



## MINORITIES COMMISSION : CONSTITUTIONAL METAMORPHOSIS ?

THE OBJECTS and the work of the Minorities Commission include, as the Press reports go, the following : examining a proposal to safeguard privileges like job reservation enjoyed by members of the scheduled castes and the scheduled tribes even after they change their religion. The chairman, Justice Ansari, said that he was aware of the constitutional requisites in respect of the reservation facility,<sup>1</sup> but did not mention any proposal to suggest the constitutional amendment. Another report stated that at the two day's minorities conference at Bhopal two union ministers opined that adequate representation should be given to the minorities in the police service.<sup>2</sup> Though this report made no reference to the Minorities Commission, an article in a leading English daily of New Delhi had attributed a view to the commission that the police force to be posted in an area afflicted with communal conflicts (like the riot torn Aligarh) should exclusively comprise members of the minority community.<sup>3</sup> This allusion was promptly refuted by its joint secretary saying that the commission had made no such recommendation.<sup>4</sup> However, an earlier UNI report stated that the Minorities Commission was examining the question of adequate representation of minority communities in government jobs. The report says that the chairman, Justice Ansari, told UNI that although the Constitution had provided for adequate representation to the scheduled castes and the scheduled tribes, there have been complaints that little had been done to give at least a proportional representation to various minority communities in the government.<sup>5</sup> Since these words are likely to create the impression that either it slipped clean from the attention of the framers of the Constitution to provide for minorities, or they deliberately pushed the matter under the carpet, a short retrospect of the crucial period of the framing of India's Constitution may be useful here.

The Constitution framers had a twin objective before them during the catastrophic years of late forties: (i) to enjoin the state from exploiting religion, and (ii) to eliminate all chances of religion exploiting the state. At the committee stage the Sub-Committee on Minorities recommended

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1. See *The Indian Express*, 27 November 1978 (New Delhi, *dak* edition). All references to the dailies are the *dak* edition which is normally one day behind its Delhi edition in reporting/publication.

2. *The Indian Express*, 4 December 1978.

3. S. Venugopal Rao, The police and communal violence; *The Indian Express*, 29 December 1978.

4. *The Indian Express*, 8 January 1979.

5. *The Indian Express*, 5 December 1978.



the addition of a provision to meet the claims of 'minorities' to special representation in government services.<sup>6</sup> B. R. Ambedkar advocated reservation of certain proportion of posts on public services for 'minorities', "whoever they may be".<sup>7</sup> And Sardar Ujjal Singh strived to save twenty per cent reservation for Sikhs.<sup>8</sup> One significant change during the drafting process was the substitution of the word 'classes' for 'minorities' by the Advisory Committee on Fundamental Rights after a thorough discussion in April 1947.<sup>9</sup> A change of historical significance, however, was brought about by the Constitutional Advisor B.N. Rau in October 1947 by qualifying the term 'classes' by the adjective 'backward'. Realising the innate dangers of communal reservations<sup>10</sup>, Ambedkar now defended the qualifying term 'backward' in the Constituent Assembly in November 1948 by asserting that "unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether".<sup>11</sup> He described the provision as a best formula to reconcile "three points of view" crossing the constitutional normative floors of the founding house: complete equality, no reservations and positive reservations.<sup>12</sup>

It is very necessary to note that this was not a single isolated instance of a sudden and foisted policy decision. Had it been so, it could not have constituted an ingredient of the Indian constitutional philosophy. On 25 May 1949 Sardar Patel presented to the Constituent Assembly the Report of the Advisory Committee on Minority Rights for reconsidering its earlier report on the political rights of minorities in the light of the fresh situation thrown open by the partition of the country. This time the area of reservations pertained to elections in the legislatures. But since the very principle of reservation on the basis of religion, may it be in any area, was the alternative being considered for final selection *vis-a-vis* the principle of non-discrimination on ground of religion as a component of the Indian polity, it is pertinent here. On fully realising the effects of country's partition on religious grounds the minorities themselves realised that it was in their own interests that communal reservations must go. "The Advisory Committee on Minorities left the question to the minorities. We did not take the initiative" said Patel. Further "When we met this time, we found a considerable change in the attitude of the minorities themselves." Yet, said Patel, "we did not want a snap vote." He further observed:

The committee on considering the whole situation came to the conclusion that the time has come when the vast majority of the

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6. B. Shiva Rao, II *The Framing of India's Constitution : Select Documents* 208 (1967).

