

**SCOPE OF ‘MINORITY’ UNDER ARTICLES 29 & 30 OF THE  
CONSTITUTION OF INDIA WITH REFERENCE TO THE  
SIKH & JAIN MINORITY CASE**

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*The government of Punjab granted minority status to Sikhs in the State of Punjab, leading to a challenge in the Hon’ble High Court of Punjab & Haryana in the case of Sabil Mittal & Ors. vs. Shiromani Gurudwara Prabandhak Committee (“Sabil Mittal”), where it struck down the impugned notifications thereby disallowing grant of minority status to Sikhs in the State of Punjab. The question, whether Sikhs can be provided minority status in the State of Punjab is now pending before a Five-Judge Bench of Hon’ble Supreme Court of India as the challenge in Sabil Mittal relies upon the judgement of the Apex Court rendered in the case of Bal Patil & Anr. vs. Union of India & Ors. (“Bal Patil”) which is under reconsideration. The issue in relation to Bal Patil is on the definition of ‘minority’ under Articles 29 & 30 of the Constitution whereas the issue in Sabil Mittal is whether Sikhs in particular are a ‘minority’ under Article 30. These issues can be decided only upon a determination of the scope of Articles 29 & 30. In this paper, I shall attempt to highlight the challenges in determination of minorities and the relevant factors that may be used to arrive at an answer on the questions that are currently pending before the five-judge bench of Hon’ble Supreme Court.*

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# SCOPE OF 'MINORITY' UNDER ARTICLES 29 & 30 OF THE CONSTITUTION OF INDIA WITH REFERENCE TO THE SIKH & JAIN MINORITY CASE

## INTRODUCTION

The government of Punjab, by way of its notification dated April 13th, 2001 (“**impugned notification**”), declared that Sikh Educational Institutions run by the Shiromani Gurudwara Prabandhak Committee (“**SGPC**”) in the State of Punjab as a minority institution, thereby allowing the SGPC to reserve 50% of its seats for the members of the Sikh community.<sup>3</sup> The impugned notification reads thus:

*“Whereas in terms of the provisions of the Constitution of India, the Sikhs are a minority community in the Country.*

*AND whereas the Governor of Punjab is of the opinion that the Sikh Educational Institutions ought to be treated as Minority Educational Institutions:*

*Now, therefore, the Governor of Punjab is pleased to declare that the Sikh Educational Institutions, run by the Sikh Gurdwara Prabandhak Committee, Amritsar, can reserve upto fifty percent seats exclusively for the members of the Sikh Community; and for furtherance of the interest of the Sikh Community, the aforesaid Committee may, make reservation within the seats, so reserved.”(emphasis author’s)*

The impugned notification came to be challenged before the Hon’ble Punjab & Haryana High Court (“**PHHC**”) in *Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee* (“**Sahil Mittal**”). The argument advanced by the petitioners was that for determination of the “majority” or “minority” status of a community, the “State” must be taken as a unit, and as per the *census* figures (sic), the Sikhs were in majority in the State of Punjab. Therefore, the State Government in the impugned notification, by taking the “Union” of India as the basis for determination of the “majority”

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<sup>3</sup> Punjab Government, Notification No.18/33/2001-GC (6) 4513, (Notified on 13th April, 2001).The primary source is unavailable online. Only source of the notification is the file of the Sahil Mittal case in the high court where it was made an annexure. However, to access it certified copy would have to be applied which can be done either by the party to the lis or its advocate or a new advocate with fresh vakalatnama. This notification is not available online; it only finds mention in the judgement.

or “minority” status of a community has wrongly provided ‘minority’ status to Sikhs in the State of Punjab, since Sikhs are a minority in the Union but not in the State of Punjab.<sup>4</sup>

*Per contra*, the arguments advanced by the respondents were that, firstly, the population of Sikhs that must be considered for the purpose of determining “minority” status is that which is eligible to vote in the electoral college for SGPC elections rather than a mere declaration by any person of them being a Sikh.<sup>5</sup> Secondly, the question of whether the Sikhs are a minority in the State of Punjab is a question of fact which cannot be gone into by the PHHC in its writ jurisdiction. Resultantly, PHHC framed the issue of whether the declaration by the State Government of Sikhs being a minority in the State of Punjab was valid.<sup>6</sup>

