Common Civil Code upon all the religious minorities and abolition of their separate personal laws. Not only this, but they also call for the Indianization of both Islam and Christianity by which they mean that these non-indigenous religions should assimilate themselves into the culture and ethos of India (i.e. Hinduism). This rightist majoritarian ideology based on hatred of other groups is growing and becoming militant day by day. It has unleashed massive violence and a reign of terror in many parts of the country threatening the very survival of the minorities. Therefore, it is imperative to emphasize that it is incumbent upon the State to ensure that the minority safeguards are faithfully implemented and the secular character of the Indian Republic strengthened.

To sum up, it can be said that it is the constitutional obligation of the Indian Republic to protect its minorities from oppression, recurring violence, discrimination and exclusion. Mahatma Gandhi had rightly said that the civilizational status of a state should be judged by the way it treats its minorities. The record of the Indian State on this plane since Independence does not appear to be satisfactory. We wish that the democratic ideals enshrined in the Preamble of the Indian Constitution would some day become a reality for the minorities as well.