



ALL INDIA JAIN MINORITY FORUM

CHAKRESH JAIN
PRESIDENT, JAIN SAMAJ, DELHI
Cell: 98104 16503

3, ANSARI ROAD,
DARYAGANJ,
NEW DELHI-110002
Tel: 011-23274714, 23283363
Fax: 011-23272259

BAL PATIL
SECRETARY-GENERAL,
Ex- MEMBER, MAHARASHTRA STATE MINORITIES COMMISSION
Cell: 098692 55533, Telefax: 91-22-2389 3030

December 21, 2007

Dear Mr.Ram,

I am concerned to draw your attention to the following correspondence with your Readers' Editor which is self-explanatory. I have attached my letter to the Readers' Editor taking a serious exception to the report in The Hindu dated 05-11-2007 and the Readers' Editor's email reponse thereto.

I have the highest respect for the secular traditions of the Hindu publications and their unremitting pursuit of human rights and media freedom. This is evident from the institution of the Readers' Editor as an Ombudsman for the readers' grievances frontpaged on the Hindu.

At the outset I would like to make it clear that my protest against the inclusion of Jains in the SC category is not at all meant that there is anything derogatory about the SCs and the Dalits. I have always been a staunch supporter of the cause of the Dalits and the SCs and their upliftment from thousands of years of oppression. I am protesting specifically against the unwarranted and misleading inclusion of the Jains in the SC category

My protest against the impugned report was sent to your Kochi correspondent by the Readers' Editor and his clarification which in substance is a reiteration as given by Dr.Sonkar Shastri and Mr.K.V. Madanan is sent to me. This is naturally intriguing to me. I cannot make out the role, if any, played by the Readers' Editor in pursuance of the charter of the freedom of the press as laid down in the "Terms of Reference" except forwarding my letter to the concerned correspondent and blandly sending me the reiteration of the impugned report.

I regret to note that Dr.Vijay Sonkar Shastri persists in his misconceived, false and patently misleading inclusion of the Jains in the SC category, and also, Mr. K.V. Madanan, working president of the All India SC Reservation Protection Forum quotes the untenable interpretation of the *Explanation 2 of Article 25* which says that "In sub-clause B of Clause 2, the reference to Hindu shall be constructed as including a reference to persons professing the Sikh, Jain or Buddhist religions", thus reiterating the objectionable and misleading statement that "the SCs among Jains are constitutionally entitled to SC reservation" to which I have taken a strong exception.

Both of them are not at all conversant with the constitutional, judicial interpretation of Jainism as included in *Article 25 Expl.II* and even more uninformed of the historiographical genesis of Jainism as distinct from Hinduism, Buddhism and Sikhism.

The expression '*Scheduled Castes*' was used for those people who were kept outside the four-fold *Varna* (caste) system, and were called *Avarnas* (casteless). They were called by different names such as: *Chandalas*, *Panchamas* or Untouchables. The term "*Scheduled Caste*" was used by the British Government to designate all castes and classes previously covered under the term "*Depressed Classes*". Officially this word was embodied in Section 305 of the Government of India Act, 1935, . Later the expression was included in the Government of India (Scheduled Castes) Order, 1936.

THE INDIAN CONSTITUTION,

Please see the attached document Constitution Order 19 - CONSTITUTION (SCHEDULED CASTES) ORDER, 1950 THE CONSTITUTION (SCHEDULED CASTES) ORDER, 1950]¹ (C.O.19)

"Scheduled Caste" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution.

The Indian Constitution, on the basis of its Article 341 (1) only empowers the President of india to specify the castes, races or tribes or parts or groups within castes that can be deemed to be Scheduled Castes. It is then the role of Parliament to make law concerning the groups thus designated .

ARTICLE 341, SCHEDULED CASTES

The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

In 1950, while exercising the powers conferred on him in Article 341 (1), the President of India promulgated an order known as *The Constitution (Scheduled Castes) Order, 1950*. This Order of 1950 continued to use the same list used in the Government of India (Scheduled Castes) Order of 1936. The third paragraph of the 1950 Order reads:-

Notwithstanding anything contained in paragraph 2, no person who professes a religion different from Hindu shall be deemed to be a member of a Scheduled Caste.

This third Paragraph was amended in 1956 and in 1990 in favor of Sikh and Buddhist Dalits.

