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Shaping Identities: The Interplay of Constitution and Minority Rights

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Abstract

India, a nation with one of the world's largest Muslim populations and diverse religious communities including Hindus, Sikhs, Jains, and Christians, has long been recognized for its commitment to secularism and democratic principles. However, recent developments have raised concerns about the erosion of rights and protections for religious minorities. This paper critically examines the concept of secularism in India, contrasting it with the French model of laïcité and American secularism, and traces the historical evolution of constitutional provisions relevant to minority rights. It explores the legal and societal challenges faced by religious minorities in India and the broader South Asian region, addressing issues such as discrimination, forced conversions, and communal violence. The study further investigates the role of constitutional identity in shaping minority rights protections across various regions, with a particular focus on South Asia and Africa. Additionally, it analyzes how public participation in constitution-making processes can influence the effectiveness and inclusivity of minority rights provisions. Through a comparative analysis, the paper highlights the persistent marginalization of minorities and underscores the need for robust legal frameworks to protect their rights within majoritarian political contexts. The conclusion emphasizes the importance of balancing equality with the recognition of cultural, ethnic, linguistic, and religious diversity in constitutional law, as a means to foster inclusivity and social harmony.

Keywords: Secularism, laïcité, Discrimination, Constitutional law, Public participation, Legal frameworks, Majoritarianism, Cultural diversity.

1. INTRODUCTION

With a population of more than 1.2 billion, India is only surpassed by China. India has a sizable population, but it also has a diversified religious population: with an estimated 172.2 million Muslims, Hindus make up about 80% of the country's total population, making them the third-largest Muslim community in the world, behind Pakistan and Indonesia. There are also an estimated 20.8 million Sikhs, 4.5 million Jains, and 27.8 million Christians. Ever after separating from the United Kingdom on August 15, 1947, India has maintained democratic, secular, and pluralistic social structures. However, religious minorities have seen a decline in their privileges in recent years. The Indian government frequently flouts its constitutional obligations to safeguard the rights of religious minorities, both at the federal and state levels. Minority communities' right to freedom of religion is violated by both federal and state laws, while very little is known about them. In India, incidents of violence, discrimination, forced conversions, and situations where religious minorities are more frequently harassed and intimidated are not new developments; they have happened during both the Congress Party and Bharatiya Janta Party (BJP) administrations. India describes itself as a "secular" nation, but its interpretation of the term differs significantly from both the French concept of laïcité, which ensures the state's neutrality toward religious beliefs and the total separation of the religious and public domains, and the comparable American idea of secularism, which calls for the complete segregation of church and state [1-3]. On November 26, 1949, the Indian Constituent Assembly adopted the first constitution, which became operative on January 26, 1950. When India's constitution was drafted, it was not proclaimed a secular nation.

India was actually proclaimed a Sovereign Democratic Republic in the preamble. The 42nd Amendment to the Constitution, also known as the Constitution Act bill, was not ratified until January 3, 1977. The words "secular" and "socialist" were not included in the Constitution Act law, generally known as the 42nd Amendment to the Constitution, until January 3, 1977. In the landmark decision of S.R. Bommai v. Union of India (1994), the Indian Supreme Court addressed India's secularism and constitutional issues in great detail. "Regardless of the State's stance on religions, religious sects, and religious denominations, religion cannot be combined with any secular activity of the State," penned Justice Kuldip Singh, one of the nine judges on the panel [3-5]. According to Article 4(2) TEU, the EU is required to uphold the national identities of its members, which are ingrained in their basic political and constitutional frameworks and include local and regional self-government, as well as the equality of those states before the Treaties. The EU must also respect the fundamental state tasks of its member states, such as preserving law and order, protecting national security, and guaranteeing the integrity of the state's territory [6-8]. Therefore, while interpreting and applying EU law, the EU does so on the legal pretext of Article 4(2) TEU, which recognizes and respects the constitutional identities of the Member States.

