

# RELIGIOUS INTOLERANCE IN INDIAN PRIVATE SECTOR: A COMPARISON WITH UNITED STATES LAW

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## ABSTRACT

The term “*Secular*” enshrined in the Preamble of Constitution of India by Forty Second Amendment in 1976 clearly laid down the path of effective non-religious governance and provided for an efficient safeguard to all the religions and religious beliefs which is elaborately protected under Articles 25 to 28 of the Constitution of India. Such fundamental freedom to practice and propagate one’s religion with a reasonable restraint coupled with basic framework of “equality, liberty and fraternity” lead to a scheme or structure where a citizen should be able to exercise his religious beliefs or practices without being discriminated against for the same and ensuring an ‘equal’ society with a feeling of brotherhood. Although Article 15 provides for an explicit prohibition of discrimination on the grounds of religion, but such protection is not extended to private sector employees due to one sided interpretation of term ‘state’ and absence of an anti-discrimination law in the country extending equally to both public as well as private sector employees.

This article draws out legislative schemes from federal laws of United States of America which have addressed these similar issues in an effective way with special focus on laws of State of California and FEHA and highlights the need for an Anti- Discrimination statute in the country by comparing two real life scenarios and drawing inferences from wider constitutional frameworks and philosophies of both the countries.

## I. INTRODUCTION

Right through its ancient and rich history, India has been a land of diverse religious groups living as a part of unique socio religious community which has been propagated as an essential part of the cultural identity of the country. This integration of socio-cultural characteristics as a result of plethora of civilizations has made India one of the most religiously diverse country

in the world with Hinduism being the majority practiced religion followed by minority religions such as Islam, Sikhism, Buddhism, Christianity and Jainism etc.<sup>i</sup> Term '*Religion*' cannot be defined in a standard or universal manner due to multiple factors involved in the concept, but it is often recognized as set of certain beliefs, symbols and practices based on the idea of being sacred and is contributed into creation of a community. Since religion majorly involves people with similar sacred beliefs forming an association, it has a major impact in ascertaining socio cultural and political pulse of the people<sup>ii</sup>. A larger part of policy planning always involves taking into consideration the diverse demography of the country so as to improve the governance and effective application of the policies with welfare of religious communities.

Post-independence era with drafting of the Constitution of India has been considerate towards the idea of efficient accommodation of all the religious groups so that they co-exist with each other in harmony and without any clash of ideals or beliefs. Indian Constitution provides for a '*Secular*<sup>iii</sup>' state which makes it comprehensively clear that state or government of India will not have an official religion and all the religions will receive equal protection and support from the state. This provided for a basic framework whereby major fundamental rights guaranteed by the constitution involve right to '*practice or propagate*' one's religion with a reasonable restraint<sup>iv</sup>. Along with ensuring secular protection, Constitution lays down basic framework for '*equality, liberty and fraternity*' which collectively ensure that every citizen should be able to exercise his faith or belief without any discrimination striving towards equality and promoting a feeling of brotherhood among all the sections of the society so as to maintain integrity of the country<sup>v</sup>. Such a guiding principle or philosophy has been held as part of the '*basic structure*' of the constitution<sup>vi</sup>.

But as all the guiding principles of governance, application of 'secular' principle becomes somewhat ineffective due to mass diverse demography and the concept of religion being subjected to abuse for political incentives and practice of hate politics for earning vote banks on the basis of religious intolerance. Thus a diverse collection of religious beliefs and faiths often pose a major problem of maintaining public harmony and assuring dignity to each and every religious identity.

As we have all witnessed that India has been a victim there have been various incidents of communal violence such as Godra incident in Gujrat, 1984 Sikh riots or abolition of Babri Mosque etc. which can be cited as classic example of religious intolerance or classic clash of religious beliefs and pointless battle of communal superiority. These incidents have always

been strong pointers for discrimination suffered by individuals on basis of religion which is a protected characteristic of an individual. In one of the most classic method 'discrimination' can be defined as unfair or negative treatment given to an individual on the grounds of that individual belonging to protected category or possessing certain protected characteristics. Although Constitution of India explicitly prohibits the state to discriminate against any citizens on the grounds of religion, race, caste, sex, place of birth<sup>vii</sup> and that no citizen can be denied entry to shops, public restaurants and places of public entertainment on the grounds of above protected characteristics<sup>viii</sup>. Post 1991 with the advent of LPG policies, Indian employment sector has witnessed a drastic change with the government and private sector growing and catching up with each other. Now when it comes to government employment sector, employees have a pretty much secure redressal mechanism with their rights being protected under Part III of the Constitution. Private sector employees on the other hand do not enjoy protection of such redressal mechanism due to one sided interpretation of 'state' and absence of an anti-discrimination law in the country applicable to both public as well as private sector employees in India. Somewhat similar situation was faced by Mr. Zeeshan Khan when applying for a job in one of the private sector companies in 2015.<sup>ix</sup>

