

Minority Provisions and Individual Rights – A Liberal Critique

**Dissertation submitted to Jawaharlal Nehru University
in partial fulfillment of the requirements for the award
of the Degree of**

Master of Philosophy

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CERTIFICATE

This is to certify that the dissertation entitled "**Minority Provisions and Individual Rights – A Liberal Critique**" submitted by **V. Sri Ranjani** in partial fulfillment of the requirements for the award of the degree of **Master of Philosophy** is her own work and has not been previously submitted for any other degree of this or any other university.

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ACKNOWLEDGEMENT

This dissertation would not have seen the light of day if not for the support of the various people who helped, motivated and encouraged me to develop my ideas and articulate them in the dissertation.

I am grateful to Dr. Rajeev Bhargava who had been a major source of motivation, who was always accessible for any help and who allowed me to think through issues in my own way without imposing anything on me.

A big thanks to Sri Vidya, Rajagopal and Sheela for their indispensable help and great support for the purpose of typing and the binding of the dissertation. I am also thankful to Mr. Viswanath for proof reading and editing the dissertation.

Thanks is also due to my parents for believing in me and letting me do what I want to do.

I would also like to thank Divya for the morale boosting and encouraging comments as well as for the subtle but substantive suggestions. It is because of Mr. Narsimhan's invaluable help, that I had an easy access to the Supreme Court cases.

I thank Ms. Anuradha for spurring me to go on.

My heartfelt thanks is also due to many other unnamed friends and acquaintances whose help and influence, helped me to develop the ideas in the dissertation.

INTRODUCTION :

This study seeks to question, analyze and relate the following terms in the spirit of liberal ideas – individual, community, state, minority, rights.

On one hand, there is the tendency in social sciences to treat the single individual as someone who can be completely isolated, and to seek and elucidate in the structure of its psychological functions independently of its relations to all other people. On the other hand, there are trends which give no proper place to the psychological functions of the single individual, and attribute to social functions 'a soul of their own beyond individual souls' – what could be called as a "group mind".

Such approaches give the appearance of the study of the individual and the study of the group as two completely separable disciplines, with the implication that an unbridgeable gap exists between individual and community, and individual and society.

The study is a quest in discovering and understanding conceptual tools to know the nature and "group mind" of the community and the nature and the psychology of the individual. The study also seeks to delineate the circumstances in which rights (especially internal rights) necessitated by the vulnerability of the minority status of the community may be used against vulnerable internal minorities within the minority communities. Rights may be

granted to internal minorities. But such rights may go against the minority community.

The question then arises as to what are the precautions to be considered while granting minority rights to communities such that they do not have any or have minimal potential of harming internal minorities (minorities within minorities) ? To what extent can the cultural distinctness be upheld while considering such precautions? The attempt to answer these questions would involve the delineation of the categories of minority rights, individual rights and rights of individual members and rights of internal minorities.

Also, what would be the kinds of rights granted to individual members and internal minorities? Such rights could be individual rights as well as group rights depending on the nature of the need of internal minorities. The internal minority could be sub-groups within the minority or individual members within the minority.

Internal minority rights could range from the right to exit to, to the right of dissent and non-conformity (may or may not demanding acceptance of the community) to, to the right to be represented and heard of as a part of the community. It is the right to be represented and heard and be accommodated in the community which the dissertation seeks to highlight. The impetus for the defence of this right is the belief that the most important interest for a human being is in leading a good life. As a necessary component of that, what is needed is the capacity to frame, pursue and

revise one's conceptions of the good life. Testing and choosing for oneself among the options are a major part of life's value. But no one chooses the options oneself; no one chooses the context of choice. And that being so, the cultural resources with which one finds oneself are among one's unchosen circumstances of life. Through no fault of one's own, and sometimes through no fault of any one, the culture in which one begins provides an insecure foundation on which one has to build.

If the choice of the 'right' way of life does not conform to the community's way of life which may not be a secured foundation, ways have to be worked out to live by the 'right' way while not being abandoned by the community.

Such rights, even if granted by the state, for the sake of effectiveness and stability have to be acknowledged and accepted by the community. The community has to do this by modifying itself in such a manner so that its cultural distinctness is not felt to be sacrificed.

This dissertation seeks to explore the reasons on the basis of which internal minorities and individual members of a cultural community can be granted the basic human rights even if such rights seem to be not in conformity with the cultural community's way of life, while not denying them membership in the cultural community.

The first chapter seeks to delve into the concept of minority community to explore the nature and needs of the constituents – individual members as well as internal minorities. The chapter seeks to attempt to

understand the significance of the ideas of human dignity, equality, freedom of thought, expression and conscience for the individual members of a cultural community, particularly a minority cultural community.

The second chapter concentrates on the issues of minority, rights, role of the state in the conflict between minority group rights and rights of individual members in the minority community, in the Indian milieu. It specifically tries to point out the position of the Constitution of India on the above issues and how it could be applied in the context of the understanding of the term --- minority, in India.

The third chapter is on how the stated provisions in the Constitution are applied in India by the judiciary and to what extent is such strict application of "procedure established by law" relevant in the present context especially in regard to issues when the conflict is between minority cultural community's standpoint and the position of the individual members of such a community, particularly on the norms of equity, justice and liberty.

CHAPTER -- I

Group Rights versus Individual Rights?

A group is a collection of people, in a broad sense. A group however is not just a cluster of people. There generally exists a certain pattern of organized relationship within a group – among the constituents of a group and the group and its constituents. It could also have certain aims and objectives.

Rights could broadly be defined as the basic social conditions of good life, which enable the realisation of a human being's personality. Rights initially come across as claims upon society, demanding protection and even freedom. When such claims are recognised and sanctioned by the society, they attain the status of rights.

Anyone who claims to take rights seriously has to accept one or both the important ideas –

1. the idea of human dignity ;
2. the idea of political equality

Weaker members are entitled to same concern and respect as the stronger members have secured for themselves.

Invasion of a right then means treating a person as less than a person or less worthy of concern.

Rights are then formidable moral and juridical weapons. Hence, when wrongfully delineated and distributed, rights become dangerous and indeed

harmful. But they also can be a powerful weapon in the struggle for the well being of the weakest.

A right demanded by a group as an entity to maintain its identity and to protect and perpetuate its interests and concerns could be termed as a group right. Such a group could be in a minority in society. A minority by itself is a broad concept covering a wide range of varied hues. It may generally be in a numerically weak position. It may also view itself and even be viewed in a socially disadvantaged position. There may be a feeling of vulnerability within the group. (This vulnerability could be 'perceived' as well as 'real'). This vulnerability could sensitize the group towards feelings of marginalisation in the society. It may feel threatened that other groups or society at large may shape the emerging social and political order and in the process subsume the interests of the group. The distinctness of the group too may be threatened.

However, as Green states, "---- there is nothing about minorities status as such that generates rights. It is just that the most vulnerable are those with the least powers and resources, and they are often, though not invariably in the minority. Minority status is one imperfect correlate of social marginality. Some minorities, such as the rich are extremely powerful; some majorities such as women, are not.¹" Even Kymlicka feels that the

¹ Green, Leslie -- "*Internal Minorities and Their Rights*" in Judith Baker's (edited) *Group Rights*

vulnerability of the context of choice is the ground on which minorities appeal in claiming rights².

Such socially not prominent and/or numerically insignificant groups can be broadly of two types.

- (a) There are groups, which are historical entities. They have a shared common past. The primordial ascriptive aspect is given. They share a certain culture, religion and way of life. Cultural and religious communities are prominent examples of such groups;
- (b) There are groups where the members of the group voluntarily and consciously come together bound by a common stake in society. Such groups generally have a purpose and are goal-oriented. Occupational associations, women's groups are examples of such groups.

Both the types have a two-fold aim, One, to prevent discrimination against the members of the group and two, to have their voice heard and presence felt.

The second kind of group demands group rights which do not flow in any essential way from membership in that social group; it derives from an urgent but individuated interest. The first kind of group seeks rights which people have only because they are members of a certain minority group. The value of group membership is part of the ground of the right.

² *Kymlicka, Will -- Liberalism, Community and Culture*

What distinguishes type (a) group (historical entities with a common past and a shared way of life) from type (b) group (an entity which comes into being through the deliberate efforts of its members and is bound by a common stake in society) is the emphasis of the former type of group on being able to continue with an inherited form of life, and being safeguarded from policies and external influences which threaten to undermine that form of life. It is this continuation and preservation of an inherited form of life which is of crucial value for groups distinguished by shared traditions and culture. For such groups self determination will be less a matter of exercising choices than of being able to continue with an inherited form of life and being safeguarded from policies and external influences which threaten to undermine that form of life.

The focus of this dissertation would be on group rights of type (a) (cultural communities). Justification for such group rights is that there is a need for such rights to ensure the survival of cultural identity which serves as the 'primary foci of identification' because it is based 'on belonging, not accomplishment'. Group rights foster a feeling of belongingness springing from partaking and living by a shared moral law. or Adding substance to the above justification are the aspects of vulnerability and social marginality which are invariable albeit imperfect correlates (as pointed out by Green) of minority status. The argument then put forward is, "----- because cultural membership is given generally by birth rather than by choice, individuals should not be held morally responsible for their unequal possession of this

good. Members of minority cultures thus have a strong justice based claim for measures to protect their cultures from destruction “

This dissertation deals with the concept of an ethnic or cultural minority. Any definition of such a minority will contain two components-

- (a) An objective component dealing with such things as a common heritage and language;
- (b) A subjective component dealing with self identification with the group³.

Minority is then viewed as a group of people characterised by certain shared ascriptive features, sharing a common historical past, a form of life imbued with shared commonalities and constitutive attachments, who feel marginalised when another distinctly different, sharply defined cultural community (designated as the majority) or society at large has the power to chiefly, if not exclusively shape the contours of the emerging social and political order.