The definition and purpose of constitutional identity have become major points of contention since the identity clause was added to the Treaty on European Union (TEU; Maastricht Treaty) in 1992 and was reformulated in the

Treaty of Lisbon, which amended both the original treaty and the treaty establishing the European Community in 2009 [9]. This idea is being utilized more and more to oppose deeper European integration and to uphold the internal adjudicative authority of the domestic courts [10-11].

The eight nations that make up South Asia are Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, and Sri Lanka. The Hindu state was maintained in Nepal, which has a majority of Hindus, until 2015. However, the new constitution embraced the ideas of federalism, inclusivity, republicanism, and secularism. The Maldives, Afghanistan, Bangladesh, and Pakistan are Islamic countries with a majority of Muslims. Despite having a majority of Buddhists, Sri Lanka abandoned Buddhism as the official state religion. In 2008, the Bhutanese constitution designated Buddhism as the country's spiritual heritage. India is a country with a majority of Hindus that has accepted the secular system [12-13]. There are many different types of minorities in South Asia, but most of them face discrimination due to their faith. Minorities are consistently subjected to discrimination by the majority, particularly within state institutions. For instance, in India, minorities continue to endure conditions of unreliable levels of intolerance, segregation, and disdain due to the states' majoritarian temperament [14]. Following the immense devastation caused by World War II, the International Society solidified plans to establish a worldwide system to defend human life and rights concurrently, which resulted in the adoption of the Universal Declaration of Human Rights on December 10, 1948. In terms of the protection of human rights at different levels, this study represents the constitutions of South Asia [15]. All human rights are fundamental rights; nevertheless, human rights are those rights that are deemed fundamental rights by the nations and are protected by their respective constitutions. the concept's theoretical development in detail as well as the major problems and uprisings that people are currently confronting [16-17]. The purpose and significance of human rights, the function of the Constitution, and its limitations have all been elucidated. The idea of rights can be defined as a collection of several types of rights [18]. A variety of socioeconomic rights, such as the freedom to engage in political life, the right to health and education, the right to work and minimum salaries, and the right to freedom of movement, are typically included in the second category of rights [19-20]. This category includes rights to development, minority rights, cultural rights, and many more. Key concerns in the modern world are covered, such as globalization and its effects on rights, democracy, development, pluralism, crises of secularism in communal peace, etc. Lastly, how the constitution has lived up to its obligations or fallen short of protecting rights [21].

The goal of minority rights is to guarantee minorities' freedom to maintain and celebrate their unique cultures as well as their equal participation on an equal basis in the political, social, and economic spheres of society. The principles of equality and nondiscrimination are vital, but they are simply the first step toward protecting minorities. By granting minorities the freedom to follow their own faith, create their own cultures, and speak their own languages, the second pillar goes one step farther. The goal is to guarantee minorities the freedom to

embrace their unique identities, or, to put it another way, the right to be treated fairly without sacrificing their uniqueness [22-23]. The heart of minority rights is the freedom to continue being unique. The "equality approach" and the "minority rights approach," which have been incorporated into the constitutions of most states, reflect this dual perspective on minority rights. The "equality approach" advocates for a strong legislative statement of the equality principle and the outlawing of discrimination in order to guarantee equitable treatment for all ethnic groups. The "minority rights approach" is the alternative strategy that contends that respecting cultural, ethnic, linguistic, and religious differences should be protected and promoted through the establishment of legal norms [24]. It does this by arguing that equality and non-discrimination alone are insufficient to guarantee the safety of minority communities. The purpose of this study is to investigate how the constitutional designs of the sub-Saharan African governments have interpreted and favored these two approaches. While the majority of African nations, if not all of them, have specific protections in their constitutions to guarantee equality and nondiscrimination, very few have gone so far as to embrace a minority rights strategy. Recent events have raised important questions about ethnicity in the constitutions of various African states, underscoring the necessity to respect minorities' rights to enjoy their own culture and access to power [25]. This includes the recent disintegration of the formerly tranquil Ivory Coast, the ethnic violence that followed Kenya's elections and led to the independence of South Sudan from the rest of the country, or the ongoing fratricidal violence against minorities in Nigeria. The list might go on forever because, in some ways, minorities' resistance to oppression or repression has been the primary cause of all modern ethnic conflict. From this angle, the Great Lakes Region scenario provides a heartbreaking example of the complex relationship between ethnic violence and the dearth of safety for minorities.