Being an MBA graduate, he had applied for a job at a private diamond export firm based in Gujarat only to be rejected with the reason cited that it was company's policy to hire only non-Muslims and thus Zeeshan was rejected because he hails from the Muslim community. This rejection of job application due to a person possessing certain religious belief or belonging from a particular religious community is a classic primetime example of religious discrimination in the pre recruitment process. If we wonder how this company discriminated in such an open and bold manner with expressly citing its discriminatory policy as the reason. Answer lies hidden in the lack of alternatives available with Zeeshan under Indian legal system to redress such conduct on the basis of protected category due to inability of enforcing his fundamental rights and a legislative void providing easy getaways to private sector employers with their discriminatory intent in India. If we track the remedial steps which Zeeshan can further take against the company for such conduct, it leads to no recourse available in any possible manner be it civil or criminal law.

This highlights a critical situation in the Indian scenario with no legislative teeth available against private sector employers to prevent them from discriminating against their job

applicants or employees on basis of religion and the entire machinery of ‘*enforcement*’ of the fundamental right failing in its purpose due to literal interpretation of the ‘*state*’.<sup>x</sup>

If we compare the situation with United States legal system there are express legislations available prohibiting such form of discrimination in both private and public sector right since advent of civil rights movement <sup>xi</sup>. Federal and state laws of United States provides for an effective administrative remedy against religious discrimination with equally effective recourses to the court machinery providing a three sixty degree anti-discrimination protection cover to the employees irrespective of their employment sector .

This article will thus critically analyze the federal scenario vis a vis comprehensive protection granted against religious discrimination in the United States of America as well as in the State of California and further draw a comparative analysis of the same with protections available under Indian private sector employment .So that some effective steps can be suggested for an efficient redressal machinery to be established for the aggrieved employees, who have been a victim to religious discrimination by their employers in the private sector.

## **II. FEDERAL ACCOMMODATION OF RELIGIOUS BELIEFS (UNITED STATES OF AMERICA)**

In order to get a better understanding of the exact legal scenario for protection of individuals from religious discrimination in their respective employment sector , we will first look into a similar situation faced by Mr. Gurdit Singh while working as a mailman in Disneyland, Florida on account his exercising his religious belief<sup>xii</sup>

Gurdit Singh, A Sikh- American employee at the Walt Disney World in Florida had been working as a mail carrier at the amusement park since 2008 .He was directed by his superiors to confine himself on the mail routes which made him stay away from the customer’s visibility as it will violate company’s ‘*look policy*’ . The reason behind such direction was Gurdit’s religious appearances. Being a follower of Sikhism, a religion originated in India since 1500’s ,Gurdit had kept his turban and maintained long unshaved beard which are crucial aspects of religious beliefs and easily qualify as a part of grooming techniques held sacred by Sikhs all around the world. Standing up for Gurdit’s cause, Sikh Coalition and American Civil Liberties Union (ACLU) heavily criticized Disney’s look policy via a letter as it led to ‘*segregation*’ of



the mailmen to a route which had a greater workload and led to a feeling of ‘animosity’ among his fellow mailmen as he was unable to help them in their respective routes thus halting his career advancement from a professional perspective. In an official statement with respect to a response to this letter, Walt Disney reversed its decision on look policy of this kind and accordingly allowed Gurdit to work on other visible mail routes thus providing a ‘*religious accommodation*’ on the basis of his religious beliefs. This will lead to a discrimination free workplace for Gurdit accommodating his sacred beliefs efficiently with his job discrimination without keeping him away from the public view.

