

**“Minorities at Cross Roads:
Comments on Judicial Pronouncements”**

The elections in April-May, 2014 this year have put a strong majoritarian Government in power at the Centre. I welcome it.

Whilst I welcome a single-party majority government, I also fear it.

I fear it because of past experience with a majoritarian government in the nineteen sixties and nineteen seventies: when the then all-Congress Government had unjustifiably imposed the Internal Emergency of June 1975. And rode rough shod over the liberties of citizens.

I cannot forget it nor can I condone it.

My wife and I have lived through it and we know how a very large number of people suffered.

Traditionally Hinduism has been the most tolerant of all Indian faiths. But - recurrent instances of religious tension fanned by fanaticism and hate-speech has shown that the Hindu tradition of tolerance is showing signs of strain. And let me say this frankly – my apprehension is that Hinduism is somehow changing its benign face because, and only because it is believed and proudly proclaimed by a few (and not contradicted by those at the top): that it is because of their faith and belief that HINDUS have been now put in the driving seat of governance.

Jawahar Lal Nehru was a Hindu.

But he never looked upon the diverse and varied peoples of India from the stand point of Hinduism. He wrote in that most inspiring book "The Discovery of India" that "it was fascinating to find how the Bengalis, the Canarese, the Malayalis, the Sindhis, the Punjabis, the Pathans, the Kashmiris, the Rajputs, and the great central block comprising of Hindustani-speaking people, had retained their particular characteristics for hundreds of years, with more or less the same virtues and failings, and yet they had been throughout these ages distinctively Indian, with the same national heritage and the same set of moral and mental qualities.

Ancient India, like ancient China (he wrote), was a world in itself. Their culture and civilization gave shape to all things. Foreign influences poured in and often influenced that culture, but they were absorbed. Disruptive tendencies gave rise immediately to an attempt to find a synthesis.

It was some kind of a dream of unity that occupied the mind of India, and of the Indian, since the dawn of civilization. And that unity was not conceived as something imposed from outside. It was something deeper; within its fold, the widest tolerance of beliefs and customs was practiced and every variety was acknowledged and even encouraged. This was Nehru's great vision of the diversity and unity of India.

When someone told Panditji that Hindi was the predominant language of India, he agreed although he said he would have preferred it if it was Hindustani, and then he added (and I ask you to note what he added):

(I quote) "Quite frankly I do not understand the way some people are afraid of the Urdu language. I just do not understand why in any State in India people should consider Urdu a foreign language and something which invades their own domain. Urdu is a language mentioned in our Constitution. I object to any narrow mindedness in regard to Urdu...."
(Unquote).

And how right he was. These words were said by him in December 1955. They have proved prophetic. Almost 60 years later, just last week, a Constitution Bench of 5 Judges of India's Supreme Court rejected a constitutional challenge to Urdu being made the second regional language in the State of Uttar Pradesh, where it is widely read and spoken.

It is a step and a very important step in the right direction.

Some day in the future – for the good of the integration of India - Urdu deserves to be included not just in the Eighth Schedule where it lies with 21 other recognized Indian languages, but upfront in a trinity of National languages of India i.e. Hindi, Urdu and English.

When speaking of minorities. Do remember that in some countries there is no linguistic equivalent for the

expression. In an official communication to the U.N. Sub-Commission (on the Prevention of Discrimination and the Protection of Minorities), the Government of Thailand stated that the concept of “minorities” was unknown in that country. The communication said (and I quote):

“Although this word has a Thai translation from the English for the purpose of communication with the outside world, it has no social or cultural connotation whatever”!¹

But for us in India we have a written Constitution and there is no difficulty in knowing who are reckoned as “minorities”. Article 29 read with Article 30 provides that any section of citizens of India residing in India or any part of the territory of India having a distinct religion, language, script or culture of their own are minorities with the right – a fundamental right – to conserve their religion language

¹ CFUN Study (E/CN Sub. 2/348 Rev. 1) on the Rights of Persons belonging to Ethnic Religious and Linguistic Minorities (1979) by Francesco Capotorti, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities – P-13.

script and culture. One culture was anathema to the Founding Fathers.

