

**RESOLVING THE CONUNDRUM
OF INDIAN MINORITIES:
LACUNAE IN NATIONAL COMMISSION
FOR MINORITIES ACT, 1992**

Parthiv Joshi*

Jay Shah**

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ABSTRACT

Protection and Promotion of the interests of Minority groups have been paramount considerations in the Indian constitutional jurisprudence - enshrined in Articles 29 and 30 of the Constitution. Pursuant to the same, the National Commission for Minorities Act, 1992; enacted with a view to promote these ideals – vested powers of identifying minorities with the Central Government, which consequently identified 5 ‘minority communities’ in 1993.

*There is, however, a dearth of existing research that attempts to scrutinise the legal position of this grant of minority status. This commentary attempts to fill the gap by juxtaposing the 1993 Notification with the celebrated Pai Foundation (2002) judgement’s position of law and argues, *inter alia*, that – (i) NCM Act, 1992 and the NCMEI Act, 2004 vests unchecked powers with the Government, which is prone to political misuse, (ii) the ‘unit’ to determine the status of minority is a State/ Union Territory, (iii) the 1993 Notification purportedly identifies minority groups based on national population. It is concluded that (i) such incorrect identification of minorities is detrimental to the interests of many deserving minority populations such as Hindu, Baha’i, and Jew communities in many parts of India, (ii) the scope and meaning of minorities is required to be appropriately defined under the NCM Act, 1992 and NCMEI Act, 2004.*

This paper finally underlines how the ‘less than 50%’ criteria minority determination is unsuitable for Indian demographics and proposes a New Determination Model – accounts for state’s relative population proportion, along with factors such as social, political, and economical non-dominance.

Keywords- Indian Minorities, Determination, NCM Act, NCMEI Act

* Student, Gujarat National Law University.

** Student, Gujarat National Law University.

Introduction

The Indian Constitutional Scheme guarantees liberty of belief, faith, and worship to all its citizens, with Articles 25-30 recognising the religious, cultural, and educational rights of majority and minority alike. Articles 29 and 30¹ enable the minorities to ‘establish and administer their own educational institutes’. However, despite these constitutional safeguards and laws which were in force, there persisted a feeling of inequality and discrimination among the minority groups.² In order to remedy the same, two Central Legislations; namely the National Commission for Minorities Act, 1992³ (‘NCM Act’) and National Commission for Minority Educational Institutions Act, 2004⁴ (‘NCMEI Act’), were enacted to look after various matters connected with the minority classes in the country. Pursuant to the powers conferred therein, the Government has identified 6 minority communities till date.

Notably though, the expression ‘minorities’ has neither been defined in the constitutional scheme, nor in the subsequent legislations, and this has led to emergence of conflicting positions of judicial and parliamentary interpretations. This commentary endeavours to examine these positions and attempts to remedy the apparent anomaly Government’s identification of minorities in the context of the celebrated *T.M.A. Pai Foundation v. State of Karnataka*⁵ (‘Pai Foundation’) & related judgements.

Who are Minorities?

The scope and meaning of the expression ‘minorities’ as it occurs in heading of Art. 29 and Art. 30 certainly begs further clarity. The word is derived from the Latin – ‘minor’, and J.A. Laponce in *The Protection to Minorities*⁶ describes ‘minorities’ as “a group of persons having different race, language, or religion from that of the majority of inhabitants”⁷.

The omission of definition of ‘minorities’ in the Constitution appears to be a conscious choice as the proposed amendment of Shri T.T. Krishnamachari in Constituent Assembly to substitute the expression ‘minorities’ with ‘certain classes’ was not accepted. However, this omission of definition does not attribute any less significance to the concept as it has been

¹ INDIA CONST. art. 29, 30.

² *Genesis of NCM*, NCM, <http://ncm.nic.in/home/pdf/about%20ncm/genisis.pdf>, 15 February 2022.

³ National Commission for Minorities Act, 1992, No. 19, Acts of Parliament, 1992 (India).

⁴ National Commission for Minority Educational Institutions Act, 2004, No. 2, Acts of Parliament, 2005 (India)

⁵ *T.M.A. Pai Foundation & Ors vs State Of Karnataka & Ors*, (2002) 8 SCC 481.

⁶ 9 J.A. LAPONCE, THE PROTECTION OF MINORITIES: BY JA LAPONCE (University of California Press 1960).

⁷ *Pai Foundation*, (2002) 8 SCC 481, ¶ 164.

employed 4 times in the Constitution: once in headnote of Art. 29 and again in headnote, clauses (1) and (2) of Art. 30.