AMENDMENT OF 1956 IN FAVOR OF DALIT SIKHS

Following agitation by Master Tara Singh, *the Constitution (Scheduled Castes and the Scheduled Tribes) Orders (Amendment) Act*, providing for inclusion of Dalit Sikhs in the list of the Scheduled Castes, was passed in 1956. It said:-

"Notwithstanding anything contained in para 2, no person who professes a religion different from the Hindu or Sikh religion shall be deemed to be a member of a Scheduled Caste."

AMENDMENT OF 1990 IN FAVOR OF DALIT BUDDHISTS

In May 1990, to commemorate the centenary of the birth of Dr. Ambedkar, Prime Minister V.P.Singh brought Dalits who converted to Buddhism into the list of Scheduled Castes . He made representations to Parliament that this change of religion , from Hindu to Buddhist , had not altered their social , economic or educational conditions. The same should be acknowledged in the case of Dalits who become Christians.

“Notwithstanding anything contained in para 2, no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste.”

In the aforementioned context I am intrigued why neither Dr.Sonkar Shastri nor Mr. K.V. Madanan, working *President of the All India SC Reservation Protection Forum*. who are so solicitous about the SC Reservation Protection quoting *Explanation 2 of Article 25* in an entirely misconceived constitutional context quote that **"In subclause B of Clause 2, the reference to Hindu shall be constructed as including a reference to persons professing the Sikh, Jain or Buddhist religions".** .

Thus so far, Buddhists and Sikhs have been so declared and there is a demand for the inclusion of Dalit Christians and Dalit Muslims to be included in the Scheduled Castes category. This constitutional position clearly refutes any unwarranted and even derogatory statement imputing that Jains are also included in the SC category.

2. As regards the the constitutional position of Jains under *Article 25 Expl.II* it is constitutionally and judicially untenable to assert as Mr. K.V. Madanan does that Jains Sikhs and Buddhists are included in Hindu religion. To repeat, the amendment to the Constitution in 1990 clearly states: **“Notwithstanding anything contained in para 2, no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste.”**

In this context, It would be useful to review as to what the reaction of the Jain community was to their inclusion in *Expl.II of Article 25* at the dawn of the Constitution. On 25th January, 1950, a Jain delegation was led to the Prime Minister Jawaharlal Nehru and other central leaders to draw their attention to the anomalous position of the Jains under *sub-clause (b) of Clause 2 of Article 25* and a petition was submitted.

Jawaharlal Nehru clearly assured the delegation that the Jains are not Hindus and on 31-1-1950, his Principal Private Secretary, A.V. Pai wrote the following letter in reply to the petition:

“This Article merely makes a definition. This definition by enforcing a specific constitutional arrangement circumscribes that rule. Likewise you will note that this mentions not only Jains but also Buddhists and Sikhs. It is clear that Buddhists are not Hindus and therefore there need be no apprehension that the Jains are designated as Hindus. There is no doubt that the Jains are a different religious community and this accepted position is in no way affected by the constitution.” (emphasis supplied) (“Nehru Jawaharlal, Letter No.33/94/50-PMS, Prime Minister’s Secretariat, New Delhi, 31st January, 1950.)

Even when the Sikhs are recognised as minorities they did not feel secure enough and hence made a representation to the *Constitution Review Commission* in 2002 stating that the *Expl. II* affected their independent status and hence should be amended.

Thus “The perseverance of the Sikh community that any dilution of Sikhism vis-a-vis Hinduism or any other religion should be removed has found favour with the *National Commission to Review the Working of the Constitution* headed by the former Chief Justice of India, M.N. Venkatachaliah. The recommendation of the *Commission* in this regard said : “The Commission without going into the larger issue on which the contention is based, is of the opinion that the purpose of the representations would be served if Explanation II to Article 25 is omitted. (The Tribune News Service, April 2, 2002.)

As noted by Prof. Mehmood, a former Chairman of the *National Minority Commission* and a former Dean of the Faculty of Law, Delhi University:

“A confusion, indeed not warranted by the words of *Explanation II* to *Article 25*, seems to have gone round that the Constitution declares Buddhists, Jains and Sikhs to be “Hindus”. Most certainly *it does nothing of the sort...* The provision of Explanation II in Article 25 has no religious connotation. Instead of saying the same thing four times of four different religious communities - Hindus, Buddhists, Jains and Sikhs - Article 25 (2)(b) says it once, for the Hindus, and then adds that the same provision be read in the Constitution for three other communities as well - the Buddhists, the Jains and the Sikhs. Makers of the Constitution did not intend to merge the Buddhists, Jains and Sikhs into the Hindu religion; nor were they indeed competent to do so. Hinduism, Buddhism, Jainism and Sikhism remain, under the Constitution and the law of India, four different faiths; and their followers four different religious communities.” (*Religious Identity, Beliefs and Practices under the Indian Legal System*,) article in *Religion and Law Review* June 1999)

