

Fundamental Rights, Secularism and Constitution of India: An Analysis of Rights of Muslims in India

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Abstract

The Constitution of India based on the ideals of justice, liberty, equality and fraternity provides human rights to all its citizens on the basis of equality and non-discrimination. Secularism in India i.e. equality of all religions is the basic structure of Indian Constitution. All the religions and religious communities in India are equal in the eyes of law and State has no religion of its own. The State is directed to protect all its peoples and communities equally, and cannot discriminate on the basis of religion. The State has authority to take affirmative actions for those who are backward and deprived. Muslims, the most backward minority community are under-represented in legislatures, poorly employed in government jobs and services, and have the least literacy rate and thus, special rights and protection, and affirmative action programs are needed for their upliftment to stand at equality with other communities. This paper will study the fundamental rights together with the secular principles given in Indian Constitution in relation to Muslim minority in India. This paper will analyze the backward condition of Muslim community of India and will try to find the ways forward.

Keywords: Fundamental Rights, Secularism, Minorities, Affirmative Action.

Introduction

Indian Constitution, based on the secular values and principles of equality of all religions and with no official State religion, protect and promote all the religions equally and non-discriminately and directs the State to provide to its people- justice, liberty, equality and fraternity. These ideals are enshrined in Preamble to the Constitution in the form of "...justice- social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual..." The Constitution incorporated, among other things, all the important human rights including civil and political rights under Part 3 as Fundamental Rights; and socio-economic and cultural rights under Part 4 as Directive Principles of State Policy, for the overall growth and development of its peoples with equality and non-discrimination, and protecting and promoting the weaker section of the society. Indian Constitution also provided for affirmative action and reservation policies and plans for deprived segments including the Scheduled Castes (SCs), the Scheduled Tribes (STs) and the Other Backward Classes (OBCs) on the basis of their social backwardness due to historical wrongs and sufferings.

Indian secularism (1976) which is enshrined in the Preamble and applicable in the constitutional provisions provides for the separation of State and religion, as in West. Secularism in India also means equality of all religions i.e. *sarva dharma sambhava*. Secularism in India means that the State will not favour any religion at the cost of other and will promote all the religions equally. Constitution of India provided to every individual, the right to freedom of religion which includes right to practice and also to propagate; and right to choose the religion of one's own choice and also not to choose any religion (Article 25), it also includes provisions of equality before law, equal protection of law, and non-discrimination on the basis of religion, among other things (Article 14 and Article 15). Thus, legally, the concept of secularism means all religions and religious communities in India have equal legal status and enjoy equal freedoms and rights.



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Aim of the Study

Muslims being equal citizens of this country have equal rights with other communities. The paper is important at this juncture where minority community feels most excluded, and marginalized. It is important to look into the constitutional protection and rights of Muslims in India. This paper will study the fundamental rights together with the secular principles given in Indian Constitution in relation to Muslim minority. It will study rights applicable to everyone equally and the rights applicable particularly to Muslims. In spite of fundamental rights available to every citizen of India equally and non-discriminatorily, Muslims remain the most backward community in India in general and also among other minority communities. This paper will try to find the reasons behind backwardness of Muslim community. This paper will also analyze the status and the backward condition of Muslim community of India and will try to find the ways forward.

Review of Literature

Issues of minorities always remain a debatable topic in any society where minorities are threatened and their rights are violated when they don't have proper constitutional protection and the society is gripped with the problem of communalism. The issues and rights of minorities and secularism are the topics of great interest to social researchers and academicians. A large stock of valuable literature is available and the researches on these issues are still evolving. Some of the important literature and works of social scientists and academicians are briefly discussed.

Chandhoke (2019) questions how peoples with religious, linguistic and cultural differences can live together with mutual respect with rising intolerance towards religious and ethnic minorities etc. It discusses secularism and communalism and evolution of minority rights in India. Khan ed. (2018) in his work focussed on issues and problems of Muslims in India and various aspects of exclusion of Muslims in different spheres. It includes discussion on denial of constitutional rights and the legitimacy of the State in relation to Muslim minorities. It has critically analysed the rights of minorities in Indian Constitution, and the role of Indian judiciary in relation to minority rights. This work also discussed on how communalism and majoritarian politics targeted and adversely affected religious minorities especially Muslims in India. Sen (2018) focussed on the concept of religion and State and analysed the legal base of religion in India. Sen's work examined the judgements of Supreme Court on constitutional provisions of religious freedom. It also discussed various interpretations of the right to freedom of religion in Article 25 by Indian judiciary. Its latest edition included landmark judgement of Supreme Court on the triple talaq.

