

Towards a New Consideration: Justice for the Minorities

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[With the publication of Issue no 13 of Policies and Practices we began a series of short status reports on social justice in India. This issue (no 14) is the second in that series of reports. It examines the protective strategy of the Indian State with regard to minorities and shows, how such a strategy of protection quickly transforms into another policy of governing the people. This issue containing three articles shows in the process, how situations of marginality produce incipient demands for justice. Finally it suggests the necessity of a new charter on minority rights. It emphasises the need for a dialogic and right-based approach as distinct from a protection based approach. -Ed.]

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Governing the Minorities?

Samir Kumar Das

As most of the world's actually existing democracies have already moved a full circle, the principle of majority rule that has hitherto governed them, loses much of its relevance and eventually develops many of its own anomalies. Minorities – ethnic, caste and sexual or otherwise, all over the world refuse any longer to accept what has historically been meted out to them in the name of majority rule and are increasingly showing signs of becoming restive and violent. While history has opened up a new space for the assertion of minority rights, this paper warns us against the recent attempts made particularly by a section of scholars and activists including the global multilateral agencies, at grabbing and appropriating this newly created space and incorporating it into the currently fashionable neo-liberal agenda of governance. 'Good governance' - as the neo-liberals maintain, is the means through which minority rights within the *given* nation-space can be secured, accommodated and protected. We on the other hand argue that the contemporary assertion of minority rights calls for the re-articulation of a new political space beyond the historically established and given nation-space and their incorporation into the nation-space is possible only at the risk of surrendering minority rights. Never before in the history of nations, has the dichotomy between nations and minorities been such profoundly posed as it is in recent times. This paper proposes to map minority rights in the newly emerging political space – a space that does not necessarily feed into the imperatives of nations, nation-states and the sovereignties that accompany their existence.

I. Coming of the Nation-Space

In the famous Girish Karnad play – *Tughlaq* written in 1964, the Sultan of Delhi (1326-51) - while deciding to shift the capital of his kingdom in 1327 to Daulatabad – about 700 miles away, ordered his subjects to immediately resettle them to the new capital:

Every living soul in Delhi will leave for Daulatabad within a fortnight. Everyone must leave. Not a light must be seen in the windows of Delhi, not a wisp of smoke must rise from its chimneys. Nothing but an empty graveyard will satisfy me.

Although Tughlaq considered Daulatabad as impregnable in terms of its defensibility and central in terms of its command over the whole of Hindusthan compared to Delhi that he thought was too close to the northwest and hence vulnerable to outside attacks organized mainly from that side, he readily understood that defense has no meaning without a kingdom that needs to be

defended and a kingdom has no meaning without the subjects willing to express their unwavering loyalty to the Sultan and hence, it is logical that the shift of capital will have to be accompanied by a transfer of population. Although Tughlaq unlike the rulers of his time was right in appreciating modern technologies of government, he did not know how to organize the transfer of his subjects without doing violence to their will. Thus began a saga of forced migration – perhaps the first of its kind in India’s history, sparked off and catalyzed at the instance of political masters with hardly anyone of Tughlaq’s subjects - as the play informs us, willing to oblige him and shift her voluntarily to the newly established capital. We therefore have traumatic and brutalizing stories of people – old and infirm, challenged and impaired, pregnant women and little children physically unable to walk and move, tied firmly to the chariots and horse carriages driven majestically by the royal dignitaries and the Sultan’s sycophants dressed in their full ceremonial regalia and dragged all the way to Daulatabad. Many of them lost their limbs or died on their way – yet the capital could be established and Mohammed Bin Tughlaq ruled his kingdom from his newly established capital for about 17 years until he decided to return to Delhi and once again with the subjects who were able to survive the ordeal of first round of forced migration. At one level, both these rounds of migration – nevertheless cruel, traumatic and brutalizing even by medieval standards, helped in making up a public spectacle – probably unprecedented in Indian history. While nomadism and human migration have been as old as the formation of human groups, its transformation into a public spectacle with rulers exercising their power over subjects by way of herding and organizing them together, dividing them into neatly distinct and albeit distinguishable categories, bodily transferable to places and areas suitable for their government is of course a patently modern phenomenon.

Yet at another level, Tughlaq was tragically modern - he was a modern ruler trying only unsuccessfully to come to terms with his pre-modern times. He came in advance with albeit very modern technologies of government in his repertoire. Karnad’s *Tughlaq* does not provide any comic relief to us, which most of the school textbooks that we read in our childhood and instruct our children to read, do, from an otherwise very serious and somber history of kings and battles, wars involving tears and agonies. Karnad’s *Tughlaq* aptly sums up the tragedy of a failed ruler who failed - not because he lacked ingenuity and innovativeness, but because he was much too ingenuous to remain rooted to his time. Indeed, he is fed up with his constantly ingenuous self - the ‘patient’ in him as he once puts it in the play and he finds it impossible to get rid of it without terminating his life. His own self becomes a problem for him. As he cries out:

I wish it was as easy as that. I have often thought of that myself – to give up this futile see-saw struggle and go to Mecca. Sit there by the Kaba and search there for the peace which Daulatabad hasn’t given me. What bliss! But it isn’t as easy as leaving the patient in the wilderness because there’s no cure for his disease. Don’t you see - this patient racked by fear and crazed by the fear of enveloping vultures, can’t be separated from

me? Don't you see that the only way I can abdicate is by killing myself? Could have done something if the vultures weren't so close. I could have crawled forward on my knees and elbows. But what can you do when every moment you expect a beak to dig into you and tear a muscle out? What can you do?

When our political masters did the same bizarre act of having acceded to the partition of the subcontinent in 1947 – if not actually conniving to partition it, and getting their populations 'adjusted' and 'transferred', boxed and disciplined into neat and distinct categories of nations, they – unlike Tughlaq, were adored as our 'founding fathers' and celebrated as the great architects of their histories – this time, history in plural. While there *was* history in the past, there *are* histories now. One act of partition severed all our links with common past history and has given unto us our histories equally distinct from each other. All that is common will have to be forgotten. Nationalist histories make this act of collective forgetting a must, almost an obligatory part of our history writing. It did not happen in the case of Tughlaq because he was out of sync with the history of his time. Why did the history of Delhi after all continue to lurk behind while he ruled from Daulatabad so that he had to finally return and resettle his people after 17 years? History continued to operate in two altogether divergent registers – one that he sought to control by way of issuing his commands and dictates and the one that constantly eluded him by defying his mechanisms of control. He could not bridge the chasm. Why was Tughlaq unsuccessful in investing his people with a history he wanted them to embrace? Why are the constant cracking and splitting of political boundaries of kingdoms and empires in pre-modern societies did not have to coincide with population adjustments and transfers? The reason is simple: His belief that he could make history in the way he had intended turned out to be a self-deception – given that he came at a time when people continued to believe that history was divinely ordained and their attachment to land they inhabit is ineradicable so much so that the rulers are required to adjust them to these imperatives.

There were certain mechanisms active in our societies that evidently helped in keeping social space relatively free and untrammelled by the constant changes and upheavals that otherwise swept the political arena. Village life – we are informed, remained unaffected by the regional kingdoms and central empires. Thus, even if people became parts of different political orders and dispensations – thanks to the conquests and outside invasions, they could be sure that all this was happening on a vast yet continuous civilizational space within which cultural differences appeared more as differences of degree within a wider mosaic than of kind with fragments that could not be pieced together. Besides, political orders and dispensations did not seek to inscribe any new history; they allowed themselves to be the instruments of its inscription. Nehru was no Tughlaq – although Karnad's *Tughlaq* written in the same year in which Nehru breathed his last, according to some, makes - an albeit opaque reference to him and at times, caricatures him. While Tughlaq sounds enigmatic, Nehru does not. If partition of 1947 did not sound either bizarre or grotesque – 'Tughlaqi' we call it in our

everyday vernacular, it was because the surgery was made in order to create a new political space – a space in which the political is expected to coincide with the social and vice versa. The age of modern states has brought in a new political lingo in which it is considered neither absurd nor monstrous to talk about partition to be followed by population transfers. It is only with the emergence of the modern state that each political space will have to be culturally distinct and to use Benedict Anderson's famous term, 'particularistic' (Anderson 1991:9) and is required to give unto itself a cultural – even if that remains fictive and unhistorical. The fiction is potent and modern states seek continuously to do the impossible of actualizing the fiction in order to become what they want to. Modernity, as we know, is not so much a being as it is the art of becoming. But as partition turns out to be 'messy' belying all our expectations of surgical precision from it (Chatterji 1999), the articulation of this political space exists only as a chimera – a fiction, but obviously a potent fiction constantly driving the states to actualize it. Partition accordingly becomes the new means of building nations in a decolonized world.

If partition of 1947 connotes the articulation of a new space – a terribly fragmented space with each fragment thriving and asserting its autonomy on the powerful fiction of the distinctiveness of its history and culture, it also encourages people to embrace, enact and elaborate the fiction. The articulation of a nation-space creates a new form of power – a power that unlike the colonial power does not inflict pain and thus stand in a certain opposition to them, but holds out the promise of liberating them and yet turn them into its objects. This is what the turn from colonial to postcolonial forms of power signifies to us. Atin Bandyopadhyay's *Nilkantha Pakhir Khonje* (In Search of the Nilkantha Bird) is a two-volume Bengali novel of epic magnitude in which the *Karta* – the head of a Hindu joint family then living in East Pakistan, notwithstanding the opposition from the members of his family and most importantly his Muslim neighbours, finds it immoral – more than anything else, to remain there once India is born as a separate nation-space. According to him, it is immoral to stay in East Pakistan – the homeland for the Muslims, once India dispenses with this land. We have to keep in mind that the family was widely respected in the area and did not have to directly suffer the riots that broke out on the eve of partition. In spite of all their persuasions, he was adamant and clung on to his decision – a decision he had to regret subsequently insofar as the bubble of fiction did not take time to burst. Correspondingly, we know stories of many Muslims in Calcutta who refused to stay on in West Bengal – once East Pakistan was formed on the ground that it was immoral on their part to remain in a state that was not theirs. In short, the burgeoning ethnographies on the migrants from either side of the divide speak of the same thing: the arrival of a body of people who – unlike Tughlaq's subjects, are now willing to acquiesce to a new political authority with which they can identify themselves and in which they hope to be constituted as sovereign subjects and politically empowered citizens. Their subjection to the newly established political authority was also a means for subjectifying them – that is to say, endowing them with the rights and freedoms that follow upon it. In other

words, it is only within the newly articulated nation-space that one becomes a citizen with rights and freedoms enjoined by it. There was hardly any schism felt between one's identity as a national and one's identity as a rights-bearing citizen.

Elsewhere, I described this process as 'natural selection' (Das in Samaddar ed. 2004). The appearance of a modern postcolonial state – whether in South or in South East Asia is marked by the project of articulating the political space in a manner that implicitly selects its own people. Indian state explicitly promised to retain its secular character. Mohammed Ali Jinnah assured the minorities that the state would do everything to make them feel safe in the newly created Pakistan. Nehru and Liquat Ali Khan signed the famous agreement in 1950 in which both leaders renewed their pledge to protect the respective minorities in their own states. Yet, everyone knew that their pledges ran against the way the political spaces were articulated and divided in the subcontinent. In spite of their pledges, people moved – whether with the assurance of transfer as in the west, or without it as in the east. Not many paid heed to them by way of returning to their ancestral homes. Tughlaq's irony was that he never got his political forces right. Political forces this time around were themselves maverick and clearly Tughlaquesque; if only history could get a leader like Tughlaq to preside over them. It only made a Tughlaq out of Nehru - without of course the travails and irony that the Sultan of Delhi had had to suffer. Nehru became a hero and Tughlaq remained a much-maligned maverick. The mad rush for settling oneself on the right side of the newly drawn international borders was evident in all the post-partition migrations and population transfers.

II. Popular Sovereignty and the Production of Minorities

I have dwelt at length on the articulation of this new political space for I consider it as critical to our understanding of the state of minorities in South and South East Asia. Each such space created its own people unique to it – which we term 'nation' and this explains why there was mad rush of people immediately before and after partition in South Asia for relocating themselves on what they consider as the right side of the border enclosing it. Few of us recognize today that the doctrine of popular sovereignty in Social and Political Theory is predicated on the emergence of the nation ('people-nation') as a unique and homogeneous body. Nation is the key middle term that connects people to the sovereignty of the state. The experience seems universal – only the historical routes are different. The constitution of an unwieldy and haphazard multitude into a well knit, disciplined and homogeneous body of industrial workers and citizens – so eloquently shown in the historical researches of E. P. Thompson and in more recent times, of Sandro Mezzadra, took place in Europe in its 'highest time' between 1640 and 1660. In Europe, it happened without colonial mediation (Mezzadra 2005, mimeo).

This historical experience gave everyone an opportunity of identifying oneself supposedly with one's own people – the people whom one considers as one's own, one's nation – and with it, the nation-state. Thus, many Hindus of

Pakistan decided to come back to India as much as many Muslims of India decided to respond to the call of Pakistan and migrate to that country. While being free to identify with a nation of one's own choice – if we were to call it a choice at all in view of the tumultuous days of partition and post-partition riots, one was also constrained by the given menu of nations and nation-states, offered to them at this critical juncture. History offers a choice, but only a limited choice. The articulation of a political space and the people filling it are made possible by the serial repudiation of similar claims made by many others within the society. 'India' and 'Pakistan' were just two of many such otherwise unrealized possibilities like, 'United Bengal', 'Tribalstan', 'Dalitsthan', 'Dravida Nadu' and 'Sikhistan' etc. available at that time. I wonder whether there were possibilities other than heading towards forming nations and nation-states available at that time. In an age of nation-states, history inevitably rules out such non-national possibilities. Repudiation of the claims of such communities as the Nagas, Mizos and Kashmiris, the Mohajirs and Balochs, the Chakmas and Hajongs, the Tamils, the Shans, Hmongs, Kachins and Karens, the Lhotsampas of Nepali origin, the plainsmen *Madhesias* of the *terai*, the Malaya Muslims, the Moros, Filipino Chinese and the Acenese forms the basis of nationhood in India, Pakistan, Bangladesh, Sri Lanka, Burma/Myanmar, Bhutan, Nepal, Thailand, the Philippines and Indonesia respectively.¹ Minorities are produced not through any act of our choice for none of us wants to be in a minority. Minorities are produced through sovereign repudiation of their claims to nation- or peoplehood.

The works of Giorgio Agamben suggest that there is hardly any philosophical basis involved in the process of repudiation or for that matter, vindication of a group's claim to people- or nationhood. Popular sovereignty, he will argue, is not about people constituting them as sovereign, it is about the power that first of all privileges them as people and throws others into the scrap heap of history. People and the minorities are determined by what he calls, 'practical considerations' - the power of 'pure violence' as he illustrates it – a violence that only the sovereign can exercise without offering any philosophical or moral justification. The way modern states treat their minorities - some of which are named above, is reflective of this sovereign power. This is the power that can suspend all the legal and Constitutional provisions, keep rights and freedoms otherwise enshrined and guaranteed in the Constitution, laws of the land and norms in a limbo and arrogate to itself the license to expel and exterminate those who do not deserve to be called the 'people'. Hence, they deserve to be ruled by exception and summarily eliminated. As he observes:

In modern biopolitics, sovereign is he who decides on the value or the non-value of life as such. Life, which with the declaration of rights, had

¹ Reports prepared by human rights organizations or various state and statutory agencies on each one of the groups mentioned above document in detail the atrocities routinely committed to them.

as such been invested with the principle of sovereignty – now itself becomes the place of a sovereign decision” (Agamben 1998: 142).

While the nation and people are invested with rights, minorities are left only with their ‘bare lives’. Sovereign power bares the lives of the minorities as much as it impinges on whatever they are left with - their ‘bare lives’

The point I am trying to emphasize is simple: violence against minorities is not to be confused with any ordinary kind of inter-communal riot or violence that countries of South Asia historically are never short of. For, it is not violence that takes place as a result of any chance conflict between communities in which minorities are merely involved as parties to what eventually turns into a free-for-all between communities. Most of the riots in India or elsewhere by and large reflect this trend, although it is possible to argue that in such free-for-alls, it is invariably the minorities who have finally to bear the brunt both in terms of the number of human casualties they suffer or the extent of loss caused to their property. Violence against minorities is committed as part of the exercise of sovereign power in order to create and maintain the purity of the nation or people. The Gujarat carnage of early 2002 was organized as part of the campaign for cleansing the state of the Muslims and breaking their economic backbone (Das in Banerjee et al 2005a:126-34). The National Human Rights Commission – a statutory body in India in its report exposes their connection. The report prepared by it points to the involvement of state power – whether by omission or by commission. Similar statutory bodies like the National Commission on Women and National Minorities Commission booked the state – the politicians, administrators and the bureaucrats, for their direct connivance with the perpetrators of violence. The administrators and bureaucrats who refused to be part of this ‘purification campaign’ were transferred, demoted and subjected to many other forms of punishment. Many of them were forced to quit their jobs. The early riots and violence between communities did not bear the mark of sovereign power in them. Violence against the minorities today is truly an exercise in popular sovereignty. It seems that the flag of rights can only be hoisted on the bare bodies of the minorities. Every single act of violence against minorities gives credence to and reinforces the doctrine of popular sovereignty. I propose to come back to the same theme in the next section. Let me now focus a little more on the dynamics of violence against minorities. Violence against minorities has acquired a random character. Minorities are attacked today - not because they are prospering and their prosperity has posed a threat to the majority domination. Not even because there is an elite emerging from within the minority societies threatening to question the economic and political domination of the majorities - as most of the analysts would have us believe, although the majority’s perception of threat coming from them can only make the situation worse. Violence against minorities takes place because they are minorities – pure and simple. Everyone outside the nation or people predefined in the society is a potential target of attack by its sovereign authority. The modern state seeks to realize the impossible fiction of creating a nation or people in probably the most grotesque ways. Besides, communal riots are increasingly taking on the character

of pogroms organized and executed by the state authorities – most importantly, by the security agencies. Both the Gujarat carnage of 2002 in India mentioned above and post-election violence in Bangladesh in 2001 point out how organized violence against the minorities have become the dominant mode of exercising sovereign power. The Sri Lankan case is interesting. It shows how a conflict brewing between the dominant Sinhalese and the minority Tamils in Sri Lanka since 1983 gradually transformed into a seesaw battle between the Tamils of the north and the east and the Sri Lankan state mainly centred in Colombo.

While the reality of physical violence is too stark to be denied, the perpetration of all-pervasive violence has helped in excising as it were their visibility from public life. The recently tabled report of Sachar Committee constituted in March 2005 points only to the complete alienation of the Muslims of India from the popular body of nation. While they account for nearly 14 percent of the total population, their representation whether in primary education or employment particularly public employment and in national parliament and other legislative bodies is invisible. Less than 4 percent Muslims graduate from school while, only 4 percent go to madrasas, principally because in most areas of high of Muslim concentration even primary state schools do not exist for miles. Where they do exist, they invariably prefer to send their wards to them. The dropout rate of Muslim children is much higher compared to other community wards due to “poverty” as these children are pressed into work by their indigent parents. The Muslim share in government employment is 4.9 percent. In a state like West Bengal, their representation in state Public Sector Undertakings is exactly zero percent! Among India’s Security Agencies (viz., CRPF, CISF, BSF, SSB &c.) Muslim representation stands at a meager 3.2 percent. Just 2.7 percent are in place among District Judges. In towns that range in population between 50,000 and 100,000, Muslim per capita expenditure is less than that of India’s Scheduled Castes and Scheduled Tribes! This is also the case in areas across West Bengal, Andhra Pradesh, Gujarat, Rajasthan, and Madhya Pradesh. Not more than 3 percent Muslims are able to get subsidized loans, and only 1.9 percent benefit from the Central Government’s Antyodaya Anna Yojana Scheme (a programme that aims at preventing starvation among the extremely poor). Only 2.1 percent Muslim farmers own tractors, and just 1 percent own hand pumps for irrigation. The arrival of nation-space is marked by a growing invisibilization of the Muslims in India and their complete absence in areas of public life. The problem is not that the minorities are the passive victims of violence; the problem is precisely that the violence that is exercised over them also makes them invisible and sends them into complete oblivion. If this is what happens to the largest of the minorities, then the time is not too far away to declare India as a nation without minorities.

III. Democracy's Secret Project of Nation Building

That most states of South and South East Asia can hardly be described as democracies even in a very formal sense does not seem to make any change in the nature of their responses to the minorities. For, democracies, as Agamben argues, are first of all constituted as modern states. His works draw our attention more to the mechanics of sovereign power in so-called liberal-democratic states of Europe than in the widely known authoritarian ones. The mechanics of popular sovereignty – according to him, escape the paraphernalia of democratic regimes. Apart from the minorities with ‘bare life’ mentioned in the last section, democracies also create the *contingent minorities*.

Insofar as a new political space comes into being with nation as a body of people as its legitimate inhabitants, any further division between the majority and the minority *within* that space - that any representative democracy is bound to create under modern conditions, does not alter its basic character. Democracy - we often tend to forget, is not merely the name of a game; it also implies the reconstitution of the field in which the game is played. Such terms as - ‘majorities’ and ‘minorities’, make sense only within the field of a homogeneous body of people where minorities with ‘bare life’ *as if* do not exist. The liberal project of bringing such a field into existence – blood-soaked and painful as the process evidently is, always remains secret and unacknowledged. One has only to deconstruct the great liberal texts in order to read what the project augurs for the minorities. In our enthusiasm with the great game that democracy introduces, we often lose sight of the field that it reconstitutes in order that the game could be played on it.

In his *Two Treatises*, John Locke – widely considered as the father of classical liberalism, for instance, argues that the will of the majority passes on as that of the people (Locke 1946:82). Although this comes as a sudden and off-the-cuff remark without any rhyme or reason being cited in support of it, the contention can be cited only by way of envisaging an organic connection between the majority and the people at large. The minority cannot be so defiant as to rule out the deep nationalist cultural consensus that binds them with the majority. If Locke ever talks about minorities, he talks about minorities of a very special kind – not of course, the minorities with ‘bare life’ who are far too adventurous and refuse to exercise their choice from within the historically driven menu of alternatives, therefore remain docile and tame and at the end of the day, decide not to fracture the consensus of the people. John Stuart Mill elaborates on the importance of the consensus in a democratic society and warns that democratic institutions cannot function in a society ‘made up of nationalities’ for a society divided into different nationalities are too weak to put up a ‘joint resistance’ to the authoritarianism of the majority. He also lays down that “it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities” (Mill in Ishay ed. 1997:282). The political space will have to be adequately flattened in order that the division between the majority and the minority does not turn out to

be a cultural fault line – too wide to be narrowed down for making them available for collective mobilization against the authoritarianism of the majority. Democracies can bridge the majority-minority division operating within the same cultural field but are unable to cross the fault lines of cultures that divide them.

