

**Late B.G. Deshmukh Memorial Lecture 2016 by Dr. Madhav Godbole on 4 April 2016 at
Mantralaya in Mumbai.**

IS INDIA A SECULAR NATION?

Introduction

At the outset, I must say how happy I am to have this opportunity to address this august gathering in the memory of Late B.G. Deshmukh, one of the most illustrious civil servants of India. I had the privilege of working closely with him in the state and the centre. It was because of him that, as principal finance secretary, I could initiate and vigorously implement zero-base budgeting in the state and earned, what some of the detractors believed, the ignominious, but what I am ever proud of, nick-name of "Mr. No". I am glad to know that this "glorious" tradition of finance secretary being the 'punching bag' has continued in Maharashtra to this day! If only all states had more "Mr. Nos", the state governments would have done yeomen service by enhancing the rate of growth of the states and ensuring more productive public expenditures. B.G., as he used to be fondly and reverentially known, was brutally frank and open in tendering his advice to his colleagues and political executives. He achieved the rare distinction of occupying the three highest and most coveted positions in the civil service of chief secretary of a state, cabinet secretary and principal secretary to prime minister. He personified the best in the "endangered species" of the civil service.

I am going to speak today on whether India is a secular nation. I have deliberately framed the question so as not to restrict it to 'India as a secular state'. For, I believe, it is not enough if the Indian state is secular, which it is not. It is equally, if not more, important that we are a secular society, a secular nation. I believe this question needs to be asked, reflected upon and answered truthfully.¹ My latest book, *Secularism--India At Cross-Roads*, on this subject is being brought out by Rupa & Co., New Delhi, shortly. It is perhaps the first book totally devoted to operationalisation of secularism and comprehensively looks at the constitutional, statutory, policy and administrative issues in the light of the experience of

¹ Some portions of the speech have been italicized for emphasis.

the working of secularism gained over the last 66 years since the adoption of the Constitution.

The Backdrop

At the outset it must be stated that I am a firm believer in the concept of secularism. It is my conviction that India's survival as a multi-religious, multi-lingual, multi-racial, multi-cultural society will depend on how successful it is in working its secularism. Presently, religious minorities constitute about 20 per cent of India's population, with Muslims accounting for 14.2 per cent. According to some estimates, in a few years, this percentage is likely to stabilise at a little over 25, with Muslims accounting for 20 per cent. With extremist and radical external forces such as Islamic State of Iraq and Syria (ISIS) and Inter-Services Intelligence (ISI) of Pakistan, to name just two, bent on disturbing the peace and tranquillity in the country, it will be fool-hardy to neglect the welfare of minorities. No society can prosper or be at peace with itself if one-fourths of its population feels neglected, deprived and unwanted.

There is a great deal of talk in the country about the appeasement of minorities in general and Muslims in particular but socio-economic indicators of Muslims brought out by Justice Sachar Committee bring out convincingly how this so-called "vote-bank" of some political parties has remained at the margin all these years. It is shocking to see that Parliament did not have time to discuss the findings of this report as also the major recommendations of Justice Ranganath Misra Commission report. Both these high level expert groups were appointed by the then United Progressive Alliance (UPA) government. Many in this distinguished gathering are aware of the predecessor-successor complex which is so common in civil services. Unfortunately, studies of expert committees and commissions too have been afflicted by this virus. Secularism was expected to bring about the integration of the diverse elements of Indian society. But, it is a travesty that the majority community as well as the minorities are dissatisfied with it. In fact, the concept of secularism has lost all credibility.

It must be stated that India would not have been either a parliamentary democracy or a secular nation, to whatever degree it is, without the firm commitment of Jawaharlal Nehru and Vallabhbhai Patel to these precepts. The Indian Constitution is one of the most explicitly

secular Constitutions in the world though the founding fathers of the Constitution could not agree on calling it 'secular' for fears that it would be perceived as anti-religious or irreligious in the Western sense of the term. It was felt that by calling it secular, the Constitution would be denuded of the ethical and moral underpinning of the religious precepts which are so necessary for the governance of the country. This deficiency was made good during the Emergency in 1976 by the Forty-second Amendment by the inclusion of the word 'secular' in the Preamble of the Constitution.

It is disconcerting to see that, in recent times, serious questions are being raised about India's secularism. It is for the first time since independence that the *Hindu Rashtra* ideology is being talked about so openly, defiantly and persistently. It is interesting to note that Jawaharlal Nehru had made his position clear on *Hindu Rashtra* way back on 6 September 1951:

It may sound very nice to some people to hear it said that we will create a *Hindu Rashtra* etc...Hindus are in a majority in this country and whatever they wish will be done. But the moment you talk of *Hindu Rashtra* you speak in a language which no other country except one can comprehend and that country is Pakistan because they are familiar with this concept. They can immediately justify their creation of an Islamic nation by pointing out to the world that we are doing something similar. *Hindu Rashtra* can only mean one thing and that is to leave the modern way and get into a narrow, old fashioned way of thinking, and fragment India into pieces. *Those who are not Hindus will be reduced in status.* You may say patronisingly that you will look after the Muslims or Christians or others as in Pakistan they say that they will look after the Hindus. Do you think any race or individual will accept for long the claim that they are looked after while we sit above them?²

If the Supreme Court had not categorically declared in *S.R. Bommai v. Union of India* ((1994) 3 SCC 1) that secularism is a part of the basic structure of the Constitution and Parliament has no powers to dilute it in any way, concerted efforts would have been made by some political parties to amend the Constitution to dilute its secular tenets. In retrospect, it is fortunate that the proposal of the Janata government contained in the Forty-fourth

² Gopal S. and Iyengar Uma, ed., *The Essential Writings of Jawaharlal Nehru*, vol. I, Oxford University Press, New Delhi, 2003, p. 186.

Amendment Bill, 1978, for effecting amendment of the Constitution by holding a referendum on certain important matters such as its secular or democratic character, abridging or taking away fundamental rights, prejudicing or impeding free and fair elections on the basis of adult suffrage, and compromising the independence of the judiciary, did not find acceptance in the Rajya Sabha. Otherwise, attempts would even have been made to rally public opinion in favour of doing away with the secular characteristics of the Constitution and I would not be surprised if, in the present polarised political atmosphere in the country, it would have found a majority support. The Supreme Court itself has expressed apprehensions in this regard: "India till now is a secular country...we do not know for how long it will remain a secular country." (*Indian Express*, February 10, 2015: 1)

Against this background, it is necessary to examine what needs to be done to safeguard secularism from political turmoil and vicissitudes and to ensure that it will continue to be an important ingredient of the basic structure of the Constitution. In this context, it will be appropriate to recall what Jefferson, the statesman who played a great part in the making of the American Constitution, had stated: "We may consider each generation as a distinct nation, with [a] right, by the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country." I hope proposals made hereafter would be looked at in this light.

Secularism-- Constitutional Precepts and Reality

A series of articles in the Constitution underline the precepts of secularism. These include: article 14--equality before law; article 15--prohibition of discrimination on grounds of religion, race, caste, sex or place of birth; article 16--equality of opportunity in matters of public employment which, inter alia, lays down that no citizen shall, on grounds of religion, race, caste etc. shall be ineligible for, or discriminated against in respect of employment or office under the state; article 19--protection of certain rights regarding freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, and *to practice any profession, or to carry on any occupation, trade or business*; article 21--protection of life and personal property; article 25--freedom of conscience and free profession, practice and *propagation of religion*; article 26--freedom to manage

religious affairs; article 27-- freedom as to payment of taxes for promotion of any particular religion; article 28-- freedom as to attendance at religious instruction or religious worship in certain educational institutions; article 29--protection of interests of minorities; and article 30--right of minorities to establish and administer educational institutions. Reference must also be made to the two provisions in the directive principles of state policy which have considerable significance in sustaining secularism in the country. These are article 44-- uniform civil code for the citizens, and article 48--organisation of agriculture and animal husbandry which has been invoked for banning cow slaughter in a number of states. Particular attention may also be invited to article 51A on fundamental duties which, in clause (e), lays down the duty to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities; and to renounce practices derogatory to the dignity of women; and clause (f) to value and preserve the rich heritage of our composite culture.