The PHHC, while relying upon the decision rendered by the Supreme Court (“**SC**”) in the case of *Bal Patil & Anr. v. Union of India & Ors.*<sup>7</sup> (“**Bal Patil**”) held that the term ‘minority’ has not been defined, and as per the constitutional scheme, it is simply an identifiable group of any community deserving protection from any potential deprivation of their religious, cultural, and educational rights by any other community having the numerical strength to gain political power.<sup>8</sup> While relying upon the decision rendered in the case *TMA Pai Foundation v. State of Kerala*<sup>9</sup> (“**TMA Pai Foundation**”) the PHHC held that the state must be regarded as the unit for determination of minorities.<sup>10</sup> While using the test laid down in the case of *TMA Pai Foundation*, the PHHC held that the Sikh community in the State of Punjab is not a minority and struck down the impugned notification.<sup>11</sup>

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<sup>4</sup> Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee, CWP No. 14646 of 2007, (P&H H.C.) (Unreported), ¶ 8, at 11.

<sup>5</sup> *Id.* at 11-12.

<sup>6</sup> *Id.* ¶ 10, at 13.

<sup>7</sup> *Bal Patil & Anr. v. Union of India & Ors.*, (2005) 6 SCC 690.

<sup>8</sup> Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee, CWP No. 14646 of 2007, (P&H H.C.) (Unreported), ¶ 18, at 21.

<sup>9</sup> *TMA Pai Foundation v. State of Kerala*, (2002) 8 SCC 481.

<sup>10</sup> Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee, CWP No. 14646 of 2007, (P&H H.C.) (Unreported), ¶ 14, at 15-16.

<sup>11</sup> *Id.* ¶ 15, at 16-17.

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The judgement of the PHHC came to be challenged before the SC, and the SC noted that to arrive at its ruling, the PHHC relied upon the decision of the SC rendered in the *Bal Patil* case, which is pending reconsideration. Therefore, the validity of the decision of the PHHC can only be judged properly upon reconsideration of the judgement rendered in the *Bal Patil* case.<sup>12</sup>

### CONSTITUTIONAL PROVISIONS

The relevant provisions of the Constitution of India (“**the Constitution**”) dealing with minorities are Articles 29, 30, 350A, and 350B.<sup>13</sup> Of the four provisions, Articles 29 and 30 are Fundamental Rights in Part III of the Constitution that afford protection to “*any sections of citizens*” and “*minority*” respectively. These two provisions do not enjoin upon the state any duty to protect the language, script, and culture but merely provide “*any section of citizens*” or “*minorities*” the right to protect their culture. Articles 350A and 350B are not fundamental rights but constitutional rights that enjoin upon the state the duty to make an endeavour to provide adequate facilities for instruction in the mother tongue at the primary stage and to appoint special officers for linguistic minorities.<sup>14</sup>

It is noteworthy that, upon a literal reading of the aforementioned four provisions, Article 29 appears to be the broadest in its scope, as it firstly applies to “*any section of citizens*” having a distinct “*language, script or culture*” under clause (1) and secondly affords protection to all citizens in securing admission in state-funded educational institutions by employing the words “*no citizen shall be denied admission*” under clause (2); followed by Article 30, which applies only to “*minorities based on religion or language*”, and finally Articles 350A and 350B being the narrowest of the four in their scope, as they apply only to linguistic minorities. It is pertinent to note that none of the aforementioned provisions define the term ‘minority’.

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<sup>12</sup> *Shiromani Gurudwara Prabandhak Committee v. Sahil Mittal & Ors.*, S.L.P (C) No. 2755 of 2008.

<sup>13</sup> INDIA CONST. art. 29, 30, 350A, & 350B.

<sup>14</sup> INDIA CONST. art. 350A & 350B.

Articles 23 and 23A of the Draft Constitution, which correspond with present-day Articles 29 and 30 of the Constitution, respectively, had some doubts from the Constituent Assembly members on their construction; however, the Constituent Assembly, without defining them, deemed it proper for the Courts to fill in the omission, allowing space for changes in political and value structures.<sup>15</sup> Before proceeding further, it would be relevant to briefly advert to the Constituent Assembly Debates (“**CAD**”) in relation to Draft Article 23.