Prior to the Constitution coming into force, a ‘minority’ was understood as a class based on religion, having separate electorates. With the idea of separate electorates being discarded after freedom, the expression was included in Chapter III under Art. 30 in two senses – based on (i) religion, and (ii) language. The term was inserted with the intent of instilling security and confidence in the minorities. However, it is essential to identify the intended beneficiaries of this, and a determinative test to ascertain the same is required.

Determining Unit: Country or State?

The crux of the said determinative test revolves around the question as to whether the minority status shall be determined in relation to the country’s population, or that of the state where the said group resided. We shall scrutinize both the models in the upcoming section to adequately determine which one is best suitable in Indian context.

State-Wise Determination Model

Shri K.M. Munshi in his note and draft Article VI (3) in the Constituent Assembly Debates used the expression ‘national minorities’ and suggested that the protection envisaged be guaranteed as a fundamental right to ‘citizens belonging to national minorities’. Intervening the debates, Dr B.R. Ambedkar clarified that the grant of minority status was intended to cover classes that might not have been minorities in a technical sense of accustomed parlance, but would nonetheless constitute cultural or linguistic minority. He explained the same with an example as reproduced below:

“For instance, if a certain number of people from Madras came and settled in Bombay for certain purposes, they would be, although not a minority in the technical sense, cultural minorities. Similarly, if a certain number of Maharashtrians went from Maharashtra and settled in Bengal, although they may not be minorities in technical true sense, they would be cultural and linguistic minorities in Bengal”⁸

He added that the article in deliberation intended to protect such cultural and linguistic minorities as well, thus, minority was supposed to be interpreted in a much wider sense and not merely in a technical sense. Therefore, apprehending that the specific inclusion of the said expression ‘minorities’ could lead to a narrower interpretation, the expression itself was removed from the body of the article (now, Art. 29).

⁸ *Pai Foundation*, (2002) 8 SCC 481, ¶ 169.

This discussion persuaded the Bench in *Pai Foundation* to observe that the Constituent Assembly Debates unambiguously provide for determination of minority on basis of State/Union Territory's population only. It was further observed that Art. 350-A and 350-B also indicate that the minorities shall be determined State-wise only.

*Re: Kerala Education Bill, 1957*⁹ ('*Re: Kerala Bill*') first discussed the concept of minorities and held that it must be determined on basis of the State's population. Since the Constitution did not define the expression, the Court devised that any religious or linguistic group that was numerically less than 50% of the state's population would be entitled to the status. This proposal of 50% criteria was later upheld in another judgement of *A.M. Patroni v. E.C. Kesavan*¹⁰ ('*A.M. Patroni*') as well.

A similar 50% criteria was adopted by the Government of India in its views before the Special Rapporteur of the UN Sub-Commission on *Prevention of Discrimination and Protection of Minorities*¹¹. Pursuant to the same, the report¹² published by the Centre for Human Rights, Geneva recognised minority as a "group numerically smaller than the rest of the population of the state to which it belongs". Additionally, the United Nations General Assembly adopted Resolution No. 47/135 in 1992¹³, whereof Art. 1 provided for protection of national minorities in a country as well as of "religious and linguistic minorities within their respective territories" (essentially, the State/UTs for India).

In addition to this, Art. 30 of the Indian Constitution puts religious and linguistic minorities at the same pedestal by using the word 'or', and as such the unit to determine linguistic or religious minority has to be one and the same.¹⁴

Therefore, the intention of the framers of the Constitution and observations by the Supreme Court clearly indicate that the unit for determination of linguistic and religious minorities shall be a State.

Country-Wise Determination Model

A contrary interpretation in favour of the country-wise determination suffers from certain fallacies in view historical fact that the different states in India were formed on basis of language of majority population of the area, such that a linguistic group in such a State would

⁹ In Re: The Kerala Education Bill, AIR 1958 SC 956

¹⁰ Aldo Maria Patroni and Anr. v. E.C. Kesavan and Ors., AIR 1965 Ker 75, ¶ 6.

¹¹ 1947 *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, United Nations Human Rights Council.

¹² Capotorti, F., 1979. *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (Vol. 384). New York: United Nations.

¹³ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UNHRC General Assembly Resolution 47/135 (18.12.1992).

¹⁴ *Pai Foundation*, (2002) 8 SCC 481, ¶ 75, 81, 162.

form a majority in their own State. However, the same class' population would constitute a minor proportion of the country's population. Thus, if the unit for determination of minority status is held to be the Country, then each of such linguistic group in their respective States would be entitled to the same, effectively defeating the purpose of these provisions.