deSouza et. al. (2019) in their work *Democratic Accommodations: Minorities in Contemporary India* discussed the place of minorities and their rights and claims in India. It focussed on India's multi-ethnic and multi-cultural features and what India can offer to the world especially to the countries that are challenged with ethno-cultural and

ethno-religious assertion. The book advocates the argument that all democratic countries that are plural must find out their own strategy of accommodation. The book analyses India's response to its diversity which is distinct in itself. Bjørge ed., (2019), focuses on the rise of vigilante movements by far right groups against minorities and other marginalised sections. The book covered various regions of the world including Asia. It tried to find the purpose, organisation and operational mechanism of the vigilante groups.

Naqvi (2016) in his work analysed how the last century destroyed the Hindu-Muslim unity and brotherhood. He tells that how the two religious communities celebrated each other's culture and lived in peace and harmony. It explained how communal and divisive politics destroyed the social fabric and Muslims were excluded and marginalized. Naqvi looked into the causes and factors behind the division of Hindus and Muslims.

Smith (1963) in his work *India as a Secular State* analyzed how the secularism as a concept originated in Indian society. He found that religion as an important factor has always contributed in developing India's civilization. Bhargava's (2010) *The Promise of India's Secular Democracy* is about debates on secularism in India. It covers issues like democratic vision of new republic of India, the evolution of Indian federal structure, secular principles and constitution, and it also discussed on the personal laws of Muslims. Brass (2011) studied the problem of communal violence in India and mechanisms through which communal violence is provoked and sustained. He also focused on the role of different actors complicit in violence and how the rights of victims are affected.

Critical Analysis of Fundamental Rights

Indian Constitution guarantee fundamental rights in Part 3 from Articles 12 to 35 in the form of basic human rights and freedoms to all Indian citizens including Muslim minorities. It includes civil and political rights and are provided to everyone with equality and non-discrimination on any ground like race, religion, caste, gender, etc. These rights are justiciable in nature and are enforceable by courts i.e. an individual can approach a court in case of violation of his/her basic rights (Basu 79). Fundamental human rights safeguarding the interests of the peoples including minorities are essential for the normal functioning and success of any democracy. Article 13 of Indian Constitution states that all the laws that are in violation of fundamental rights shall be void and any law that takes away fundamental rights cannot be enacted. Thus, the Supreme Court and the High Courts can declare any law unconstitutional if it violates fundamental rights of peoples. Broadly, there are six fundamental rights in the form of right to equality, right to various freedoms, protection against exploitation, religious freedom, educational and cultural rights, and constitutional remedy, and these are equally guaranteed to all the citizens including Muslims, enshrined in the Indian Constitution as mentioned below:

The Constitution guaranteed equality before the law and the equal protection of law of every individual in India through Article 14. The Constitution through Article 15 protects people by providing for non-discrimination on the basis of religion etc. Article 16 provides for equal opportunity in public employment to all citizens without discrimination on religious and other grounds. The Constitution protects the people by denying privilege in favour of any person. It is based on the doctrine of rule of law that no one is above the law of the land. It also provides for equality of treatment in equal circumstances i.e. among equals the law should be equal and likes should be treated alike, thus, it also provides for affirmative action by the State towards depressed and backward classes (Basu 85).

The Constitution empowered peoples with various freedoms in the form of speech, expression, assembly, association, movement, residence and profession. The Constitution also provided safeguards in respect of conviction for offences. The Constitution provided protection of life and personal liberty to all the peoples under Article 21. It also protects against arbitrary arrest and detention in certain cases through Article 22. The Constitution protects the life and dignity of peoples by prohibiting and criminalising human trafficking, forced labour, and employment of children in factories.

Article 25 to 28 provided religious rights including religious freedoms and equality indicating the secular nature of India's society and polity. The Constitution provided freedom of conscience, profession, practice and propagation of religion. It provides that the State has no official religion and that every individual possess the right to freely practice his or her religion. Every community can establish and maintain religious and charitable institutions and can manage their own religious affairs. No one can be forced to pay taxes for religious purposes and no one can be forced to attend religious instructions.