The Constituent Assembly distinguished the “minority” under Article 29 (“**earlier draft Article 23**”) from a “technical minority”, i.e., a numerical minority, because according to the Constituent Assembly, the minority under the Constitution was not necessarily a minority in the numerical sense but in a cultural and linguistic sense such that even though the number of such a group might not numerically constitute a minority, its culture and linguistics would qualify it as a minority.<sup>16</sup> One of the objectives, according to the Constituent Assembly for framing Article 29 in such words, was to ensure that the migrants, who would otherwise not form a minority in the technical sense, should not be deprived of their cultural and linguistic rights in the country’s other provinces.<sup>17</sup>

Hence, as per CAD, there appears to be a distinction, *first*, between “technical minorities” and “minority” under Article 29 of the Constitution. *Second*, because the Constituent Assembly resolved to delete the term ‘minority’ from Article 29 but did not do the same for Article 30 of the Constitution, there also appears to be a distinction between “minority” as envisaged under Article 29 from the ‘minority’ under Article 30. This is further fortified by the ruling of the SC in the case of *The Ahmedabad St. Xavier’s College Society and Ors. v. State of Gujarat and Ors.*<sup>18</sup> (“**St. Xavier’s College**”) wherein it held:

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<sup>15</sup> DR. ANWARUAL YAQIN, CONSTITUTIONAL PROTECTION OF MINORITY EDUCATIONAL INSTITUTIONS IN INDIA (Deep & Deep Publications, 1st ed., 1982).

<sup>16</sup> B. R. Ambedkar, 7, CONSTIT. ASSEMB. DEB., DEC. 08, 1948, <https://www.constitutionofindia.net/debates/08-dec-1948/>.

<sup>17</sup> YAQIN, *supra* note 14.

<sup>18</sup> *The Ahmedabad St. Xavier’s College Society & Anr. v. State of Gujarat & Anr.*, (1974) 1 SCC 717.

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*“6. ...Article 29 confers the fundamental right on any section of the citizens which will include the majority section whereas Article 30(1) confers the right on all minorities...”<sup>19</sup>*

Having gained a proximate understanding of the intent of the drafters in accordance with cultural and educational rights under the Constitution, it would be relevant to discuss what the point of reference is Union or State, as to determine the “minority” status of a community.

### UNIT TO DETERMINE MINORITY STATUS

In the *Kerala Education Bill*,<sup>20</sup> the Apex Court was deciding whether the proposed control administered by the government over recognized and aided educational institutions, including minority institutions, would be violative of Article 30 and while interpreting Article 30(1) of the Constitution it devised the “less than 50%” method, i.e., “*a minority community means a community which is numerically less than 50%*”.<sup>21</sup> However, the SC framed the question of whether the 50% population is in reference to the entire population of India or the population of the concerned state. The SC answered this question by holding that, when a Bill is passed by the State Legislature, then the point of reference of population must be that of the State, whereas when the bill is passed by the Union, the point of reference of population must be that of the entire country.<sup>22</sup>

The 50% rule suffers from the fundamental issue that the population in a country as diverse as India can be so heterogeneous that no single community constitutes 50% of the state population, such that there exists a majority in relation to which a minority can be recognised.<sup>23</sup> The second difficulty in accepting the 50% rule is that a community may form a minority as per the 50% rule in the Union but may not be a minority in State, similarly, it may form a minority in the State but not within a block,

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<sup>19</sup> *Id.* ¶ 6 at 2.

<sup>20</sup> In Re: Kerala Education Bill, AIR 1958 SC 956.

<sup>21</sup> *Id.* ¶ 39 at 30.

<sup>22</sup> *Id.* ¶ 39 at 21.

<sup>23</sup> KAMLESH KUMAR WADHWA, MINORITY SAFEGUARDS IN INDIA (CONSTITUTIONAL PROVISIONS AND THEIR IMPLEMENTATION), 6-7 (Thomson Press (India), 1975).

ward, or district, within the State, i.e., a community of a religion could be congregated in a particular district of a State to form a numerical majority therein, such as Muslims in Mewat in Haryana, but not in another district, such as Muslims in Gurugram or Faridabad.<sup>24</sup> For further illustration we may consider that the population of Muslims, Sikhs, and Christians in the States of Jammu & Kashmir, Punjab and Nagaland respectively, is above 50% of the State population, but they are less than 50% of the population of the entire country.<sup>25</sup> This is precisely the issue that has arisen in the case of *Sahil Mittal*<sup>26</sup> wherein the Sikhs, who are a majority in the State of Punjab, have been declared a minority within the State of Punjab, on the strength of the ‘minority’ status held by the Sikhs in the Union.