One of the main issues liberal democracies face the challenge of defending minority' interests in majoritarian political systems may be brought up by public involvement in constitution-writing processes. Do majorities defend their privileged status or do minorities' rights get better protection in constitutions as a result of more public participation in the process? There is a well-established research agenda that includes the process of designing constitutions and its effects on democratic performance, horizontal and vertical accountability, and conflict management; however, very little is known about the relationship between public participation and minority protection in the process of creating constitutions and constitutional design.

2. Literature review

Ripu Sudan Singh et al. [1] proposed that a minority is a group of people who make up a smaller portion of the population than the majority in a given state, region, or society, and/or who identify as members of a distinct race or culture. Regarding social mores, religious beliefs, and behavioral patterns, they diverge. Minorities can be broadly classified into two categories: racial minorities and religious minorities. They have a unique identity and are of diverse ethnicities. There have been minorities in practically all societies. In every instance, they coexist

peacefully and have friendly, non-aggressive relationships with the majority population. In the other version, there are ongoing crises and an antagonistic and contentious relationship with the majority population. Minorities have three roles in every culture, and they each contribute in a distinctive way to the growth of their nations. Their absence is noticeable, and their presence has an impact. All citizens are entitled to equality under the constitution, regardless of their gender, caste, geography, tribe, or religion. Minority prejudice and repression have origins that stretch back as far as written history. Minorities confront severe intolerance in many forms as a result of discriminatory laws and inadequate government policies that fail to give equal protection to these groups. throughout the context of international human rights law and constitutional rights, this paper provides a broad overview of minority rights violations throughout South Asia. The constitutional provisions pertaining to human rights in the area will also be examined in this study, which also aims to disseminate its results and offer some potential remedies to level the playing field for human rights in South Asia. This research attempts to answer the query How has the constitution evolved to assist the protection of rights?

Jeremie Gilbert et al. [2] said that Africa has had a constitutional renaissance in the past ten years, with the adoption of new constitutions by multiple nations. A number of these constitutions were enacted in the wake of severe ethnic unrest, particularly around the Great Lakes. The nature of ethnic conflicts, which had their roots in the oppression of minority populations, means that the new constitutional provisions pertaining to minority rights and ethnicity will have a huge impact on regional peace and stability. This article aims to investigate the extent to which some of the most recent constitutions of the continent are addressing, or not addressing, the rights of the most marginalized minority communities by analyzing the recently adopted constitutions of Rwanda, Burundi, and the Democratic Republic of the Congo. This essay investigates why most African constitutions still generally oppose the recognition of minority rights by concentrating on the Great Lakes region.

Eduardo j. et al. [3] proposed that the concept of super diversity is intriguing and should be applied to the legal sciences. Comparative examination of the European Constitutions reveals that allusions to culturally based minorities in the constitutions reflect the unique political environment of each nation, even though there is a commonality between the classification systems commonly used in international organizations and comparative constitutional law. Apart from the cultural attributes such as language, ethnicity, religion, and nationality that define minorities, anti-discrimination laws typically encompass other identity factors like gender, sex, physical appearance, beliefs, and social or economic standing. However, the European constitutional texts scarcely mention additional factors that are pertinent to the concept of super diversity, such as work status and site of residence within an urban setting. Superdiversity could jeopardize the fair and equitable treatment of traditional minorities if it is applied without being contextualized.