The most important provision in terms of protection of interest specifically of minorities are cultural and educational rights of minorities provided under Article 29 and 30. These guarantees have special significance for religious minority communities because these are the only provisions in the fundamental rights which are specifically provided to minorities and they provide protection to language, script, culture and educational rights of minorities.

The remedy granted by the Constitution under Article 32 is an important provision in the way that it guaranteed to protect all other rights. If anyone's fundamental rights are violated or are not implemented, a person can move to the highest Court, which in turn can issue writs for the enforcement of the same. The government and its officials cannot infringe, contain or violate the fundamental rights of any person.

Although, legally, the fundamental rights are enjoyed by everyone without discrimination. But there are limitations in the provisions and clauses of fundamental rights and there are hurdles in the form of laws and Presidential orders that adversely affect the rights and interests of minorities. Indian Constitution based on the principle of equality and non-

discrimination, also have some exceptions providing positive discrimination which includes affirmative actions and reservation policies on the basis of social backwardness. But the benefits of affirmative actions are available only for the SCs and STs and not Muslims. Muslims are denied reservation by stressing that they are a religious community and there is no religious based reservation. Reservation of seats for Muslims in education and employment is not against the Constitution and is solely depended on the political will. Reservation policies for Muslims in various states like Kerala, Andhra Pradesh, Tamil Nadu, etc., are in consonance with the provisions of the Constitution.

The Justice Ranganath Mishra Commission Report had also suggested reservation of up to 15 per cent for Minorities in education and employment (Mishra 95).

The minorities' claim of reservation based on backwardness can also be justified from the debates on human rights in the Constituent Assembly. Sardar V Patel, Chairman of the Committee on Fundamental Rights, Minorities... included the word "classes" in place of "minorities" and then later he and some other members of the Assembly clarified that classes include minorities (Ansari 26). On the question of reservation to backward classes, Supreme Court has looked into the debates of Constituent Assembly, but at same time ignored the meaning of classes as discussed in Assembly when the question of reservation to minorities appeared.

Article 15 ensures that there will be no discrimination against any citizen on religious or any other ground. However, further in clause 3, 4 and 5 of Article 15 the Constitution has permitted the State to provide special provisions to women and children, special provisions for any socially and educationally backward classes of citizens or for SCs and STs or for their admission to educational institutions (Basu 93). In order to provide socio-economic equality to the disadvantaged peoples, Article 16(4) has permitted the State to take action if any backward classes of citizens are not adequately represented in the services of the State. Backward classes of citizens in Article 16(4) includes SCs and STs as has been described in various court's judgements (Basu 96).

The Objectives Resolution is the basis of discussion for the rights of minorities to be incorporated in the Constitution, which was forwarded by J L Nehru in the Assembly on December 13, 1946. The Resolution besides guaranteeing equality and non-discrimination, and basic human rights also guaranteed and promised to provide adequate safeguards for the protection of minorities (Ansari 96). Accordingly, the Constituent Assembly, then, established an Advisory Committee on Fundamental Rights and Minorities... under the Chairmanship of Sardar V Patel which later appointed a Sub-Committee on Minorities to be headed by H C Mookherjee. K M Munshi, a Sub-Committee member prepared a questionnaire on political and economic rights of religious minorities and a body to look into the issues and problems of minorities. The questions on minorities were discussed in the Assembly and Sub-Committee in its Report on July 27, 1947, recommended reservation for minorities under joint

electorates system; no provision for reservation in cabinets, but provided representation through a convention under a scheduled to the Constitution; and finally, reservation of seats for religious minorities in public services (Rao 48).

Thus, after Constituent Assembly discussed the issue of giving reservation to minorities along with the SCs and STs in employment and legislative bodies. The Advisory Committee accepted most of the recommendations of the Sub-Committee including population-based quota for minorities in legislatures and ensuring their adequate representation in public services. Interestingly, besides reserved seats, it assured additional rights of minorities to contest unreserved seats as well (Ansari 76).

Finally, the Report prepared by the Advisory Committee providing reservation to minorities in proportion to their population under joint electorate in all Central and Provincial Legislatures, promising incorporation of the principle of representation of minorities in the Cabinet in a Schedule to the Constitution, and guaranteed share in the All India Services and also in the Provincial Services, was adopted by the Constituent Assembly on August 27 and 28, 1947. The acceptance of these recommendations was reiterated once again in February 1948 when they were included in Part XIV of the Draft Constitution under the title "Special Provisions Relating to Minorities." Draft Articles 292 and 294, included provisions and assurances for reservation of seats under joint electorate based on population in Parliament and State Legislative Assemblies. Till April 1949, the Constituent Assembly maintained its stand favouring reserved seats for minorities in legislatures and public services. Later, on the basis of narrow interpretation given to secularism, draft Articles 296, which provided that claims of minorities in services shall be considered and Article 299 providing for appointment of special officers for minorities for Union and each state were subsequently dropped (25).