In the *T.M.A. Pai Foundation case*, an eleven-judge bench held that since religious, and linguistic minorities have been put at par under Article 30(1) of the Constitution, the point of reference to determine religious minority would be the same as one used to determine linguistic minority; secondly, because the reorganisation of states was done on a linguistic basis, the unit for determination of ‘minority’ status of a community must be the state.<sup>27</sup>

The position taken in *T.M.A. Pai Foundation* by an eleven-judge bench is different from that taken by a six-judge bench in *Re Kerala Education Bill*; while the latter held that whichever legislature, State or Union, proposes the Bill, would become the unit for determination of minority, the former has held that under Article 30 the minority would not have different meanings on the basis of who is legislating, State or Union.<sup>28</sup> Therefore, as of today the unit for determination of minority on a numerical basis appears to be the State and not the Union as per the eleven-judge ruling made in *T.M.A. Pai Foundation*. This begs the question that if the Unit for determination of a minority is to be the State, then is it the State empowered to declare a community as a minority, or the Union; or both?

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<sup>24</sup> In *Re: Kerala Education Bill*, AIR 1958 SC 956, ¶ 39 at 21.

<sup>25</sup> WADHWA, *supra* note 22, at 7.

<sup>26</sup> *Sahil Mittal & Ors. v. Shiromani Gurudwara Prabandhak Committee*, CWP No. 14646 of 2007, (P&H H.C.) (Unreported).

<sup>27</sup> *TMA Pai Foundation v. State of Kerala*, (2002) 8 SCC 481, ¶¶ 74-81 at 552.

<sup>28</sup> *Id.* ¶ 81 at 553.

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**POWER TO NOTIFY 'MINORITY'**

As has been discussed in the foregoing paragraphs, post-*T.M.A. Pai Foundation* judgement, the unit for determining a minority is the State and not the Union. The seventh schedule to the Constitution provides the Union, State, and Concurrent Lists which contain the subjects whereupon the Union, State, and both Union and State can legislate respectively. Following are the statutory and constitutional provisions pursuant to the legislative powers of the Union and State as provided in the Constitution that have been employed for granting minority status to certain communities.

**I. NATIONAL COMMISSION FOR MINORITIES ACT, 1992**

One of the statutes that gives the Union the power to declare a community as a minority is the National Commission for Minorities Act, 1992 (“**NCM Act**”) which is a Central Act, the preamble thereof reads thus:

*“An Act to constitute a National Commission for Minorities and to provide for matters connected therewith or incidental thereto.”<sup>29</sup>*

§ 2(c) of the NCM Act defines ‘minority’ and reads thus:

*“**Definitions.**—In this Act, unless the context otherwise requires,—(c) “minority”, for the purposes of this Act, means a community notified as such by the Central Government.”<sup>30</sup>*

Two conclusions can be drawn from a reading of the preamble and the definition of “minority” as contained in the NCM Act; *first*, the Act was enacted to constitute the National Commission for Minorities and matters incidental to the creation of such Commission; *secondly*, the scope of the term “minority” as contained within the NCM Act is limited to the NCM

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<sup>29</sup> The National Commission for Minorities Act, 1992, Preamble, No. 19, Acts of Parliament, 1992 (India).

<sup>30</sup> *Id.* § 2(c).

Act itself, and the term as contained therein was not intended to apply to those situations that are unrelated to the NCM Act.

Therefore, it appears that the NCM Act exists exclusive of Articles 29 and 30 and does not create any restrictions in the scope of the term “minority” as envisaged under the said Articles. In other words, while assessing a community’s claim under Articles 29 and 30, the absence of recognition as a minority under the NCM Act will not hinder its claim. If this conclusion holds true, then the power to declare a community as a minority for the purposes of Articles 29 and 30 would exist independent of the NCM Act. This begs the question, if the definition of ‘minority’ as contained in § 2(c) of the NCM Act is unrelated to Articles 29 and 30 of the Constitution, what then is the purpose of § 2(c) of the NCM Act?

