RIGHT TO CULTURE AS A POSITIVE RIGHT

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DECLARATION

I declare that the dissertation entitled "**Right To Culture As A Positive Right**" submitted by me in partial fulfilment of the requirements for the award of the degree of Master of Philosophy of Jawaharlal Nehru University is my own work. This dissertation has not been submitted for the award of any other degree in this University or any other University.

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CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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For

Amma and Abba

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INTRODUCTION

The right to Culture seems to have finally arrived on the global political agenda. James Tully in a candid and unhesitating remark says, culture is "an irreducible and constitutive part of politics".[1] The end of Cold War and the fall of the Communist Block in 1989 substituted the terms of the debate that filled most of the ideological space at that time. The debates over ownership of means of production were taken over by the debates over identity and cultural affiliation. The rise of free market ideology at this time induced a change in the nature of state regulation from an emphasis on redistribution of resources by controlling market forces to a minimalist laissez faire state with a commitment to least interference in market forces. This economic liberalization engendered large scale migrations with people from less developed countries moving to more developed liberal democracies which encouraged such migration to fulfil the requirement of a larger workforce. This large scale immigration drive witnessed in the last three decades or so, made sure that almost every nation in the world today houses a variety of different religious, ethnic and linguistic groups having a cultural of their own. There are about 5000 to 8000 different ethnic and cultural groups presently accommodated in about 200 nations.[2] This is not to say that these countries were homogenous before the immigration drive, but it definitely made diversity more pervasive and gave new impetus to the social movements for recognition, where already existing indigenous people and national minorities joined hands with the immigrants to ask for a more difference friendly political setup. The initial response of the host nations was to assimilate different people into the national culture by adopting difference blind policies. There were growing attempts by the nation-states to make their populations homogenous, in the interest of maintaining the ideal of liberal citizenship which entailed equal citizenship rights for all people and strict state neutrality. These common citizenship rights were in the form of civil and political rights, where the duty cast on the state was of non-interference in the enjoyment of equal civil and political liberties by the citizens. Soon, these common rights of citizenship defined by dominant groups of people were found lacking to address the concerns of certain sections of peoples such as indigenous groups,

[1] James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity, Cambridge: Cambridge University Press, 1995, p. 5

[2] Will Kymlicka and Wayne Norman, Citizenship in Diverse Societies, Oxford University Press, 2000

ethnic and religious minorities, blacks, homosexuals who expressed the feeling of being marginalized and stigmatized despite having equal citizenship rights. In some instances, the movements for greater recognition and a multicultural citizenship took the form of ethnic and religious violence and civil war in former Yugoslavia, Rwanda, Sri Lanka, Israel, Sudan, Northern Ireland, India and disputes about identity, difference and recognition showed up in milder forms in Spain, Canada, Belgium, Americas, Australia and New Zealand. Such precarious state of affairs required some innovation and adjustment in the theory and practice of liberal democracies worldwide. Consequently, Liberal democracies came up with certain measures to ensure greater recognition and political participation of smaller cultural groups differentiated by race, language, ethnicity, and religion. These issues came to be addressed in various international agreements and cultural rights found mention and exposition in the Universal Declaration of Human Rights (UDHR), 1948. Since then, the issues of accommodation and recognition of cultural minorities have acquired great significance in the contemporary political theory and of course International Law. The adoption of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities bears testimony to this fact.

The recognition that in a liberal democracy, the interaction between the dominant majority and smaller minority cultures, under conditions of strict neutrality and formal equality, erodes 'fragile cultural forms'[3] brings cultural identity out of the private fold to the public realm and engenders positive claims by such fragile groups on the state. This recognition bases itself on the normative value of cultural identity for the individual as well as groups and legitimizes the claims of minority cultural groups as requiring special assistance or exemptions from the state for the preservation of their cultural identity. Owing to such recognition argued vigorously by liberal multicultural theorists, such as, Will Kymlicka, Joseph Raz, Charles Taylor, the liberal political thought underwent some modification from its classical version and made room for the accommodation of claims grounded in difference. This involved a loosening of the long cherished liberal principles of state neutrality and formal equality. State neutrality meant that state would provide level playing field for all individuals irrespective of which group they belong, cultural or otherwise. This meant that state would maintain distance from different cultures and ways of life, allowing

[3] Matthew Festenstein, Negotiating Diversity: Culture, Deliberation, Trust, Polity Press, Cambridge, 2005, p. 2

people to pursue their own projects within the framework of equal liberal rights. Formal equality meant no special treatment of any cultural group or set of individuals by the state, even if they are disadvantaged in certain way. In a way the economic laissez faire that was followed after the cold war, as observed earlier, got extended to cultural laissez faire, where the state does not interfere in any matter pertaining to cultural identity as a matter of principle. 'Liberal Culturalists'[4] rejected the policies of cultural laissez faire and argued that state is involved in the construction of the cultural character of the society. Will Kymlicka called this policy as the 'strategy of benign neglect'. He writes

> The members of ethnic and national groups are protected against discrimination and prejudice, and they are free to maintain whatever part of their ethnic heritage or identity they wish, consistent with the rights of others. But their efforts are purely private, and it is not the place of public agencies to attach legal identities or disabilities to cultural membership or ethnic identity. This separation of state and ethnicity precludes any legal or governmental recognition of ethnic groups, or any use of ethnic criteria in the distribution of rights, resources, and duties.[5]

He has argued that state cannot avoid involvement in shaping the cultural profile of society. Government decisions on languages, internal boundaries, public holidays and the state symbols unavoidably promote certain cultural identities and thereby disadvantage others. Examining the quotation cited above, it can be inferred that there is a major disaffection with the negative rights provided to cultural minorities in the form of freedom of speech and expression, freedom of conscience and religion, freedom of association and so on, since such a provision excludes use of any cultural or ethnic criteria in the distribution of rights, resources and duties. Negative rights are those rights where the correlative duty is of non-interference. For instance, in case of right to freedom of religion and conscience, the state's duty is to refrain from interfering in the choice and practice of any religion by an individual. It does not imply any duty of assistance or positive involvement of the state in any manner. On the other hands positive rights are rights which imply a duty of interference, where a right cannot be exercised unless the state gets involved in some way or the other. Cultural rights in most liberal democracies have existed as negative rights, where people are free to

[4] Festenstein, Op Cite., p. 67
[5] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, Oxford University Press, 1995, p. 115

pursue and develop their culture but are not given any assistance in doing so by the state apparatus.

However, an enquiry into the nature of cultural rights shows that they inherently have a positive dimension to them. Considering that language, customs and traditions, a particular education are integral components of preservation of culture, preserving and developing these components requires institutions. That is why a huge debate about the preservation of minority cultures revolves around the establishment and autonomy of minority educational institutions. Due to the fact that building and maintaining institutions requires state assistance to some extent, the claims that cultural preservation be granted as positive rights have been gaining momentum worldwide. Institutions become even more important when we consider the fact that cultural identity is essentially maintained through groups and communities. Culture has been argued to be a 'public good' by Charles Taylor and 'Participatory good' by Denise Reaume. It means that culture is a good that can be enjoyed only in community with the involvement of other people and cannot be enjoyed individually. Example of language is given as it is a good which can only be enjoyed with others. There is practically no use of my knowing a language if I cannot speak in that language with people around me. Only if somebody speaks with me in my language understands the nuances of that language as I do, I can be said to be enjoying the good of speaking my language. Liberal regime of individual rights has been found to be lacking, for the characteristics of cultural rights are such that they cannot be exercised unless the structure of the group is maintained and the group as a whole is given rights.

Need of state intervention for cultural minorities is also highlighted because they have been shown to be the victims of structural inequalities at times, which not only affects their goal of cultural preservation but also their socio-economic well being. It has been argued by Bhikhu Parekh, Iris Marion Young, among others, that often in the case of cultural minorities, the attitude of bigotry and mistrust shown by the dominant majority over long periods of time and the history of discrimination results in patterns of structural inequality which cannot be corrected by adhering to principles of formal equality and non-interference. It is here that a need for a positive right to culture for such communities is felt so that the state, through positive measures, brings about a change in the socio-political institutions in order that they do not reproduce the same inequalities again.

The scope of this study is confined to the issues raised by the preservation of cultural identity in a liberal democratic regime. Studies of similar issues raised in an authoritarian regime are outside the purview of this project. In the first chapter the distinction between negative and positive rights is explained. Since, the genesis of this distinction is situated in the work of Isaiah Berlin, 'Two Concepts of Liberty' who distinguished between negative and positive liberty, the concepts of negative and positive liberty are explored in depth so as to get a better understanding of the idea of negative and positive rights. This is followed by a discussion of the relationship between liberty and right. The purpose of this exercise is to trace the link between liberty and right in order to understand how negative rights came to be formulated for the protection of negative liberty and positive rights are purported to be formulated for the protection of positive rights. In what follows, the origins and evolution of negative rights to life, liberty and property is discussed with the help of an exposition of the political philosophies, especially with respect to rights, of liberal thinkers John Locke, John Rawls and Robert Nozick. This discussion is coupled with a discussion of the shift in liberal practice, as shown by the change in the role of the state from a police state to a welfare state. I have argued that the regime of negative liberal rights is unable to address the glaring inequalities existing among people and that the distribution of resources through voluntary exchanges between individuals are not just per se, because resources were not held evenly at the time of these exchanges. Arguments given by modern liberals for the significance of welfare rights, which are essentially positive rights, are used in support in order to bring out the inadequacy of the classical liberal version of negative rights to life, liberty and property. Lastly in this chapter, the theory developed by Stephen Holmes and Cass Sunstein is discussed, according to which all rights are positive rights because all rights in order to be effective and enforced need some kind of government expenditure. According to this account even the negative right such as a right not to be killed can be exercised with the help of state apparatus like police, courts and judiciary. What their account does is that it challenges the long held view that positive rights are expensive and an extraordinary concession from the state, when compared to basic negative rights. It establishes that positive rights are no more expensive and no more a burden on the taxpayer than negative rights as all 'non-empty' rights in order to exist, entail costs.

In the second chapter we turn to the concept of cultural rights. The term 'culture' is attempted to be described so as to make sense of what interests are sought to be protected by a regime of cultural rights. Then the place of cultural rights under international law is sought to be ascertained. This takes us to the tension between universalism and cultural relativism. Since Cultural rights in the international law evolved simultaneously with the international human rights, the virtue of universalism which underpinned the conception of human rights was also sought to be imputed to the concept of cultural rights. Subsequently though, with greater clarity on the nature of cultural rights as protecting particular interests, the concept of universal cultural rights was shown to be untenable. In the next section, the right to self determination is discussed and it is found to be enclosing the right to culture within its ambit. The right to self-determination by its very nature is hostile to the concept of absolute state sovereignty and due to the significance attached to the state sovereignty by the international agreements; right to self-determination was accepted only as subservient to the sovereignty of nation states. Due this conflict, the right to culture was adopted as a milder version of the right to self-determination. The next section discusses in detail the debates on multiculturalism as an answer to the problem of accommodation of different cultures within a cohesive democratic polity. First, it is attempted to establish the normativity of cultural identity as a constitutive element of an individual's identity. This is followed by the arguments advanced by the multiculturalists in favour of the proposition that preservation of cultural identity is a legitimate goal to be pursued and should be promoted by a liberal state. Two kinds of arguments are advanced, (i) asserting the instrumental value of culture in promoting the core liberal value of individual autonomy and (ii) asserting the non-instrumental value of culture in taking the pursuit of culture and cultural diversity to be a good in itself. The critic of multiculturalism mounted by the anti-essentialist, the libertarian and the neutral egalitarian is discussed next. I have argued that multicultural approach is more feasible to adopt because liberal democracies by their very nature, bring the numerically inferior groups in a position of disadvantage which in turn, produces the feeling of alienation and marginalisation among the cultural minorities.

In the next chapter, the case of Indian Muslims is taken as an empirical study to establish the line of argument adopted in the second chapter. A careful study of the kinds of minority rights existing in India is undertaken. This chapter makes a considered assumption based on

the works of Nancy Fraser and Iris Marion Young that claims of recognition and redistribution are always imbricated with one another and that the claims of recognition are not always made for the sake of asserting identity but very often they encapsulate within them the claims for socio-economic amelioration or greater participation in the decision making processes. First section deals with the history of minority safeguards in India right from the colonial times. The second section on the post independence scenario identifies the characteristics of the difficult terrain that minority rights in India have had to tread and the factors responsible for it. An attempt is also made here to identify relationship between the 'minority question' and the question of backwardness and how the claims of Indian Muslims grounded in culture have become the basis for the claims for socio-economic upliftment including reservations in jobs and educational institutions. The response of the Government of India to such claims is attempted to be gauged by analysing two recent reports on the conditions of Indian Muslims. The Sachar Committee Report and the Ranganath Misra Commission Report are studied for the recommendations they make and the two different approaches towards affirmative action, their recommendations promulgate. Both the reports envisage certain positive rights for the minorities inasmuch as both of them create positive obligations on the state. While the Sachar Committee Report adopts a minimal or more adjustive approach in terms of the burden it imposes on the state, on the other hand Misra Commission Report takes a more extravagant stance and recommends reservations in Government jobs and educational institutions for minority. This has the effect of creating new set of obligations on the state. The state's response however comes out to be tilted in favour of the later report because of the gains it brings to political incumbents in electoral politics.

CHAPTER ONE

WHY POSITIVE RIGHTS?

Negative and Positive Rights: Species of the Two Concepts of Liberty

The distinction between positive and negative rights has its roots in and derives from the customary distinction between positive and negative liberty. As such, it goes back to the times of Hobbes, Locke and Mill who introduced and expounded the idea of negative liberty in their works, and with that laid the foundations of the liberal school of thought in political philosophy. The idea of positive liberty also has its roots in the works of J.S. Mill. However, The distinction between the two came to be carefully explicated by Isaiah Berlin in his famous essay, 'Two Concepts of Liberty'(1958). Thinking about freedom and thereafter rights in terms of these two senses, that is, positive and negative, made serious inroads into the works of political philosophers only after the aforementioned essay by Berlin.

In this essay, negative liberty is characterised by the absence of restraint, obstruction or any kind of interference in whatever a person wants to do or become. A person shall be considered free in a negative sense to the extent that he is not obstructed in doing or

becoming what he is able to do or become. Negative liberty here is thought to be something which forms the answer to the question - 'What is the area within which the subject - a person or group of persons - is or should be left to do or be what he is able to do or be, without interference by other persons?'[6]The negative liberty of a person constitutes the area of personal freedom where no one can interfere. It is in effect freedom from interference, but Berlin marks out that it is not to be confused with the inability to do something. For instance, if I am unable to jump and pluck a mango because I am too short or I am unable to go for a journey around the world and unable to do so many other things because of my poverty, these cannot be treated as signifying my lack of freedom. It will only be regarded as a lack of freedom if I believe that human actors have had a role to play in bringing about my poverty or my short height. The involvement of the human agent, or rather the belief in the involvement of a human agent in the deprivation that I am suffering, is essential in order to attribute this situation of mine to lack of freedom, or infringement of freedom. Thus, non-interference by others is the essence of the negative sense of liberty. But this non-interference does not extend to the point where a person, while exercising his own freedom, encroaches or infringes upon the freedom of another. Most ardent of the supporters of negative liberty, the classical liberals like John Locke, J.S. Mill, Benjamin Constant had all agreed that since the minimum personal space of negative liberty qualified by non-interference is important to every individual, this space for each individual shall be limited by the condition of non-violability of the space of others. In other words, the negative liberty of a person can be curtailed or interfered with if, in the exercise of his liberty, he tends to encroach upon the negative freedom of other individuals.

Positive Liberty on the other hand is characterised by a presence of control, self determination, and self realization.[7] The notion of positive liberty derives from the human desire to be in control of the affairs of his life. Everyone wants to be his or her own master. In the words of Berlin, "I wish to be somebody, not nobody; a doer deciding, not being decided for, self directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies off my own and realising them."[8] Positive liberty is essentially about 'freedom to' in contradistinction to 'freedom from' which characterises the negative version of it. It consists

[6]Isaiah Berlin, *Two Concepts of Liberty*, 1958, p. 2; later in Isaiah Berlin, *Four Essays on Liberty*, Oxford University Press, 1969, pp 121-22.
[7] Ian Carter, Positive and Negative Liberty, *The Stanford Encyclopedia of Philosophy*, Spring 2012.
[8]Isaiah Berlin, *Two Concepts of Liberty*, 1958, p. 8.

in the freedom to make my own plans and execute them in my own way, to chart my own course and not being directed by anyone. The interesting thing is that 'not being directed by anyone' is also taken to include an individual's own internal urges and passions which tend to take him away from his real or cherished goals. Let us consider an example to bring out the difference between negative and positive liberty more clearly.

> Suppose A is driving a car through town, and he comes to a fork in the road. A turns left, but no one was forcing him to go one way or the other. Next he comes to a crossroads. He turns right, but no one was preventing him from going left or straight on. There is no traffic to speak of and there are no diversions or police roadblocks. So he seems, as a driver, to be completely free, but this perception might change if we consider that the reason he went left and then right is that he is addicted to cigarettes and he is desperate to get to the tobacconists before it closes. Rather than driving, he feels that he is being driven, as his urge to smoke leads him uncontrollably to turn the wheel first to the left and then to the right. Moreover, he is perfectly aware that his turning right at the crossroads means he will probably miss a train that was to take him to an appointment he cares about very much. He longs to be free of this irrational desire that is not only threatening his longevity but is also stopping him right now from doing what he thinks he ought to be doing.[9]

Now, in this example, A is free in the negative sense of the term freedom in as much as he is not obstructed by any external human agent on his way. There is complete absence of any obstacle in any form whatsoever. On the flipside, he is not free in the positive sense of the term freedom as he is lacking control over himself. In order to be free in this sense, he must be self determined, that is, he must be able to direct himself in his own interests, but here as we see, he falls prey to his innate urge to smoke which he himself consciously wants to get rid of and which he knows to be stopping him from realizing his own truly cherished ends. Thus, A is not positively free here. Berlin contends that the 'self' in an individual is divided and he identifies these two kinds of 'self' as follows. One is the rational self that is reflective of its actions and calculates what it wants in the long run and acts according to it. This self takes responsibility for its actions and is called 'higher self' and the 'autonomous self' by Berlin. On the other side is the lower self that gets affected by every burst of desire and passion. It is identified with the self of irrational desires, temporary impulses and needs to be kept in check. It does not take moral responsibility for its actions and is called the 'heteronomous'and the 'empirical' self by Berlin. In the example cited above, the self that gives in to the irrational desire to smoke is the lower self and is inferior to the higher self which wants to meet its appointments and is not a slave to the irrational passions. So, one can

[9] This example is taken from Ian Carter, *Positive and Negative Liberty*, The Stanford Encyclopedia of Philosophy, Spring 2012.

be said to be free if his autonomous self is in control and the heteronomous self is not allowed to direct actions, and this is so when one is not a slave to his irrational desires.

Based on this, Berlin identifies a paradox that he calls 'the paradox of positive liberty'. This paradox unfolds when it comes in conflict with the negative liberty. It happens when a person or a group of persons claim to be more rational than others and start to coerce them into doing certain things which they claim is the requirement of their autonomous, real selves. Berlin states that history has witnessed a lot of dictators who justified their actions in this manner. They completely ignored the actual demands or needs of the people which they understood as the demands of their merely empirical selves and claimed that they are actually liberating them of their lower selves. The people under these dictators were considered to be ignorant of their real selves and thus these dictators claimed to be helping them in their pursuit of self realization. So, Berlin categorically pointed out the dangers of paternalism and authoritarianism that go with positive liberty. He also says that sometimes the autonomous self is understood to be wider than the individual himself and is taken to include social wholes like, tribe, clan, church or state and therefore the true interests of an individual are identified with the interest of the whole tribe or state and have to necessarily conform to the interest of the whole. This situation provides fertile grounds for the infringement of negative liberty of individuals as has been corroborated by historical evidence in the form of Soviet and erstwhile dictators of the cold war era. This is why classical liberals like Locke, Constant and Mill who were ardent supporters of negative liberty did not support positive liberty because of its tendency to jeopardize negative liberty in the manner cited above. Political Liberalism holds on to the principle of negative liberty as it founding principle.

How is the notion of positive liberty relevant to political thought and what are its implications forsocial and political institutions? This question is intriguing because positive liberty seems to be concerned with the factors that are internal to an individual or a group of individuals as to whether the individual or the group is able to act autonomously in accordance with their higher selves or not. Such is not the case with the concept of negative liberty because it is concerned with factors that are external to the agent inasmuch as one should not be interfered with or obstructed by any external agent in the pursuit of one's goals and this is where the role of state and the socio-political institutions within it becomes relevant. A political thought obsessed with the ideal of negative liberty generates a politics where the effort is to form such political institutions which ensure that the state does not transgress an individual's negative

liberty and the weight of the state's resources is put behind securing individual freedom in the negative sense from all possible threats coming from various agents. This effort to ensure political freedom translates into the entitling of individuals with 'rights'. Granting rights such as right to life and personal liberty, right to freedom of speech and expression, right to freedom of religion and conscience and other such rights has been the method deployed by the countries with a liberal tradition to secure the negative freedom of its citizens. Especially after enduring the horrors of World War II, not only countries with a liberal tradition but countries with different political philosophies came together in agreement on the need to protect the above stated rights at all costs which culminated in the adoption the Universal Declaration of Human Rights(UDHR), 1948, under the aegis of the United Nations. This document defined an elaborate list of rights and obligated all the signatory states to make provisions in their respective domestic laws in order to enforce them. Rights are indeed a powerful mechanism to this effect as they endow the rights holder with a status by virtue of which he can make claims, which can be legally enforced, against the state or anyone else who tampers with his liberty. And such rights, which have been formulated to protect the negative liberty of a person have come to be known, in the political grammar, as 'negative rights'. On the other hand, as we shall see later, rights invented to vindicate the positive liberty of people have come to be termed as 'positive rights'. The list of rights contained in the UDHR mentions both negative as well as positive rights and the way the procedure for their implementation has been laid down coupled with the problems raised by the signatory states in enforcing them, brings out the difference between the negative and positive dimensions of rights, as shall be observed in the second chapter[10], even more clearly.