The reality is however quite disappointing. The majority community as also the minorities are totally disillusioned with the working of secularism. Instead of being the cementing force, secularism has led to alienation of all communities. This is borne out by series of failures in important areas. These include grievance of Hindus that rules, regulations and restrictions are being prescribed only for the their religious institutions; non-implementation of the uniform civil code; passage of Muslim Women's Divorce Act to appease the radical, orthodox and conservative Muslim elements, totalling disregarding the liberal and reformist Muslim view; propagation of religion by Muslims and Christians leading to large-scale conversions, particularly in the tribal areas and of persons below the poverty line, and unjustified protection given to minority educational institutions.

Equally disconcerting are some other signposts which raise serious doubts about how secular India is. Most important of these are non-separation of religion from politics, wanton demolition of the Babri Masjid, anti-Sikh riots in Delhi and other places in 1984, horrific riots in Mumbai in December 1992 and January 1993, and unbelievable atrocities in riots in Godhra and other cities in Gujarat 2002, continued widespread communalism and communal violence in several parts of the country which led to 8,449 communal incidents resulting in 7,229 deaths and 47,321 persons injured in a brief span of 1954 to 1985, and

banning of cow slaughter leading to curtailment of freedom of persons about what to eat and restricting their freedom to carry on any profession and trade.

Due to constraints of time and space, I shall briefly deal with only a few of these features. What is striking is the total lack of political will on the part of all political parties to address these critical issues, thereby raising serious doubts about their real commitment to secularism, whatever may be the rhetoric indulged in by them for public consumption.

There are two very strong views in the country regarding enactment of a uniform civil code. It needs to be noted that while an impression was created by the speeches of Vallabhbhai Patel, Nehru and others in the Constituent Assembly that Muslims had agreed to go along with the provision for uniform civil code, careful reading of the debates clearly shows that all Muslim members, without an exception, were stoutly opposed to making a provision for a uniform civil code even in the directive principles of state policy and had in fact pressed for deleting it altogether. There has been no change in the stand of the Muslims since then. It is clear that no political party, including the BJP, will be able to get such a bill passed in Parliament. In my soon-to-be released book on secularism I have elaborately brought out the strong opposition of Hindus which had to be resisted while enacting the Hindu Code and how there was a persistent cry of Hindu religion being in danger. Even prominent leaders of the Congress party itself, like Rajendra Prasad, who was the President of the Constituent Assembly and also the President of India later, were stoutly opposed to the reforms in Hindu law. We, as a nation, should be eternally grateful to Jawaharlal Nehru for standing firm and having the relevant enactments passed. It is, however, unfortunate that Nehru did not show similar courage in initiating enactment of a uniform civil code. If reforms in Muslim personal law had been pursued, the social and religious ethos of the country would have undergone significant changes by now. Having lost the golden opportunity at that time, it will be impossible to enact a uniform civil code now, irrespective of the exhortations of the Supreme Court, unless there is a strong reformist and liberal move from within the Muslim community. Sadly, all political parties are remiss in encouraging modern, scientific, enlightened, progressive and liberal leadership among the Muslims.

While enactment of a uniform civil code will thus have to inevitably wait, separation of religion from politics is of such urgency that no time should be wasted in bringing this about.

It is interesting to note that the Constituent Assembly (Legislative) had passed an explicit resolution on the subject as far back as 3 April 1948. In fact, it was perhaps the first major resolution passed by the Assembly. The resolution moved by Ananthasayanam Ayyangar read as under:

Whereas it is essential for the proper functioning of democracy and the growth of national unity and solidarity that communalism should be eliminated from Indian life, this Assembly is of opinion that no communal organisation which by its constitution or by the exercise of discretionary power vested in any of its officers or organs, admits to or excludes from its membership persons on grounds of religion, race and caste, or any of them, should be permitted to engage in any activities other than those essential for the bona fide religious and cultural needs of the community, and that all steps, legislative and administrative, necessary to prevent such activities should be taken.

Nehru had welcomed the resolution and assured that the government "wished to do everything in their power to achieve the objective which lies behind this resolution... The only alternative is civil conflict. We have seen as a matter of fact how far communalism in politics has led us; all of us remember the grave dangers through which we have passed and the terrible consequences we have seen..." The resolution slightly amended to permit any activities other than those essential for the bona fide religious, cultural, social and educational needs of the community was passed by the Constituent Assembly.³ But, though Nehru was prime minister for 17 years, he failed to take any action on the resolution. The only other time when any political party enjoyed 2/3rd majority in the Lok Sabha, so as to be able to see through such a constitutional amendment, was when Indira Gandhi and Rajiv Gandhi were in power. But they too did not find it politically expedient to act on the resolution. It was only after the demolition of the Babri Masjid, when the secular credentials of the Congress party were being seriously questioned in India and abroad, that P.V. Narasimha Rao government brought the Constitution (Eightieth Amendment) Bill and a bill for amendment of the Representation of People Act before Parliament in 1993 to bring

³ Government of India, Ministry of Information and Broadcasting, *Independence and After--A Collection of the More Important Speeches of Jawaharlal Nehru from September 1946 to May 1949*, New Delhi, 1949, pp. 47-51.

about separation of religion from politics. However, no effort was made by the government to take other political parties into confidence and to build a national consensus and create pressure of public opinion on the subject. The bills were so shoddily piloted in Parliament as to raise serious doubts whether the government wanted them to be passed at all or whether it was meant to be just a window-dressing exercise. As a result, the bills failed to receive adequate support and had to be withdrawn. Though over two decades have elapsed since then and though the Congress or UPA led by that party was in power for most of this period, no effort was made to revive the proposal. This once again brings out the hollowness of the commitment of so-called secular parties to secularism. With the BJP in power at the centre since 2014, it will be futile to expect any action in the near future. But, unless this issue is addressed seriously, India's secular credentials will continue to be questioned.

Demolition of the Babri Masjid is a shameful chapter in India's recent history raising serious doubts about its secularism. I was destined to live through this ignoble chapter at close quarters as the union home secretary. All efforts made by the ministry of home affairs to avert the tragedy by resorting to action under article 355 (Duty of the Union to protect States against external aggression and internal disturbance) for taking possession and safeguarding the Babri Masjid by central forces, followed by imposition of President's Rule in Uttar Pradesh under article 356 (Provisions in case of failure of constitutional machinery in States) of the Constitution were frustrated due to the disinclination of the prime minister to act. I have brought out the happenings of the period at length in a 80-page chapter titled 'The Ayodhya Debacle' in my memoirs *Unfinished Innings* published by Orient Longman way back in 1996.⁴ I have also dealt at length in my article in the *Economic and Political Weekly*,⁵ with the untenable defence given by P.V. Narasimha Rao in his book *Ayodhya 6 December 1992* published by Penguin/Viking, posthumously, in 2006, in which Rao has claimed that he was unable to take any action due to the restrictive provisions of the Constitution and that he was made a scape-goat by Congress party. This must be the only case of its kind in history in which the prime minister has alleged of being made a scape-goat!! Otherwise, it is

⁴ Madhav Godbole, *Unfinished Innings--Recollections and Reflections of a Civil Servant*, Orient Longman, New Delhi, 1996.