Among minority group rights as rights of cultural communities there can be two versions. They can be rights of communities (as opposed to individuals) or they can be community-specific rights (as opposed to being universal⁴). Both the versions aim to protect the stability of cultural communities.

³ *Kymlicka, Will -- Liberalism, Community and Culture*

⁴ *Kymlicka, Will -- Liberalism, Community and Culture*

The version of rights 'of communities' is intended to protect the cultural community from destabilising internal dissent. To the extent that rights of communities involve keeping in check any potential or actual internal dissent, it involves intra-group relations. It also contains the potential danger of oppressing individual members in the name of group solidarity.

'Community-specific' rights involve inter-group relations-the right of a particular group in relation to the larger society. It aims to protect the minority cultural community from being marginalized by other groups or society at large. Such group rights are directed 'outwards' as claims upon the state or against other group or groups external to it.

Minority cultural communities in the framework of intra-group relations can be interpreted in two ways. One interpretation is that the right of minority groups' may be no more than a short-hand expression for rights which are actually held by all individuals in the group and which each individual continues to hold even when that individual finds himself or herself in a numerical minority. However, the other interpretation would be minority rights held by a minority qua group, i.e. the group itself as a single irreducible entity. These are that version of group rights directed 'inwards' to those who make up the group. They may be conceived as rights held by the group collectively against its members severally⁵.

⁵ *Jones, Peter -- Rights*

It is the conflict between these two interpretations, which leads to the necessity of individual rights, which will not be subsumed under or suppressed by group rights.

A question, which then arises, is - Is a group reducible to the individuals who constitute it ? Here, the term 'individuals' refers to distinct biological organisms with their mental states the content of which are individuated internally, i.e, without reference to external, more particular social relations. Groups are thought to be an aggregate of such individuals who possess distinctively human attributes prior to their relations with other individuals.

This however, is not the true conception of a group. Though the group may be constituted of individuals, its identity is not reducible to the individuals who constitute it. Just as the characteristics of the individuals in the group influence the group's identity, the identity of the group as an entity is a part of the individuals who constitute it.

Groups then are wholes with individuals as their parts. Wholes are unlike aggregates, which are groups not bound by any common enterprise or shared relationship or way of life. *Wholes tolerate identity-preserving changes*⁶.

Also groups are constantly forming and dissolving in response to political and institutional circumstances. As Donald Horowitz has put it,

⁶ Bhargava, Rajeev -- "Should We Abandon The Majority – Minority Framework?" in Dhirubhai Sheth and Gurpreet Mahajan (edited) *National – States and Minorities. (Forthcoming)*

'Ethnic identity is not static; it changes with the environment'. There is an 'interactive quality' to the variables related to group identities: culture, boundaries, conflict and the policy outcomes of conflict⁷.

Social change is a constantly recurring process. As individual change, so would group change. For a group or a community is not simply a bundle of habits, but rather a set of meanings in the minds of the members. A community's conventions have to be thought in order to be lived in and because ideas enter so deeply into its constitution, none of its forms are final; it is vulnerable to new and better ideas.

At this point, I would like to clarify that the advocacy of necessity of individual rights not subsumable under group rights need not be equivalent to the debate between 'individualists' and 'communitarians' over the relative priority of the individual and the community. Individual rights in this context need not imply a direct defence of the rights of the unencumbered, atomistic identity of a person qua individual as against an irreducible community identity where an individual's identity is, largely if not exclusively, influenced if not shaped, by the community. The concern here is for *the individuals as members of the community*.

Even for people like Melissa S. Williams⁸, who argue for special measures to protect minority cultures from destruction even if such

⁷ Kukathas, Chandran – "Are There Any Cultural Rights?" *Political Theory*

⁸ Williams S. Melissa – "Group In Equality and the Public Culture of Justice" in Judith Baker (edited) *Group Rights*

measures amend rights viewed as definitive of a liberal order, the concern is for *individual members* of the minority culture and not for any abstract entity.

So how does one define an individual self? "Selfhood involves being self-aware or reflective;somehow taking into account the boundaries of selfhood at birth and death and feeling a continuity of identity in between; placing oneself in a generational sequence and network of other connected selves as forbears and descendants and relatives; being in partial communication and communion with other contemporary selves while experiencing an irreducible separateness of experience and identity; engaging in joint and individual enterprises in the world with some degree of forethought and afterthought (not just 'behaving'); guiding what one does and appraising what one has done at least partly through reflection on one's performance; feeling responsible, at least sometimes, for one's actions and holding others responsible for theirs".⁹

How are group rights especially of groups, which are cultural communities, formulated? Rights particularly group rights demanded by an ethnic group, are influenced and sanctioned by prevalent ethical concepts. These ethical concepts are prone to be articulated, and in the process of articulation, decided by the leading members or elite of the group.

A section of the cultural community take it upon themselves to assert their cultural identity. This elite section, out to protect its cultural distinctness

⁹ Smith Brewster in Anthony, George and Hsu (edited) *Culture and Self-- Asian and Western Perspectives*

can be motivated towards such an end by two kinds of reasons-often one overlapping the other.

- (1) The protection of the interests of the elite (material and otherwise), gains and at times even survival is dependent on the distinct practices and way of life of the cultural group.
- (2) The elite may feel that the purity, sanctity, way of life of the cultural group can be maintained only if the cultural distinctness is protected, as defined in a certain spatio-temporal framework.

Such an elite may form as particularists but to exist as elite and maintain their position of elite in a group and to espouse their way of dealing with the concern of the group, they need to take on universalistic concerns within the group. This is for the purpose of bringing a unity within the group. This need for unity within the group is for containing the asymmetries and conflicts of the differentiated socio-economic order within the group. This kind of unity is sought to be forged by laying down certain rules and norms. Norms are felt to be needed as the purpose of the unity of the group may by itself not be of any utilitarian or practical significance to the individual members of the group. Norms would endow the rules with a moral value and ideological significance. The elite authority which would enunciate the norms would exert pressure on the individual members to honour their obligations. In the process, the elite and the norms they enunciate are endowed with 'mystical and divine' sanction which enhance their status. However this unity

opposes if not oppresses, the diversity and plurality within the group. The elite seek to maintain status-quo. What is sought is to establish a kind of domination in the name of unity. Egalitarianism within the group is a threat to elite as it could rob them of their enhanced status. The power cult is everywhere embedded in the total culture of the elite group. The questioning of the nature of mediation and of the causes interconnection between the symbolism of culture and power structure have to be dealt with and analyzed. This will lead to examining the problem of doubt and belief among the actors in the community, both as individuals and as a collective.

In deciding the ethical concepts the elite set the framework and agenda for the rights of the group, rather than an agenda for the rights of individuals in the group.

Even if the group is seen as constituted of individuals, the consociational aspect tends to view such individuals with singular, integral and simplistic identities. Though culture may be the 'primary foci of identification', one has to consider the massive but diffused and unarticulated impact of social processes and acknowledge the simultaneous stake of individual in various spheres which impinge on their identity. For as Jeremy Waldron points out, the cosmopolitan individual is a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self¹⁰.

¹⁰ Waldron, Jeremy in Will Kymlica (edited) *Rights of Minority Cultures*

Also, cultural communities are not voluntary associations. Membership is usually determined by birth rather than by deliberate choice (notwithstanding conversion). Cultural communities may be regarded as voluntary associations to the extent that members recognise as legitimate terms of association and the authority that upholds them. For people like Kukathas, the evidence of such recognition would be the granting of right to exit from the community.

Now, there is a tendency for the conception of the group by the elite not only to decide the agenda for group rights but also to set up norms for the group which the members of the group, to remain the members of the group have to conform to. This consequently could lead to the stereotyping of the identities of the members of the groups. Such stereotyping may not however conform to reality due to broadly two overlapping reasons.

1. There may be intra-group differences within the group due to the differential levels in the socio-economic hierarchy of the minority cultural group.
2. One has to consider the multiplicity of influences, within and outside the community on the individual members, which impinge on their identity.

As Judith N Shklar states, "At a superficial level we must assume that some people will be encumbered with group traditions that they cherish while others may only want to escape from their social origins and ascriptive

bonds. These socially very important aspects of human nature are, like most acquired characteristics, extremely diverse and subject to changes. Social learning is a great part of our character, though the sum of all our roles may not add up to a complete 'self'. For political purposes it is not this irreducible 'self' or the peculiar character that we acquire in the course of our education that matter, but only the fact that many different 'selves' should be free to interact politically".¹¹

Such free interaction may however produce behaviour which may not be in conformity with group traditions as well as the norms set for group behaviour. Such non-conformity could be exhibited by individual members as well as minorities within the minority community. Such minorities are called internal minorities.

Non-conformity to the set norms of the group could lead to alienation of the non-conforming members. It could mean even ostracisation or expulsion from the group. Therefore, the exhibition of non-conforming characteristics may place the individual not only at a vulnerable but also at a clearly disadvantageous position at the level of the cultural community. Also, to the extent that the role of the individual is mediated only through or largely through the role of the individual as a member of the cultural community, the vulnerability and disadvantages which arise from individual non-conformity will not only be reflected at the level of the cultural community but also affect the role of the individual member as citizen. The state grants certain minority

¹¹ Shklar N. Judith – “*The Liberalism of Fear*”

rights to members of minority communities by virtue of their membership. Non-conformity may jeopardize that membership which can consequently affect the granting of minority provisions to such non-conforming members. However in spite of not conforming to the norms of the community, the individual member may be as vulnerable and in need of the minority provisions as the other member of the community who conform to the set norms. Hence, the safeguards which the individual member may obtain as a citizen from the State by virtue of being a member (partial or total) of the cultural community, may become non-applicable as the individual does not conform to the stereotypical image of the cultural community.