An interesting aspect in this situation that why did a mere interruption from civil protection organizations like Sikh coalition and ACLU in form of an official letter had enough persuasion effect to sway a private entertainment giant in accepting its discriminatory ‘segregation’ on the basis of religion, take a step back and remedy its adverse action affecting employment conditions and job description. First reason which takes the front seat is to mostly protect its worldwide reputation i.e. maintaining its worldwide image in taking care of its staff and making sure that none of the staff members face any discriminatory conditions based on their protected category as it harms public goodwill of the company. But the major reason behind such a remedy of reversing its policy and taking responsibility of adverse employment action is the presence of an effective legal machinery for such discrimination cases on the basis of religion or religious beliefs which efficiently provides adequate administrative remedy coupled with judicial remedy covering both the actual discriminatory action but also the impact of a neutral policy or guideline on an employee belonging to protected category.

United States of America provides for effective federal statutes which aid the workers or employees in both public as well as private sector seeking adequate reliefs from their employers in the form of punitive damages or compensation etc. Title VII of the Civil Rights Act, 1964 is a major anti-discrimination statute which bars any adverse employment action motivated by an employee’s religion. It also provides for cases where employee’s religious or sacred beliefs conflicts with a workplace policy or employer’s directions. In such situations employer must provide for a ‘*reasonable accommodation*’ which eases the conflict, but such an accommodation should only be provided to an extent that it does not lead to an ‘*undue hardship*’<sup>xiii</sup>

Claims with respect to religious discrimination form a crucial part of workplace discrimination claims reported in US every year with EEOC (The Equal Employment Opportunity

Commission), an administrative body established under the statute for handling complaints pertaining to employment discrimination and guiding the plaintiff through a proper judicial recourse so as to claim adequate compensation for the same. As per a survey about one-third of the workers reported that they have been a victim to religious discrimination or non-discrimination of their beliefs but only five percent reported that they felt excluded because of their religion.<sup>xiv</sup>. Discrimination on basis of other protected categories such as race, color or gender are more prevalent in the workplaces. From total of 93,727 discrimination cases in 2013 only 3721 were pertaining to religion. Although there have been few cases as compared to other categories, but religious discrimination in highly diverse private workplaces has been increasing since 1990's with majority issues of lack of reasonable accommodation by employers. Thus we will first analyze the US Constitution and its impact on religious freedom and then take up a detailed account of Civil Rights Act 1964 with reference to workplace discrimination on the basis of religion. Followed by a comprehensive study on the state of California and its legal machinery for countering discrimination claims on the basis religious beliefs in light of California Fair Housing and Employment Act and corresponding legislations pertaining to accommodation of religious beliefs at the workplace

#### **a. FEDERAL CONSTITUTION AND RELIGION**

Constitution of United States provides for its secular ideology in the form of first amendment adopted in 1791 as part of ten amendments forming the Bill of Rights. It accordingly states that "Congress shall make no law respecting an *establishment of religion*, or *prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."<sup>xv</sup>

Analyzing the amendment it can be stated that it expressly provides for 'freedom of religion' on an equal standing with other freedoms such as speech or expression or peaceful assembly and it thus provides for an element of religious liberty to the citizens against the state. This principle of liberty in professing one's religion is deeply involved as the core philosophy of the founding fathers of the US Constitution. Post Independent America was on its way to become a 'melting pot' for a diverse population of migrants who were forming a major part of the country's population. Most of these migrants were refugees running from religious prosecution in their respective countries like Jews and Protestants. Their main idea of leaving their former

countries and moving to new America was mainly to protect and profess their religion without any intervention from the state. This led to an idea for a “*wall of separation between the church and State*” proposed by one of the founding fathers and Third President of the United States of America, Thomas Jefferson in letters to the Baptist Church of Danbury, Connecticut<sup>xvi</sup>. He accordingly stated that American people should be endowed with a liberty that the legislature cannot provide establishment of any religion or prohibit ‘free exercise of religion’ by an individual thus calling for an effective separation between the state and religion. This separation principle has been the backbone of freedom of religion in the First amendment.

This religious freedom is accordingly granted expressly by two clauses in the amendment. First one is the *establishment clause* which is clearly stated in the first few words of the amendment that government cannot establish an official religion or pass any law in respect of the same. This clearly provides for neutral government which is not motivated by any religious ideology and upholds a principle of secularism. Originating from the Separation principle stated above this clause helps in preventing oppression and bloodshed resulting from government mingling with religious beliefs and thus demarcating functions of state and religion in the society<sup>xvii</sup> and accordingly making sure that the government does not join forces with any religion which ends in a situation of favorable laws towards people of that community only<sup>xviii</sup>. This clause is absolute in nature and forbids not only establishment of religion but also strikes down any law which leads to establishing an official religion by the federal or state machinery.