An argument in favour of country-wise determination was also rejected in *D.A.V. College v. State of Punjab*¹⁵, wherein the 5 judge bench of the Supreme Court observed that 'Arya Samajis' were to be considered a religious minority in the state of Punjab even when they were a majority in the Country as a whole. The said position was again discussed and upheld in the subsequent *D.A.V. College, Bhatinda v. State of Punjab*¹⁶.

Minorities in India

So far, we have examined various models and understandings on what the expression 'minorities' represents in the Constitutional Scheme. It is now pertinent to evaluate the *status quo* in India. § 2(c) of NCM Act and § 2(f) of NCMEI Act empower the Central Government to issue a notification identifying the classes or groups that could benefit under the said Acts. Consequently, the Central Government in 1993, vide a Notification¹⁷ ('1993 Notification') identified Five communities as 'Minorities', namely, (i) Muslims (ii) Christians (iii) Sikhs (iv) Buddhists (v) Zoroastrians (Parsis). Vide another Notification¹⁸ in 2014, one more community (Jains) was added to the list.

Interpretation of the said clause (c)¹⁹ of § 2 came up before the Apex Court in *Bal Patil v. Union of India*²⁰ wherein the ruling of *Pai Foundation* persuaded the Court to dispose of the appeal noting that the judiciary does not have a role in issuing any direction or mandate in relation to identification of minorities. The Court further observed that the said provision did not define 'minority' but merely enabled the Central Government to identify the same at its sole discretion. What essentially emerges is that in the existing scheme of legislations, the Central Government is the sole authority that shall conduct its own assessment to notify minorities at its own will and whims.

Violation of Fundamental Rights

¹⁵ D.A.V. College v. State of Punjab, (1971) 2 SCC 269, ¶ 18.

¹⁶ D.A.V. College, Bhatinda v. State of Punjab, (1971) 2 SCC 261, ¶ 11.

¹⁷ Government of India, SO No. 816 (E), F. No.1/11/93-MC (D) (23.10.1993).

¹⁸ Ministry of Minority Affairs, S.O. 267(E) (Notified on 27.01.2014).

¹⁹ National Commission for Minorities Act.

²⁰ Bal Patil and Ors. v. Union of India and Ors., (2005) 6 SCC 690.

Although this discretion left with the Centre by itself is not something beyond the reasonable powers conferred upon the Legislature, it is imperative to determine whether the objects and purposes of the said Act read with Art. 29 and 30 have been achieved. For the purpose of this determination, we shall first shed light on the population distribution of the following select States/ UTs of India according to Census 2011:

Table 1: Community-wise Population Distribution (in %) in select states²¹

	Mizoram	Lakshadweep	Nagaland	Meghalaya	J&K	Arunachal P	Manipur	Punjab
Hindu	2.75	2.77	8.75	11.53	28.44	29.04	41.39	38.49
Christian	87.16	0.49	87.93	74.59	0.28	30.26	41.29	1.26
Muslim	1.35	96.58	2.47	4.4	68.31	1.95	8.4	1.93
Sikh	0.03	0.01	0.1	0.11	1.87	0.24	0.05	57.69
Buddhist	8.51	0.02	0.34	0.33	0.9	11.77	0.25	0.12
Jain	0.03	0.02	0.13	0.02	0.02	0.06	0.06	0.16
Others*	0.16	0.11	0.28	9.03	0.17	26.68	8.57	0.36

* Others include followers of Bahaiism, Judaism, etc.

Source: Census of India, 2011

The population demographics reveal that:

- (i) Three states (Mizoram, Nagaland, Meghalaya) and One UT (Lakshadweep) have Christian/ Muslim communities in majority, and the Hindu population constitutes a relatively smaller proportion of the State/ UT's population.
- (ii) Other Four states have Hindu community in considerable fraction, nonetheless the Christian/ Muslim Communities are similar in proportion as well.

It is evident that these select States/ UTs have dissimilar demographics from rest of the country where Hindu community constitutes a major population proportion.

Assessing this situation along the test laid down in the *Pai Foundation* judgement, the following position emerges with respect to Hindu community:

- Hindu community constitutes a clear minority in States/ UTs under category (i) as the Christian/ Muslim communities constitute a majority by the virtue of population demographics.
- The States/UTs under category (ii) pose a rather unique situation whereby neither of the communities (Hindu, Christian, Muslim, Sikh, Others) constitute a clear majority nor do they constitute a clear minority.