Anna Fruhstorfer et al. [4] proposed that does the process of drafting a constitution impact how broadly the rights protected within it are interpreted? Specifically, is it preferable for minority rights safeguards to have more participation in constitution-making processes? Although a lot of attention has been paid to the constitution-making process and how it affects different results, little is known about how public participation or discussion in this process affects the extent and content of minority rights. We find a positive relationship between participatory drafting processes and the inclusion of minority protections in constitutions under some conditions. We use a wide range of data to empirically assess the relationship between constitution-making processes and the protection of rights for minorities. The article's conclusions support basic claims regarding the public's participation in constitutional construction and have significant ramifications for our understanding of political representation.

Joshua Castellino et al. [5] suggested that the historical context of minorities' and vulnerable groups' rights in India is first presented in this chapter. It aims to present the role that the British had in both laying the groundwork for later reforms and, according to some observers, sowing the seeds of dissatisfaction among the people of India. Drawing from the constitution's enumeration of minorities, notably those based on religion and language, the second section lists them in India and adds a summary of the plight of the SC/ST. The substantive provisions of the Indian minority rights law are the subject of the third section. The approach is grounded in certain statutes, particularly in the context of Muslim personal law, and constitutional principles (including the challenges where applicable). The last section lists the available treatments and discusses their questionable efficacy in attempting to create a modern, young democracy that is both diversely inclusive and has a strong sense of national identity.

Christophe Maes et al. [6] suggested that the definition and purpose of the concept of constitutional identity have become a major source of debate since the adoption of Article 4(2) of the Treaty on European Union. At the request of the AFCO Committee, the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs commissioned this study, which looks at the definition of constitutional identity and how it has been interpreted in different EU Member States. It evaluates this concept's effect on the EU's relationship with its Member States. Lastly, the study assesses the potential contribution of the concept of constitutional identity to future EU integration.

Laurianne Allezard et al. [7] proposed that there has been a lot of scientific interest in the concept of constitutional identity. But it also obscures another legal reality, which is the existence of other identities, such national, linguistic, and collective identities—sometimes in a simplistic way. Constitutional identity is actually a complex and dynamic system of identities that is revealed by reading European constitutions and constitutional court rulings. This essay makes the case that identification is a legal and normative argument in addition to a political one. Two primary types can be identified from the standpoint of constitutional law: a genuine identity

that existed before the constitutional norm and a false identity that emerged after the norm. In order to preserve this interweaving, the constitutional courts refer to these identities as constitutional identities, which are interdependent and linked to one another. As a result, Constitutional Identity serves as a forum for debate and gives rise to various kinds of constitutionalism in Europe by defining the meaning of constitutional principles and norms.

3. Discussion

A President of the Russian Federation's Constitutional Court analysis suggests that those ideas appear to follow a "particular path." They are also the outcome of the constitutional judges' reconciliation of conflicting constitutional norms and the reflection of an agreement between identities within the framework of constitutional law. The ambivalence of applying "universal" notions modified to the identity entrenched in the constitutional language is demonstrated by the case-law of the Moldovan Constitutional Court. The Moldovan Constitutional Court defined constitutional identity and said that its elements like democracy are fundamental principles of European constitutionalism. On the other hand, the court's interpretation of these principles seems to be unique to Moldova in certain other rulings. Thus, national identities undoubtedly influence the "universal" conceptions of European constitutionalism. Identity is linked to the core ideas of constitutionalism, such as democracy, sovereignty, and the structure of the State [1]. The Constitutional Council states that the official language ensures the indivisibility of sovereignty. If the language were to change, the French conception of sovereignty would also have to alter. As a result, the identity of constitutional law in Europe varies according to the dominating identity's inclusiveness or exclusivity as well as the balance between identities. Individual and real identities that differ from the dominant one will therefore be confined to a limited individual sphere; the more importance this latter is accorded within the constitutional system, the more the principles will be interpreted in accordance with this identity. "Subject to public order, morality, and health, all persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion," according to Article 25, Sub clause 1 of the Indian Constitution. Its Explanation II and sub clause 2 (B) are regarded as highly contentious, nonetheless [2]. Explanation I, on the other hand, stipulates that carrying and wearing kirpans is considered an integral part of the Sikh religion. "Hindus shall be construed as including a reference to persons professing the Sikh, Jain, or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly," reads Explanation II in sub clause 2 (B). This clause in the constitution is extremely discriminatory since it implies that, while being a multi religious nation, India is only really concerned with the social welfare of Hinduism and its associated institutions [3]. Sikhs, Buddhists, and Jains are essentially included together under Hinduism in the appended Explanation II. Other laws that discriminate against these religions have also resulted from Explanation II; these include the Hindu Marriage Act of 1955, the Hindu Succession Act of 1956, the Hindu Adoptions and Maintenance Act of 1956, and the Hindu Minority and Guardianship Act of 1956. It is clear from the study's review of how different Member States interpret the idea of constitutional identity that different Member States