This minority in other words will have to be culturally vacuous to sustain our democracies. Unlike the minorities with ‘bare life’, democratic minorities are produced through the representative practices of a democratic state. The functioning of democracies therefore implies a displacement of minorities – from minorities with ‘bare life’ to representative ones. The democratically constituted minority, as we have said, is a docile body firmly ensconced in a well knit and culturally homogeneous people. Nowhere has the importance of minority resistance to majority authoritarianism is more sharply focused than in Alexis De Tocqueville’s two-volume *Democracy in America* – a book that in spite of being written with an aristocratic fervour, aptly summarizes the author’s nagging anxiety that majority rule could act as the ‘highest limitation’ on justice. For him too, majority and minority are plotted on a horizontally laid out social matrix for they are part of what William Connolly calls, the same ‘national imaginary’ insofar as they subscribe to Christianity and give up nomadism and are involved in settled cultivation (Connolly 2000:184). By making the majorities and the minorities an integral part of the same ‘national imaginary’ of America, Tocqueville summarily rules out the claims of Indians and other indigenous tribes – who being neither Christians nor settled cultivators cannot be a part of the national imaginary of America. Thus nation as a body is brought into existence through many such repudiations and denials and democracy by way of producing contingent minorities and simultaneously displacing the bare-life ones takes no notice of them. Democracy is for those who secure the sovereign recognition of people- or nationhood – not for the minorities with ‘bare life’. People are sovereign insofar as the sovereign power makes them so. Democracy does not harbour any obligation to those who are outside it.

The distinction between ‘bare life’ minorities and minorities produced through representative practices of modern democracies roughly – though not exactly coincides with a distinction I made about a year back, between minorities *as* nations and *national* minorities (Das 2005b mimeo). Mohammed Ali Jinnah – the scion of modern Pakistani state never considered Muslims of pre-partition India as minorities – he only considered them as nation entitled to form a sovereign state of their own (Mohapatra 2001, mimeo). In simple terms, it is within any particular nation-space that one becomes a majority or for that matter a minority. Its location within the nation-space is critical to its recognition as a minority. But the category of ‘bare life’ minorities is wider in terms of its potential and possibilities than my initial category of minorities as nations. For, the former also opens itself to many of the non-national possibilities that history might offer to them. As I have said, the point needs further exploration. However, modern state’s treatment of these two kinds of minorities is also remarkably different. ‘Bare life’ minorities are ruled by suspending the constitution and laws of the land – in Agamben’s famous words, by way of

making an exception to them. Thus, Gujarat 2002 sounds like a reenactment of Auschwitz – only distinction being that the victims did not have to be herded together in order to be liquidated inside any concentration camp. The entire society instead was conveniently converted into a huge camp. The ‘pure violence’ perpetrated by the sovereign power thus makes the minorities with bare life invisible by way of displacing them. When the entire society transforms into a camp, the camp as the concentrated site of torture and killing loses its visibility. It produces a *camp society* - one which refuses to take notice of its victims. The fiction of nation therefore feeds on another fiction – that of the non-existence of the minorities, the creation of a virtual society where minorities do not exist. On the other hand, modern states find national minorities as safe and sanitized – capable of being governed by the Constitution and their laws. Thus, we have in India special provisions for preservation and protection of minority languages and cultures and ‘affirmative action’ for the uplift of a section of them. While debates are going on for including the Muslims in the list of groups for reservation, religious minorities are yet to be officially recognized for such affirmative action.

IV. The Age of Minorities and the Contemporary Agenda of Minority Rights

The separation of democratically constituted minorities from minorities with ‘bare life’ is essential for our democracies to function and modern democracies often make us forget that they are first and foremost, modern states. Our greatest illusion about democracies is that we hold them as democracies without being *ab initio* states and nation-spaces. In this part of our discussion, we choose to focus on the crisis that democracies of South and South East Asia have been facing say, during the last two and half decades.

While democracies everywhere thrive on the creation and articulation of a new political space and a popular consensus accompanying it, we have to recognize that we live in an age of minorities. The popular consensus that once was instrumental in creating and consolidating the nation-space seems to show signs of breakdown – not because of the return of ‘bare life’ minorities with vengeance after so many years of independence and de-colonization, but because the so-called ‘people’ or ‘nation’ finds it difficult to survive any longer as a well knit and homogeneous body – thanks to globalization and the accompanying communications revolution, labour migration particularly of cheap and unskilled labour making it ‘illegally’ to foreign countries, growing resource and livelihood crisis faced by such indigenous people, the Chakmas of the Chittagong Hill Tracts of Bangladesh or the tribes of central India and South Gujarat or the Kachins and Karens of neighbouring Myanmar, persecution and human rights abuses and most importantly, the rapidly changing demographic balance in their wake in most of these countries. The menace of women’s trafficking cannot be understood without a reference to the forces of ‘massive and mixed’ labour migration in the age of globalization (Banerjee 2006). We have some albeit sporadic reports on the Kachin women working in the brothels of Bangkok and

Kuala Lumpur, the Bangladeshi and Nepali women being trafficked to Mumbai and many other metros, Chin women serving as domestic help and construction workers in Mizoram, Bangladeshi rickshaw pullers and umbrella repairers on the streets of Kolkata – migrants are everywhere, notwithstanding that they are ‘rejected’ in their own land and ‘unwanted’ in the guest countries.² We live in a region where even the so-called ‘nation’ and ‘people’ are haunted by the nagging fear of being outnumbered by others and consequently losing their language, livelihood and culture. Their fear might have been misplaced, if not unfounded – but is powerful enough to stir up xenophobic reactions from the majorities. The Assam movement (1979-1985) in India provides a paradigmatic expression of these deeply rooted fears and anxieties. Globalization has turned minorities into a syndrome – whether of the majorities perceiving the threat of being reduced to minorities as in the Assam case or the numerical minorities themselves.

Besides, as globalization has loosened in a certain sense the grip of the fairly centralized national governments over the societies they are supposed to command – thanks to the growing influence of such multilateral agencies as the World Bank, International Monetary Fund and others and the scruples of stricter minority, refugee and human rights auditing and environmental monitoring, governance today has become a much more disaggregated and multi-centred activity. Under the circumstances, the principle of ‘one state, one nation and one people’ does not seem to apply in the way it once used to – immediately after decolonization and the emergence of national governments. The people as a body are now called upon to prove their unity not just at the macro-level of the nation as a whole but at every level of governance. Thus, who exercises control over the streets of Mumbai in India, Peshawar in Pakistan or over land to be inundated with saline water for cultivation of exportable shrimp in Khulna, Bangladesh becomes as much important as winning national elections in their respective countries. The newly resurgent gang wars for control over localities and *mohallas* are a product of globalization. The majority that rules the country from the parliament of New Delhi in India finds it difficult to establish its unflinching authority over the streets of Mumbai. As the streets of Mumbai acquire a hitherto unprecedented importance for reasons not far to seek, the majority looks much more disaggregated – if not decimated. Hansen’s study on Bombay/Mumbai for example tells us the story of how the presence of ‘competing centres of power’ in the city undermines the monopoly authority the sovereign power has hitherto enjoyed:

The state commands no self-evident authority to affect the rule of law. Instead, we see competing centres of power – Shiv Sena, the

² See for example, Kachin Women’s Association Thailand (2005). Sanlap and Jabala – both Kolkata-based organizations have brought out reports on the trafficking of the Bangladeshi and Nepali women and women from such districts as, Murshidabad and Malda in West Bengal, India. The Anthropological Survey of India similarly has published a report of the condition of rickshaw-pullers in Kolkata. For the state of Chin refugees, see, Mang (2000) for example.

“underworld”, the police force – exercising competing claims of sovereignty and employing different registers of bio-power, and thus different claims to “stateness” (Hansen 2001:217).

Similar ethnographic accounts on Delhi (India) and Khulna (Bangladesh) point to the difficulties the national governments face while making their writs and dictates reach out to the multiple levels of our local and regional existence. Veena Das’s study on the anti-Sikh riots points out how the Congress Party then in power in New Delhi lost its command over its local cadres who indulged in a fierce killing spree immediately after the assassination of Indira Gandhi in 1984. Her study interestingly draws our attention to the sudden - almost instantaneous emergence of many agencies in the wake of the void created by the assassination – each carrying the ‘signature’ of the state with its claims to sovereignty and authority over the same urban space (Das 2004). Malini Sur’s recently concluded work on Khulna shows how vast tracts of prime agricultural land are taken over from their owners and labourers working in them and are inundated with saline water for cultivating profitable and exportable shrimp through extralegal – if not completely illegal means. Her study points to the rising salience of mafia dons and other locally based militia in the land acquisition process and the saline ingress that renders the land infertile and uncultivable.³ As democracy gets disaggregated into various levels – each retaining its relatively distinct and autonomous character, such terms as ‘national majorities’ or ‘national minorities’ have lost much of their relevance. The proliferation of levels is likely to render these coinages redundant before long.

The plea for minority rights today is part of the agenda of governance – more particularly, ‘good governance’. To my mind, the *Human Development Report* prepared by UNDP in 2000 was probably the first of its kind by a multilateral agency to make an explicit reference to the question of minorities – and thankfully, to the minorities based on ethnicity, sexuality, language, religion and such other factors and underlined the importance of securing and protecting minority rights in promoting ‘good governance’. It noted with concern that even in developed countries such as, Germany and Sweden, minorities are yet unable to realize them. While the rights and freedoms are usually guaranteed for all in a democratic country, it pointed out that unless ‘systemic assessment of economic and institutional constraints to the realization of rights as well as of the resources and policies available to overcome them’ is conducted, minorities would continue to be subjected to discrimination by the majority (UNDP 2000:2). A justice mechanism capable of obviating and thwarting the majority hegemony will have to provide the enabling conditions for the minorities. It indirectly talks about certain special provisions that would compensate for the disabilities they have historically suffered and ensure their full entitlement to the rights and freedoms in due course. The special provisions are meant for gradually preparing

³ Malini Sur presented her findings to a workshop on ‘Gender and non-traditional formulations of security in South Asia’ organized by Women in Conflict Management, Security and Peace in New Delhi on 24-25 September 2006.

them for their full entitlement. The enabling mechanism – most importantly, will further be subjected to monitoring - as the *National Human Development Report (India)*, 2001 puts it, by ‘empowered, autonomous and credible structures’ and civil society groups (Planning Commission, 2001:123). Civil society vigilantism is indeed, regarded as the key to the protection of minority rights.

I however propose to read the plea for minority rights being made a part of ‘good governance’ as only a desperate attempt on the part of the neo-liberals, at rebuilding and restoring the liberal nationalist consensus otherwise undermined in recent times. The plea is based – not so much on the realization that the consensus around nation- or people-hood was only too impossible a fiction to be actualized, but on the realization that the fiction helped in privileging the cultural majorities, while discriminating against – if not completely wiping out, the minorities with ‘bare life’. While liberals look upon the individual as the final and irreducible unit of their philosophical formulations, rights - according to them, pertain to the individuals rather than groups or communities. For example, the right to education viewed in this light is regarded as an individual right. But, when I saw a little tribal girl of about 6 years in one of the remotest villages of Keonjhar in Orissa (India) studying in a primary school run under the auspices of a programme viz., ‘Education For All’ (EFA) supported by the Dutch Core Financing Agencies – that I was asked to evaluate about six years back, I soon realized, this right is bound to discriminate against the tribal children unless it is accompanied by their right as tribals to primary school education in their respective mother tongues. While right to education is an individual right, same right in tribal or for that matter, in any of the minority languages is a group or community right. The puzzled and bewildered look of the little girl was instantly suggestive of her complete inability to make sense of the world of education being conducted in front of her through Oriya – the dominant language circulating in the state. Individual rights – left to them, reinforce the preexisting cultural differences and inequalities instead of bridging them. Group rights once guaranteed serve as the means of mitigating these differences and inequalities. The unequals – unless made equal through the conferment of these rights special to them, cannot be treated equally. It will have disastrous consequences for the minority societies and their cultures. As Will Kymlicka – perhaps the staunchest defender of minority rights in recent times from within the liberal camp, argues:

This conception of equality gives no recognition to cultural membership; and if it operates in a culturally plural country, then it tends to produce a single culture for the whole of the political community, and the undesired assimilation of distinct minority cultural communities. The continued existence of such communities may require restrictions on choice and differentials in opportunity (Kymlicka, 1989: 152).

The liberals and neo-liberals are also mindful of the threshold beyond which minority rights being defined in group and community terms cannot be stretched. It is - as we have said, a means of mitigating the cultural differences and inequalities till a point is reached when they become part and parcel of the nation

or the people as a body. The inside of the nation-space is flat and horizontally laid out – occupied by individuals equal only in the eye of law and operating as equal legal personalities and does not recognize any hierarchy and inequality within it. The group rights are a preparatory ground for their gradual assimilation into the national body. Governance – as the neo-liberals argue, will have to be geared to the objective of guaranteeing minority rights as a means of mitigating discrimination and nothing more. It only replicates the liberal project of making and taming a people, disciplining them into a peaceful and tranquil body of nation and citizens and turning them into an object of governmentality.

What if minority rights encroach on individual rights? An example may be cited in this connection. About a month back, there was a story flashed in many of the local newspapers of Kolkata. A Muslim man while deeply asleep muttered the word ‘Talaq’ thrice without – as he subsequently admitted, being conscious of his act. As his wife heard it, she took it as a joke to be shared with her friends and close neighbours some of whom might have communicated it to the local clergy and the Muslim leaders. As the news spread, the couple had no control over it and the clergy sat in a customary court and asked the couple to solemnize what was uttered and remain separate. The woman never thought that the joke would prove to be so cruel for her and their little child. The judgment was: if they wanted to reunite, they would have to remarry and the remarriage would have to be intervened by the solemnization of their marriage with others. Unlike the case of the tribal girl, here we seem to side with the couple and argue that minority rights should not be so overstretched as to transgress their respective individual rights to live together as husband and wife. Indeed, Rajeev Bhargava calls it, ‘democratic multiculturalism’ – which, unlike liberal multiculturalism does not allow the groups and communities to do whatever they want in the name of their culture – from female genital mutilation and self-immolation as sati to head hunting so on and so forth, but asks the state to throttle and censor those minority rights which flout the benchmark set forth by our basic human rights (Bhargava in Bhargava et al 1999). The liberal uneasiness is addressed by subordinating minority rights to basic human rights. The neo-liberal dependence on the state insofar as minority rights are concerned is evident in matters of both giving and taking away of these rights. Never before in their history, have the minorities been so dependent on the state for their group and cultural rights. The accent on state leads them to make advocacies for rebuilding and reforming states in these countries.

V. Rearticulating Political Space: A Plea for Minority Rights?

It is imperative that we push minority rights beyond the neo-liberal agenda of reintegrating them into the nation-space. The neo-liberals fail to realize that the agenda they are propagating and pursuing has lost its relevance at a time when the liberal national-popular consensus has been severely corroded and the world is getting fragmented into minorities at multifarious levels without being reunified under a centre. The fragments of minorities today lack the potential of

being brought together around a centre. Neither the 'nation' nor the 'people' is any longer a homogeneous body but is visited and penetrated by others – the poor, the marginals, the ethnic and caste minorities, the gay, lesbian and the trans-gendered etc. who have hardly any prospect in the electoral game still governed by the rule of numbers. Etienne Balibar's recent writings point to the emergence of a new notion of sovereignty especially in the changed European context and he terms it as 'anti-strategic' sovereignty. It is anti-strategic because it refuses to remain part of any grand strategy of politics with a sovereign power firmly lodged at its centre issuing its diktats followed by others placed at different levels of the nation-space.

A new space has thus been created in the wake of the erosion of the nation-space – a space in which 'bare life' minorities might get a chance to stage their return. The path that it might take is still unclear. But, the way local overlords and factions, area dominators and gangsters, regional satraps and musclemen have become important in institutional politics whether by demystifying the early nationalist consensus or by forcing the so-called central forces to come into alliance with them. All this was perhaps preceded by the collapse of the Congress Party dominance in Indian politics since the late 1980s. Minority governments making coalitions with others have been ruling India since then. Some states of South and South East Asia seek to manage the crisis by resorting to military takeovers and rule by the military juntas. The army provides the symbolism of unity in many of the divided societies. Pervez Musharraf – the present president of Pakistan in a recent interview to NDTV, recognized the importance of military uniform that he may have to wear before Pakistan goes to polls in 2007 as a symbol of unity in an alarmingly divided society of Pakistan. The breakdown of national-popular consensus has not been followed by any one strategy to cope with it. While minorities have reasons to feel empowered in such dispensation, I do not know how long the states will take to appreciate the importance of sharing sovereignty with them without necessarily adding to the number of existing sovereign states. Minority rights today call for sharing of sovereignty.⁴ The minorities have started making the claim to a share of sovereignty without breaking the states. The Naga demand for 'special federal relationship with India' is just one example.

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⁴ For a statement on the theoretical implications of shared sovereignty, see, Samaddar (2006, mimeo).

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Mapping Minority Rights and Protection in India

Paula Banerjee

Introduction

The question of minority rights and protection in India acquired particular urgency after the genocide on Muslims in Gujarat in March-April 2002. India being the largest democracy in the world and since elections in Gujarat State Assembly was due within a year, human rights communities in most of South Asia waited to see how Indian democracy would respond to such horrific violence against its largest religious minority. Elections in Gujarat the same year portrayed the fallacy in thinking that democracies have a better track record in providing protection to minorities. The people's mandate brought back Narendra Modi, who is said to be the chief architect of violence in Gujarat, and his cronies in huge numbers portraying "the dark side of democracy", once again.¹ Attacks on Muslims and other minorities are nothing new in India or even in Gujarat. But Gujarat riots of 2002 are of significance because of its magnitude and because of the large-scale involvement of state machinery in designing and carrying out the attacks.

India is a multi-ethnic, multi-religious, multi-cultural and multi-linguistic country like all the other countries of South Asia. Muslims form 13.4%, Christians 2.3%, Sikhs 1.9% and other religious communities about 2% of the total population.² These numbers do little to portray the magnitude of complexity regarding protection of minority rights. There are minority pockets in large parts of India and so the targeting of minorities is a recurrent phenomenon. For example, Northeast India houses Christian minorities who are also ethnic and linguistic minorities. As Christians the majority community or the Hindu belt can target them. Also their ethnic and linguistic diversity means that they are not unified in their responses. In fact the numbers game is so pervasive that local ethnic or linguistic majorities target the minorities in their own region. So in Assam the Ahoms and Bodos try to marginalize each other but also target the Muslims and the Santhals sometimes in tandem. Such a situation makes a mapping exercise of particular significance so that policies for protection of rights of minorities can be envisioned. This is meant to be such an exercise.

There has been efforts both nationally and internationally to define minorities but without too much success. The question of minority rights has

¹ Michael Mann, "The Dark Side of Democracy: The Modern Tradition of Ethnic and Political Cleansing," in *The New Left Review*, No. 235 (May/June 1999) pp. 18-45.

² "The First Report on Religion," *Census of India*, 2001. All data in this mapping exercise unless otherwise mentioned are taken from 1991 and 2001 Census.

received considerable attention in international legal discourse in recent times. Since the 16th century, treaties were being drafted by the European rulers, which guaranteed to minorities within their domain the enjoyment of their traditional religious rights. But, it was not until the formulation of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) that minority protection was extended by international treaty. Although the Universal Declaration of Human Rights (1948) and the International Covenant of Civil and Political Rights (1966) introduced an ideology of human rights but none of these specifically spoke of minorities. It was the ICCPR article 27 that proclaimed, “In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own cultures, to profess and practice their own religion, or to use their own language.” But even this article spoke of persons and not groups. In this context, one may also look at a definition of a minority provided by Francesco Caportini, the UN (United Nations) Special Rapporteur in the Sub-commission on the Prevention of Discrimination and the Protection of Minorities, in 1977, in a report, where he defines minority as a “group numerically inferior to the rest of the population of the state – possess ethnic, religious or linguistic characters differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.” The other international instruments that gave special protection to groups include the Genocide Convention (1950), International Convention of All Forms of Racial Discrimination (1965), the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief (1981), Convention on the Rights of Child (1989), CEDAW etc. However, even the UN did not define minorities after deliberating on it for fifteen years portraying how contentious the issue is. This portrays the difficult for a country like India in defining not just minority protection but even minorities themselves.

Historical Construction of Minority/Minorities in India

The first Muslims to arrive at the shores of India were the traders from Muscat and Ormuz. They came long before 712 AD when the first Muslim conquerors came to Sind. The first Christians came much before that and like the Muslims they were also probably traders. Although there are some who argue that the first Christians to come to India were the followers of St. Thomas and they came in around 52 AD on proselytizing missions.³ Numismatic evidences show that people living in the Southern part of India traded with representatives of Christian monarchies from about 68 AD. However, this is ancient history. The division of the polity into majority and minority is a fairly recent phenomenon. It

³ Bonita Aleaz, “Indian Christians Today,” in Monirul Hussain and Lipi Ghosh eds., *Religious Minorities in South Asia: Selected Essays on Post-Colonial Situations, Vol.II* (Manak Publications, New Delhi, 2002) p. 51.

was under British colonialism that for the first time there was an effort to confer rights to communities rather than individuals. This is not to say that Indian society was monolithic before that. There were multiple cleavages already present on the basis of caste, class, religion, gender and race long before the British rule. There are evidences that communities were favoured or discriminated against on the basis of their proximity to the ruling power. For example, under many Muslim rulers the non-Muslims had to pay the religious tax or jizya. However, it was under the British that rights on the basis of group affiliations were systematized. When in October 1929 a Round Table Conference was convened in London it was decided that India was to have a new form of government that would be federal in nature. It was here that the British Prime Minister Ramsay Macdonald made a declaration that legitimized guarantees for minorities. He was reported to have said the following: "The view of His Majesty's Government is that responsibility for the Government of India should be placed upon legislatures, Central and Provincial, with such provisions as may be considered necessary ... and also with guarantees ... required by minorities."⁴ The Communal Award that followed made special reservation for groups such as Muslims and Christians. Award for the backward castes was barely stopped after Gandhi's threat of fasting unto death. However it needs to be pointed out that in the Karachi Congress of 1931 and the second Round Table Conference the same year Congress leaders such as Jawaharlal Nehru and Mahatma Gandhi consistently upheld that minorities should be given enough safeguards so that they can combat majoritarianism in democratic politics. The radicalization of conceptions of majority/minority as political tools can perhaps also be traced from the same period or the early 1930s.