One response to the problem of non-conformity can be the granting of the right to exit to the non-conforming individual members. Such a right may however have no effect in obviating the ill effects of expulsion from the group. This is because, membership in a cultural community has a 'high social profile'. Though the individual may exit from the group others would perceive and respond to identify the individual as a member of that group. The individual then, in spite of, not conforming to the norms of the group, may remain as vulnerable to social, economic and political pressures from the larger society as a member of the group.

The right to exit is also self defeating to the extent that the non-conforming individual member is not to be alienated from the cultural community or to challenge the historical or political structure of the

community, but to seek an accommodation of the member's stance within the community.

Rights of individuals granted to individual members in the group would ensure freedom to such non-conforming individuals without harming their social profile by accommodating their stance within the community. Such rights would be additive in nature. They would supplement the structure of group rights. Each right would entail a specific form of equality and freedom or at least the absence of certain inequalities.

In what circumstances would the need to grant rights to internal minorities arise? Such circumstances would arise when the internal minority has a membership in a cultural community through an organic relation, where entry is based more on primordial ties than voluntarism, where membership is at least partly ascriptive, and exit, when possible, is costly.

Leslie Green is right in pointing out that minority rights are more dense than they appear. People have rights as members of a minority group, but members of the minorities have rights as individuals and sometimes also as members of an internal minority¹².

What is the justification for granting of rights to internal minorities? Logically, it may seem that if minority groups can minority rights, then so can internal minorities. They too are minority groups and they have two different majorities to contend with. So, members of internal minorities or marginal

¹² Green, Leslie – "Internal Minorities and Their Rights" in Judith Baker (edited) *Group Rights*

groups (the basic statistical unit being the individual) need to have minority rights.

Communities are impossible without commitment to shared principles, as Walzer argues. Tyranny in the name of such principles is not inevitable. Though it is a danger yet commitment must be made by the members of the community to one another and to the common principles animating their lives and inspiring their history and traditions. Commitments also mean that the common principles, and the rituals, traditions and institutions embodying them, acquire an authority deserving respect¹³.

One justification for granting minority rights is that such a justification rests in the recognition of value to the culture of the community. Justification of granting rights to individual members could then normatively rest on the recognition and respect of the commitment of the individual members to the community.

Commitment here can be defined as - active and passive. Active commitment is when an individual member or a few members assume a set of special responsibilities and obligations towards the group. Passive commitment is made when "a commitment draws on the notion of a person's perception of his own self, and the belief that the community expresses a fundamental part of it. Having these beliefs, he is committed in the passive sense to perceiving membership of the community as the way to go and to

¹³ Walzer, Michael – *"Liberalism And The Art of Separation" Political Theory*

giving the community the support required of him by his membership to it. Committing himself to it is thus the carrying out of the action commitment of his beliefs about himself and the nature of the community to which he belongs".¹⁴

Rights to individual members of minority cultural communities could then be the evidence of acknowledging the nature of the latter kind of commitments. For, as Benn points out, "mutual support, sympathy and understanding flow to those who are known not merely to value the common enterprise (an outsider might do that) but to have invested their personalities in the same venture".¹⁵

Minority cultural communities have an inherent tendency to gravitate towards the dangers of tyranny and insensitivity to internal differentiation, which also makes it necessary to grant rights to individual members. The tendency towards uniformity is because the term minority is basically a numerical concept and minority group rights are basically sought on the basis of the numerically disadvantaged position (though the equally important social component cannot be overlooked). Added to this, the circumstances of the minority communities make it extremely prudent to strive for unity.

The awareness of being a numerical minority makes such a group recognise the need for unity through uniformity in an acute manner, which

¹⁴ Ben I. Stanley – *A Theory of Freedom*

¹⁵ Ben I. Stanley – *A Theory of Freedom*

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may then be conflated with the idea of uniformity. Beneath the idea of unity one can argue, lies the anxiety of status quo. Unity through uniformity then could be a dangerous proposition. It is against diversity, plurality, and heterogeneity. It could also be against freedom.

There is the fear that the strength of numbers may be diluted by internal dissent. An authoritative single voice from the community gives the impression of greater cohesiveness. In a bid to have a clear authoritative voice, there are efforts to make the group more stringently organized and disciplined. More often than not, internal minorities are silenced and disempowered in the process.

In addition, the danger of tyranny in the name of commitment to shared principles exists. Because shared beliefs and purposes constitute communities; those who do not share them may be coerced by those who do. Since human rights are not essentially a part of the shared tradition of every community, the rights of dissenting and/or non-conforming members are not protected. This makes it all the more necessary to have individual rights.

Also in the interest of the unity of the group to fragmentation could be avoided by doing away with intolerance to non-conformity and providing for individual freedoms within the schema of group rights. Fragmentation in the cultural community may also lead to the dilution of the cultural resources. The cultural resources not only give substance to the identity of the group as

an entity but also bear upon the lives of the individual members, particularly in three significant ways:

- (a) Cultural resources provide the context of choice, enabling to choose modes of life possibly guarded by instrumental, utilitarian reasons and informed by considerations of prudence;
- (b) The cultural resources of a community life may be viewed, apart from being a context of choice as a moral engagement highly valued for its intrinsic worth;
- (c) The 'shared way of life' of a cultural community is an inherited form of life. The cultural resources are an inheritance, inherited across generations of individual members. Therefore, fragmentation of the cultural community needs to be avoided to prevent the denial of the inherited form of life to the future generations of individual members, which would constitute the context of choice for them.

However, if the contexts in which individual members must make their choice, are not carefully deconstructed, the rights of those whose reality one does not wish to or is ill-equipped to acknowledge could easily be denied¹⁶.

¹⁶ Razack, Sherene – “Collective Rights and Women : ‘The Cold Game of Equality Staring’ “ in Judith Baker (edited) *Group Rights*

The plight of women in cultural communities could be an illustration. Women are generally considered in greater particularity (in relation to men) as upholders and bearers of the cultural values of any community. They are to that extent more prone to the tyranny of the set cultural norms.

However, as Ely points out,"-----women have been operating at an unfair disadvantage----though its tricky pinning down just what gives rise to that intuition". Again as Ely observes, it could be argued that "many women have accepted the overdrawn stereotype and thus have seen nothing to "correct"-----and by their example may even have acted so as to reinforce it".

The real prejudice in the context is then very difficult to recognize and correct because being sufficiently pervasive it can block "its own correction not simply by keeping its victims 'in the closet' but also by convincing even them of its correctness"¹⁷.

Though one may decide how to live one's own life, the fact is that it is decided within certain cultural and linguistic narratives. In other words, the members are part of a cultural community, the character of which is largely beyond their control, but that (character of the community) structures their lives. It therefore is important to study how these narratives are organized in the interest of some and not others. Women for example have not enjoyed

¹⁷ Ely John Hart *"Facilitating the Representation of Minorities"*

the same options, as have men within these narratives, and to understand where their personal agency ends and narratives take over is no easy task.¹⁸

However, before this it is essential to acknowledge that each individual is endowed with a potential capacity for innate autonomy (i.e. the capacity to decide how to lead one's own life). What is crucial is that such a capacity must be nurtured through relationships with others. It then becomes important to examine how nurturing is accomplished. This leads one to inquire about the structure of relationships and that could possibly have the element of oppression in the picture.

The constraints on individual choice are in reality far more pervasive and deeply embedded than one realizes. If the cultural resources are ideally to provide the context of choice to individual members, the consequent implication would be that if those choices are constrained by factors not of their choosing, the members are entitled to rights which would effectively bring them to a point where they might be said to be exercising freedom of choice.

When rights are ascribed to individual members, apart from group rights, it may be alleged that individuals are viewed as selfish and asocial beings, which undercuts the very idea of group rights. Underlying the idea of group rights is the idea of viewing the members of the group as connected entities. Individual rights, it is felt would view members of the group as unencumbered beings. This is not true. The whole point of providing for

¹⁸ Razack, Sherene -- "Collective Rights and Women: 'The Cold Game of Equality Staring'"

rights (both individual and group rights) is to provide for human interaction. Rights would provide for greater interaction for individuals in the group and would consequently enrich the resources of the group.

It is felt by some that rights, particularly individual rights, foster individualism because they give moral significance to individuals separately. They have therefore been condemned, by people who are communitarians for promoting atomism, both in reality and as a moral ideal. In establishing safeguards for individuals, rights are seen to erect fences which separate and divide people from one another - rather than encourage people to think of themselves as members of a community characterized by a rich and closely integrated common life. Rights are alleged to foster egoism because they make claims on others, which are grounded in the right-holder's own interest. Whereas duties, obligations, responsibilities are other-regarding, rights are essentially self-regarding. Rights, it is at times felt, promote an unedifying and unhealthy, self-centredness.

To clear such misconceptions, it is necessary to understand the term – right. the word right has different force in different contexts. In most cases, when someone has a right to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference.

There is a difference between saying that someone has a right to do something in this sense and saying that it is the 'right' thing for him to do, or

that he or she does no wrong in doing it. Conversely, something may be the right thing for him to do, but he or she may have no right in doing it.¹⁹

Ordinarily, this distinction between the issues of whether one has a right to do something and whether it is the right thing for him to do, causes no trouble. But sometimes it does, because sometimes we say that one has a right to do something when we mean only to deny that it is the wrong thing for one to do. We use 'right' this way when we speak of someone having the right to act on his or her own principles or the right to follow his or her own conscience. We mean that one does no wrong to proceed on one's honest convictions, even though we disagree with these convictions.....

As for the allegation that individual rights promote an unedifying and unhealthy self-centredness such individual which seek to attain distinct liberties for individuals must be recognized only when the right as an equal is applied.

We must begin by accepting that some conceptions of rights are incompatible with some conceptions of community. Some conceptions of the nature and content of rights are highly individualistic, particularly those which stress the strictly negative character of human obligations, and these may encourage the weakening of social bonds. Likewise, some conceptions of community, particularly those which stress hierarchy and inequality and those which 'lose' the individual in an organic unity, do not recognize

¹⁹ Dworkin, Ronald- "Taking Rights Seriously",

individuals as beings with rights. But not all conceptions of rights are at odds with all notions of community.