7. *Id.* at 224.

8. B. Shiva Rao, *The Framing of India's Constitution: A Study* 194 (1968).

9. *Supra* note 6 at 258-62.

10. See VII *C.A.D.* 701.

11. *Id.* at 702.

12. *Id.* at 701.



minority communities have themselves realised after great reflection the evil effects in the past of such reservation on the minorities themselves and the reservations should be dropped.<sup>13</sup>

On their own persistent demand the Hindu untouchables who had converted to Sikh religion and yet retained the original characteristics of utter backwardness that formed the *raison d' etre* of the concept of scheduled caste were admitted to the scheduled caste status. "So far as other communities are concerned", said Patel,

particularly the Muslims, enough time was given to consult their own constituencies, their communities and also other minority communities. It is not our intention to commit the minorities to a particular position in a hurry. If they really have come honestly to the conclusion that in the changed conditions of this country, it is in the interest of all to lay down real and genuine foundations of a secular State, then nothing is better for the minorities than to trust the good-sense and sense of fairness of the majority, and to place confidence in them.<sup>14</sup>

And he further stated: "A minority that could force the partition of the country is not a minority at all".<sup>15</sup>

Jawahar Lal Nehru, who had to carry the heavy burden of saying reconciliatory things, also cautioned the minorities that in a democracy as against a foreign rule, safeguards only isolated the minority.<sup>16</sup>

On 11 November, 1949 T.T. Krishnamachari suggested, by moving an amendment in the Constituent Assembly that in part XVI of the Constitution for the word 'minorities' where ever it occurred, the words 'certain classes' be substituted because several members were opposed to the use of the word 'minorities'. This amendment was adopted, and the title was reworded as 'Special Provisions Relating to Certain Classes'.<sup>17</sup>

This is the part that contains provisions for the appointment of a commission for backward classes.<sup>18</sup> Since the Constitution had thought-

13. VIII C.A.D. 270.

14. *Id.* at 272.

15. *Id.* at 351.

16. *Id.* at 330.

17. IX C.A.D. 571, 605.

18. Art. 340 reads :

- (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.



fully rejected the concept of minority status for economic and political rights, disapproved division of the population on the basis of minorities and majority, and expressly and firmly registered its decision in the several 'non-discrimination' clauses in the Constitution, the stipulation of a *minority* commission would have been patently discordant with the postulate of equality in unity. The constitutional concept of 'backward class' transcends the sectarian, linguistic, racial and parochial barriers. Therefore, the Backward Classes Commission as originally contemplated by the Constitution should serve well the purpose of safeguarding the job interests of the socially, educationally and economically backward *citizen* members of the Muslim or Christian or Sikh or any other sect, including the task of investigating any instances of the state discrimination amongst the backward classes, *inter alia*, on the basis of religion. Since the Constitution had just buried the Hindu, Mughal and British *raj* policy of job apportionment on the basis of religion there was no point in reviving the ghost via a provision stipulating for a minority commission. Besides envisaging a Backward Classes Commission, the sincerity of the Constitution in expecting the state to practise the precept of equality of all citizens has found expression in the constitutional scheme of a justiciable fundamental right to non-discrimination on ground of religion in job reservation.

The Janata Party election manifesto had promised the appointment of a civil rights commission which idea then branched off into two commissions—the Minorities Commission and the Backward Classes Commission.<sup>19</sup> Now suppose the Backward Classes Commission recommends one thing about a backward class, of say hide and skin tanners comprising all sections of society like Hindus, Muslims, Christians, *etc.*, and the Minorities Commission recommends quite an opposite thing about the component groups *qua* 'minorities', whose recommendations should the government value? The legal position is that while the Backward Classes Commission has a constitutional existence, the Minorities Commission has not. Hence towards another step—amend the Constitution to recognise the phoenix!

