



THE CONCEPT OF MINORITY: JUDICIAL APPROACH

K. Chandrasekhar

Research Scholar, Department of Law, S. K. University, Andhra Pradesh.

Abstract

Almost all states have one or more minority groups within their national territories characterized by their own ethic, linguistic or religious identity which differs from that of the majority population. Wide spread economic and social discrimination against minorities is a common phenomenon. It is combined with the denial of dignity, identities and cultures. The need for protection of minorities under national international laws has perhaps never been as urgent as it is in our times. Any discussion on rights of minorities in national and international laws would remain incomplete without clear understanding of notion of 'minority' which constitutes the subject of controversy. The main object of this paper is to elucidate the concept of 'minority' as generally understood in national and international laws.

Introduction

Wide spread economic, political and social discrimination against minorities is a common phenomenon. It is combined with the denial of dignity, identities and cultures. Even genocide takes place in this modern age. The frequent violations of their basic rights have brought the issue of minority protection once again at the fore front of international human rights discourse. The need for protection of minorities under national and international laws has perhaps never been as urgent as it is in present time. The protection of minority rights has become an issue of contemporary relevance.

It is widely recognized that the absence of an universally accepted definition of the term 'minority' is one of the main challenges associated with the protection of minorities due to lack of a universally accepted definition, There are no settled criteria¹ for determining a minority. The state of affairs is product of a combination of factors, most notably intractable conceptual differences and adoption of intensely politicized and unyielding stand points by state representatives.

Concept of Minority in International Law

In view of the legal significance of the matter of defining the term, numerous attempts have been made over the years at different international forums to clarify the essence of the term 'minority'. One of the first official attempts to define minorities was undertaken by the Permanent Court of International Justice [PCIJ] in its advisory opinion in connection with the immigration of the Greco-Bulgarian Communities.² The definition by the PCIJ refers minorities in the context of community as a "group of persons living in a given territory or locality, having a race, religion, language and traditions of their own, and united by the identity of race, religion, language and traditions in a sentiment of solidarity with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another". The PCIJ held that the existence of communities is a question of fact and it is not a question of law and therefore the question whether, according to local law, a community is or is not recognized as a juridical person need not be considered. The Special Rapporteur, sub commission on prevention of Discrimination and protection of Minorities [SCPDP] in 1954 describes the minorities as 'those non – dominant groups in a population which possesses and wish to preserve ethnic, religious traditions or characteristics markedly different from those of the rest of the population'.³ Italian professor Francesco Caporoti defined minority as 'a group which is numerically inferior to the rest of the population of a state and in a non dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly maintains a sense of solidarity, directed towards preserving their culture, traditions, religion or language'.⁴ According to Prof Deschne's Minority is "a group of citizens of a state, constituting a numerical minority and in a non – dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having sense of solidarity with another, motivated, if only implicitly, by collective will to survive and whose aim is to achieve equality with majority in fact and law".⁵ The Copenhagen document of 1990 clearly laid down that to belong to a

¹ Malcom Shaw, *The definition of Minorities in international law*; in Yoram Dinstein and Mala Tabory [eds], *The Protection of Minorities and Human rights* [Martin Nijoff publishers, London 1992] P1; Aftab Alam, *The Concept of Minority in International law*, *Indian Journal of international law* [2014] pp 93-98. Massey James (1999): *Minorities in a democracy: The Indian Experience*, Manohar, New Delhi.

² *Greco- Bulgarian Communities PCIJ Ser B.No 17,32*[1930].

³ UN Doc .E/ 1573[1954]pp. 48-49, See also UN Secretary General, *Definition and classification OF minorities*. memorandum submitted by the Secretary General. UN Commission on Human rights, UN Doc .E/ CN 4/ Sub. 2/85 ;27 December 1949 Para 37 and 39.

⁴ F. Caporoti, *The Special Rapporteur., Sub commission on prevention of Discrimination and protection of Minorities, Study on the rights of persons belonging to Ethnic and Linguistic Minorities UN Doc E/CN 4 sub2/384/Rev 1* [1979]40.

