

## EFFECT OF AFFIRMATIVE ACTION IN INDIA VIS-A-VIS SECULARISM

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### Introduction

What is secularism? Secularism as a modern political and constitutional principle involves two basic propositions. The first is that people belonging to different faiths and sections of society are equal before the law, the Constitution and government policy. The second requirement is that there can be no mixing up of religion and politics. It follows therefore that there can be no discrimination against anyone on the basis of religion or faith nor is there room for the hegemony of one religion or majoritarian religious sentiments and aspirations. It is in this double sense--no discrimination against anyone on grounds of faith and separation of religion from politics--that our Constitution safeguards secularism, however imperfectly.

The Oxford English Dictionary states that Secularism is the doctrine that morality should be based solely on regard to the well being of mankind in the present life to the exclusion of all considerations drawn from belief in God or in a future state.

Donald E. Smith, Professor of Political Science in Pennsylvania University provided what he regarded as a working definition of a secular state. This was in his book *India as a Secular State*. "The secular State is not a State which guarantees individual and corporate freedom of religion, it deals with the individual as a citizen irrespective of his religion is not constitutionally connected to a particular religion, nor does it seek to promote or interfere with religion".

The definition given by Smith reflects three aspects of secularism in the form of inter-related relations as: Religion and Individual; Individual and State; State and Religion.

### Secularism in other country

#### **United States**

The word secular is not to be found in the Constitution of U.S.A. But the doctrine is embodied in it. Section 3 of the Constitution drafted by the Philadelphia Convention was ratified in 1789 reads 'The Senators and Representatives before mentioned and all executives and judicial officers, both of the U.S. and of the several states, shall be bound by oath or affirmation, to support this constitution, but no religious test shall ever be required as a qualification to any office or public trust under the United States'. The key words here are 'no religious tests' shall be required to hold an office. In India amongst the first things that its people see is the religion and caste of a person.

#### **England**

Here there is a close alliance between the Church and State. The Church became independent of the Pope in the 16<sup>th</sup> century and is the official Church of England. The monarch is the head of state (equivalent to the Indian President) and head of Church. Though there is religious freedom, the Church of England has a special status inasmuch as the monarch of England must join in communion with the Church of England. Saying that the Queen is the head of State and Church is like saying that the President of India is the head of say the VHP. Not

possible in India because Hinduism is not an organized religion like Christianity.

### Germany

In Germany the word Secular means that Government and Religion are two separate things and must be kept separate. The State has to deal with people irrespective of their faith or religion. All Laws are same for every citizen, either minority citizen of majority one. There are no special laws for special interests of minorities/majority. 200 years ago in Germany the Church owned all the land. To the Germans secularism meant take away all land from the church and hand it over to local administration.

### Secularism in India

India is a secular country. The term 'secular' denotes the threefold relationship among man, state and religion. The word Secular has not been defined or explained under the Constitution in 1950 or in 1976 when the word 'secular' was made part of the preamble. A Secular State means that the State protects all religions equally and does not uphold any religion as the State religion.

Secularism is the doctrine that the spheres of politics and religion must be separate.

In the Constituent Assembly debate, there was a tussle on the issue of secularism between those who wanted a strict separation between state and religion (no links theory) and those who wanted India's centuries old religious traditions to be reflected in its polity. The latter group proposed an 'equal respect theory' of secularism which respected all religions and granted religious liberty to all. What came out of the deliberations was a compromise that leaned towards the latter group.

The thinking of the Constituent Assembly on the issue is well brought out by a statement made by Shri K.M. Munshi in the Assembly, "We are a people with deeply religious moorings. At the same time, we have a living tradition of religious tolerance - the result of the broad outlook of Hinduism that all religions lead to the same God. In view of this situation, our state could not possibly have a state

religion, nor could a rigid line be drawn between the state and the church as in the U.S."

### Constitutional Provision

**Article 25 (1).** It provides that 'subject to public order, morality and health and all the provisions of this part, all persons are equally entitled to freedom of religion and the right to profess, practice and propagate the religion of one's choice.'