That the unexceptionable constitutional grundnorms are being denatured now to distil a new value of equality-plus speciality-cum community-with no nonunity-yet a separate entity-status is understandable, but not the

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(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

19. Besides, we have the *Scheduled Castes and Tribes Commission*. In an article in the *Indian Express* the plethora of the commissions has been criticised and the problems of poverty and unemployment on communal lines deprecated. The author also advocates the idea of a Civil Rights Commission in preference to a Minorities Commission. See J.V. Verghese, A Civil Rights Commission, *The Indian Express*, 7 June 1978.



disillusionment that the framers of the Constitution neglected the minorities, or the disenchantment with their secularism.

So much about the infra-structure of the constitutional values. Coming to the legal aspect, article 16 of the Constitution establishes two principles: (i) equality of all religions in opportunity to jobs under the state, and (ii) job reservations. But the second is not in derogation to the first; it is an egalitarian policy based on secular factor of economic, social and educational backwardness of any group of citizens. When caste or religion is made the basis of identifying backwardness for seat reservation in educational institutions or for job reservations, it is at once in violation of the Constitution.<sup>20</sup> Thus, three per cent of job reservations for economically weaker sections of 'upper castes' would at once be a fraud on the Constitution, whatever a political big gun with or without horns on the head may say. Article 16 does not mention even the scheduled castes/tribes, for no class *ipso facto* has any vested right. It is the factor of backwardness that is aided.

The job reservation clause [article 16(4)] prescribes two conditions to claim the benefit: (i) the fact of being a backward class, and (ii) not being adequately represented in the state services. Both are essential factors, a single one would not suffice. Thus, as elaborated by Chief Justice Ray:

If preference shall be given to a particular under-represented community other than a backward class or under-represented State in an All India Service such a rule will contravene Article 16(2). A similar rule giving preference to an under-represented backward community will not contravene Articles 14, 16(1) and (2). Article 16 (4) removes any doubt in this respect.<sup>21</sup>

The exception that clause (4) of article 16 carves out is not in the nature of being nihilistic of the basic principle in clause (2) that the state shall not discriminate only on ground of religion, race, caste, sex, residence *etc.*, because the choice of the word in clause (4) is 'class' and not caste or community. The State of Jammu and Kashmir where Justice Ansari adorned the highest judicial chair has had the dubious distinction of having committed a hat-trick in defying the above constitutional mandate and disregarding the judicial injunctions issued by the Supreme Court. The State of Jammu and Kashmir had advanced the argument in *Triloki Nath Tiku v. State of Jammu and Kashmir*<sup>22</sup> that since the expression 'socially and educationally backward classes' used in article 15(4) was absent from clause (4) of article 16, the sole test of backwardness under article 16(4)

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20. The case law on the point, commencing from *State of Madras v. Champakam Dorairajan*, A.I.R. 1951 S.C. 226, including the famous *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649 and arriving at the *Thomas* case, *infra* note 21, is well known and is not proposed to be reviewed here in entirety.

21. *State of Kerala v. N.M. Thomas*, A.I.R. 1976 S.C. 490 at 499-500.

22. A.I.R. 1267 S.C. 1983 at 1286.



was 'inadequacy of representation in state services.' Rejecting this contention Chief Justice Subba Rao insisted on the combination of the two factors, lest the rich and cultured class would snatch away the benefit from really deserving backward classes. This case involved communitywise distribution of jobs.<sup>23</sup> The scheme was repeated by the state in spite of the court's verdict and, therefore, again quashed in the second case—*Triloki Nath Tiku v. State of Jammu and Kashmir*.<sup>24</sup> 'In complete defiance of the court's order' the state committed a hat-trick by again repeating the communal policy in promotion of teachers and was again reprimanded by the Supreme Court in *Makhan Lal Waza v. State of Jammu and Kashmir*.<sup>25</sup> The Supreme Court laid down in these cases that what the Constitution permitted was not 'distribution of all posts communitywise.'