⁵ Madhav Godbole, 'Ayodhya and India's Mahabharat: Constitutional Issues and Proprieties', *Economic and Political Weekly*, 27 May 2006.

the well accepted prerogative of prime ministers to find a scape-goat for each of their lapses!

The Ayodhya debacle has several other firsts to its credit. Prime Minister Rao's assurance of "rebuilding the mosque" given immediately after its demolition on 6 December 1992 has remained on paper. Kalyan Singh, who was the chief minister of U.P. at the time and who had given assurances to the National Integration Council, the government of India and the Supreme Court to fully safeguard the Babri Masjid, has been elevated as a Governor by the NDA government. Earlier, the Supreme Court, before which he was hauled up for contempt of court, gave punishment of imprisonment till the rising of the court and a token fine of Rs 2,000! The judicial commission of inquiry under the chairmanship of Justice M. Liberhan, set up within a week of the demolition of the mosque, created a world record by taking 17 years to complete the inquiry and effectively found no one guilty! The CBI cases against the perpetrators of the crime are still languishing though 22 years have elapsed. It is this callousness and connivance which goes to show how sham is India's commitment to secularism. On this background to call secularism a part of the basic structure of the Constitution makes no sense.

Equally disconcerting is the manner in which perpetrators of crimes in the widespread communal riots have been casually and leniently handled by the respective state governments. In spite of appointing dozens of committees and commissions to identify those responsible in the anti-Sikh riots in Delhi, hardly any action has been taken against the leaders of the Congress party who are alleged to have instigated the riots. These riots took place under the benign leadership of the central government and were therefore all the more shocking. The riots in Mumbai in December 1992 and January 1993 is another can of worms. Justice Srikrishna Commission has commented on them at great length. But the political parties and persons responsible have been permitted to go scot-free. The usual adage of the law taking its own course has been held to ridicule. The Godhra riots were qualitatively different in that it was the state-sponsored violence against the minorities. The National Human Rights Commission and the Supreme Court have done a yeomen service in upholding the rule of law but the main issue of the urgency of reorganisation of police administration which has been highlighted by the judicial commissions as also the citizens' commissions again and again has been over-looked. Even the directions of the Supreme

Court issued as far back as 2006 in a public interest litigation have remained on paper. What kind of a robust and vigilant democracy are we if even the orders of the highest court in the country are not to be implemented?

Finally, the question has to be asked whether banning cow slaughter is in keeping with the concept of secularism. The Supreme Court upholding the constitutional validity of these enactments by a majority decision of 6:1 on 26 October 2005 ((2005) 8 SCC 534) has closed all options, at least for the present. It proves the adage that the Supreme Court is supreme only because there is no appeal over its decision. As one of the judges of the Supreme Court had said, "If there were an appellate court over us, probably a majority of our judgments would be upset." It would also be worth recalling what Justice Brennan, a judge of the US Supreme Court, had said, "The Supreme Court [of United States] is not final because it is infallible; the court is infallible because it is final."⁶

In a secular state, religion is expected to be a purely personal and private matter and is not supposed to have anything to do with the governance of the country. The Supreme Court had observed in the *Bommai* case that if religion is not separated from politics, religion of the ruling party tends to become the state religion. This seems to be coming true. The BJP and its affiliate parties have given to the prevention of cow slaughter sanctity of Hindu religious precept. But this is hardly justified. Further, the fundamental right of persons to practise any profession or to carry on any occupation, trade or business contained in article 19 (1) (g) of the Constitution has been over-ridden by article 48, one of the directive principles of state policy. In the scheme of the Constitution, directive principles are not supposed to over-ride the fundamental rights. But, it has now become a sacrilege to even raise such questions. Economic justification for enforcing cow slaughter is also highly questionable. It is unfortunate that though Nehru was staunchly opposed to prevention of cow slaughter, he did not oppose the inclusion of this provision in the Constitution. In fact, the discussion in the Constituent Assembly shows that a political decision to incorporate this provision was taken in the Congress Party meeting and it was merely formalised in the Constituent Assembly by putting forth spacious and unconvincing arguments. This is yet another instance of the ambivalence of the Constitution on secularism.

⁶ Madhav Godbole, *The Judiciary and Governance in India*, Rupa & Co., New Delhi, 2008, p. 69.

Constitution Making-- Inevitably an Exercise in Give and Take

The gigantic, complex and highly emotive exercise of uniting and integrating this continental sized country, including, apart from British India, more than 550 princely states, and comprising multiplicity of religions, languages, cultures, customs, traditions, political and social divisions was attempted for the first time in the history of India and credit must be given to the founding fathers of the Constitution for carrying all these diverse elements with them and unanimously agreeing on such an epoch-making Constitution. Though the Congress party alone had an overwhelming presence all over the country, due to Mahatma Gandhi's foresight, eminent persons representing different view-points were elected to the Constituent Assembly with the support of the Congress party. One of them was Dr. B.R. Ambedkar, who was also made the chairman of the drafting committee. Understandably, the Constitution was a compromise document. This is particularly evident in the provisions pertaining to secularism.

Nehru and Patel were particularly keen on doing away with the communal electorates and the reservation of seats in legislatures on the basis of the strength of religious communities. Once this objective was achieved with the concurrence of the minorities, the Congress party was prepared to concede the other demands of minorities as a compromise. As a result, provisions were made in the Constitution to include right to propagation of religion as a fundamental right, at the instance of Muslims and Christians on the ground that propagation was a part of their religion. The right of minorities to establish and administer educational institutions was also similarly recognised as a fundamental right, in spite of reservations expressed by several members including Jayaprakash Narayan and Rajkumari Amrit Kaur.

Operationalising Secularism

As stated earlier, India's future is intrinsically tied up with secularism. To make a real success of it, time has come to seriously examine its working during the last 66 years since the adoption of the Constitution. There are no political compulsions any longer. I have made an objective and dispassionate attempt to look at the relevant issues in the discussion

hereinafter. Since the proposals are aimed at strengthening secularism, they are not adversely affected by the injunction of the Supreme Court on non-amendability of the provisions pertaining to secularism.

Define the word 'secular'

It is best to start the exercise with the basics. As stated earlier, the founding fathers of the Constitution had reservations about the word 'secular'. But, as the Constituent Assembly debates bring out, there was no doubt in anyone's mind that India was giving itself a secular Constitution. But, the definition of the word 'secular' was never debated or agreed upon. Even Nehru seemed ambivalent about the true meaning of secularism though he was responsible for firmly advocating it: "It is perhaps not very easy even to find a good word [presumably in Hindi] for 'secular'. Some people think that it means something opposed to religion. That obviously is not correct. What it means is that it is a state which honours all faiths equally and gives them equal opportunities; that, as a state, it does not allow itself to be attached to one faith or religion, *which then becomes the state religion.*"⁷ Banning of cow slaughter is clear proof that Hindu religion is being made into a state religion!

In 1976, when the word 'secular' was included in the Preamble by the Forty-second Amendment, again this question was evaded and no definition was provided. After the massive defeat of the Congress party in Lok Sabha elections in 1977, the question arose of reconsideration of this highly controversial amendment, which effectively had rewritten the Constitution on a number of crucial points. The Forty-fourth amendment bill introduced by the Janata government in 1978 contained definition of the word 'secular' as equal respect for all religions. However, this was objected to by the Congress party which still had a majority in the Rajya Sabha (as has been the position in 2014-16) and therefore this clause was dropped. Again, an effort was made in 1993 to include the same definition in the Constitution (Eightieth) Amendment bill on separation of religion from politics but, as stated earlier, this bill itself fell through. As a result, as of now, there is no definition of this term.