The answer can be found in § 9 contained in Chapter-III of the NCM Act, titled ‘Functions of Commission’. These functions include evaluating the progress of minority communities in the country,<sup>31</sup> monitoring safeguards provided to minorities,<sup>32</sup> recommending measures for implementation of safeguards,<sup>33</sup> inquiring into complaints of minorities,<sup>34</sup> conducting research on discrimination against minorities,<sup>35</sup> making periodical reports on the status of minorities,<sup>36</sup> etc. Without any declaration identifying the minorities, the functions mentioned in § 9 of the NCM Act, cannot be fulfilled. Hence, the minority as envisaged under § 2(c) might intersect with communities claiming to be a minority under Articles 29 and 30, however, § 2(c) is not the provision that validates the status of a community as a minority for protection under the said Articles.

This position can further be fortified by taking the example of some of the communities that have been notified as minorities under § 2(c) of the NCM Act,<sup>37</sup> namely, Muslims, Christians, Sikhs, Parsis, Buddhists, Jains which are

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<sup>31</sup> *Id.* § 9(a).

<sup>32</sup> *Id.* § 9(b).

<sup>33</sup> *Id.* § 9(c).

<sup>34</sup> *Id.* § 9(d).

<sup>35</sup> *Id.* § 9(e).

<sup>36</sup> *Id.* § 9(f).

<sup>37</sup> Ministry of Human Resource Development, Notification NO.F. 7-5/2005-MC(P), [https://www.education.gov.in/sites/upload\\_files/mhrd/files/Notification18012005.pdf](https://www.education.gov.in/sites/upload_files/mhrd/files/Notification18012005.pdf)

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minorities in the Union but not in certain States. If merely their status as a minority under the NCM Act were to be accepted for granting protection under Articles 29 and 30 of the Constitution, then the entire objective of the drafters of the Constitution would be defeated as the said Articles were enacted only to afford protection to those that are “*not only technical minorities but also cultural minorities*”. In Punjab, Sikhs form 57% of the total population; in Lakshadweep, the Muslims form 96% of the population; and in Nagaland, Christians form 87% of the total population.<sup>38</sup> Hence, a pure reliance on recognition as a minority under the NCM Act would violate the constitutional scheme under Articles 29 and 30.

Another important factor that lends support to the argument that the status of minority under the NCM Act is unrelated to minorities under Articles 29 and 30 is the very fact that there is no restriction on the type of minority under the NCM Act. The NCM Act can include scheduled castes, scheduled tribes, and other backward castes; whereas under Article 29, the minorities can be decided only based on language, script or culture, and under Article 30 the minority can only be decided based on language or religion. Therefore, the NCM Act which though *prima facie* appears to be concerned with minorities, is not the statute that provides either Union or State the power to notify a community as a ‘minority’ for the purposes of Articles 29 and 30. In the absence of any statutory or constitutional provision to this effect, a resort can be made to the Seventh Schedule<sup>39</sup> of the Constitution which contains the three lists that enlist the subjects upon which Union, State, or both are empowered to bring legislation.

## II. SEVENTH SCHEDULE

In *Re Kerala Education Bill*, the Apex Court, while deciding the question of the point of reference for determination of minority, in *obiter*, had noted that Entry 25 of List-III of the Constitution (“**Entry 25**”), makes education a subject of both Union and State legislation.<sup>40</sup> Can the power to declare a

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<sup>38</sup> Office of the Registrar General & Census Commissioner, India, 2011 Census Data, *Population Enumeration Data*.

<sup>39</sup> INDIA CONST., sch. 7.

<sup>40</sup> In *Re: Kerala Education Bill*, AIR 1958 SC 956, ¶ 21, at 19.

community as a minority then be said to emanate from Entry 25? It would be relevant to briefly go through Entry 25 which reads thus:

*“25. Education, including technical education, medical education, and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.”*<sup>41</sup>

Entry 25 of List-III of the Constitution most certainly grants both the Union and the State the power to legislate on education; however, the subject of “minority” is distinct from education; and though the two, minority and education, may overlap with each other as they do under Article 30(1) of the Constitution, the power to legislate over education cannot be interpreted as the power to legislate on minority. What then is the scope of Entry 25 in so far as minorities are concerned?