Also the ascription of rights to individuals does not preclude the group or the community. All that rights insist is that there are certain ways at least in certain matters in which a community is required to treat or not to treat its individual members.

What then is the purpose of such individual rights? The idea of rights has been seized on as a way of resisting trade-offs. As Jeremy Waldron points out rights express limits on what can be done to individuals for the sake of the greater benefit of the others; they impose limits on the sacrifices that can may be demanded from them as a contribution to the general good.....rights are small designed to pick out those interests of ours that are not to be traded off against the interests of others in this way. They are to use Ronald Dworkin's image, our "trump cards", to be played in the last resort to protect the basics of our individual freedom and well-being²⁰.

In addition, individual rights need not require people to act selfishly or place them beyond criticism if they do act selfishly. Such rights remain open to critical appraisal. In addition, when a human being claims rights as an individual, logically, those rights are for all other human beings as individuals.

²⁰ Waldron, Jeremy—"Rights in Conflict"

What are such rights based upon? Broadly, it can be stated that such rights are based on values implicit in the commitment to human agency – the human capacity for free action the value of a sense of purpose, the material conditions of individual initiative and the importance for each person of his or her own pursuit of what he or she takes to be a good way of living.

If people have to act morally, altruistically and show concern for others for social co-operation, it cannot be taken for granted under any and every condition. The integrity of at least the basic interests of the people have to be guaranteed to justify such expectations. As Jeremy Waldron observes, “.....may be people need to have such things as assurance of a freedom from Hobbesian terror, an assurance of bodily security, a modicum of personal privacy and the intellectual and political space to start thinking things through for themselves, before they are capable of rising to the demands of social morality”.²¹

If it is morally important for people to act socially, altruistically and sensitively the needs of community then people should live and thrive in the conditions of freedom, security and well-being that make that sensitivity and action a real option for them. In other words, to rise above self-interest the most desperate and fundamental aspects of interests are to be ensured. These interests could also be partially constitutive of moral agency. As Jeremy Waldron states, “I cannot be a moral agent without space or security to think and reflect on what I ought to do?”

If this complexion is present then the unpleasant aspect of egoism in individual rights begin to fade. It may be the ideas that the common commitment to life in a community cannot be carried through unless the individuals who are to assume that responsibility are granted the wherewithal to enable them to bear it.

Again as Jeremy Waldron points out, the communitarians are right to insist that one has to have an interest in one's moral agency, in being the sort of person who can respond to such a responsibility. Such an interest lies close to the basis of self-respect, given the social nature of humans. Any concern, then, that modern individuals are being alienated from involvement in their community must, to be credible, be a concern that the conditions be provided that make that involvement possible. Concern for the moral self can be the basis for a concern for individual rights²².

Self-interest and concern for other need not pull in opposite directions; in a complex world, one may be the pre-condition of the other.

What is the nature of the challenge of non-conformity?

In cases where non-conformity is not because conformity entails violations of interest, freedoms or beliefs, but is simply not conforming to the set norms, the structure and the identity of the group is not challenged.

²¹ *Waldron, Jeremy (edited) Nonsense Upon Stilts*

²² *Waldron, Jeremy (edited) Nonsense Upon Stilts*

What is sought is simply the accommodation of non-conforming stance. Even if compatibility cannot be arrived at between the non-conforming member(s) and the group, plurality is sought to be acknowledged.

However, in cases where non-conformity is due to violation of rights which conforming to the norm may entail, it could mean questioning at least parts of the existing structure of community. The nature of rights demanded in such cases has the concept of need as the foundation of rights. Needs are what most deserve the stringent protection afforded by rights and it is the powerless who will be least able to satisfy their needs if they are not accorded such protection. At the core of the concept of need is the notion that an animate entity (here a non-conforming individual or internal minorities) ails because it lacks some X and that it recovers if X is available to it (or perhaps ails because of the presence of some X and recovers when X is removed).²³

One should however, not forget even as change may be sought in certain aspects of the community's way of life; the change is sought within the community because non-conforming members strongly want to be part of the community.

Pleading for plurality does not necessarily mean pleading for separation, insulation or segmentation. It is the asymmetry between the objective situation and the subjective for unity that has caused the crisis and

²³ Flathman E Richards-“Rights,Needs and Liberalism” Political Theory

reduced the notion of unity into a hypocritical / ideological construction. That is why it is necessary to see the hardness of contemporary social reality – how it oppresses, alienates and separates, how in the name of ‘unity’, it seeks to establish some kind of domination or other.

Instead of the right to exit (which may lead to the alienation of the individual and the disintegration of the community), it is the right to be acknowledged and accommodated which is demanded (which partially restructures the community at best or at the least makes a case for plurality and tolerance within the community) which actually ensures the cohesiveness and identity of the community.

Broadly, the conflict between rights of groups and rights of individual members can be characterized as the tension between the vision of the cosmopolitan individual living in a flux of identities and the vision of the individual belonging and being immersed in the life and culture of a particular community. The idea of granting rights to individuals in a community, not viewed as irreducibly but as individual members of the group, seeks to resolve this tension.

The realms in which such struggles take place, more often than not, remain partially or totally beyond the available institutional arrangements at any given moment. These realms deserve as great a part of theoretical attention as these arrangements are customarily given.

Rights, particularly individual rights could be used as devices to establish priorities. For instance, the decision to put rights in an established

constitution or basic law is a decision to rank the actions, states-of-affairs, or objectives protected by the rights, as so important that debate about them ought to be removed (as far as possible) from the ordinary processes of political interaction and legislation; the latter processes are to be take place within the constraints set by rights²⁴.

²⁴ *Singh, Rustam – “ Man, Political Man, Political Theory” Political Theory*

CHAPTER – II

Minorities and the Indian Scenario

This chapter focuses on the Indian scenario. It attempts to examine the definitions of a group particularly as a minority group and an individual; it tries to explore the concepts of group rights and individual rights-all in the Indian concept. It briefly studies the Indian constitution position on the issue of rights and the extent and kind of protection and prominence given to the rights. The rights are attempted to be categorized as individual rights and group rights (and what kind of group rights are actually minority group rights). Also there is an attempt to assess the potential strength of these.

The chapter tries to differentiate and understand the various categories on the basis of which a group projects itself as a minority. It would be the aspects through which the group as an entity defines itself and articulates its identity. It is through these categories that the chapter tries to understand how the rights of individual members can possibly be subsumed, suppressed and even violated.

It then turns to the probable solution of the intervention of the state to resolve the possible conflict and tension between the rights of the minority groups and the rights of the individual members. What is to be sought is the answer to the question as to how can the state (particularly a secular, liberal, neutral state) intervene on behalf of the individual member to protect his/her rights without abandoning its status of being a secular and neutral state?

The idea of rights for groups as well as individuals has been dealt with in a fairly comprehensive manner in Part III covering Fundamental Rights as stated in the Constitution of India. Fundamental Rights provided for in the constitution of India are rights not primordial or transcendental in nature but are rights conferred on the people of India by and through the constitution. They are largely in the nature of rights to individual members and lest they be taken away or abridged by the party in power.....the constitution enjoins that the State shall not make a law so as to abridge or take away these rights. To ensure that the fundamental rights of the individuals will not be trampled over by the majority party in power, the framers of the constitution chose to define the terms "State" and "Law" which ordinarily need no definition and hence with a purpose. The term "State" includes only the executive and legislative organs at the different levels of government and the term "Law" in its inclusive definition excludes "Constituent Law" or amendment of the constitution. To further ensure or guarantee that the rights of the individuals may not be taken away or abridged by the "State" making a "Law", inadvertently or deliberately, the constitution enables the rights to be enforceable in a court of law. The rights guaranteed to the individuals,are not cast in absolute terms but are hedged in with all sorts of limitations and qualifications.

The fundamental rights cover from Article 12 to Article 35. The fundamental rights indicate a dual conception of an individual in the constitution-(a) as a citizen and (b) as a member of ascriptive groups.

The first fundamental right is the Right to Equality. It covers Articles 14 to 18. Article 14 is Equality before law-the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Article 15 is the Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-

- (1). The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (2). No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
 - (a). access to shops, public restaurants, hotels and places of public entertainment;
 - (b). the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public.
- (3). Nothing in this article shall prevent the state from making any special provision for women and children.
- (4). Nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provision of the advancement of any socially and educationally backward classes of citizen or for the scheduled castes and the scheduled tribes.

The next fundamental right is the Right to Freedom covering Articles 19 to 24.

Article 19 is the Protection of certain rights regarding freedom of speech, etc-

- (1). All citizens shall have the right-
 - (a) to freedom of speech and expression;
 - (b) to assemble peaceably without arms;
 - (c) to form associations or unions;
 - (d) to move freely throughout the territory of India;
 - (e) to reside and settle in any part of the territory of India;
 - (f)
 - (g) to practice any profession or to carry out any occupation, trade or business
- (2). Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
- (3). Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent

the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, in the interests of the sovereignty of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the rights conferred by the said sub-clause, and in particular nothing in the said sub-clause shall affect the operation of any

existing law in so far it relates to, or prevent the State from making any law relating to, -

- (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by any State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Article 21 is the Protection of life and personal liberty-no person shall be deprived of his life or personal liberty except according to procedure established by law.

Articles 25 to 28 cover the Right to Freedom of Religion.

Article 25 is the Freedom of conscience and free profession, practice and propagation of religion-

- (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
- (2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law-

- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I-The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion

Explanation II-In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26 is the Freedom to manage religious affairs-Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer some property in accordance with law.

Article 27 is the Freedom as to payment of taxes for promotion of any particular religion-No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for

the promotion or maintenance of any particular religion or religious denomination.