Disentangling Liberties and Rights

When I contend in the statements made above that rights have been formulated to protect the liberties of people, I do not mean that rights and liberty are one and the same thing. There have been several legal thinkers, especially the ones associated with legal positivism, who take rights and liberties to be the same and their argument is based on the proposition that everyone has a right not to be interfered with in the exercise of his liberties. But this seems to be a fallacy as explained in the works of legal jurists, who dealt with the concept of rights in detail, such as Salmond, Hohfeld and Glanville Williams. They all have interpreted rights and

[10]See the section on 'Cultural Rights: Their Formulation in International Law' in the next Chapter.

liberties to have different meanings, while accepting that mostly the liberty to do something carries a right to do that thing as well, but they also point out many occasions and examples where a liberty does not have a corresponding right to it, but is still exercised as a liberty.

Salmond identified three different categories into which the notion of rights, which was applied until his time in a broader sense to "any advantage or benefit which is in any manner conferred upon a person by a rule of law"[11], is to be divided. (1) Rights in the strict sense, defined as interests protected by the law by imposing its duties with respect to the rights upon other persons, (2) Liberties; defined as interests of unrestrained activity and (3) Powers, when the law actively assists me in making my will effective[12]. He identified three types of legal obligations or burdens correlative to the above three categories of advantage or benefit as duties, disability and liability. Correlatives are burdens which go hand in hand with the benefit, such that a benefit cannot exist without its correlative burden. For instance, I have a right against B that he cannot enter my land only when B has a duty not to enter my land.

Hohfeld, in his highly influential work[13] took forward the scheme of Salmond and went on to identify eight legal conceptions that were enmeshed in the notion of rights. Hohfeld preferred to call the liberty of unrestrained activity a 'privilege'. He derived eight legal conceptions out of his dissatisfaction with the idea that all kinds of jural relations between two people could be reduced into rights and duties. He classified jural relations into a scheme of correlatives and opposites. They can roughly be put as:

Jural	rights	privilege	power	immunity
Opposites	no-rights	duty	disability	liability

Jural	right	privilege	power	immunity
Correlatives	duty	no-right	liability	disability

[11]John Salmond, *Jurisprudence*, London: Sweet and Maxwell, Limited, 1937 p. 299 (first published in 1902).
[12]Ibid., P. 299,304.
[13]Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, *Yale Law Journal*, Vol. 23, No.16, 1913.

Correlatives, as discussed by Hohfeld, are two legal positions that entail each other and opposites are two legal positions that deny each other, such that every pair of correlatives must always exist together and no pair of opposites can ever exist together. We are concerned with rights and privileges here. Hohfeld said that the word 'rights' has been used indiscriminately to cover the relations of privilege, power and immunity at times. Explaining the correlatives right and duty, he said, "if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place."[14]According to him, the word 'Claim' would suit the best to denote rights in this strict sense. While talking about privilege, referring to the same example as cited above, he says, "X has a *right or claim* that Y, the other man, should stay off the land, while he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off."[15] So, simply put in Hohfeld's terms, liberty is a negation of duty.

I have a liberty to take a walk down the street because others are disabled from interfering in my walk. But here others are not duty bound, as they can also take a walk down the street in the exercise of their liberty and it may be the case that so many people come down the same street which happens to be narrow that I can no longer take the kind of walk I was contemplating, but I cannot sue them or bring in the authorities to take action against them. In this case, it appears prima facie that other people have a duty not to stop me from walking, but according to Glanville Williams, the duty does not correspond to my liberty to walk, but it corresponds to my right not to get assaulted. So, what appears to be the duty of other people not to interfere in my walk is actually a duty not to assault me, because the act of someone stopping me from walking constitutes an assault. And this duty derives from my right not to be assaulted. This is an example where my liberty to walk along the street is supported in its exercise by my right not to get assaulted, but there are many cases where this is not so. As explained by Glanville Williams[16], a right exists when there is positive law on the subject which confers the said right and lays down the correlative duty, whereas a liberty exists when there is no law against it. Therefore, 'my liberty to walk along the street is merely an expression of the fact that there is no law against it and is different from my right not to be assaulted.'[17] In the words of Glanville Williams liberty is defined as "any occasion on which

[14]Ibid., p. 9.
[15]Ibid., p 10.
[16]Glanville Williams, The Concept of Legal Liberty, *Columbia Law Review*, Vol. 56, No. 8, 1129 -1135, 1956.
[17]Ibid., P. 1143.

an act or omission is not a breach of duty. When I get up in the morning, dress, take breakfast, and so on, I am exercising liberties, because I do not commit legal wrongs."[18]

We find some fine examples in Williams' work where a liberty to do something exists independently of any right to do so, thereby bringing out the distinction between right and liberty very clearly. In one such example, A and B are walking together when they find a gold watch lying in front of them. A has the liberty to run forward and pick it up, but B might run faster than A and pick it up first. This will de facto be an interference with A in the exercise of his liberty, but it will not be a tort or any other legal wrong to A. There is no law prohibiting B's action in this case and thus B is under no duty not to interfere. A's liberty here is a bare liberty unsupported by any right. In another such example, "I am in need of a cook and after much inquiry I find a good cook who is willing to take employment with me. I have a liberty and power to employ her, but you commit no wrong by offering better wages and substituting me."[19] Talking about rights further in his paper, Glanville Williams contends that right in the strict sense of the term always relates to the conduct of another person, and not to the conduct of right holder himself. This is because 'no one ever has a right to do something; he only has a right that someone else shall do (or refrain from doing) something.'[20]On the other hand, a liberty relates to the conduct of the holder of the liberty himself. Here, when he says that 'he only has a right that someone else shall do or refrain from doing something', he recognizes the difference between rights which cast a positive duty on others - duty to do something and rights which cast a negative duty - duty to refrain from doing something.

Drawing together the discussion above, we can say that liberties in respect of which duties have been fixed by law, have attained the form and content of rights and they operate as rights, while innumerable other liberties, not qualified by any duties, such as waking up in the morning, having breakfast, going for a walk, and so on are liberties simpliciter. Basically, liberties comprise of all the permissible actions that we can possibly do, all the acts which are not proscribed by any law, and the doing of which does not entail the protection of authorities. But certain liberties which were thought to be needing the explicit protection of law like the freedom of speech and expression, freedom of movement have been transformed

[18]Ibid., P. 1129.
[19]Ibid., p. 1144.
[20] Glanville Williams, op cit., p. 1145.

into rights by laying down specific duties, breach of which can be forcefully corrected by law.

Positive Liberty to Positive Rights

Let us return to the concept of positive liberty as expounded by Berlin. This seems largely concerned with internal factors, the factors of heart and mind of a human being which have nothing to do with any external agents. And if we try to translate it into a right it comes closest to the right to self-determination, or in an extended form, the right to participate in the process of forming government. As per this concept, a group of people which governs itself is said to be positively free and thus a democratic society would be considered free according to this exposition. We talk about society here because, recalling Berlin's autonomous self, it is a self which is wider than the individual and generally includes collectivities like, church, tribe, state and positive freedom has been contemplated to be achieved through such collectivities. This is not to say that positive freedom cannot be conceived in terms of an individual. In a democratic, self determined society, an individual is positively free to the extent that he participates in the democratic process. But is mere participation in the governing process enough to make an individual free in the positive sense?

In order to better appreciate this question, we need to reconsider the point that Berlin makes while discussing the two kinds of liberty. There he says that mere inability to do something is not to be regarded as lack of freedom and least of all, lack of political freedom, unless that inability is believed to be brought about, directly or indirectly, by human agents. My inability to take a trip round the world or to get higher education or to get a proper accommodation because I am too poor to pay for them cannot be attributed to my lack of freedom unless I believe that such arrangements have been made by human agents around me that I am constrained from earning money due to which I am poor. I am not free to the extent that I believe so. And, here I do not get to decide who makes such arrangements and in what

manner I am being constrained from earning. Nor do I get a chance to participate in this process. We know that positive liberty essentially means self-control, the ability to govern one self, to manoeuvre the course of life according to one's plans, self–realization. Now, if the case cited above is true, that is, if I am deprived to such an extent that I cannot afford the basic requirements of life and if I believe that my deprivation has been caused by the role of human agents, then what becomes of my positive liberty? I can surely not be expected to achieve self-realization and I am definitely constrained from doing what my autonomous self tells me to do and thus, I cannot be said to be positively free by any account. Now, if such is the case, and indeed many great thinkers like Rousseau, Marx, and T.H. Green actually believed it to be so, then who is to ensure or restore my positive liberty? In the case of negative liberty, the polity entrusts the state machinery with the protection of negative freedom of its citizens by enacting relevant laws and entitling individuals with rights. Can 'positive freedom' also be achieved through state action? And can the state possibly promote positive freedom of citizens by aiding them in their own efforts or by creating conditions conducive for attaining it? The aforementioned thinkers in support of the cause of positive liberty have answered these questions in the affirmative, and have shown that politics is responsible for the loss of positive freedom and politics alone can restore the positive liberty of people. The arrangements that restrain my positive liberty are assumed to be controlled by the state because we collectively give to the state, the agency to govern ourselves. We will see in the next section the way we make the state, the upholder of our liberties, through a contract. This makes the claims on the state, to restore our positive freedoms by recognizing our positive rights, theoretically plausible. Now, as in the case of negative rights, can we cast a duty on the state to provide people with necessary resources for them to be able to lead a self determined life? In other words, can we move from negative liberty to positive liberty and then towards positive rights? This question has attracted a lot of debate and though we can see a movement towards positive rights, it has been difficult, slow and cautious to say the least and this has to do with the content of the duty that a regime of positive rights casts on the state. While the duty imposed by negative rights is merely a duty of restraint in as much as it lays down what the state shall not do, the duty imposed by positive rights lays down what the state must do, it puts affirmative obligations on the state. Let us examine briefly, the background of this negative-positive debate.

The Disaffection with Negative Rights

In the history of western political thought, especially from the post-enlightenment era, liberties have been understood as negative liberties and rights flowing from them as negative rights. This is because in those days of authoritarian regimes, the major threats to liberty were understood to be coming from the subjugation of weaker sections by the powerful groups and especially from the institution of state with unassailable powers, which used to be considered as the main oppressor. Therefore, the idea of liberty was to save people from force, subjugation, interference in their lives, to secure for individuals a private space for themselves wherein no one could have a say except the individual himself. These concerns were addressed by several philosophers who propounded the liberal way of thinking as an answer to the above concerns.

John Locke, considered as one of the first liberal political philosophers, was a fierce defender of individual freedom against the forces of authoritarian repression. He believed that human beings are born free and equal and they have natural rights to life, liberty and property which are inalienable and exist independent of any worldly authority. They existed prior to any government. Before people could come together in agreement to form a political authority, they used to live in a 'state of nature', which is a situation where there is no legitimate political authority, no common judge to resolve disputes and people live in accordance with the 'law of nature'.."Men living according to reason, without a common superior on earth, to judge between them, is properly the state of nature."[21]The law of nature, according to Locke, is the law of reason because the law of nature can be discovered by reason alone and it applies to all men irrespective of their place of habitat and of whatever agreements they had made. Locke believed that, emerging from this state of nature, individuals came together by their own volition and consent to create political societies and any special obligations operate only when individuals voluntarily agree to them. The central postulates of Locke's theses can be summed up as:

(i) That all persons are naturally free, born to a set of natural rights to freely govern their own lives within the bounds of natural law.

[21]John Locke, Two treatises (2.19) in Alex Tuckness, Locke's Political Philosophy, *The Stanford Encyclopedia of Philosophy* Winter 2011 Edition.

(ii) That labour is the sole source of original property, grounding for the labourer private property rights in the products of that labour (provided that enough and as good of what nature provides is left for others).

(iii) That free consent is the sole source of legitimate political authority and of correlative political obligations of citizens in a free society

(iv) That political authority is limited in its legitimate scope to securing by legal coercion persons natural rights to life, liberty, health and estate.[22]

As can be seen from the above postulates, Locke vouched for a minimal state with the primary duty to protect individual's life, liberty and property. And as the words 'limited in its legitimate scope' suggest, the duty on state is essentially negative inasmuch as state will come into action only when rights to liberty, life or property are threatened or infringed, and the scope of duty does not extend to anything else such as positive actions to enhance quality of life or liberty of the people.

Similarly, the strict demarcation between private and public realms, central to liberal philosophy is conspicuously displayed in Locke's theory. According to him, "my religion is my own business like my finances my health and my family life. What I labour to produce is private to me, an extension of my person. Provided only that I observe the requirements of natural law, these private matters are beyond society's rightful reach."[23] The public realm, on the other hand is a just framework of institutions which is designed only to safeguard our basic rights and ensure a secure and peaceful society. The proper end of society, according to Locke is no more than to provide peace and security for the private endeavours of people. This view of Locke forms the genesis of the liberal emphasis on limited government and the resulting steadfastness to negative rights. This approach got further elaborated and justified in the works of J.S. Mill, Kant, Benjamin Constant.

But this approach supporting a minimalist state with merely negative duties of non-interference soon came to be criticised on different counts. Egalitarians were troubled by the growing divide between the lives of rich and poor and blamed it on the approach of giving extra importance to negative rights and liberties while exhibiting apathy towards the real lives

[22]A. John Simmons, *Locke's introduction* in Steven M. Cahn ed. *Political Philosophy: the essential texts*, New York, 2005, p. 245.
[23]A. John Simmons, op Cit., p. 244.

of ordinary people. Even within the liberal strand of thought, excessive tenacity to traditional rights and liberties which were civil and political in essence, without caring about the material well being or the socio-economic conditions of people, was shown to be an infructuous exercise. The argument went like this: if a person is in such a precarious material condition that he cannot exercise or make use of his civil and political liberties, then what good are these liberties to him. To quote from Waldron, "why on earth would it be worth fighting for a person's liberty (say his liberty to choose between A and B) if he were left in a situation in which the choice between A and B meant nothing to him, or in which his choosing one rather than the other would have no impact on his life."[24]But Berlin maintained that conditions for the exercise of liberty are not to be confused with the extent of liberty itself. He recognised that there are other important goods to be pursued in life other than liberty, equality being one such good. And there might be a situation where I, myself being free, am agonized to see that my fellow brothers who happen to be under an authoritarian regime are not free and I am ready to sacrifice my liberty in order to secure theirs. According to Berlin, this will not entail any increase in liberty. Berlin said,

> it is true that to offer political rights or safeguards against intervention by the state to men who are half-naked, illiterate, underfed and diseased is to mock their condition; they need medical help or education before they can understand, or make use of an increase in their freedom. What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom what is the value of freedom?[25]

Here we see that though he maintained that from an analytical point of view, 'liberty is one thing and the conditions for it are another', but he recognized the perils of utter neglect towards the socio-economic well being of people.

Marx's analysis is by far the most severe critic of the liberal approach to rights. He called the negative civil and political rights as 'bourgeois rights' and said that this "narrow horizon of bourgeois rights" together with the laws and customs have been devised by "egotistic man, man separated from other men and community."[26] For Marx, liberal rights and the concept of justice, which are based on the premise that every individual needs protection from fellow human beings, work to separate human beings with each other. Liberal rights are rights of separation, designed to protect us from such perceived threats. This view of freedom takes

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[24] Jeremy Waldron, *Liberal rights: Collected papers 1981-1991*, New York, 1993, p. 7.
[25] Isiah Berlin, *Four Essays on Liberty*, London, 1969, p. 124.
[26]Karl Marx, Early Texts, ed. Daniel McClellan, Oxford, 1971, p. 102 in Thomas Halper, *Positive rights in a republic of talk: a survey and a critique*, Kluwer academic publishers, The Netherlands, 2003, p. 29.

freedom to be freedom from interference and according to Marx "what this view overlooks is the fact that real freedom is to be found positively in our relations with the other people. It is to be found in human community, not in isolation".[27]

The glaring inequalities between the rich and the poor, the disenchantment of the poor, working classes of people with their civil and political liberties and the diminishing worth of these liberties brought about a realization that "if one is really concerned to secure the civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of a person's life that make it possible for him to enjoy and exercise that liberty."[28] Rights formulated to improve these conditions of a person's life, and to ensure a minimum subsistence standard of living have come to be known as 'second generation rights' in the international human rights regime after the 'first generation rights' comprising the civil and political rights. The second generation rights are composed mostly of social and economic rights which are intended to bring the socio-economic status of an individual above a certain basic level. These rights are commonly termed as positive rights as they entail a positive duty of providence, rather than mere non-interference. That is why the Universal Declaration of Human rights adopted in 1948 is full of such positive rights. According to Art. 25(1) of the UDHR,

> everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood beyond his control.

Even President Franklin D. Roosevelt in his speech delivered as part of the 1941 State of the Union address referred to four fundamental freedoms which all the people everywhere in the world ought to enjoy; out of which two are essentially positive freedoms. They were (a) freedom of speech and expression, (b) freedom of worship, (c) freedom from want, (d) freedom from fear. The last two freedoms being positive in nature went against the constitutional values of the US, set forth in the First Amendment, which were more in tune with liberal conception of rights.

A few years later, in Britain, mounting a social democratic critique of liberalism, T.H. Marshall emphasized and distinguished between the civil, political and social aspects of citizenship rights and invoked the concept of social rights as essential to the citizenship

[27] Jonathan Wolff, Karl Marx, *The Stanford Encyclopedia of Philosophy*, Summer, 2011.
[28] Jeremy Waldron; *Liberal rights: collected papers 1981-1991*, New York, 1993, p. 18.

status. The social aspect of citizenship rights was defined by him as a right to a "modicum of economic welfare and security and the right to share to the full in the social heritage, and to live the life of a civilised being according to the standards prevailing in the society."[29] Now, his words 'to live the life of a civilized being according to the standards of the society' couch within them all major positive rights like right to work, health, education, clean environment and whatever else is necessary for a person to come up to the standards prevailing in the society. Deriving from this social aspect of citizenship as put forth by Marshall, the Labour Party in Britain came up with the institution of the 'welfare state' indicating that the state duty now would not only be confined to maintaining peace and security, but would be conceived as including the duty to provide with the above standards for all people.

John Rawls's 'A Theory of Justice' captured the above concerns regarding the state's duty to provide with certain minimum living standards by mitigating the liberal insistence on a minimal state by making it more accommodative of the claims grounded in equality. Although, echoing the conviction of Berlin, Rawls also said that a "lack of means is to be counted as affecting the worth of one's liberty, not the extent of liberty itself",[30]his theory of justice marked a departure from the tradition established by Locke and his successors. He proposed a conception of justice which, while remaining committedto the sanctity of individual rights, is equally committed to the egalitarian ideal of fair distribution and in that he showed the "practical possibility of a form of constitutional democracy ensuring both liberty and equality".[31] Rawls's *Theory of Justice* is based on the two principles of justice he propounds. The first and lexically prior principle of equal basic liberties says that "each citizen has an equal right to the most extensive system of equal basic personal and political

[29]T.H. Marshall and Tom Bottomore, *Citizenship and Social Class*, Pluto Press, London, 1992, p. 8

[30]John Rawls, A Theory of Justice, Cambridge, Mass, 1971, p. 204; Cited in supra note 22, p. 18.

[31]Joshua Cohen, *introduction to John Rawls* in Stephen M. Cahn ed. *Political Philosophy: essential texts,* New York, 2005, p. 473.

liberties compatible with a similar system of liberties for others."[32] This principle is interpreted to envisage the strict protection of specific liberties like liberty of thought and expression, association and other rights and liberties associated with the rule of law. The second principle of justice has two components both of which operate in setting the limits to the acceptable extent of socio-economic inequalities. The first one says that "when inequalities are attached to offices and positions, say when different jobs are differently rewarded, those offices and positions must be open to everyone under conditions of fair equality of opportunity."[33] Basically, according to this principle, everybody who is equally fit and qualified should be having equal opportunity to get to their desirable positions notwithstanding the differences in their socio-economic status. The second component is called the 'difference principle' and it states that institutions which generate unequal holdings owing to the differences in natural talents and endowments are fully just only if they are to the greatest benefit of the least well-off.

According to Joshua Cohen, this principle requires an economic structure which reduces the inequalities in income and wealth owing to differences in natural talent. Further commenting on the joint effects of the two principles of justice, he says that

> The first principle ensures equal basic liberties and the difference principle guarantees that the minimal level of resources is maximized…if the worth of person's liberty is an increasing function of the level of that person's resources, then by maximizing his minimum resources we also maximize the minimum worth of his liberty.[34]

Thus Rawls tried to bring closer the two competing goals of liberty and equality.

But Robert Nozick is not impressed by the egalitarian version of liberalism and severely criticises the contemporary accounts of liberalism like the one given by John Rawls and thee one followed by welfare states. His philosophy seeks to revive the classical version of liberalism and his arguments inherit and echo the Lockean tradition of natural rights to liberty and property. His conception of justice relies on absolute constraints imposed on people's behaviour affecting others and consent is the central element in his conception of justice. For him, "whatever comes by the voluntary consent of people who do not violate the rights of others is just and any attempt to interfere with this process is an illegitimate interference with

[32] Ibid.
[33] Ibid., p. 474.
[34] Joshua Cohen, op cit.,pp. 474-475

liberty."[35] According to Nozick, any attempt to establish a pattern of distribution along egalitarian or any other basis, threatens the freedom of people to do what they want to do with their possessions. This is because, in order to maintain any pattern of distribution, interventions would be required in the event of any damage done to the pattern by consenting adults. He states that whatever comes out of the voluntary consent of adults without violating the rights of others is just and should not be tampered with. His thrust is on protecting the rights of people which come with the ownership of their holdings if they have legitimately acquired them. For instance, I should not be interfered with if I try to sell, mortgage or gift my land or other possession to someone when both of us have consented to this transfer. He emphasizes that power to dispose of one's possessions – to give them away, to exchange them for others, to determine what will happen to them after one's death-are very important.[36]Nozick says that even egalitarians assume that to distribute a good to a person necessarily entails giving him some powers, over that good, of this kind. Then he argues that interests protected by such powers should be weighed against various considerations supporting equality. Now, a serious question to be asked here is that voluntary transactions among consenting equals indeed makes the transaction and its consequences just, but what about the initial transactions when a person acquires holdings from previously unowned things. Locke argued that one may legitimately acquire property from previously unowned things in order to satisfy needs in a manner that enough and as good is left for other people. Now, it is difficult to believe that without some restraint or regulation by a political authority, people may be stopped from acquiring more than what is required. Nozick does not say much about the basis of calling the initial acts of acquiring property legitimate. He merely mentions a principle of justice in acquisition, which if followed by a person, his holding shall be considered legitimately acquired. The question is on what basis should we assume that all previously held holdings were justly acquired? The question of exchange also depends on this because no exchange can be valid unless it is shown that holdings in question were previously legitimately held. Thomas Christiano raises an important criticism saying that when one legitimately acquires something previously unowned, one restricts others from using it and in effect, the liberty of others is curtailed without their consent. That is why egalitarians ask for a justification of inequalities in the initial resources. Nozick replies that such a demand for justification would be valid "if these were the result of some centralised

[35]Thomas Christiano, *Robert Nozick: introduction* in Stephen M. Cahn ed. *Political Philosophy: essential texts*, New York, 2005, p. 493.