In *Re Kerala Education Bill*, the Apex Court had held that there can be three types of minority institutions under Article 30(1) of the Constitution, namely,

*“(1) those which do not seek either aid or recognition from the State, (2) those which want aid, and (3) those which want only recognition but not aid.”*<sup>42</sup>

The aforementioned second category was further divided into two parts by the Court, namely,

*“(a) those which are by the Constitution itself expressly made eligible for receiving grants, and (b) those which are not entitled to any grant by virtue of any express provision of the Constitution but, nevertheless, seek to get aid.”*<sup>43</sup>

A marriage of Article 30(1) and Entry 25 of the Constitution allows the Union, or State governments the power to provide aid or recognition to minority institutions without violating the Constitutional Scheme.

Since Entry 25, which provides Union and State Government the power to legislate on education, is not the source to declare a community as a

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<sup>41</sup> INDIA CONST., sch. VII, List III, *Concurrent List*, Item 25.

<sup>42</sup> In *Re: Kerala Education Bill*, AIR 1958 SC 956, ¶ 23, at 19.

<sup>43</sup> *Id.*

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minority, and there is no other item in either of the three lists, namely, Union, State, and Concurrent, that even remotely relates to minorities, Entry 97 of List-I of the Constitution (“**Entry 97**”) could be a source for the Union to declare a community as a minority for the purposes of Articles 29 and 30. Entry 97 reads thus:

*“97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.”<sup>44</sup>*

It is pertinent to note that the powers under Entry 97 can only be invoked by the Union, as they are found in List-I of the Constitution. Hence, even if it is accepted that Entry 97 can be invoked to declare a community as a “minority” under Articles 29 and 30 of the Constitution, there is still no item in either of the aforementioned three lists in the Seventh Schedule that grants state governments the power to declare a community as a minority for the purposes of Articles 29 and 30 of the Constitution.

### ANALYSIS

#### I. ON SCOPE OF PROTECTION UNDER ARTICLES 29 & 30

The legislative intent behind enacting Article 29 of the Constitution was to protect those communities that are not only technical but also cultural minorities. The legislative intent behind Article 29 cannot be assumed to be the same for Article 30, as the term “minority” was not omitted by the Constituent Assembly Members from Article 30. Hence, the scope of “minority” under Article 30 is narrower than Article 29, and its application is also different from Article 29.<sup>45</sup>

Consider that a cultural minority of Maharashtrians in Uttar Pradesh, i.e., a section of Maharashtrians who are lesser in number in relation to the cultural majority of Uttar Pradesh, attempt to conserve Marathi by way of campaigns, movies, etc., and they seek protection under Article 29 from

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<sup>44</sup> INDIA CONST., sch. VII, List I, *Union List*, Item 97.

<sup>45</sup> *St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389, ¶7 (Ray, C.J.), ¶71 (Khanna, J.).

any legislation of the government (Union or State) that hinders their attempt to conserve their language, script or culture. To claim such protection under Article 29, they would only have to show that their culture is distinct from the culture of the majority of the population of Uttar Pradesh. However, if, in the same set of facts, the same section of citizens created an educational institution for Maharashtrians in Uttar Pradesh, then they would have to show that the Marathi speakers in the State of Uttar Pradesh are a technical minority, *i.e.*, Marathi is not spoken by the majority of the population in the State of Uttar Pradesh.

In almost all claims relating to linguistic minorities, there shall be a considerable majority in relation to which a minority can be identified. However, the same may not be true for religious minorities; in which case, none of the communities claiming to be religious minorities would have a right to establish and administer their own educational institution in that state. A question might arise: if there exist multiple communities such that none form a majority and, consequently, none form a minority, would it not be appropriate to allow all such communities the right under Article 30?