Article 28 is the Freedom as to attendance at religious instruction or religious worship in certain educational institutions-

- (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
- (2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution
- (3) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institutions or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor his guardian has given his consent thereto.

Articles 29 and 30 constitute Cultural and Educational Rights

Article 29 is the Protection of interests of minorities-

- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

- (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30 is the Right of minorities to establish and administer educational institutions-

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
- (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
- (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The Indian state without explicitly mentioning the term 'neutrality', seems to have aspired towards the ideal of the neutral state as a response to the variety of conceptions of good life as it recognizes a multiplicity of ways in which a fulfilled way of life can be lived without any perceptible

hierarchy among them. The neutral state should not seek to promote any particular conception of the good life because of its presumed intrinsic superiority.

There is thus a dual conception of the individual in the constitution-

- (a) as a citizen and
- (b) as a member of an ascriptive group.

The kind of perception of the individual as a citizen was catered to in the declaration preamble regarding justice and equality, the fundamental rights which guaranteed equality and almost all Directive Principles of State Policy, which promised equal rights, equal opportunities, equal treatment in equal circumstances. To sum up, equality before the law and equality of status as a citizen. This is one cluster of rights under the constitution, one kind of perception of the individual who dwelt in the sovereign territory of India.

There is a second cluster. This consists of that part of the preamble which held out the promise of liberty of not only thought and expression, but of faith and worship; and those Fundamental Rights which guaranteed more specifically, the Freedom of Religion. Thus the second cluster acknowledged, that citizens though equal, may have distinct identities, because of their differing languages, religion and cultures.

The two clusters, or the two perceptions of the citizen who dwells under the constitution are distinct, but they need not be contradictory. Nothing in them warrants that. Rather, they contribute to a rounded

perception of many needs of a human being, and the many roles he or she plays. They were clearly seen as complimentary by the framers of the constitution.

Yet, the two clusters have not harmonized. The vision of the founding fathers has turned out to have been in certain respects, severely astigmatic.

A reading of the Constituent Assembly Debates however shows that not all the members of the Constituent Assembly were not entirely unaware or insensitive to the potential disharmony between these two clusters of rights in the Constitution. Probably the then prevailing political scenario was such that the impetus moved towards greater social control than individual liberty. The heat of the fanatic kind of communalism resulted in the tendency to acknowledge the authority of cultural and religious groups over its members which resulted in the watering down of the idea of rights of members of a community.

Such a tendency was evident even in 1931 at the Karachi session of the Congress. At this session, a resolution on Fundamental Rights was adopted. In the Right to Religion, clause 9 declared the neutrality of the State in matters pertaining to religion. This provision is in conformity with the secular principle that the State shall not patronize any religion or interfere in the religious sphere. But there are circumstances in which the interference of the State in those walks of life which are supposed to be covered by religion, becomes very essential. In India there are a good number of practices which are associated with religion, but have no ostensible relation with any faith.

The Purdah system, the practices covered by both the Muslim personal law and the Hindu caste system may be cited as some pertinent examples. Perhaps, Mrs. Kamala Devi Chattopadhyay had this in mind when she moved an amendment seeking to add "except regarding social legislation affecting their progress and welfare of the people", to the original clause. But her amendment was negated. Probably the rejection of this amendment was the outcome of a desire to placate Muslim communalism.

Even in the Constituent Assembly Debates there has been an awareness as well as acknowledgement of the differentiated nature of the minorities. For instance, Sardar Patel (Vol 5) states that, the minorities among themselves are (also) divided; there are conflicting interests among the minorities themselves. -----we have tried to see that the minorities also instead of being divided among themselves try to present a united front in order to safeguard their interests. But there are certain points on which minorities cannot be united because there are minorities within minorities.

Pocker Sahib Bahadur also affirms this line of thought while stating, "there are communities with vital differences among themselves, whether on grounds of religion or other differences. -----and it is our duty to provide for them constitutionally, that they are all adequately represented". He further attacks the concept of only a section of the minority (elite) to claim to speak for the whole community. He goes on to state, "the mere fact that a particular member belongs to a particular community is not a guarantee that his views represent the views of that particular community".

Acknowledging the right of an individual as not just a citizen but also as a member of the cultural community, Pandit Govind Ballabh Pant stated, "-----every citizen in a free state should be treated in such a manner that not only his material wants but also his spiritual sense of self-respect must be fully satisfied".

Further being sensitive to internal minorities, Z.H.Lari states that "the constitution should contain no provisions which would have the effect of isolating any section of the people from the mainstream of public life". In an individualist defence of the issue of justice to minorities, he states, "to me it appears that justice to minorities is the bedrock of democracy. The reason is this. The twin principles of democracy are, one, that the majority must in the ultimate analysis govern, and second, it is the right of every individual to have some voice in sending his representative-----".

There were, however, movements in the Constituent Assembly when the religious identity of the individual seemed to dominate over the citizen identity of the individual. This is evident from the words used by Dr. Ambedkar while talking on the uniform civil code. To mollify the opposition to the uniform civil code, he stated, "..... it does not say that the State shall enforce it upon all citizens merely because they are citizens" thereby reducing citizenship to a second place, with religious identity taking the pride of place.

There was also an awareness among the members of the Constituent Assembly members that the constitution might be, under the sway of the

present turmoil, deciding too much for the future. Shri Mahavir Tyagi even went on to observe that, "it may be that in matters like these, that is cultural and educational rights, they could be defined only in as far as they appertain to individuals and the question of minorities had better be left to the future Governments. I think we are binding the hands of our future Governments too much. We should leave them free to do according to the times and the situations they face".

While Right to Equality and Right to Freedom as well as Right to Personal Liberty stand as safeguards of individual Rights, Right to Freedom of Religion and Cultural and Educational Rights could be termed as protecting the rights of groups, the latter especially catering to minority groups. However, the right of the group need not be taking the group as an irreducible entity. Particularly, noteworthy in this regard is the wording of article 25 – "----- all persons are equally entitled to freedom of conscience and the right freely to profess, practice, and propagate religion". The usage here has been of the term persons and not groups or communities, probably indicating towards an individualized exercise of the right through the word religion is generally in connotation with collectivity, thus giving one an idea that it is possible to think of collective privileges or group rights as reducible to the rights of the individuals who constitute the group.

However, the rights are basically in the nature of negative injunctions to the state, forbidding the state from interfering in the enumerated spheres of the lives of citizens and groups in the country. There is no overt and clear

positive direction to the state to take steps to facilitate the achievement and enjoyment of rights. For instance, the Constitution in Part III prohibits the state from discriminating on the basis of caste, creed, color, sex, religion or region. This is a negative injunction. However, there is no positive direction in Part III like providing for compulsory education irrespective of caste, creed, color, sex, religion or region. Though compulsory education may have been mentioned elsewhere in the constitution, the fact that it is not a part of Part III which is justiciable, points towards the fact that the nature of Part III is basically in the form of negative injunctions.

Further, the Indian state seems to endorse the position of Charles Larmore that (for the liberal), neutrality is a *political* ideal. The state's policies must be neutrally justifiable that does not require that other institutions in society operate in the same spirit. In other words, neutrality as a political ideal governs the public relations between persons and the state, and not the *private relations between persons and other institutions*²⁵.

Even the negative injunctions which would be at least a part of the safety net for the citizens, do not always apply to all realms of authority in India. Rather, they seem to apply exclusively to the Indian state. It doesn't obligate the state to prevent the violation of even negative injunctions by others. Potential violations or violators are neither included, nor are such violations dealt with in Part III of the constitution.

²⁵ Larmore, Charles – “*Liberalism and the Neutrality of the State*”

Even when the state can intervene in an area of social life, it is only to the extent that the state has a neutrally justifiable goal that requires that intervention and only to the extent required by its persons of that goal can it justifiably institutionalize neutrality in that area.

Neutrality would seem to emphasize the equal freedom of all persons to pursue their conception of a good life clearly indicating an individualistic exercise of choice in choosing among conceptions of good life. This “freedom” has a sharply circumscribed sense. It covers only the right of the person not to phase neutrally unjustifiable interference by the state. It confirms to what Isaiah Berlin called the “negative” conception of freedom.

The only specific safeguard to individual liberty is Article 21- Protection of life and personal liberty. It reads as-“No person shall be deprived of his life or personal liberty except according to procedure established by law”.

Even in the Constituent Assembly, Mr. Ismail Saheb stated that, “this (protection of life and personal liberty) had nothing to do with the minority of the majority. It concerns with the right of every citizen. Personal liberty is the core of the whole freedom.... but this question of personal liberty is left almost as an orphan. Only one mention is made of personal liberty and it is left there, it is left to be taken care of by “procedures established by law”.

Though this article has no explicit limitations and restrictions, its scope too is largely inhibited by the phrase "procedure established by law", whereby the parameters of the safeguards of life and liberty are constricted by the legislative or law making organ of the state.

It is but Article 13 which has the potential to enable the whole chapter of fundamental rights to be used as a vibrant instrument for the protection of the rights of citizens. It deals with laws inconsistent or in derogation of the fundamental rights by stating that such laws, to the extent of their inconsistency be void. It further states that the State "shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of the contravention be void.

The significance for this dissertation of Article 13 lies in the definition of the term 'law'. Article 13 (3) (a) states that "'law' includes any ordinance, order, bye law, rule, regulation, notification, custom or usage having in the territory of India the force of law".

Law, then by the above definition would include personal laws of various communities. And by the above statement of Article 13 it could be deduced, that if the personal laws or customs which have the force of law, are found to be inconsistent with provisions of Part III or take away or abridge the rights conferred by this part, they would to the extent of inconsistency or contravention be considered void.

However, this is not so to a large extent in practice. Personal laws and community customs which have the force of law, even when blatantly violating rights of Part III have been upheld by the legislature as well as the judiciary. (This has been illustrated with cases in Chapter 3).