But after Indian independence in 1947 the picture became even more complex. The principle of one-man one vote meant that minorities could be perpetually kept away from power sharing. During the Constituent Assembly debates there were enormous discussions on making positive discrimination towards minorities. In Nehru's *Objective Resolutions* of 13 December 1946 it was stated that the Constitution of India would contain adequate safeguards for minorities and other backward classes. Iqbal Ansari in a well thought out article describes how during the *Constituent Assembly Debates* the leaders of the majority party consistently chipped away all safeguard from minorities ostensibly for creating a homogenous nation. The Advisory Committee of the Constituent Assembly on Fundamental Rights and Minorities headed by Sardar Patel with the help of its sub-committee on minorities addressed itself to the question of protection of minorities. The sub-committee in its Report of 27 July 1947 made some recommendations for reservation of seats for recognized minorities under joint electorates that might be devised. It also recommended reservation for minorities in public services and the appointment of independent officers to look after the working of these safeguards. The Advisory Committee accepted most

⁴Ramsay Macdonald quoted in B.L. Grover and S. Grover, *A New Look At Modern Indian History* (S. Chand, New Delhi, 1997) p. 338.

of these recommendations by 8 August 1947. Yet within two years the situation changed completely. It was during the May 1949 debates that Sardar Patel reopened the debate over minorities and argued with some other members that minorities themselves do not want such safeguards. But if one goes through the Constituent Assembly Debates one finds that there were representatives of the minority community who opposed the removal of such safeguards. Their voices were drowned and all those who supported the majority communities' decisions such as Tazmul Husain were not just heard but also given wide publicity. Husain it is said had naively commented, "The term minority is a British creation. The British created minorities. The British have gone and minorities have gone with them."⁵ The majority communities views are encapsulated in an argument expressed by L. Krishnaswami Bharath who argues in a debate on the minorities that he is "very happy to find that members belonging to the minority community are now coming round to the view that it is no good to have this kind of communal electorate even though in a diluted form in the form of a joint electorate. I am happy that Begam Aizaz Rasul has discarded this and does not want the separate electorate. Mr. Karimuddin also said the same thing but he wanted what is known as proportional representation through single transferable voting system. I am sorry to say that it is an attempt to come by the backdoor or side windows what is denied by the front door."⁶ It clearly shows that the majoritarian leaders were against any safeguards to minorities. As a result of such mechanizations of the ruling elite although some positive discrimination could be made towards caste minorities religious minorities remained bereft of such safeguards. The leaders of the majority community were steadfast in refusing any positive discrimination towards religious minorities. Even regarding appointment to public services notwithstanding protests from well-known leaders of minority communities such as Naziruddin Ahmad and Sardar Bhopinder Singh Brar Articles 296 and 299 that contained such safeguards were changed completely. The word minority was deleted from these articles by throwing all rules of procedure for amendment of articles to the winds. The change came without adequate discussion and without any precedence of such summary changes of accepted articles. It has also to be noted that the change came not while partition violence continued but after it was over. This amounted to not merely a volt face but to many minority leaders it represented an act in bad faith as well. As Ansari points out the Indian nation-state tried to adopt a liberal-democratic character and rejected ethno-religious idea of the nation. In the process minority rights came to be problematized in the legal-political institutions of citizenship and articulated "in terms of cultural rights of

⁵ Husain quoted in Iqbal Ansari, "Minorities and the Politics of Constitution Making in India," in D.L. Seth and Gurpreet Mahajan eds., *Minority Identities and the Nation-State* (OUP, New Delhi, 1999) p. 120. Much of what I say in this paragraph is taken from Iqbal Ansari's writings.

⁶ Constituent Assembly Debates, Vol. VII (9 November 1948),

<http://parliamentofindia.nic.in>

communities, in addition to the rights of their individual members as citizens.”⁷ But by refusing to define citizenship in ethno-religious terms the leaders denied deep-rooted cleavages within the society. The Indian National Congress might have been inspired by a homogenized, unitary, cultural nationalism that created much deeper conflict among communities than it solved. The impending language movement however dramatically pointed to these social and political cleavages and conflicts.

The Indian Constitution has sought to practice non-discrimination through a number of Articles. Article 14 provides that the State shall not deny to any person equality before law or equal protection by law. Article 15 asserts that the State shall not discriminate on the grounds of religion, race, caste, sex and place of birth and Article 16 provides none of the previously mentioned categories can lead to discrimination for any employment or office under the State. The Constitution has pledged to guarantee freedom of conscience through Article 25 and freedom of communities to manage their religious affair through Article 26. Article 29 states that “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.” There were also efforts within the Constitution to protect the socially and economically backward communities such as the scheduled caste or tribes. Article 46 states that the State, “shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” However, very little was done to protect religious minorities. That the Constitution is not a problem solvent is portrayed by multiple claims for self-determination of communities as a defence against political irrelevance and marginalisation. Many of these communities belong to the scheduled tribes as marked by the Indian Constitution. Obviously positive discrimination as practiced by the Indian State could not mitigate their claims of nationhood. According to Madhu Kishwar it was largely “due to the gap between the pious platitudes mouthed the post-independence Congress leadership and the cynical political games it actually played.”⁸ In making the situation of minorities more precarious the political will of the leadership cannot be denied even until the present day when the BJP has taken up the mantle of Hindu majoritarianism.

The Constitution of India uses the term minority/minorities in four of its Articles. They are Articles 29 (1), 30, 350-A and 350-B. But in the Constitution there is almost no effort to define minority or minorities. One observer points out that in the, “absence of any constitutional guideline, we are left only with

⁷ Iqbal Ansari, “Minorities and the Politics of Constitution Making in India,” in D.L. Seth and Gurpreet Mahajan eds., *Minority Identities and the Nation-State* (OUP, New Delhi, 1999) p. 134. Italics in the original

⁸ Madhu Kishwar, “Politics of Majoritarianism vs. Minoritarianism,” in D.L. Seth and Gurpreet Mahajan eds., *Minority Identities and the Nation-State* (OUP, New Delhi, 1999) p. 156.

legal interpretation of minority. On the meaning of the word minority the Supreme Court felt that though it was easy to say that minority community means a community which is numerically less than 50 per cent, it left part of the question unanswered, namely, 50 per cent of what?"⁹ The State of Kerala in 1958 had at one point contended that in order to claim the fundamental rights guaranteed for minorities under Articles 29 (1) and 30 (1) of the Indian Constitution a person needed to belong to a community that forms less than 50 per cent of the population in that area. But the Supreme Court had observed that such a position is untenable simply because where is one to draw a line? If to become a minority a person needs to belong to a community that is less than 50 per cent of the population of an area then why not make it 50 per cent of a district or ward?¹⁰ In a 1971 judgement the Supreme Court clearly decided that since an Act of State Legislature extends to the whole of the State then minorities also must be recognised in reference to the entire state.¹¹ However, even before that in *A.M. Patoni vs E.C. Kesavan*, Justice Madhavan Nayar of the Kerala High Court decided that although the word minority, "is not defined in the Constitution, we must hold that any community – religious or linguistic – which is numerically less than 50 per cent of the population of the State is entitled to fundamental rights guaranteed" by Article 30.¹² A problem that emerged from such dispensations is that a person belonging to a minority community may not get benefits or protection guaranteed to minorities if s/he is not a minority of a particular state. However, even then there are conflicting interpretation as is shown by the debate on Article 30.

It is said that only Indian citizens may claim the protection of the rights under Article 29 but for Article 30 there are no such stipulations. Justice Shah, delivering judgement in *S.K. Patro vs State of Bihar* stated that:

The protection of rights under Article 29 may be claimed only by Indian citizens. Article 30 guarantees the right of minorities to establish and administer educational institutions: the Article does not expressly refer to citizenship as a qualification for the members of the minorities.

However, further on the Judge observed that Article 30 may be claimed by non-citizens who are however, residing in India.¹³ Accordingly, in order to claim benefit of Article 30 members of minority communities need not be citizens of India and can only be a resident. What the legal system is not unanimous about is the minimum period for such residency or where such residency ought to be. For example, can a person belonging to a minority community in Assam claim minority status in Orissa? The law does not claim to be clear on this point. There are other discrepancies as well. For religious

⁹ Rajendra Pandey, *Minorities in India – Protection and Welfare* (APH Publishing Corporation, New Delhi, 1997) p. 5.

¹⁰ Ibid.

¹¹ *All India Reporter*, 1971, D.A.V. College Jullundhur vs. the State of Punjab, 56, 1737.

¹² *All India Reporter*, 1965, Kerala, 76.

¹³ Justice Shah quoted in Rajendra Pandey, *Minorities in India – Protection and Welfare* (APH Publishing Corporation, New Delhi, 1997) p. 7.

minorities what the Indian legal system says is that to claim minority status members should belong to well-defined religions of India such as Islam, Sikhism, Christianity, Jainism etc.¹⁴ So what happens to sects such as Namdharis or Ahmadiyahs? Clearly they may not claim minority status unless they claim membership of religions that are given minority status. Such legal muddles make a mapping exercise that much more complex particularly because there are no one interpretation of minorities in the Constitutional Articles present. In popular discourse the word “minority” in India is often used in the context of religious minorities such as Muslims, Christians, Sikhs, Parsis etc. But one of the leading social scientist on minorities, Imtiaz Ahmad among others, questioned such a “narrowed down connotation of minorities.” This connotation according to him is based on two wrong assumptions, first, that Hindus are a monolithic group and second, that religious minorities are more disadvantaged than other minorities. He according to Javed Anand correctly argues that, “minorities are not based on religious difference alone. They are based on social disadvantage and deprivation.”¹⁵ In this essay I have tried to present a representative account of minorities in Constitutional and legal terms.

Minorities Commission, Human Rights Commission and Women’s Commission are expected to provide for legal and administrative means for the protection of minority rights in India. Critiques point out that these national commissions are extremely limited in their authority, as they do not have any punitive powers. Their state counterparts are said to be even more limited and circumscribed by their allegiance to state governments. True, while the riots in Gujarat were going on these commissions proved to be totally ineffective and as such unable to deal with the situation. Yet after the riots these commissions raised the demand to try perpetrators of violence outside the state so that justice can be delivered. The judiciary in large measures accepted their demands portraying that they do have some moral force that can be tapped at critical moments. A mapping exercise makes it necessary to give a closer look to the working of these national commissions particularly in time of political and social tumult. Gujarat presents a clear example of such tumult. But to understand Gujarat riots one need to understand the situation of religious minorities such as Muslims and Christians. Unless one understands the situations of these minorities one fails to understand why the question of minorities is so fraught with passion.

¹⁴ *All India Reporter*, 1976, A.S.E. vs. Director of Education, Delhi Administration, Delhi, 207.

¹⁵ Imtiaz Ahmed quoted in Javed Anand, “Minority Rights in India: Constitution and Reality,” in Sumantra Banerjee ed., *Shrinking Space: Minority Rights in South Asia*,” (Lalitpur, South Asia Forum for Human Rights, 1999) p. 145. I prescribe to a similar viewpoint and consider both scheduled caste and schedule tribes as minorities. My views on this issue is also similar to that of Dipankar Gupta and Ranabir Samaddar and they argue that minorities are not a static but an evolving category. In the present context even the Dalits define themselves as minorities and I accept such self-definitions of groups. Therefore, in my analysis I have spoken of both religious, ethnic and caste minorities who are all consistently disadvantaged by state policies.

Situation of Religious Minorities

The expression “minorities based on religion means that the only or the main basis of a minority should be its adherence to one of the many religions and not a part or sect of the religion and that other characteristics of the minority are subordinate to the main feature, namely, its separateness because of its religion.”¹⁶ In India Hinduism is the religious faith of the majority and by the 2001 Census, Hindus form 80.5 % of the total population. Their exact numbers are 827,578,868 in a total population of 1,028,610,328 persons. The total population of Muslims in India is 138, 188, 240.¹⁷ They are the largest religious minority in India. There are other religious minorities such as Christians and Sikhs but none as important as the Muslims in India.

Muslims in India

The partition of the Indian subcontinent is considered by most of Indian intellectuals as a direct result of the Muslim claim that they form a separate nation. Interestingly however, there are historians today who claim that the call for partition came originally from Hindu leaders such as Bhai Parmanand, who were living in Muslim majority areas.¹⁸ For our purposes this is not a crucial question. What is important is that even after partition there were 35 million Muslims remaining in India. By the 1951 Census Muslims formed 9.8% of the total population. Hence this made India the country with the fourth largest number of Muslim population. About the Indian Muslims one very important observer has commented that:

Even at the height of separatism the identity of the Muslim elites remains ... an Indo-Islamic one. The Muslims of India cannot get away from their sense of Indianness in the cultural and social sense In the southern and north-eastern parts of India ... there is a remarkable degree of cultural assimilation between Hindus and Muslims, not only in rural but also in urban areas Thus, it would be seen that a sense of cultural separatism is prevalent in a small section of the urban population in north India only and its importance should not be exaggerated Election processes and political opportunism have much to do with the growth of communalism all over the country.¹⁹

¹⁶ Rajendra Pandey, *Minorities in India – Protection and Welfare* (APH Publishing Corporation, New Delhi, 1997) p. 72.

¹⁷ All population figures are taken from “The First Report on Religion,” *Census of India 2001*.

¹⁸ Christophe Jaffrelot “*The Relationship between Democracy and Communalism in India*,” Lecture in CERI, Paris, 28 January 2004.

¹⁹ Asghar Ali Engineer, “Indian Muslim’s Identity Interfacing the Hindu-Muslim Problem: A Co-operative Approach in Monirul Hussain and Lipi Ghosh eds., *Religious Minorities in South Asia: Selected Essays on Post-Colonial Situations, Vol.II* (Manak Publications, New Delhi, 2002) p. 116-117.

Thus growth of communal feelings is attributed to electoral politics in India. It is often said that the leadership or the elite of communities in an effort to maintain their positions of power deliberately creates an atmosphere of confrontation. Census then becomes a tool for this artificial exacerbation of tensions leading to conflict. Therefore, to understand such conflicts an analysis of Census reports over the past 50 years assumes importance.

By the 1941 Census it was ascertained that the Muslims were 23.7 % of the total population. In the 1951 Census their percentage was reduced to 9.8 %. In 1961 it went up to 10.7 % of the total population and by 1981 they were 11.4 % of the total population. In the 1981 Census their numbers in Assam was not counted as no Census could be taken in Assam. In 1991 the Census in Jammu and Kashmir could not be taken. In the present Census, as has been stated before the Muslims formed 13.4 % of the total population. The decadal growth rate of Muslims between 1951 and 1961 was 32.5 %, between 1961 and 1971 was 30.9 % and between 1971 and 1981 was 30.6 %. This is an artificial lowering of decadal growth rate because in Assam, where Muslims form over 30 % of the population the Census could not be taken. On the other hand between 1991 and 2001 their decadal growth rate was figured at 36 %. This is also an artificial high. In 1991, as has been stated earlier, the Census of Jammu and Kashmir could not be taken due to political tumult in the state. It is only in Jammu and Kashmir that the Muslims are a majority. In the 2001 Census they formed 67 % of the total population of that state with a population figure of 6,793,240. Therefore since this number was not factored in ten years back their growth rate seemed unusually high by the 2001 Census and all hell broke loose.

The Census data that was released on 6 September 2004 stating that Muslim decadal growth rate has increased from 1991 raised a storm. The Bharatiya Janata Party (BJP), which is the Hindu nationalist party and the main opposition in the Parliament, took it up as an issue for further agitation. Their President M. Venkaiah Naidu expressed “concern” at this apparent demographic shift. Their party spokesman Arun Jaitley said that the figures have raised some concern and was worrying because of the national target to reach population stabilization by 2026. He further said, “it is regrettable that instead of being concerned and alarmed at the population explosion, pseudo secular political parties are concerned at those who are expressing concern at this.”²⁰ All attention turned to Assam and West Bengal, the two states where Muslims although in minority, were 30 % and 25.2 % of the total population respectively. Percentage wise after Jammu and Kashmir these were the two states with the highest percent of Muslim population. Also these are Border States and Hindu nationalist concerns that illegal immigrants are swamping border regions were given credibility.

That illegal Muslims hordes are entering through the India Bangladesh border was an old concern of the people of Northeast India. Newspapers from the region have been reflecting such concerns for the last few years. Typically news

²⁰ “Census relook at Muslim data,” *Times of India*, 9 September 2004.

on illegal migrants in Northeast India often runs like this: “BSF has apprehended 298 smugglers, including 206 Bangladeshis, along the international border with Bangladesh in the North-east during the first seven months this year.”²¹ That the Bangladeshi’s mentioned in these reports are largely Muslims is stressed by stereotyping their dress. Often these reports say that: “A group of about 15-20 Bangladeshi dacoits clad in lungi and armed with country made guns raided the houses,” of villages in the border areas.²² Lungi is a dress typically worn by Bangladeshi Muslim peasants. Hence the dress conveys that the miscreants are Muslims. Thus negative attitude towards Muslims and their harassment is nothing new in Northeast India, particularly in Assam.

Apathy towards Muslims particularly Bangladeshi Muslims have led to the anti-foreigner movement in Assam in the late 1970s and early 1980s. The movement was ideologically aimed at preserving the socio-economic, cultural, lingual and political identity of the Assamese nationality. The leaders of the movement demanded a stop to the participation of foreign nationals in the democratic political process, and their identification and deportation from Assam/India. As a result of this movement however, not just Bangladeshi’s but even Indian Muslims were persecuted. For example, in Nellie in 1983 thousands of Muslims were massacred. According to one observer, the massacre of Nellie, “by a conservative count, took more than 1200 lives – mostly of women and children. An eminent Assamese journalist has estimated the death toll of the Nellie massacre to be 3,000 dead. All the victims belonged to the Na-Asamiya (Neo-Assamese) Muslim community. I have pointed out elsewhere that the Muslims of Assam are an inseparable part of contemporary Assamese society Not a single victim of the Nellie massacre belonged to the category of foreigners as defined by the existing laws of the country.”²³ The Nellie massacre is without doubt one of the worst pogroms faced by Muslims in India surpassed probably only by the events in Gujarat in 2002. It was clear that the police and the civil administration had prior information that such an attack against the Muslims was impending yet no one took any steps to avert it.²⁴ Even after the massacre almost no one was brought to justice. Nellie portrays how secular and social movements can suddenly become communal and how the minorities bear the brunt of such movements.

After the Noakhali riots in 1948 there has been no major uprisings against the Muslims in Bengal. However, in the last few months news of Muslim infiltrators across the border is getting more and more shrill today and this should be considered in the nature of early warning. In a recent newspaper report by a popular vernacular newspaper it was stated that, “in West Bengal Muslims are

²¹ “206 B’deshis held in 7 months: BSF,” *The Sentinel*, 17 August 2003.

²² “B’deshi dacoits penetrate security cover in Khowai,” *Tripura Observer*, 21 August 2003.

²³ Monirul Hussain, “The Muslim Question in India,” in Monirul Hussain and Lipi Ghosh eds., *Religious Minorities in South Asia: Selected Essays on Post-Colonial Situations, Vol.II* (Manak Publications, New Delhi, 2002) p. 130.

²⁴ M.J. Akbar, “The Children of Nellie,” *Sunday*, 3 March 1984, pp. 15-18.

multiplying fast. Compared to the percentage of increase in Hindu population the percentage of increase in Muslim population is almost double.”²⁵ In the same report it was stated that the decadal growth the Hindu population in West Bengal is 14.22 % but among the Muslims it is 25.92 % . As a result it was stated that the BJP party spokesman had shown concern as he felt that the growth rate of all communities should be similar so that demographic balance can be maintained. The BJP also commented that the rise in the number of Muslims in West Bengal might be due to increase in the number of infiltrators from Bangladesh. No matter what the report say the Muslims in West Bengal number only 20,240,543 in a total population of 80,176,197. In 1991 they were 23.61 % of the total population and in 2001 their increased number made up only 25.2 % of the total population. So the fear of demographic shift is unreal. Also, although such reports typically say that Muslims are more backward than the Hindus as their literacy rate is much lower but what these reports do not say is that sex-ratio among the Muslims is far better particularly in the age group of 0-6 years. The sex ratio in 0-6 years age group among Hindus is 956 but among Muslims it is 968 in West Bengal. This shows that Muslim girl child has a far better rate of survival than Hindu girl child does in West Bengal. Although this is true of most of the country no one ever says so because such statistics goes against the stereotype that Muslims are backward. Even in the recent pulse polio campaign Muslims are seen as resisters because of their “inherent backwardness and conservatism.”²⁶ Negative attitude towards Muslims continue and majoritarian political parties often instigate it. This, according to many Muslim people, has been portrayed by the forced sterilization campaign (Nashbandi) of the Congress Party during Emergency.²⁷ This can be seen by the debate raised by the issue of banning of cow slaughter.

India it is said has the sixth of world cows and 57 percent of the world’s buffalos. India’s livestock population is the largest in the world. These animals are often undernourished and ill treated. Once they become unproductive their owners often sell them for slaughter. Although “Indian’s ostensibly worship cows, they also butcher over 30,000 of them daily, usually in unsanitary, ill-managed torture chambers euphemistically called abattoirs.”²⁸ Just before elections in five state legislatures the BJP coalition threatened to bring a bill in the Indian Parliament to ban all killings of cows in 2003. Demands to ban slaughter have been used as a political card from 1857 onwards. Leaders such as

²⁵ “The Bangladeshi infiltrators are destroying the demographic balance,” *Bartaman*, 9 September 2004.

²⁶ Biswajit Roy, “Muslim Women and the Pulse Polio Campaign,” *Unequal Communication: Health and Disasters As Issues of Public Sphere* (Kolkata, Mahanirban Calcutta Research Group, February 2005) p. 42.

²⁷ Biswajit Roy, “Muslim Women and the Pulse Polio Campaign,” *Unequal Communication: Health and Disasters As Issues of Public Sphere* (Kolkata, Mahanirban Calcutta Research Group, February 2005) p. 43.