As the Constitution prohibits discrimination against any citizen, the commission would certainly be rendering a salutary service to the society and the Constitution by unearthing the latent and patent instances of official discrimination against any citizen in employment under the state on the ground of religion or caste. This would include discrimination against those members of the scheduled castes who convert to christianity and thereby lose their caste status. The Supreme Court has already held that backward classes must be comparable to the scheduled castes who are standing examples of backwardness and must be steadily kept in mind in determining backwardness.<sup>26</sup> Thus, the genuine cases of social, economical, educational and occupational backwardness are well covered irrespective of religion, whether it be religion by birth or by conversion. So in reality, what may be in jeopardy is the now well known institution of vested interests. That certain sections amongst the scheduled castes are exploiting their entrenched privileges by status is the well known unrecognised fact and also the fact that the powers that be have a lot to lose in disturbing this nest. This neither justifies the conversion bar nor the demand to lift it.

In the prevailing milieu and with the three commissions vying with each other in recommending what special treatment should be accorded by the government to the segments of the society they espouse, consequently arousing expectations of niches being carved out to promote the interests of separate groups, it is pertinent to ponder if there is also any will left in any quarter to investigate into the malpractices on the Constitution and the resultant atrocities on the unprivileged unemployed millions of citizens ?

With the Constitution as it is, will it be in consonance with it to reserve jobs communitywise for giving 'adequate representation' to certain communities ? Can a Christian by conversion be treated differently from a Christian by birth ? Can poor Brahmins be treated differently from rich

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23. That is, according to the state's scheme fifty per cent for Kashmiri Muslims, forty per cent for Jammu Hindus and ten per cent for Kashmiri Hindus.

24. A.I.R. 1969 S.C. 1.

25. A.I.R. 1971 S.C. 2206.

26. *Janki Prasad v. State of Jammu and Kashmir*, A.I.R. 1973 S.C. 930 at 936.



Brahmins in job selections? Can these results be obtained in conformity with the original norms of the Constitution without amending it?

One more recommendation of national significance by the Commission pertains to the Aligarh Muslim University (AMU). Chairman Ansari has described the Supreme Court decision in *Azeez Basha v. Union of India*<sup>27</sup> as "faulty"<sup>28</sup>. The only fault of the Supreme Court was that it did not dilate upon the entire history of the founding of the AMU. It is of course another thing that not all would like that the entire faithful account of the Muslim ethos fostered at Aligarh before and after the formation of the university, during the freedom struggle, before and after the partition and after the amendments in the AMU Act in 1951, 1965 and 1972 should be recorded. But otherwise the court did not understate or underestimate any fact, nor minced any words in recognising that the AMU was established as a result of the efforts of the Muslims. However, the founders of the MAO College approached the central government to get the kind of university they wanted to establish—a central educational institution, a statutory body, that could confer degrees, affiliate colleges and be financed by the government. They could have established a private university themselves, but did not want it. Is it then logically, what to talk of legally, tenable to turn round and say that while the Muslims approached the central government to establish the AMU, not the government but the Muslim members of the founding committee themselves established the university? Even today a private university can be established, for instance the Brahma Kumari Ishwariya Vishva Vidyalaya, but, the kind of university the AMU, Delhi or Jodhpur is, could, and can, be established only by a competent legislature.

The Commission recommends that if necessary by an amendment of the Constitution<sup>29</sup> or else by a simple amendment of the 1920 Act, AMU should be recognised as an institution established by the Muslim minority. Now a 'minority educational institution' as envisaged in article 30 of the 1950 Constitution is a legal concept with a constitutional status. Such a status did not exist in 1920, could not be conferred then, simply because the 1950 Constitution was not in existence then. Therefore, it cannot be just 'recognised' today, unless it is established today. A 'university' is a 'state' under article 12. In view of this legal position many crucial questions emerge: Does article 30 require the state to establish a minority educational institution to satisfy the demands of a minority? Can the state establish such an institution in conformity with the spirit of articles 27 and 28(1)? Clause (2) of article 28 was incorporated by the framers of the Constitution with specifically the Banaras Hindu University (BHU) and the AMU in mind to obviate the impugment of the state maintenance of these religious educational endowment institutions. Suppos-