have not all agreed to accept the idea that EU law supersedes national constitutions [4]. The different ways that EU law has historically been applied in the legal systems of Member States have contributed to their refusal to recognize EU law's primacy. For example, in "monist" systems, Community law, which is now EU law, was automatically applied in the domestic legal system of the Member State (e.g. the Netherlands and Belgium). under contrast, international law is seen as distinct from domestic law under "dualist" systems (such as the United Kingdom). This means that only to the extent that a domestic law provision has transposed or absorbed an international legal provision will it be considered a part of the domestic legal system. Then, at most, national law provisions could have an indirect impact on international law. Since the EU's founding, the majority of legal systems have incorporated both "monist" and "dualist" aspects, having changed their constitutions to permit the EU to assume decision-making authority. The CJEU gradually established the CFR as the relevant standard for fundamental rights review, as evidenced by the process of constitutional dialogue between the courts regarding fundamental rights review. This allowed the CJEU to harmonize the various approaches used by national courts and reassure them that it would monitor the legislative activities of EU institutions for rights [5].

In nearly every South Asian nation, minority conditions are the worst. In their individual states, minorities experience higher levels of deprivation. The Indian judiciary, operating independently, has offered the broadest interpretation of the constitution's clauses pertaining to minority rights. A unique clause known as Article 30 gives minority groups the freedom to establish any kind of educational institution, including universities. In contrast to certain other (SAARC) constitutions, the customary laws and other religion-based personal laws of minorities are safeguarded by the constitution. However, minorities in India are in danger, just as Muslims and Schedule Caste members are in Secular Bharat now. Similarly, although Bangladesh, Pakistan, and the Maldives are Islamic nations with secular ideals, prejudice against minorities persists in these and other SAARC nations. Because they are minority, Hindus in Pakistan and Afghanistan are in no way safe. Therefore, there is a significant conflict between minorities and majorities, whether based on religion or caste, in contrast to South Asian governments where the rest of the world has constitutions and human rights [6]. The "privileged" argument might alternatively be addressed by emphasizing "marginalization." The "privileged" argument argues that governments are giving particular ethnic groups "privileges" by establishing special minority rights. The emphasis on marginalization draws attention to how these arguments misunderstand what minority rights actually entail. The goal of minority rights is to grant special rights to the most marginalized communities so that they can achieve equality with the rest of the community.