One has to fall back on the diverse ways in which the word has been described. In governmental parlance, it is understood as "sarva dharma samabhava"-- treating all religions equally or equal respect for all religions. The Hindi translations of the word,

⁷ Gopal S., *Jawaharlal Nehru--An Anthology*, Oxford University Press, Delhi, 1980, p. 330.

namely, "Dharmanirapeksha" or "panthanirapeksha" or "nidharmee" too have been rightly questioned. Another definition put forth is that government should be equidistant from all religions. Serious questions have been raised about the validity of these definitions. For example, Late Justice R.A. Jahagirdar has, in his erudite articles in *The Radical Humanist*⁸ emphasised how these definitions are untenable.

The Supreme Court has been interpreting the word 'secular' in different ways. At one extreme was its interpretation in the *Bommai* case when it declared that there must be a wall between the state and the religion, and a political party must not be linked to any religion, as otherwise, the religion of such a party is perceived as a state religion.

Reference must also be made to the statement of H.R. Gokhale, law minister, during the Emergency. While piloting the Forty-second Amendment Bill in the Lok Sabha, Gokhale was highly critical of the concept of 'basic structure' devised by the Supreme Court. He said: "First of all I do not agree, with much respect to the Supreme Court, that there is something like the basic features which could not be amended... *What is not defined cannot exist and it is incapable of defining it.*"⁹ If the same logic is extended to secularism, since the word 'secular' has not been defined, does it mean that India is not secular?

Since secularism has been declared by the Supreme Court as a part of the basic structure of the Constitution, governments, both at the centre and in the states, must be made accountable for implementing it. But, how can the state be held accountable unless the meaning of the term 'secular' is clear? It is high time a national debate is started on the subject so as to arrive at a political and societal consensus and to include the definition in the Constitution.

Define the word 'minority'

I shall now turn to the word 'minority'. The concept of secularism is based on recognition and protection of minorities. The two cannot be separated. One would have therefore expected that the founding fathers of the Constitution would first define the term minorities. Unfortunately, this was never done. The Constitution merely takes off from

⁸ Jahagirdar R.A., 'Secularism Revisited', *The Radical Humanist*, February 2015 (p. 24) and March 2015 (pp. 35-6).

⁹ Kashyap Subhash C., *History of the Parliament of India*, vol. 4, Shipra Publications, Delhi, 1997, p. 91.

where the British had left it, which was in fact the very epitome of the British policy of 'divide and rule'. For want of a clear definition, the Supreme Court has adopted the highly questionable criterion of numerical strength. As a result, a community will be treated as a minority till its population exceeds 50 per cent of the total. This will make a mockery of the concept of minority. In the Indian context, apart from other considerations, this is highly relevant. Muslims are already 14 per cent of the population. According to some estimates, their population is expected to stabilise at about 20 per cent in the next few years. Even if this estimate turns out to be an under-estimate, as some would like to believe, it may stabilise at 25-30 per cent of the total. Should it be recognised as a minority? What should be the cut-off? This issue needs to be debated. It is no doubt an extremely sensitive and divisive issue but, as a mature democracy, India must debate it rationally and objectively, keeping the political baggage aside.

Creation of a Commission on Secularism

The Supreme Court has done a great service to the country by declaring that secularism is a part of the basic structure of the Constitution. But this declaration has remained on paper and no steps have been taken so far to translate it into reality, except for it becoming a part of political rhetoric in the country. Some of the other features of basic structure recognised by the Supreme Court, are parliamentary democracy, independence of judiciary, freedom of press etc. For each one of these, over the years institutional and legal framework has been established to make sure that they are carefully nurtured and safeguarded. For example, the Election Commission of India has been sufficiently empowered to ensure that there are free and fair elections in the country and electoral malpractices are put down with a heavy hand. Parliament of India is vigilant about safeguarding its independence, privileges and supremacy. The judiciary, after its shocking experience of being undermined during the Emergency in 1975-77, has been vigilant in guarding its turf. In fact since then, Indian judiciary has emerged as the world's most powerful judiciary with even matters pertaining to appointments of high court and Supreme Court judges coming entirely under the Supreme Court. This is the only case of its kind in the world. In 2015, the Supreme Court has declared unconstitutional the law unanimously passed by Parliament to appoint a National Judicial Commission for the purpose. The Supreme Court and the Election Commission have

emerged as the most respected institutions in the country, enjoying highest credibility. This is no mean achievement.

Against this background it is particularly unfortunate that no steps have been taken by the government to ensure proper implementation of secularism and to give it credibility. In fact, secularism has lost all credibility since it has become a plaything in the hands of political parties, irrespective of which hues and colours they belong. At the same time it needs to be emphasised that secularism will decide how India would emerge over the years. In the decade of the 1980s, we have seen how fringe and extremist elements in the miniscule religious minority of Sikhs, comprising just about 1.5 percent of India's total population, held the country to ransom for nearly a decade and led to shocking alienation of common Sikhs, not just in India but also those residing abroad.

By comparison, the Muslim population in India is already a little over 14 percent. As stated earlier, it is projected to stabilise around 20 percent in the next few years. Most Muslims in India are highly tolerant and peace-loving, but there are fringe and extremist elements which cannot be overlooked. Particularly with the external forces such as ISIS, Al Qaeda and ISI, it would be in India's interest to ensure that home grown terrorist forces are not permitted to emerge. But this is only the negative side of it. It is necessary that the issue should be addressed in a positive manner so as to bring the Muslims in the mainstream of society. In this context, the atmosphere in the country since the beginning of 2015 is of serious concern.

The issues pertaining to secularism emerge in diverse sectors of society. These relate to attempts at rewriting history, communalisation of academic and research institutions, rewriting of text books, circumscribing artistic freedom and so on. At present these issues can be agitated primarily before the higher judiciary as Parliament has mostly become dysfunctional. And whatever is raised in Parliament inevitably becomes highly politicised and is looked upon on the basis of party loyalties and strategies.

The experience of agitating issues pertaining to secularism by way of public interest litigation (PIL) has also been far from happy. Strictly PIL is supposed to be a non-adversarial litigation. It is expected that both parties would look at the issues constructively to find a

workable and acceptable solution to the problem at hand. However, experience has been quite the contrary. Practically in every case the government has taken an adversarial position and contested even reasonable proposals put forth by the petitioners. Secondly, as brought out in my book, 'The Judiciary and Governance in India' (2008), the process of admission of a PIL itself is somewhat opaque and the outcome can hardly ever be predicted. Thirdly, it takes unduly long time to get the final decision of the court. For example, in the PIL pertaining to appointment of a Lokpal, due to the resistance of successive governments, the case was heard by the Supreme Court on 29 occasions and was finally closed on 12 September 2003 as 'none is ready with the matter to make submissions'. In the case of the PIL pertaining to non-implementation of the recommendations of the National Police Commission regarding modalities for appointments etc of police officers, it took over 12 years for the Supreme Court to give a final decision. The same was the position in PILs pertaining to Haj subsidy, proliferation of Shariat courts as a parallel judicial system, Ram Janma Bhoomi-Babri Masjid dispute and so on. In this light, taking recourse to PIL does not appear to be an alternative to setting up of any independent institution for deciding matters pertaining to secularism.