Religious and linguistic minorities not only have a separate status under our Constitution. They have also been conferred an additional fundamental right – a right which no ordinary law can take away – viz. to “establish and administer educational institutions of their choice”.

The intention of the framers of the Constitution was to use the term ‘minorities’ in the widest sense.

In the Constituent Assembly debates you will find mention of this intent (you will find it in Vol.VII of the Constituent Assembly Debates at pages 922-923). It is recorded there (and this is an example given by our Founding Fathers in the debate during Constitution-making) – that Maharashtrians settled in Bengal or Bengalis settled in

Maharashtra – even though Hindus settled amongst Hindus and hence not a religious minority in either State – are nonetheless *linguistic minorities* in each of the respective States and so have a fundamental right to protect their own language and culture; and additionally, to establish educational institutions “of their choice” to foster that language and culture.

By its very existence, then – and our Constitution recognizes this – every minority group whether religious linguistic or cultural in any part of India poses a challenge to – the predominantly majority community – a challenge to what has been elsewhere described as:

“the dynamics of governance amidst pluralism”.

This is the challenge for every government including a majority government, even a majority government that has a 2/3rd majority in Parliament. It is – still pledged to

safeguard and enhance minority rights – The Constitution has ensured that the dynamics of Governance amidst pluralism has to be tackled peacefully and with vision.

In every nation intolerance towards someone who looks, talks or worships differently (or who even lives or dresses differently) from the majority community has always been a basic human infirmity.

Every tribal society in almost every part of the world has chosen a word to denote “foreigner” or “outsider”.² In Bhutan and Sikkim when most of the foreign visitors were from India – they still are from India - the term GYAGAR (Tibetan for “Indian”) was adopted to denote the “outsider” – an innocent term in itself, but the tone of voice or accent

² In ancient Greece the word “Barbaros” (foreigner) was reserved by the Athenians for their traditional enemies the Persians; after the insular City States of Greece the same word was invoked to denounce Philip of Macedon – though Greek, he was considered outside the cultural pale of Athenian society!

with which it was expressed conveyed something derogatory or contemptuous.

Whatever the source from which a minority derives its existence, religious, ethnic or linguistic, the rest of society has to make a conscious effort in coming to terms with it: but the fact of life is that the larger the majority community with greater political power the lesser the inclination to make efforts to build bridges.

Which explains – why generally speaking minorities because they are minorities are not well-treated, or at least do not feel well-treated, in different parts of the world – This is a theme that has been explored more fully in a recently published book by a Lebanese author M. Amin Maalouf (The book is titled "*In the name of Identity*")³. He points out that those who claim a complex identity are often

³ Published in 1996 in French with English translation published in the year 2000.

marginalised because others perceive them through the lens of only one aspect of their identity: *their religion*.

Maalouf grew up in Lebanon and moved to France in 1976, at a young age. He sees himself as both Lebanese and French. He celebrates the ability of humans to maintain numerous identities. He does not like the singular (what he calls) tribal identity of fanatics who are (as he says) “easily transformed into butchers”. About fanatics he writes that any doctrine with which they identify can be and is perverted, including liberalism, nationalism, atheism and communism. He believes in (what he calls) *calming identity conflicts* because as he says:

“it will mean making people, especially minorities, feel included”

a useful guide for us in India – if we all, majority and minority, move towards calming identity conflicts. We need it particularly now when we are poised for greater economic development.

History shows several ways in which members of a society have tried to solve the problems posed by the presence of a minority group ("section of citizens", as our Constitution describes them). These ways or methods are four in number.

(1) The first method is: forceful suppression and eradication:

- Will Durant records in his Story of Civilization⁴ – that in India in the middle-ages during the alien despotism of the Sultanates of Delhi, Sultan Ahmad Shah boastfully feasted for three days whenever the number of defenceless Hindus slain in his territories reached twenty thousand!

The same method was adopted even in modern times as witnessed in the planned liquidation of six million Jews;

(2) The second method is: coercive or hostile toleration:

- Which is like the treatment of a sect of Muslims known as Qadianis (or Ahmediyas) in Modern day Pakistan. The Ahmediyas, because they were in a minority and because the rest of the Muslims in their Parliament were in a majority, were declared officially and statutorily as non-Muslims in the Islamic State of Pakistan. Today they are hardly “tolerated” – even as non-Muslims!