[36]Thomas Scanlon, Nozick on Rights, Liberty, and Property, *Philosophy and Public Affairs*, Vol. 6, No. 1, 1976, p. 10.

mechanism of distribution. He rejects this demand on the ground that, such inequalities do not result from 'state action' but instead flow from independent actins of many individuals all acting within their rights."[37]I do not find any strong reasons to believe that in such a situation where there is an absolutely minimal state, or even under the State of Nature, as contemplated by Locke and Nozick, the initial acquisitions made by people according to their perceived needs were just. I think that where there is no centralised mechanism of distribution, the chances of arbitrary and forceful acquisitions increase because consent is not always free. Consent can be vitiated by a lot of factors like fraud, misrepresentation, coercion and undue influence. We cannot say for sure that the first exchanges and acquisitions that happened between human beings were all just and legitimate.

The point that the champions of negative liberty miss in my considered view is that they assume that every individual is similarly placed and has similar circumstances, so that when guarantees of non-interference from any external source are provided to them, they are expected to grow and progress in their respective life plans at a similar pace, with similar ease. This approach turns the quest for resources into a race. In today's world where resources are scarce, this turns into a race for appropriation. And this race is between people with different abilities and endowments. Disabled are also there and able bodied as well and in such a scenario the result reflects the difference in their natural endowments, whoever being the stronger appropriates more and more, the weak get nothing and the state witnesses this race from a distance adhering to its vow of non-interference. And being strong or weak is governed by the fact of how much one has already appropriated before coming into the race. Thus, due to the initial inequality in distribution we have our resources unevenly held, which calls for the need to redistribution.

There is also another argument which says that being worse off in a society where the general standard is way ahead, that is, where majority of people are well-off, is a bad in itself. It doesn't matter whether initial allocations were just or not; the state has to indulge in redistribution as one of its primary functions.

[37]Thomas Scanlon, Nozick on Rights, Liberty, and Property; Philosophy and Public Affairs, Vol. 6, No. 1, 1976, p. 9.

Henry Shue[38] has argued that no one can fully enjoy any right that he is supposed to have if he lacks the essentials for a reasonably healthy and active life. Rights safeguarding individual autonomy, rational agency and independence are no doubt cherished by us, but we also know that "things like malnutrition, epidemic disease and exposure can easily destroy the human capacity that these rights presuppose. There is no prospect of an individual living the sort of autonomous life that we have in mind when we talk about liberty if he is in a state of abject and desperate need."[39] Waldron further argues that "the human autonomy that is at stake when we stop people from attacking or threatening one another is no less at stake when individuals are reduced by hunger or fear of destitution to desperate pleading for subsistence."[40]

Stephen Holmes and Cass Sunstein on the other hand have given a totally different perspective on the distinction between positive and negative rights. Far from considering positive rights as vague, complex, costly, and burdensome on the state and society, as they have been for long taken to be, they contend that all rights are positive. First, they contend that the only meaningful rights are those which can be legally enforced thereby rejecting any account of moral rights. Then they proceed to say that since all acts of enforcement entail expenditure like the use of police, judicial officers, executioners and so on, they constitute positive claims on the state. Basically, Holmes and Sunstein challenge the long accepted view that 'property rights limit government expenditure and taxpayer's burden by constraining the permissible range of government action and welfare rights increase the government expenditure by expanding required range of government action. Contesting the customary distinction between the 'negative property rights of the laissez faire state and the 'positive' welfare rights of the regulatory state they repeatedly emphasise the point that government has to necessarily allocate considerable resources for the enforcements and maintenance of all rights whether positive or negative. According to them, going by the definition of rights which excludes 'empty rights' (rights not recognized by law), the very existence of any right implies significant government investment in enforcing that right. The 'costs' associated with the existence of rights per se, be they positive or negative, are comprised mainlyof enforcement costs incurred in taking affirmative steps to "(i) detect and punish public and private actors who infringe upon legally recognized rights and (ii) establish and maintain

[38]Henry Shue, *Basic Rights: subsistence, affluence, and US Foreign Policy*, Princeton University press, 1980.
[39]J Waldron, *Liberal 1981-1991*, , op. cit.,p. 8.
[40]Ibid.

legal apparatus whereby private individuals can present and seek compensation for alleged rights violations."[41]

Holmes and Sunstein argue on the basis of the above model that there is no structural difference between positive welfare rights and negative rights to security and property. Consider this passage

> The effective enforcement of the positive rights to minimal levels of housing, education, and medical care obviously requires that the government expend considerable resources on hospitals, schools, and building construction (and consequently, raise significant taxes for those purposes). But it should be just as obvious that the effective enforcement of the negative rights to security of person and property requires that the government expend considerable resources on police, prosecutors, judges, and prisons (and again, collect significant tax revenues.[42]

Suppose, for instance, a right not be killed or not to be wrongfully confined requires active police protection and suppose if somebody confines me wrongfully, then in order to enforce my right to personal liberty, I need intervention from the police, courts, maybe media and other parts of the government machinery. So, the difference between the negative right not to be wrongfully confined and the right to assistance from state apparatus/resources ceases to exist and effectively the right not be wrongfully confined can be said to be as much a positive right as a negative right. Therefore, according to Holmes and Sunstein's thesis, all rights, when it comes to enforcement, are positive rights.

No wonder the Universal Declaration of Human Rights, 1948 houses many positive rights, owing to the realization in political circles, liberal or otherwise, that positive rights cannot at least be ignored and that there has to be some mechanism by which the interests and needs couched by positive claims are addressed. We have seen this move in India as well, where initially positive rights were placed in the non-enforceable claims category as 'the directive principles of state policy', though many of them have subsequently been read into enforceable fundamental rights through judicial activism. Art 21 of the Indian constitution which declares the right to life and personal liberty has been expanded to include a variety of

[41]Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, W.W. Norton and Co., New York, 1999, pp 15-16.
[42]Jonathan M. Barnett, Rights, Costs and the Incommensurability Problem, *Virginia Law Review*, Vol. 86, No. 6, Sept, 2000, p. 1311.

positive rights and eventually made it into a mini charter of rights by the Indian Supreme Court. Art 21 of the Constitution of India states "no person shall be deprived of his life or personal liberty except according to procedure established by law." Now this right, which is clearly a negative right by its tenor and intent has been interpreted by our Supreme Court to be including Right to livelihood[43], right to live with human dignity[44], right to pollution free air / wholesome environment and health[45], right to privacy[46], right to shelter[47], right to education[48], and the right to a fair and speedy trial.[49]

Now, the rights to cultural expression and cultural preservation have also found their way into the ambit of positive rights as they have been analysed, by multicultural theorists, to constitute those fundamental human interests which need protectionin law. The United Nations Covenant on Economic, Social and Cultural Rights brings cultural rights at par with socio-economic rights in the international human rights discourse. The concerns underlying the recognition of different cultures and the need to address the claims grounded in culture are equally important, and more or less similar to the concerns underlying the socio-economic well being of people. This debate brings out the concern that maldistribution is not the only source of injustice and that sometimes misrecognition also degrades human existence in a cogent way. We shall turn to these issues in the next chapter.

[43]Olga Tellis and Others vs. Bombay Municipal Corporation, 1985 SCC (3) 545
[44]Francis Corallie Mullin vs. The administrator, Union Territory of Delhi and Others, 1981 SCC (1) 608 The apex court also observed that right to life does not refer to the mere physical act of breathing, it is not a right to mere animal existence but refers to a right to live with human dignity for every Indian.
[45]Rural Litigation and Entitlement Kendra vs. State of U.P., AIR 1985 SC 652
[46]Kharak Singh vs. State of Punjab, AIR 1963 SC 1295
[47]Ahmedabad Municipal Corporation vs. Nawab Khan, Gulab Khan and Others, AIR 1997 SC 152
[48]Unni Krishnan, J.P. And Ors. Etc. ... vs State Of Andhra Pradesh And Ors., AIR 1993 SC 2178
[49]HussainaraKhatoon & others vs. Home Secretary, State of Bihar, AIR 1979 SC 1369

CHAPTER TWO

RIGHT TO CULTURE

If we think of culture, it reminds us of certain set of beliefs, values, socially evolved and established customs and practices with which a certain people can be identified. A culture helps its members to understand and shape their lives and also informs their interaction with fellow human beings. A culture provides us with symbols, vocabulary, good and bad practices endowed with meanings which act as a medium for us to make sense of things around us as well as to make sense of our own lives. The different definitions of culture provided by scholars are highly fluid and open ended, and it is taken to mean anything from the capacity to understand oneself and one's relationship with others, the shared attitudes, values, goals and practices which characterize any association or group of people to the different ways that different people adopt for doing things. The term 'culture' is derived from the latin word 'cultura', which means cultivation. Initially it used to refer to the betterment or improvement of individual through education and other such means, but the ambit of the word culture has been expanding ever since. One of the broad definitions of 'culture' is worth mentioning here.

> The totality of the knowledge and practices, both intellectual and material, of each of the particular groups of a society, and at a certain level of a society itself as a whole… From food to dress, from household techniques to industrial techniques, from forms of politeness to mass media, from work rhythm to the learning of family rules, all human practices, all invented and manufactured materials are concerned and constitute, in their relationships and their totality, culture.[50]

As we can infer from the above definition, the tem culture is very broad. It has different shades of meaning and due to which it becomes difficult to talk of culture in terms of rights or to adjust the 'slippery' terrain of culture into the fixed categories of rights. There is no doubt that interests grounded in the culture of people have been considered important and have had expression in terms of rights. But such expression in terms of rights has been more

[50] Lyndel V. Prott, Cultural Rights as People's Rights in International Law, Hein Online Journals, 10 Bull. Austl. Soc. Leg. Phil. 4 1986, p.5.

often than not in indirect terms. For instance, claims for preservation of cultural identity were deemed to be taken care of by the rights to freedom of expression, freedom of association, and freedom of conscience and religion. Certainly, these rights were not formulated for the purpose of cultural protection but they have been considered as the 'necessary pre-requisites for the protection of culture and especially the culture of minorities'[51]. Later on, however, after the adoption of Universal Declaration of Human Rights (UDHR) in 1948 and through other subsequent International agreements, certain cultural rights came to be recognized and enumerated. Some of the rights which loosely came to be termed as cultural rights are:

i. The right to freedom of expression, together with the important concomitant rights of freedom of religion and freedom of association. Though these rights are generally classified among civil and political rights, they seem to be an essential basis for the existence of any cultural rights and are guaranteed by all the major human rights instruments.
ii. The right to education [Universal Declaration 1948, Art 26, International Covenant on Economic, Social and Cultural Rights, Art 13(1) **,** Protocol I to the European Convention on Human Rights 1950, Art 2, American Declaration of the Rights and Duties of Man 1948, Art12, Banjul Charter 1981, Art 17(1)]
iii. The right of parents to choose the kind of education given to their children [Universal Declaration, Art 26(3), International Covenant on Economic, Social and Cultural Rights, Art 13(3), Protocol I to the European Convention on Human Rights 1950, Art 2].
iv. The right of every person to participate in the cultural life of the community [Universal Declaration Art 27(1)**,** International Covenant on Economic, Social and Cultural Rights 1966, Art 15(1)(a), American Declaration of the Rights and Duties of man 1948, Art13, Banjul Charter, Art 17(2)].
v. The right to protection of artistic, literary and scientific works [Universal Declaration, Art 27(2), International Covenant on Economic, Social and Cultural Rights, Art 15(1)(c), American Declaration of the Rights and Duties of Man 1948, Art 13].
vi. The right to develop a culture [UNESCO Declaration of the Principles of International Cultural Co-operation 1966 Art 1(2), Banjul Charter 1981, Art 22(1)**,** right to preserve and develop its own culture, Algiers Declaration 1976 Art 13].

[51] Brownlie, 'The Rights of Peoples in Modern International Law', Bulletin of the Australian Society of Legal Philosophy, Vol. 9, 1985, pp104-119

vii. The right to respect of cultural identity (Algiers Declaration Art 2).

viii. The right of minority peoples to respect for identity, traditions, language and cultural heritage (Algiers Declaration Art 19).

ix. The right of a people to its own artistic, historical and cultural wealth (Algiers Declaration Art 14).

x. The right of a people not to have an alien culture imposed on it (Algiers Declaration Art 15).

xi. The right to the equal enjoyment of the common heritage of mankind [Banjul Charter Art 22(2)].[52]

Out of these rights, the rights from vi to xi are essentially collective rights or 'peoples' rights' as referred to in International Covenants. And, it has been difficult to define and incorporate them in legal statues because they contain both the negative and positive aspect of rights. The rights enumerated as ii and iii, that is, the rights related to education also have the same characteristics. This is because along with non-interference from the state, in the sense that state does not tamper with the cultural norms and practices or the kind of education purported to be provided to their children by a particular cultural group, these rights in order to be fully exercised need assistance from the state. For instance, in case of the right to education or the right of parents to choose the kind of education given to their children, it entails as a necessary implication, the provision of buildings and other infrastructure, the training of teachers and other material resources. This has the effect of mixing the categories of 'refraining' and 'providing' and involves the application of both. Another difficulty which comes in the way of recognizing these rights is the fact that the enjoyment of the rights to preservation of culture or language is necessary achieved in collectivities. We shall come back to this point later. Yet another difficulty arises because of the nature of obligation these rights impose on the states. We shall explore this point in the next section.

Cultural Rights: Their Formulation in International Law

The origin of cultural rights can be traced to the growth and development of human rights. They developed simultaneously with other human rights but later on with further clarity on their implications, they assumed a different trajectory from that of universal human rights.

[52] This List is taken from Lyndel V. Prott, Op Cite., p. 8-9

Cultural rights locked horns with human rights on the issue of Universalism. The attempt to impute universal nature to cultural rights, as was true of other human rights, was challenged as robbing cultural rights of their very essence which was to protect particular interests. This shall be dealt in the next section. The horrors of World War-II brought the realization to mankind that enormous harm can be inflicted by the excesses of one group of people over others if there is no overriding check. This realization generated a great concern for the rights of individuals irrespective of their regional, racial, religious and cultural affiliations. An examination of the genealogy of cultural rights shows that they are fourth generation rights following the Civil, Political and Social rights in the series. The road to their international recognition, as observed earlier, was very difficult. They came into picture after the Second World War in the 1940s and 1950s with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Thus began the regime of universal human rights. Cultural rights found a modest articulation in the Art. 27(1) of the UDHR which reads, "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".[53] In trying to find out as to why cultural rights came to be recognized only after the Civil, Political and Social rights we have to look into the question of the nature of cultural rights and how they are different from other rights. This further takes us into an inquiry of the nature of human rights recognized internationally and protected by the international legal order. A standard account of the nature of international human rights is that these rights protect interests which are universal in nature. Going by this account, international human rights protect essential features of being human, features that we share "regardless of any Geographical, Historical or Cultural contingencies that otherwise divide us."[54]But this account does not work when deployed to explain the international legal protection for rights that protect interests that are not universal in nature and are qualified by the contingencies and variations of Geography, History and Culture. Cultural rights are an example of such rights because they protect interests which are associated with one's culture and cultural belonging is contingent upon when, where and to whom one is born.

The difficulty of pinning down the essential features that merit protection in the form of rights coupled with the other difficulties as pointed out earlier made the case for recognition and codification of international cultural rights difficult. Therefore, in the debates around

[53] http://www.un.org/en/documents/udhr/

[54]Patrick Macklem , The Law and Politics of International Cultural Rights:A Review Essay of Elsa Stamatopoulou, Cultural Rights in International Lawand Francesco Francioni and Martin Scheinin (eds), Cultural Human Rights in Legal Studies Research Series, Vol. 9, No. 6, University of Toronto, June, 2009, p. 2

cultural rights, they were usually not considered as basic to human existence as other civil, political, economic or social rights. Such apprehension and uncertainty about the status of cultural rights was one of the major factors responsible for the split of UDHR into two separate covenants. The controversy which was central to the politics that went behind the splitting of the UDHR into two separate sets of rights enshrined in the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), respectively, was about the justiciability of these rights. A group of countries led by the US and Great Britain argued that since they contemplate positive obligations on states, Social, Economic and Cultural rights were non-justiciable and therefore could not be included in a unified document implementing the Universal Declaration. Whereas no such argument was given with respect to ICCPR as it mainly contained negative rights in their classical understanding as first generation rights. Apart from this, there was a proposal in the General Assembly to include a provision in the UDHR explicitly meant for minority protection. But, Art. 27 along with Art 1 of the UDHR were used by US, Canada and Latin American countries to argue against the need of having such a provision in the UDHR. Leading the pack of countries with this view, the US argued, "Art. 27 together with Art. 1, which contains a commitment to non-discrimination would suffice to protect minority cultures and in any event minority protection was a European issue."[55] This was opposite to the stand taken by USSR, several Eastern European countries, Lebanon and India. This difference in opinion about the operability of positive and negative rights came out conspicuously in the provisions of the two covenants, one relating to negative rights and the other related to the positive rights.

There were strong supervisory mechanisms provided in the Optional Protocol to the International Covenant on Civil and Political Rights for the enforcement of the rights enshrined in the ICCPR, but no such mechanism was provided in case of ICESCR. In the words of Patrick Macklem

> The upshot was that the International Covenant on Civil and Political Rights provided for the creation of the Human Rights Committee to review state compliance, and an Optional Protocol empowered it to deal with individual complaints of violations of Covenant rights by states also party to the Optional Protocol. The International Covenant on Social, Economic and Cultural Rights, in contrast, provided no equivalent right of individual petition and limited its monitoring mechanism to state reporting procedures.[56]

[55] Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and beyond*, Martinus Nijhoff , Boston, 2007, p. 13.
[56] Patrick Macklem, Op Cite., p. 18

Not only this, the Art. 27 of the UDHR was itself divided into two corresponding articles in the two constituent covenants. Art. 27 of the ICCPR affirms that persons belonging to the ethnic, religious and linguistic minorities "shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." It is clear from the language of the above article that the right given to minorities is negative in nature. On the other hand the Art. 15 of the ICESR says that it shall be the right of everyone to take part in the cultural life of the community. This article, ironically, according to Stamatopoulou has the effect of favoring cultural homogeneity over cultural diversity. This weak formulation of cultural rights, especially with respect to minorities, as there was no specific provision dealing with the rights of minorities, could not suffice for long in the wake of rising concerns for better protection of minority rights worldwide. Consequently, in 1992, the United Nations General Assembly adopted the UN Declaration on Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. In the statement of objects and reasons, the General Assembly expressed the following

> Inspired by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious or linguistic minorities,
> Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,
> Emphasizing that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States,
> Considering that the United Nations has an important role to play regarding the protection of minorities
> Recognizing the need to ensure even more effective implementation of international human rights instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities,
> Proclaims this Declaration on the Rights of Persons Belonging to
> National or Ethnic, Religious and Linguistic Minorities:

Interestingly, this covenant marks a departure from the earlier stance taken by the two covenants, ICCPR and ICESCR and provides explicit positive rights to the persons belonging to national, ethnic, religious or linguistic minorities. Especially, Article 4 of this declaration having five clauses is a storehouse of positive rights. All these clauses start with words, 'States shall/should take appropriate measures' and impose positive obligations on the states to create favourable conditions for 'expressing their characteristics', 'developing their language, religion, traditions and customs', adequate opportunity to 'learn their mother

tongue and gain knowledge of the society as a whole', measure to ensure their 'full participation in the economic progress and development in their country'.[57] However, this is soft international law because there is no mechanism by which these rights can be enforced.

Universalism and Cultural Relativism

The principle of universalism underpinned the concept of human rights ever since its inception, which meant that human rights belonged to everyone by virtue of being human, no matter where he or she resides. Representatives from all the UN nations representing varied societies came together and agreed on certain common principles vindictive of the dignity of human life which would serve as the basis of human rights. Thus, the Universal Declaration of Human Rights, 1948, came to be adopted. But agreeing on such principles was far easier than implementing them and the universalistic operation of human rights came under severe criticism from the upholders of local religious, cultural and legal norms. They complained that universalism perpetuates colonialist practices and that it assumes the superiority of one group over the other and bases values, ethics, power on that assumption. The reaction to the universal conception of human rights gave rise to a new approach in cultural politics, namely, Cultural Relativism and it received prominence as a means to counter colonialism. To quote from Elisabeth Reichert,

> In cultural relativism, all points of view are equally valid, and any truth is relative. The truth belongs to the individual or his or her culture. All ethical, religious and political beliefs are truths related to the cultural identity of the individual or society…Simply stated cultural relativism refers to the view that all cultures are equal and universal values become secondary when examining cultural norms. No outside value is superior to that of local culture."[58]

This is the other side of the extreme and assumes dangerous propositions because cruel inhuman practices such as female genital mutilation, female infanticide and other grievous kinds of discriminations also take place in the name of local culture.