²⁸ Ramesh N. Rao, “Banning Cow Slaughter in India,” *India Currents*, 9 September 2002, www.indiacurrents.com

Mahatma Gandhi and Madan Mohan Malaviya supported the banning of cow slaughter. Even the Constitution Bench of the Supreme Court had declared such a ban is not unconstitutional. In fact among the states only Kerala and West Bengal slaughter cows but often in other states this is done illegally. In Kerala beef accounts for more than 40 percent of all meat consumed and 80 percent of the people are beef eaters says human rights activist Praful Bidwai.²⁹ It is also true that beef in India cost much less than lamb or chicken and it is a preferred form of protein for the poor. India also exports over US \$ 200 million worth of meat every year and there are nearly 4000 tanneries in India. In fact animal rights activists propose the lifting of all bans from cow slaughter because by trying to slaughter the animal in a clandestine manner the animal is subjected to more pain and torture.³⁰ But BJP led government could still raise a storm over this issue simply because there is “the general impression that Muslims in India eat the flesh of cow.”³¹ It originates from the mistaken belief that cow slaughter was brought to India by the Muslims in the Middle Ages although evidences show that eating the flesh of cow was prevalent even in the ancient period. Although the proposed legislation raised a storm of protest from the human rights community it was used as a stick to beat the Muslims who were marked as supporters of barbarism by the BJP coalition.

It would perhaps be unwise to make gross generalizations about the situation of Muslims in India. There is a great diversity noticeable among Muslim populations in India on the basis of their lifestyle, work participation, and pattern of work. Today Muslims in India form the second largest Muslim population in the world after Indonesia. One observer points out that, “The Indian Muslims are by no means a monolithic, homogenous community but are culturally and ethnically diversified group bound together by their common belief in Islam.”³² In terms of work participation of Muslims in India there are 31.3 % Muslims who are working. For Hindus the work participation rate is 40.4 %. In 1981 the share of Muslims in Indian Administrative Service was 116 out of 3883, which is only 2.99 %. In Indian Public Service in 1981 again there were 50 Muslims out of 1753 persons making their percent only 2.85. Summarizing the findings on socio-economic indicators, such as occupation, ownership of land and standard of living, by religion Shariff Abusaleh of National Sample Survey Organization (NSSO) states:

Muslims are mostly self-employed and their share in regular paid jobs is low. The Hindu population is relatively better employed in regular salary-paying jobs in urban areas. The work participation of Muslim females is extremely low. The landholding is better among Hindus than

²⁹ Praful Bidwai, “Storm over move to ban cow killings,” *Inter Press Service*, New Delhi, www.atimes.com

³⁰ Maseeh Rahman, “Is Nothing Sacred?” *TIME*, 29 May 2000, www.time.com

³¹ Dharmapal and Mukundan, *The British Origin of Cow Slaughter in India* (New Delhi, SIDH, 2000) quoted in www.dancewithshadows.com

³² Muthaharunnisa Omar, quoted in F.R. Faridi and MM Siddiqi eds., *The Social Structure of Indian Muslims* (Institute of Objective Studies, New Delhi, 1992) p. 65.

Muslims, and Muslims work on non-agricultural occupation in substantial proportions in rural part of India. Muslims, are, by far, the least educated when compared with Hindus and Christian populations in India.³³

By the NSSO figures of 1987-88 again there are 53.4 % Muslims who are self-employed, 28.9 % are regular wage earners and 13.4 % are casual labourers in urban areas in India. Although the work participation rate by the present census have gone up by about 2 % still according to one observer 95 % of Muslims in India are, “estimated to belong to the categories of peasant, craftsmen, semi-skilled and unskilled labourer. In rural areas most of them are agricultural labourers.”³⁴

Muslims are extremely under-represented in all government services where their percentage is far below their total population. The absence of Muslims from both the private and the public sectors is a known fact but perhaps more alarming is the under representation of the Muslims in the armed and security forces. The enormity of the Gujarat pogroms has made people aware of this lack. Omar Khalidi has written extensively on this theme. In a study on the composition of the armed forces and the paramilitary forces in the six states of Uttar Pradesh, Bihar, Andhra Pradesh, Karnataka, Maharashtra and Gujrat, he comments on the lack of Muslims in these forces. The Indian Army had 30-36 percent Muslims at the time of partition. The Armed Forces Reconstitution Committee, which divided the forces at the time of partition assumed that all Muslims will join Pakistan. But they were wrong in their assumptions. As many as 215 Muslim commissioned officers and 339 Viceroy’s Commissioned Officers opted to remain in India and refused to go to Pakistan. But in the post-partition years the number of Muslims in the armed forces reduced to 2 percent. Often Muslims allegiance to India is doubted particularly when the adversary is Pakistan. Yet the Rajput regiment consisting of largely Muslim soldiers performed with much distinction in the 1965 war with Pakistan. In a letter to the Chief Ministers dated 20 September 1953, Prime Minister Nehru had noted, “In our Defence Services, there are hardly any Muslims left. In the vast Central Secretariat of Delhi, there are very few Muslims. Probably the position is somewhat better in the province, but not much more so. What concerns me most is that there is no effort being made to improve this situation, which is likely to grow worse unless checked.”³⁵ The previous government in India might have made a concerted effort to garner the support of the security forces on the basis of religion if the Gujarat riots are any indicators. According to Aftab Ahmad Ali,

³³Shariff Abusaleh of National Sample Survey Organization (NSSO), 43rd round, 1987-88, quoted in Sebastian Vempeny, *Minorities in Contemporary India* (Kanishka Publishers, New Delhi, 2003) p. 92.

³⁴ Sebastian Vempeny, *Minorities in Contemporary India* (Kanishka Publishers, New Delhi, 2003) p. 90.

³⁵ Jawaharlal Nehru, *Letter to the Chief Ministers* quoted in A.G. Noorani, “Muslims in the Forces,” *Counter Currents.Org*, 13 October 2003, <http://www.countercurrents.org>, p. 3 of 7.

the former Director of SVPN Police Academy the situation of minorities in riots depend to a large extent on the political party in power in that state. The police chief often have to work according to the dictates of the Chief Minister who can otherwise instantly remove or transfer police personnel. No wonder then in Gujarat the police often supported genocidal acts of the Modi government. Perhaps keeping an eye on events in Gujarat veteran journalist A.G.Noorani has commented, “in this there is a lesson for Muslims. Improvement of their lot is part of a wider secular agenda for reform.”³⁶

According to a National Minorities Commission Report it is not just in the security services but also in the field of education that Muslims are grossly under represented. The report says that the percentage of Muslim students in state aided or majority-managed schools is disproportionately low.³⁷ Less than 4 % of the total populations of engineering schools are Muslims. Government spending on minority education is also disproportionately low and even in a state such as West Bengal it is about 2 % of the total spending on education. *Khariji Madrasas* are the educational institutions that most Muslim children go to. These institutions double-up as orphanages and there is a popular opinion that these are the breeding grounds for fundamentalism. Attitude towards Muslims thanks to the rise of Hindutva is at low ebb in most of India today. According to a social scientist this has been happening from 1990 onwards from when there is a noticeable increase in communal rioting against Muslims whereby Muslim peasantry and working classes is getting displaced in large numbers.³⁸ Riots of 2002 in Gujarat can be considered as a result of such growing communal polarization in India.

Gujarat Riots of 2002³⁹

Any mapping of minority rights in India remains incomplete unless one looks into the genocide and attacks against minorities from time to time. Community conflicts are markers in themselves and so one needs to explore how minorities have fared in dramatic incidents of violence such as the Gujarat riots. Through such an exercise one can explore possible mores of redresses if any available to minorities as a group. Also, one can look into compensation received by victims of violence and see if any efforts are made to restore justice. Further, an analysis of cases such as the Best Bakery case can provide a better understanding of the role of judiciary in protecting the human rights of minorities and delivering

³⁶ Ibid. p. 6 of 7.

³⁷ *National Minorities Commission Annual Report, 1996-97*, GOI, p. 41.

³⁸ Ajazuddin Ahmad, *Muslims in India 1990-1993, Vol. II*, (Inter India Publications, New Delhi, 1994) pp. 14-15.

³⁹ Parts of this section are taken from Paula Banerjee, “Resisting Erasure,” Paula Banerjee, Samir Das and Sabyasachi Basu Raychowdhury eds. *IDPs in South Asia* (Sage, New Delhi, forthcoming).

justice after they have been victimised by majority community and the state government.

Gujarat is the latest and one of the most dramatic examples of attacks against minorities by the majority community. For people in Gujarat riots are not a new phenomenon. Beginning with 1969 communal violence of varying degrees had occurred intermittently in Gujarat and such occasions increased between 1985 and 1999. These riots were not against the Muslim community but also included the anti-Dalit attacks of 1980s and attacks against Christians in 1999. Other than communal attacks there are also other kinds of violence against minorities in Gujarat. For example, the building of Sardar Sarovar Dam has led to massive displacement of tribal people. But the acts that took place in Gujarat from February 2002 onwards have been unprecedented in many ways. As Asghar Ali Engineer has pointed out, "Gujarat carnage represents the peak of communal violence in independent India." Both in terms of its intensity and magnitude, it has surpassed the record of all the earlier riots of post-colonial India. According to official estimate 700 persons have lost their lives but unofficial numbers are as high as 2000. What was passed-off as riots were actually genocidal acts in nature, where while one community was slaughtered the state machinery looked the other way. The cruelty and brutality witnessed in Gujarat was also of an unprecedented level. Few events of contemporary India have shaken the conscience of civil society as deeply as the Gujarat carnage of 2002. The events began with over 1000 *kar sevaks* travelling from Ahmedabad to Ayodhya by Sabarmati Express on 22 February 2002.⁴⁰ On the way they reportedly harassed Muslim men and women in the train and in respective stations. While they were returning on 27 February there was again reportedly altercation with Muslim vendors in the Godhra station. Soon after near Falia it was discovered that a coach was on fire. As a result about 59 people died of whom 26 were women and 12 children. It is still not clear how the coach caught fire but the supporters of the Vishwa Hindu Parishad (VHP), the Bajrang Dal and the ruling Bharatiya Janata Party (BJP) made this an occasion to mount a massive attack against the Muslims in Gujarat leading to death, dislocation and displacement of an unprecedented scale. Soon violence spread across Gujarat. In Ahmedabad alone about 50,000 Muslims were displaced. Hundreds were killed in mob attack. In Vadodara, Gandhinagar, Meghaningar, Sabarkantha, Himmatnagar etc. many more were killed and displaced. Reports kept coming that in Pandharvada village 70 people belonging to the minority community were burnt alive. In Mehsana 28 farm labourers were murdered.⁴¹ By April 2002 the Government indicated that there were over 98,000 people displaced living in 100

⁴⁰ Kar sevaks are volunteers who raise money and work for the extreme right wing organisation such as the VHP.

⁴¹ "Communalism Combat," March-April 2002 in Basudeb Chattopadhyay, Ashis Ranjan Guha and Ramkrishna Chatterjee eds., *Communalism Condemned: Gujarat Genocide 2002* (Progressive Publishers, Kolkata, 2002) pp. 3-16.

relief camps.⁴² In a citizens report it was stated "there are over 100 relief camps scattered all over Gujarat with over one lakh (100,000) victims. There is shortage of food, water and medical help. Most government functionaries, particularly Ministers, do not bother to visit most of the camps, as their only inmates are Muslims. There is urgent need to reach food, water and medical help to the victims."⁴³

Among the first group to collect testimony of riot-affected people in Gujarat were members of the Vadodara PUCL and Shanti Abhiyan. They came out with a report on the basis of testimonies collected from Muslims from 27 February until 26 March. They found out that between 28 February and 22 March more than 39 Muslim houses were gutted and 19 shops looted only in Baranpura area. There were two police points close by and a fire brigade, which refused to respond to the callers for help. In Bahar colony when women asked police to help them "the police refused to listen to them and in fact did laathi charge on them to drive them into their homes."⁴⁴ Among others an elderly woman Ameena Memon was badly hit in the laathi charge."⁴⁵ In another incident Hamida Bano Ibrahim, a 40 year old woman was hit by a police so hard that her right hand was fractured in three places.⁴⁶ One of the recurrent themes of the report is people's anger at the role played by the police and state machinery. Muslims were caught up in a reign of terror promoted by the police. Amnesty International in its report for example noted: "Some form of organization and planning of the crimes committed is repeatedly suggested by survivors, eyewitnesses, relief workers, political commentators and members of extremist Hindu organizations themselves."⁴⁷

The idea behind attacking Muslim minorities in Gujarat was perhaps because unlike in most of India Muslims in Gujarat are economically better off. In 1991 Muslim population in Gujarat was 8.73 % and in 2001, 9.1 %. Therefore, it was definitely not due to any large-scale increase in Muslim population in Gujarat. That attack against Muslim minority in Gujarat had an economic dimension is clear from directions given by the VHP to Hindus in Gujarat so that they stop trading with Muslims. According to a *Communalism Combat* report riots in Gujarat cost Rs. 35,000,000. Attacks against Muslims led to widespread displacement. More than 1,200 villages in the districts of Panch Mahal, Mehsana, Sabarkantha, Bharuch, Bhavnagar and Vadodra witnessed mob attacks on the minority communities leading to large-scale exodus. People

⁴²"We Have No Orders To Save You" State Participation and Complicity in Communal Violence in Gujarat, Human Rights Watch (HRW), April 2002, p. 6

⁴³ Onlinevolunteers, 30 May 2002, www.idpproject.org/India

⁴⁴ laathi means baton.

⁴⁵ "Gujarat Carnage: Women's Perspectives on the Violence in Gujarat," By PUCL Vadodara and Shanti Abhiyaan, Vadodara, 27 February-26 March, p. 7.

⁴⁶ Ibid, p. 8.

⁴⁷ Amnesty International, "India: The state must ensure redress for the victims. A memorandum to the Government of Gujarat on its duties in the aftermath of the violence" (28 March 2002), 1.

belonging to the majority community then confiscated their land. Even land belonging to *dargahs* and mosques were not spared. Over 240 *dargahs* and 180 mosques were burnt down. The Amnesty International has noted with concern the unprecedented brutality faced by the minority community in Gujarat. Assailants in most cases known to them raped women in front of their children or even other family members.⁴⁸ In many cases, men and women were bludgeoned to death with heavy and blunt-looking stones, killed by screwdrivers, tridents etc. or were simply burnt alive by bursting gas cylinders or dousing petrol or any other inflammable material on them as in the Best Bakery case.

The Citizen's Initiative of Ahmedabad sponsored the first fact-finding visit by a women's panel. Between 27 March and 31 March the six-member team visited seven relief camps in both urban and rural Gujarat. These were in Ahmedabad, Kheda, Vadodara, Sabarkantha and Panchmahals district. The team found compelling evidence of extreme sexual violence against women during the days of mayhem. In every case of mob violence there was evidence of pre-planned targeting of women. There were gruesome testimonies of how violence against women was used as an instrument to displace people. In one such testimony from Naroda Patia minor girls said that mobs started chasing them with burning tyres. "We saw about 8-10 rapes. We saw them strip 16 year-old Mehrunissa. They were stripping themselves and beckoning to the girls. Then they raped them right there on the road." In another camp a rape victim spoke of her experiences. She said that while running away from the mob she fell behind as she was carrying her young son, Faizan. "The men caught me from behind and threw me on the ground. Faizan fell from my arms and started crying. My clothes were stripped off by the men and I was left stark naked. One by one the men raped me. All the while I could hear my son crying." The fact-finding team also found evidence of police complicity in this carnage. Not only were women forced out of their homes and targeted in the streets but also the police helped the attackers. The report said that in the vast majority of the cases the police refused to lodge First Investigative Reports (FIR). When questioned about violence against women even the District Collector of Panchmahals said, "maintaining law and order is my primary concern. It is not possible for me to look into cases of sexual violence." Women hid in the forests for 3 to 4 days before they could reach the safety of camps. The report said the relief camps were organised by Muslim community leaders with hardly any help from the government. The report also stated that an "immediate impact of the violence is the creation of female-headed households. In many cases entire families have been killed. Women testified to having witnessed several members of their family dying. They were dealing not only with the trauma of this loss, but facing a future with their life's savings and livelihood sources destroyed." Many women in the camps stated their fear about going back to their homes where they might be

⁴⁸Fact Finding by a Women's Panel, "Sexual violence against women," *Communalism Condemned: Gujarat Genocide 2002*, ed. Suranjan das, (Calcutta: Netaji Institute of Asian Studies, 2002), 173, 175.

targeted again.⁴⁹ Other groups such as Citizens Tribunal and All India Democratic Women's Association corroborated these evidences.⁵⁰

There were other initiatives where women visited Gujarat to find out about the situation of riot-affected women. Among the last to visit Gujarat was a team set up by the National Commission for women, which is mandated as the apex body for the protection of women's rights. During their visit they went to Himmatnagar, Ahmedabad, Godhra, Kaiol and Vadodara between 10th and 12th April 2002. One of the members of this team wrote about her experiences of camp life. She said:

How long could anyone stay in the camps? The temperature was already 43 degrees. In the next few weeks it would soar to 47 or 48 degrees. There were babies, infants and newborn under the canvas. There were pregnant mothers, the old, and the ailing. Water, sanitation and privacy were in short supply. There was no privacy during waking or sleeping hours, to feed the baby or change one's clothes. The situation was mired in pathos and humiliation.⁵¹

The National Commission for Women reported that many of the camps "were not up to the mark" and they asked the government to carefully supervise relief. They pointed out in the camps organised by the government there were no representation of women in the organising committee. With several pregnant and lactating women and children they felt there should be adequate representation of women in these committees. They also felt that security arrangements for women and children were inadequate "who feel extremely insecure in the present circumstances." There were no special provisions for pregnant women. The committee observed that, "sanitary towels and other personal items of clothing such as undergarments, footwear etc. also need to be provided." They also observed that there was a lack of lady doctors and gynaecologists. More importantly there were no facilities for women and girls to who have been

⁴⁹ Syeda Hameed, Ruth Manorama, Malini Ghosh, Sheba George, Farha Naqvi and Mari Thekaekara, *How Has The Gujarat Massacre Affected Minority Women?: The Survivors Speak*, Fact-Finding by a Women's Panel, Citizen's Initiative Ahmedabad, 16 April 2002.

⁵⁰ The Concerned Citizens Tribunal Reported "A distinct, tragic and ghastly feature of the state sponsored carnage unleashed against a section of the population, the Muslim minority in Gujarat, was the systematic sexual violence unleashed against young girls and women. Rape was used as an instrument for the subjugation and humiliation of a community. A chilling technique, absent in pogroms unleashed hitherto but very much in evidence this time in a large number of cases, was the deliberate destruction of evidence. Barring a few, in most instances of sexual violence, the women victims were stripped and paraded naked, then gang-raped, and thereafter quartered and burnt beyond recognition." *An inquiry into the carnage in Gujarat*, Citizens Tribunal - Gujarat 2002, Published by: Citizens for Justice and Peace, <http://www.sabrang.com/tribunal/vol2/womenvio.html>

⁵¹ Vasudha Dhagamwar, "The Women in Gujarat's Camps -I" *The Hindu*, 22 May 2002, (online edition) <http://www.hinduonnet.com/thehindu/2002/05/22/stories/2002052200351000.htm>

widowed or orphaned to get any special training to earn their livelihood. No efforts were made to make women aware of the compensations that were promised to them. Although inadequate these compensations could at least give some confidence to women who are traumatised by their own destitution.⁵² What the members of the committee were most concerned about was that, “no one seemed to have asked questions related to rehabilitation. What efforts were being made to make their homes and localities safe? Or to determine, in consultation with them, where the women without men folk or children without parents would go?”⁵³ The National Human Rights Commission in its report accused the government of having failed to take appropriate anticipatory and subsequent action to prevent the spread and continuation of violence. It also criticised the government for discriminatory treatment towards Muslims even while giving compensation and recommended that compensation to Godhra victims should be same as that given to victims of riot.⁵⁴

Gujarat riots will also be remembered for attacks against children from minority community. Children were subjected to rape, mutilation murder and burning, often with petrol poured down their throats so that they burn faster. Children and youth of minority community were also arrested on a large-scale after the Godhra incident and brutally tortured in custody. In the following months many of these camps where children were kept for reasons of safety were shut down and the children disbursed under duress. Some children were forced to return to their home. A fact finding team on the situation of riot affected children in Gujarat reports, “thousands of children have been scarred for life, and if their trauma, rage, incomprehension, and need for security and education are swept under the carpet, such suppression will inevitably result in massive eruptions of violence in the coming years.”⁵⁵

Traumas for many people from minority communities still continue in Gujarat. A fast-track court released most of those who have been accused of perpetrating violence. The situation became so bad that the National Human Rights Commission applied to the Supreme Court to take up the matter. In some

⁵² “Report of the Committee Constituted by the National Commission for Women to Assess the Status and Situation of Women and Girl Children in Gujarat in the Wake of Communal Disturbance,” in *The Gujarat Pogrom: Indian Democracy in Danger*, Compilation of Various Reports, Indian Social Institute, New Delhi, June 2002, pp. 48-56.

⁵³ Vasudha Dhagamwar, “The Women in Gujarat’s Camps –I” *The Hindu*, 22 May 2002, (online edition) <http://www.hinduonnet.com/thehindu/2002/05/22/stories/2002052200351000.htm>

⁵⁴ Report of the National Human Rights Commission in Basudeb Chattopadhyay, Ashis Ranjan Guha and Ramkrishna Chatterjee eds., *Communalism Condemned: Gujarat Genocide 2002* (Progressive Publishers, Kolkata, 2002) pp 151-160.

⁵⁵ Kavita Panjabi, Krishna Bandopadhyay and Bolan Gangopadhyay, *The Next Generation: In the Wake of Genocide, A Report on the impact of Gujarat Pogrom on Children and the Young* (Citizen’s Initiative, Ahmedabad and Action Aid, India, Kolkata, 2002) p. 5.

of the notable cases such as the Best Bakery Case the Supreme Court gave its verdict for trying in the accused outside of Gujarat. This has been an unprecedented legal decision in favour of justice towards minorities and a little discussion on that seems necessary for a mapping exercise.

Best Bakery Case

The Best Bakery case is one of the most serious instances of violence during the Gujarat carnage in 2002. On 14 March 2002, 14 people, all Muslims were killed in the Best Bakery in the Hanuman Tekri area of Vadodara. Many of these people were burnt to death when the Bakery was attacked by a large mob of 500 people. 21 people were accused of these murders. It happened during a bandh called by the VHP and the Bajrang Dal. The National Human Rights Commission in its report of April 2002 recommended that this case be handed over to the CBI. For similar reasons a Public Interest Litigation (PIL) was also lodged to transfer the Best Bakery litigation to CBI. There have been allegations that the police failed to take action to save the victims during the attack by the mob that lasted for hours. Ironically the investigations were handed over to Police Inspector P.P. Kanani, who have been repeatedly named for brutal harassment of Muslims in Vadodara particularly in Memon Colony and Panigate.⁵⁶

The Best Bakery case was tried by a fast track court specially set up to try cases of violence during the Gujarat carnage. But in the manner in which investigation were carried out left much to be desired. Investigations were handed to the very same police who were considered partisan in this riot. Also the Public Prosecutor was a man known for his bias against Muslims and a long time member of RSS. Also the security of the witnesses was never assured. The failure of the Court to make any arrangement regarding the security of the witnesses was a serious lapse. Neither did the Court prevent such cases from being handled by police officers who were known for their bias against the Muslims.