²¹ Office of the Registrar General & Census Commissioner, India, 2011 Census Data.

In both categories, the Hindu community is bereft of the protection and benefits under Art. 29 and 30 since ‘Hindus’ have not been notified as ‘minority community’ by the Central Government as under § 2(c) or 2(f) of the NCM Act and NCMEI Act respectively.

Similar positions emerge with followers of Bahaiism and Judaism who are also deprived of their fundamental rights – despite being minorities in Mizoram, Lakshadweep, Nagaland, Meghalaya, J&K, Punjab, Meghalaya.

On the contrary, despite constituting a majority/ not constituting a minority, other communities (Christian, Muslim, Sikh) in the select States/UT are entitled to the protection and benefits under Art. 29 and 30 merely because of Government’s identification.

Conclusion

- 2(c) of the NCM Act and §2(f) of the NCMEI Act vests arbitrary powers with the Central Government, and in absence of any definition of ‘minorities’, the Central Government assumes the responsibility of being the sole authority to identify minorities. This purportedly has created a situation where the Government could misuse the said power for political or otherwise reasons.
- The 1993 Notification issued by the Central Government in exercise of its powers under the said § 2(c) is incongruent with the *Pai Foundation* judgement as the minorities therein have not been identified by taking State/UT as a Unit. It seems that the said notification identifies ‘national minorities’ based on the Country’s population demographics. Notably, the identified Five communities do not constitute ‘minorities’ by population demographics in at least 8 States/UTs of India. Therefore, the notification is *ultra vires* the Constitution and its basic structure.
- The grant of ‘minority’ status based on national population acts to the detriment of Hindu, Baha’i , and Jew communities, as despite actually constituting a minority in the select States/UTs, they are not entitled to the said protection and benefits, and do not have the right to establish and administer educational institutions. Such arbitrary and irrational disbursement of protections and benefits jeopardises Fundamental Rights of Hindu, Baha’i, and Jew communities.

Recommendations

- Since the 1993 Notification identifying Five Minority Communities is *ultra vires* the Constitution and its basic structure, it should be repealed.

- To remedy any further confusion, the expression ‘minorities’ should be appropriately defined in terms of population of a State/UT as expressed by *Pai Foundation* and in the spirit of the 1992 UN Resolution²².
- Guidelines for identification of minorities at State Level by the Central Government should be framed.
- As a remedial measure, Hindu, Baha’I, Jew communities should be identified as ‘minority’ communities in the select States/ UTs.

Proposed Minority Determination Model

The current position of law as developed in *Re: Kerala Bill, A.M. Patroni and Pai Foundation* suffers from certain inaccuracies and is not suitable to be directly adopted. The said case laws propose grant of minority status to communities being numerically less than 50% of a State/UT’s population. However, owing to the diverse and unique population demographics of India, there are many States/UTs e.g. Arunachal Pradesh and Manipur where no religious group constitutes 50% + of the State’s population, and there exists no clear majority.

A similar scenario has been contemplated by M.P. Jain, an eminent jurist in his magnum opus *Indian Constitutional Law*²³, and the discussion therein suggests that in such a situation, “*every group will fall within the umbrella of Art. 30(1) without there being a majority group in the State against which minorities need to claim protection*”.

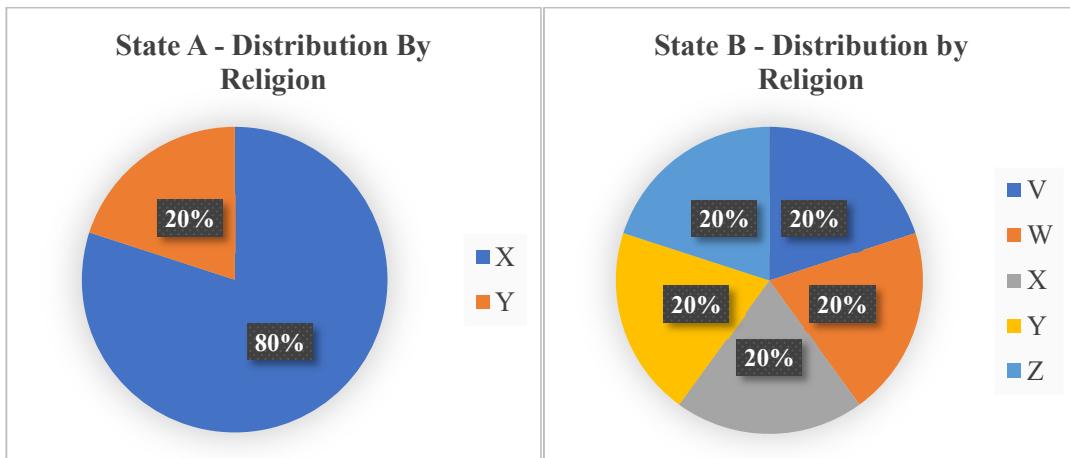
Hence, the 50% criteria does not sufficiently help achieve the intendment of the Articles 29 and 30, and a new criteria should be devised for the same taking into account the State/UT’s population demographics.