In my considered view, we need to take a middle path between the two extremes of universalism and cultural relativism. Though, according to universalists, universalism implies

[57] http://www.un.org/documents/ga/res/47/a47r135.htm
[58] Elisabeth Reichert, Human Rights: an examination of Universalism and Cultural relativism, *Journal of Comparative Social Welfare*, Vol. 22, No. 1, April, 2006, pp. 28-29.

that some moral requirements are the same for everyone while it does not imply that we all have a moral requirement to be the same. They try to defend it in other numerous ways. They also say that we have to have some universally accepted values and norms otherwise social life would become impossible, but the experience of the rise of universalism has shown that it has proved detrimental to the genuine aspirations of the local cultures. On the other hand the experience of giving uncontrolled power to local cultures over their people has also bore unpleasant results. While no one can claim to have a right to impose a particular conception of good on the local cultures, the local cultures also do not have a right to treat their members in whatever way they please.

Right to Self-Determination and Right to Culture

Along with a concern for individual rights, concerns for one kind of collective right, the right to self – determination of a people also burgeoned during this period. It is important to know what we mean by the terms -'the right to self determination' and 'a people'. Article1 (1) of The International Covenant on Civil and Political Rights, 1966, says, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." It is quite manifest by a reading of the above article that the right to preserve one's culture is implicit in the right to self determination. Going by UNESCO's deliberations, 'a people' has been defined in two ways. Firstly, "a people is identified with a distinctive culture: those who share a given culture are a people…to qualify as a people, those sharing a culture should think of themselves as collectively possessing an enduring, separate identity."[59] The second definition identifies a people with the inhabitants of a political community enjoying some kind of political status, that is, the inhabitants of a sovereign state or of a dependent territory. However, the right to self determination of a people came to be recognized only with respect to those people who were the subjects of foreign rule and people who were the part of overseas dependencies. For people who constituted a segment of the population of sovereign states, the right to self determination was never recognized because it came in conflict with the right of the states to territorial integrity and sovereignty over its people. This is evident when we look at the UN Declaration on Friendly Relations and Cooperation Among States,

[59] Vernon Van Dyke; The Cultural Rights of Peoples; Universal Human Rights, Vol. 2; No. 2; April-June, 1980; pg 2-3.

1970 which while endorsing the principle of equal rights and self determination of peoples specifies that 'Nothing in the declaration shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.'[60] This is likely to be interpreted as a denial of the right to self determination of a segment of the population of a state. The more likely interpretation is that, even if such people have a right to self determination, a conflicting right of state is held to be overriding. Lot of peoples under colonial rule asserted their right of self determination and got independence during this period, but certain people within the independent and sovereign nation states, who were different from the majority of the population in cultural, racial or linguistic terms were still kept struggling and fighting for their right to self determination. In fact, as identified by Vrdoljak, the right to self determination assumed different meanings in relation to right to culture at different moments in history. He writes

> the early 20th century, when self-determination was synonymous with sovereignty, and cultural rights were the province of the League of Nations mandate and minority protection systems; 2) decolonization after the Second World War, when self-determination emerged as a right exercisable by those subject to colonial occupation or foreign domination, and cultural rights were contained by the paradigm of individual human rights protection; and 3) the post-cold war period up to the present, when self-determination is revealing itself to possess internal dimensions, and cultural rights are receiving renewed attention in the context of minorities and indigenous populations.[61]

A denial of the right to self determination to these people coupled with the nationalist imperatives of difference blind policies promoting assimilation into the dominant majority culture, undertaken by the newly formed nations, resulted in the erosion of the minority cultures. These also turned out to be some of the important factors which invoked the need for 'cultural rights of peoples' and provided impetus to the worldwide movement for recognition of such rights.

The Multicultural Debate

[60] United Nations, General Assembly Resolution A/2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, 24 October 1970, Annexure.

[61] Vrdoljak, Self-Determination and Cultural Rights in Franceso Francioni & Martin Scheinin (eds), *Cultural Human Rights*, Leiden: Martinus Nijhoff, 2008, quoted in Peter Macklem, Op Cite., p. 9

Peter Macklem, Op Cite., p. 9

Cultural identities are originators of specific needs and interests which become a part of an individual's conception of a good life. The view that is commonly shared by the proponents of multiculturalism who advocate the right of people to 'preserve their culture' is that cultural identity has normative weight in the sense that it gives the possessor of that identity reasons to act in particular ways. One part of the debate is that how strong is the normative pull exerted by a cultural identity, which in turn brings forth the question that what kind of rights and entitlements should be thought to be flowing from this pull? The other part of the debate is that the normative pull of cultural identities being acknowledged, what can be the appropriate, acceptable methods by which preservation of a culture might be attempted? This question becomes controversial because once we accept the normative pull of cultural identities and that certain rights flow from such identities, then granting such rights will have an effect on the rights of individuals on one hand and other collective entities on the other. This concern flows from the rule that no right is absolute and the experience that rights, sometimes, conflict with one another. Therefore, measures that can justly be taken to implement a right must be limited by due respect for other rights that might be adversely affected.

Now, let us consider the individualist arguments for the protection of cultural identity. The proponents of individualist arguments led by Kymlicka have tried to connect the normativity of cultural identity with the core value of liberalism, individual autonomy. Will Kymlicka, Joseph Raz, Yael Tamir have tried to show how individual autonomy is dependent on and affected by cultural belonging. According to them, individual autonomy consists in being in charge of one's own life, being able to form and revise one's own conceptions of good. A culture offers a person options and endows them with meaning and familiarity and thereby forms a context in which that person is able to exercise the capacity to choose. The aforementioned thinkers proceed to take a positive conception of individual autonomy. For them autonomy not only requires that one is not coerced or manipulated while making the choices but also requires that there exists a menu of meaningful options from where one can choose. Kymlicka says, 'freedom involves making choices among various options, and our societal culture not only provides these options but also makes them meaningful to us.'[62] In this sense, culture provides the conditions under which a person can make choices about what matters to her and culture also provides narratives, evaluative categories, and meanings to understand and reflect on these options. Thus, if we accept that individual autonomy is

[62] Will Kymlicka; Multicultural Citizenship; 1995; pg 83.

important then we have to value the cultural context which is a necessary condition of it. In other words, there is an individual interest in cultural identity as a condition for the exercise of individual choice which in turn becomes a condition of a valuable way of life. As a corollary of this way of thinking, it can also be argued that cultural identities are the originators of specific needs and interests in an individual and if a person is unable to pursue those needs and interests than it constitutes a severe limitation on his/her autonomy. This is a individualist and instrumental account of normativity of culture. Instrumental in the sense that this account does not consider culture itself to be possessing any value worth preserving but takes culture to be important because it is a means to the realization of individual autonomy.

Chandran Kukathas has taken a strong exception to this view and his main critic is that looking from the perspective of Cultural minorities, they are not interested in a system of minority rights which is tied to the promotion of individual autonomy. He mentions certain communities which follow illiberal practices as an integral part of their culture, like the practice of Peublo Indians to discriminate against those people in their community who do not follow the traditional religion of the community and other practices of discrimination against girls in the matters of education exercised by many communities. For such communities, implementing any such system of rights would require them to change their internal structuring as per the liberal standards of Individual freedom and democracy. So, they would resist any such scheme of special minority rights, and according to Kukathas, special rights for minorities, in effect, limit the freedom of individual members within the community to revise the traditional practice. In reply, Kymlicka affirms the liberal commitment to the view that 'individuals should have the freedom and capacity to question and possibly revise the traditional practices of their communities'[63] and accepts that the aforementioned practices violate the reason why liberals want to protect the cultural membership, that is, membership in a culture is what enables an informed choice about how to lead one's life. He further says that on this count liberal theory will condemn certain traditional practices of minority cultures, just as it has historically condemned the traditional practices of majority culture. So, according to him 'a liberal conception of minority rights will endorse special rights for a minority culture against the larger community, but it will not accept special rights for a minority culture against its own members. The former protect the

[63] Will Kymlicka; The Rights of Minority Cultures: Reply to Kukathas; Political Theory; Vol. 20; No.1; Feb 1992, pg 142.

autonomy of the members of the minority culture and the later restrict it.'[64] So, if in case some members of a minority culture reject liberalism, then the members of the majority culture will have to sit with them and work out a way of living together. Kymlicka believes that liberals have no right to impose their view on others, but what liberals can do is to spell out the positive implications of the liberal notions of freedom and equality and enter into a dialogue with the minority culture.

The non individualist arguments for the normativity of culture take culture to be something which attains value only in a group, something that can only be enjoyed jointly with others. Charles Taylor says that culture is essentially a social good. The standard accounts of collective goods view them as public good. Public goods are non-excludable in character in the sense that if clean air, street lighting is provided for one citizen, it can easily be provided for all others at no greater cost. But public goods are consumed individually. For instance, Street lamp is a public good which shows way to all the people who pass by and benefits all but still I use the lamp to find my way home, while some other person uses the light of the lamp to find his way home or to his shop, which implies that the good is consumed individually not jointly. Taylor differentiates these kind of goods with goods which can only be enjoyed with the involvement of others, like friendship, love, solidarity, community or participation in a culture and calls them social goods.[65]

Denise Reaume calls such kinds of goods as participatory goods. According to Reaume participatory goods are those goods which not only require more than one person to produce the good but are valuable only by virtue of the joint involvement of many. Participatory goods like Taylor's social goods are similar to public goods in as much as they are also meant for the public at large and are non-exclusionary, but different from public goods in terms of consumption, that they are consumed not individually but jointly with others. Among these goods are included, as Reaume puts it, 'core aspects of culture such that each individual needs others in order to enjoy them.'[66] For example, language is something which is of use to me only when I can communicate with people in my language which requires that other people also know how to communicate in my language. I can be said to be enjoying the good of speaking my language only when I speak it with fellow speakers who are as familiar with the nuances of the language as I myself am. This shows that I have quite a robust interest in

[64] Ibid 142.
[65] Charles Taylor; Philosophical Arguments; 1995, pg 190.
[66] Denise Reaume; Individuals, Groups, and Rights to Public Goods, 1988 in Mathew Fenstentein – Negotiating Diversity, 2005.

other people knowing my language. Similarly I have an interest in other customs and practices which I perform collectively with the members of my community and which constitute a part of my identity. Is this interest robust enough for me to ask for a scheme for the protection and preservation of the constituents of my cultural identity against erosion or extinction, as a matter of right? This is the question which I seek to ponder on in this work, and I think that this interest is robust enough and provides strong enough grounds to be accorded a positive protection rather than a mere negative freedom. There are, of course, problems in accepting this view. Let us look at the potential problems that arise by examining the criticisms of this view.

Probably, one of the strongest critic of multiculturalism is given by the proponents of cosmopolitanism or the anti-essentialists like Seyla Benhabib, Jeremy Waldron, james Clifford, to name o few. According to these thinkers a culture is 'polyvocal and internally contested, a welter of the competing interpretations of meaning and value that people offer, hybrid in a way that reflects promiscuous interaction and their consequent overlap.'[67] They believe that the proponents of multiculturalism hold a mistaken view of culture. They wrongly assume that 'cultures are coherent and homogeneous, that is members of a culture share common vision, that cultures are clearly bounded and readily differentiated from each other, that cultures are static in the sense that they mostly reproduce themselves.'[68] This has been termed by scholars as the essentialist view of culture and according to the anti essentialists this line of thinking is mistaken because it gives rise to an ethical and normative status for culture. Culture being a source of meaning and value becomes a good in itself, which in turn gives rise to the political claims based on culture and demands for a public policy which promotes cultural preservation. Benhabib is afraid to grant collective rights to any cultural group which is not fluid, not ready to redefine itself, not ready to revise its conception of good, because as per her account, cultural differences are real but boundaries between them are so porous and their content so internally varied and fluid that granting group rights proposed by the elites of a group would endanger internal minorities and their individual autonomy.

[67] Review of Seyla Benhabib – The Claims of Culture: Equality and Diversity in the Global Era by Shawn W. Rosenberg in Political Psychology; Vol. 24; No. 4, 2003; pg 856.
[68] ibid

Benhabib, however agrees with the multiculturalists to the extent that since culture partially constitutes individual identity so a respect for individual autonomy in constructing life's narratives does entail a respect for cultural identity as well. And she also agrees with multiculturalists on the point that a commitment to democratic egalitarianism does require the accommodation of cultural difference within the legal and political institutions, but her major point of departure from the multiculturalists is that she does not consider cultural preservation a good in itself. She believes that preservation of culture is instrumentally valuable in the sense that it is a means for attaining deeper and inclusive democratic egalitarianism, but it does not qualify to be a goal to be pursued for its own sake. And thus under her scheme, 'there is no a priori reason to assume' that all the claims grounded in culture whether raised by indigenous peoples, immigrants or national minorities are 'justifiable before being submitted to the test of discursive and deliberative justification.'[69] Thus, the 'claims of culture' should be subject to open contestation and within a model deliberative democracy, should prove to be weighty enough to be considered. This theory of Benhabib is obviously criticized on various grounds. One of them being that every cultural community especially indigenous peoples cannot be expected to come up to the standards of deliberative democracy inasmuch as it involves following the principles of discussion and having the skill of placing arguments. Her model seems to be too ambitious on this count. We will come back to the other criticisms of her theory later in the chapter.

James Clifford draws attention to the signs indicating that the privilege given to natural languages and natural cultures from the start of Twentieth Century is fast dissolving. To quote from him "in a world with too many voices speaking all at once, a world where syncretism and parodic invention are becoming the rule, not the exception, an urban, multinational world of institutional transience-where American clothes made in Korea are worn by young people in Russia, where everyone's 'roots' are in some degree cut-in such a world it becomes increasingly difficult to attach human identity and meaning to a coherent 'culture' or 'language'."[70]

In a similar vein, Jeremy Waldron supplies a strong cosmopolitan argument against undue importance attached to cultural affiliations and makes a case for dispersion of cultural influences. He says, "We live in a world formed by technology and trade; by economic,

[69] Seyla Benhabib - The Claims of Culture Properly Interpreted: Response to Nikolas Kompridis; Political Theory; Vol. 34; No. 3, June 2006; pg 385.
[70] James Clifford - The Predicament of Culture; Cambridge, Mass: Harvard University Press, 1988.

religious, and political imperialism and their offspring; by mass migration and the dispersion of cultural influences. In this context, to immerse oneself in the traditional practices of, say, an aboriginal culture might be a fascinating anthropological experiment, but it involves an artificial dislocation from what actually is going on in the world. That it is an artifice is evidenced by the fact that such immersion often requires 'special subsidization' and 'extraordinary provision' by those who live in the world where culture and practices are not so sealed off from one another."[71]

The anti-essentialist thinkers argue that the multicultural theorists like Will Kymlicka and Charles Taylor, inter alia, justify the political claims of culture on essentialist premises, that is, cultures are internally consistent and clearly bounded wholes. According to them this premise is flawed and therefore the justifications for cultural rights supplied on this basis also need to be reviewed. For instance, Seyla Benhabib has gone on to say that only those cultures should be granted with exemptions or assistance in the political sphere, who prove themselves to be fluid and open to change. Even Waldron's tenor in the paragraph quoted above seems to suggest that only those minority cultures that can survive without 'special subsidies' and 'extraordinary provisions' deserve to survive while others do not deserve to survive. Thus, they are not ready to accept any non-instrumental value of culture. Recalling here the fact that more than One Thousand languages and cultures around them in the world have become extinct and more than Two thousand languages have less than Two Hundred speakers, taking the anti-essentialist stance would mean that this is no loss. It is like saying that this will continue to happen and it is the speakers of a language who are responsible for the loss of their language because they stopped speaking their language, not the majority cultures or the government policies. This stance is by no means absurd, but if we look at the amount of pressure that the nationalist imperatives of assimilation and homogenization have been exerting on the minority cultures in any nation state, especially in recent decades, this stance looses much of its strength.

Nikolas Kompridis has provided the most sustained critic of Seyla Benhabib and the likes. In one of his papers titled, 'Normativizing Hybridity/Neutralizing Culture'[72], Kompridis contends that the position taken by anti-essentialist thinkers is flawed because what they offer is a concept of culture which undermines its own application, such that nothing empirical can

[71] Jeremy Waldron - Minority Cultures and the Cosmopolitan Alternative; University of Michigan Law Review; Vol. 25; No. 3, 1992, pg 763.
[72] Nikolas Kompridis - Normativizing Hybridity/Neutralizing Culture; Political Theory; Vol. 33, No. 3, June 2005.

actually confirm to it. Reminding us that one of the many meanings of culture also refers to the practices and achievements that we wish to pass on to the succeeding generations, he goes on to say, "even if we grant, as we must, that many of us are members of and have attachments to more than one culture, it remains a question how we could even get attached, let alone remain attached, to what is so fluid, porous, unbounded and ever re-negotiable… If cultures are really so porous as is made out to be, then it is very difficult to see how one could ever be in a position to have a culture one could claim as one's own, in a position of having something with which one sufficiently identifies and about which one sufficiently cares to want to pass it on."[73] He claims that the anti-essentialist view of culture due to its conceptual limitations is incapable to understand and explain cultural continuity and further contends that this process of excessive normativization of a simple concept as hybridity, turns it into a difference erasing concept which negates the 'otherness of the other'. According to him, the capacity of this process to normalize cultural difference and thereby neutralize the political claims of culture is the reason for its wide acceptance by a large number of political theorists skeptical of the claims of culture. Referring to the position taken by Benhabib that minority cultural identities should seek public recognition of their specificity in ways which do not deny their fluidity, Kompridis contends that this is a one sided position because "it unfairly imposes upon minority cultural identities a standard of reflexivity and openness to change that majority cultures do not impose on themselves."[74]

This brings us to the role of State in protecting or eroding different cultures and ways of life. We have a whole battery of liberal thinkers who believe and argue that the nation state should be neutral to all cultures and that state should not interfere with the cultural market place, in the sense that it should keep away from making judgments about any culture and from promoting or discouraging any particular culture. This has been termed by Will Kymlicka as the policy of 'Benign Neglect'.

According to one such thinker, Chandran Kukathas, the state should only be concerned with providing the conditions of peace and order and leave people free to pursue their own goals alone or in association including the choice to live by some cultural standards. But for the sake upholding the conditions of peace and order, the state may intervene in the matters of

[73] Ibid; 319-320
[74] Nikolas Kompridis; The Unsettled and Unsettling Claims of Culture: A Reply to Seyla Benhabib; Political Theory; Vol. 34; No. 3, June, 2006; pg 390.

the individual or the group, but only for the sake of upholding the conditions, not for the sake of affairs themselves. Accordingly, no specific entitlements accrue to groups because of their cultural identity. So, some groups will flourish and others will fade away, but which do so and why they do so is not proper concern of the state. The right to culture, thus, can be had to the extent of and in the form of individual rights of freedom of conscience, expression and association.[75] He grants immense latitude to voluntary associations in the way they treat their members. Groups are free to organize their members in whatever way they deem fit and this is justified by the need to respect every individual's right to follow his conscience. So, groups are entitled to treat their members as they please provided that the group is voluntary, that is, there exists a legally enforceable right of exit.[76]

A different version of state neutrality is given by Brian Barry. His is a liberal egalitarian version which construes neutrality and impartiality as equal treatment for different cultures, outlooks, religions and ways of life. And, equal treatment consists in furnishing people with the identical set of rights and opportunities. He prescribes a common set of liberal civil and political rights to be distributed among each member of the society which will eventually provide a level playing field for each member on which everyone can pursue one's own goals and projects. In his scheme, claims made on behalf of culture cannot be justified in the name of liberal justice because according to his conception, equal treatment requires difference blind rights and policies, rights that are insensitive to those differences that multiculturalism encourages. People can, nevertheless, exercise choices from within the identical set of possible choices based on their preferences and cultural commitment, but that remains a private matter and the set of resources, from which people have an equal opportunity to take, has to be the same for everyone. On being criticized that the identical laws and policies that he talks about have unequal impact on different groups of people, he retorts that the unequal impact does not derogate from the commitment to equal treatment. This is so, because according to him law exists only to protect some interests against others and thus, laws will tend to impact unequally on people with different interests. For, instance, only smokers would be affected by a law proscribing smoking in public places.[77] But, Barry is not averse to exceptions in the general set of identical laws and he finds nothing incoherent in arguing for an exception on grounds of equal treatment, provided that the rights or exemptions claimed

[75] Chandran Kukathas - Liberalism, Multiculturalism and Oppression. In A. Vincent (ed.); Political Theory: Tradition and Diversity; Cambridge University Press, 1997.
[76] Chandran Kukathas; Are There Any Cultural Rights?; Political Theory; Vol. 20; 105-139, 1992.
[77] Brian Barry; Culture and Equality; Cambridge University Press; 2001, pg 34.

are acceptable from a liberal egalitarian viewpoint. Therefore, he is in favour of exceptions to turban wearing Sikhs and headscarf wearing Muslim girls in the areas of education and employment law, so that they can study and work in schools and workplaces which prescribe a common uniform without bearing the costs of having to give up their cultural practices, unless, it directly interferes with the kind of work that is required to be done. Thus, Barry's version, though not sympathetic to the multiculturalists, gives a new model of peaceful co-existence under a liberal regime.

As mentioned earlier, Kymlicka has termed the approach adopted by the two above mentioned authors as the 'strategy of benign neglect'. And, the multicultural theorists including Taylor, Raz and Carens find this approach flawed and incoherent because according to them, a nation state cannot possibly avoid involvement in shaping the cultural profile of the society and cannot remain neutral on the cultural front. This is because, the government decisions on languages, internal boundaries, public holidays and the state symbols, which constitute the primary functions of any state, inevitably end up promoting certain cultural identities while disadvantaging certain others.