The Public Prosecutor never raised the issue of security of his witnesses. Under the given circumstances many witnesses turned hostile. They later stated that members of VHP and BJP were threatening them. During proceedings the Public Prosecutor never introduced the report of NHRC that was relevant to the case. Neither did they refer to the media reports of intimidation of witnesses. There was also no effort to investigate the contradictions in amended statements made by witnesses. Hence when all the 21 accused were acquitted on 27 June 2002 for lack of evidence there was obvious consternation among Rights groups and minorities. The judgement did not comment on the unusual circumstances of

⁵⁶ “India: Best Bakery case – concerns for justice,” 2 July 2003, www.rediff.com/news/2003/jun/27guj.htm

witnesses turning hostile even after making similar comments to PUCL or media groups that they had made in their FIR statements.⁵⁷

There were demands from civil society groups that the case be reopened and investigated by the CBI. There were also demands that the case be tried outside of Gujarat. The first track courts decision also shocked the NHRC that was convinced of collusion between the accused and the prosecution in Gujarat. Also civil society groups such as Citizens for Peace and Justice brought Zaheera, a key witness in the case to Mumbai where she reported to the media that she allegedly received threats from a Vadodara MLA.⁵⁸ The Supreme Court on 12 April 2004 ordered the transference from Gujarat to Maharashtra. While giving the judgement Justice Doraiswamy Raju and Arijit Pasayat not only questioned the impartiality and efficiency of the investigation and prosecution, but also expressed concern over Court's "indifference to sacrilege being committed to justice." The judges observed that the trials "were reduced to mock trials or shadow boxing of fixed trials."⁵⁹ An observer commented that the prosecution in the best bakery trials could do such a shoddy job because of the "pervasive climate of impunity enjoyed by all rioters from Jabalpur 1961 to Delhi 1984 to Kanpur 2001 that emboldened the rioters in Gujarat 2002 to kill, rape, burn and loot without any fear of punishment."⁶⁰

Currently, the case has been transferred to Mumbai. It is considered as a landmark for both the National Human Rights Commission and minority groups themselves. It is also considered a victory for people fighting for justice. Yet the case itself has turned even more complex portraying the complexity of the issue. The key witness Zaheera Sheikh was in Mumbai in 2004 and she filed an FIR against the Vadodara BJP MLA Madhu Shrivastava, who allegedly threatened her to withdraw her statements earlier. Soon however, she again retracted her statement and became a hostile witness. There are rumours that she was paid off by BJP MLAs in Gujarat. Zaheera's attitude may harm the cause of human rights of the Muslim community in India. The case is still pending in the Maharashtra High Court.

Christians in India

In 1981 the Christian population in India was 16,165,447 and they formed 2.43 % of the total population. In 1991 the Christian population rose to 19,640,284 but their percentage dropped a little to 2.34. In 2001 their numbers rose to

⁵⁷ Best Bakery Case, PUCL Press Release, 7 July 2003, www.pucl.org/Topics/Religion-communalism/2003/best-bakery.htm

⁵⁸ This is reported in a number of newspapers. One of the recent ones being an article entitled, "Gujarat police in city to record Zaheera's statement," *Free Press Journal*, 15 September 2004.

⁵⁹ Justice Doraiswamy Raju and Justice Arijit Pasayat quoted in *Human Rights Today*, Vol VI, No. 2 (April-June 2004) p. 1.

⁶⁰ Iqbal A. Ansari, "Best Bakery Not the Only Case of Subversion of Justice," in *Human Rights Today*, Vol VI, No. 2 (April-June 2004) p. 1.

24,080,016 and their percentage dropped again a little and currently they form 2.3 % of the total population. Hence the decadal growth rate of Christians is on the decline. Most of the Christian population in India are found either in South India or in Northeast India. In Nagaland, Mizoram and Meghalaya the Christians form overwhelmingly the majority of the population being 90 %, 87 % and 70.3 % respectively. The sex ratio of Christians in India is much above the national average and it is 1009 women to a thousand men. In India only among Christians does one find women more in number than men although in the sex ratio of 0-6 years girls are much less in number being only 964, but even that is higher than the national average.

Education is a priority for Christians in India. In fact Christians are responsible for the missionary zeal of educating the whole of the tribal population of Northeast India. According to F.S. Downs: "One of the functions of Christianity, sociologically speaking, was to help the hill tribes to preserve their identity, in the face of perceived new threat of assimilation into Hindu societies of the plains."⁶¹ Christians were also responsible for collecting scattered tribal dialects and creating written languages out of them. Social scientists say that Christians are responsible for creating at least 50 written languages.⁶² Christian efforts to educate Northeast India are laudable. The Baptist missionaries formed some of the first schools in Northeast India. Even now the literacy rate in most of Northeast India is higher than the rest of the country. The literacy rate of Christians in India is 80.3 %, which is considerably higher than the national average. Even female literacy rate among Christians is as high as 76.2 % by the latest Census. By 1995 there were 226 colleges in India run by Christians with a total enrolment of 3,43,378. There are three Medical and two Engineering Colleges run by Christians. Christians are pioneers in the field of women's education. Among the 950 women's colleges in India Christians run 87 of them.⁶³

However, education does not reflect the only reality of the lives of Indian Christians. Their work participation rate is as low as 39.7 %. In urban sectors their work participation rate is as high as 56 % but in rural areas it is much lower. Over 75 % of Christians live in rural areas. In urban sectors most of the jobs taken by Christians are those of secretaries, nurses, teachers, salesmen etc. There are very few Christians in the higher administration of the government and there are equally less Christian CEOs. Also very few of them are doctors and engineers and practically there are no big Christian entrepreneurs.⁶⁴

Most Christians in India are converts from backward communities. This has been one of the main reasons for pro-Hindu governments such as the BJP led

⁶¹ Ferederio S. Downs, *History of Christianity in India* (CHAI, Bangalore, 1992) p. 4.

⁶² Sebastian Vempeny, *Minorities in Contemporary India* (Kanishka Publishers, New Delhi, 2003) p. 98.

⁶³ Figures given by All India Association for Christian Higher Education (AIACHE) Publication, 1995.

⁶⁴ Sebastian Vempeny, *Minorities in Contemporary India* (Kanishka Publishers, New Delhi, 2003) pp. 104-105.

government to start virulent campaigns against missionary preaching because these political parties consider it a camouflage for religious conversions. From 1954 missionaries are required to obtain entry visas before coming to India. Although article 25 guarantees to every person the right to profess, practice and propagate any religion that they might want the Indian state is extremely cautious about missionaries. Way back in 1956 the Niyogi Committee report had condemned Christian missionaries by alleging that they have exploited uneducated people. In 1960 there was an effort to introduce a bill to save SC and ST from forced religious conversion. In 1978 Morarji Desai had to withdraw a bill to ban conversions. When BJP came to power it embarked on a policy of terrorising minorities in the name of alleged conversions. According to a social scientist “Minorities were made to suffer in the name of conversions as it happened to the Christians during the years from 1998 to 2001,” coinciding with the arrival of BJP to power.⁶⁵ Many of the states such as Tamil Nadu banned conversions. In 1998 attack on Christians began in six districts of Gujarat and even a girls school was attacked in Rajkot. In a meeting on displacement in Bangalore in 2002 representatives of Christian Church groups from Gujarat spoke to the author about the great insecurity that they were facing in the post Gujarat riots.

Since over 90 % Christians in North India belong to the Schedule Classes and Schedule Tribes. For this reason Christians often share the disabilities of Ethnic minorities such as the tribal people. Hence any mapping exercise remains incomplete if one does not look at the situation of ethnic minorities such as the tribal people in India.

Situation of Ethnic Minorities

In 1981 more than 7.8 % of the total population belonged to the Scheduled tribes. Today their population is about 8 %. These tribes are often called *adivasis* or original inhabitants of the land. Article 366 (25) of the Indian Constitution has defined Scheduled Tribes as “such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purpose of this Constitution.” By the Constitutional Order of 1950 the President of India made 212 Scheduled Tribes. Later by Acts of Parliament some other groups were included. Today the number of Scheduled Tribes is 698. From 1999 India has a separate ministry on tribal affairs. Tribals are also ethnic groups and so they form the largest part of ethnic minority groups in India. Most tribes have their distinct social structures, dialects, rituals, lifestyle etc. Many of the tribes are demanding recognition as people and nation. For example, the Indian Government and the Naga Tribal People are engaged in the longest State versus Community conflict in South Asia. Although Nagaland became a separate state in 1963 but that was too little too late. The Naga demand by then had become a demand for self-determination and no longer a demand for autonomy. All through the late 1980s and early

⁶⁵ Ibid. 210.

1990s the GOI tried to douse the flame of independence among the Naga people through draconian acts. The Oinam massacre, the Mokokchung killings, the Kohima firings etc have become legendary as repressive acts of the State. From 1997 there is a ceasefire between the GOI and two major Naga rebel groups and violence have slightly abated in that region.

From the 1980s there are other tribal groups who are demanding autonomy. The GOI imposed the Armed Forces Special Powers Act (AFSPA) of 1958 on the frontier tribes as a response to such demands. Although this dreadful Act was supposed to be operational only for 6 months it has continued to be in operation even now. Today the tribal people of Manipur have created a huge protest by the civil society against this Act. The Manipur government was forced to withdraw this Act from certain parts of Imphal, the capital city. The AFSPA has been imposed on almost all frontier tribes people from the late 1970s. Still the tribal people have continued their fight for autonomy resulting in demands for Gorkhaland, Boroland etc. In the late 1990s the GOI started exploring possibilities for a political solution. Three new tribal majority states namely, Uttarakhand, Chhattisgarh and Jharkhand were created in 2000. But this did not solve the ethnic problem. There are many more demands for autonomy among tribal people. The tribal people have a grievance that the mainstream has never considered them as equal participants in the Indian democracy. This is born out by the Constituent Assembly debates on the Sixth Schedule. In this debate the tribal people were often called backward and primitive etc. When there was an effort to give some autonomy to tribal people through the Sixth Schedule numerous objections were made by members of the Constituent Assembly. In an effort to protect the rights of non-tribals living in tribal areas they said:

“There are so many people of our country, so many Assamese, Punjabis and Sikhs – all people of the country. You cannot consign them to a mis-rule, to a primitive rule ... There is no need to keep any Tribalistan away from us so that in times of trouble they will be helpful to our enemies.”⁶⁶

Therefore from the beginning tribals were marked both as primitive and as potential enemies and hence not worth for any special consideration. Such an attitude did not change to any great extent and today they are often the major victims of developmental projects designed by the State. In fact another way of looking at the minority question is to see how they have fared in the development agenda of the Indian State. In the last two decades India's developmental markers and markers of modernisation the building of dams, highways, mining etc. All these projects have necessitated massive displacements. It would be interesting to explore how minorities have fared in these projects by analysing which communities get to benefit by such projects. Previous research on these developmental projects suggests that it is the caste Hindus who have benefited by them and among the largest groups that are displaced are the tribal and caste minorities. One needs to review such projects to analyse the situation of different

⁶⁶Shri Kuladhar Chaliha, in *The Constituent Assembly Debates*, vol. IX, Tuesday, 6th September 1949, pp. 1-2 of 20, <http://parliamentofindia.nic.in/debates/vol9p27a.htm>

groups of minorities within the development paradigm followed by the Indian State. Tribal situation vis-à-vis developmental projects reflect the problems faced by ethnic minorities in India.

Tribal People and Developmental Displacement in India

In India alone one study testifies that 36 lakh *adivasis* have been displaced and only about one-third has been rehabilitated.⁶⁷ If one looks at World Bank reports after 1993 on the construction of dams one gets this picture even more clearly.⁶⁸ The Sardar Sarovar Project, often described as one of the most flawed projects, displaced largely the Tadvis, Vasavas, Bhils and the Bhilalas but very few Hindus who were not *dalits*. In a recent survey it was again stated that tribal population has been disproportionately affected by developmental projects in India. An estimated two per cent of the total Indian population has been displaced by development projects. Of these, 40 % are tribal people although they constitute only 8 % of the total population today.⁶⁹ During the last fifty years, some 3,300 big dams have been constructed in India and another 1,000 are under construction. Many of them have led to large-scale forced eviction of vulnerable groups. The situation of the *adivasis* or tribal people is of special concern as they are reported to constitute between 40 % and 50 % of the displaced population. In 1994 even the GOI came up with an estimate that over 15 million people have been displaced and over 11 million were still awaiting rehabilitation. Although non-governmental agencies give a much larger figure of displaced people in India but the government figures are import because they reflect that most of the displaced have not been rehabilitated.

One of the most controversial development projects in India is the Narmada Valley Development Project. It envisages building 3,200 dams that will reconstitute the Narmada and her 419 tributaries into a series of step-reservoirs and become easy sources of water for irrigation. The first dam on the Narmada River, the Bargi Dam that was completed in 1990, reportedly displaced 114,000 people from 162 villages and today irrigates only 5% of the land it was said to benefit. Most of the evicted did not get any compensation.⁷⁰ The people who are evicted are largely tribals and the dams are meant to benefit landowners who are

⁶⁷ Stan Swamy, "New State, Dying Hopes," *Combat Law: The Human Rights Magazine*, Vol. 2, Issue 1 (April-May 2003) p. 83.

⁶⁸ Lyla Mehta and Bina Srinivasan, "Balancing Pains and Gains: A Perspective Paper on Gender and Large Dams," A Working Paper of the World Commission on Dams (unpublished), Prepared for Thematic Review, Cape Town, South Africa, <http://www.dams.org/> p. 2.

⁶⁹ Courtland Robinson, *Risks and Rights: Causes, Consequences, and Challenges of Development-Induced Displacement* (Brookings-SAIS Project, Washington D.C., May 2003) pp. 10-11

⁷⁰ Report by Global IDP Project, <http://www.db.idpproject.org/Sites/idpSurvey.nsf/wViewCountries/9E49C4B9CFA1B344C1256A940028BDDD>

largely Hindus. Human Rights activists say that the construction of more than 3,000 dams will flood thousands of acres of forestland largely populated by tribal people, striking a devastating blow to human lives and biodiversity. Furthermore, the displacement of the Narmada Valley residents from their lands threatens their rights to livelihood and self-determination. Since 1985, the Narmada Bachao Andolan (NBA) has been organizing massive rallies and peaceful demonstrations to protest the destruction of the Narmada Valley. Despite the non-violent nature of the protests, NBA activists have been arrested and beaten on countless occasions. In 1993 the World Bank withdrew from the project and this was deemed as a victory for the rights movement in India but in 2000 a ruling by the Supreme Court authorises renewed construction of the dam. Those who oppose the project place themselves in danger of rising floodwaters and of arrest and detention.

That *adivasis* often pay a high price for trying to assert their rights is obvious from the following event. On 20 April 2000 Colonel Save, an environmental activist with the Kinara Bachao Samiti (Save the Coast Committee), which was protesting the construction of a port in the coastal zone of Gujarat, was arrested in his house and taken to the local police station, where he was reportedly beaten by the police. He subsequently died from a brain injury. Although rights of vulnerable groups including *adivasis* are protected under the law, activists defending the rights of these communities by peaceful protest have been met with excessive force by law enforcement agencies.

The Rayagada and Koraput districts of Orissa, located on the Bay of Bengal coast near Calcutta, have been home to many tribal people. Since the 1950s, these people were gradually moved off their ancestral land to make room for dam projects and mining operations. Those displaced have been poorly compensated, if at all, and many have lost their livelihoods and their homes. Since 1993, several multinational companies have become involved in the development of mining and processing plants in the area, which is rich in bauxite. Tribal families who faced displacement or loss of land were reportedly offered monetary compensation. There are also allegations that some *adivasis* were forced to accept compensation under threat of violence and offered alcohol and other inducements.⁷¹ However, cash compensation did not actually compensate for the loss of land by the tribal people. Mining in Orissa has caused massive and permanent disruption of rights of tribal people.

The new forest laws and orders on encroachments have led to further displacement of tribal people. On 1 April 2002 the following order was passed by the Supreme Court, "...the Union of India has received responses from various states with regard to the problem of encroachment in forest. The said responses are being attended to and a final decision will be taken and directions issued by the Union of India within six weeks." Following this on 3 May 2002 a letter from Inspector General of Forests called for eviction of encroachers. As a result of this order thousands of tribals are evicted. They have been living in these

⁷¹ Amnesty International Report, <http://www.amnestyusa.org/justearth/india.html>

lands for generations. But because they did not have the pattas to these lands they are now being evicted from them.⁷²

In most of South Asia tribal people are a persecuted lot. Just because the frontier tribes are largely in conflict with the State it does not mean that the non-frontier tribes are any better off. The situation for developmental projects and forest laws are equally bad. Recently we visited a region called Sonbhadra. The situation of tribal people here portrays the seriousness of their situation in most of India. This region on account of its natural barriers, rough terrain and extensive forests became the abode of different tribal groups. In the post 1950s it was the site of massive developmental projects such as dams. Also big industries such as Kanoria chemicals and Hindalco were set up. This was followed by coal and limestone mining leading to massive influx of non-tribal people in the region. Colossal industrialization projects led to soil erosion, deforestation and growing pollution. Many acres of tribal land were soon submerged under water due to the construction of reservoirs of the Rihand dam. Due to the construction of this dam more than 2,20,000 tribal people from 140 villages were displaced. Of them the majority were displaced multiple times not only due to building of dams but also because of coal mining and the establishment of a thermal power plant. Then by declaring tribal land as forest land the government made many more homeless.

The local people who had already suffered because of massive environmental degradation and deforestation now lost almost 80% of their common property resources. This resulted in their increasing pauperization. Most of them were reduced to subsistence living. Today these people are faced with near starvation situation. Located close to the infamous Kalahandi, people of Sonbhadra are facing a similar situation of starvation today. Their children are dying of a disease called hunger. In December 2003, when I visited the area, at last 18 children belonging to the Ghasia tribe died of hunger and the number keeps increasing. Numerous civil liberties organizations are working in this area including People's Voices for Civil and Human Rights (PVCHR) and Fellows for Reconstruction, Initiative, Education, Nourishment and Development of the Society (FRIENDS).

If one looks at highway-building projects in metropolitan cities in India one sees how tribals are displaced from the vicinity of these cities. As yet there are only very few protest against such displacements. Tribals are facing persecution in most parts of India. The tribal people are completely distanced from resources. They are now being forced to move away from natural resources such as forests on which their lives depend. Since most of them practiced *jhum* cultivation and since there is a state policy against *jhum* cultivation their lands are being taken away from them. In the process their children are dying of starvation and yet there is very little effort by the state to address this problem. It

⁷² Pradip Prabhu, "Tribals Face Genocide," *Combat Law: The Human Rights Magazine*, Vol. 1, Issue 4 (October-November 2002) p. 73.

has to be realised that without substantial help from the State and *adivasi* friendly policy the situation will not change.

Other Minorities

There are a number of other minorities in India. Among religious minorities the Sikhs form 1.9 % of the population today. However, the Sikhs are located in one state within India and that state is Punjab. In a total Sikh population of 19,215,730 people, 14,592,387 live in Punjab. Sikhism and Hinduism have coexisted for many years. But in the 1980s the Sikhs came up with a demand for homeland that was symbolized in their movement for Khalistan. That movement was contained through military and political initiatives and today the Sikhs are participating in the political processes once again. However, what needs to be realised is that the Sikh demands have been contained and not solved.

There are a number of linguistic minorities in India. Language came to be recognised as a legitimate basis for state formation in India from the 1950s. Many Indian states were organised on linguistic lines. As a result most of these states have what may be called a home language. As per the 1981 Census India has over 700 languages of which only 15 are recorded in the Eighth Schedule and which is spoken by 95.6 % of the population. In view of this diversity of languages the Constitution recognises the concept of linguistic minorities. But the Constitution is silent about the definition of the term and so through judicial decision it came to be recognised as a spoken language, that may not have a distinct script. That linguistic minorities or speakers of minority languages can have major problems was revealed by discrimination faced by Bengalis in Assam during the anti-foreigner movement. However, today language is an add on issue and can become problematic when it is juxtaposed with other issues such as religion and ethnicity.

Dalits and the Issue of Protective Discrimination

According to a number of social scientists there are “special types of minorities mentioned in the Constitution,” and they are the backward classes or the dalits.⁷³ The situation of caste minorities or dalits is much more serious than many other minority groups in India. There might have been some controversy in accepting dalits as a minority but the United Nations Committee on the Elimination of Racial Discrimination at its sixty first session in Durban recognised discrimination against dalits as racial discrimination. The dalits, officially called the Schedule Castes, were victims of the inhuman practice of untouchability. Ghandhiji had named this group *Harijan* or God’s own People. The Anti-Untouchability Act of 1955 had legally abolished this inhuman practice but when this Act was reviewed

⁷³ Sebastian Vempeny, *Minorities in Contemporary India* (Kanishka Publishers, New Delhi, 2003) p. 184. Many other social scientists such as Imtiaz Ahmad also prescribe to this view.

in 1976 it was found out that the same year 5108 incidents of untouchability was registered in the courts. To make protection more stringent and effective The Protection of Civil Rights Act was enacted. In 1989 The Schedule Caste/Tribes (SC/ST) Prevention of Atrocities Act was enacted.⁷⁴ There are a number of positive discrimination measures for SC/ST. The Directive Principles say that: “The State shall promote with special care the educational and economic interest of schedule castes/tribes and shall protect them from social injustice and all form of exploitation.” In accordance with this provision the GOI has provided for a number of measures to protect the SC/ST. In economic, educational and political spheres provisions have been made through reservation of seats to improve their participation. It must be mentioned however, that discrimination in the private, social and economic spheres is not covered through these legislation. As late as in 1997 there were 1157 untouchability related crimes registered in Indian courts.⁷⁵

It is not as if reservation for SC/ST and Other Backward Classes (OBC) was accepted without protest. In the late 1980s the Mandal Commission identified 3743 caste groups as OBCs. The Commission recommended that 27 % jobs be reserved for the OBCs in addition to the already accepted reservation of 15 % for SCs and 7.5 % for STs. The National Front Government to implement the decision of Mandal Commission led to massive protest culminating in “a number of cases of soul-searing self-immolation attempted by students.”⁷⁶ This was not the first or the only protest by upper caste Hindus against reservation for minorities. In Gujarat there were attacks against SC, ST and OBCs in 1980 and 1985. Cases for reservation has come up before the Supreme Court a number of times. The Supreme Court has consistently ruled that the consideration of national interest cannot be sacrificed in determining the extent of special provisions. Thus Supreme Court maintains that a special provision contemplated by Article 16 must be within reasonable limits as is obvious from the following ruling: “if under the guise of making special provision, a State reserves practically all the seats available ... that clearly would be subverting the object of Article 15 (4). In this matter again we are reluctant to say definitely what would be proper provision to make.”⁷⁷

There has been some improvement in the situation of dalits due to protective discrimination. The Bahujan Samaj Party and the ascendancy of Mayawati on the dalit card is a visible example that things are changing. The BSP was able to get elected the representatives of the SC community elected under its banner. According to one report: “Dalits have utilized the laws and

⁷⁴ Sukhadeo Thorat, “Hindu Social Order And Human Rights of Dalits,” *Combat Law: The Human Rights Magazine*, Vol. 1, Issue 4 (October-November 2002) p. 4.