⁴ Vol.-I page 461.

(3) The third method is: by voluntary or involuntary assimilation or absorption.

- As witnessed by forced conversion in the middle-ages which effectively destroyed the identity of religious minority groups. The Ismaili Khojas and the Cutchi Memons of today were originally Hindus – who were forcibly converted to Islam during the invasions of Mahomed of Ghazni (AD 971 to 1030) and his successors. They are now a recognized sect of Muslims in India, who practice the religion of the Prophet.

Our Constitution has consciously rejected these first 3 methods as contrary to the Indian ethos:

- (4)** Our Constitution has consciously adopted the fourth way – **Affirmative action for protection and preservation** - as the only way – because at the time of the framing of the Constitution and for many years after that, this was the Hindu ethos i.e. – the true Indian ethos.

In the Indian Constitution, the provisions of Part III have been so drafted as not only to prevent disability for, or discrimination against minorities, but to create positive and enforceable rights on them. And then Parliament has put in

place since 1992 the National Commission of Minorities Act – the role of the Commission is to protect and preserve the minorities from attacks from outside.

It is this liberal approach to Fundamental Rights and protection of minorities that has helped – the minorities in India to progress, so far – as well as to conserve and protect their guaranteed rights. Then why are the minorities at the cross-roads today?

It is because the body set up by Parliament to protect minorities has omitted to take effective steps to protect them.

We have been hearing on television and reading in newspapers almost on a daily basis a tirade by one or more individuals or groups against one or another section of

citizens who belong to a religious minority and the criticism has been that the majority government at the centre has done nothing to stop this tirade. I agree.

But do remember that every government whether at the Centre or State – whether composed of one political party or another – will do or not do whatever it considers expedient to advance its own political interests. This is why in my view Parliament has in its wisdom set up an independent Minorities Commission to look after the interest of Minorities. It is true that the National Commission for Minorities has functions defined in Section 9 of the Act, but the functions would definitely not preclude the Commission issuing Press Statements or filing criminal complaints regarding diatribes against minorities or protesting against hate speeches against minorities in general or against any particular minority community. The Commission is specifically empowered to do two things:

- (i) To look into specific complaints regarding deprivation of rights and safeguards of the minorities and take up such matter with the Authorities; and
- (ii) Suggest appropriate measures in respect of any minority to be undertaken by the Central Government or the State Government.

I would implore the distinguished members of the National Commission for Minorities (and believe me they are influential and distinguished) to read the Statement of Objects and Reasons for enacting the National Commission for Minorities Act. This is what the Statement of Objects and Reasons says: (I Quote)

“The main task of the Commission – mark you – the main task of the Commission – shall be to evaluate the progress of the development of minorities, monitor the working of the safeguards provided in the Constitution for the protection of the interests of minorities and in laws enacted by the Central Government or State Governments, besides looking into specific complaints regarding deprivation of rights and safeguards of the minorities.”

So the main task of the Commission is “protecting the interests of minorities”. And how does one protect the interest of minorities who (or a section of which) are on a daily basis lampooned and ridiculed or spoken against in derogatory language? The answer is by invoking the provisions of enacted law – law enacted in the Penal Code

and the Criminal Procedure Code. Otherwise the Commission is not fulfilling its main task which is the protection of the interests of the minorities.

I do implore the Commission and its distinguished members to take steps as an independent Commission set up by Parliament and not controlled by government, to actively move to safeguard the interests of the minorities. It is as important as giving educational facilities and improving the economic condition of the minorities which the Commission and Government are rightly pursuing.

Those who indulge in hate speech must be prevented by Court processes initiated at the instance of the Commission because that is the body that represents Minorities in India. Whoever indulges in such hate speech or vilification (whatever the community to which they belong) they must be proceeded against and the proceeding must be widely publicized. It is only then that the confidence of the minorities in the National Commission for the Minorities will get restored.

I would respectfully suggest that if we minorities (through the statutory body set up by Parliament) do not stand up for the rights of minorities and protest against such hate speeches and diatribes how do we expect the Government to do so -?

A majoritarian Government is elected and exists mainly on

the vote of the majority community. On the other hand the Commission is an independent statutory body. Its Chairman is not a Minister of Government. And though it receives grants from the Central Government it is not expected to be a mere mouthpiece of that Government.