Instead of giving these communities "more" rights, the goal is to give them enough protection so that their degree of protection is comparable to that of the dominant community [7]. The rights are not "privileges," but rather the ability to enjoy their language, culture, and religion in the same manner as members of any other non-marginalized group. Not the creation of new advantages, but equality is the goal. By concentrating on "marginalized" communities, myths about the nature of minority rights may be dispelled. The concept of super

diversity, which was initially introduced in the social sciences, is intriguing and ought to be integrated into the legal sciences. This can be put into practice by employing it as a method for analyzing the efficacy of the law and by making sure that research on the connections between various legal situations and other aspects of variety is conducted more thoroughly in the fields of law and other social sciences. However, the fair and equitable treatment of conventional minorities may be threatened if superdiversity is applied without being calibrated to each environment. These may become lost in an amalgam of dynamic linkages among diversity variables, confusing the policies that should be implemented in each circumstance and masking some demands. The empirical studies presented in this article show how challenging it is to accomplish two normatively significant objectives: creating a constitution with strong protections for minorities and including the public in the drafting process [8-11]. Our diverse statistical models examine numerous aspects of this relationship and evaluate several likely scenarios in which minority interests could be impacted by public engagement. We find evidence for H2a, which hypothesized that public engagement at the convening stage of the drafting process would result in higher protections of minority rights, even though we were unable to reject the null hypotheses for aggregate participation or participation in ratification. Although a null result has little theoretical significance, our negative results might nevertheless be instructive. Our discovery that there is no correlation between the overall level of public participation in the drafting process and the change in the protection of minority rights during a constitution's replacement raises the possibility that good things do not always go together and that public participation initiatives need more careful planning.

4. CONCLUSION

Lastly, I explain why it is critical to distinguish between the idea of "Constitutional Identity" and the broader concept of "identity of constitutional law." This is because it clarifies that constitutional identity is not a product of opportunism on the part of constitutional courts, nor has it suddenly appeared out of thin air. Due to its strong ties to constitutional law, judges commonly invoke the concept of Constitutional Identity while appearing before the European Court of Justice and the European Court of Human Rights93. This gives the judge's use of the concept legitimacy. It also offers restricted protections to communities of religious minorities. Article 18 of the UN Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights are two examples of international standards of freedom of religion or belief that are not complied with by state and national laws in India, as the report shows. Religious minority populations and Dalits have both experienced discrimination and persecution under Congress Party and BJP-led governments as a result of a confluence of excessively broad or imprecise legislation, an ineffective criminal justice system, and a dearth of consistent case law. The idea of minorities has actually been politically manufactured in order to gain interest and power on a larger scale. Therefore, there is a significant conflict between minorities and majorities, whether based on religion or caste, in contrast to South Asian governments where the rest of the world has constitutions and human rights.

Violations of human rights that resulted in the murder of innocent people, acts of terrorism, unrest, poverty, and problems based on caste and religion. The state has not been able to achieve peace through any book, constitution, or law. Instead, conditions have evolved over time to allow for the management of affairs in a morally righteous manner in accordance with established laws that cannot injure people unlawfully, regardless of who they are. To ensure peace and prosperity in the area, particularly in India and the other South Asian states, all governments must eventually abide by the constitution and its essential provisions. A possible strategy to better adapt the minority rights framework to Africa is to concentrate more emphasis on the need to create a unique legal framework of protection for the most marginalized communities rather than ethnic minorities. The majority of the concerns about the "ethnic jigsaw puzzle," the privileged argument, and the fear of Balkanization are addressed by this perspective. When marginalized populations are highlighted, attention may be drawn to the idea that minorities' rights do not consist of seceding from states but rather of making sure that the most disadvantaged people stay inside them. The emphasis on marginalization may promote a far more global approach to human rights law and the "Africanization" of minority rights in state constitutions. Lastly, it is important to remember that we must pay close attention to how emergent technologies develop and the effects they will have on society. On their own, the identification variables at work might be less and less significant, but the current dynamics of diversification might also indicate this. In addition to one or more cross-memberships within particular groups or categories, an individualized aggregate of personal data—which can be far more challenging to assess and politically combat—can also contribute to prejudice or segregation. The significance of protecting individual and collective rights and the function of participatory democracy are both significantly impacted by our findings. First, we found no evidence of a systematic link, despite the fact that a large body of research on participatory democracy and minority rights supports a negative association, and we thought the opposite would be true in the context of constitution building. Rather, our analysis points to a more nuanced situation.

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