⁵ Jules Descenes, *Proposal concerning a definition of the term "Minority" UN Doc. E/ CN 4/sub.22/185/ 31.14 may 1985.*



national minority is purely a matter of a person's individual choice.⁶ However neither the mere fact of existence nor state recognition alone is sufficient for establishing minority status of an individual; rather together they form effective criteria for determining the same.

A review of several proposals of definition, discussed above, does reveal that there are certain elements that recur, some of which are objective and others are subjective. These elements seem to be essential components of a definition of the term minority even though some of these elements are criticized and are not always being interpreted in the same way.⁷ A minority according to above discussed definition must satisfy five criteria given below.

- a. Numerical inferiority
- b. Non-dominance
- c. Nationality or citizenship status
- d. Distinguishing ethnic, religious, or linguistic characteristics
- e. Subjective criteria-A sense of solidarity directed towards preserving culture, traditions, religion or language.

The definition of the term minority continues to present few difficulties. Much of the time, however, it is self evident which group constitute minorities. When scrutinizing the various proposals of definition by academia and from within international organizations, a certain core of objective and subjective elements for such definition emerge quite clearly as most of the definition proposals have common components, which taken together most minority situations. The most important characteristic of minority is that the group must exist as a separate and distinct entity and it must possess collective aspirations. There is no dispute about the ethnic, religious, linguistic or national affiliation of the group, although in some cases there may be some genuine uncertainty. Thus though we may not have a universally agreed definition of the term, but still it is possible to find key elements of the concept of minority endorsed by international law. These elements certainly help clarifying the essence of the concept of minority in international law.

Concept of Minority in Indian Constitution

'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 Article 23 of the Draft Constitution corresponding to the present Article 30, was being debated, doubts were indeed expressed in the constituent Assembly over the advisability of leaving vague justifiable rights to undefined minorities. The assembly chose to avoid any further elaboration and left it to the wisdom of the courts to supply this omission⁸. Dr B.R. Ambedkar said⁹,

"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. For instance, for the purposes of this Article 23, if a certain 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. 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".

As early as 1958, in 'In Re the Kerala Education Bill, 1957'¹⁰, 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*. However, the recent case of T M A Pai Foundation and Ors vs State of Karnataka and Ors¹¹ has specified the geographical entity of state for consideration of the status of minority for Article 30. To quote from the judgment, "Since reorganization of the states in India has been on linguistic lines, therefore, for the purpose of determining the minority, the

⁶ Copenhagen document of the conference on the Human Dimensions of CSCE [1990] [para 32]

⁷ See *Interalia*; Deschenes, supra note 5 and Malcom shaw, supra note 1. See also Yaqin, A (1986): *Constitutional Protection of Minority Educational Institutions in India*, Deep and Deep Publications, New Delhi.

⁸ Yaqin, A. *Constitutional Protection of Minorities educational Institutions in India*, Deep & Deep Publications, New Delhi [1986]

⁹ See *Constituent Assembly Debates 1948-49 PP 922-23*.

¹⁰ AIR 1958 SC 956

¹¹ 2002[8]SCALE 2



unit will be the state and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered state wise.”

One fails to understand how organization of states on linguistic basis provides a base for consideration of the states as the basic unit for arithmetical calculation for determining religious minorities. Further, it is important to mention that the condition of having less than 50 per cent of the population in a state, distinguishable on religious or linguistic terms, does not entitle one to the rights automatically. In the words of Ambedkar¹²

“I think another thing which has to be borne in mind in reading article 23 is that it does not impose any obligation or burden upon the State. It does not say that, when for instance the Madras people come to Bombay, the Bombay government shall be required by law to finance any project of giving education either in Tamil language or in Andhra language or any other language...The only limitation that is imposed by article 23 is that if there is a cultural minority which wants to preserve its language, its script and its culture, the State shall not by law impose upon it any other culture which may be either local or otherwise. Therefore this article really is to be read in a much wider sense and does not apply only to what I call the technical minorities as we use it in our Constitution.”¹³

Succinctly, 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. Does the concept of language refer to the languages having adequately developed grammar and script or only script is sufficient to claim the status or is spoken language a condition enough to acquire the status of minority? As far as language is concerned, the case of D A V College, Jullunder vs State of Punjab¹⁴ 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 that language should also have a distinct script for those who speak it.