I come now to the second part of my talk this evening – about judicial pronouncements.

Before the nineteen nineties – and I emphasize this because it means that for almost forty long years after independence – on almost every occasion on which the minorities approached the Supreme Court of India complaining of State or Central legislation or executive action as infringing their fundamental rights, the challenge was upheld. It was most heartening. The Supreme Court of India functioned as a Super Minorities Commission – as it was meant to: this was long before a Minorities Commission

got established by law made by Parliament.

For instance, way back in 1952 a small minority group known as Anglo-Indians, who ran many reputed schools in Bombay, were adversely affected by an order passed by the then Government of Bombay. The Order forbade state-aided schools using English as a medium of instruction to admit pupils other than Anglo-Indians or citizens-of-non-Asiatic descent. Anglo-Indians could maintain and administer their schools and teach in English but only to Anglo-Indians; if they admitted other Indians they forfeited State aid - unless of course, they switched over to Hindi as the medium of instruction. The effort was to encourage the use of the National language (Hindi) - which is a constitutional prescription.

Although the object was laudable, the order was struck down by the Supreme Court because under the Constitution

– Anglo-Indians which had a distinct language (which was English) had a fundamental right to conserve, the same and because the direct effect of the Order was to prevent Indians from entering Anglo-Indian Schools on grounds of race and language⁵.

Seven years later, (in 1959), the same Supreme Court of India thwarted an attempt by the Communist-controlled Government of Kerala to take over the management of Christian Schools contrary to Article 30. In an Advisory opinion given by a bench of seven Judges of India's Supreme Court – rendered in a Presidential reference - large parts of the Kerala Education Bill were declared unconstitutional.⁶ This is well-known. What is not so well-known is what Chief Justice S.R. Das (a devout Hindu) said in his judgment when (presiding over a Bench of 7 Judges). He gave a peroration at the end of his judgment: which he

⁵ State of Bombay vs. Bombay Education Society AIR 1954 SC 561.

⁶ In re Kerala Education Bill 1957. AIR 1958 S.C. 956.

wrote for himself and for five of his colleagues on the Bench. This is how it read:

“There can be no manner of doubt that our Constitution has guaranteed certain cherished rights of the minorities concerning their language, culture and religion. These concessions must have been made to them for good and valid reasons. Article 45, no doubt, requires the State to provide for free and compulsory, education for all children, but there is nothing to prevent the State from discharging that solemn obligation through Government and Government-aided schools and Art.45 does not require that obligation to be discharged at the expense of the minority communities. So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own.” (Unquote).

He then ended his peroration with these words:

“The genius of India has been able to find unity in diversity by assimilating the best of all creeds and cultures. Our Constitution accordingly recognises our sacred obligation to the minorities.”

Notice that the expression “our sacred obligation to the minorities” was used not once but twice in the same judgment.

Even the Judge who did not entirely agree with the views of Chief Justice S.R. Das and of his 5 Companion Justices – in the Kerala Education Bill case – (he was Justice Venkatarama Aiyar (a Brahmin whose portrait hangs in Court No.3)) had said (and I quote):

“But what is the policy behind Art.30(1)? As I conceive it, it is that it should not be in the power of the majority in a State to destroy or to impair the rights of the minorities, religious or linguistic. That is a policy which permeates all Modern Constitutions, and its purpose is to encourage individuals to preserve and develop their own distinct culture.”

Mark the words: “their own distinct culture”/.

After the Kerala Education Bill Case, some State Governments said they found it increasingly difficult to regulate educational standards, and so the Highest Court in 1974 was requested to constitute a larger Constitution Bench to reconsider its previous decisions. It did.

Certain provisions of the Gujarat University Act 1949 had laid down statutory conditions for affiliation of colleges in Gujarat to the Gujarat University; they applied to all educational institutions including those run by minorities; they provided that teaching and training in all colleges affiliated to the University would be conducted and imparted by teachers appointed only by the University. Since the provisions interfered with the minorities' right to administer and run educational institutions "*of their choice*" – a fundamental right guaranteed under Article 30 – these provisions were challenged by the Ahmadabad St. Xavier's College (managed by Jesuits).