Clearly, the time has come to create a new institution, namely, a Commission on Secularism (COS) for ensuring adherence to the constitutional mandate on secularism. I had propounded this idea while discussing the lessons of Partition in my book *The Holocaust of Indian Partition--An Inquest* (2006). To be effective, such a commission must be appointed by an amendment of the Constitution and should be presided over by a former chief justice of India, with five other members drawn from among former judges of the Supreme Court, chief justices of the high courts, eminent jurists, and other public figures of highest integrity and reputation. The term of the members should be five years or attainment of the age of 72 years, whichever is earlier. The commission should be covered by the provisions of the Contempt of Court Act.

The selection of the chairman and members of the COS should be transparently apolitical. The selection committee may comprise the vice president of India, the prime minister, the speaker, the chief justice of India, union home minister and the leaders of opposition in the Lok Sabha and the Rajya Sabha.

Such a commission will be able to take a holistic view on all matters pertaining to secularism and even intervene in matters coming up before the high courts and the Supreme Court. Reference may be made in this context to the very laudable role played by the National Human Right Commission (NHRC) which had intervened in the cases pertaining to Godhra pogrom before the Supreme Court and has become an important moral voice to reckon with. At the time when there are only a few national leaders of stature left in the country with any moral authority and credibility who command universal public respect, the commission on secularism will be ideally suited to fill the vacuum.

The COS will be best equipped to create public awareness on secularism. Its open hearings will provide an opportunity to all political parties, intellectuals, religious leaders, non-government organisations, and concerned citizens to argue their points of view, either in person or through an advocate, in a free and fair manner. Keeping in view the basic purpose of setting up the COS, it is suggested that the hearings of the commission should also be televised. It is only through such a public discourse that the values of secularism enshrined in the Constitution can be translated in reality.

The commission should have the responsibility to pronounce judgments on all declarations, actions and programmes of political parties, public institutions, state and central governments, electronic and print media, and others, so far as their impact on secularism is concerned. The commission may take cognisance of such actions *suo moto* or on an application from any individual or organisation. The decision of the commission should be binding on all concerned, unless it is set aside or modified by the Supreme Court. Thus, inevitably the powers and authority of COS will have to be much wider than those of National Human Rights Commission, whose recommendations are not binding on the government. It may be relevant in this context to recall that the often violent agitations for ban on cow slaughter subsided, when the matter went before the high courts and later the Supreme Court, irrespective of the merits of their decisions. Similarly, the highly emotive and explosive issues pertaining to implementation of secular policies need to be depoliticised by entrusting them to a constitutional commission on secularism. It may be recalled that Turkey's ruling Justice and Development Party (AKP) faced a serious battle for survival in 2007 when the country's constitutional court reviewed a case to ban the party for its alleged anti-secular activities in violation of the Turkish Constitution.

The reports of all commissions and bodies set up by the government are required to be submitted by them to the government which in turn submits them to Parliament. Often, there is considerable delay in the process and the government chooses the time politically most convenient and opportune for the purpose. Looking to the special position proposed to be accorded to the COS, it is suggested that the annual or any special reports of the commission may be submitted by the commission directly to Parliament and the government, and released simultaneously to the media and the public.

Secularism is a precious fundamental right of each citizen and the COS would ensure that it becomes a reality. I am aware that such a step will be resisted by vested interests, but if pressure of public opinion is built up, its establishment would make a significant difference to the way India is governed. The question which remains is whether there will be statesmanship and political will to support this far-reaching and over-due political reform. A national campaign needs to be launched to prevail upon all political parties to initiate and support steps for a constitutional amendment to set up a commission on secularism.

Separation of Religion from Politics

The serious problem of communalism and communal violence was brought out earlier. It is interesting to see from the fortnightly letter of Nehru to chief ministers as far back as September 3, 1954 that the nature or the intensity of the communal problem has not changed even after passage of 62 years since then, underlining the importance once again of separation of religion from politics. Nehru had written: "there are some Muslims in some centres who might be prone to mischief. There are one or two Muslim organizations that have been carrying on objectionable activities... The Hindu communal organizations are definitely aggressive and they can play on the religious or other feelings of the majority community... Agitations like the anti-cow slaughter one are also used for this purpose. I have no doubt that many people who participate in this agitation are influenced by political or like motives and not so much by religious ones. The RSS [Rashtriya Swayam Sevak Sangh] utilises this for its own purposes."¹⁰

¹⁰ Gopal S. and Iyengar Uma, ed., *The essential Writings of Jawaharlal Nehru*, vol. I, Oxford University Press, New Delhi, 2003, pp. 190-1.

Earlier, Jawaharlal Nehru had reiterated in his fortnightly letter to the chief ministers on February 5, 1948: "There is a strong opinion in the country, with which I sympathise, that no political-religious organisation or rather no organisation confined to a particular religious group and aiming at political ends, should be allowed to function. We have suffered enough from this type of communalism whether it is Muslim or Hindu or Sikh...I do not want, of course, to suppress any legitimate political activity. But the combination of political activity with a religious group is a dangerous one as we know from experience. You will have to give thought to this matter as to what should be done."¹¹ Unfortunately, these remained only pious wishes and, during his long tenure of 17 years as prime minister, Nehru failed to take any further action.

I firmly believe that unless this issue is addressed with sufficient political resolve so as to carry through a suitable constitution amendment, it will be futile to talk about India as a secular nation. On the basis of the past experience and to meet the concerns expressed by some political parties during the debate on the Constitution (Eightieth) Amendment Bill in 1993 regarding the likely misuse of such an enactment, I would suggest that the amendment bill should be confined only to deregistration of a political party which has religious links and restraining such political party from contesting elections at any level in the country. A political consensus needs to be built up among political parties for the purpose. If any political parties are not prepared to join in the consensus, a strong public opinion will have to be created nationally to isolate them and to go ahead with the constitution amendment, disregarding their opposition. Some persons may consider this a tall order but there is no getting away from such a surgical operation, if the nation is to be saved!

Right to Propagation of Religion

Apart from giving freedom of conscience and permitting free profession and practice of religion, article 25 gives freedom of propagation of religion. There was considerable controversy about giving this right, and that too as a fundamental right. Several members in the Constituent Assembly had spoken against giving such a right but their objections were overruled on the spacious plea that it was necessary to give this right in accordance with the

¹¹ Parthasarathy G., ed., *Jawaharlal Nehru--Letters to Chief Ministers 1947-1964*, Jawaharlal Nehru Memorial Fund, New Delhi, 1985, p.60.

compromise which was arrived at with the Muslims and the Christians who had argued that propagation was a duty cast on them by their religion. The recommendations of the Niyogi Committee on Activities of the Christian Missionaries on the subject underline how serious has been the problem of conversion, particularly in the tribal areas.¹²

There are a number of decisions of the high courts and the Supreme Court according to which *the right to propagation is not a right to conversion*. The activities of Muslims and Christian missionaries in some parts of the country have led to serious law and order problems. The *ghar-wapasi* movement undertaken by the Hindu organisations has also led to communal tensions and agitations in various places. It is high time this problem is nipped in the bud by amending article 25 to delete the word 'propagation' therefrom.

Doing Away with Protection to Minority Educational Institutions

Articles 25 to 29 of the Constitution are really the crux of secularism, except for the word 'propagation' as discussed earlier. Article 30 (1) which gives right to minorities to establish and administer educational institutions is, in one sense, an appendage and need not have been there at all. But this too was inserted, particularly at the instance of the Christians and Anglo-Indians who had a number of educational institutions. There was considerable opposition to this article in the Constituent Assembly but the Congress party wanted to be generous to the minorities, disregarding the likely long-term implications of encouraging separate identities and undermining spread of secular education. There is no justification to continue this right. If at all, it could be retained for the linguistic minorities. But considering the rapid spread of English as a medium of instruction all over the country, including in the rural areas, due to the forces of globalisation and spread of information technology, it is no longer necessary to give this right even to linguistic minorities.