The answer is in the negative for the simple reason that the minorities envisaged under Article 30 are technical minorities, which would in all cases have to be determined in relation to a majority, *i.e.*, if community “A” claims to be a minority then it must claim to be so in relation to a larger sum of a population whereof it forms a part such that its population is a minority. In the absence of a majority, there can be no technical minority, and hence, Article 30 cannot be invoked. For example, the State of Manipur comprises Hindus (41%), Christians (41%), Other religions (9%), and Muslims (8%), and the State of Arunachal Pradesh comprises Other religions (39%), Christians (30%), Hindus (29%) and Muslims (2%).<sup>46</sup> Hence, in the States of Manipur and Arunachal Pradesh, protection cannot be granted under Article 30 since there is no majority in relation to which any single section of the population would form a “technical minority”. Would this interpretation violate the legislative intent? H.R. Khanna J. in

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<sup>46</sup> *Supra* note 37.

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the *St. Xavier's College Society case*<sup>47</sup> explained the object of Article 30 of the Constitution while holding thus:

*“75. ... The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy...”*

Therefore, the objective behind the enactment of Article 30 of the Constitution was to protect minorities from the vicissitudes of majoritarian politics. In a state where there is no majority community, one cannot reasonably fathom a threat to multiple small communities if the basis for such a threat is based purely on numbers forming a majority.

### II. ON THE BAL PATIL CASE

In the *Bal Patil case*, the SC held that 'minority' for the purposes of Articles 29 and 30 means:

*“an identifiable group of people or community who were seen as deserving protection from likely deprivation of their religious, cultural, and educational rights by other communities who happen to be in majority and likely to gain political power in a democratic form of Government based on election”*.<sup>48</sup>

First, it is not apparent what the source is on the basis of which the SC has devised this definition. Second, as explained in the foregoing paragraphs, there is a difference between “minority” under Article 29 and Article 30 of the Constitution; hence, treating them in the same way can lead to unintended outcomes, as was rightly anticipated in the *St. Xavier's College Society case*.<sup>49</sup> If a “minority” under Article 29 of the Constitution based on culture is afforded protection under Article 30 of the Constitution, then the distinction between the words “any section of citizens” and “minority” would be rendered nugatory, which would also be directly opposed to the legislative intent, as the Constituent Assembly deliberately omitted the

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<sup>47</sup> *St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389, at 771.

<sup>48</sup> *Bal Patil & Anr. v. Union of India & Ors.* (2005) 6 SCC 690, (Dharmadhikari, J.) ¶ 11.

<sup>49</sup> *St. Xavier's College Society v. State of Gujarat*, AIR 1974 SC 1389, at 743.

word “minority” from Article 29 of the Constitution and kept it in Article 30 of the Constitution.

*Third*, the protection under Article 29 is only for cultural minorities whereas the protection under Article 30 is for religious and linguistic minorities. In other words, all religious or linguistic minorities are cultural minorities but not all cultural minorities are religious or linguistic minorities. An equal treatment of the two articles would cause a cultural minority to stand on the same footing as a religious or linguistic minority. This point of distinction is not merely symbolic but also practical, as there can exist a diaspora that shares the same religion and language as the majority of the population in a State but does not share the same culture. The majority of the population in India professes the religion of Hinduism and speaks the language of Hindi, but within Hinduism there exist various cultural differences across the States.

If the minority under Article 29 of the Constitution is put on equal footing as under Article 30, then the cultural difference between Hindi-speaking Hindus from two different states would be sufficient grounds to seek protection under Article 30 of the Constitution, which was only intended to cater to religious and linguistic minorities.

### III. ON THE SAHIL MITTAL CASE

The PHHC relied upon the definition of “minority” in the *Bal Patil case* to hold that Sikhs cannot be granted minority status in the State of Punjab. While the conclusion arrived at by the PHHC is correct, the reasoning is vulnerable to challenge. For the reasons explained in the foregoing paragraphs, the definition of “minority” in the *Bal Patil case* for the purposes of granting protection under Articles 29 and 30 of the Constitution is out of keeping with the true meaning of ‘minority’. It is proposed that the correct reasoning for striking down the State Government’s notification declaring “Sikhs” as a “minority” community in the State of Punjab would be, *first*, the State government does not have the power to grant “minority” status to a community for the purposes of Articles 29 and 30 of the Constitution; *secondly*, though the Sikhs, like any other section of citizens, are entitled to conserve their language, script, or culture under Article 29 of the Constitution, they are not a technical minority in the State of Punjab

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to be entitled to establish and administer educational institutions under Article 30 of the Constitution.