The Court heard the case – this time sitting in a larger Bench of nine judges⁷ – for reconsidering the decision in the Kerala Education Bill case.

⁷ St. Xavier's Collage Vs. State of Gujarat. AIR 1974 S.C. 1389.

But this Bench of 9 Judges in the end re-affirmed what was said by the Bench of 7 judges in the Kerala Education Bill case. It struck down the offending provisions as inapplicable to minority-run colleges. One of the Judges sitting on the Bench was Mr. Justice H.R. Khanna, one of the most famous and the most noble of India's Judges. He was a votary of the Bharat Vikas Parishad which is a functioning social organization now chaired by Mr. Justice Rama Jois – a distinguished BJP Member of Parliament.

In the St. Xavier's College case Justice H.R. Khanna delivered a memorable judgment giving reasons why minority interests are so zealously protected in every society – especially in India. This is what he said:

“The safeguards of the interest of the minorities amongst sections of the population is as important as the protection of the interest amongst individuals or persons who are below the age of majority or are otherwise suffering from some kind of infirmity. The Constitution and the laws made by civilized nations, therefore, generally contain provisions for the

protection of those interests. It can, indeed, be said to be an index of the level of civilization and catholicity of a nation as to how far their minorities feel secure and are not subject to any discrimination or suppression."

Khanna knew that it was the feeling amongst minorities about their security and about non-discrimination that mattered.

In an excellent treatise on the Role of the Supreme Court in American Government, Prof. Archibald Cox has written that constitutional adjudication depends upon a delicate symbiotic relation –

"The court must know us better than we know ourselves. Its opinions may sometimes be the voice of the spirit, reminding us of *our better selves*"

The judgment of the Supreme Court of India in the St. Xavier's College case reminded all Indians of their "better selves".

State-aided Minority Educational Institutions (MEIs) however, did not receive, the same favourable reception from the Supreme Court when Article 30 was invoked in the case of institutions of higher learning – in postgraduate courses in medicine, engineering and the like.

In these groups of cases (where I had been briefed and had appeared for some of the MEIs), different benches of the Supreme Court – at first – wavered as to how much, or how little, autonomy should be conceded to such minority educational institutions. The cases shuttled from a bench of two justices, to a bench of five justices, then from a bench of five justices to a bench of seven justices (on 19th March 1994), and were ultimately referred to a bench of 11 justices (in TMA Pai Foundation vs. State of Karnataka).

With the mandatory constitutional age of retirement of

Supreme Court judges (at 65), the composition of the bench was entirely different from what it was in 1974! In 2002 the difficulty the bench of 11 justices felt (in TMA Pai) – that’s what they said – was how to reconcile the provisions of Article 30(1) with the seemingly contrary provisions contained in Article 29(2):

Article 30(1) provided:

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

But Article 29(2) provided as follows:

“(2).. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”

But in the Kerala Education Bill case (1958), an attempt had been made at a reconciliation – this is what the Court in the Kerala case said:

“The real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority (educational) institution with a sprinkling of

outsiders admitted into it’;”

The expression ‘sprinkling of outsiders’ was later explained (in bench decisions of the Supreme Court) as not restricting the number of outsiders so long as the minority character of the institution was not affected.

But the inarticulate major premise underlying the ultimate decision of the justices who constituted the majority in the 11-judge bench in *TMA Pai Foundation* (2002) was the strong suspicion that many of the MEIs, in receipt of state aid, were selling seats to the highest bidder and were thus disentitled to invoke the Fundamental Right to ‘administer’ the MEI in question. In the *Kerala Education Bill* case (1958), Chief Justice S. R. Das had warned that the Fundamental Right guaranteed by Article 30 to *administer* educational institutions would not include the right to ‘maladminister’ them.

In the view of most of the judges on the bench (in *TMA Pai Foundation*), state-aided MEIs, which had established institutions for postgraduate courses in medicine, engineering and the like, were claiming a Fundamental Right to administer them almost solely with a view to profiteering in the matter of admissions and allotment of seats. It was money and not merit that mattered to them. 'Maladministration' therefore became a convenient stick with which to beat the MEIs – not unjustifiably, at times – but only at times: not every time!