⁷⁵ Annual Report of Commissioner for SC/ST in *Combat Law: The Human Rights Magazine*, Vol. 1, Issue 4 (October-November 2002) p. 5.

⁷⁶ Rajendra Pandey, *Minorities in India – Protection and Welfare* (APH Publishing Corporation, New Delhi, 1997) p. 205.

⁷⁷ Rajendra Pandey, *Minorities in India – Protection and Welfare* (APH Publishing Corporation, New Delhi, 1997) p. 211.

mechanisms existing within the country to try to promote and protect their rights, only to find that dominant caste values, prejudice and vested interests prevalent across all levels of government and society so seriously debilitate the political will to implement and enforce these laws that they have been emasculated and reduced to the status of mere paper tigers.”⁷⁸ The NCDHR reports that although there are legislation against bonded labour between 1976, when the Act against bonded labour was passed, and 31 March 1999, the Indian Government identified a 280,340 bonded labourers largely from dalit community. Almost half of the rural Dalit population (49%) are agricultural labourers, while only 25% are cultivators. Even the Ceiling Land, or surplus land, which has been distributed is not being enjoyed by Dalits. In 1996, a door-to-door survey of 250 villages in Surendranagar District, in the state of Gujarat, found that 1087 Dalit landholders possessing title to Ceiling Land are unable to enjoy cultivation of the land. The main reasons for this were that: those who had title to land had no possession; those who had possession had not had their land measured or faced illegal encroachments from upper castes.⁷⁹ Activists working on the issue of dalit rights, however, state that whatever improvement there is in the situations of dalits today is largely due to state policies.

Protective discriminations, however, have in no way solved the problems faced by schedule castes. A recent report on the situation of dalits in India points out that: “Dalits are forced to live in segregated colonies, are restricted from inter-dining and inter-marrying. Even if one is legally entitled to positions of power or authority, Dalits are not allowed to exercise it.” Also, “Dalits cannot expect equal treatment at public facilities and societal services Physical violence and atrocities are meted out whenever Dalits challenge the status quo.”⁸⁰ In 1997 504 dalits were murdered, 3462 were grievously hurt, 1002 dalit women were raped and 12149 faced other atrocities.⁸¹ This was in no way an exceptional year but rather a typical year in terms of atrocities towards dalits. As for reservation most dalit organisations argue that the top jobs are never reserved. There are a lot of jobs that are not reserved. Also despite 50 years of reservation “only 3-4 % Class 2 and 1 posts are being occupied by reserved category candidates.” Jobs that are accessible to dalits are those of security, sweeping or manufacturing of goods in the state sector.⁸² Of the total SC reservation quota in the Central Government, over 54% remain unfilled. More than 88 percent in the

⁷⁸ “Caste, Race and the WCAR,” NCDHR Report, <http://www.dalits.org/CasteRaceandWCAR.html>

⁷⁹ *ibid.*

⁸⁰ “National Campaign on Dalit Human Rights, (NCDHR)” www.dalits.org/CERDSubmissionNCDHR.htm p. 2.

⁸¹ Annual Report of Commission for the Scheduled Caste and Tribe, Delhi, 1997, in *Combat Law: The Human Rights Magazine*, Vol. 1, Issue 4 (October-November 2002) p. 6.

⁸² Mihir Desai, “Reservation and Recent Judicial Trends,” in *Combat Law: The Human Rights Magazine*, Vol. 1, Issue 4 (October-November 2002) pp. 15-17.

Public Sector and 45 percent in the Banks remain unfilled.⁸³ Therefore, positive discrimination may have helped dalits but only slightly. Resources seem to be needed even to access rights and the SC/STs in India do not have even that minimum amount of resources.

Minority Women In India

A mapping exercise on minority rights and protection needs to give special attention to the question of women. The Indian state have traditionally viewed women less as individuals and more as members of their communities. From the late nineteenth century onwards there were lengthy debates in the legislature on how to improve the status of Indian women. Although often everyone agreed that something needed to be done but no single programmes for women's empowerment could be formulated because community leaders, who were all male, had problems with such programmes. Women's lives came to be guided by the personal laws of their communities. Notwithstanding the discriminatory nature of personal laws particularly regarding women most nationalist leaders refused to critique it. Even Gandhi during the Second Round Table Conference in 1931 assured the Muslims that the Congress Party would not touch their personal law without even considering how it discriminates against Muslim women. Whenever women from minority communities have tried to access civil laws they faced the brunt of community wrath. Often neither the secular judiciary and nor the state have helped women to fight discrimination enforced by their own communities as in the Shahbano and the Ameena Cases. Although a lot has already been written by social scientists on such cases it would still be of significance to revisit them especially within the context of autonomy of minorities. Also it would be of particular significance to bring on board the debate on Uniform Civil Code and reflect on how the state and the minority communities have respond to it.

Before mentioning the Shahbano case one has to point out that Muslim women is not a monolithic category. However, even at the cost of being simplistic one has to make broad generalizations in a mapping exercise such as this. Also it has to be remembered that Islamic practices do not constitute the whole of women's lives. According to feminist scholars, "Stereotypes of Muslim women, entrenched by the trinity of multiple marriages, triple *talaq*, and purdah, have held them hostage for so long that they have become difficult to dislodge."⁸⁴ However, notwithstanding these caveats one has to speak of the Shahbano case in any discussion on the situation of minority women. In April 1985, the Supreme Court of India passed a judgement in favour of Shahbano. The Supreme Court confirmed the judgement of the High Court of awarding Shahbano, a divorced

⁸³ "Broken Promises And Dalits Betrayed: Black Paper On The Status Of Dalit Human Rights," NCDHR, <http://www.dalits.org/Blackpaper.html>

⁸⁴ Zoya Hasan and Ritu Menon, *Unequal Citizens: A Study of Muslim Women in India* (OUP, New Delhi, 2004) p. 4.

Muslim woman, maintenance of Rs. 179.20 a month. Shahbano won her case on the basis of 1973 Code of Criminal Procedure. But when by-elections came Syed Shahabuddin defeated the Congress-I candidate. When an independent Member of Parliament introduced a bill to save Muslim personal law the ruling party reversed its support and resorted to a whip to ensure the passage of the bill, which was passed in May 1996 as the Muslim Women (Protection of Rights in Divorce) Act.⁸⁵ The bill became a retrogressive law and was meant to stop women from accessing civil laws. This case clearly portrays the problems faced by women from minority communities. They are being discriminated against both by the majority community, supported by the state and their own patriarchies.⁸⁶

The situations of women from minority communities are much worse than the situation of men of the same communities. Among all communities other than the Christians the sex ratio for women is much lower. Women also have lower literacy rate than the men. Only 50 % Muslim women are literate, 76 % Christian women and 63 % Sikh women are literate. A study undertaken among Muslim women clearly reveals, “financial constraints and a clear gender bias eclipse all other constraints on Muslim women’s education.”⁸⁷ The work participation rate of minority women is also lower than the men. In times of riots women face the brunt of violence. During Nellie massacre largely women and children were killed. In Gujarat too women were targeted. Men of other communities often target women as symbols of honour of their own communities particularly during conflict. Also in times of communal violence men, often kill women from their own communities lest others dishonour them.

Among the tribal people who are giving up *jhum* cultivation women are the poorest of the lot. We find differing opinions regarding the relative position of women in tribal India. Some say that women here enjoy much higher status in this region while others call them “primitive”. Verrier Elwin is said to have commented that tribal women in Northeast India “is in herself exactly the same as any other women”.⁸⁸ Although there are great disparities among women’s status in Northeast India due to their different historical experiences and hence different social construction of their roles recent researches show that since most of these women practiced *jhum* or shifting cultivation they enjoyed a better

⁸⁵ For an analysis of the case see Zakia Pathak and Rajeswari Sunder Rajan, “Shahbano” in Judith Butler and Joan W. Scott eds. *Feminists Theorize The Political* (Routledge, New York, 1992) pp. 257-279.

⁸⁶ Sona Khan, Shahbano’s lawyer in an Interview with Deepti Mahajan in New Delhi on 6 July 2004 agrees that Muslim personal law discriminates against women. However, she categorically states that “it is not fair to criticise the discriminatory personal laws of one community while the discriminatory laws of other communities are not paid attention to.”

⁸⁷ Zoya Hasan and Ritu Menon, *Unequal Citizens: A Study of Muslim Women in India* (OUP, New Delhi, 2004) p. 233.

⁸⁸ Verrier Elwin quoted in Lucy Zehol (ed.), *Women in Naga Society* (Regency Publications, New Delhi, 1998) p. 1.

position in society. A noted woman scholar's of Assam is of the opinion that, "because of the practice of shifting cultivation, women are considered as assets to the families and partners of men in *jhum* cultivation."⁸⁹ Population movements and pressure on lands have impacted heavily in areas where people practised *jhum* cultivation before. Now that the tribal people are forced to give up *jhum* cultivation the situation of women who were the majority among the cultivators is becoming worse as is the case of Naga women or Reang women in Tripura. Both their social and economic position is affected by this transition yet there are hardly any programme to retrain them for income generation leading to further pauperisation of tribal women.

Even in displacements of tribal people due to developmental projects women are at the receiving end of the spectrum and can hardly ever access resources for their sustenance. As has been pointed out earlier although the beneficiaries of the dam are meant to be large landowners, tribal people are paying the price. In such situations it is common that women from these communities will be worst affected. As one observer points out, relief programmes tend to overlook women's crucial roles as producers, providers, and organisers, and have delivered assistance directly to male heads of households, whether it is food, seeds and tools, or training. This reduces women's influence over areas previously controlled by them — such as the production and provision of food — undermining their position within the household and the community.⁹⁰ Therefore, tribal women face problems both for being tribal people as well as for being women.

Among dalits women face increased atrocities. An NCDHR report states that: "Women are the worst victims," of violence against dalits.⁹¹ It says that "Dalit women are the most discriminated and exploited persons in a society dominated by caste hierarchy and patriarchy. For them, the intersection of caste and gender means that they are subject to the most extreme forms of violence, discrimination and exploitation, even at the hands of women from upper-castes."⁹² In 1984 there were 692 rape cases against dalit women and in 1994 the number had risen to 991. Literacy among Dalit women is just 23.76%, that is, about half the literacy rate of non-Dalit women. Such low levels of literacy have profound consequences for their lives and the rest of the Dalit community. Illiteracy makes them susceptible to superstitious beliefs and misinformation regarding their bodies, reproduction and health, due to which their fertility rates continue to be higher than those of non-SC women. The representation of dalit women in the job market is very low. Dalit women are perhaps the most

⁸⁹ Renu Debi (ed.), *Women of Assam* (Omsons Publications, New Delhi, 1994) p. 2.

⁹⁰ Tehmina Rehman, "Internal Displacement: Atrocities on Women in India," *Gender Issues*,

http://www.punjabilok.com/india_disaster_rep/issue_significance/gender_issues.htm

⁹¹ "National Campaign on Dalit Human Rights,"

www.dalits.org/CERDSubmissionNCDHR.htm p. 2.

⁹² "Broken Promises And Dalits Betrayed: Black Paper On The Status Of Dalit Human Rights," NCDHR, <http://www.dalits.org/Blackpaper.html>

economically deprived section of society. According to one commentator the “workforce structure of dalit women is such that they rarely own land.”⁹³ In 1991 71% of dalit women workers were agricultural labourers in rural areas. Only 19 % were cultivators. The new economic policies of opening public sectors to private companies have reduced jobs for women, particularly dalit women. Some of these women as in Andhra Pradesh are forced to become *jogins* (similar to devdasis). These girls are married to village gods and are then sexually exploited by the upper caste. Among 15,000 *jogins* in twelve districts of Andhra Pradesh 80 % are dalit women.⁹⁴ Also because these women are considered polluting they do not get jobs in people’s homes. All these things taken together drive these women towards prostitution and further sexual exploitation. The State seems oblivious to the condition of these women and positive discrimination does not seem to have touched these women to any great extent.

Conclusion

In a mapping exercise such as this it needs to be remembered that the category of minorities are not fixed, but rather time specific. Composition of minorities change on the basis of state policies and today’s tentative majority can become a minority tomorrow. In India everyday new minorities are created. Speaking of the Indian situation eminent sociologist Dipankar Gupta has commented, “minoritization can be so indiscriminate and disrespectful of previous consensus, then no matter how exhaustive the listing of minorities, the exercise will always be both incomplete and futile.”⁹⁵ The determinant for the creation of minorities is not number but powerlessness. In a majoritarian and masculinist state system such as found in India old cleavages on the basis of class, caste, gender, race, ethnicity gets entrenched within societies. Added to that the New Economic Policies of globalisation and a new world order drives us further away from a just world. In such a situation new minorities emerge and the older ones get even more marginalized. It is not as if within those communities there is no space for accessing power. The ascendancy of BSP portrays that there is such scope. But for that powerless groups need to play the majoritarian game whereby a few of them are able to access greater resources but the rest remains marginalized. This is the state of material politics of minorities in India.

This mapping exercise of minorities in India is not intended to be a summary of the situation of all minorities in India as that is an impossible project. Rather the effort has been to look at the issue of autonomy of minorities by examining some cases that reflect on different communities’ ability to access resources and to negotiate with the state and other communities as a group. Such

⁹³ Vimal Thorat, “The Least of the Oppressed,” in *Combat Law: The Human Rights Magazine*, Vol. 1, Issue 4 (October-November 2002) p. 24.

⁹⁴ Ibid, p. 25.

⁹⁵ Dipankar Gupta, “Secularization and Minoritization,” in Sheth and Mahajan, p. 54.

a mapping exercise amply portrays that a lot needs to be done before minorities of today can be called equal participants in Indian democratic processes.

[I am very grateful to both Professor Iqbal Ansari and Professor Ranabir Samaddar for their extensive comments, advice, support and help. They have inspired me to critically rethink established categories and understand that minorities are not a static category but constantly emerging under the majoritarian regimes of South Asia. It was Ranabir Samaddar who pointed out to me that Muslims faced not merely genocidal attacks but genocide in Gujarat. I thank Sumona Das and Deepti Mahajan for helping me with my research. My colleague Lipi Ghosh helped me with resources and books on minorities. Thanks to Jeevan Thiagraja and Dhanya Ratnavale for giving me this opportunity to revisit the situation of minorities in India once again.]

An Indian Charter for Minority Rights

Sabyasachi Basu Ray Chaudhury

[At the initiative of the International Centre for Ethnic Studies (ICES), Colombo, a Statement of Principles on Minority and Group Rights in South Asia was drawn up and revised in April 2006. Cecilia Thompson did the main work for the preparation of this regional paper. François Roch undertook the background Research, and the regional experts namely, Iqbal Ansari, Annil Bahattari, Radhika Coomaraswamy, Priyadarshini Dias, Rohan Edirisighe, Mario Gomez, Meghna Guhathakurta, Ahmed Imtiaz, I.A. Rehman, Ranabir Samaddar, and the Minority Rights Programme Officers of ICES, Jeevan Thiagarajah and Dhanya Ratnavale contributed with comprehensive, insightful and invaluable comments, contributions and suggestions regarding the background paper, the draft Statement of Principles and the annotations. Now on the basis of the Statement Sabyasachi Basu Ray Chaudhury has drafted a charter on minority rights in India being published here as part of this compilation for comments, suggestions, and circulation.-Ed.]

Preamble

1. The Constitution of India has included a few very significant provisions relating to the protection of minorities and guarantees the cultural and social diversities in the country. But, the functioning of the Indian political system has indicated that the Constitution has not always been able to reflect the realities of the majoritarian basis of the Indian polity, the poor state of the protection mechanisms available in the country, and the low level of the constitutionally acknowledged minority rights on the basis of which these provisions are likely to function;
2. Very often the history of majoritarianism seems to suggest that the ideology of majoritarianism still exerts extensive and decisive influence on the conduct of State affairs in India, and the Indian State sometimes seems to believe that this country does not have a multi-ethnic, multi-religious and plural society, and as if minorities have not contributed in building this society;
3. Usually the protection of minority rights has been granted in India in terms of provisions of certain rights as rights of individual citizens, but not specifically as rights of members of minorities, that is group rights, and certain affirmative actions exist mainly as positive discrimination, and rights of minorities are assured only in the form of non-discrimination and equality before the law, which has proved insufficient to guarantee that minorities, who are often disadvantaged by society, so that they may exercise all their human rights without discrimination and on a basis of equality, and may effectively participate in cultural, religious, social, economic and public life, as well as in decisions which affect them;

4. The minorities remain excluded from the decision-making processes in Indian national life, particularly in various levels of administration, formation and function of representative bodies including assemblies, formulation of cultural policies, and significant norms of citizenship, with the consequence that constitutionally and legally provided rights are not implemented in practice, and widespread violations of minority rights and discrimination against particular groups of the population continue on a daily basis, with citizenship having become an impoverished reality. In India, sub-group loyalties of people based on caste and sub-caste, clan and tribe being strong “others” are easily excluded, discriminated or neglected. Occurrence of inter-group violence involving minorities based on religion, sect, race, language and ethnic identity is rather common. Very often the members of minorities, including religious minorities, have been exposed to abuses perpetrated by private persons with the connivance or acquiescence of governments, with the criminal justice system failing in many instances in providing persons belonging to minorities with adequate legal redress for abuses suffered. The operation of the justice system is such that it has not only failed to deliver speedy untainted justice, but has given rise to a pervasive climate of impunity, with perpetrators of violations not having been brought to justice, which is one of the major sources of recurring violence in India;

5. India has done very little to remove the root causes of religious and other forms of discrimination, and violations perpetrated against minorities. The orthodoxies of the majority religion are not always ready to extend equal rights to the “other” who may be outside the religious/sectarian fold. This situation re-emphasises the need to elevate the national-judicial and legal norms and constitutional jurisprudence in India on equal protection and group rights issues to the standards of regional and international human rights law relating to minorities, that include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the OSCE Framework Convention for the protection of National Minorities, the European Charter on Regional or Minority Languages, the Hague Recommendations Relating to the Educational Rights of National Minorities, the Lund Recommendations on the Effective Participation of National Minorities in Public Life, and other similar documents;

6. This situation of discrimination against minorities has aggravated after the tragic events of September 11, 2001, and certain minority communities have been facing systematic discrimination, and, in general, the weaker groups are suffering as a consequence of structural reforms, withdrawal of social welfare functions of the State, and the situation is calling for immediate establishment of regional and national standards and harmonisation of juridical-legal guarantees of minority rights. The Statement of Principles on Minorities and Group Rights in India may include the following:

Principle 1

Application of the Principles

(a) These principles shall be observed by the State, authorities, public and private organisations, institutions, corporations, NGOs, groups of persons, public officials and private individuals, whether State or non-State actors and irrespective of their legal status;

(b) These principles shall apply without distinction to all groups, including, but not limited to, minorities, peoples, nationalities, ethnic groups, castes, tribes, migrant workers, stateless persons, internally displaced persons, refugees, as well as, where appropriate, to each member of such groups;

(c) These principles shall apply to all persons and groups, irrespective of any citizenship, disenfranchised or other status;

(d) These principles complement international, regional and national standards, norms and principles of human rights, refugee and humanitarian law. They shall not affect more favourable provisions concerning minorities, or the legal regime that may exist in a State or is provided for by relevant bilateral or multilateral agreements, in which case the more favourable provisions shall apply.

Annotations

While applying these principles, the following points need to be remembered. In India, in common parlance, minority solely refers to the religious minorities, and that too the Muslims, whereas there are so many religious as well as linguistic minority groups in the country. Moreover, the group rights are very often acknowledged solely as cultural rights in India, and the economic, political and democratic substance of governance is distanced from the grant of certain group rights.

These principles not only apply to the State but to all the actors within the Indian society, and extend beyond the traditional responsibility of States to promote and protect human rights within their territory, in fulfilment of their obligations under international law. Increasingly, with the erosion of the central role of the State, the rise of nationalism, and the expanding role of non-State actors such as extremists, rebel groups and trans-national corporations who have become perpetrators of human rights violations, the respect and promotion of human rights have come to concern all sectors of society.

This principle points to the existence of the diversity of different groups and peoples from a variety of religions, beliefs, and linguistic, ethnic and cultural backgrounds in India. The scope of the principles should not be limited to the sometimes-restrictive concept of a minority, but should rather apply to all groups within the Indian society, in particular, those who are disadvantaged, excluded, marginalized or stateless, or have been disenfranchised. Finally, the principle reiterates that this statement is intended to complement and enhance the effective

implementation of international human rights in full respect of individual dignity, tolerance and peaceful coexistence between individuals and groups, and that those provisions at national, regional and international levels which are most favourable to minority protection shall prevail.

Regional and International Standards

With reference to the responsibility of non-State actors, article 4 of the *Convention on the Prevention and Punishment of the Crime of Genocide* (hereafter referred to as the “Genocide Convention”) states that persons committing genocide shall be punished irrespective of “whether they are constitutionally responsible rulers, public officials or private individuals”. In humanitarian law, common article 3 to the *Geneva Conventions and Protocol II* provides protection in situations of non-international armed conflict and binds not only State actors but also all parties to the conflict. Similar language is used in principle 2 of the *Guiding Principles on Internal Displacement*, which stipulates, “These principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without diverse distinction”.

Principle 2

Non-Discrimination and Affirmative Action

All individuals shall be protected from discrimination and shall be treated without distinction of any kind, including, but not limited to, on the basis of language, religion, culture, national or social origin, sex, caste, birth, descent, citizenship or other status;

all individuals shall be recognised as a person before the law, with full equality before the law, equal protection of the law, and equal benefit from the law;

non-discrimination and equality of treatment shall apply in all areas of economic, educational, social, religious, political and cultural life;

special protection shall be afforded to persons, particularly women, who may be subject to threats or acts of discrimination, hostility, violence and abuse as a result of their ethnic, cultural, linguistic, religious or other identity;

the enactment of laws relating to the crime of genocide and the effective application of laws on hate speech and hate crime shall be promoted;

special measures of affirmative action shall be taken in order for persons belonging to minorities to enjoy equal rights with the rest of the population.