If violation of fundamental rights which are justiciable and hence considered inviolable, itself is upheld by the legislature and by the judiciary, what then is the status and position of individual rights and individual liberty in the Indian polity?

This chapter then turns to examine the definition, meaning and significance of the term minority group in India. Minority could be a numerical concept. This definition is generally worked out in relation with the existence of a majority. However, the numerical criteria to be defined as a minority is not clearly stated. So while a culturally-religiously well defined group may demand to be viewed, recognized as a minority in relation to the majority and be granted special rights of a minority, numerically minority groups within the minority may not be recognized as a minority distinct from the larger minority. For example-Christians in India could be termed as a numerical minority. There could be but groups among the Christian community. However, the minority provisions for Christians caters mainly to the mainstream and not necessarily to minority groups within.

Also if the numerical concept be applied, statistically the basic unit of a minority is reducible to the individual. However, special privileges which the minority community seeks generally are to sustain itself against the

majority and to maintain hold over individual members within the minority community to protect the cohesiveness of the community.

Minority rights could also be demanded by a minority group on the basis of the distinctness of its culture and way of life. Such a group because of being numerically or socially disadvantaged may find itself vulnerable to the real or perceived tendency of the majority to assimilate the minority group or to the homogenizing threat of forces of modernization. The problem in this formulation arises with the question as to who in the community decides what is distinct? There may be discordant voices within the community on the issue of the distinct characteristics of the community. It also involves the issue of whether rights should be granted to maintain the distinctness of the community when such a right may involve trade-offs with individual rights of the members of the community.

Another ground of a group to be defined as a minority is the trait of marginality and peripherality. The argument of affirmative action is based on such a ground. It is on this ground that Iqbal A. Ansari argues for affirmative action for Muslims (Times Of India October 16th, 1997). According to him, the Muslims' demand for reservation can be justified in terms of social, educational and historical backwardness.

Fear also could be a component for such a ground. It could range from covert, subtle or open hostility to physical torture in extreme cases.

An aspect of the traits of marginality and peripherality is that it has the potential to cut across the barriers of culturally distinct groups or numerically defined groups. The category of Woman is a prime example of this.

The term-minority in India is generally an entity overlapping all the above concepts. What is striking however is the way the concepts are selectively used, foregrounded or withdrawn as per the context, by the minority community.

This can be clearly illustrated on the issue of women's reservation bill and rights. If the reservation comes through, women (the biggest minority if the criteria of marginality is taken) as a group would be seen as having been granted a group right. However, this group right would be reducible to the rights of the individual members of the group(women) and this may not curry favour with cultural communities as such a right may prevent any trade-off of the cultural minority with the marginalised minority. In such a context, the cultural minority would rather invoke its numerical position or cultural distinctness rather than marginalization of its members. The community may however favour a bill like the Muslim Women Reservation Bill wherein it uses the marginalized section of the community to enhance and protect the cultural aspect (Muslim) rather than improve the lot of the marginalized (Women).

Then comes the issue whether the Indian secular state should intervene in the matters of cultural groups?

India is a constitutionally created secular state. This however need not imply the existence of a secularised society. Secularism may broadly be viewed as a separation of politics from religion. To that extent a secular state would logically appear as a neutral state to cultural and religious communities.

The cultural community would consider any move towards intervention in the community by the neutral secular state as a dilution of its neutral and secular stand. It may be viewed as a move which cuts at the autonomy of the cultural groups.

This fear may have its roots in the avoidance of an explicit embrace of secularism by the Constitution-makers. Rather the purpose of secularism was sought to be covered by the right to freedom of conscience and profess, practice and propagate religion. It is possible that in avoiding an explicit embrace of secularism, the Constitution makers relied first on the Hindu tradition of tolerance and second on the forces of modernization. (J.B.D'Souza)

Probably, the minority communities were wary of both these measures. The Hindu tradition of tolerance smacked of charity while the forces of modernization threatened them with homogenization.

To offset this feeling the Indian state could assure the cultural communities neutrality among competing conceptions of good not only among the various communities but also among the goods of modernization as well as of the traditional ways of life.

This however doesn't lead to the idea that such a state has no right to intervene, especially in cases of violation of individual rights in the community. The State however should take care to intervene on neutral grounds for neutral reasons.

The community may still argue that such intervention would amount to the politicization of the community. But this argument does not hold as the community defines and articulates itself in relation to the present political and social circumstances and can sufficiently be politicized to seek not only group rights of a cultural nature but also group rights in the nature of social and political rights. So, if cultural communities can demand group rights in the nature of social and political rights, so can political institutions intervene in the event of any violation by the community of such rights.

CHAPTER – III

Judiciary and Communitarianism

The judiciary has a significant role to play in a constitutional democracy. In a constitutional democracy, while the formulation of laws is the domain of the legislature, upholding the constitution and examining the validity of the laws so that they are in conformity with the principles enunciated in the constitution is the task of the judiciary. The judiciary is also entrusted with the task of interpreting the constitution in relation to the dynamics of society while not compromising with the basic principles of the constitution.

The right to interpret the constitution - the supreme law of the land and to examine the validity of laws enunciated gives an impression that the judiciary is a powerful organ of Indian democracy.

This, however, is not quite the case. The judiciary is not as powerful as it is made out to be. This is evident even in the Constituent Assembly Debates in the debate of the retention of the clause "due process of law" or of the clause "procedure established by law".

Initially, the clause "due process of law" was favoured by the Constituent Assembly members. This was borrowed from the American Constitution. It, broadly interpreted, implied that the law would be stated in the constitution and a certain openness and flexibility would be retained in the process of the application of the law in conformity to its outline in the

Constitution. The procedural part was hence left open. This would grant the judiciary tremendous scope to check the excesses of the legislature and uphold the basic structure of the constitution (which would include the Fundamental Rights).

However, the gigantic scale of the communal civil war, which was a background to the Constituent Assembly Debates foregrounded, the need for social control. As a consequence of this individual rights took a backseat and the issue of personal liberty was not given its due prominence in the constitution. This was because the majority in the assembly was "more anxious to establish social control than to serve individual liberty".

Thus under these conditions, the original "due process of law" clause was substituted by a new clause "except according to procedure established by law", which was borrowed from Article 31 of the post war Japanese constitution. In this way, the courts were deprived in substance of the power to interfere with an unjust law. The Constituent Assembly Debates revealed that the majority of the members were in favour of this provision. Indeed a justification for this was given by K.Hanumanthayya, when he was speaking of Article 13 (now Article 19) in the Assembly. He said:

"Society changes: governments change: the temper and psychology of the people change from decade to decade, if not from year to year. The law must be such as to automatically adjust itself to the changing conditions. Courts cannot, in the very nature of

things, do legislative work: they can only interpret. Therefore, in order to see that the law automatically adjusts to the conditions that come into being, in times to come, this power of limiting, the operation of the fundamental rights is given to the legislature.

After all the legislature does not consist of people who come without the sufferance of the people---. If at a particular time, the legislature thinks that these rights ought to be regulated in a particular method, there is nothing wrong in it, nothing despotic about it, nothing derogatory to these rights".

However, the opposition to this viewpoint came from some eight speakers, including K.M.Munshi, a member of the Drafting Committee. Munshi said: (Constituent Assembly Debates Vol. VII December 6th, 1948 page 853).

"Our emergency at the moment has led us to forget that if we do not give that scope to individual liberty and give it the protection of courts, we will create a tradition which will ultimately destroy even whatever little of personal liberty exists in this country".

Z.H.Lari supported this standpoint. He also pointed out that "every legislature and every government is liable to do such things which the British Government did. You cannot excuse excesses of law simply because those excesses are committed by a popularly elected legislature. That is

why, there are two domains, one is the domain of individual liberty and the other domain is where the state comes to regulate our life". (Vol. VII December 6, 1948). Prior to this, Pandit Thakur Das Bhargava had also pleaded for the retention of the original "due processes of law" clause in these words:

"We want to bulwarks for our liberties, one is the legislature and the other is the judiciary. But even if the legislature carried away by party spirit and is sometimes panicky, the judiciary will save us from the tyranny of the legislature and the executive.

Hence, "due process of law" should be retained. I want the judiciary to be exalted to its right position of palladium of justice and the people to be secure in their rights and liberties under its protecting wings".

Ultimately, the assembly decided in favor of the revised version. It appears that in arriving at a decision, the Makers were guided by the Japanese example. A perusal of the discussion on this issue in the Constituent Assembly reveals that the Founding Fathers accepted the Japanese model for two reasons. Firstly, they wanted to avoid the vagueness and uncertainty that have cropped up around the doctrine of the

"due process". Secondly, they were not prepared to allow the judiciary to become a super legislature²⁶.

One may get the impression that the judiciary in a secular state would have more to do with the democratic processes and issues of participation or denial of participation of citizens in the democratic process than with issues pertaining to religion or cultural communities. However, to the extent that communitarian thinking conflicts with the secular and democratic process, the judiciary finds itself involved in the issues of religion and community. As the upholder and interpreter of the Constitution of the country, the Court may be called upon by the cultural community to prevent the violation of its fundamental right to religious freedom. Those people who may feel their fundamental right to equality and/or freedom is being violated by the cultural community that may also call upon the Court.

Such conflicts may surface more often in minority cultural communities. This is because the minority status of the cultural community makes the community feel more deeply aware of the need to maintain its cultural distinctness. This deep awareness to maintain cultural distinctness may lead to a rigid conception of the community, perpetuated on the basis of strictly laid out norms.

However, to the extent that, at a basic level, it is a clash between the community and the individual in a democratic polity, even majority

²⁶ *Chaturvedi, D.C. – Indian Fundamental Rights*

communities undergo this conflict. Nevertheless, the minority status of a cultural community makes such conflicts seem more apparent.