Unlike Kymlicka and other liberal theorists who have approached the idea of multiculturalism from a liberal point of view, Bhikhu parekh[78] has emphasized on the limitations of this approach in his work. He argues that a theory of multiculturalism developed within the boundaries of liberalism will be unable to fairly accommodate truly diverse systems and will have the effect of undermining real efforts to advance intercultural understanding and peaceful relations among different cultural groups. According to him, "liberalism, like any other substantive doctrine, entails a distinct cultural perspective" and adopting such an approach would be unjust because it precludes the legitimate claims of non liberal cultures to participate in the decisions regarding the political structure of the larger society and the resultant political structure is shaky as it does not enjoy the allegiance of such non-liberal groups. In his book, Parekh makes a case for creating the political conditions for 'intercultural dialogue' among liberal cultural groups, among non-liberal cultural groups and among non-liberal and liberal cultural groups and his model lays great emphasis on "culturally mediated interpretations and applications of laws".[79] Parekh also like Kymlicka

[78] Bikhu Parekh; *Rethinking Multiculturalism: Cultural Diversity and Political Theory*; Palgrave, NewYork, 2000

[79] Review by Alice Hearst of Bikhu Parekh's Rethinking Multiculturalism: Cultural Diversity and Political Theory in *Law and Society Review*; Vol. 36; No. 2, 2002; pg 496.

looks at modern nation states as ‘preoccupied with assimilation and homogeneity, where citizens are asked put their territorial and political identities above the other identities which may be equally important’. Therefore according to him, modern nation states should strive to create conditions for meaningful intercultural dialogue. He acknowledges that balancing national unity with self deter minatory rights for different groups is very difficult but it can be done if there is flexibility in the system and a willingness to live with unresolved issues.

In my considered view, the arguments put forward by modern liberals such as Kymlicka and Raz give a more plausible picture of the claims of minority cultures, especially if we examine closely the practice of liberal democratic states. The inherent advantage that democracy entails for numbers, makes life difficult for minority cultures under the conditions of strict neutrality and formal equality. Moreover, as noticed earlier, claims grounded in the preservation of culture have a positive dimension to them which cannot be addressed unless the state is positively involved. As regards the thinkers who are disposed against multiculturalism, one common line of argument that all of them seem to have espoused is that multicultural policies and granting group rights leads to a hardening of group structures and a freezing of boundaries between them. This situation, according to this line of argument, makes the diffusion or mixing of cultures less likely and thus leads to greater division in society. Taking exception to this view, I think that the divisions get even steeper and the boundaries even more hardened when people of a different culture live under a constant threat from the dominant culture, where they live with a permanent perception of being discriminated against and looked with suspicion. In such a scenario, where hostility defines the relation between minority and majority, minority directs all its efforts towards maintaining their distinctness from the dominant group. It becomes highly unlikely that boundaries will get loosened up and the two cultures will take or learn things from each other. Whereas, when the structure of the minority group is well protected, where its members are able to express and develop their personalities in the context provided by their own culture, a loosening of boundaries or a cosmopolitan kind of setup becomes more likely.

CHAPTER THREE

The Rights Implications of the Claims of Indian Muslims

In this Chapter, a part of the purpose is to enquire into the debates arising out of the question of minority rights in India and the challenges thrown by them. Another part is to analyse as to why the state is expected to play a more active role in the protection of minority rights and also the Indian Government's response to the various claims made by the minorities on the Indian State. A study of the recommendations of the two most comprehensive reports submitted by the Sachar Commission and the Ranganath Mishra Commission, both appointed at the behest of the Central Government of India and entrusted with the task of identifying the relative status of religious and linguistic minorities in India, particularly Muslims in case of Sachar, as to how their concerns can be best addressed, constitutes the rest. The main objective of the study of the above two reports is to examine the difference in the approach adopted by the two commissions in addressing the minority question by locating these approaches in the positive rights- state intervention debate. I intend to concentrate on religious minorities here, particularly Muslims, because in the Indian context, their relationship with the State has been the most tumultuous and interesting.

Theoretical Setting

They fall within the category of 'National Minority' as identified by Kymlicka in order to differentiate them with the immigrant populations, whose claims on the state, according to him, do not have as strong a normative basis as that of national minorities. The status of national minorities has been kept by Kymlicka at par with the indigenous people of a land who are deemed to be justified in making positive claims on the state for the protection of their distinct culture.

The issue of minority safeguards has gained in significance because almost every nation in the world today has to deal with distinct groups of people, who despite having the equal citizenship rights, feel alienated from the mainstream and find it difficult to identify

themselves with the nation as a whole. There are two kinds of approaches which have historically informed the claims for social justice – Recognition and Redistribution. Politics of Recognition seeks to achieve a difference-friendly world, where assimilation to majority or dominant cultural norms is no longer the price of equal respect.[80] Charles Taylor has argued that "non-recognition or misrecognition . . . can be a form of oppression, imprisoning someone in a false, distorted, reduced mode of being. Beyond simple lack of respect, it can inflict a grievous wound, saddling people with crippling self-hatred. Due recognition is not just a courtesy but a vital human need."[81]

On the other hand, the Politics of Redistribution seeks a more just distribution of resources and wealth, for instance from rich to poor, from owners to workers. The claims for socio-economic rights derive from the politics of redistribution, whereas the claims of cultural rights derive from the politics of recognition. Since long it had been considered that the solution to social inequalities and the problem of minorities lay in the redistribution of wealth and resources due to which all the attention was usually given to the redistributionist approach by the political philosophers for almost a century. But some factors such as the decline of communism since the fall of Soviet Union in 1989 and the rise of free market ideology soon after, which meant that the high emphasis given to the redistribution of wealth by controlling market forces transformed into least interference by the state in the functioning of market, have resulted in a reduced focus on redistribution as a means to social justice. The rise of free market ideology also meant increase in cross border trade and loosening of borders which gave rise to high levels of immigration in the past couple of decades. This meant a further diversification of the already diverse populations of the nation states and people having different ethnic and cultural affiliations making arrangements of living together. This in turn gave rise to identity politics, where large scale social movements came to be organized around the theme of protection of identity and related claims, for instance, movements lead by Catalans in Spain, Quebecois in Canada, Maori in New Zealand, Muslims in France or India. All these factors brought the politics of recognition to the forefront. Nevertheless, this is not to be taken as a demise of the politics of redistribution, because it is

[80]Nancy Fraser and Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange*, Verso, London New York, p 7.

[81]Charles Taylor, *Multiculturalism and The Politics of Recognition*, Princeton 1992, p.25.

still alive and active and the rising economic inequalities everywhere in the world reaffirm the continuing importance of an egalitarian redistribution of resources.

It has been observed by Fraser[82] that in the real world, 'Culture' and Political Economy are always imbricated with one another; and virtually every struggle against injustice, when properly understood, implies demands for both redistribution and recognition. Nancy Fraser also invokes the principle of 'Participatory Parity' in the same work. Her main argument being that the main concern for the cultural minorities is that they do not get an equal opportunity to participate in the public discourse, in the decision-making processes. The reasons for this, as she identifies them, are "cultural injustices that engender institutionalized patterns of interpretation and evaluation unjustly denying them the equal respect and/or equal opportunity for achieving social esteem which is a necessary condition for participatory parity."[83]

This seems to be the case with the Muslim minority in India because the issues raised by the Muslim groups in India seem to be informed by both the politics of recognition as well as the politics of redistribution. The cumulative findings of the two above mentioned reports have suggested that the reasons for the lagging behind of the Muslim community from their fellow countrymen in so many respects are grounded in both maldistribution of resources as well as misrecognition of difference. It has been argued that members of the Muslim community suffer on one side from high rates of unemployment, poverty and over-representation in low paying menial work and on the other front they suffer media stereotyping, exclusion and marginalization in the public sphere.

The perceived discrimination and unequal conditions that Muslims express as being subjected to in India has majorly to do with the structural inequalities that exist between social groups and that are seldom addressed by formal political equality as usually practiced in a democracy. Iris Marion Young in her seminal work points out that social structures which give rise to structural difference between groups are one of the reasons why people inhabiting different social positions feel discriminated or alienated. This ground of structural difference is different from other reasons attributed to the feeling of discrimination that are more direct or intentional such as declaration of a community as a threat to the nation or enacting patently

[82]Nancy Fraser - Social *Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*; The Tanner Lecture on Human Values; delivered at
Stanford University; April 30–May 2, 1996
[83] Ibid pg 36.

discriminatory laws with respect to a particular community. It is different in the sense that the source of this difference is not intentional, rather structural difference conceives and reinforces itself through institutionalised patterns. An attractive example is given by Young to explain social structures and the way they inhibit the capacities of some people. The structure is compared to a bird cage and the resulting inequality and oppression to the way the birdcage affects the bird's flight.

> The cage makes the bird entirely unfree to fly. If one studies the causes of this imprisonment by looking at one wire at a time, however, it appears puzzling. How does a wire only a couple of centimetres wide prevent a bird's flight? One wire at a time, we can neither describe nor explain the inhibition of the bird's flight. Only a large number of wires arranged in a specific way and connected to one another to enclose the bird and reinforce one another's rigidity can explain why the bird is unable to fly freely.[84]

Then she goes on to say "Basic social structures consist in determinate social positions that people occupy which condition their opportunities and life chances. These life chances are constituted by the ways the positions are related to one another to create systematic constraints or opportunities that reinforce one another, like wires in a cage".[85]. Then explaining structural inequality, she says "Structural inequality consists in the relative constraints some people encounter in their freedom and material well-being as the cumulative effect of the possibilities of their social positions, as compared with others who in their social positions have more options or easier access to benefits."[86] An examination into the current grievances raised by minorities as well as other social groups differentiated by class, religion, language, gender and caste in India, it can be said that these structural inequalities play a big role in perpetuating them. Structural inequalities go a long way in explaining why despite of explicit guarantees of equality of opportunity, freedom from discrimination and various other safeguards provided in the Constitution of India, these groups feel discriminated or marginalized.

She recognizes that structural groups sometimes build on or overlap with cultural groups. And an important point she makes in this context is that political movements seeking recognition and respect for cultural groups, grounded in the fact that 'a person lacks equal dignity if the group with which he or she is associated does not receive public recognition as

[84] Iris Marion Young, *Inclusion And Democracy*, Oxford University Press, New York, 2000, pp 92-93.
[85] Ibid 94
[86] Ibid 98

having an equal status with others', are no doubt claims of justice in their own way. But here, groups do not seek recognition for its own sake, or to get a sense of pride in the cultural group but they do so for the sake of other goods. She argues here for the instrumental value implicit in cultural preservation and says -

> Where there are problems of lack of recognition of national, cultural, religious, or linguistic groups, these are usually tied to questions of control over resources, exclusion from benefits of political influence or economic participation, strategic power, or segregation from opportunities. A politics of recognition is usually a part of or a means to claims for political and social inclusion or an end to structural inequalities that disadvantage them.[87]

This can be said to be specifically true of the Muslim minority in India because inevitably all claims to cultural recognition and movements forged by the community in recent times have taken the form of demands for autonomous educational institutions, greater representation in government bodies, reservations in jobs and so on. In Young's words they are part of demands for political inclusion and equal economic opportunity, where claimants deny that such equality should entail shedding or privatizing their cultural difference. For the same reasons she criticises the label of 'identity politics' often given to such mobilization of groups for demanding more inclusion and equality. She argues

> The public political claims of such groups, however, rarely consist simply in the assertion of one identity as against others, or a simple claim that a group be recognized in its distinctiveness. Instead, claims for recognition usually function as part of or means to claims against discrimination, unequal opportunity, political marginalization, or unfair burdens. [88]

Thus, according to her, primary claims of justice refer to experiences of structural inequality more than cultural difference.

She makes an important distinction between 'interests', 'opinions' and 'perspectives' which she uses to respond to the critics of essentialism on one hand and to argue for the proper representation of the 'perspectives' of differently situated groups on the other. She defines interests as "what affects or is important to the life prospects of individuals, or the goals of organizations. An agent, whether individual or collective, has an interest in whatever is necessary or desirable in order to realize the ends the agent has set. These include both

[87] Ibid 105
[88] Ibid 103-104

material resources and the ability to exercise capacities".[89] Then she contends that interests conflict frequently not only between agents but also in the actions of a single agent. Then she defines opinions "as the principles, values, and priorities held by a person as these bear on and condition his or her judgement about what policies should be pursued and ends sought". Opinions also, according to her, are contestable and vary discursively from person to person within a community or a social group. Perspective as described by her means the different experience, history and social knowledge which differently positioned people in different social group structures derive from that positioning.

> Because of their social locations, people are attuned to particular kinds of social meanings and relationships to which others are less attuned. Sometimes others are not positioned to be aware of them at all. From their social locations people have differentiated knowledge of social events and their consequences. Because their social locations arise partly from the constructions that others have of them, as well as constructions which they have of others in different locations, people in different locations may interpret the meaning of actions, events, rules, and structures differently. Structural social positions thus produce particular location-relative experience and a specific knowledge of social processes and consequences.[90]

Thus perspective, according to Young, is different from interests and opinions in that perspective consists in the set of questions, the kinds of experience, and the assumptions with which the reasoning begins, rather than the conclusions drawn. She gives a striking example of the perspective shared by African Americans in order to clearly distinguish between perspective on one hand and interest and opinion on the other.

> For more than fifty years the *Pittsburgh Courier* has been an important newspaper for African Americans in the city of Pittsburgh and for many of those years in other parts of the United States as well… In the pages of this newspaper each week appear reports of many events and controversies that exhibit the plurality of interests, not all of them compatible, that African Americans in Pittsburgh and elsewhere have. On the opinion pages, moreover, appear editorials that cover the range from right-wing libertarianism to left-wing socialism, from economic separatism to liberal integrationism. Despite this variety of interests and opinions, it is not difficult to identify how the *Pittsburgh Courier* nevertheless speaks an African American perspective. Most of the events discussed involve African Americans as the major actors… When the paper discusses local or national events not specifically identified with African Americans, the stories usually ask questions or give emphases that are particularly informed by issues and experiences more specific to African Americans.[91]

[89] Ibid 134
[90] Ibid 136
[91] Ibid 138

From here she takes on the challenge of anti-essentialists. The anti essentialists argue that taking the group of people as one entity, while giving them recognition as a whole and devising policies for them on the basis of the picture depicted by the whole, wrongly presupposes that all the members of that group have identical interests and thereby freezes their identity. So, they argue that formulating any sort of group specific policies or measures is detrimental for the individual autonomy of its members and undermines the fluidity of the group. To this Young replies that individuals belonging to the same social group undoubtedly have different and even conflicting interests and opinions, but they still have similar perspective on social processes and issues. Therefore, according to her, different groups of people who are minorities or disadvantaged in any other sense can become the subject of group specific inclusive policies which in turn deepens the democratic process. She gives similar reasoning for the need to devise special provisions or mechanisms to ensure adequate representation of such disadvantaged or marginalized, or for that matter any group which has different characteristics and is inadequately represented, so that maximum social perspectives can be taken into account for reaching decisions. Decisions reached in this way, with more and more perspectives having been heard, bring about more just outcomes.

This is quite true of the objections raised against any minority specific measure purported to be taken in India. Particularly with respect to Muslims any Muslim specific affirmative action by the state is critiqued on grounds that Muslim population in India is highly diverse from within with different socio-economic achievements and different aspirations. There is no denying this fact as the Conditions of Muslims are very different in Kerala and Lakshadweep from what they are in Bihar, Uttar Pradesh or West Bengal. There are also caste and class affiliations in Muslims like in almost all other communities in India. Nonetheless, somewhere they share a same perspective on social issues which often smacks of structural inequalities leading to disadvantaged outcomes.

Let us first consider a brief history of minority safeguards in India in order to better appreciate the current discourse on minority rights in India.

A Brief History of Minority safeguards in India

Going back to colonial India, minority representation had its origin in the Morley-Minto constitutional reforms which instituted separate electorates for Muslims. As articulated by Rochana Bajpai, the late colonial period saw an expansion in group rights minorities. The uprising of 1857 threw new challenges at the British rule and to tackle these challenges, they needed more information and elaborate chain of personnel and this culminated in the policy of including more Indians in the government. The colonial state had no qualms about identifying groups as homogenous entities having identical interests and thus granting them recognition and rights as groups. Religious minorities were not the only group allowed more representation, but different caste groups and racial groups were also considered. In the words of Bajpai, "the representation of important and distinctive interests became the hallmark of colonial constitutionalism."[92] This trend of emphasizing on group rights, as we shall find later, continued after independence and according group rights was recognized as a legitimate way to achieve equality and social justice. Even staunch liberals within the Indian leadership saw injustices as patterned along group lines and therefore had no ambiguity in addressing those injustices via group specific measures. Several caste groups who were subjected to the practice of untouchability came to be recognized as 'Depressed Classes'. Religious minorities and the depressed classes pitched their concerns together and formed a formidable pressure block on the British government during this time. Different mechanisms like separate electorates, reserved seats in legislatures, weighted representation, nomination were being employed as forms of group representation. Not only this, group quotas were extended to government employment during this period. Muslims, Anglo-Indians, and depressed classes got a share of reserved seats for them in all public services. As summed up very nicely by Bajpai, "the colonial state positioned itself as the guardian and guarantor of the important distinct communities, minorities and weaker sections, a stance that served to legitimate British rule in India."[93]

In the meantime, as the British were faced with changed circumstances owing to the results of World War II, they showed their interest in advancing their departure from India. The Congress demand for a Constituent Assembly, which was opposed by the British as well as the minorities as they feared Congress, having the overwhelming numbers that it had,

[92] Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India*, Oxford University Press, New Delhi, 2011, p 32.
[93] Ibid 39.

would dictate terms, now found acceptance with the British. Congress was pressing hard for the quick institution of a Constituent Assembly which would set the task of making the constitution of independent India in motion as it was seen by Congress as the only way to break the deadlock that had ensued after the failed attempts to resolve the 'Minority Question'[94].The Muslim League led by Jinnah boycotted the elections to the Constituent Assembly as their fears were not allayed and no agreement reached by that time. The Cabinet Mission plan of 1946 came at a time when the departure of British was almost certain. The plan contained provisions for the formation of the Constituent Assembly and envisaged transfer of power to an undivided India. This was, perhaps, the last hope of avoiding partition but unfortunately, the terms of the Cabinet Mission plan, which provided for a weak centre and large residuary powers for the provinces, were not acceptable to Congress[95] and hence, it sounded like a death knell to any possibility of an independent undivided India. However, Muslim League representatives who had decided to stay with India after partition started participating in the working of the Assembly and with the enactment of the Indian Independence Act, 1947; the Constituent Assembly became legally sovereign and would henceforth function as the national legislature.[96]

Now, when reigns were handed over to the Constituent Assembly to create a constitution for the newly independent country and it assumed the task, the question of minorities was still looming large. There were prolonged and heated debates in the assembly as to nature and scope of the safeguards to be granted to the minority communities and the deliberations in the assembly assumed a trajectory of gradual retrenchment with respect to minority rights. The minority safeguards already existing under the Government of India Act, 1935 were mainly of two kinds: Political safeguards comprising representation in legislatures, executive and government employment, and Cultural safeguards concerning religious, cultural and educational rights.[97] The political safeguards were seen to be divisive for the society, with the large scale communal strife leading to the partition of the country fresh in the memory of the framers of the constitution, and thus abolished. The Partition of India and the way it was effectuated left people on both sides, that is, Hindus and Muslims,

[94] Taken form Shiva Rao; The framing of India's Constitution: A Study; Indian Institute of Public Administration, 1968. The collection of issues around minority rights and safeguards is referred to as the minority question.
[95] H.M. Seervai; *Partition of India: Legend and Reality*; Emmenem Publications; Bombay, 1989.
[96] Rochana Bajpai, pg 47.
[97] ibid

with lasting hatred and suspicion for each other. Going into the details and reasons of such fallout is beyond the scope of this chapter but the important point deserving emphasis here is that Partition proved to be the most lethal of factors contributing to the abolition of political safeguards for the Muslim minority in particular. This is not to say that partition was the only factor responsible for the abolition of political safeguards in the Constituent Assembly. "The discussion on religious minorities was filled with anxieties that cannot be explained only by partition. There was an underlying fear that according too much recognition to the religious minorities would disrupt the project of Indian nationhood."[98] These apprehensions on one side and the assurances that Congress had made to different sections of minorities that their interests would be protected put Congress into a testing situation. In the words of Bajpai,

> after partition, Congress – the party with an overwhelming majority in the constituent assembly was put to test. It was now called upon to make good its claim that it was not just a Hindu party but represented all sections of India, and that the Indian nation it had fought for was not a Hindu counterpart to Pakistan but embodied a distinct ideal of nationhood. Merely because Congress was so dominant in the assembly, it could not afford to be seen as coercing the minorities. Moreover, it had a long standing commitment to non-majoritarian decision making on minority questions which it continued to profess throughout the constitution making."[99]

But the prevailing atmosphere of antagonism plus the nationalist ideology, with national unity and development as the primary themes, gaining supremacy as the normative bases for decisions, made the political safeguards for Muslims unacceptable. Nonetheless, Cultural and educational safeguards did not take the same route as political safeguards and they got due protection in the scheme of the Indian Constitution.

The incorporation of cultural safeguards has been interpreted as a result of a bargain between the minority groups and the Congress by some authors. Especially the Muslim minority members while acceding to the abolition of political safeguards were somewhere hoping that they would get cultural and educational safeguards in lieu of the sacrifice with regard to the political safeguards. This position of Muslims can again be explained as a by-product of partition because after partition they came to be seen as a highly suspect group

[98] Bishnu Mohapatra's essay: *Minorities and politics* in The Oxford Companion To Politics In India; Niraja Gopal Jayal and Pratap Bhanu Mehta; OUP, pg 220.
[99] Rochana Bajpai pg 65-66.

and were not in a position to assert their claims. Due to the same reason they would avoid incurring the wrath of senior Congress leaders especially someone like Nehru as they needed his support to save themselves of the hard-line Hindu members who were pressing for an even more circumscribed version of minority safeguards. The Christians were adamant on being granted a right to propagate their religion as it was essential to their faith and they are said to have given up provisions like reserved seats in legislatures in lieu of such a right. As opined by Bajpai and Galnville Austin[100], the nationalist vocabulary of social justice, secularism, national unity, democracy and development while being averse to the political safeguards, was construed to imply religious and cultural freedom for the citizens. Although, the hard line Hindu faction of the assembly that considered any kind of safeguards for the minorities as a threat to national unity produced similar arguments against cultural and educational rights as well, but most of the nationalists in the Assembly considered the preservation of religion and culture as legitimate goals to be pursued and thus, they prevailed.