However, **clause (2) of Article 25** imposes limitations on the right guaranteed by clause (1) and reflects the peculiar needs of Indian society.

Clause (2) provides that, 'nothing in this Article shall affect the operation of any existing law or prevent the state from making any law – (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.' Thus, clause (2) of Article 25 appears to have allowed the state to interfere in the sphere of religion subject to public order. Making use of Article 25 (2) (a), state manages temples and other religious institutions. In fact, several state governments have full-fledged department for temple administration. By virtue of Article 25 (2) (b), State has enacted temple entry laws and affected changes in the personal laws of communities.

**Article 30** is another Article that seeks to protect corporate freedom of religion.

Clause (1) of this Article, provides that 'All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.' Clause (2) provides that 'state shall not, while giving grants in aid to educational institutions discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language.'

## Religious Matters under Distribution of Powers

Under Article 246 of the Constitution read with Schedule VIII various religious matters noted below fall in the jurisdiction of the State - and both Parliament and the state legislatures, or either of them, can legislate on such matters:

- ❖ Pilgrimage outside India - Union List, entry 20;
- ❖ Pilgrimage within India - State List, entry 7;
- ❖ Burials & burial grounds, cremations & cremation grounds - State List, entry 10;
- ❖ Family relations, succession & all other personal-law matters -Concurrent List, entry 5;
- ❖ Charities, charitable institutions & endowments – Concurrent List; entry 28;
- ❖ Religious endowments & religious institutions – Concurrent List, entry 28.

## Indian Supreme Court on Secularism

In **Ismail Faruqui Vs Union of India**<sup>ii</sup>, the Ram Janma Bhoomi case, the court endorsed a version of secularism that has its rationale in Hindu scriptures. The court accepted the claim that secularism in India exists because of Hindu tolerance.

In case such as **S.R. Bommai Vs Union of India**<sup>iii</sup>, Supreme Court has affirmed secularism as a basic feature of the constitution.

In this case, a nine-judge bench of the Supreme Court referred to the concept of secularism in the Indian context. According to SAWANT, J.:

“.....religious tolerance and equal treatment of all religious groups and protection of their life and property and of the peace of their worship are an essential part of secularism enshrined in our Constitution.....”

The concept of secularism is not merely a passive attitude of religious tolerance. It is also a positive concept of equal treatment of all religions.

In a landmark judgment in **Santosh Kumar vs. Secy. Minister of Human Resources Development**,<sup>iv</sup> the Supreme Court has held that introduction of Sanskrit Language as a subject in the Central Board of Secondary Education (CBSE) is not against ‘secularism’ as it is the “mother of all Aryan language”. The Court directed the CBSE to make necessary amendments in the syllabus within 3month to make Sanskrit language an elective subject for nurturing our cultural heritage.

In **Ms. Aruna Roy and others vs. Union of India and others**,<sup>v</sup> the Supreme Court has ruled that the concept of secularism is not endangered if the basic tenets of all religions all over the world are studied and learnt. Value based education will help the nation to fight against fanaticism; ill-will, violence, dishonesty and corruption. These values can be inculcated if the basic tenets of all religions are learnt.

In the year of 2004 in **State of Karnataka Vs Praveen Bhai Thogadia**,<sup>vi</sup> the Apex Court uphold and order of the Additional District Magistrate, restraining Dr. Thogadia from entering the district and from participating in any function in the district for a period of 15 days. PASAYET, J. speaking for the court said : “whenever the authorities concerned in charge of law and order find that a person’s speeches or actions are likely to trigger communal antagonism and hatred resulting in fissiparous tendencies gaining foothold, undermining and affecting communal harmony, prohibitory orders need necessarily to be passed, to effectively avert such untoward happenings.