Deleting Provision for Prohibition of Cow Slaughter

Article 48, though a part of the directive principles, has now been elevated in public discourse to the level of a fundamental right. The marginal note of this article is innocuously

¹² Niyogi Committee Report on Christian Missionary Activities, 1956, <http://en.wikipedia.org/wiki>.

worded as 'organisation of agriculture and animal husbandry'. However, the sting is really in the sentence which asks the state to prohibit the slaughter of cows and calves and other milch and draught cattle. The basic question is whether such a total ban on slaughter of cows and their progeny is justified on any grounds at all except that of the religious sentiments of the Hindus. But even in regard to them, there is no universal demand for a total ban by all Hindus. Most importantly, such a ban is not in keeping with secularism. Particularly in the drought-hit areas in a number of states such as Maharashtra, it is causing large-scale distress to farmers. As I have stated earlier, Indian Constitution is a mix of several compromises, particularly in so far as its proclaimed secular ideology is concerned.

Particularly after the BJP government came to power in the centre in 2014, the demand for banning cow slaughter has gained strength. Effectively 'ban the beef' has become the national motto and another potent instrument in the hands of extremist elements to disturb the peace, tranquility and communal harmony in the country. Jawaharlal Nehru had stoutly opposed the demand for banning cow slaughter during his term and had even staked his prime ministership thereon. Thereafter the stand of the Congress party has changed completely and now it seems to be as much in favour of the total ban as the BJP and the Shiv Sena. It is time to consider seriously whether India can sustain its claim as a secular nation by resorting to such populist measures. I am firmly of the view that all well-meaning people in the country should come forward to strongly oppose the present moves on the subject.

Two Basic Electoral Reforms

Making Voting Compulsory

Secularism in India has remained at the margin mainly because people have not looked at it as their fundamental right. In fact, it is considered an important ingredient of vote-bank politics. Unless all eligible voters participate in the elections, the accountability of the political parties cannot be established fully. The government of Gujarat had taken the initiative in the matter by enacting a law for making voting compulsory for elections to village panchayats. The Governor had reserved the bill for approval of the President. In many instances in the past, the central government has looked at a number of proposals

received from the state governments in a partisan manner. This bill was one of them and was kept pending by UPA government for a long time. A Private Members' Bill had also been introduced in Parliament during the UPA regime to make voting compulsory but it was not supported by the government.

Voting has been made compulsory at least in 30 democracies round the world. They include, among others, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Costa Rica, Cyprus, Fiji, Greece, Luxembourg, Peru, Singapore, Switzerland and Uruguay. Compulsory voting was introduced in Australia in 1924 when the voter turnout was just about 58 percent in the elections in 1922. Now Australia consistently boasts of a voter turnout of over 90 percent. Compulsory voting in Belgium dates back to 1893. Currently voter turnout in Belgium is over 90 percent.¹³

As can be seen, the results achieved are quite striking. The objections raised to making voting compulsory are hardly convincing. For example, it is argued that a person cannot be forced to vote if he does not want to. The law can provide that a person would have the option to go to the polling station and mark his preference on the ballot paper in a separate box showing his disinclination to vote. Another objection which has been raised is that it would be administratively impossible to deal with hundreds and thousands of cases where people default and do not vote. Even this objection is not sustainable as such cases can even be dealt with by post by conveying to the person that he would have to pay the prescribed fine for contravention of the law for compulsory voting. Even announcing on a notice board, in the case of village panchayats, and in newspapers, in other cases, names of persons who have not voted, could serve the purpose of *shaming the persons*. Particularly in a case like India where the day of voting is declared a public holiday, there is no justification to not vote. *In the final analysis question is whether absentee democracy is what we are aiming at.* If all minorities, for example, make it a point to go and vote, their political leverage will increase by leaps and bounds and their voice cannot be ignored by the political parties any longer. When the voting age was reduced by Rajiv Gandhi government from 21 years to 18 years, doubts were raised about its advisability but we have seen what difference it has made to the political life in the country. Similarly now voting needs to be made compulsory for the elections to the local bodies, state legislatures and Parliament.

¹³ Godbole Madhav, *Good Governance Never on India's Radar*, Rupa & Co., New Delhi, 2014, pp. 174-5, 248-9.

Making 50 %+1 Vote Necessary to Win

The first-past-the-post system adopted in India since the British times, though simple to administer, suffers from some important deficiencies. It is seen that in most cases the winning candidate gets negligible votes, at times just 20 to 30 percent of the total, which is a mockery of representative democracy. In the elections to UP Assembly held in 2007, 96.53 percent of the winners polled less than 50 percent of the votes cast. The corresponding figures were 89.71 percent in Bihar (2005), 88.89 percent in Bihar (2006), 81.63 percent in Tamil Nadu (2006), 93.84 percent in Jharkhand (2005) and so on. In the Lok Sabha elections in 2004 the corresponding percentage was 59.85.¹⁴

The National Commission to Review the Working of the Constitution (NCRWC) has also invited attention to this matter and has stated:

The multiplicity of political parties combined with our Westminster based first-past-the-post system results in a majority of legislators and parliamentarians getting elected on a minority vote. In other words, they usually win by obtaining less than 50 percent of the votes cast, i.e. with more votes cast against them than in their favour. There are states where 85 percent to 90 percent of the legislators have won on a minority vote. At the national level, the proportion of MPs who have won on a minority vote is over 67 percent at an average for the last three Lok Sabha elections. In extreme cases, some candidates have won even on the basis of 13 percent of the votes polled.

But more importantly in this system often the winning candidate confines his propaganda to his own caste, creed, language or religious group. Particularly in a country like India which is a multi-religious, multi-racial, multi-linguistic and multi-ethnic society a system must be devised which would make it as representative of this diverse community as possible. This can be done only by laying down that a winning candidate must get minimum 50 percent plus 1 vote. To be able to achieve this a candidate would necessarily have to appeal to a broad spectrum of his constituency. This will be specially important for minorities since they are often neglected and overlooked in the present election campaigns.

¹⁴ Gopalaswami N., Political Parties and Elections: Some Issues, *Journal of Constitutional and Parliamentary Studies*, vol. 41, Nos. 3-4, New Delhi, July-December 2007, p. 196.

At times it is argued that this will prolong the election process and would be administratively impossible to implement. However this is clearly not based on any in-depth understanding of the issues. With the adoption of the electronic voting system it should not be difficult to hold a second round of voting among the two top candidates who had received the maximum votes. The Election Commission has also favoured this suggestion and has said that it sees no difficulty in its implementation. The NCRWC had also recognised “the beneficial potential of this system for a more representative democracy”. The commission has recommended that the government and the Election Commission of India should examine this issue in all its aspects, consult various political parties and other interests that might consider themselves affected by this change and evaluate the acceptability and benefits of this system. The Commission recommended a careful and full examination of this issue.¹⁵

If secularism is to be strengthened in the country, I strongly believe that this electoral reform is absolutely necessary and needs to be implemented as soon as possible.¹⁶

Centre- State Relations and Bogey of Federalism

During the last few years a number of critical issues facing the country have got bogged down due to the fears expressed by the states about the federalism getting adversely affected. This cry for ‘federalism in danger’ is as dangerous as the cry of ‘religion in danger’. This has affected policies in various areas such as enacting a model law for Lokayuktas, enactment of a central legislation for the Central Bureau of Investigation, reorganisation of the railway police protection force, setting up of a federal police agency and so on. When the Constitution was prepared, the problems of law and order, terrorism, naxalism, organised crime, and crime with international ramifications were not serious enough and therefore the subjects ‘public order’ and ‘police’ were put in the State List. Ideally, both these should have been put in the Concurrent List, as is the case in a number of Western democracies. As a result states have been objecting to the role of central government in

¹⁵ Government of India, *Review of the Working of the Constitution, Report of the National Commission to Review the Working of the Constitution*, vol. II, Book 1, New Delhi, 2002, pp. 91-2.