In my view, the ultimate majority decision in *TMA Pai Foundation* was not so much the result of a textual interpretation of the constitutional provisions as of the apprehension of the judges that treating the right of minorities under Article 30 as 'absolute' (as it had been described in the earlier cases) would totally negate the

claim of the states to *regulate* MEIs – especially in higher education. My plea to the judges that not suspicion, but only concrete allegations and proof of such allegations in individual cases could deprive MEIs of their Fundamental Right to administer minority educational institutions established by them, was invariably met with stony silence!

Prior to the decision in *TMA Pai Foundation* (2002) Courts in India – i.e. our Judges – had shown a special solicitude for minorities since (ordinarily) they would not be able to find protection in the normal political process. In other countries also, there has been a tendency for Courts, when dealing with minority rights, to conceptualize their role to that of a political party in opposition.⁸ In his foreword to a book written by Justice K.K. Mathew titled: *Democracy Equality and Freedom* published by Eastern Book Company

⁸ Judicial deference to legislative wisdom must not be allowed to undercut the normal democratic processes by legislators to display “prejudice against discrete and insular minorities” – See Chief Justice Stone’s famous footnote in *U.S. V. Carolene Products Co.* 304 U.S. 4, 152 = 82 L.Ed. 1234 at p-1242.

way back in 1976, Prof. Upendra Baxi said that the Supreme Court of India regarded minority rights as one of the “preferred freedoms”. He was right. But he wrote this more than 40 years ago.

Minority rights are still regarded by the Courts (as they have to be) as fundamental rights, but (and I say this with regret) they are no longer regarded by the Judges of today as “preferred freedoms”.

The decision in *TMA Pai* was a un-mitigated disaster for the minorities. Let me tell you why. Article 30 (the right of minorities, religious and linguistic to establish and maintain education institutions of their choice) has now been placed by Court decision on a much lower pedestal than it was – or was intended to be. It has been equated only with a fundamental right guaranteed under Article 19(1)(g) – i.e. a mere right to an occupation (running an educational institution the Judges said is an “occupation” like any

other):

Even though the fundamental right under Article 30 had been expressly made – deliberately made - not subject to any reasonable restrictions at all, the Bench of 11 Judges (by majority) relegated this right to a right to an occupation guaranteed by Article 19(1)(g) i.e. therefore subject to reasonable restrictions imposed by law in public interest – i.e. subject to State regulation.

The Fundamental Right of MEIs have got devalued, because approximating the provisions in Article 30 to the provisions contained in Article 19(1)(g) mean, that as a matter of perception, the ‘reasonable restrictions’ imposed by ordinary law on this Fundamental Right – permissible under Article 19(6) – has also got subsumed in what was an otherwise unrestricted Fundamental Right guaranteed under

Article 30!

With the result that when the Right to Education Act 2009 – was challenged as unconstitutional before a Bench of 3 judges of the Supreme Court it was upheld – two of out of the Bench of three judges holding that even admissions to minority education institutions governed by Article 30 were required to conform to its provisions – however, it was only in May 2014 that the majority view on this limited point has been over-turned by a unanimous Bench decision of five Judges.⁹

As I said before – initially, when dealing with minority rights, courts in India had invariably conceptualized their role as that of a political party in opposition – until one of the political parties, the Bharatiya Janata Party (the BJP), in the early 1990s characterized the policy of the Congress

⁹ *Pramati Educational and cultural Trust vs. UOI* – judgment dated 6.5.2014 – 2014 (7) Scale 306 (para 40).

Party (the ruling party in power at the Centre for more than 40 years) as an "appeasement of the minorities". The label stuck; "minority" became and has become an unpopular word.

And after the same political party had included in its Election Manifesto in the general election of May-June 1991 the party's resolve if and when it came into power to amend Article 30 to the disadvantage of minorities, 'minority rights' got less and less protected by Courts (including the Supreme Court of India) than they were before.

A large number of Judges of the Supreme Court today no longer pay much attention to what the great Chief Justice S. R. Das had said at the end of his judgment in the Kerala Education case.

NOW – SOME CONCLUSIONS –

Way back in 1836 a lively Anglican priest and social reformer, the Rev. Sydney Smith¹⁰ perceived the dangers of giving political power to *the people*. Preaching in St. Paul's Cathedral he ventured to suggest that:

“It would be an entertaining change in human affairs to determine everything by minorities. They are almost always in the right.”