Hence, we propose the following Determination Model that attempts to remedy the highlighted concern:

1. The determination of numerical inferiority shall not be in absolute percentage terms, but should be identified on the basis of a community’s relative population to that of other communities. An illustration for the same being:

²² UNHRC ‘Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities’, General Assembly Resolution 47/135 (18.12.1992).

²³ M.P. JAIN, CONSTITUTIONAL LAW OF INDIA 1326 (LexisNexis, 8th ed. 2018)



The above example illustrates that despite the population share of a religion (*Y here*) being 20% in both cases

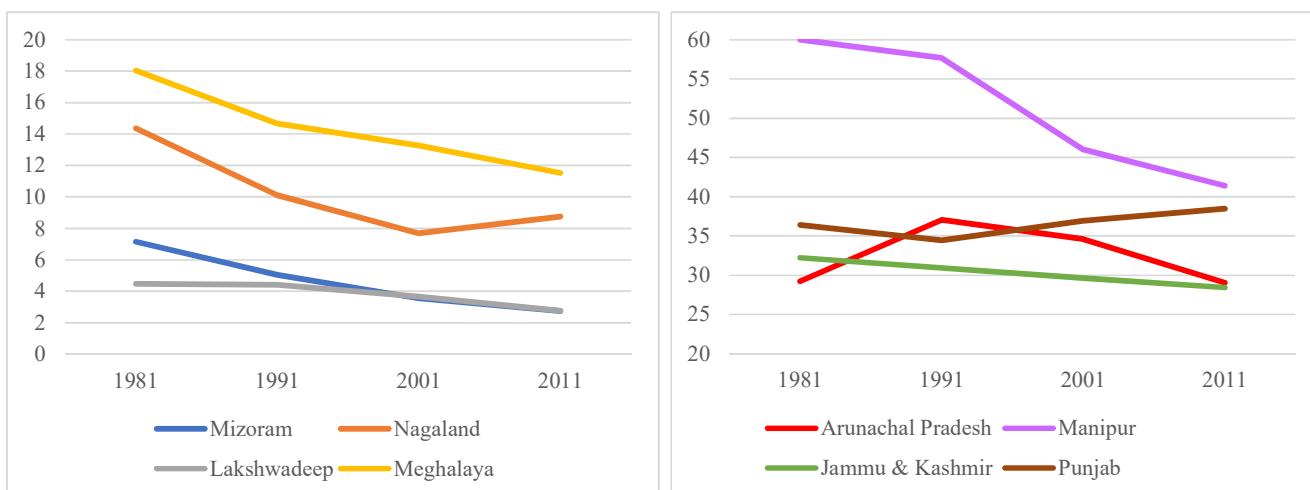
- (i) They shall be entitled to Minority status in State A, whereas,
 - (ii) They shall not be entitled to Minority status in State B
2. Rather than Numerical inferiority being the only determining factor, social, political, and economical non-dominance shall also be account for.

Increasing Relevance in Coming Times

This commentary has attempted to highlight certain *status quo* lacuna and then after propose a probable solution. It is noteworthy that the population demographics of Census 2011 have been referred to throughout. The latest Census would have further corroborated to our finding that the changed population demographics of Indian States demand a re-evaluation of existing legislations. But in light of the delayed Census, we might attempt to speculate probable change in demographics based on past population trends so as to determine the relevance of our findings in coming times.

For the purpose of this preliminary inquiry, we shall take an example of population trends of Hindu community since 1981.

Graph 1: Hindu Population Trends since 1981



Source: Authors

As the trend suggests, the population proportion of Hindu communities in the select States/UTs have been decreasing/ or having no substantial increase. In absence of any material evidence suggesting to the contrary, it shall be reasonable to assume that this trend will not witness a drastic alteration with the upcoming Census.

Therefore, we find it satisfactory to conclude that the alternative recommendation to grant minority status to Hindu community (and similarly, to Baha'i and Jew community) shall be further substantiated.