The Cultural and Educational safeguards that were finally adopted by the Constituent Assembly are enshrined in the Articles 29 and 30 in the Part III (consisting of enforceable fundamental rights) of the present Constitution. Art 29 reads as follows:

(1) Any section of 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, and

(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.

Art. 30 says:

(1) Minorities, whether religious or linguistic shall have a right to establish and administer educational institutions of their own 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

[100] Glanville Austin; The Indian Constitution: The cornerstone of a Nation; Oxford: Clarendon Press, 1966.

(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.[101]

(2) 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 and language.

Here we see a slight difference between the two articles as to the people to whom they are addressed. Both these articles are considered the only substantive provisions specifically granting cultural and educational safeguards to minorities and come under the head of minority rights in various commentaries of the constitution. But in article 29 the words 'any section of citizens' in the clause (1) and the words 'no citizen' in the clause (2) imply that any section of Indian citizens and not only minorities can claim the protection of Art. 29. Although initially, in the draft adopted by the Assembly in August, 1947, this article was conceived as applying specifically to minorities and the clause (2) of Art. 29 read like this – "No minority whether based on religion, community or language shall be discriminated against in regard to admissions in the state educational institutions, nor shall any religious instruction be compulsorily imposed on them." This got changed in December 1948 to "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." Similarly clause (1) of article 29 originally read as "Minorities in every unit shall be protected in respect to their languages, script, and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect." In the revised draft adopted by the Assembly in December, 1948 this was changed to "any section of 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". These changes are a part of the attenuation drive that minority safeguards went through during the deliberations of the Constituent Assembly. And importantly these changes were defended strongly by B.R. Ambedkar as representatives of depressed classes were in favour of the extension of these clauses to cover the backwards classes and tribals as well. Right from the period of constitutional reforms undertaken by the colonial regime to the initial stages of

[101] This clause was inserted into Art. 30 by the Indian Parliament by 44th Amendment Act, 1978.

the functioning of the Constituent Assembly, the term 'minority' was the rallying point for different smaller groups including the backwards and the weaker sections to ask for safeguards. This is because every kind of affirmative action in those times was being provided under the category of minorities and for this reason even the backward groups which were not part of the religious or linguistic minorities wanted to bring themselves within the ambit of this category.

But this situation changed during the course of the Constituent Assembly debates and there was a clear shift in the normative source of affirmative action from minority to backward. 'Backward' became the new rallying point for claimants. This shift was initiated with the decoupling of the 'minority question' from the question of 'backward classes'. The case of backward classes was dealt differently by our legislators and their case for safeguards like reservation of seats in legislatures, employment and educational quotas was given an affirmative nod unlike the similar claims of minorities. One of the reasons for this special treatment was they had an enigmatic leader in the form of B.R. Ambedkar who presented their claims from the platform of the Constituent Assembly very forcefully and otherwise also exercised influence as he was a revered figure and was given the charge of the Chairman of the Drafting Committee. Secondly the nationalist vocabulary seemed to justify such claims. These claims of backwards classes were deemed to be required by the goals of social justice and national unity. Because, they had a long history of brutal suppression in all respects at the hands of Hindu upper castes, a sense of 'atonement for past sins'[102] and a sense of 'paternalistic benevolence'[103] got attached to the deliberations on safeguards to be provided to them. Thakur Das Bhargava while arguing for preferential treatment of depressed classes said, "..it is an oath taken by the house to see that within the coming years we will provide all the facilities that can be provided by the nation for expiating our past sins."[104] Pandit G.B. Pant, talking the responsibility of the house to bring the depressed at par with the rest of people argued, "we find that in our own country we have to take particular care of the Depressed classes, the Scheduled Castes and the Backward Classes.

[102]Marc Galanter, *Competing Inequalities: Law and the Backward Classes in India*, New Delhi, 1984, p. 554.
[103] Niraja Gopal Jayal, *Democracy and the State: Welfare, Secularism and Development in India*, New Delhi, 1999.
[104] *Constituent Assembly Debates* (CAD); Vol. VIII; Thursday, the 16th June, 1949.

We have to atone for our omissions… The strength of the chain if, measured by the weakest link of it and so until every link is fully revitalised, we will not have a healthy body politic."[105]

Owing to the preponderance of such views in the Constituent Assembly, the depressed and the backward classes were provided with strong safeguards, such as reservations in legislatures as well as government employment, institution of a special officer for voicing their concerns and setting up of a statutory commission to investigate their conditions and recommend suitable measures, in the final draft of the constitution. While the religious which minorities on the other hand were not accorded any of these provisions as they could not be justified for minorities within the nationalist vocabulary pervasively prevalent in the debates. This, in turn, instigated the minorities to draw attention to their backwardness. Z.H. Lari on behalf of Muslims and Sardar Hukam Singh for Sikhs, among others, argued vehemently for the need to include backwards section in the religious minorities within the backward classes earmarked for preferential treatment in the assembly, but religious minority were not regarded as backwards as a matter of principle in this period. Minorities and Backwards inhabited a different domain in the political imagination of Indian leaders at that time. This shift in focus from 'minority to backward' continued to hold sway after the independence of India, where, as we shall see later, the focus of much of the positive discrimination and preferential treatment policies have been the depressed and the backward classes. In fact, the twin tensions portrayed here; one that of the majority nationalist opinion focussing its attention towards the theme of backwardness to the exclusion of minorities and the other one that of the religious minorities trying to come under the protective umbrella of backward classes are very much dominating the parliamentary debates in India even today.

Coming back to the cultural and educational safeguards finally spelt out for the minorities, the wording and tenor of Articles 29 and 30 show that these articles fulfil the twin objective of protecting the negative liberty of people belonging to minorities to pursue and preserve their distinctive culture and prohibiting the state from indulging in discrimination on ground of cultural difference. A careful reading of both the articles shows that the obligations imposed on the state are essentially negative in nature inasmuch as the state is obliged to refrain from discriminating or imposing the dominant culture on the minorities. There is no

[105] *CAD* Vol. II; Friday, 24th January, 1947.

positive obligation put on the state to assist or make special provisions for the enhancement of minority cultures. Even Ambedkar commenting on the revised version of minority provisions said in the assembly, "The only limitation that is imposed…is that if there is a cultural minority which wants to preserve its language, its script and its culture, the State shall not by law impose upon it any other culture which may be either local or otherwise."[106] A passage from Bajpai, further demonstrates this point very lucidly.

> In contrast to Backward groups, where the duty of the state to render assistance was explicitly written into the constitution, religious minorities were free to pursue their culture at their own initiative without a constitutional entitlement to state assistance…the duties that were seen to be required of the state were limited to forbearance from interference, rather than to protect or aid…It was not seen as requiring positive action from state to set up institutions to enable the preservation of minority cultures and languages. While the article did leave the possibility of state aid...It was not seen as requiring from the state to set up institutions…While the article did of course leave open the possibility of state aid for minority educational institutions…[107]

This possibility of state aid proved to be a saviour for the minority cultures.

Post Independence Scenario

The guiding principles which emerged at the end of the debates continued to shape the collective vision on which the new Indian nation set forth its journey. The next couple of decades under the Congress rule carried forward the vision of its enigmatic leaders like Nehru, Gandhi, Ambedkar and Patel and the plan that was charted out for India was not much different from what was envisaged in the assembly. But with the passage of time, those principles and predictions were put to test and it is not surprising that some of them proved wrong. The ends of social justice and inclusive development were sought to be vehemently pursued and the affirmative action by the state was thought to be the most suitable means to these ends. But these policies, whose one of the desired results was to make India into a casteless and classless society, could not, as their results can be seen now, achieve what was contemplated of them. Bishnu Mohapatra puts it in this way –

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[106] B.R.Ambedkar in *CAD* Vol. VII; Wednesday, the 8th December, 1948.
[107] Rochana Bajpai pg 140 and 145.

> The Nehruvian vision which emerged at the end, emphasized the idea of non-discrimination and the idea of a inclusive nation. Many who believed in liberal utopia and the rationality of modernity believed that the project of development would eventually blunt the rough edges of identity politics in India. This did not happen and the power of majoritarianism kept the idea of exclusive nation alive. Unless the ideology of majoritarianism in its different forms is squarely tackled, the regime of minority rights in India would remain painfully fragile.[108]

His recognition at the end of his statement that the regime of minority rights in India is 'painfully fragile' shows that the politics which ensued after independence did not work out favourably for the minorities. An enquiry into the politics of the minority educational institutions in India, as unfolded by a re-interpretation and a re-modification of the import of articles 29 and 30 by the Indian Judiciary and the legislative response to it, nicely elaborates the point made above.

In one of the first references made to the Supreme Court by the President of India in 1958 regarding the constitutionality of the Kerala Education Bill, which involved an interpretation of the Art. 30 of the Constitution of India, the Supreme Court took an activist view of Art. 30. In this case, (*In Re Kerala Education Bill)* [109] our Supreme Court was asked for its advisory opinion on the constitutionality of some provisions of the Kerala Education Bill, which were alleged to be an excessive impingement on the autonomy of some minority institutions (in this case some schools run by the Anglo-Indian community), to be unconstitutional and violative of the Art 30(1). The Supreme Court on 15th March, 1958, speaking through Chief Justice Bhagwati declared, inter alia, that

> the distinct language, script or culture of a minority community can best be conserved by and through educational institutions, for it is by education that their culture can be inculcated into the impressionable minds of the children of their community. It is through educational institutions that the language and script of the minority community can be preserved, improved and strengthened…The minorities, quite understandably, regard it as essential that the education of their children should be in accordance with the teachings of their religion and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of their culture.[110]

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[108] Bishnu Mohapatra's essay: *Minorities and politics* in The Oxford Companion to Politics in India; Niraja Gopal Jayal and Pratap Bhanu Mehta; OUP, pg 220-221.
[109] *In Re Kerala Education Bill,* 1957 [1959] S.C.R. 995.
[110] ibid

While commenting on clauses 14 and 15 of the Bill, which conferred unbridled powers on state to exercise full control over a state aided minority institution; the Court declared these clauses to be violative of Art. 30 and opined –

> But the power to regulate does not, in general, comprehend the power to prohibit, and the right to control the affairs of an institution cannot be exercised so as to extinguish it. Now, Cls. (14) and (15) operate to put an end to the right of private agencies to establish and maintain educational institutions and cannot be upheld as within the power of the State to regulate or control. The State is undoubtedly free to stop aid or recognition to a school if it is mismanaged. It can, even as an interim measure, arrange in the interests of the students to run that school, pending its making other arrangements to provide other educational facilities. It can also resume properties which had been acquired by the institutions with the aid of State grant. But it cannot itself compulsorily take over the school and run it as its own, either on the terms set out in Cl. (14) or Cl. (15). That is not a power which springs directly from the grant of aid. To aid is not to destroy.[111]

Usually this phase starting from the commencement of the Constitution till the 1970s is considered to be a liberal phase[112] as the Indian Supreme Court applied a liberal interpretation to the minority cultural and educational rights, and established them as one of the strong pillars of Indian democracy. In another verdict in *The Ahmedabad St. Xavier's College Society vs. State of Gujarat*[113] Justice H.R. Khanna speaking about the cultural and educational rights of minorities, said –

> The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence… Special rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institution and by guaranteeing to the minorities autonomy in the matter of the administration of those institutions. The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true, genuine equality, an equality not merely in theory but also in fact… It is only the minorities who need protection, and Article 30, besides some other articles, is intended to afford and guarantee that protection.[114]

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[111] ibid
[112] Tahir Mahmood, *Politics of Minority Educational Institutions: Law and Reality in the Subcontinent*, ImprintOne, Gurgaon, 2007, p. 23.
[113] 1974 AIR SC 1389 and 1975 SCR (1) 173.
[114] ibid

In this period, the apex court by giving a wide import to the minority safeguards enshrined in Articles 29 and 30 kept the state intervention within limits as far as the autonomous functioning of minority educational institutions is concerned. Though some amount of state regulation is permitted as regards the syllabi of examination, conditions of employment of teachers, health and hygiene of students[115], but all other matters of importance were left to be governed by the management of the institution itself. However, this was soon to change as the court when later confronted with similar questions chose to narrow down the import of the above articles by applying different reasoning and curtailed the scope of these special rights to a considerable extent. This period is called 'the phase of deterioration'[116] by Tahir Mahmood in the introduction to his book which is a collection of essays on the politics of minority educational institutions in India since independence. This period is supposed to have started with the pronouncement of the Supreme Court in *St. Stephen's College vs. University of Delhi*[117] The Court observed -

> Even though a minority may have established an educational institution but if it receives aid or is recognised by the State, it is bound by the mandate of Article 28(3). The third restriction is put by Article 29(2) according to which if such minority educational institution receives aid from the State funds then it cannot deny admission to any citizen on grounds only of religion, race, caste, language or any of them. Thus Articles 15(4), 28(3) and 29(2) place express limitations on the right given to minorities in Article 30(1).

It further laid down that the minority institution shall make available at least 50 per cent of the annual admission to members of communities other than the minority community. The same was further upheld by an Eleven Judge Bench of the Supreme Court in *T.M.A. Pai Foundation vs. State of Karnataka*[118] which while applying the principle of harmonious construction to the interplay between Art.29(2) and Art.30(1) declared that a fixed quota for the non-minority students would be compulsory in a minority educational institute if it is receiving grant-in-aid in any form from the state. It further dealt a blow to the independent character of the minority institutions by allowing for the institution of an external Appellate Tribunal to adjudicate over dispute arising out of disciplinary matters. Following this trend in

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[115] *State of Kerala vs. Rev. Mother Provincial*; 1970 AIR SC 2079 and 1971 SCR (1) 734.
[116] Tahir Mahmood, *Politics of Minority Educational Institutions: Law and Reality in the Subcontinent*, ImprintOne, Gurgaon, 2007, p. 23.
[117] AIR 1992 SC 1630.
[118] 1992 SCC (2) 195.

P A Inamdar vs State of Maharashtra[119], Hon'ble Supreme Court entitled the State government to provide for a common entrance test procedure for all colleges in a particular stream including the minority colleges and further allowed the admission procedure of a minority educational institution to be fully regulated by the state government.

The struggle for preserving the minority character of Aligarh Muslim University (AMU), the largest Muslim minority educational institution recognized by the central government, is quite instructive in order to map the changing judicial approach in this regard. The minority character of AMU which was earlier known as the Mohammedan Anglo Oriental College, established by Sir Syed Ahmad Khan in 1885 and later got the status of University by the Aligarh Muslim University Act, 1920, came under challenge in the case of *S. Azeez Basha vs. Union of India.*[120] In this case the honourable Supreme Court rejected the minority character of AMU and gave a reasoning which was found to be puzzling by many commentators later on. It observed that under Art. 30, the words 'establish and administer have been used conjunctively and therefore have to be applied together. Thus, if a minority community is proved to have established the institution, only then it can claim the right to administer it. The apex court further observed that since Aligarh Muslim University was not established by the Muslim minority but came into being by the enactment of the Aligarh Muslim University Act of 1920, it cannot be given a right to administer the university and hence the minority character of AMU stood quashed. This judgment was severely criticised by various scholars and Prof. Iqbal Ansari in one of his essays[121] remarked that the Court's statement that AMU was established not by the Muslims, but by the AMU Act, 1920 is tantamount to saying that India got its independence not because of the efforts of Gandhi, Nehru, and various other freedom fighters and the mass movement against the British but because of the Indian Independence Act, 1947. This judgement engendered a huge outcry by the Muslims of India and consequently, to pacify Muslim sentiments, the central government got the Aligarh Muslim University Amendment Act, 1981 passed by the Parliament. By this act, the sections 2(1), 5(2)(c) and 23 were amended to categorically declare AMU as a minority institution. Section 2(1) which defined the term university earlier stood as "university means Aligarh

[119] AIR 2005 SCW 3923 and 2005 (3) Mh.L.J. 1067.
[120] 1968 AIR SC 662
[121] Iqbal Ansari, 'Aligarh Muslim University: Historical Facts and Judicial trends' in Tahir Mahmood, *Politics of Minority Educational Instituions: Law and Reality in the subcontinent*, Imprint One, Gurgaon, 2007.

Muslim University." And now it was changed to "University means the educational institution of their choice established by the Muslims of India, which originated as the Muhammadan Anglo-Oriental College, Aligarh and which was subsequently incorporated as the Aligarh Muslim University. Similar changes were made in the other two sections to reaffirm the minority status of the University and to neutralize the effect of the verdict. Then again in 2005, upon a petition being filed in the Allahabad High Court by some doctors against the provision of reservation for Muslim candidates in the post graduate medical exam conducted by the University, the Allahabad High Court while quashing the above provisions declared AMU to be a non-minority institution[122]. It held that "the judgment of the Hon'ble Supreme Court in the case of Azeez Basha still holds good even subsequent to the Aligarh Muslim University Amendment Act, 1981 (Act No. 62 of 1981). Aligarh Muslim University is not a minority institution within the meaning of Article 30 of the Constitution of India. Therefore, the University cannot provide any reservation in respect of the students belonging to a particular religious community."[123] Now an appeal against this order is lying in the Supreme Court. Unless the Supreme Court upholds the above verdict of the Allahabad High Court, the AMU Amendment Act, 1981 will remain valid, as only Supreme Court has the jurisdiction to determine the validity of an Act passed by the Parliament.

Gathering from the above discussion, the Judicial intervention seems to have abridged the cultural and educational rights of minorities at three levels: (a) minority intake in minority colleges, (b) rights of the aided institution, (c) the regulatory measures applicable to the minority educational institutions.[124] What this kind of interpretation of minority rights does is that it reduces the minority safeguards given in the form of rights to merely liberties or privileges from a theoretical point of view.

Recalling the discussion in the first chapter, where rights essentially entail a correlative duty and liberties do not, where liberties are permissions without requiring any obligation on others, the regime of minority rights seems to be pushed increasingly into the 'liberty' space. But this is not to say that minority educational institutions have not at all flourished in India. Despite these hurdles applied by judicial interpretation, they have had a life of their

[122] *Dr. Naresh Aggarwal vs.Union of India*; 2005(4) All.L.J. 3745.
[123] ibid
[124] Arshad Amanullah; Legal Dynamics of Minority Educational Institutions; *Economic and Political weekly*; Vol. 43; No. 12, March, 2008; Pg 31.

own. The recent decision of the National Commission for Minority Educational Institutions (NCMEI)[125] to declare Jamia Millia Islamia as a minority institution and the Supreme Court upholding this decision in a recent verdict shows that the doors have not been totally closed for such institutions and they can expect some recognition as well as assistance from the state.

In the post independence discourse on minority rights in India, the issues raised by Muslims have couched both the demand for measures against discrimination on account of a distinct culture and assistance by the state for socio-economic amelioration. In the words of Bishnu Mohapatra, "In the contemporary minority discourse, welfare concerns and identity issues are always blended together".[126] The case of Urdu language is illustrative in this regard. Urdu, which is the mother tongue of a large number of Muslim inhabitants of North India was ridden roughshod over by the government after independence due to similar reasons, that of Partition and the resultant suspicion with which everything connected to a Muslim identity was greeted with, as discussed in the first section of this chapter. It came to be considered as the language of the people of Pakistan and one of the reasons contributing to the partition and the state apathy towards Urdu in the following decades can be attributed to this attitude. One of first instances which marked the suppression of Urdu in independent India was the adoption of the Three Language Formula (TLF). The All India Council for Education recommended the adoption of three language formula in September, 1956. After consultation with the State governments, it was adopted by the Chief Minister's Conference. "This recommended that in every state three languages should be taught in the schools - (1) the language of the state (which would normally be the mother tongue of the majority of its inhabitants) (2) another modern Indian language (Hindi would often be chosen where the first language was not Hindi), and (3) one other language**."**[127] This formulation was very elastic and was open to be applied according to the different language requirements in different states. Although the very idea behind the introduction of the TLF was to facilitate learning and basic education in one's mother tongue, but the way it was interpreted and applied by the state governments turned out to be suicidal for Urdu. In the

[125] This commission was set up under the National Minority Educational Institutions Commission Act, 2004 to advise the centre and the state governments on any matter related to the education of minorities.
[126] Bishnu Mohapatra's essay: *Minorities and politics* in The Oxford Companion To Politics In India; Niraja Gopal Jayal and Pratap Bhanu Mehta; OUP, pg 230.
[127] Ralph Russel; Urdu Since Independence; *Economic and Political Weekly*; Vol. 34; No. ½; Jan, 1999; Pg 44.

State of UP, which was and continues to be the hub of the largest Urdu speaking population and where Urdu is the second largest spoken language after Hindi, Urdu seemed to be the natural choice as one of the languages to be taught. But the State government of UP and almost all north Indian States declared Sanskrit, which was clearly a prominent ancient language to be a modern Indian language. And Urdu, which was clearly a modern Indian language, was discontinued as a medium of teaching with English and Hindi taking the two other slots. In UP, which has more than 2 crore speakers of Urdu and historically has been the centre of Urdu learning, the situation is alarming. According to a study by Ather Farooqui, "there is not even a single primary or junior high school of Urdu medium. The only two Urdu medium high schools are those run by and affiliated to Aligarh Muslim University".[128] In Bihar, there are more Schools though, but in most of them, Urdu is taught as a subject and it is not a medium. Due to lack of scientific vocabulary in Urdu, lack of good books and teachers, most of the students whose mother tongue is Urdu, opt for Hindi medium. In Andhra Pradesh as well there are obstacles in the path of Urdu learning. Though the situation is slightly better in terms of the number of Urdu medium schools and number of students studying in them, but there also Urdu remains a medium of examination and not of instruction. Another constraint which Urdu faces is that it is not concentrated in a fixed territory and its speakers are scattered in different states. This is why it could not gain the regional language status and thereby could not benefit from the linguistic reorganization of states in India after independence. Out of the five major states where Urdu is the mother tongue of a sizeable population, namely, Uttar Pradesh, Bihar, Andhra Pradesh, Maharashtra and West Bengal, only Maharashtra has a better record of Urdu education. And this is because the responsibility of promoting Urdu, in Maharashtra, has been taken up by voluntary Muslim Organisations and trusts which are run by leading Muslim businessmen.