### **IV. ON DEFINITION OF "MINORITY"**

As has been highlighted in the preceding paragraphs, "minority" means different things under Articles 29 and 30. In so far as "minority" under Article 29 is concerned, it is merely a symbolic term because the protection under Article 29 is not dependent on a community's status as a minority. The term used under Article 29 is "any sections of citizens" and the same extends to all sections irrespective of their status as majority or minority, as has been held in the *St. Xavier's College Society* case.

In so far as Article 30 is concerned, it is proposed that rather than devising a blanket definition of "minority", a working definition, only for the purposes of Article 30, must be devised, which deviates from the conventional understanding of what forms a technical minority. As discussed in the foregoing paragraphs, minorities envisaged under Article 30 are technical minorities, which would in all cases have to be determined in relation to a majority. However, if the point of reference for determining minority status is changed from a section of the population to multiple sections of population, then a community can form a minority. For e.g., Muslims in the State of Manipur would not be able to claim technical minority status in relation to another section of the population because no religious community constitutes 51% of the total population in the State. However, if the point of reference is the sum total of all other religions, then Muslims would form a technical minority. This would be in the spirit of the constitution since it does not appeal to reason that while the constituent assembly members enacted a provision to grant protection to technical minorities, they would deny the protection of such a provision to an entire state simply because they do not form a technical minority as per a tool of determination of a technical minority devised by courts.

The intent behind enacting Article 30 was to protect those communities that, due to their smaller numbers, do not enjoy the same political clout as other relatively larger communities and, by virtue of such demographics, stand at risk of exploitation. Therefore, the focus of Article 30 is not

“minority” as much as it is protection against a strong ‘majority’. An endeavour must be made by the legislature to determine what amounts to a strong majority for the purposes of Article 30. A majority *simpliciter* would be any number of people that form more than 50% of the total population. But there can exist multiple permutations of the population of communities within a state such that, though the population of one community is less than 50%, it is nonetheless considerably large enough to exert political influence over other sections of citizens. The underlying principle is that a figure of 50% is not the only method of determining a “majority” in socio-political affairs. A prevailing example of this principle in practice is the “First Past the Post” system of elections in India, wherein a successful candidate does not need to achieve more than 50% of the total votes to be declared successful, but only requires more votes than the other candidate(s).

Once a definition has been arrived at for a majority, a “minority” under Article 30 would include any community that is not a majority in the state where it seeks to establish and administer educational institutions of its own choice. And merely by virtue of there being a strong majority, a presumption would lie in favour of the community claiming to be a “minority” under Article 30. Therefore, the two-pronged test to determine a “minority” under Article 30 would be as follows:

1. Is the community claiming a right under Article 30 a technical minority, *i.e.*, is the number of its associated members less than 50% of the total population of the state?
2. Is there a community (constituted of a single or multiple religions) in that state that forms a strong majority, *i.e.*, a community whose number of associated persons are more than or equal to 50% of the total population of the State?

Only upon finding an answer in the affirmative to both of the above-mentioned questions can the courts recognize a community’s claim under Article 30. At all times, the courts must be mindful of the legislative intent behind Article 30. It is to protect the religious and linguistic interests of a community that may be vulnerable to a strong majority in a state. The Article does not exist to protect minorities from all forms of exploitation or deprivation of civil liberties like ethnic cleansing, discrimination in

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government service, etc. Protection w.r.t. such violations of human rights would be based upon other provisions of the Constitution such as Articles 14, 19, 21, to name a few. Article 30, however, merely provides those communities that are vulnerable to a strong majority the right to establish and administer educational institutions such that their religious and linguistic heritage is not diluted or destroyed over time.

The ruling of the SC in the Sahil Mittal case, which is pending adjudication before a constitutional bench, will first determine whether the test to determine the “minority” status of a community shall be the same under Articles 29 and 30 or different. Secondly, if it is not the same, then what would be the test under Articles 29 and Article 30? If the SC does a literal interpretation of Articles 29 and 30 while referring to CAD then it is likely that in States such as Manipur and Arunachal Pradesh, the religious communities therein would not be able to establish and administer their own institutions. However, if the purpose behind enacting the two articles shall form a consideration for the SC’s ruling, then it is likely that a new definition for the purposes of Article 30 shall be envisaged, which would deal with the dilemma of those communities that don’t form a technical minority but nonetheless face a threat to their religion or language.