But the great democrat, Abraham Lincoln, frowned on such heresy. In his First Inaugural Address in March 1861 he said that “the rule of a minority as a permanent arrangement is wholly inadmissible; so that rejecting the majority principle, anarchy and despotism in some form is all that is left”

So you see - for as long as people aspire to govern according to majoritarian values in terms of assumptions

¹⁰ “The Smith of Smiths” – by Hesketh Pearson, Published by Penguin Books, 1948 at P.248.

held by the majority, the minorities must always suffer – anywhere and everywhere. Even Abraham Lincoln said so.

But with respect, I suggest that neither the view of the lively Anglican priest nor of the great democrat are valid.

In my humble view there is – there has to be – a middle way.

Some years ago I read an article in the Times of India: an interview with Sulak Sivaraksa of Thailand. He is a prominent activist and had been persecuted by many dictatorships in Thailand. He has been forced into exile. He was asked whether he felt that the major world religions needed to reinvent themselves in order to be more effective in “*these troubled times*”? And Sulak Sivaraksa answered that every religion must go back to its original teachings and make itself more relevant today.

He was then asked why there were great disparities in the way Buddhism was being practised? And his answer was significant, and for us all -crucial. This is what he said:

Quote. "I make a distinction between Buddhism with a Capital 'B' and buddhism with a small 'b'. Sri Lanka has the former, in which the state uses Buddhism as an instrument of power, so there are even Buddhists monks who say the Tamils should be eliminated. Thai Buddhists are not perfect either. Some Thai Buddhist monks have compromised and possess cars and other luxuries. In many Buddhist countries, the emphasis is on being goody-goody, which is not good enough. I am for buddhism with a small 'b' which is non-violent, practical and aims to eliminate the cause of suffering..." Unquote.

If I were to project myself into the mind of the founding fathers and review what they thought were the rights of minorities in the context of freedom of religion, I would lay great emphasis on the fact that whilst most of them started the business of Constitution making, by defining minorities with a big 'M', within a few years, they began to accept the fact that, in the vast Indian Union, in the smooth working of

the Constitution the minorities had a great future if their sights were lowered – if *they* chose to accept “minority” with a small ‘m’.

In 1984, at a conference in New Zealand to which I was invited, I heard its human rights commissioner (Justice John Wallace) say: ‘the minority view is generally right, provided the minority can carry the majority with it.’ His was the voice of mature experience, not of mere human-rights rhetoric.

When we in India discuss the state of our nation, we should never forget the historical context: Minority with a *small ‘m’* must be the watchword. Because minority with a small ‘m’ may help to carry the majority with it – provided always that the majority has the humility and statesmanship also to accept “majority” as a word with a small m. ‘Majority’ with a small ‘m’ helps to instill a sense of confidence in the

minorities. The possibility of conflict arises only when one or other of these groups stresses the big 'M' factor.

Sorry for the bits of plain – speaking this evening. Ladies and Gentlemen.

But I must tell you Hon'ble Minister that when a delegation of some members of the Commission came over some days ago to invite me to speak I alerted them and told them that they would not like to hear my views; I told them that I was pretty critical in my approach to minority rights. But they insisted that I come and speak. This is the reason why parts of this talk may not have gone down well with some of you. I am sorry but I assure you I did not mean to offend anyone.

In a book written by a distinguished advocate of old Mr. P. B. Vachha, which is a judicial history of the Bombay High Court during the British period, the book had been

commissioned by the Judges of the Bombay High Court but then they did not approve of certain passages in the book and asked Vachha to remove them. He refused. So a group of us advocates got together and financed the publication privately. In his Preface Vachha wrote that in writing the history of the Bombay high Court he had adopted the advice given to India's great historian Ferishta, by Ibrahim Adilshah, when Ferishta migrated from the Nizamshahi Court at Ahmednagar to the Adilshahi Court at Bijapur. Famous words:

“Write”, said the Monarch, “write without fear or flattery.”

Fear and flattery of the powers that be are the worst enemies of historical truth, and vitiate an opinion at its very source.

I have always been impressed by these brave words. It is better to be unpopular than to be untruthful.