I think this state of affairs with respect to Urdu language, which Urdu speaking Muslims consider an integral part of their culture, contributes to the feeling of alienation expressed by them. Bishnu Mohapatra says:

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[128] Ather Farouqui; Urdu Education in India: Four Representative States; *Economic and Political Weekly*; Vol. 29; No. 14; April, 1994; Pg 782.

> The decline of Urdu in North India has had a negative impact on Muslims' ability to get employment. The demand of Muslims to give Urdu a proper status in select provinces was and still directly related to real economic benefits. This is also related to the identity concerns of the community. The neglect of Urdu then becomes a sign of community's powerlessness, and a reflection of majority community's politics of misrecognition. In a sense the concern for Urdu language embodies simultaneously the issue of economic welfare as well as of identity for the Muslims.[129]

There is a constitutional safeguard provided by Article 350A of the Constitution which expressly lays down the primary education in mother tongue as a desired goal. It says, "it shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities." But this constitutional assurance remains a dream in case of the Muslims with Urdu as their mother tongue. According to the former Supreme Court judge M.N. Venkatachaliah, "On paper Urdu enjoys constitutional safeguards designed to protect minority languages. But in practice, state apathy has shrunk the sphere of Urdu…Urdu is not simply one of the languages of this country. It is a culture and civilisation in itself… The status of Urdu in India needs to be evaluated more realistically and in a mood of generous recognition of its great civilizational content."[130]

Coming to the relationship of Minorities with the theme of backwardness in post-independence India, it is worthwhile to note that the seeds of such an interaction had already been sown in the Constituent Assembly Debates during the framing of the Indian Constitution. The current discourse is an extension of the same interactions and tensions as noticed earlier, but now the theme of backwardness has assumed a centre stage in the minority rights discourse in India. Minority communities have time and again tried to draw the attention of the state towards the economic and educational backwardness of their members vis-a-vis the other communities and have demanded affirmative action in its various forms. In India, as the very meaning of affirmative action has been translated into reservations by a string of government policies, the minorities also have focussed their

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[129] Bishnu Mohapatra's essay: *Minorities and politics* in The Oxford Companion To Politics In India; Niraja Gopal Jayal and Pratap Bhanu Mehta; OUP, pg 230.

[130] M.N.Venkatachaliah; Language and Politics: Status of Urdu in India; *Economic and Political Weekly*; Vol. 34; No. 26; 1999; Pg 1659.

energies on demanding reservations in government jobs and educational institutions as a means of their socio-economic upliftment in recent times. This is true especially of the Muslim groups in India who have found in their relative backwardness a legitimate ground for making such claims on the government. The constitutional provisions which permit such preferential treatment have been enshrined in the Art 15 and 16 of the Indian Constitution. Art. 15 which is about the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth contains a clause which allows for positive discrimination, that is, Art 15(4). It says - Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. And, Art. 16 which is about equality of opportunity in employment also allows for unequal treatment for certain class of citizens. Art 16(4) says – Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

As the terminology of these articles suggests, the positive discrimination and preferential treatment is purported to be given to socially and educationally backwards classes apart from the SCs and STs. The fact that these constitutional provisions do not specify any religious or caste groups as the beneficiaries of the special provisions, and make a religiously neutral category of socially and educational backwards classes as the addressee of the above provisions, has rendered the religious minorities eligible for special treatment by the state. Various movements carried out by minorities to get the benefits of these special provisions have derived their legitimacy from this opening which allows for the special provisions to be made in favour of those members of religious minorities who are socially and educationally backwards. However there are counterviews to this premise which consider any religious group, claiming benefits as a group, outside the scope the special provisions. This is still an ongoing debate which is beyond the purview of this chapter.

In one of the first attempts of the Government of India to respond to the demands of minorities, a high power panel was appointed by the then Prime Minister, Smt. Indira Gandhi in 1983 to look into the concerns of minorities. Dr. Gopal Singh, the then Home Minister headed the committee which came out with the Gopal Singh Committee Report. This report identified Muslims and Neo Buddhists as the two educationally backwards

communities at the national level and recommended special efforts to be undertaken for bringing these two communities at par with the rest of the population. It also highlighted the under representation of Muslims in government employment and their relatively low economic status. This report got tabled in the parliament only in the year 1989 after which the government issued a 15 point directive on the welfare of minorities, but apart from that, not much could be made out of this report.[131]

The Central government appointed the First Backward Classes Commission in soon after independence in the year 1953 under the Chairmanship Kaka Saheb Kalelkar. The Kalelkar Commission, as it was generally called, was entrusted with the task of identifying the criteria for determining classes of people apart from the SCs and STs as Socially and Educationally Backwards. It submitted its report in 1955 and suggested some criteria which were not accepted by the government. The government instead asked for suggestions from the various state governments and refused to draw up an All-India List of Backwards, excluding the SCs and STs. Later on, the central government gave the discretion to the state governments for devising their own criteria of backwardness as per the situation in a particular state. The state governments in turn appointed local commissions to deal with the issue and came up with varied criteria like "identification of backward areas rather than backward classes, adoption of economic backwardness as a criterion, continuation of the existing caste based list of backward classes and so on.[132] The state wise list prepared by the various state commissions were mostly religion and caste neutral and included in them religious minorities such as Neo-Buddhists, SC converts to Christianity and Islam.[133] This attracted a lot of litigation in different states and the various state High Courts again came up with varying decisions. In order to clear this mess, the Government of India appointed the second backwards classes Commission, headed by B.P. Mandal in 1979 to suggest the criteria for identifying socially and educationally backwards apart from the SCs and STs. The Mandal Commission suggested 11 criteria out of which four were social indicators, three educational and four economic. It gave separate weightage to the 11 indicators in the social, educational and economic groups by giving weightage of 3 points to each of the four indicators in the social group, a weightage of 2 points to each of the three educational

[131] Report of the National Commission for Religious and Linguistic Minorities; Vol. 1; Pg 76.
[132] Report of the National Commission for Religious and Linguistic Minorities; Vol. 1; Pg 58.
[133] ibid

indicators and 1 point to each of the four economic indicators. On the basis of the weightage given to the indicators those castes or communities, which scored more than 50 percent, were listed as backward classes.[134] More importantly for religious groups, the backwards classes identified by Mandal, included caste groups within the religious minorities. In a way Mandal brought back the salience of caste in the determination of social backwardness in India which was later reaffirmed by the Supreme Court in Indra Sawhney vs. Union of India[135], when it opined that the backwardness contemplated in Art. 16(4) of the Constitution of India is social backwardness which leads to educational and economic backwardness. The matter reached the Supreme Court for checking the constitutional validity of the Mandal recommendations. It further observed that

"The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes."[136] Although certain castes from minority religious groups including Muslims were included in the list of beneficiaries, but the adherence to the caste based criteria did not work in favour of minority communities. This can be said due to the fact that castes in Indian Muslims and Christians although very much present, are not historically as well embedded and are not numerically as strong and politically as well organized as in the case of Hindus. This showed in disproportionately low number of Muslim and Christian Castes finding their place in the Central OBC list notified by the Welfare ministry, government of India in 1993. Originally it notified 1238 communities in 14 states. Revised list now has 2159 communities identified as backward. 'In the Central list with religion-wise break up, the number is Hindu 2083, Muslims 52, Christians 22, and Sikhs 2, out of total 2159. In the State list the religion-wise break up is Hindu 2123, Muslim 163, Christians 38, Buddhist 2, and Sikh 6, out of total 2332'.[137] Apart from this, the effect and impact of these exercises of the government of India, in setting up of commissions and identifying backward classes, on the minorities got diminished due to a number of other factors. The most important of them being the contentious and adversarial terrain that any

[134] Excerpt taken from the Report of the National Commission for Religious and Linguistic Minorities; Vol. 1; Pg 59.
[135] AIR 1993 SC 477.
[136] Ibid Para 88A (http://www.indiankanoon.org/doc/1363234/)
[137] Report of the National Commission for Religious and Linguistic Minorities; Vol. 1; Pg 61.

affirmative action for the minorities has had to tread through before recognition. The fear of liberal factions in the Indian leadership that according too much recognition to religious minorities might hamper the national unity, on one hand and the rise of Hindu Nationalism on the other, have contributed to this state of affairs.

Meanwhile, continued pressure from the minority groups resulted in the setting up of a National Minorities Commission in 1978 to address the concerns and safeguard the interests of minorities. It could not make much progress towards its objectives because it functioned as a non-statutory body (not recognized by any law). Soon after its inception the need to provide a constitutional status to the commission was voiced in the parliament[138] and it was apprehended that the commission would remain an ineffective institution unless it is granted some constitutional basis. It was attempted firstly in 1978 itself with the introduction of 46th Amendment Bill in the Lok Sabha, but it got dissolved. Then again, a year later in 1979, an attempt was made through 51st Amendment Act, but this one also failed because of lack of support in both the houses. After these two attempts this issue remained dormant in the following years. In the meantime, a joint proposal for constituting two National Commissions for Scheduled Castes and Scheduled Tribes respectively and one for the minorities was brought up before the parliament in 1990. While the National Commission for Scheduled Castes and Scheduled Tribes (NCSCST) was established by suitably amending the constitution and giving it constitutional status, but the commission for minorities was not touched. It was only in 1992 that the then welfare minister, Sitaram Kesari introduced the National commission for minorities Bill in Lok Sabha and it got passed. It was not without intense debate in the House. The supporters of the Bill argued that without statutory recognition, the commission would remain ineffective in safeguarding the rights of minorities and the spirit of the constitution to protect the interest of minorities was also invoked. Opposition came mainly from the Bhartiya Janta Party (BJP), which is the political wing of the Hindu right in India. They opposed the bill contending that it would

[138] *Lok Sabha debates*, 22 Feb 1978, 28 March 1978, 11 April 1978, 10 May 26 July and 2 Aug, 1978; cited in Bishnu Mohapatra; *Minorities and Politics* in The Oxford Companion To Politics In India; Niraja Gopal Jayal and Pratap Bhanu Mehta; OUP, pg 231.

prove to be divisive for the society and would be used for partisan ends.[139] But the support from all other ends ensured the passage of the Bill into an Act.

This period saw a lot of social upheaval with different sections of people forging forceful movements and building pressure on the state machinery for the recognition of their interests. There was the rise of Hindu nationalism on one side and the collection of backwards castes among the minorities and otherwise, other than the SCs and STs demanding reservations in the wake of Mandal Commission recommendations on the other. It was from the mid 1980s that the Hindu Nationalists started mobilizing Hindus on the issue of Ram Janmbhoomi (birth place of Ram) in Ayodhya. The sensitive issue of Ram Janmbhoomi struck a chord with the general Hindu masses especially in the North and the Central India and resulted in the demolition of Babri Mosque, which allegedly shared the site of Ram Janmbhoomi. It was a severe blow on the secular fabric of the Indian polity and was severely condemned from various quarters, except the Hindu Right wing organizations. But, nevertheless, it brought electoral gains to the Bhartiya Janta Party (BJP), which did not last long though. With the BJP coming to the helm of affairs, during this period a new reasoning was evolved to explain such communal uproars and to counter the minority bandwagon. This was the theory of 'Minority Appeasement'. The turn of events in Ayodhya was explained as a natural outcome of the policy of minority appeasement which the Congress was perpetuating for the past so many years. From this period onwards every initiative purported to be taken in furtherance of minority rights came to be termed as a part of 'minority appeasement' indulged in for the sake of Muslim Votes because they generally voted en bloc according to the above thesis. "Even the enactment of a National Commission for Minorities was an unjustified concession for them".[140] And the current promises by the central government to provide for Muslim sub-quotas in jobs are also impugned on the same basis. This counter ideology has ushered in a precarious state of affairs where every measure addressed to minorities gets examined with an adversarial approach rather than being informed by a collective concern for a section of people who are the part of the same political community. As pointed out by Mohapatra every initiative taken for addressing the concerns of minorities becomes a matter of fierce contestation and

[139] Bishnu Mohapatra; *Minorities and Politics* in The Oxford Companion To Politics In India; Niraja Gopal Jayal and Pratap Bhanu Mehta; OUP, pg 231.
[140] ibid

gets mired in controversies. He suggests that there has to be a consensus reached between different political parties on the issue, otherwise minority rights regime would continue to be fragile. He also voices the need of a 'more responsive state and a vigilant civil society' for the proper protection of minority rights in India. An Excerpt from the speech of Dr. B.R. Ambedkar given on 4th November, 1948 on the floor of the Constituent Assembly, which echoed the same concerns, is worth mentioning here –

> To diehards who have developed a kind of fanaticism against minority protection I would like to say two things. One is that minorities are an explosive force which, if it erupts, can blow up the whole fabric of the State. The history of Europe bears ample and appalling testimony to this fact. The other is that the minorities in India have agreed to place their existence in the hands of the majority. In the history of negotiations for preventing the partition of Ireland, Redmond said to Carson "ask for any safeguard you like for the Protestant minority but let us have a United Ireland."Carson's reply was "Damn your safeguards, we don't want to be ruled by you." No minority in India has taken this stand. They have loyally accepted the rule of the majority... It is for the majority to realize its duty not to discriminate against minorities. Whether the minorities will continue or will vanish must depend upon this habit of the majority.[141]

Recommendations of the Sachar Committee Report and the Ranganath Misra Commission Report showing two different approaches towards affirmative action

Sachar attacks the content of positive action from the state, it recommends a shift in focus, a shift in priorities within the existing level or degree of positive action, whereas Mishra attacks the degree or the volume of positive action, it recommends an increase in the extent of positive action from the state which is more costly.

On March 9, 2005, a Notification was issued by the Prime Minister of India to constitute a High Level Committee for the preparation of a Report on the Social, Economic and Educational Status of the Muslim Community of India. This Committee was to be headed by Justice Rajinder Sachar as the Chairman, Five other Members and One Member Secretary. The broad purpose of this committee as stated in the report was to "consolidate, collate and analyse the data/information from the various agencies of the central and the state

[141] *Constituent Assembly Debates*; Vol. VII; 4th Nov, 1948. (http://parliamentofindia.nic.in/ls/debates/vol7p1a.htm)

governments and conduct an intensive literature survey to identify published data, articles and research on relative social, economic and educational status of Muslims in India at the state, regional and district levels…to identify areas of intervention by the government to address relevant issues relating to the social, economic and educational status of the Muslim Community."[142]

Before going into an examination of the recommendations made by the Committee, lets us consider briefly the approach and the guiding principles which the committee sets out to be followed in its performance of the above stated task.

Right at the start of the first chapter entitled 'Context, Approach and Methodology'; the Committee refers to the Constitutional mandate of commitment to the equality of citizens and responsibility of the State to preserve, protect and assure the rights of minorities in matters of language, religion and culture. It recalls the emphasis given by the national leaders at the time of the framing of our Constitution to the doctrine of 'unity in diversity' to which the above constitutional mandate is attributed. The Committee also derives its guiding principles from the United Nations Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities, 1992 and takes the following understanding of the provisions of the above declaration: (a) that the promotion and protection of the rights of persons belonging to such minorities contribute to the political and social stability of the countries in which they live, (b) that meeting their aspirations and ensuring their rights acknowledges the dignity and equality of all individuals and furthers participatory development which in turn contributes to the lessening of tensions between groups and individuals, (c) that all developed countries and most developing ones give appropriate emphasis to looking after the interests of minority. Thus, the committee assumes as a concluding principle that in any country, 'the faith and confidence of the minorities in the functioning of the state in an impartial manner is an acid test of it being a just state'.[143] Commenting on the relationship between the status of minorities and the development process of a country, it says "Ideally, development processes should remove or reduce economic and social obstacles to cooperation and mutual respect among all

[142] Government of India Notification No. 850/3/C/3/05-Pol., 9 March, 2005.
[143] Prime Minister's High Level Committee, Cabinet Secretariat, Government of India; Social, Economic and Educational Status of Muslim Community of India: A Report (Sachar Committee Report), p. 1.

groups in the country. If development processes are misdirected, they may have the opposite effect. It is this aspect which is important and needs to be addressed so as to give confidence to minorities."[144] Development deficit seems to be one of the major areas sought to be addressed by the committee. While recognizing the significant economic growth and development that India has achieved since independence, the committee remarks that despite of it, not all socio-religious have benefitted equally from the growth process. The committee identifies three kinds of issues prominently confronting the Muslim community in India.

(i) *Identity related issues* – identification of Muslims while interacting in public spaces does not bring favourable results for them. The committee apprises of the enormous number of complaints it received from Muslims across India that they are constantly looked with suspicion not only by different sections of the society but also by the public institutions and governance structures. This reflects in their inability to buy or rent homes at places of their choice due to the reluctance of owners to sell or rent property to Muslims and difficulties in accessing good public schools for their children. Second component of this issue is related to patriotism. The report says, "They carry a double burden of being labelled as 'anti-national' and as being 'appeased' at the same time. While Muslims need to prove on a daily basis that they are not 'anti-national' and 'terrorists', it is not recognized that the alleged 'appeasement' has not resulted in the desired level of socio-economic development of the Community."[145]

(ii) *Security related concerns* – recurring communal tensions and violence in different parts of the country make Muslims apprehensive about their security. The treatment of communal riots by the government which is highlighted by seeking of political mileage and inability to bring the perpetrators to the book further deepens the sores. There have been complaints, as noted by the committee that media overplays the involvement of Muslims in communal riots and propagates the negative stereotypical image of Muslims. This is coupled with police highhandedness and social boycott which is observed to have forced Muslims to leave the places 'where they had been living for centuries.'

[144] Ibid.
[145] Sachar, Op Cite., p. 11

(iii) *Equity related issues* – according to the report, "the feeling of being a victim of discriminatory attitudes is high amongst Muslims, particularly amongst the youth. From poor civic amenities in Muslim localities, non representation in positions of political power and the bureaucracy, to police atrocities committed against them — the perception of being discriminated against is overpowering amongst a wide cross section of Muslims". This combined with the identity and security related issue has led to an 'acute sense of inferiority in the community' which largely hampers participation in the public spaces and leads to 'collective alienation'.

In this context, the committee records its findings. It states that while there is considerable variation in the conditions of Muslims across states, but the community exhibits deficits and deprivations in practically all dimensions of development. Muslim community is shown to be lagging behind in almost all of the human development indicators. The urgent need of recognizing diversity along with a sharp focus on inclusive development with mainstreaming of the community is stressed at the very start of the recommendations. It further says, "this is only possible when the importance of Muslims as an intrinsic part of the diverse Indian social mosaic is squarely recognized". Now let us consider the broad recommendations given by the committee and the reasoning behind them.

1. *The constitution of an Equal Opportunity Commission (EOC) to look into the grievances of aggrieved groups* – the committee recommends the constitution of an Equal Opportunity Commission on grounds of the need to enhance the legal basis for providing equal opportunities. The report observes, "it is imperative that if minorities have certain perceptions of being aggrieved, all efforts should be made by the state to find a mechanism by which these complaints could be attended to expeditiously."[146] It is further observed that though there are already existing legal mechanisms like the fundamental rights of equality and the rights against discrimination which can be enforced by courts, institutions like the National Human Rights Commission and the National Commission for Minorities to look into the grievances related to state action, but the role of these mechanisms is limited when

[146] Sachar, Op Cite., p. 240

it comes to day-to-day events and non-state agencies. Such a mechanism should, in view of the committee, be available to all individuals or associations who entertain a grievance that they have received less favourable treatment on account of their being of a particular socio-religious category. The committee categorically rejects the assumption that there is an inevitable conflict between the interests of minority and majority communities in the country but accepts that there is an inbuilt sensitivity to discrimination amongst minorities in every country which is natural. So, recognizing this reality, according to the committee and also the mandate of a well established legal maxim that justice must not only be done but appear to have been done, provide the basis for this recommendation.

2. *Working out a carefully conceived nomination procedure to increase inclusiveness in governance* – this recommendation stems from the committee's belief that 'mere material change would not bring about the true empowerment of minorities; they need to acquire and be given the required collective agency'. As a statement of reasons, it is stated that in a diverse society marked by 'high socio-cultural complexities' such as India, the democratic processes based on universal adult franchise often fail to provide adequate opportunities to ethnic, religious and linguistic minorities to get elected and become a part of 'governance structures because of their low population shares. The twin constraints of 'inadequate numbers' and lack of 'political empowerment' preclude the minorities from making any effective presence in the governance structures. This accounts for their marginalization and negligible political influence which in turn hits their capacity to participate meaningfully in the development processes. The committee at the end suggests putting up of strong mechanisms in place in order to 'enable them to engage in democratic processes at various levels of polity and governance'.
3. *Elimination of anomalies with respect to reserved constituencies under the delimitation scheme* – this is also a part of the suggested drive to increase the political participation of minorities. It had been noticed by the committee in its surveys that a lot of constituencies with a high population of minorities had been reserved for Scheduled Castes particularly in the states of Uttar Pradesh, Bihar and Andhra Pradesh. And conversely constituencies with very high proportions of

Scheduled Caste population have been left unreserved. This has a serious impact on the chances of the candidates belonging to the minority groups to get elected from their constituencies to the parliament and state assemblies.