¹⁶ According to the Nepal’s Ambassador to India, Deep Kumar Upadyay, Nepal’s newly promulgated Constitution is the most progressive in South Asia with its provisions of 33 per cent reservation for women. It also has both first-past-the-post system as well as proportional representation. This combination of the two ensures that minorities’ representation is taken care of. (*Indian Express*, September 24, 2015: 1)

these matters. But this has not prevented the states from relying on the deployment of central para-military forces, when the occasion demanded. But restricting the role of the central government has led to cases such as Ayodhya debacle, Godhra riots and major communal riots in a number of states. Time has therefore come to take a serious view on amendment of the Constitution. Needless to say, federalism will be relevant only if the country survives!

These issues are particularly relevant if communal violence and communal riots are to be dealt with effectively. The experience so far shows that unless the central government is enabled to take an active role in the matter, merely making available to states central para-military forces and intelligence inputs from central agencies will not be adequate.

Restructuring Police Departments

Experience has shown that weaknesses and inadequacies of police have been largely responsible for starting or escalating communal violence. The root cause of this is the politicisation and communalisation of police in various states. Several judicial commissions of inquiry appointed on major communal riots have strongly brought out this point.

Reference must be made in this context to the decision of the Supreme Court in the public interest litigation on non-implementation of the recommendations of the national police commission. The final decision of the court came only in September 2006, nearly 12 years after the filing of the PILs. Though inordinately delayed, the Supreme Court laid down guidelines for reorganisation of the police departments in the states and the centre. Though nearly a decade has elapsed since the decision of the Supreme Court, most major state governments have not implemented the court orders. For example, the data collected by the Bureau of Police Research and Development (BPR&D) for the year 2013 shows that almost 80 per cent of Superintendents of Police (SPs) in districts across the country got transferred within two years of their tenure in a district. More than 50 per cent got transferred in less than a year. According to the data, UP has been the worst offender in terms of transferring officers before their two year tenure is complete. Even officers senior to SPs have not been spared. As per the data, in 2013, 114 range DIGs faced transfers within a year of their tenure. As many as 48 were transferred within two years. (*IE*, November 29,

2015: 7) For some strange reason, the Supreme Court has been reluctant to haul up the defaulting states for contempt of court.

Another matter of serious concern is the politicisation and communalisation of police. In this connection special mention must be made of the statements of L. K. Advani who had spearheaded the Babri Masjid agitation. He has written in his autobiography, 'My Country My Life':

I recall vividly an experience en route from Ayodhya to Lucknow [on December 6, 1992 after demolition of the Babri Masjid]. In spite of strict security all along the 135 –kilometre journey, I could see people engaged in celebrations everywhere. Within half an hour of our departure from Ayodhya, our car was stopped by the police. On seeing that the car carried Pramod Mahajan and me, a senior officer of the UP government walked up to us [and] said, '*Advaniji, kuch bacha to nahin na? Bilkul saaf kar diya na?*' (I hope nothing of the structure is surviving and that it has been totally raised to the ground.) I am recounting this incident only to highlight the general mood of the populace, including employees and officials of the state government, after the tragic development in Ayodhya—that of jubilation.¹⁷

The National Police Commission in its eighth and concluding report submitted in May 1981 had made one significant recommendation. An officer who has functioned as the DGP /IGP, after his retirement from service, shall not be eligible for any employment under the government of India or under the state government or in any public undertaking in which GOI or the state government have a financial interest.¹⁸ This is equally relevant for the senior Indian Administrative Service officers. This very critical recommendation ought to have been acted upon expeditiously. There have been any number of instances where senior police [and IAS] officers who had obliged the political party in power during the communal riots have been handsomely rewarded. One can cite dozens of instances to support this. I would suggest that even now it is not too late to accept this recommendation. I would like to suggest only one amplification thereof, namely, such

¹⁷ Advani L.K., *My Country, My Life*, Rupa & Co., New Delhi, 2008, p. 402.

¹⁸ Government of India, Ministry of Home Affairs, *Eighth and Concluding Report of the National Police Commission*, New Delhi, 1981, p. 52.

officers will not also be given political party tickets to contest elections during a cooling-off period of three years.

If a sense of confidence is to be created amongst the minorities that they will be treated fairly, justly and their life and property will be safeguarded, all efforts will have to be made to deal with the communal bias in the police. The precepts of secularism, safeguarding the interests of the minorities and importance of human rights are some of the subjects which need to be included in the syllabus of police training institutions. In the refresher courses organised for field police officers and constabulary, actual case studies of communal riots, findings of official inquiries or judicial commissions of inquiries must be placed before them for discussion. Knowledgeable representatives of minority communities could be invited for interaction with the police personnel in the training sessions. Unfortunately this important aspect has been totally lost sight of.

It is also necessary to give sufficient representation to minorities in the police services. In this context, the example of the Rapid Action Force of the central government which is often deployed during communal riots is noteworthy. Conscious efforts have been made by the central government to give representation to minorities in this force. This example needs to be replicated in the states.

The indication of how the winds are blowing since the coming to power of the BJP government at the centre in 2014 is the recent instruction issued by the home ministry to the National Crime Records Bureau (NCRB) not to publish the data on Muslims in police. The publication of such data first began 16 years ago. It is for the first time that such a ban has been imposed. (*Indian Express*, November 30, 2015: 1) Such efforts are counter-productive for the success of secularism. It is interesting to see that the NCRB report for 2013 showed that there were 1.08 lakh Muslim police who accounted for 6.27 percent of the total strength of 17.31 lakh police in the country, as compared to their percentage of 7.55 in 2007. Public pressure must be brought on the government to revise this decision to ensure that data on Muslims in police will be published each year.

Rule of Law and Reality

Even if police departments are restructured as above and other changes suggested herein are effected, unless rule of law is established in the country, nothing substantial can be achieved. This is particularly true in dealing with an important and sensitive subject like secularism.

Reference must be made to the important provisions of sections 153-A and 153-B of Indian Penal Code (IPC) which have largely remained on paper. The 'majesty of law' about which a common citizen hears time and again is supposed to have laid down that 'howsoever high you may be, the law is above you'. This is certainly not true so far as the high and mighty in public life are concerned.

Full powers need to be given to the senior police officers to directly prosecute persons infringing these provisions, without the necessity of obtaining the approval of the state government. Experience has shown that the state governments look at this question entirely from a political point of view and withhold the approval for prosecution or even reject the proposal altogether. It is seen that cases filed under these sections are often withdrawn later at the behest of the government for political ends. If secularism is to be translated into reality, communalism will have to be put down with a firm hand. And this would be possible only by ensuring that the above provisions of IPC are made effective. The National Commission to Review the Working of the Constitution has also said that "effective implementation of laws is lacking. This deserves the highest degree of attention." (p. 87)

Towards this end, as recommended by the second administrative reforms commission (SARC), the provision contained in section 196 CrPC requiring prior sanction of union or state government or the district magistrate for initiating prosecution for offences under sections 153A, 153B, 295A¹⁹ and 505²⁰ of IPC, be deleted. It has also rightly suggested that the punishment for communal offences be enhanced, and special courts should be set up

¹⁹ (deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs).