Prof. P.C. Jain (L.L.M.; Ph.D.; Associate Professor, Department of Law, Former Administrative Secretary to Vice-Chancellor, University of Rajasthan, Jaipur – 302 004) in his article *Right of Jains to be Declared as a Minority based on Religion – Some Observations* (cited as : (2004) PL WebJour 10) (<http://www.ebcindia.com/lawyer/articles/705.htm#Ref1>) offers a learned discussion of the Constitutional and legal aspects of Jain minority religion.

Dr.Jain cites the Aurangabad Bench of Bombay High Court (*Shri Amolak Jain Vidya Prasarak Mandal, Kada v. State of Maharashtra*, WP No. 587 of 2000 decided on 10-10-2002) has also held so for the Maharashtra State. The community which is recognized as a minority based on religion has the right to establish and administer educational institutions of their choice. Article 30(1) of the Constitution declares thus:

“30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.”

If Jains are part of Hindu religion they cannot also be called a minority based on religion. But, on the other hand, if, for the purpose of Constitution, they are not part of Hinduism, and form a separate independent religion can they, for the purpose of Article 30(1), be called a minority based on religion.

As emphasized by Dr.Jain: “The competence of Constitution-makers was not limited by any religious doctrine. If they wanted they could have said that Sikhism, Buddhism and Jainism are not so much separate religions but only separate sects arising out of and based on Hinduism historically and culturally, and therefore, parts of Hinduism. But instead of saying so they have everywhere mentioned these three religions as separate religions. It was open to them to regard them as separate

religions. If once they have regarded so, it should not be open for any one to argue that they are sects or sections of Hindu religion. Thus, without any doubt, it could be said that the Constitution and the Hindu Code have recognized Jains to belong to a separate religion.”

The word “religion” has not been defined in the Constitution. But **Mukherjea, J.** speaking for the Court in the case of *Commr. HRE v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, observed: *AIR 1954 SC 282*. (*AIR para 17*):

“Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. **There are well-known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent first cause.** A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.”

The above observation was also referred by **Gajendragadkar, J.** in *Tilkayat Shri Govindlalji Maharaj VS. The State Of Rajasthan And Others* [1964(1) SCR 561,) and by **Jaganmohan Reddy, J.** in *State of Rajasthan v. Sajjanlal Panjawat*, [1974] 2 SCR 741; (*AIR 1975 SC 706*)

In *Gateppa v. Eramma*, **Kumaraswami Shastri, A.C.J.** of Madras High Court has also said thus: (*Gateppa v. Eramma*, *AIR 1927 Mad 228*) :

“I would be inclined to hold that modern research has shown that Jains are not Hindu dissenters but that Jainism has an origin and history long anterior to the Smritis and commentaries which are recognized authorities on Hindu law and usage. In fact, Mahaveera, the last of the Jain Thirthankars, was a contemporary of Buddha and died about 527 B.C. The Jain religion refers to a number of previous Thirthankars and there can be little doubt that Jainism as a distinct religion was flourishing several centuries before Christ. In fact, Jainism rejects the authority of the Vedas which form the bedrock of Hinduism and denies the efficacy of the various ceremonies which Hindus consider essential.”

In *Hirachand Gangji v. Rowji Sojpal* **Rangnekar, J.** of the Bombay High Court also observed that **the Jains have rejected the scriptural character of the Vedas, and repudiated the Brahminical doctrines relating to obsequial ceremonies, the performance of shraddhas and the offering of oblations for the salvation of the soul of the deceased, that Jains did not believe that a son, either by birth or adoption, confers spiritual benefit on the father, and that they differed from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse was burnt or buried and held:**

“Now, it is true, as later historical researchers have shown, that Jainism prevailed in this country long before Brahminism came into existence or held the field, and it is wrong to think that the Jains were originally Hindus and were subsequently converted into Jainism.” (*AIR 1939 Bom 377*);

In *CWT v. Champa Kumari Singhi* **Banerjee, J.** of the Calcutta High Court has also said that: **“The Jains rejected the authority of the Vedas, which forms the bedrock of Hinduism and denied the efficacy of various ceremonies which the Hindus consider essential. It will require too much of boldness to hold that the Jains, dissenters from Hinduism, are Hindus....”**