However, its recent judgments are deeply disturbing. Supreme Court has, it seems, brought the argument that symbols of Hindu India stands for Indian culture and history as a whole. Is the Supreme Court, the guardian of the constitution, becoming a willing accomplice in the majoritarian project? On the other hand, the emphasis on minority rights, an essential aspect of our version of secularism has come under increasing attack. Critics describe it as ‘pseudo secularism’, ‘appeasement of minorities’

and such like. The Supreme Court seems to share this view as evidenced by its repeated strictures to implement the uniform civil code. (Sarla Mudgal and others Vs Union of India, 1995; John Vallamattom and others Vs Union of India, 2003).

## Communalism

Communalism is a belief or ideology according to which the people belonging to one religion have common economic, social and political interests contrary to the interests of people belonging to another religion. One can discern three degrees or forms of communalism:

- ❖ Mild: similar interests among the followers of the same religion;
- ❖ Moderate: dissimilar interests among the followers of different religions;
- ❖ Extreme (based on fear and hatred): antagonistic interests of people belonging to different religions.

Communalism is a modern phenomenon, mostly in post-colonial societies, where the elite or middle classes use the religious identity to mobilize people for their own political gains. As a result, the struggles of the weaker sections for human rights and social transformation get marginalized.

Communalism is a very serious problem looming large over India today. Even though it has been an integral part of socio-political life in India for a very long time, the colonial period is widely considered to be responsible for the large-scale communalisation of India. However, its replacement by an independent secular state which was preceded by the partition of the country on communal lines was expected to lay the foundation for a steady decline of the communalisation of Indian society. But this expectation seems to be progressively belied in recent times. There appears to be now an unparalleled growth of communalism and, consequently, communal tensions in India. It is a fact that communalism has crept into all levels of Indian polity and that there is today a complimentary relationship between politics and communalism.

Hence it may be asked if the present problem is a continuation of the same in its colonial mode or is it an altogether discontinuous development.

## The Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011<sup>vii</sup>

The bill was first introduced as the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 which was later renamed as the Communal Violence (Suppression) Bill, 2005, after which it was renamed as the Communal and Sectarian Violence Bill, 2010. The Communal and Sectarian Violence Bill was reframed finally to its present form i.e. "Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011". It comprises of 138 sections and four schedules; it was drafted by the National Advisory Council and then thoroughly discussed at the National Integration Council.<sup>viii</sup>

## Rationale & Purpose of the Bill

The Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 is intended to enhance State accountability and correct discriminatory exercise of State powers in the context of identity-based violence, and to thus restore equal access to the law for Scheduled Castes, Scheduled Tribes, and religious and linguistic minorities. That such acts of violence occur repeatedly is a tragedy for a modern democracy. However, when they do, then it is the Constitutional right of every citizen, no matter how numerically weak or disadvantaged, to expect equal protection from an impartial and just State.

Over the past 63 years, the country has often witnessed discriminatory exercise of State power. Several episodes of communal and targeted violence against non-dominant groups provide evidence of abdication of state responsibility, bias and even complicity of local administration, failure to prevent, control, or provide basic relief. This is established by Judicial Commissions of Enquiry

reports, and ratified further by fact-finding reports. Such deliberate abdication of public duties, occurs repeatedly in episodes of mass violence including, for instance, in the targeting of Biharis in Maharashtra, Assam and elsewhere, of Sikhs in several states in 1984, of Muslims in Nellie, Bhagalpur, Bhiwandi, Mumbai, and Gujarat, of Tamils in Karnataka, of Christians in Kandhamal, and of Dalits and Tribals in several parts of the country. Existing Laws of the land and the machinery of the State are found to work relatively impartially when targeted identity-based offences are committed against dominant groups in a State, but not similarly for non-dominant groups.

## Key Provisions of this Bill

**Defining communal & targeted violence:** The provisions of this Bill will apply only when it is first established that the offence was 'targeted' in nature i.e. it was knowingly committed against members of a non-dominant group because of their membership of that group, and not for any other reason. Offences under the Indian Penal Code shall be considered offences under this Bill when they meet the definition of 'targeted' above. The Bill also specifically defines 'organized' communal and targeted violence as mass violence that consists of multiple or mass commission of crimes that is widespread or systematic in nature.