Sardar V Patel's letter to the President of the Constituent Assembly on May 11, 1949, reopened the discussion on issue of reservation of minorities in legislatures. The debate so reopened culminated not only in abolition of reservation in legislatures but also in the unwarranted denial of any guarantee of fair share of minorities in public services (26). It is important to mention here that reservation of seats for the SCs and the STs in legislatures and public services were kept intact. However, it was ensured through the subsequent Presidential Order of 1950 (1950) that the benefits of affirmative action and special measures were confined to the Hindu Scheduled Castes only. The denial of reservation to minorities in public services and legislatures affected their social, economic and political interests adversely.

Again, though the Constitution under Article 19 has assured important liberties to its citizens in the form of various liberties including freedom of speech and expression etc., with certain reasonable restrictions. Freedom of speech and expression is one of the important rights for any successful democracy.

This freedom is subjected to some restrictions relating to public order, national security, court's contempt, incitement of offence, etc. Thus, these restrictions are important for maintaining harmony, decency, stability, public order, etc. in the society and country. Hate speeches dividing the society on communal and caste lines are not a new trend but in recent times, communal speeches and propaganda are at its peak. These practices divide the society and groups and the violence against minorities' increases, which not only becomes a law and order problem but also restricts the country's progress.

Again, religious freedom is an important aspect of any secular country which empowers its people with the right to choose and follow any religion and also not to follow any religion and further right to profess, practice and propagate his/her religion. The right to freedom of religion also provide right to convert to other religion. Muslims have however been unreasonably restricted many times with their right to freedom of religion. Inter-faith married couples are targeted in the name of *love jihad* and those Hindus who have religiously converted themselves to Christianity or Islam with their choice are attacked in the name of *ghar wapsi*. As most of the religious conversion in India take place from Hinduism to Christianity and Islam, many states have passed anti-conversion laws. The conversion issue becomes a sensitive topic in India because peoples of mostly majority community are converted and to avoid this many states with ruling BJP government and in one case Congress have passed anti-conversion laws. Thus, limiting the right to freedom of religion by restricting the meaning of the word "propagation". The Supreme Court also while hearing on the conversion law in *Stainislaus v. State of Madhya Pradesh* gave a narrow understanding and held that right to propagate a religion does not include right to convert others. The Constituent Assembly while discussing the right to freedom of religion and conscience also discussed the meaning of the word propagation which included right to convert others (Chandhoke 50). Freedom of religion is a very personal matter and a person can choose and follow whichever religion he likes.

The cultural and educational rights of minorities provided under Articles 29 and 30 are also subject to some limitations. They were originally intended to provide special rights to protect and promote the interest of minorities, but the subsequent changes made during the debates of the Assembly limited the rights. There was a big debate on the cultural and educational rights of minorities in the Constituent Assembly and finally, after long debates and discussions and after all the amendments the section relating to the rights of minorities was titled as: Cultural and Educational Rights. Article 29 in its clause 1 provides that "any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." Further, clause 2 states that "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”(Basu123).

The educational rights provided under Article 30 states that “all minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.”(Article 30 (1)) In making any law which requires “acquisition of property of minority established and administered educational institution,” referred to in clause (1), “the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.”(Article 30 (1)A) It further says that:“in granting aid to educational institutions the State shall not discriminate against any minority educational institution.”(Article 30 (2))

The original recommendations of the Advisory Committee proposed in the Constituent Assembly were that the language, script and culture of minorities shall be protected and that in this respect no law may be passed which may act oppressively; no minority shall be discriminated against in regard to admission to educational institutions administered by State, and no religious instructions be compulsorily imposed on minorities; all minorities shall be free to establish and administer educational institutions of their choices; and finally, the State shall not, while providing aid, discriminate against institutions of minorities.(CAD)The Constituent Assembly amended the original proposals of the Advisory Committee and substituted the words ‘minorities’ and ‘minority’ with ‘any section of the citizens’ and with ‘citizen’ in clause 1 and clause 2 of Article 29 respectively. Thus, the purpose of protecting minorities from discrimination in admissions to State run educational institutions was excluded and clause 2 of Article 29 has in reality became more a right of majority community to take admissions in the minorities’ institutions. In spite of protecting the interest of minorities, which even the Constitution makers wanted, Article 29 (2) has restricted the content of the right under Article 30 (1) (Seervai 55).