4. *Linking incentives to diversity* – this recommendation comes from the urgent need to enhance diversity as already pointed out by the committee. Here, the committee first makes the suggestion to explore the idea of providing certain incentives to a diversity index to be maintained by the various government bodies and even the private ones. It is observed that a 'wide variety of incentives can be linked to this index so as to ensure equal opportunity to all socio-religious categories (SRCs) in the areas of education, government and private employment and housing'.[147] Examples given are such as incentives in the form of larger grants to those educational institutions that have higher diversity and are able to sustain it, incentives to private sector to encourage diversity in the workforce, incentives to builders for more diverse housing complexes creating composite living spaces for different SRCs. The need for the creation and encouragement from the government to the creation of common public spaces where members and children of different SRCs can study and interact together is also stressed. The expenditure, it is suggested, can partly be borne from the funds earmarked for the Jawaharlal Nehru National Urban Renewal Mission (JNNURM). It shows that Sachar committee is very keen on reducing the burden of costs on the state in implementing its recommendations. It devises alternative and innovative ways of giving shape to its suggestions. One of the motives behind suggesting this measure as expressed by the committee is that it would enhance the opportunities for children of poor families to read and interact with children from different backgrounds who otherwise do not have proper study spaces and such chances to interact in or around their homes.
5. *Initiation and the institutionalization of a process of evaluating the content of school textbooks* – the content of the school textbooks has an enduring influence on the formative years of childhood according to the committee. The committee believes that along with the family, the school has an instrumental role in shaping a child's character and the sense of values. Since children read textbooks several times, its

[147] Sachar, Op Cite., p. 242

familiarity tends to reinforce the values being suggested in the texts. Thus, if, according to the committee, the text of the text books is 'derogatory with regard to specific communities, it can alienate the children of those communities from the wider society'. The committee recommends "that the process of evaluating the content of the school textbooks needs to be initiated to purge them of explicit and implicit content that may impart inappropriate social values, especially religious intolerance."[148]

6. *High quality government schools to be set up in all areas of Muslim concentration* – This includes the setting up of high quality schools for girls from 9th to 12th standards which, in the opinion of the committee, will encourage more enrolment of Muslim girls. This recommendation is coupled with a stress on the availability of primary education in the mother tongue. An appropriate mapping of Urdu speaking population and provision of primary education in Urdu where Urdu speaking population is concentrated is also suggested. The committee, in this matter particularly, makes a strong recommendation by putting an obligation on the state to run Urdu medium schools wherever necessary. The reason for such a move is the serious note taken by the committee of the constitutional guarantee of provision of primary education in one's mother tongue. The larger motives behind these recommendations are the recognition by the committee of the desperate educational situation of the Muslims as compared to the other SRCs. The report states that Muslims have the largest percentage of children in the below 10 age group with a figure of 27% as compared to the national average of 23%. Along with this, Muslims have the lowest enrolment and continuation rates at the elementary level. This translates into their even lower numbers in higher studies. These facts make primary education particularly important for the Muslims, according to the committee.
7. *Drawing up of experts from the community on relevant interview panels and boards* – this move is suggested to increase the participation of members of Muslim community in government employment and programmes because a detailed analyses of Muslim participation has shown very limited participation in both. It is

[148] Ibid 244

contended that since such practice has been in vogue for the Scheduled Castes and Scheduled Tribes and has proven to be beneficial for these communities, it would be worth undertaking for religious minorities as well.

8. *New Central Government Schemes with large outlays for welfare of minorities with equitable provision for Muslims* – this recommendation is associated with the finding by the committee that Muslims have not benefitted much from the existing government schemes and programs. The report says, "at times the Muslims do not have adequate participation as beneficiaries; when participation is adequate, the total amounts allocated to the program are too low to make any meaningful impact".[149] It is also observed that while there are many Central Plan Schemes and Centrally sponsored schemes available for the welfare of SCs, STs and OBCs, but such schemes for the welfare of minorities are very rare and thus the need for specifically targeted schemes.
9. *Providing financial and other support to initiatives built around occupations where Muslims are concentrated and that have growth potential* – this suggested measure stems mainly from the perceived need to improve employment opportunities and conditions. The rationale is provided by the finding of the committee that a large segment of Muslims is involved in self-employment activities and within that most of them are engaged in occupations or sectors that are stagnant. For addressing this issue skill upgradation and education and credit availability have been identified as crucial factors to be taken care of. It has been observed in the report that,

> It is imperative to increase the employment share of Muslims particularly in contexts where there is a great deal of public dealing. Their public visibility will endow the larger Muslim community with a sense of confidence and involvement and help them in accessing these facilities in larger numbers and greater proportion. To achieve this, efforts should be made to increase the employment share of Muslims amongst the teaching community, health workers, police personnel, bank employees and so on.[150]

But interestingly, Sachar Committee does not recommend reservations for achieving the above purpose. It recommends different innovative measures like undertaking a visible recruitment process in areas and districts with high percentage of Muslims, job advertisement in Urdu and vernacular newspapers and other media, and simple messages

[149] Sachar, Op Cite., p 251
[150] Sachar, Op Cite., p. 252

like ‘women, minority and backward class candidates are encouraged to apply’. Such kinds of measures are supposed to contribute to the above objective and build an atmosphere of trust and confidence. Trust and confidence are important in the context of Muslims because it has been found by the committee that they usually avoid applying for tests and interviews, but when they appear in them, their success rate is appreciable.

At the end the committee stresses the importance of community initiatives and participation for bringing success to the recommended measures. It exhorts the communities to forge partnerships with government as well as private sectors. It recognizes the better utilization of Waqf properties as providing good partnership opportunities for the Muslim community.

I think the nature of the recommendations is the hallmark of the Sachar Committee Report. The recommendations are unique because along with addressing the concerns of the Muslims as well as other Socio-Religious Categories in an exhaustive way, the burden they put on the state machinery is minimal. The recommendations are replete with examples where the required measures can be affected within the existing schemes and provisions by the state.

Now let us consider the recommendations of the Ranganath Misra Commission entrusted with a similar task and examine the difference in approach with that of the Sachar Commission, as exhibited by the nature of recommendations given by the two Commissions.

Ranganath Misra Commission Report

On October 29, 2004, the Government of India resolved to constitute a National Commission for Religious and Linguistic Minorities. It was to consist of a Chairman, former Chief Justice of India Ranagnath Misra, and three other members. The terms of reference were the following:

i. to suggest criteria for the identification of socially and economically backward sections amongst religious and linguistic minorities;

ii. to recommend measures for the welfare of socially and economically backward sections among the religious and linguistic minorities including reservation in education and government employment;

iii. to suggest necessary constitutional, legal and administrative modalities required for the implementation of its recommendations.

iv. One reference subsequently added was to give recommendation on the issue raised in Writ Petitions 180/04 and 94/05 in the Supreme Court regarding the clause (3) of the Scheduled Caste Order, 1950 as to the modalities of inclusion in the list of Scheduled Castes.[151]

The National Commission for Religious and Linguistic Minorities (NCRLM) also cites the UN Declaration on the Rights of Minorities, 1992 as a guiding norm and refers to it in the following way

> The UN Declaration on the Rights of Minorities 1992 enjoins the States to protect the existence and identity of minorities within their respective territories and encourage conditions for promotion of that identity; ensure that persons belonging to minorities fully and effectively exercise human rights and fundamental freedoms with full equality and without any discrimination; create favourable conditions to enable minorities to express their characteristics and develop their culture, language, religion, traditions and customs; plan and implement national policy and programmes with due regard to the legitimate interests of minorities; etc.[152]

Then the commission looks towards the certain provisions in the Indian Constitution as its guiding principles. Mention is made of Art. 15 and 16 which prohibit the state from making any discrimination on grounds only of religion, race, caste, sex, place of birth in any kind of state action in relation to citizens, but allow positive discrimination for backward classes of people section of people. They interpret these articles in the Constitution coupled with the decision of the Supreme Court in Indra Sawhney vs. Union of India, as permitting the treatment of an entire caste or religious group as a 'class'. On the basis of this interpretation, the Commission makes an important inference that the Minorities who are socially and educationally backwards are within the ambit of the operation of Art 15 and 16

[151] Report of the National commission on Religious and Linguistic Minorities (NCRLM), Ministry of Minority Affairs, New Delhi, 2007, pp1-2

[152] NCRLM, Op Cite., p. 4

and thus entitled to the benefits of reservations earmarked for socially and educationally backward classes of citizens. The reasoning given by the Commission goes like this

> While Articles 15 and 16 empower the State to make special provisions for backward "classes", they prohibit discrimination only on the ground of 'caste' or 'religion'. In other words, positive discrimination on the ground of caste or religion coupled with other grounds such as social and educational backwardness is constitutionally permissible and, therefore, under a given circumstance it may be possible to treat a caste or religious group as a "class". Therefore even though Article 15 does not mention minorities in specific terms, minorities who are socially and educationally backward are clearly within the ambit of the term " any socially and educationally backward classes" in Article 15 and 'any backward class' in Article 16.[153]

Thus, what the Commission infers from the Constitutional provisions providing for affirmative action by the state, that is, Articles 15 and 16 and the subsequent Supreme Court verdicts is that expression backward class is religion neutral and may include any caste or religious community which, as a class, has suffered from social and educational backwardness. Then the commission turns to the Article 46 incorporated under the Directive Principles of State Policy in the Indian Constitution. This article says, "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation." The Commission infers from this article that although it refers particularly to the Scheduled Castes and Scheduled Tribes, but does not restrict to them the scope of the term 'weaker sections'. Therefore, according to the commission, state should promote with special care the educational economic interest of religious and linguistic minorities as well.

Now let us consider the recommendations made by the National Commission on Religious and Linguistic Minorities:

1. Perhaps the most sweeping recommendation made by the commission is that the identification of backward classes for the purposes of affirmative action should be delinked from caste and religion and a uniform criterion based on social, educational and economic indices, which is equally applicable to all, should be adopted. And in view of the commission, those who are educationally and economically backward are

[153] Ibid 5

also socially backward. The commission holds the current criteria of backwardness as applied for giving reservations responsible for the widespread perception that the benefits from reservation have been usurped by the better off and politically more advanced within the backward classes, due to which the poorest among the poor have not benefitted at all. Under the current system, social backwardness is given more weightage than economic or educational backwardness and groups defined by castes are taken to be the units for targeted action. Under the Mandal Commission case[154], the Supreme Court rejected the idea of identifying backwardness solely on the basis of economic criteria and re-affirmed the validity of the process of inclusion of groups who are socially and educationally backwards on the basis of their caste. It was opined by the court that caste is still the most relevant criteria for identifying backwardness as caste groups show collective signs of backwardness due to their historically low social status and can be considered as a class for the purposes of affirmative action. The Misra Commission recommends against this system. As shall be seen later, this recommendation in effect opens up the doors for the other more specific recommendations which provide for separate reservation for religious minorities.

2. The Misra Commission suggests that there should be a single list of socially and educationally backwards including the religious and linguistic minorities without any distinction on the basis of caste or class. The existing lists prepared on the basis of backwardness of caste or class should cease to exist after the new list is prepared. It has been observed by the commission that in view of the generally low educational, social and economic status of people in under-developed and backward states, the poor and socially and economically backward of each community, including Muslims are equal victims and suffer equally from disability or deprivation. Therefore, according to the commission, a comprehensive view of socially and economically backwards of all communities needs to be taken in an integrated manner rather than a segregated manner.[155]

[154] Indra Sawhney vs. union of India
[155] NCRLM, Op Cite., p.145

3. The Below Poverty Line (BPL) lists should be made eligible for the grant of reservation without distinction on the basis of caste, class, group or religion. The reason supplied by the commission is that the BPL lists are prepared on the basis of social, educational and economic criteria and they are more scientific as they are revised periodically. This stems from the view taken by the commission that the SC/ST and OBC lists have not been prepared scientifically either on the basis of any proper survey or reliable data on the socio-economic condition of particular castes or classes. This creates grounds for abuse of the reservation system where powerful sections among the groups take advantage of the reservation scheme at the cost of the most deprived among them. Thus, the commission exhorts for limiting the benefit of reservations for the socially and economically backwards irrespective of caste or class.

4. The members of the commission express their belief that both social and economic backwardness emanates from educational backwardness and thus it makes some strong recommendations for redressing the educational backwardness of minorities especially with respect to Muslims as they had been declared as the most educationally backward religious community along with the Neo-Buddhists by the National Education Policy, 1986. The commission recommends 15% of seats in all non-minority educational institutions to be earmarked for minorities with a break up of 10% for the Muslims (commensurate with their 73% share in the total minority population at the national level) and the remaining 5% for the other minorities. And in case the 10% of the reserved seats for the Muslims do not get filled, then other minorities should fill up those seats. This is recommended with a view to neutralise the effect of the 50% ceiling put on the minority intake in minority educational institutions by Judicial intervention. According to the commission this virtually earmarks 50% seats for non-minority students in minority institutions. So, adopting the same analogy and same purpose some seats for minority students in non-minority institutions are suggested to be reserved by the commission.
5. Under the economic measures also the commission recommends reservations for minorities apart from the general development assistance suggested to be given to small scale industries, self employment occupations where minorities are in

concentration. This reservation is purported to be given in the existing government schemes like Rural Employment Generation Program, Prime Minister's Rojgar Yojna, Grameen Rojgar Yojna, etc, with the same 15% share and a break up of 10% for Muslims.

6. Same scheme of reservation is recommended to be provided in government employment as well. The commissions suggests that since minorities and especially Muslims are under-represented and sometimes wholly unrepresented in government employment, they should be considered backward within the meaning of the term backward as used in the Art. 16(4) without qualification of the words socially and educationally. 15% of the posts in all cadres and grades under the Central and the State Governments are recommended to be earmarked for minorities with a similar break up as mentioned earlier.
7. The commission is convinced that the above action recommended by it would have the full sanction of Art. 16 but simultaneously it is in the commission's contemplation that the sweeping reservation for minorities as recommended above might be difficult to implement. In that case, the commission recommends an alternative measure. It recommends 8.4%sub-quota to be earmarked for minorities within the 27% OBC quota since according to the Mandal Commission report, the minorities constitute 8.4% of the total OBC Population. This is further suggested to be broken up into a 6%quota for Muslims and the remaining 2.4% for other minorities with minor adjustments according to the population of various minorities in states and Union Territories.
8. Lastly, the commission recommends the repeal of Scheduled Caste Order 1950, which restricts the Category of Scheduled Castes to Hindus, Sikhs and Buddhists. It suggested to make the Scheduled Caste status completely religion neutral like that of Scheduled Tribe. It is alleged to be discriminatory and against the spirit of the constitution as excludes from its purview Muslims, Christians, Parsis and Jains. The commission contends that while it is conscious of the fact that the Indian Constitution prohibits discrimination on the basis of Caste and still allows for special provisions in favour of Scheduled Castes, but it also prohibits discrimination on the basis of religion. In view of the commission, a reading of the constitutional provisions in tandem, any religion based discrimination in the selection of particular castes for

affirmative action comes in conflict with the letter and spirit of the Indian Constitution.

The Difference in Approach

A comparison between the recommendations of the two reports suggests that while Sachar relies on innovative socio-economic measures, Ranganath Misra makes reservations as its primary measure. In terms of the burden exerted on the state, it can be said that the recommendations of Sachar are minimalist in nature, whereas recommendations of NCRLM can be said to be extravagant. Both the reports put positive obligations on the state and can be said to be furthering the positive rights of minorities, but there is a difference in the kind of positive rights created by the two reports. This difference stems from the difference in the kind of obligations put on the state. In case of Sachar, it can be said that the recommendations are more adjustive in nature and less drastic than those of NCRLM, inasmuch as it does not create any new set of obligations but merely entails a shift in emphasis within the existing framework. But, on the other hand the approach adopted by NCRLM seems to be more acceptable to the government. This is because reservations are favoured by political parties because of the gains it brings to them owing to the kind of electoral politics prevalent in India. They mobilize support on caste lines and different groups vote en bloc in favour of the party which promises reservations to them. On the other hand socio economic reforms look, prima facie, to be more expensive, but the way they have been recommended to be implemented by Sachar takes away the rigour of expenditure from them.

The character of electoral politics makes the policy of granting reservations very lucrative. Political parties mobilize caste groups on the basis of promises made for inclusion in the list of beneficiaries of reservation and in response such caste groups vote en bloc in favour of that party. Such politics makes the reservation policy to be a hit among the political powers. As a result, they are reluctant to undertake socio-economic reform. As gathered from the argument provided by Holmes and Sunstein, The economic measures suggested by Sachar

are but as expensive as any other basic liberty right. I think we need to lay emphasis on Sachar recommendations as they have the potential of drastic results. Especially in case of Muslim community, more than anything it needs is the elimination of discrimination, elimination of negative stereotypes, participation in shared projects and so on. Unless these evils are addressed, no amount of reservation or any other measure can change the situation of Muslims in India.

CONCLUSION

This work tried to locate the claims of culture within the liberal democratic practice. The normative importance of the claims grounded in culture seems to have been established considering the strength of the arguments provided by the multiculturalists in its support. One, cultural identity is shown to be a factor in promoting individual autonomy which is perhaps, the most integral value of liberalism as a political doctrine. Individual autonomy consists in being in charge of one's own life, being able to form and revise one's own conceptions of good. As the argument goes, a culture offers a person options and endows those options with meaning and familiarity and thus forms a context in which the individual is able to exercise the capacity to choose. On the other hand Culture makes for a constitutive attachment of the identity, that is, it plays a big role in the identity formation of an individual and one of those attachments which is always tied to the 'self' of the individual. Such constitutive attachments have a bearing on the formations of the conceptions of good by an individual. John Rawls elaborating on the capacity of persons to have a conception of good, writes

> Given their moral power to form, to revise and rationally pursue a conception of good, citizens' public identity as a moral person is not affected by changes in their conceptions of good…By contrast, citizens in their personal affairs, or within the internal life of associations, may regard their ends and aspirations differently. They may have attachments and love that they believe they would not or could not, stand apart from; and they might regard it as unthinkable for them to view themselves without certain religious or philosophical convictions and commitments[156]

In simpler words it can be also be said that given the nature of cultural belonging, it generates specific conceptions of good and specific interests in an individual and if an individual is unable to pursue those ends and interests, then it will imply a severe limitation on his individual autonomy. Given the importance of cultural belonging for an individual, most liberal democracies have recognized minimal negative rights to cultural belonging and expressions. However, the issue is far from resolved. The individual dimension is only one dimension of cultural rights; the other more controversial dimension is the group dimension.

[156] John Rawls, 'Kantian Constructivism in moral theory', *Journal of philosophy*, 1980, vol. 9, no. 77, pp 515-72 in Evan Charney, 'Identity and Liberal Nationalism', *American Political Science Review*, vol. 97, no. 2, 2003, p. 297

The right to culture it has been argued can only be exercised in a group, in community with the other members of the group. Now in order to secure cultural identity, the right to culture has to be granted as a group right. Now granting autonomy to the group, endangers the autonomy of individuals in the groups and this a concern which has attracted intense debate but still finds itself unresolved. We have examples where highly discriminatory and inhuman practices are legitimized on account of group's autonomy to pursue its culture. Practices such as female genital mutilation, discriminatory customs against women are some frequently seen examples. Now, how do we ensure individual autonomy along with the group's right to culture? It is not that granting autonomy to a group does not enhance the autonomy of individuals comprising that group; but it also endangers the autonomy as observed earlier. One of the solutions provided by Kymlicka is that minority groups should only be granted rights against the dominant majority, while they should not be granted any rights against their own members. However, this is not easy when it comes to practice.

Nevertheless, the experience of minority groups in liberal democracies shows that certain disadvantages accrue to them due to their lesser numbers and different cultural or ethnic affiliations. The functioning of democracies has been shown to be prone to structural inequalities which are perpetuated by liberal institutions that stick to neutrality and formal inequality. This brings the role of state in protecting the minorities from discrimination on one hand and structural inequalities on the other. Ensuring these objectives implies that state has to take a more proactive role and recognize certain positive obligations upon itself. This brings us to the question of positive rights. Positive rights are difficult to enforce because they impute positive obligations on the state. Usually positive rights are difficult to conceive and adopt because in order to enforce them state has to play an active role. Right to Health, Right to Food, Right to Education are few of such rights which require intervention by the state for their fulfilment. But, the argument developed by Holmes and Sunstein has challenged this proposition. They have brought positive rights at par with negative rights by establishing that existence and maintenance of all rights whether positive or negative incurs costs and to that extent positive rights are no more costly than negative ones. This implies that policies of affirmative action should be encouraged more and more.

In my considered view, we need to focus on the enabling aspect of the cultural rights in the same way as Iris Marion Young has elaborated the enabling conception of justice which refers to not only a just distribution of rights but also to the institutional conditions necessary for the development and exercise of individual capacities and collective communication and

co-operation.[157] Apart from the direct affirmative measures which state is required to take for the protection and development of cultural minorities, a more inclusive model of democracy is also required. This involves including as many 'perspectives'[158] as possible into decision making so as to make process more just.

The Indian state is perhaps, one of the few states with such elaborate affirmative action programs. The Indian constitution allows for reservations in legislatures, in government jobs and government educational institutions. The objectives set out by the framers of the Indian constitution behind the adoption of such affirmative action policies was to achieve a casteless and classless society where reservations were provided as a temporary measure to bring the weaker sections on an equal footing with each other. However after sixty years of the implementation of such policy we find that the results are ironic. The lists of backward classes have continuously been increasing rather than getting eliminated. As caste is still being used as a criterion for identifying backwardness, people become more and more caste conscious and they mobilize themselves on caste lines to demand reservation quotas. Different political parties also mobilize support on caste lines by promising quotas to different castes. Though, this brings them fruitful results in elections, but on the other hand work to harden group identities, as different caste groups are pitted against each other for getting the benefit of reservation. This adversely affects the capability of different groups to come together and make a collective demand on the state. At the same time, the communities who do not get reservation benefits feel alienated because reservation seems like the only way adopted by the government to give attention to a particular group. According to Bhikhu Parekh this takes away attention from more serious socio-economic concerns like poverty, homelessness and so on. He writes, "Poverty has never been a national shame for India in the way that backwardness has".[159]

Drawing from the above discussion, in my considered view, Sachar Committee recommendations provide a better route towards the socio-economic amelioration of the Muslim community. The Sachar Committee strikes at the very route of the problems of discrimination and marginalization faced by the Muslim Community. I do not think that reservations can ever redress this wrong. It can only be redressed by concerted efforts towards enhanced intercultural interaction, shared public spaces, elimination of the negative

[157] Iris Marion young, *Justice and Politics of Difference*, Princeton University Press, 1990, p. 39
[158] Young, *Inclusion and Democracy*, Op Cite., p. 147
[159] Bhikhu Parekh, 'Limits of Indian Political Imagination', V.R. Mehta and Thomas Panthom (ed.), *Political Ideas in Modern India*, New Delhi, 2006

stereotypes by regulating the content in textbooks and media and so on. But as long as reservation s considered as the only means of affirmative action and is given to every erstwhile caste or class of people if they are backward, then there is no firm reason to believe that reservations should not be given to religious groups such as Muslims because it will be divisive for the society.

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