As far as the concept of religion is concerned, can a sect claim the status of minority? Does the Article accept only major well recognized religions or emerging religions can also avail of the benefits? In the latter case, how can it be established that the religion is new and is not merely a sect?

A study of court cases reveals a continuous struggle between the State and minorities on these issues. For instance, Patna High Court announced in *Arya Pratinidhi Sabha vs State of Bihar*¹⁵, that a minority is distinct from the Hindus. However, in 1976, Delhi High Court decided against providing benefits of Article 30 to denominations and sects. To quote Desai¹⁶ the most significant case on this issue was decided by the Delhi High Court in 1976. It lays down the correct position in law namely that ‘minorities based on religion’ in Article 30(1) mean only what we call in common parlance the various religious communities like Hindus, Muslims, Sikhs, Buddhists, Christians, Jains, etc, and cannot be meant to include religious denominations or sects. One gets uncomfortable on such verdicts. Acceptance of only ascriptive and well-recognized units as religious units does not take into account new religious movements and claims of new emergent religious groups for minority rights. In 1962, Brahma Samaj of Bihar made this claim, which was accepted by the High Court¹⁷. The court, however, did not accept such a claim in the cases of Chaudhari Janki Prasad¹⁸ and S P Mittal¹⁹. The ambiguous definition of religion has potential for controversy. Unfortunately, the bench comprising 11 judges in the Pai²⁰ case did not deliberate upon this important issue; hence, leaving space for continued confusion at the levels of both, the state and the minorities and simply held that [a] the term ‘minority in Art 30[1] covers linguistic and religious minorities; [b] for the purpose of determining the ‘minority’ the unit will be the state and not whole of India. Thus, religious and linguistic minorities, which have been placed at par in Art 30 have to be considered State wise.

¹² *Constituent Assembly Debates, 1948-49: 923*

¹³ *Ranju Jain, Minority Rights in Education: reflections on Article 30 of the Indian Constitution EPW June 11, 2005 p 2431*

¹⁴ *AIR 1971 SC 1737*

¹⁵ *AIR 1958, Patna 359*

¹⁶ *Desai, M, Minority Educational Institutions and Law Akshar Prakasan, Mumbai [1996]*

¹⁷ *Dipendra Nath Sarkar vs State of Bihar AIR 1962 Patna 101*

¹⁸ *AIR 1974 PAT 187*

¹⁹ *AIR 1983 SC 1*

²⁰ *Supra 11*



Conclusion

The Constitution of India provides certain fundamental rights [Articles 15-17, 25 to 30][Articles 330-339 and 350 for the benefits of minorities in India.²¹ The rights conferred under them are not absolute but subject to reasonable regulation in the interest of minority itself as well as the nation²². The language of democracy, equality and social justice are used for promoting both inclusion and exclusion of people in social categories. It is pertinent to quote Soli J Sorabjee former Advocate General of India opinion that “what most to minorities is their religion, their educational institutions, their language and their culture. One of greatest senior lawyers of Indian Judiciary Sorabjee cited the case of Albanian Government before the International Court of Justice, where in the Court emphasized that” in addition to equality in law there must be equality in fact which may involve the necessity of different treatment in order to attain a result, which establishes equilibrium. The equality must be an effective, genuine equality.” He also quoted the UN Human Rights Committee report “that for effective protection of minority rights positive measures of protection are required not only against the acts of state party itself, but also against the acts of non-state actors. Mere abstention from discriminatory acts is not enough. What is required are positive measures by states to protect the identity of a minority and rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group. Further Majority communities should be aware of and be sensitive to the cultural rights of the minority communities.. In their turn minority communities should also respect national legislation and the cultural customs and traditions of the majority community in the State in which they live. In sum survival of democracy in plural society lies in the survival of minority languages and culture.

²¹ See M.P Jain *Constitution of India Fifth edition, LexisNexis p 1200 [2008]* See B. Shiva Rao, *The Framing of India’s Constitution: Select Documents vol 11pp207.*

²² Basu ,Acharya Durgadas., *Commentary on Constitution of India vol D/1 7th Edn part 111 on Fundamental rights [1996]*Iqbal A Ansari, *Protection of human and Minority rights under the Indian Constitution,A Review,Minority Council Aligarh [2000].*