**Dereliction of duty by Public Servants:** This Bill recognizes offences of both omission and commission. Often the greatest cause for communal and targeted violence against non-dominant groups occurring, spreading and persisting is that public officials do not act. Public servants who act or omit to exercise authority vested in them under law and thereby fail to protect or prevent offences, breach of public order, or cause an offence, screen any offender, or fail to act as per law, or act with malafide and prejudice shall be guilty of dereliction of duty with penal consequences. This is the heart of the legislation, for such accountability shall serve as a deterrent to biased action.

**Sanction for prosecution of public servants:** This Bill proposes that if there is no response to a request for sanction for prosecution within 30 days from the date of the application to the concerned government, sanction to prosecute will be deemed granted. In relation to certain offences under the Indian Penal Code, 1860, when committed by a public servant, the requirement of obtaining sanction is being dispensed with. This is because these are offences against public justice. Judges shall be the most competent persons to assess the situation and proceed without sanction when satisfied that public justice has been obstructed.

**Monitoring and Accountability - National Authority for Communal Harmony, Justice & Reparation and State Authorities:** This Bill seeks to put in place mechanisms that can make the administrative and criminal justice system work as it should, free from favour or bias or malafide intent. Monitoring and grievance redressal shall be the responsibility of the National Authority for Communal Harmony, Justice and Reparation (NACHJR) and corresponding State Authorities for Communal Harmony, Justice and Reparations (SACHJR). Their mandate is to ensure that public functionaries act to prevent and control communal & targeted violence and also that public servants ensure victims have access to justice and reparation when violence occurs. The functions of the NACHJR/SACHJR are to watch, advise, remind, recommend and warn of consequences if public servants fail to act as per law.

**Composition of the National Authority for Communal Harmony, Justice and Reparation:** The Bill proposes a total of 7 members of the NACHJR, of which 4 shall belong to the non-dominant 'group' i.e. 4 members must belong either to a linguistic minority in any State in the Union of India, or to a religious minority in any State in the Union of India, or to SCs or STs. This is expected to ensure that those who have the experience of being a non-dominant group in any State (either by virtue of language or religion), and those historically vulnerable (SCs & STs) bring their experience and understanding of the institutional bias of the State to

bear on their role in the NACHJR, and thus provide an effective corrective. Further, no more than 2 members of the NACHJR may be retired public servants.

**Offences of communal and targeted violence:**

The Indian Penal Code (IPC) contains most offences committed during episodes of communal and targeted violence. These have been appended in a Schedule to this Bill, and shall be considered offences under this Bill when they meet the threshold of being 'knowingly directed against any person by virtue of membership of a group'. These offences shall attract the same penalties as laid down in the IPC.

Government is currently considering two other forms of violence for inclusion as offences in our statute books, either in the form of amendment bills or new bills. These include brutal forms of Sexual Assault (beyond the limited IPC definition of Rape in S. 375) and Torture. Both these offences have therefore been included in this Bill. Additionally, this Bill defines an offence of Hate Propaganda, because if hate propaganda can be effectively stopped it will enhance the chances of preventing violence.

**Victims' Rights:** This Bill seeks to strengthen the rights of the victim in the criminal justice system, through certain provisions in their struggle for justice – from the simple right to information at all stages, the right to get copies of all their statements, to the right to be heard in a court of law, right to protection, right to appeal, and the right to file a complaint with the NACHJR/SACHJR if and when they are aggrieved by failure of the system to protect and secure for them justice and reparations. These provisions are based on the documented experience of the denial of basic rights to victims of non-dominant groups in a State. Indian criminal law is based on the assumption that the State is always on the side of the victim, against the accused, and therefore primarily the rights of the accused need to be protected. The State investigates, prosecutes, and also adduces evidence and appeals. The victim has limited rights in this process. The reality of targeted violence against non-dominant groups is that a

biased State may in these cases, be on the side of accused and actively hostile to the victim. This Bill seeks to correct this bias.