These shall, however, be discontinued after the objectives for which they were taken have been achieved.

Annotations

In view of the Partition of India in 1947 on the basis of religion, Liaquat Ali Khan, the Prime Minister of Pakistan, and Jawaharlal Nehru, the Prime Minister

of India signed a pact on April 8, 1950 in Delhi that stated that the “governments of India and Pakistan solemnly agree that each shall ensure, to the minorities throughout its territory, complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality”. This should be given special attention while looking at the minorities in the post-partition India.

Particular attention needs to be paid to the human rights situation of minorities who are often in a disadvantaged, marginalized and vulnerable position, and are therefore, discriminated against, thus requiring special measures to ensure that they benefit from the same rights on a basis of equality with the rest of the population. If no special measures are taken in favour of minorities, the non-dominant sectors of the population may ultimately be required to conform to the dominant groups. The pogrom in Gujarat in 2002 has indicated how certain constitutional safeguards have proved to be inadequate in a situation where the members of a religious minority could not be protected from being killed and massacred as the state itself seemed to have blessings for the perpetrators.

For instance, one can refer to the Shah Bano case. Shah Bano, a 62 year old Muslim woman and mother of five from Indore, Madhya Pradesh, was divorced by her husband in 1978. The Muslim family law (marriage, gifts, inheritance, adoption and a few other civil laws are under the purview of personal laws in India - they are different for Christians, Muslims and Hindus) allows the husband to do this without his wife's consent: the husband just needs to say the word *talaaq* before witnesses for a valid divorce. Now, Shah Bano, as she had no means to support herself and her children, approached the courts for securing maintenance from her husband. When the case reached the Supreme Court of India, seven years had elapsed. The Supreme Court invoked Section 125 of Code of Criminal Procedure, which applies to everyone regardless of caste, creed, or religion. It ruled that Shah Bano be given maintenance money, similar to alimony. Critics of the Shah Bano case pointed out that while divorce is within the purview of personal laws, maintenance is not, and thus it is discriminatory to exclude Muslim women from a civil law. Exclusion of non-Muslim men from a law that appears inherently beneficial to men is also pointed out by the Indian orthodoxy.

The justification for TADA was the increase in Punjab killings after Mrs Indira Gandhi's assassination in 1984. “[The] Country was lulled into the belief that the police must be armed in that strategic part of India to suppress Pakistan prodded terrorists...Instead law was made applicable to whole of India and upheld in Kartar Singh,” said former Justice Krishna Iyer.

Anti-terror laws have very often been targeted minority groups in India more. India's Terrorist and Disruptive Activities (Prevention) Act was enacted to deal with Sikh secessionism. The civil rights activists allege that India's anti-terror laws have unfairly targeted Sikhs and Muslims, echoing the criticism of the

US Patriot Act. In Gujarat, Muslims were 9% of the population but accounted for a quarter of all jail inmates in the state.

An assessment of the Indian Supreme Court on anti-terror cases is instructive because it sheds light on the challenges faced by judges in poor and multi-religious democracies. Indian judges have to walk a difficult path between upholding a constitutional mandate of parliamentary (and majoritarian) primacy in emergency laws, and ensuring fair treatment to religious minorities.

Discrimination has been interpreted to “imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, ... language, religion, ... national or social origin... birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”¹. Discrimination has been prohibited in a number of international instruments that deal with most, if not all, situations in which minority groups and their individual members may be denied equality of treatment. Important safeguards from which individual members of minorities stand to benefit include recognition as a person before the law, equality before the courts, equality before the law, equal protection of the law, and equal benefit from the law.

This principle, and especially the provision in favour of affirmative action, will contribute to reinforcing constitutional and legislative non-discrimination provisions in India, and enhance the protection of minorities who are often disadvantaged by the State and society, with a view to ensuring that they may exercise all their rights without discrimination and on a basis of equality. Affirmative action, as provided for under principle 2(4) aims at redressing the balance in equality of treatment between minorities and the dominant majority. Provided that the measures have such an aim, and that they seek to do no more than promote this equality, they are not to be considered discriminatory. In India, the law permits affirmative action, or compensatory discrimination, in favour of minorities. But, there should be a balance between measures of affirmative action and the duration of these measures beyond the achievement of their goal on the one hand, and the fundamental right to equality and equal treatment of both minorities and majorities in society, on the other. Formation of an Equal Opportunity Commission in India as recommended by the Sachar Committee Report to look into the grievances of the deprived groups could be a step ahead in that direction. Apart from providing a remedial mechanism for different types of discrimination, it could reassure the minorities that any unfair action against them would invite the vigilance of the law.

¹ General Comment 18 of the Human Rights Committee on non-discrimination under the International Covenant on Civil and Political Rights, HRI/GEN/1/Rev.2 of 29 March 1996.

Regional and International Standards

Article 1 of the *Universal Declaration of Human Rights* states that “All human beings are born free and equal in dignity and rights”, and article 2 of the *International Covenant on Civil and Political Rights* requires States to ensure that the rights in the Covenant are ensured to all individuals within their territory and subject to their jurisdiction “without distinction of any kind, such as ... language, religion, ... national or social origin, ... birth or other status”. With specific reference to minorities, article 4 of the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (hereafter referred to as “the Declaration”) and article 4 of the *OSCE Framework Convention for the Protection of National Minorities* (hereafter referred to as the “Framework Convention”) guarantee their right of equality before the law and the equal protection of the law. The same article makes specific reference to the adoption of adequate measures “...in order to promote in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to a majority”.

With regard to special measures of affirmative action, article 1(4) of the *Convention on the Elimination of All Forms of Racial Discrimination* states that “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved”. Article 7(2) of the *European Charter for Regional or Minority Languages*, stipulates that “the adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of the languages and the rest of the population or which take account of their specific conditions is not considered to be an act of discrimination against the users of more widely used languages”.

Principle 2(4) draws upon the language of article 6 of the *Framework Convention*, which states that “The Parties undertake to take appropriate measures to protect persons who may be subject to threats of acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity”.

Principle 3

Right of Minorities to their Identity and Characteristics

The identity and characteristics of minorities shall be respected and promoted. This includes the right:

to express, maintain and develop their identity and characteristics, including their religion, language, culture, traditions, customs and heritage. To this end, measures shall be taken to create the necessary conditions for minorities to enjoy this right. Such measures do not apply in cases where practices, whether ethnic, religious, cultural, linguistic or other, are contrary to international and regional standards, norms and principles and/or in violation of national law in the field of human rights, refugee and humanitarian law;

to a nationality or equivalent citizenship status guaranteeing the same rights as those afforded to nationals;

of every person belonging to a minority to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights, which are connected to that choice.

Annotations

The right to identity is paramount to the protection of minorities as it is from such recognition that their protection may be afforded by the State, thereby also facilitating the application of specific measures for the benefit of minorities. The recognition of the identity and characteristics of minorities is very important in the Indian context as the wide variety of identities and the multiethnic, multi-religious and multi-linguistic composition of the Indian society is not sufficiently reflected in constitutional and legislative provisions, nor is the identity of minorities actively promoted. The right to distinct identity should include community-based family laws, provided they are reformed with a view to ensuring gender justice, as in some countries the uniformity of personal laws has become a tool in the hands of those who are pursuing a majoritarian cultural agenda. All minorities within India should enjoy full protection under the national laws, subject to their conformity with international human rights standards. Recognising the identity and characteristics of minorities also contributes to sharpening the focus on minorities as groups, who are distinct from the majority and dominant sections of the population in India.

Principle 2 (c) provides protection to those individuals who may not wish to maintain their separate minority identity and would prefer to assimilate with the majority population, or who may be compelled to embrace membership of a minority against their free choice. This implies that no particular identity can be imposed on a given person or that persons belonging to minorities cannot force a person to belong to, or be expelled from, their group. Of particular relevance therefore is the freedom for individuals to choose whether they wish to belong or not to a minority or other group and to define their own identities.

Constitutional Provisions

There are few direct references in the Constitution of India that refer to the specific identities and characteristics of minorities. Article 29 of the *Constitution of India* refers to minorities as “any section of the citizens ... having a distinct

language, script or culture”. Article 16 (4) refers to the “Scheduled Castes and the Scheduled Tribes” as being distinct from the majority, and at article 25, reference is made to religious minorities, such as the Sikh, the Jain and the Buddhists.

Regional and International Standards

The issue of the recognition of the identity and characteristics of minorities is firmly rooted in international law. The recognition of national, ethnical, racial or religious groups and their right to existence is referred to at article II of the *Genocide Convention*. In many instruments, the protection of the existence and identity of minorities goes beyond mere physical protection to the protection of their religious, cultural and linguistic heritage essential to group identity. Article 1 of the *Declaration* provides for the protection of the “... existence and the national or ethnic, cultural, religious and linguistic identity of minorities”, the encouragement of “... conditions for the promotion of that identity”, and calls for “...appropriate legislative and other measures to achieve those ends”.

With regard to the respect and promotion of the characteristics of minorities, article 4 (2) of the *Declaration* stipulates that “States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards”. At article 2 (1) as well as article 27 of the *International Covenant on Civil and Political Rights*, persons belonging to minorities have the right to “... enjoy their own culture, to profess and practice their own religion, and to use their own language in private and in public, freely and without interference or any form of discrimination”. Article 5 of the *Framework Convention* calls on “... Parties to undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage”.

With reference to principle 3 (c) regarding the choice of whether to belong to a minority or not, article 3 (2) of the *Declaration* states that “No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration”. Similar language is to be found at article 3 of the *Framework Convention* which mentions that individuals should have the right to choose whether to be treated as a member of a minority or not.

Principle 4

The Promotion of Diversity and Intercultural Education

Effective measures shall be taken, particularly in the fields of education, culture and the media, with a view to combating prejudices and discrimination, and to

promoting tolerance, intercultural dialogue, mutual respect, understanding and cooperation among all groups.

2. Intercultural education shall enable all persons and groups within society to participate in a democratic and pluralistic society. To this end;

compulsory curricula should include the study of history, culture, traditions, customs, languages and practices of minorities and majorities, with a view to encouraging mutual appreciation of differences and similarities between them, and as a means of promoting intercultural understanding;

(b) Intercultural education should be included in compulsory education and should be developed with the active participation of the minorities concerned, and, where appropriate, bodies representing the relevant minorities, so that they can share knowledge and perspectives about their history, culture, traditions, customs, languages and practices.

Annotations

India is far from being homogeneous cultural, religious, linguistic or ethnic entity. It is composed of a mosaic of minorities with a rich diversity of languages, religions, cultures and traditions. The identity and characteristics of minorities, groups and communities need to be recognised, and the linguistic, religious, ethnic and cultural diversity, as well as the diversity of opinion and the shared value systems in India should be celebrated. Such diversity is not static as the pattern of the mosaic of societies changes as identities shift and new identities develop. Respect for diversity, tolerance and understanding among all groups in society is an essential prerequisite of a democratic society. There is a need to emphasise the right of all social groups and communities to have their due share ensured by developing policies and promoting the principle of diversity. The aim of this principle is to strengthen social cohesion, to promote tolerance and intercultural dialogue by eliminating barriers between persons belonging to religious, ethnic, cultural and linguistic groups through mutual respect and understanding, thereby enabling the integration of minorities into society while preserving their distinct identity and characteristics.

In India, the culture, history and traditions of minority groups may be subject to distorted or false representations, especially in situations of conflict, producing low self-esteem among minorities and negative stereotypes in the wider community. The compulsory curricula tend to include only the belief, culture, history and traditions of the majority community. Intercultural education should therefore aim at, among others, eradicating the distortions and negative stereotypes of the history, culture and religion of communities, especially of the non-dominant groups. Intercultural education allows both minorities and majorities to learn about and appreciate each other in ways, which make it possible for them to appreciate each other's cultures as an enrichment of society as a whole. The importance of intercultural education as a means to promote greater tolerance, understanding and respect in minority-majority relations is crucial. Intercultural education aims at highlighting the preservation of the

identity of each group in society, accompanied by the acceptance of diversity leading to understanding and tolerance. To this end, intercultural education requires that both the minority and majority learn about each other, about their specific characteristics, their respective histories, as well as about the values of tolerance and pluralism. Special incentives could be given to the educational institutions in order to encourage higher diversity in those institutions.

Constitutional Provisions

There exists almost no reference to intercultural education in the constitution of India.

Regional and International Standards

Article 6 of the *Framework Convention* states that “Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and cooperation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media”. Article 7 of the *International Convention on the Elimination of All Forms of Racial Discrimination* stipulates that “States parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among national and racial or ethnical groups ...”.

With regard to intercultural education, article 4 (4) of the *Declaration* stipulates: “States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole”. Article 12 of the *Framework Convention* states that Parties shall, where appropriate, take measures in the field of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. In this context, the Parties shall, *inter alia*, provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. The *Hague Recommendations Regarding the Education Rights of National Minorities* (hereafter referred to as “The Hague Recommendations”) at recommendation 19 provides that “State educational authorities should ensure that the general compulsory curriculum includes the teaching of the histories, cultures and traditions of their respective national minorities”.

Principle 5

Right of Minorities to Freedom of Religion

Minorities shall enjoy the right to profess, practice, manifest or to adopt their own religion or belief and to establish their own religious institutions, organisations and associations for this purpose. This includes the freedom to:

- Worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- receive or impart instruction in their own religion or belief;
- change one's religion or belief;
- establish training schools for the faithful;
- teach a religion or belief in places suitable for these purposes;
- publish and disseminate their own religious materials, in any language or format, including in the minority language;
- train, appoint, elect or designate by succession appropriate religious leaders called for by their religion or belief;
- solicit and receive financial and other contributions to finance their own religious activities;
- establish, manage and maintain their own religious institutions;
- observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of their own religion or belief.

Annotations

The right of minorities to profess, practice and manifest their own religion is of particular relevance in India which is composed of a whole range of religious minorities and groups, and where religious issues and factionalism have come to dominate much of the political discourse, and have sharpened the expression of identity. Some religious minorities may identify themselves solely by their religious identity and its preservation. Others may perceive themselves as an ethnic or linguistic minority where religion is but one distinguishing feature. Furthermore, the nature of most religions is that the believers acknowledge some supernatural being, a revered teacher or Gods, to guide their lives and communities. As such, compromise can be difficult to achieve in balancing competing interests between religious minorities themselves, between minorities and majorities, and between religious minorities and the State. This situation may be exacerbated in countries where the dominant State religion pervades constitutional and legislative provisions, with little regard for the interests of religious minorities, potentially leading to widespread discrimination, tensions and conflict. The majority may disapprove of any individual or group converting from the majority to a minority religion, with anti-conversion sentiments reflected in a number of bills and laws. Apart from increasing anti-conversion legislative pressure, a number of family laws enactments penalise conversion by making those who convert lose the right to the guardianship of minor children.

Furthermore, it is important that safeguards be provided for ensuring that freedom of religion be exercised peacefully, especially with regard to the right to receive and use funds, including from abroad for religious purposes.

Constitutional Provisions

With regard to the right to change one's religion or belief, the State of Tamil Nadu and Gujarat in India have enacted laws regulating conversion from one religion to another. A number of Hindu family laws enactments of 1955-56 penalise conversion of Hindus to Christianity or Islam by making them lose the right to the guardianship of minor children, and members of the Scheduled Castes lose all benefits of the State's affirmative action by conversion to Christianity or Islam.

Regional and International Standards

Article 18 of the *Universal Declaration of Human Rights* provides that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance". Article 27 of the *International Covenant on Civil and Political Rights* grants persons belonging to religious minorities the right "... to profess and practise their own religion ...". Article 2 of the *Declaration* stipulates that "Persons belonging to national or ethnic, religious and linguistic minorities have the right to ... profess and practice their own religion". Article 8 of the *Framework Convention* states that "Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations".

Article 1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* and article 18 of the *International Covenant on Civil and Political Rights* provide greater detail as to the content and scope of this right. They stipulate that "...this right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching". Furthermore, "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice".

Principle 6

Right of Minorities to Use their Own Language in Private and in Public

Minorities have the right to use their own language (including their own script) freely, without interference or any form of discrimination, in private and in public, orally, in writing or in any other form. This includes the freedom for minorities to:

(a) Freely express opinions and beliefs and receive and impart information in the minority language across localities, regions and frontiers;
use their language in social, political and cultural gatherings, including in private or public conferences, meetings and assemblies;
use their language for the production and airing of private and public radio and television programmes, and have access to broadcast time in their own language on publicly funded media;
use their language in the creation, development and use of written materials, printed documents, newspapers, magazines, and other materials;
use their own surnames and first names in the minority language, and enjoy official recognition thereof;
post signs, inscriptions, commercial and other information in their own language, which can be displayed visibly to the public, and use traditional local names, street names and other topographical information intended for the public.

2. In regions and localities where minorities are present in significant numbers, or if those minorities so request and where such a request corresponds to a real need:

(a) Minorities shall have the right to use their language in relations with administrative authorities at local, regional and national level, as well as contact with public services. Administrative authorities shall take the necessary measures to ensure that public services are provided also in the minority language;
Minorities shall have the right to acquire civil documents and certificates both in the official and minority language, and regional and/or local public institutions shall keep the appropriate civil registers also in the minority language.

3. This principle does not in any way affect the status of the official language or languages of the State concerned, nor does it call into question the need for minorities to know or learn the official language.

Annotations

In India, language is both a very personal matter closely connected with identity, and an essential tool of social organisation, which, in many situations, becomes a matter of public interest. The use of minority language represents one of the principal means by which minorities can assert and preserve their identity, and the use of language bears on numerous aspects of the functioning of the Indian State. Linguistic diversity in India contributes to the richness of society, and its

preservation and promotion is testimony to political sensitivity, openness, diversity and pluralism. In some countries, the local authorities do not provide public services in the minority language, nor may minorities have access to civil documents and registers, as well as certificates in their own language. The mere prohibition of discrimination against minorities in the use of their language in private and in public is necessary but insufficient. Special measures need to be taken, and support needs to be provided, to safeguard the rights of linguistic minorities and to preserve and develop minority languages. Furthermore, the right of minorities to use their own language in private and in public involves an obligation on the part of the State to create conditions favourable for the preservation and promotion of the distinct linguistic identity of minorities. This, however, entails a commitment to provide the resources and make the necessary administrative arrangements required to effectively apply this right.

There are many situations in daily life in which it is important for minorities to be able to use their own language, freely and without interference. These may include being able to speak in a minority language at home, as well as with family and friends in public places, use a minority language in social, political or cultural gatherings, and for the production and airing of radio and television programmes. It also includes producing and disseminating materials and documents in the minority language and the posting of commercial and other signs in public places.

Principle 2 ensures that minorities can exercise their right to use their language before administrative authorities, and in their contacts with public services. This allows them to exercise their rights and fulfil their civic duties in conditions that respect their own modes of expression, improves communication between public authorities and minorities, promotes the minority language in the public domain, and thereby contributes to the richness and cultural wealth of multilingual societies. Specific reference is made to the concentration of a minority group in a region and the expressed wish of minorities to use their language in their relations with the authorities, as this principle calls for special measures to be taken which may entail the allocation of resources, other than those provided by the minorities themselves. With regard to the implementation of this right in India, it is important to focus on more adequate constitutional protection of minority languages which implies not only the guarantee of freedom to users of these languages but also involving an obligation of the State to create favourable conditions for the preservation and promotion of the distinct identity of minorities. In this respect, some of the lesser-used languages cannot survive without the official support from the State, including measures to maintain and promote such languages.

Constitutional Provisions

Despite the fact that Hindi in the Devanagari script has been declared the official language of India at article 343, the *Constitution of India* has recognised the rights of minorities to use their own language in article 29 which states that “any

section of the citizens of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same”. At articles 120 and 210, the Constitution also provides to some extent for the rights of minorities to use their language before the authorities, in that any Member of Parliament or the Legislature may be allowed to use his mother tongue if he cannot adequately express himself in Hindi or in English. In accordance with article 344 of the Constitution, persons representing the different languages specified in the Eighth Schedule of the Constitution, namely, Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Malayalam, Manipuri, Marathi, Oriya, Punjabi, Sanskrit, Sindhi, Tamil, Telegu, and Urdu, may be appointed by the President to a Commission entrusted with making recommendations to the President regarding the progressive use of the Hindi language for official purposes, the restrictions on the use of the English language, and in particular with regard to any language to be used for official purposes, in proceedings of the High Court, subject, however, to previous consent of the President. To this end, particular attention is to be paid to the claims and interests of persons belonging to the non-Hindi speaking areas.

With reference to the right of minorities to use their own language in their relations with administrative authorities, article 345 of the *Constitution of India* grants the freedom of any state of India to adopt any one or more of the languages in use in that state as the language or languages to be used for all or any of the official purposes of that state. According to article 347, “on a demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a state desire the use of any language spoken by them to be recognised by that state, direct that such language shall also be officially recognised throughout that state or any part thereof for such purpose as he may specify”. However, articles 345, 347 and 350 (A) on the right to use minority languages for specified official or administrative purposes as well as for imparting primary education is discretionary, not mandatory.

Regional and International Standards

In accordance to regional and international standards, Article 19 of the *International Covenant on Civil and Political Rights* and article 9 of the *Framework Convention* provides that every person belonging to a national minority is granted the freedom to hold opinions and to receive and impart information and ideas in the minority language, or the language of one’s choice, without interference by public authorities and regardless of frontiers. Article 2 (1) of the *Declaration* proclaims the right of persons belonging to national minorities to “use their own language, in private and in public, freely and without interference or any form of discrimination”, and article 10 of the *Framework Convention* uses similar wording but adds that minorities can do so “...orally and in writing”. More specifically, article 11 of the *Convention* provides for the right to use surnames and first names in the minority language and the right of official recognition thereof, and stipulates that “...minority language signs, inscriptions

and other information of a private nature can be displayed visibly to the public”. In addition, the right to use one’s surname and first names in the minority language and to “...display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is sufficient demand for such indications” should be respected.