27. A.I.R. 1968 S.C. 662.

28. See *The Indian Express*, 22 March 1979.

29. See *The Indian Express*, 23 March 1979.



ing for argument's sake the state establishes a Muslim minority educational institution, can it discriminate, in the face of article 15(1), against members of other religious and linguistic groups demanding such a sectarian educational institution being established by the state for their benefit? Should the amended BHU Act 1915 be re-amended now? Should the Kashmir government, for instance, be compelled to establish a Hindu minority university in Shrinagar?<sup>30</sup> Should the state be compelled to grant the legal status under the University Grants Commission Act to the Brahma Kumari Ishwariya Vishva Vidyalaya? In *Panna Lal Bharatiya v. Magadh University*<sup>31</sup> and *R.M.B.T. School v. State of Kerala*<sup>32</sup> the respective institutions were not allowed the minority status by the respective High Courts. Should the concerned states be compelled to establish Government Panna Lal (Rajasthani Language) Minority College and Government R.M.B.T. Christian Minority School? It is our considered belief that article 30 does not abandon the celebrated constitutional principle of non-discrimination on ground of religion. Reserving this thesis for some other occasion, here some more pertinent questions are—On what sound principles of secularism should the other communities be denied this state patronisation of a suitable amendment to the Constitution to establish as many religious and linguistic minorities universities as demanded? Or, conversely, on account of what apprehensions of hurting a hypochondriac secularism should any minority be granted this extravagant luxury of amending the Constitution to meet its demands?

In the commission's view all that is to be done is recognition of the minority status under article 30; the legislative competence of Parliament will remain, subject to 'only' the minority's right to administer under article 30. It is to be noted that it is not as simple as is being made out. The minority status is not being demanded just for the fun of it; just as an ornamentation; even now it is a "Muslim" university.<sup>33</sup> It is well known that the 'right to administer according to its choice' conferred by article 30 (1) on the minority today includes, by virtue of judicial legislation, autonomy in appointment of teaching and non-teaching staff including the right of the choice to confine the selection to purely members of the community; non-interference by the government in the composition of the governing bodies including, at minority's option, a right to xenophobia, right of choice in admission to students, etc. It is for these privileges that the AMU movement is being conducted. So then will it be in conformity with the rule of non-discrimination on the ground of religion

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30. Incidentally, a comment on the Indian 'secularism' is the refusal by the Kashmir government to recognise the jurisdiction of the Minorities Commission over the state.

31. A.I.R. 1976 Pat. 82.

32. A.I.R. 1973 Ker. 87.

33. See also V.V. John (Member of the commission): "It would be more elegant if Aligarh were referred to as a Muslim institution rather than a minority institution."—'The Aligarh Controversy', *The Indian Express*, 17 April 1979.





enshrined in article 16 to allow the central government institution of AMU, a statutory body, a state, maintained by the state out of Indian tax-payers' money, to limit the statutory jobs in the AMU to members of only one religion? And to limit membership of its governing bodies to only members of one community?

It is not proposed to dilate upon the details of the answers to these questions here; the objective in raising them is to focus attention to the fact that some sort of a metamorphosis of the constitutional norms seems to be in gestation. And when the constitutional values change, can constitutional amendments be far behind?

The latest development materialising the above apprehensions is the tabling of the Constitution (Forty-sixth Amendment) Bill seeking to insert article 338A in part XVI that would provide for appointment of a minority commission by the President, engrafting this foreign organism to the equality postulate of the Constitution. So, till now we have a Minority Commission without a constitutional recognition. We shall have then, to put it in straight line, a constitutional minority commission suggesting job reservations on the basis of religion, along with a constitutional provision injuncting the state not to discriminate on ground of religion (*inter alia*) in job reservation and constitutionally empowering the citizen to restrain the state through the judiciary from discriminating on ground of religion. Is the initial abortion of the 46th Amendment a symbolic gesture of retributive justice to the beleaguered equality principle? But then the wheel of amendment may be set in motion.

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