The heading “Cultural and Educational Rights” before Articles 29 and 30 and headings under these articles “Protection of interests of minorities” and “Right of minorities to establish and administer educational institutions” respectively in relation to protection of interest of minorities, clearly shows that these provisions were intended to protect and promote the cultural and educational rights of minorities. But after the tragic partition, these provisions were once again opened for discussion and drafted in such a way that they lost their original purpose and understanding (Khan 60-65).

Due to the limitations in the fundamental rights and lack of special protection and affirmative actions as discussed above, huge poverty, illiteracy, unemployment and backwardness still prevails among Muslims in India.The largest religious minority i.e. Muslims are the most backward among all the communities in India is also proved by various government reports and commissions including the Gopal Singh Committee Report (Report 1983),

Ranganathan Mishra Commission, and most important and specifically the Sachar Committee Report(Report 2006). More than 200 million Muslims in India are the most discriminated, deprived, and marginalised among all the communities. The economic and educational backwardness of Muslims as recorded in the Sachar Committee Report proves the fact of successive marginalization and exclusion of a big segment of Indian population(2006, 52). According to the reports of various commissions the literacy rate of Muslims in India is below 60 per cent, which is far below the national average of more than 65 per cent. In public services also, the rate of employment of Muslims is very poor which ranges from 3 to 5 per cent.Representation of Muslims in the legislatures both at Centre and states also does not match their population share. In spite of fundamental rights available to every citizen of India equally and non-discriminatorily, Muslims remain the most backward community in India in general and also among other minority communities.

Conclusion

The Constitution of India protects minorities through fundamental rights and directive principles of State policies and also with other legal rights. The Preamble also protects rights of minorities in India by providing security of justice, liberty and equality.The Constitution of India enshrined the rights of peoples in a secular way, thus, protecting peoples equally and non-discriminatorily on ground of religion, among other things. The Constitution also have some exceptions by providing for special measures, affirmative actions and reservations, to those who are socially and educationally backwards including SCs and STs. The Constitution, though, in many ways protects rights of minorities, but there are times when minorities’ rights have been violated and they are denied with due rights and protection. Muslims being educationally backward, politically under-represented and economically weak and the most vulnerable community in almost every sphere are denied with special protection and affirmative action unlike SCs and STs on the ground that they are a religious community and the Constitution does not talk of affirmative action on religious ground which later was made clear with the 1950 Presidential Order which provides that backward classes of only Hindus, Buddhists and Sikhs will get reservation. India, being a secular democratic republic implies that everyone should be treated equally and non-discriminatorily. There should be no discrimination on the basis of religion, every religious community should be given due respect and their rights and dignity should be well protected. The backwards and weak of every community should get equal benefits of reservation and other affirmative programs and there should be no discrimination on ground of religion.

The Supreme Court has declared secularism as the “basic structure” of the Indian Constitution, thus no religion can be declared officially as State religion. As the top court Supreme Court is authorised with interpreting the Constitution and fundamental rights and issue writs for fulfilling these rights. The Supreme Court in many cases viewed human rights broadly

and widened their scope as the case with right to life under Article 21. The Court should also look into the rights of minorities and interpret them with the constitutional principles of secularism, democracy and equality and strengthen them so that the minorities and their rights can be fully protected and their vulnerable condition can be improved. Democratic countries based on secularism must protect its minorities to develop and prosper.

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18. *Presidential Order of 1950 denies Muslim and Christian Dalits or Dalit converts to Islam and Christianity the special privileges and reservations that they are entitled to receive as SCs and OBCs.*
19. *India's secularism is based on the principle of Sarva Dharma Sambhava meaning equal treatment of all religions.*
20. *The word 'secularism' was included in the Preamble by 42nd Constitutional Amendment Act in 1976, but the secular attributes were present everywhere in the Constitution.*
21. *Article 25 of the Constitution of India talks about freedom of religion.*
22. *Article 14 and Article 15 talks about equality and non-discrimination.*
23. <https://theprint.in/india/who-is-kapil-mishra-bjp-leader-being-blamed-for-delhi-riots-had-once-called-modi-isi-agent/371226/>.