As far as the right of minorities to use their own language in relations with the administrative authorities is concerned, article 10 of the *Framework Convention*, and the *Oslo Recommendations Regarding the Linguistic Rights of National Minorities* (hereafter referred to as the “Oslo Recommendations”) grant minorities the freedom to use their language in relations and communications with the administrative authorities. More specifically, the *Oslo Recommendations* at recommendation 13 stipulate that the administrative authorities shall, wherever possible, ensure that public services are provided also in the language of the national minority, and that regional and/or local public institutions shall keep the appropriate civil registers also in the language of the national minority. They further grant persons belonging to a national minority the right to acquire civil documents and certificates both in the official language or languages of the State and in the language of the national minority in question from regional and/or local public institutions, and ensure that elected members of regional and local governmental bodies can also use the language of the national minority during activities relating to these bodies.

With reference to the media, article 9 of the *Framework Convention*, prohibits States from discriminating against minorities in their access to the media, and stipulates that “... the creation and the use of printed media ...” shall not be hindered and that the possibility be granted “... of creating and using their own media” with regard to sound radio and television broadcasting. Additional details are provided in the *Oslo Recommendations*, which state at recommendations 8, 9 and 10 that “Persons belonging to national minorities have the right to establish and maintain their own minority language media”. They should also “... have access to broadcast time in their own language on publicly funded media, and the independent nature of the programming of public and private media in the language(s) of national minorities shall be safeguarded. Public media editorial boards overseeing the content and orientation of programming should be independent and include persons belonging to national minorities serving in their independent capacity”.

Principle 7

The Right of Minorities to be taught their Language and have Instruction in their Language

1. Minorities have the right to be taught their language and to receive instruction in their language. To this end, the following measures may be taken:
to make available kindergarten, pre-school, primary, secondary, university, higher and vocational education in the minority language;

to make available a substantial part of primary, secondary and vocational education in the minority language;
to teach the minority language as part of the curriculum of primary, secondary, university, higher and vocational education.
2. This principle shall not prejudice the learning of the official language or the teaching of this language.

Annotations

The right of every person belonging to a minority to learn his or her minority language represents one of the principal means by which minority identity can be asserted and preserved. Although this principle refers to measures to be taken for minorities to be taught their language and have instruction in their language, the nature of these measures will depend on the context of the particular situation, including whether the number of students in part of a territory warrant such measures, there is a demand for such measures, and the State is able to commit the necessary resources to respond to such demands. In cases where the language of the minority is a territorial language traditionally spoken and used by many in the region of the country, pre-school and primary school education should, ideally, be in the child's own language. In regard to non-territorial languages spoken traditionally by a minority within a country, minorities should, as a minimum, have an opportunity to learn their mother tongue. In this regard, minorities have a right, like others, to establish their private institutions, where the minority language is the main language of instruction.

Constitutional Provisions

According to article 350 A of the *Constitution of India*, "It shall be the endeavour of every state and of every local authority within the state to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups, and the President may issue such directions to any state as he considers necessary or proper for securing the provision of such facilities".

Regional and International Standards

Article 4 (3) of the *Declaration* stipulates that "States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue". At article 14 of the *Framework Convention*, "The Parties undertake to recognise that every person belonging to a minority has the right to learn his or her minority language". In the same article, minorities are granted the right to have adequate opportunities for being taught the minority language or for receiving instruction in this language. Specific mention is made that this right shall be implemented without prejudice to the learning of the official language or

the teaching in this language. At recommendations 11 to 13 of the *Hague Recommendations* suggestions are made that pre-school, kindergarten and primary school should ideally be taught in the minority language. “In secondary school a substantial part of the curriculum should be taught through the medium of the minority language”. At recommendation 15, “Vocational training in the minority language should be made accessible in specific subjects...” and recommendation 17 suggests that minorities “... should have access to tertiary education in their own language...”.

The most detailed treaty in this respect is the *European Charter for Regional or Minority Languages* which provides, at article 8, a sliding scale regarding the extent to which minorities may be taught their own language and have instruction in their own language. The scale ranges from pre-school education to be made available in minority languages to ensuring that a substantial part of pre-school education is available in the relevant language. It also ranges from making primary, secondary, university education, continuing education and technical and vocational training available in the minority language to teaching the minority language as part of the curriculum.

Principle 8

Right of Minorities to Establish and Manage their Own Unions, Associations and Institutions

Minorities shall have the right to establish and manage their own unions, non-governmental organisations, associations and institutions, in all fields including education, religion, culture, language, politics and labour, and to associate with any of these at local, national, regional and international levels. To this end:

Any form of discrimination or interference in the establishment and maintenance of such institutions is prohibited;

minorities shall have the freedom to seek funding for such institutions from the State, local, regional and international sources and from the private sector.

Annotations

This principle allows for persons belonging to minorities to set up any union, non-governmental organization, association and institution they may want, and associate with any of these at local, national, regional and international levels. Granting minorities the right to freely associate and to establish and maintain their own institutions contributes to their effective participation in public and political life, and to the maintenance and development of their own identity and characteristics. Such institutions should be established and maintained freely, without interference or discrimination. Minority schools run by minorities themselves are expected to conform to basic national standards applicable to all schools, including rules regarding compulsory schooling, compulsory curricula requirements, and teaching standards, and shall be subjected to normal

supervisory standards. Minorities should also have the right to seek sources of funding for these institutions from the budget of the State, local, regional or international sources or the private sector.

Constitutional Provisions

In accordance with article 30 of the *Constitution of India*, all religious or linguistic minorities "... shall have the right to establish and administer educational institutions of their choice". Furthermore, the Constitution provides for the possibility of the State granting aid to such educational institutions, without discrimination "... against any educational institution on the ground that it is under the management of a minority, whether based on religion or language". In practice, the rights of minority educational institutions under article 30 are subjected to unreasonable restrictions especially in their admissions policy, requiring admission of a certain percentage of non-minority students as obligatory for reasons of national integration, whereas other educational institutions are not required to meet the same criteria and admit a fair number of minority students for the same purpose.

Regional and International Standards

Article 13.4 of the *International Covenant on Economic, Social and Cultural Rights* refers to the liberty "... of individuals and bodies to establish and direct educational institutions" and article 6 (b) of the *Declaration on Religious Intolerance* specifies that freedom of religion or belief includes the freedom to "establish and maintain appropriate charitable or humanitarian institutions". Article 2 (4) of the *Declaration* stipulates: "Persons belonging to minorities have the right to establish and maintain their own associations". At article 13 of the *Framework Convention*, "Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments". Recommendation 6 of the *Oslo Recommendations* grants minorities the right "... to establish and manage their own non-governmental organisations, associations and institutions".

Principle 9

Effective Participation of Minorities in Public and Political Life

Minorities have the right, irrespective of citizenship or other status, to effectively participate in cultural, social, economic and political life, and in public affairs, in particular in those that affect them directly. This includes the right of minorities: to be consulted by means of appropriate procedures and through their representative institutions when legislation or administrative measures are being considered which affect them directly;

to be involved in the preparation, implementation and assessment of national and regional programmes and plans which are likely to affect them directly;
to effectively participate in decision-making processes and elected bodies at local, national and regional levels;
to vote and be elected at genuine periodic elections;
to be effectively represented;
to have access to, and hold, public office.

Minorities have the right to participate in the conduct of public and political affairs, directly or through freely chosen representatives. To this end, the following measures may be taken:

reduced requirement for the registration of political parties;
lowered threshold for entering parliament;
special representation through reserved seats in parliament, and other elected bodies of the national society;
proportional representation;
favourable delimitation of constituencies;
creation of minority administrative and advisory bodies in particular with regard to education, culture and religion, such as minority parliaments, advisory councils and round tables.

The imposition of requirements on minorities to freely exercise their right to effective participation shall be prohibited, except for linguistic requirements necessary to hold public office;

Measures which alter the proportions of the population in areas inhabited by minorities with the aim of influencing minority representation in elections or for other political purposes, and/or restrict the rights and freedoms flowing from these principles, are prohibited. Examples of such measures include expropriation, evictions, expulsions or redrawing of electoral boundaries.

Annotations

Effective participation of minorities in cultural, religious, social, economic, public and political life, as well as in decisions that affect them, including in the legislative and administrative sectors, aims at encouraging real equality within society. It represents a shift from mere protection of minorities to guaranteeing representation by all groups. Special measures are often required to facilitate the effective participation, through substantive contribution, of minorities in decision-making. Effective participation is necessary to ensure that minorities are respected, recognised and heard. The most fundamental requirements of this right is to ensure that minorities enjoy the right to non-discrimination, including on the basis of citizenship or other status, as well as to vote and to be elected. However, this is often insufficient to enable minorities to effectively participate, and special measures are required.

One of the key issues of participation of minorities in India is their representation in all aspects of society. While it is essential that minorities and groups be given opportunities for effective participation, no single formula exists

that is appropriate to all minority situations in India. Forms of participation may therefore require adaptation to the variety of needs and aspirations of different minorities as well as to their size and distribution, and may involve the creation of ethnic, cultural and religious associations and societies, political parties, advisory and decision-making bodies, and minority representation in parliament and other elected bodies within national society.

In India, minorities may not have the same access to holding public office as the majority or dominant population. Furthermore, minorities tend to be under-represented in public and political life, as their numbers are lower, implying that they are often outvoted in terms of their representation and their potential for being heard, and cannot elect the number of representatives that reflect the actual percentage of the minority population. In India, minorities are persistently under-represented in public and political bodies. In addition, electoral boundaries may be manipulated so that, even when a minority represents a fairly large percentage of the population in a given region, its members are divided between a number of districts restricting their ability to elect even a minimal number of representatives who belong to minorities.

The Sachar Committee Report indicates that, the Muslim participation is lower in professional, technical, clerical and managerial work. In proportion to their population, the Muslims are relatively much fewer in the formal sector of the Indian economy even after sixty years of de-colonised existence of the country. The Muslims are few in number in both public and private sector employment that provide some amount of social security, status and power. Moreover, the number of Muslim members in all the policy-making bodies in India is not only inadequate, according to the Sachar Committee Report, but, in fact, has strikingly declined in Parliament and most of the state assemblies. The pattern seems to be the same at the levels of the local government. The most disturbing fact is that several constituencies in the state assemblies with sizeable Muslim population have been declared as reserved for Scheduled Castes (SC), although many of them do not have high SC population.

The measures to ensure effective participation of minorities in public and political life may include for example: a minimum number of seats for representatives of minorities in parliament and other elected bodies; proportional representation elections in which seats are allocated according to the vote cast; the lowering of thresholds for minority party representation, thereby allowing minorities to participate in the legislature and other elected bodies; reduced requirements for the registration of a minority party in elections; favourable delimitations of constituencies along minority lines, especially in countries where such minorities may be scattered across the territory, granting adequate opportunities for minority seats; and, the creation of administrative and advisory bodies which may serve advisory functions regarding matters, including policies and programmes, which concern minorities or decisions which affect them.

Constitutional Provisions

Article 325 of the *Constitution of India* ensures that no person shall be ineligible for inclusion in the general electoral roll on grounds of religion, race, caste, sex or any of them. Section 125 of the *Representation of Peoples Act* further provides that any persons who in connection with an election promotes or attempts to promote on the grounds of religion, race, caste, community or language feelings of enmity shall be punishable with imprisonment as well as fined. According to article 16 (4) and (4A) of the Constitution, the State may make provisions for the reservation of appointments or posts in favour of any backward class of citizens, Scheduled Castes and Scheduled Tribes, who, in the opinion of the State, are not adequately represented in the services under the state. In the *Mandal* controversy, the Supreme Court affirmed that reservations for ‘Backward Classes’ and ‘Other Backward Classes’ were part of the doctrine of equality and not an exception to it, and that access to government jobs was a salutary form of empowerment for disadvantaged people and those discriminated against with no access to such power².

Regional and International Standards

Article 25 of the *International Covenant on Civil and Political Rights* stipulates that every citizen shall have the right and the opportunity without distinctions and without unreasonable restrictions “(a) to take part in the conduct of public affairs, directly or through freely chosen representatives”, (b) “to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”, (c) “to have access, on general terms of equality, to public service in his country”. Article 2 (2) and (3) of the *Declaration* states that “Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life” and they have “... the right to participate effectively in decisions on the national and, where appropriate, regional level, concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation”. At article 4 (5), States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development of their country”. Article 5 (1) and (2) states that national policies and programmes as well as programmes of cooperation and assistance among States should be planned with “due regard for the legitimate interests of persons belonging to minorities”. Recommendation 9 of the *Lund Recommendations on the Effective Participation of National Minorities in Public Life* (hereafter

² R. Dhavan and F. S. Nariman, “The Supreme Court and Group Life: Religious Freedom, Minority Group, and Disadvantaged Communities”, in: B.N. Kirpal et al. (ed.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, Oxford, 2000, p. 271.

referred to as the “Lund Recommendations”), states that the electoral system should facilitate minority representation and influence, and recommendation 6 stipulates that minorities should have an effective voice at central government which may include special representation through a reserved number of seats in parliament, on the courts, and allocated positions on advisory bodies and cabinet, mechanisms to ensure that minority interests are considered within relevant ministries, and that minorities participate in civil service.

Article 15 of the *Framework Convention* provides that “The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them”. At article 16 of the Convention, “The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present Convention”. According to the explanatory report to the Convention, examples of such measures might include expropriation, evictions and expulsions or redrawing administrative borders with a view to restricting the enjoyment of such rights and freedoms (i.e. gerrymandering).

Principle 10

Devolution of Power, Autonomy and Federalism

1. Consideration shall be given to arrangements, which enhance the capacity of minorities to regulate their affairs and take their decisions, in their own interests and in accordance to local conditions.

2. Where minorities are scattered throughout the territory or part thereof, such arrangements may include self-administration on a non-territorial basis by a minority, of matters which are essential to its particular identity.

3. In geographic areas where minorities are concentrated and where they constitute a majority, such arrangements may include:

decentralised or local forms of self-government or autonomous arrangements on a territorial and democratic basis, including consultative, legislative and executive bodies chosen through free and periodic elections without discrimination;

a federal system of government.

Annotations

In India, devolution of power, autonomy and federalism may be necessary to ensure effective participation of minorities in decision-making processes both at the State and sub-State level. These arrangements, which affect the political organisation of multicultural States, allow for the accommodation of minorities and a degree of independence of minority communities in managing a substantial share of public affairs under their own responsibility and in their own interests, in

accordance to their circumstances at the local level. Different arrangements may be applied to allow for a different degree of independence of minorities in managing their own affairs, and may range from decentralisation in administrative matters, to self-government with certain legislative powers to a virtually independent administrative, legislative and judicial system. A federal system is somewhat different as it is integral to the State structure and in the functioning of the State, in particular as representation is constitutionally guaranteed at all levels of the structure, with the allocation of powers shared between the Centre and the federal entities which all work towards common aims through compromise.

Such arrangements imply the sharing of power between the Centre and its parts, while preserving the unity of States, with the sub-unit granted a certain degree of authority, which cannot be overruled or restricted by the Centre. These arrangements should, therefore, be established by legislation or preferably by the Constitution. Furthermore, a prerequisite for an efficient functioning of any of such arrangements is the provision of sufficient resources, either through financial support from central government or from the income of the minority groups themselves.

Special attention needs to be paid to the fact that territorial arrangements may only benefit the minority group concerned, and not those persons living in the same territory but who do not belong to the said minority. This situation of a minority within a minority may lead to added disparities between groups as well as to widespread discrimination and even repression in some cases. Arrangements therefore need to ensure that the autonomous entities respect and promote human rights, including minority rights.

Constitutional Provisions

The members of the Constituent Assembly in India adopted the idea of federalism to assuage communal, ethnic and cultural sectarianism. Federalism was enshrined in the *Constitution of India* in the form of a written Constitution, a dual polity, a division of legislative and executive powers between the Centre and the States, an independent judiciary, and supremacy of the Constitution and electoral rules. A range of formal institutions such as state and national legislatures, National Finance Commission, Planning Commission, National Development Council, Inter-state Council and numerous other inter-state coordinating bodies further embodied the federal political structure in the *Constitution of India*. In India, the political struggles for autonomy led to a wide variety of constitutional forms.³ The *Constitution of India* provides special status for certain states such as Jammu and Kashmir, Nagaland, Sikkim, Assam, Manipur, Arunachal Pradesh in Articles 370 and 371H. Under the special protection clause in Article 371, tribal customary laws, procedures, and land

³ For details, please see Ranabir Samaddar (ed.), *The Politics of Autonomy: Indian Experiences*, Sage, New Delhi, 2005.

rights are protected. Part XVI of the Constitution ensures special provisions for Scheduled Castes, Scheduled Tribes, and Other Backward Classes. There is also a provision for Autonomous District Councils in Scheduled Tribe-dominated areas of India. The 73rd and 74th Amendments to the Constitution ensured devolution of powers at village and town levels. Similarly, the Constitution arranged for financial autonomy of the states through constitutionally prescribed division of resources and the national level Finance Commission. Apart from creating new states, a range of accords and unilateral measures on Darjeeling, Bodoland, Ladakh, North Cachar Hills, Karbi Anglong, Khasi Hills, Jaintia Hills, Tripura Tribal Areas, Chakma Autonomous District Councils have been created either as autonomous areas or district councils under the Fifth and Sixth Schedules of the Constitution. The *Constitution of India* provides for the subdivision of India into federal entities generally according to linguistic lines.

Regional and International Standards

The political notion of autonomy is caught between various legal ideas of the right to self-determination, minority rights and minority protection, obligations of the state to offer autonomy to the indigenous peoples. As for regional and international standards, the *Lund Recommendations*, at recommendation 14 states that “effective participation of minorities in public life may call for non-territorial or territorial arrangements of self-governance or a combination thereof”. At recommendation 24, reference is made to “additional dispute resolution mechanisms, such as negotiation, fact finding, mediation, arbitration, an ombudsman for national minorities, and special commissions, which can serve as focal points and mechanisms for the resolution of grievances about governance issues”. Paragraph 35 of the *Document of the Copenhagen Meeting of the CSCE* makes reference to the possibility of creating an environment that would be conducive to the participation of national minorities in public affairs, in their own language, by establishing “appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of minorities in accordance with the policies of the State concerned”. Article 3 of the *European Charter of Local Self-Government*, states that “Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population”. Article 9 of the Charter provides that “Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers”.

Principle 11

Effective Implementation and Redress

1. Institutions shall be established, and where they exist, strengthened, with the mandate to effectively implement these principles and other rights relevant to minorities, address violations of minority rights and provide the necessary redress. These may include national institutions such as human rights commissions, commissioners, and ombudspersons. In particular, these institutions shall:

be accessible to all and their procedures shall be facilitated to provide easy access for minorities;

be independent and autonomous and dedicated to upholding democracy, human rights, the rule of law, and diversity;

provide redress including effective remedies that allow for the implementation of minority rights, sanctioning of perpetrators of violations, and compensation for the victims.

2. Minorities have the right to effective remedy and compensation for violations of their rights, and, to this end, shall have easy access to all courts and tribunals, as well as to conciliation, mediation and dispute resolution mechanisms, including through legal assistance;

3. Minorities shall have easy access to regional and international tribunals, as well as to the United Nations treaty bodies and complaints procedures.

Annotations

Human rights acquire real meaning for minorities when the public authorities of the State establish mechanisms to ensure that the rights guaranteed in international conventions and declarations or in domestic legislation, are effectively implemented and protected. In many States, normal procedures are complex, costly and slow and may therefore not be easily accessible to minorities. When confronted with violations of their rights, minorities must often overcome significant obstacles in order to access the judicial system and other domestic human rights protection mechanisms. Furthermore, in some cases, the judicial process may be ineffective in addressing violations of minority rights and granting redress and compensation. One of the challenges is to effectively enforce legal and other provisions relating to minorities and ensure that the rights of minorities are translated into reality at the national level. It may therefore be useful to consider, as a complement to judicial procedures, the establishment and strengthening of independent national institutions, which are usually able to provide quicker and less expensive recourses and are as such more accessible to minorities. When domestic remedies for violations have been exhausted, concerns can be brought to the attention of United Nations mechanisms and procedures.

In India, the constitutional and legal guarantees to protect the rights of minorities remain all too often unfulfilled. Violations of the rights of minorities are a common feature, with widespread discrimination based on caste, race, religion and ethnic origin. Some of the institutions, which have been established to safeguard the rights of minorities, have limited powers and functions, and have proved ineffective in protecting minorities. The electoral system is systematically undermined and the judiciary and legal profession inspire little confidence, resulting in few cases involving minorities being brought before the courts, and the few cases that are prosecuted are being delayed for years. Many violations fail to be investigated, perpetrators have not been brought to justice, and redress and compensation remain unattainable.

Constitutional Provisions

At article 350, the *Constitution of India* stipulates: “Every person shall be entitled to submit a representation for the redress of any grievance to any officer, or authority of the Union or a state in any of the languages used in the Union or in the state, as the case may be”. Article 350B provides for a “... Special Officer for linguistic minorities to be appointed by the President” who shall have the duty to “... investigate all matters relating to the safeguards provided for linguistic minorities under this constitution and report to the President”.

Furthermore, India has also established human rights institutions, which aim to promote and protect the rights of minorities and to address violations and injustices. These include, among others: the National Commission for Scheduled Castes and Scheduled Tribes, the National Human Rights Commission and the National Commission for Minorities of India. Their mandates and responsibilities vary, but generally they are responsible for conciliating, monitoring, investigating and advising the Government on human rights, including minority rights, and usually have the power to recommend and mediate.

Regional and International Standards

Article 6 of the *Convention on the Elimination of All Forms of Racial Discrimination* declares: “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention ...”. According to the *Oslo Recommendations*, at recommendation 16, “States in which persons belonging to national minorities live should ensure that these persons have, in addition to appropriate judicial recourses, access to independent national institutions such as ombudspersons or human rights commissions, in cases where they feel that their linguistic rights have been violated”.

Annex A

References to International and Regional Human Rights Instruments

(In order of appearance in the document)

Convention on the Prevention and Punishment of the Crime of Genocide (UN)
Guiding Principles on Internal Displacement (UN)
Geneva Conventions and Additional Protocol II (UN)
Universal Declaration of Human Rights (UN)
International Covenant on Civil and Political Rights (UN)
Declaration on the Rights Of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN)
Framework Convention for the Protection of National Minorities (OSCE)
Convention on the Elimination of All Forms of Racial Discrimination (UN)
European Charter for Regional or Minority Languages (Council of Europe)
Hague Recommendations Regarding the Education Rights of National Minorities (Foundation on Inter-Ethnic Relations)
Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UN)
Oslo Recommendations Regarding the Linguistic Rights of National Minorities (Foundation on Inter-Ethnic Relations)
Lund Recommendations on the Effective Participation of National Minorities in Public Life (Foundation on Inter-Ethnic Relations)
Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (now OSCE)
European Charter of Local Self-Government (Council of Europe)