**Compensation – a national standard for all 'affected persons':**

This Bill requires that when there is violence, and citizens lose their lives, livelihoods, and homes, then each devastation must be recognized in the same manner. Each life lost must be compensated for justly and uniformly. Regrettably this has not been the case, and governments have been both arbitrary and selective in awarding compensation to different groups of citizens with different standards of generosity. Compensation must not be a matter of charity or largesse, but a justiciable right with a single uniform standard for every Indian citizen. This Bill provides that compensation shall be paid within 30 days from the date of the incident, and in accordance with a Schedule, which shall be revised every 3 years. No compensation for death shall be less than Rs. 15 lakhs. No compensation for rape shall be less than Rs. 5 lakhs.

**The Federal Principle:** This Bill takes care not to violate in any way the federal nature of our polity. The advisories and recommendations of the National Authority for Communal Harmony, Justice and Reparation are not binding on State Governments. Law and order remains entirely with the State Government. All powers and duties of investigation, prosecution, and trial remain with the State Governments.

## Who are the Non-Dominant Groups in any State?

The Bill defines non-dominant 'groups' as religious or linguistic minorities in any State in the Union of India, and SCs and STs. Examples of non-dominant groups who have, in recent years, come under attack because of their identity in different States and where the State machinery has acted prejudicially, would include Tamils (as a linguistic minority) in Karnataka, Biharis (as a linguistic minority) in

Maharashtra, Sikhs (as a religious minority) in Delhi, Muslims (as a religious minority) in Gujarat, Christians (as a religious minority) in Orissa, and Dalits and Tribals in several places in the country.

The salient principle is that each of these non-dominant groups in a State may be vulnerable to institutional bias, and thus need special support to restore equality in the way the law works at the local level.

'Minority' which refers to both linguistic groups and religious groups, is a shifting category at the level of the States.

Thus Biharis, of all religions, constitute a linguistic minority in Maharashtra or in Assam – where they have been vulnerable to attack based on their regional/linguistic identity, but they are dominant in Bihar.

Tamil speakers are similarly a linguistic minority in Karnataka, but not in Tamil Nadu.

In several states in the Northeast, in Punjab, in the Union territory of Lakshadweep, and in Jammu & Kashmir, Hindus, belonging to any region, are numerically a religious minority. Constitutional arrangements in this regard require that the State of Jammu & Kashmir may suitably domesticate relevant aspects of this legislation,

keeping in mind the unique situation prevailing in that State.

## Is any particular group the perpetrator of communal & targeted violence?

The Bill does not classify or assume any particular group to be the perpetrator of communal & targeted violence. The perpetrator of violence could be any person, belonging to any region, language, caste or religion. The Bill is only concerned with ensuring that when the group under attack is non-dominant in that State, then the officers of the State machinery must not be allowed to let bias to breach their impartiality or colour the performance of their sworn legal duty.

Conclusively, India started affirmative action through the constitutional concept of secularism; it directly not adopted the concept of affirmative action of America. While in India all differences among the Indian people has been removing through the secular philosophy. It may be said that the affirmative action vis-à-vis secularism is in Indian phenomena.

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<sup>i</sup> 'Oxford English Dictionary', Vol. IX 1978.

<sup>ii</sup> AIR 1995 SC 360

<sup>iii</sup> AIR 1994 SC 1918; (1994) 3 SCC 1

<sup>iv</sup> AIR 1995 SC 293

<sup>v</sup> (2002)6 SCALE 408

<sup>vi</sup> (2004) 4 SCC 684,

<sup>vii</sup> Explanatory Note, National Advisory Council, Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 [http://nac.nic.in/pdf/explanatory\\_note.pdf](http://nac.nic.in/pdf/explanatory_note.pdf) (Last visited on 12.03.2013)

<sup>viii</sup> Javed Anand, In Defence of the Proposed Prevention of Communal and Targeted Violence Bill, 2011, ECO. & POL

.WKLY, Aug. 20, 2011 at 19