In such a situation, the decisions of the courts in India have significantly affected the use of religion and its practices for the citizen, the community and the polity. The conception and distinctions adumbrated by the court have conditioned thought and social action in significant ways. It is up to the court to decide whether differential treatment as offered by the constitution for the purpose of the equality is to be applied or not for the community or the individual in question. It is to do so by looking at the situations as it exists and asking if the special rights which spring from the provision of differential treatment are in fact being violated or abridged.

According to V.S.Rekhi, three distinctions have been considered by the courts to have crucial importance: sacred-profane, religion-ethics and religious-communitarian. The binary distinctions delineate the zone of the permissible and the prohibited. The appeal to sacred or religious is outlawed, but the appeal to profane, ethical or communitarian has been considered permissible²⁷.

The ethical and the religious have been conceptually delimited in such a manner that appeal in the name of great tradition has been legitimated for being ethical in content but the religious preference of the powerless, has

²⁷ Rekhi, V.S. "Religion, Politics and Law" in Robert D. Baird (edited) *Religion and Law in Independent India*

been mostly systematically excluded perhaps for reasons having been closely associated with the here-and-now worldly interests of such groups.

Another tendency of the court is to translate the distinctions between the religious and the profane into a further distinction between the personal and the communitarian, the former relating to the realm of religion and the latter to the realm of the profane. Thus appeal to religion in the form of personal preference came to be delegitimated but appeal to solidarity building characteristics of such preference became permissible.

Now, the special rights arising from the treatment of the cultural community or what could be called the "group rights" of the community is an instrument to preserve and maintain the solidarity and unity of the group. The attempt here is to see if the court in its decisions and statements to justify and apply the provisions of group rights to cultural communities, has been sensitive to the issues of internal differentiation of the community, of the potential violation of the values of equality and justice of the members of the community, of having an independent stance, freedom of speech and expression within the community.

To begin with the way in which the judiciary in India has viewed Article 26-the freedom to manage religious affairs in the fundamental right to freedom of religion. In the AIR (1959, Raj.), it was stated that Article 26 (c) and (d) do not create rights in any denomination or its section which it never had; they merely safeguard and guarantee the continuance of rights which such denomination or its section had. If the right--- (was) never vested in the

denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it, Article 26 cannot be successfully invoked.

The AIR (1961 Supreme Court) regarding Article 26, stated that matters of religion in Article 26 (b) include even practices which are regarded by the community as part of its religion. In order that the practices in question should be treated as a part of religion, they must however be regarded by the said religion as its essential and integral part; otherwise even when purely secular which are not an essential or integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26.

There does not seem to be any overt inference to the possibility of accommodating the stance of a non-conforming individual member in the cultural-religious community.

The AIR 1952 Madras (474) does however mention the possibility of accommodating the stance of a non-orthodox and also probably a non-conforming individual member within the community. In the G. Michael versus S. Venkateshwaran, it was held:

If a person is born into a particular religion--- the mere fact he is of an unorthodox type or has no belief personally in the tenets of that religion would not take him out of that category persons professing that religion.----To give an instance a person born of

Hindu parents and who has not been converted to any other religion would not cease to be a Hindu merely because he does not believe in the Vedas or has cultivated the habit of beef eating. This would be so far for the application of the personal law to him. Likewise, it would be so for political purposes.

However AIR 1963 Mys. did not maintain the tentative ideal held in the AIR 1952 Madras case. The court overrode the individual's fundamental right of equality under Article 14. In *Sudha versus Sankappa Rai*, Madras had passed an Act relating to marriage and divorce for the Aliyasanthana community. The Act provided that if a petition for divorce had been filed and a specified amount of time had elapsed, the court should grant a divorce without inquiring into the grounds a party might have, an approach that was in accord with the custom of the community. Thus, divorce in this community was easier than in certain others. An attack on the Act on the ground that it denied equal protection of the laws as guaranteed by Article 14 was rejected by the court.

This was not a case of "discrimination", the court said, but of "classification":

Each of these laws has a history of its own. No section of the community is shown to have been subjected to hostile discrimination, to adversely affect the rights of a section of the people or an

individual, but classification is to advance the cause of a section of the people without harming the interests of others. The Legislature must be presumed to have acted in the interests of the community at large as well as all sections thereof.

Right to equality was again overridden in the AIR 1968 Pune. In the case, *Gurdial Kaur versus Manghal Singh*, it was held that a custom of a particular caste that excluded a mother, who was a widow, from the succession to the estate of her deceased son if she had remarried, but not the father under the same circumstances, did not violate Article 15. The court rejected both the argument that the enforcement of this custom discriminated among castes and the argument that it discriminated against women. The court made the unhelpful observations that if the mother's arguments were accepted,

"it would be impossible to have different personal laws in this country and the Court will have to go to the length of holding that only one uniform civil code of laws relating to all matters covering all castes, creeds and communities can be constitutional", and that "it is too much to suggest that all heirs belonging to any sex must have the same rights of inheritance.

A stark instance was the case of *Saifuddin versus State of Bombay* (AIR 1961). Far from accommodating the stance of the non-conforming

individual member in the community, the court upheld the decision to excommunicate the non-conforming member from the community even while acknowledging the fact that such excommunication would result not only in the loss of membership of the community to the excommunicated member, but also the loss of civil liberties to the excommunicated member.

The case, which struck down the Bombay Prevention of Excommunication Act (1949), held that –

Where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine or breach of some practice considered as an essential part of the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community, through its religious head, "of its own affairs in matters of religion" guaranteed under Article 26.

(b). The impugned Act make even such excommunications invalid--- (and) therefore, clearly interferes with the right of the Dawoodi Bohra community under clause (b) of Article 26 of the

constitution. That excommunication of a member of a community will affect many of his civil rights is undoubtedly true.--- The right given under Article 26(b) has not, however, been made subject to preservation of civil rights. Hence, the fact that civil rights of a personnel are affected by the exercise of the fundamental right under Article 26 (b) is of no consequence. Nor is it possible to say that excommunication is pre-judicial to public order, morality and health, to which the right under Article 26 has been, made expressly subject.

The mere fact that certain civil rights which might be lost by members of the Dawoodi Bohra community as a result of excommunication even though made on religious grounds and that the act (Bombay Prevention of Excommunication Act) prevents such loss, does not offer sufficient basis for a conclusion that it is a law " providing for social welfare and reforms" within Article 25 (2). As the act invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community under Article 26 (b) of the constitution.

Justice Ayyangar while concurring with the judgement stated that,

“the impugned enactment by depriving the head of the power and the right excommunicate and penalize the exercise of the power strikes at the very life of the community by rendering it impotent to protect itself against the dissidents and schismatics. It is thus the violation of the right to practice religion guaranteed by Article 25 (1) and is also violative of Article 26 in that, it interferes with the rights of the Dai as the trustee of the property of the denomination to so administer it as to exclude dissidents and excommunicated persons from the beneficial use of such property.

Nor could the impugned enactment be sustained as a measure of social welfare and reform under Article 25(2)(b). By the phrase, “laws providing for social welfare and reform” it was not intended to enable the legislature to “reform” religion out of existence or identity. Just as the activities referred to in Article 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Article 25(2)(b) is not intended to cover the basic essential of the creed of the religion which is protected by Article 25(1).

Further, Justice Dasgupta on behalf of himself, Justice Sarkar and Justice Mudholkar concurring with the judgement stated that,

“first is that the protection of these articles (articles of right to freedom of religion) is not limited to matters of doctrine or belief, the extent also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.”

“Before however we can give a proper answer to the two questions raised, viz., (i) Has the impugned Act interfered with the right freely to practice religion; and (ii) has it interfered with the right of the Dawoodi Bohra community to manage its own affairs in matters of religion; it is necessary to examine first the place of excommunication in the life of a religious community. Much valuable information about this is furnished by an Article in the Encyclopaedia of the social sciences from the pen of Prof. Hazeltine. “Excommunication,” says Prof. Hazeltine, “in one or another of the several different meanings of the term has always and in all

civilizations been one of the principal means of maintaining discipline within religious organization and hence of preserving and strengthening their solidarity.”

The judgement further states that:

“According to the petitioner, it (excommunication) is ‘an integral part of the religion and religious faith and belief of the Dawoodi Bohra community’ that excommunication should be pronounced by him in suitable cases. It was urged that even if this right to excommunicate is considered to be a religious practice as distinct from religious faith such religious practice is also part of the religion of the Dawoodi Bohra community. It does appear to be a fact that unquestioning faith in the Dai as the Head of the community is part of the creed of the Dawoodi Bohras.

On the question whether the Bombay Prevention of Excommunication Act (BPEA), contravenes the provisions of Article 26(b), the judgement states:

“What appears to be clear is that where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras

in general, excommunication cannot but be held for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community through its religious head, " of its own affairs in matters of religion". The impugned Act makes even such excommunications invalid and takes away the power of the Dai as the head of the community to excommunicate even on religious grounds. It, therefore, clearly interferes with the right of the Dawoodi Bohra community under cl.(b) of Article 26 of the Constitution.

The only dissenting judge C.J.Sinha however maintained,

"The right of excommunication is not a purely religious matter. The effect of the excommunication or expulsion from the community is that the expelled person is excluded from the exercise of rights in connection not only with places of worship but also from burying the dead in the community burial ground and other rights to property belonging to the community, which are all disputes of a civil nature and are not purely religious matters.

Though the Act (BPEA) may have its repercussions on the religious aspects of excommunication, in so far as it protects the civil rights of the members of the community, it has not gone beyond the provision of Article 25 (2) (b) of the constitution.

The act is intended to do away with all that mischief of treating a human being as a pariah and of depriving him of his human dignity and of his right to follow the dictates of his own conscience. The act is, thus aimed at fulfillment of the individual liberty of conscience guaranteed by Article 25 (1) of the constitution, and not in derogation of it.