The report of the **Mandal Commission** also places Jain as a religion separate from Hindu religion. In the report while stating percentage distribution of Indian population by caste and religious groups, **Jains have been grouped with Muslims, Christians, Sikhs and Buddhists and under Category II, the**

heading of which is given as “Non-Hindu Communities, Religious groups etc.” In the report, Jains have not grouped with Hindus which have been placed in Category III under the head “Forward Hindu Castes and Communities” *AIR 1968 Cal 74*:-

This report has also been accepted by the **Hon’ble High Court and Supreme Court** in *Arya Samaj Education Trust v. Director of Education*, AIR 1976 Del 207) and *Indra Sawhney (Writ Petition (Civil) No.930 of 1990 – Indira Sawhney Vs Union of India And others (16.11.1992)*

In *Babari Masjid case* the Supreme Court has observed Jainism to be a separate religion from Hinduism. The Court stated in:(**CWP No. 317 of 1993**) before the Supreme Court) “Before we pass final orders, some observations of a general nature appear to be in order. Hinduism is a tolerant faith. It is that tolerance that has enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find shelter and support upon this land.”

In the *T.M.A. Pai Foundation v. State Govt. of Karnataka*((2002) 8 SCC 481) relating to educational rights of minorities, the Supreme Court was to decide the question as to who constitutes a minority. The Court heard the writ petition in February 1997. The seven-Judge Bench of the Hon’ble Supreme Court has deferred the matter to be decided by a Constitutional Bench of 11 Judges and passed the following order: (**SCC pp. 596-97, para 180**)

Consequently, the matter was referred to the **Constitution Bench of the Supreme Court** comprising of 11 Judges. The Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka* referred various decisions of the Supreme Court and held: **that the State will be the unit in relation to which the status of religious minority is to be determined. Therefore, in declaring a community as minority based on religion under Article 30(1) the decision will have to be taken by the respective States. The Court held:**

“If, therefore, the State has to be regarded as the unit for determining ‘linguistic minority’ vis-à-vis Article 30, then with ‘religious minority’ being on the same footing, it is the State in relation to which the majority or minority status will have to be determined.”

The 8 August, 2005 Judgment of the **3 Judges Bench of the Supreme Court consisting of Chief Justice R. C. Lahoti, Justice D. M. Dharmadhikari and Justice P. K. Balasubramanyan**, in the *Bal Patil Case (CA 4730 of 1999)*, written by Justice Dharmadhikari has not only declined to act on the recommendation of the National Commission for Minorities for the declaration of Jain community as a religious minority community on par with Muslim, Christian, Sikh, Buddhist and Zoroastrian (Parsi) but also its *obiter dicta* place Hindu religion above all other religions.

The Supreme Court bases its rejection of the Jaina claim for minority status on the 11 Judges Bench decision in the *T.M.A. Pai Case [2002(8) SSC 481]* which was related to the scope of Article 30 of the Constitution on the right of a linguistic, religious or cultural minority to establish and administer educational institutions of its choice.

As already noted this equation between the two categories of minorities does not logically follow, as the States have not been reorganized on religious basis and all religious communities are scattered throughout the country. States were reorganized in 1956 on linguistic basis and not religious basis.

As noted by Syed Shahabuddin (IFS (Retd.), Ex-MP, Supreme Court Advocate, President, AIMMM) in his article commenting on this judgement published in the *Milli Gazette Nov.3, 2005* and *The Tribune, Nov.25, 2005* :

"His historiography is full of flaws...All constitutional safeguards and assurances under the Constitution and in international law shall be reduced to zero if the distinct identity of any religious group, howsoever small, is denied and any group is forced to relate to Hinduism as a sect or sub-sect. The Sikhs and the Jains and the Buddhists will not accept Hindu hegemony on the ground that they are all branches of the same tree, which has sprang from the same soil. Dharmadhikari J.'s views clearly reflect the Hindutva philosophy. It is time that the Supreme Court free itself of any lurking intellectual subservience to the Hindutva philosophy."

In this case the Supreme Court of India declined to issue a writ of Mandamus towards granting Jains the status of a religious minority throughout India. The Court however left it to the respective States to decide on the minority status of Jain religion

In the judgment, the Supreme Court opined: "Thus, 'Hinduism' can be called a general religion and common faith of India whereas 'Jainism' is a special religion formed on the basis of quintessence of Hindu religion."