²⁰ (statements conducing to public mischief) sub-sections (1)(c) (with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community), (2) (statements creating or promoting enmity, hatred or ill-will between classes) and (3) (offences under sub-section (2) committed in place of worship, etc.)

for speedy disposal of the cases. I fully agree with the recommendation of SARC that a separate law to deal with communal violence is not required. The UPA government's proposal in this regard had led to bitter confrontation between the states and the centre and also the political parties which were in opposition then. Strengthening of the provisions of the IPC and CrPC will be adequate to deal with the situation.

Last 69 years since Independence have seen not only repeated incidents of communal violence, as brought out above, but regrettably some of these riots had literally turned into massacres. To recall, a few of these were: Jabalpur riot in 1961, Ahmedabad riot in 1969, anti-Sikh riots in Delhi in 1984, Mumbai riots in 1992-93 and Godhra riots in 2002. Against this background it is necessary to make a special provision to deal with genocides such as these. The law should provide to make such offences cognisable and non-bailable and much stricter punishment extending up to life imprisonment. Fear of law must be inculcated unambiguously, and anti-social elements which generally take advantage of these situations and the government functionaries who either connive at them or even support them must also be dealt with severely.

Unusual times call for unusual solutions. Experience has shown that hardly any worthwhile action has been taken so far against government functionaries who were handling these situations and had failed miserably. Time has come to examine whether the provisions of the law of torts should be extended to all those remiss in handling the genocides. Class-action suits need to be initiated in such cases as it would be impossible for the individual victims to file cases against the concerned powerful politicians and police functionaries. It is only by applying the provisions of the law of torts that they would become seriously aware of their responsibilities.

Another legislation which has wholly remained on paper is the Religious Institutions (Prevention of Misuse) Act, 1988. Rajiv Gandhi government must be given credit for enacting this legislation but it has remained only as a show-piece. It was seen during the Punjab agitation that there was a large scale misuse of Gurudwaras by the terrorists for preaching their ideology. In Jammu and Kashmir the separatists have been using Friday Namaz gatherings to launch their ideological offensive against the central government and

its organisations. Hardly any action has been taken in these cases. Same is true of the Places of Worship (Special Provisions) Act, 1991 which too has not been acted upon.

It is equally frustrating to see that communal speeches made by candidates have not been adequately dealt with under the provisions of the Representation of People Act, 1951. In this context, the observation of the Supreme Court in one of the cases is significant. The Court had said: so long as communal political parties are not banned from participating in political life of the country, there is very little that the courts can do to restrain. Reference must also be made to the recommendation of the National Commission to Review the Working of the Constitution in this regard. The commission has recommended: "Any election campaigning on the basis of caste or religion and any attempt to spread caste and communal hatred during elections should be punishable with *mandatory imprisonment*. If such acts are done at the instance of the candidate or his election agents, these *would be punishable with disqualification*." (p. 87) Unfortunately, no action has been taken by the government on this recommendation.

Adoption of Inquisitorial System

The experience of investigation of crimes in communal riots has raised serious questions, whether it be anti-Sikh riots in Delhi or riots in Mumbai or Godhra or any other major communal riots in the country. There is a widely prevalent view that such cases are not investigated vigorously or objectively and the police often act under political pressure or in a communal manner favouring one community or the other. It would be recalled that in some cases even a plea was made to the high courts and Supreme Court that a special investigation team (SIT) may be appointed by the court and the investigation may also be carried out under the supervision of the court. Such petitions were agreed to by the Supreme Court in Godhra cases but obviously this cannot be done in every case considering the workload of the high courts and Supreme Court. It is therefore time to consider whether in cases involving serious communal riots, the French model of 'police judiciaire' should be adopted.

Justice Malimath committee on reforms of criminal justice system has noted that:

*The inquisitorial system is certainly efficient in the sense that the investigation is supervised by the judicial magistrate which results in a high rate of conviction. The committee on balance felt that a fair trial and, in particular, fairness to the accused, are better protected in the adversarial system. However, the committee felt that some of the good features of the inquisitorial system can be adopted to strengthen the adversarial system and to make it more effective. This includes the duty of the court to search for truth, to assign a pro-active role to the judges, to give directions to the investigating officers and prosecution agencies in the matter of investigation and leading evidence with the object of seeking the truth and focusing on justice to victims.*²¹

B. K. Nehru, former civil servant, diplomat and Governor, in his book 'Thoughts On Our Present Discontents' has invited attention to the fact that:

In a country where telling lies in a court of law is not regarded as immoral, and where the police is unfortunately not always above manufacturing evidence and extorting confession, a system of this kind [inquisitorial] would, ... be definitely more suitable to our needs than our present procedures. As a result of a thorough magisterial investigation already made, the onus to prove his innocence lies heavily on the accused. This will shock our lawyers who have inherited Anglo-Saxon prejudices along with their system, but there is reason to believe that there are fewer miscarriages of justice under the continental system and much greater enforcement of the law than is prevalent in India today.²²

The Law Commission in its seventy seventh report submitted in 1978, had recommended that "Although we have adopted the accusatorial system the trial judge should not play an altogether passive role, but must take greater interest and elicit such information as may be helpful in finding the truth".²³

²¹ Government of India, Ministry of Home Affairs, *Report of the Committee on Reforms of Criminal Justice System (Justice V.S. Malimath Committee)*, vol. I, New Delhi, 2003, pp. 265-6.

²² Nehru B.K., *Thoughts on Our Present Discontents*, Allied Publishers, Delhi, 1986, pp. 111-2.

²³ Government of India, Ministry of Law and Justice, *Law Commission of India, Seventy-seventh Report on Delays and Arrears in Trial Courts*, New Delhi, 1978, p. 157.

In spite of these valid arguments there are many legal luminaries who are strongly opposed to any change-over from the existing system. I had in my book 'The Judiciary and Governance in India' (2008) examined these facets in the light of experience in a number of cases. I had stated: "*This touching faith in the present state of Indian criminal justice system is difficult to understand.* Even a cursory look at the data regarding the conviction rate should be instructive in this regard. In 1968 the conviction rate was 70 percent. In 1999 it came down to below 40 percent and in 2003 it was 35 percent. In 2006 it was estimated to be below 30 percent. According to the then chief justice of Bombay High Court Justice M. B. Shah, the conviction rate was just 5 per cent." I had suggested that a trial should be given to the inquisitorial system on a pilot basis in selected districts. (Godbole 2008: 440-4) This has assumed new urgency in the context of increasing threats to secularism. In all major cases with a bearing on secularism in recent years, it has come to light that the police investigations and convictions leave much to be desired. This has created a great sense of insecurity among the victims of these riots who mostly belonged to minorities. I therefore believe that the time has come to take a decision that at least in cases of serious communal riots, to begin with, inquisitorial system should be adopted. This one single step will go a long way in reassuring the minorities that the government is serious about making a reality of secularism.

To Sum Up

The above analysis shows that a great deal remains to be done if secularism is to become a way of life in India. This will be possible only if there is a real political, social and intellectual commitment to it and, the state and central governments, the political parties, the civil society and the media strive for it. I am thankful to the Maharashtra Regional Branch of the Indian Institute of Public Administration headed by Shri Swadheen Kshatriya for giving me this valuable opportunity to share my thoughts with you.

(Dr. Godbole is former union home secretary and secretary justice.)