The position of an excommunicated person becomes that of an untouchable in his community if that is so, the act in declaring such practices to be void has only carried out the strict injunction of Article 17 of the constitution by which untouchability has been abolished and its practice in any form is forbidden. The article further provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The act, in

this sense, is its logical corollary and must, therefore, be upheld.

However, things looked better in the case --- Joshua versus Geevarghese Mar Diocorus, 1985 (1) I.L.R (Kerala Series). In that case, the court found that a bishop, in issuing an excommunication order against plaintiff, had exceeded his jurisdiction under church law. The court enjoined the bishop and other officials from implementing the excommunication order and from interfering with priests who were willing to give plaintiff communion and other benedictions. The court noted the seriousness of excommunication to the plaintiff because he was of this church "by nurture and by nature".

The idea of belonging "by nurture and by nature" was further strengthened in the case of Biju Uthup versus Father Manjungal (Kottayam, Kerala Nov.24th, 1990). In that case, the plaintiff sought recognition of his right to be married in a parish church of the Kottayam Diocese. The plaintiff's father concededly has been a member of the Knanaya Catholic community and of the parish in question, but he had married a woman who, although a Catholic, was not a member of the Knanaya community. The plaintiff was the offspring of this union. The bishop of the Kottayam diocese ruled that because plaintiff's father had married someone not of the community, the father had ceased to be a member of the community and his children by this marriage were not members either. Since the plaintiff was not a member of

the community, the bishop ruled he had no right to be married in a parish church.

The Kerala court disagreed. It held that under the law of the Knanaya Catholic community, the fact that the plaintiff's father had married outside the community did not prevent the plaintiff from being a member. The plaintiff had become a member, the court held, as a result of long attendance at the parish church and acceptance by the local church group. Since the plaintiff was a member of the Knanaya catholic community, the court held, he was entitled to be married in the parish church.

The court also needs to ascertain the nature of the motives of the contending parties and the extent of the degree of substantiality that such motives possess. The debate on the Syrian Christian Succession Law is a case in point.

The Syrian Christian Succession Law discriminated daughters against sons in the matter of right to property. In 1951, the princely states of Travancore and Cochin (places with a sizeable population of Syrian Christians) joined the Indian Union. The Indian Union passed a law in 1924, the Indian Succession Act, according to which the widow gets one-third of the intestate property and sons and daughters get equal share of the remaining property. Technically, after 1951, the Indian Succession Act should have been in vogue in Travancore and Cochin. The Christian opposed this and the church supported their position. Verdicts in the Kerala and Madras High courts supported the Church's stand.

During the 1960s and 1970s, Syrian Christian women made several attempts to make representation to Chief ministers and Law Commission to have the 1924 Indian Succession Act as the prevalent law governing the Syrian Christian Women's succession issues. Nothing came of all these efforts because of the Church's official position, which was against any change in the existing law.

It was in this context that Mary Roy along with others filed the case in the Supreme Court. In the verdict in 1986 the court said, "Mary Roy is eligible to legal support of 1924 Indian Succession Act like any other Indian Christian Woman from 1951 onwards".

In 1993, the Law Minister of Kerala, on behalf of the Syrian Christian Lobby, voiced the opinion that a legislation should be brought before the assembly to cancel the retrospective effect of the Supreme Court verdict in the Mary Roy case.

Among other things, what the community was saying was that, the allotment of property and giving a share to the daughters is a private affair and the state has no right to interfere. But what has to be affirmed is that the Supreme Court by its interference was upholding the equal status of women. The church did not feel that the State was interfering in the privacy of the family when through the 1916 Act it was said that the daughter be given only one-fourth of the property. These only expose the gender bias in the structure of justice of the community.

More recently in 1999, Ahmed Koya's family in Kozhikode, Kerala underwent the brunt of the fundamentalist grip of his community. Koya's daughters were expelled from their madarsa for participating in a cultural festival. The masjid committee adamantly maintains: "It is against Islam for girls or women to perform on stage". Ahmed Koya however retorts, "I am a devout Muslim and do not have to be told what is Islamic by them". The courts have been approached for mercy was rejected in the community.

In yet another case in 1999 in Kerala, Tasnibanu, 20, a student of Manchery in Mallipuram, wanted to marry Abdul Naseer under the Special Marriage Act instead of the traditional Islamic rites. It was then that the local masjid committee and some fundamentalist groups moved in. Banu was dismissed from her college by its Muslim management, confined to home by her father and tortured by her relatives. Her fiancée has filed a habeas corpus petition in the Kerala High Court²⁸.

The court must attempt to see if the non-conforming act is simply not conforming to the existing set norms of the community or if it entails some specific perceived good through non-conformity.

If it is just not conforming to the existing norms, then as long as the non-conforming act does not challenge the existing structure of the community, far less seek to change the norms of the community, the non-conformity is harmless to the community as it poses no threat to it and could be tolerated.

However, if it may seem that the non-conforming act entails some good as perceived by the non-conforming individual, the court again has to ascertain whether such non-conformity is felt by the community as undermining its stability or challenging its structure.

If the community does feel threatened by the non-conforming act, it then is the job of the court to delineate the issue of the good through the non-conforming act and the issue of the undermining of the stability of the community. The court then has to ascertain, to its best possible ability, as to what extent the perceived good through non-conformity conflicts with the stability of the community. The court also could look into and deliberate about the various possibilities of safeguarding the perceived good by circumventing the alleged threat to stability.

If the conflict does seem inevitable, the court has to consider the substantiveness of the perceived good against the graveness of the potential threat to stability and decide while being informed by the norms of equality and justice.

As mentioned earlier the court is already tied by the "procedure established by law" clause. The creativity of the courts in the interpretation of the constitution, which could be used for the protection of personal liberty, is constrained by the procedure already set by law.

One way in which this limitation could be overcome is to explore the potential of Article 13 which states that any law made in contravention of the

²⁸ *India Today, February 15, 1999*

fundamental rights would to the extent of the contravention be null and void. The term "law" is defined as any ordinance, order, byelaw, rule, regulation, notification, custom or usage having in the territory of India the force of law.

Clear-cut ultimate solutions would be neither possible nor desirable. For this very reason, a certain amount of "openness" in legislative language would be desirable so that judges have scope to reach the best decisions in all the relevant circumstances rather than be forced by rigid rules to resolve a case in the "wrong" way²⁹.

There seems to be a tendency for the judiciary to view the concepts of group/community right and individual right as two entirely different and unconnected entities. To the extent that there is a tendency to view them as unconnected, there is the further tendency to view any conflict between individual right and group right as an attempt of the individual right to undermine the group. It also seems to legitimate the notion of viewing the group as an irreducible entity by itself.

²⁹ *Jones Peter - Rights*

CONCLUSION:

This dissertation has made an attempt to highlight the need and importance of the rights of individual members in a cultural community. It has tried to point out that sensitivity to the needs of cultural identity and catering to the entity of the cultural community by itself would not do total justice to the individual members of the cultural community. For that, one has to acknowledge various competing selves within each individual and be sensitive to the needs of the various selves. Such needs even if clearly present may be blatantly ignored. This may be because catering to these needs may be perceived as compromising on the identity of the community which is considered as a definitional and at times exclusive aspect of the identity of the members. So to prevent compromising on the identity and distinctness of the cultural community, a move is made towards greater solidarity and uniformity in the community.

This line of thought does not encourage plurality, diversity or heterogeneity. It results in the stereo typical definition of the members of the community and tends to treat the community as an irreducible entity. Such stereo typification occurs at the cost of doing away with freedom of expression, thought and conscience of individuals who comprise the community. In other words, a trade-off occurs of the rights and freedom of individual members for the solidarity of the community in the need to project a unified image of the community. The minorities are more aware of the

need to project a unified and coherent image because of their vulnerability which flows from their deficiency in numbers.

This dissertation seeks to highlight the need to be sensitive to internal differentiation and to the needs of individuals in the community, not just as individuals or as part of the community but as individual members of the community.

At the risk of sounding wishy-washy, the dissertation also reiterates the important role of cultural communities and the necessity of the provisions needed to protect their distinctness especially if they are in a minority and in a vulnerable position. This is because, of the many selves in an individual, the cultural community and its influence indisputably cater to a certain indispensable aspect of an individual need 'to belong'. Also another reason for safeguarding the cultural identity is that cultural community protects autonomy. They do this in as much as they look to guarantee the stability of the cultural environment within which the individual is able to exercise the capacity to make meaningful choices. Unfortunately, many cultures do not place such importance on choice.

What it points out is that trade offs be avoided, especially of the rights of the individual members for the sake of the community.

The Indian Constitution, though seems balanced in regard to the position of the individual and the community, the laws of the Constitution are being applied, the tendency is a tilt towards the community. This tendency is illustrated with court cases in Chapter III of this dissertation. The tilt towards

the community, particularly the cultural community, could be traced to the prevailing situation of partition at the time of the making of the Constitution. The situation necessitated social control on one hand and placating the apprehensions of vulnerable minority cultural communities on the other hand.

The error seems to lie in the attitude that the perspective of the Indian scenario in regard to rights, communities and individuals which was crystallized under the influence of the partition and in the wake of the need to have social control and accommodate cultural diversity seems to have stretched beyond circumstances. Though the need for special provisions for minority cultural communities is still needed, it is high time that the same sensitivity be extended to the individual members of the cultural communities. There are two basic aims of minority provisions :

- (a) to preserve the distinctness of the minority community; and
- (b) to assure the members of that community against any discrimination especially on the norms of equity and justice, which they may face because of being members of the minority community.

Any attempt to resolve the conflict between the rights of the individual members of the community and the rights of the community has to ensure that neither (a) nor (b) is upheld at the cost of the other.

The judiciary too needs to shed its somewhat rigid and conservative attitude and be more 'open' in ways regarding the resolution of cases in the

'right' way rather than be forced by the procedure in the Constitution to resolve a case in a manner not in conformity with human rights and human dignity.

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