However, the late eminent jurist and constitutional expert, **Dr.L.M. Singhvi**, in a letter dated **June 3, 2006** to **Shri A.R. Antulay, Minister for Minority Affairs**, (re: **Bal Patil judgement**) there is a detailed discussion of the issue of the recognition of Jain religion as a religious minority in consonance with the secular faith of the Indian Constitution. Particularly he has stressed how the Jain Sramana and the Vedic traditions "differed substantially and sharply, even though both the traditions flourished among the same people living together in Bharat" and that the "Jains did not accept the authority and the orthodoxy of the absolute adherents of Vedas" just as the Jains also did not "accept the concept of Creator God and Created Universe."

Dr.Singhvi also has referred to the Supreme Court decision in the case (**Bal Patil vs.Union of India**) which he considers to be "an example of utter superficiality."

What he has further noted is that the "**judgment was also per curiam,**" and that "**the Court simply said that a mandamus cannot be issued to command a recommendation be implemented. What it said was that it was for the Central and State Government to decide on the question. Earlier, larger Benches had recognized Jains as a distinct and separate. The judgment in Bal Patil case is a judgment of three Judges which goes against the judgment of 11 Judges and many previous judgments of larger Benches on the basis of which Jains must be recognized as a religious minority, distinct and separate from from the Hindus. Indeed, inclusive references to Jain and Sikhs in Article 25 of the Constitution clearly indicates that Jains, sikhs and buddhists despite being separate and distinct were accepted as minority religion ."**

In conclusion he notes his "**locus**" as the **Founder President of the World Jain Confederation** commanding the support of all sects and denominations of Jains in India and throughout the world, and requests Shri Antulay to notify "Jains as a religious minority and to provide the much needed assurance to reinforce our Rainbow Pluralism and Unity in Diversity implicit in Indian Secularism"

In the latest Supreme Court Appeal (Civil) 9595 of 2003: The judgement dated August 21, 2006, in the case of **Committee of Management, Kanya Junior High School Bal Vidya Mandir, Etah, UP vs Sachiv, UP, Basic Shiksha Parishad, Allahabad, UP & Others**, delivered by judges, **SB Sinha and Dalveer Bhandari**, emphatically states:

"(The) Jain religion indisputably is not a part of Hindu religion. The question as to whether the Jains are part of the Hindu religion is not open to debate. Jains have a right to establish and administer

their own institution. But only because an institution is managed by a person belonging to a particular religion the same would not ipso facto make the institution run and administered by a minority community. A minority is determinable by reference to the demography of a state.

The Judgment further said: "**The Founding Fathers of the Constitution had unequivocally recognized the Jains as a minority community as is evident from the proceedings of the Constituent Assembly. While keeping in view that the Jains are a minority community, a representative of the Jain community was taken in the Minority Advisory Committee of the Constituent Assembly.**"and further noted that **"Jain religion indisputably is not a part of Hindu religion."**

The Gujarat Freedom of Religion Act, 2003, was enacted to amend the **Gujarat Freedom of Religion Act 2003**.

Following countrywide protests, and representations against the proposed amendment to the Bill the **Gujarat Governor, Mr.Nawal Kishor Sharma** recently returned the controversial **Gujarat Freedom of Religion (amendment) Bill, 2006**, saying the legislation violated the right to religious freedom. The bill, meant to check religious conversions, sought to replace the definition of convert by a new one under which a person renouncing one denomination and adopting another denomination of the same religion was to be excluded from the meaning of 'convert'.

Returning 'The Gujarat Freedom of Religion (amendment) Bill, 2006', the governor said **"what made it more objectionable were three explanations stipulating that the Jains and Buddhists shall be construed as denominations of Hindu religion,"**

The provisions of amendment bill violated Article 25 of the Constitution which guarantees to all citizens to freely profess, practice and propagate a religion, Sharma said. The bill should be reconsidered for suitable amendments so as to bring its contents in conformity with the Constitution, he said.

In the aforesaid context, I demand retraction of the unwarranted and misleading statement on Jains being included in SCs and an unqualified apology by Dr. Vijay Sonkar Shastri and Mr. K.V. Madanan and also from the Editor, The Hindu for the publication of the impugned report in the The Hindu dated 05-11-2007 , and request you to publish my rejoinder in The Hindu conclusively showing that the Jains are not SCs failing which I shall be constrained to take such appropriate steps as are necessary.



(Bal Patil)