This clause has been applied by the U.S. Supreme Court in developing the famous three step assessment test also known as ‘*lemon test*’<sup>xix</sup> where in order to assess whether a statute or legislation violates establishment clause, three elements must be taken into consideration.-

- a. The statute must have a secular legislative purpose.
- b. The principal or primary effect of the statute must neither advance nor inhibit religion.
- c. The statute must not result in an "excessive government entanglement" with religion

If all of these elements are satisfied, then only a legislation can be considered non-violative of Establishment Clause. Hon’ble Court used this test to strike down an act favoring funding of public Catholic schools as unconstitutional. So this clause lays down the principle of neutrality to be followed by the state which means not favoring one religion over another and not favoring religion over non religion and vice versa thus respecting the atheist ideology as an essential element of faith.<sup>xx</sup>

The second one is '*Free Exercise Clause*', which accordingly states that all the persons have liberty to practice, propagate and change their religion according to their conscience and individual choice. Furthering the idea of a 'secular' state, this clause accordingly prohibits the government to interfere in an individual's choice to practice his religious beliefs or philosophy. It relates to the Establishment Clause in the sense that government's functions and powers including legislature's power to make laws should not contradict with an individual's choice of religion. However like Establishment Clause, free exercise of religion is not absolute and is subjected to higher standards of public morality or national interest. Such a freedom will always be subjected to questioning in the case of conflict with a civic obligation i.e. If a particular religion provides for human sacrifice, it will be held illegal and state can interfere in interest of the community. Hon'ble U.S. Supreme Court laying down restrictions on the Free Exercise Clause held that although any law or statute cannot interfere with religious belief and opinion but it can regulate some religious practices in the interests of civic community<sup>xxi</sup>. Using this rationale, the Hon'ble Supreme Court accordingly convicted a member of Mormon community practicing polygamy as his religious duty and thus held that a religious obligation cannot be used as a defense to a criminal indictment. In lines with this decision it can be stated that holding a religious belief is absolute choice but practicing such beliefs or actually acting on them is subjected to scrutiny of the state and must always be non-contradictory with penal laws of the country<sup>xxii</sup>. Thus state can only interfere in religious practice or bylaws when it has a 'compelling interest' in refusing accommodation of the same<sup>xxiii</sup>.

Since the adoption of the first amendment these two clauses were only enforceable against the federal government and not the states. It was only after adoption of Fourteenth Amendment that such freedom of exercising religion was extended and made applicable to the states. Due Process Clause accordingly provides that state shall not deprive any person of life, liberty or property without due process of law<sup>xxiv</sup>. Interpreting freedom of religion in similar lines with the liberty of an individual to practice or profess his religion, US Supreme Court accordingly extended the 'freedom of religion' to states along with the federal government<sup>xxv</sup>.

However with this due process clause, it is certainly clear that first amendment in cases of freedom of religion is only available against state actors per se and not private entity or citizen. So in situations where a private employer discriminates against an employee for wearing his religious garb or refuses to provide for accommodation of his religious beliefs it will clearly not lead to a violation of first amendment of the constitution. In order to provide for an effective



legal solution such a private scenario, congress enacted statute protecting the religious interests as well as cases of retaliation by private employers in 1964 and a somewhat similar model laws were adopted by various states in order to protect its employees working in private sector and effectively providing for a freedom of exercising one's religion extend beyond the government or public sector employment.<sup>xxvi</sup>

## **b. CIVIL RIGHTS PROTECTION AND RELIGION**

America has always been a victim of racial discrimination i.e. discrimination between blacks and whites. With African American population mostly working as slaves under their white master's, there has been a significant amount of oppression face by the members of African American community up until abolition of slavery in 1865<sup>xxvii</sup>. However even after such a significant and historical step taken in favor of securing equal rights for every American citizen irrespective of his or her race, a majority of southern states still based their laws and policies on racial discrimination by using poll taxes and literacy tests so as to continue disenfranchisement of their African American population. Following a strict policy of segregation through various laws, they mostly turned a blind eye towards recurring incidents of violence, harassment and humiliation from white supremacist groups like the infamous Ku Klux Klan.<sup>xxviii</sup>

For years after the period of reconstruction ended, Federal government did not draft a law addressing the existing issue of civil rights in the country. It was only in 1957 Justice department took up the anti-discrimination issue by establishing a civil rights section as well as civil rights commission to enquire and redress discriminatory issues faced by the community. It was only in John F Kennedy's presidency post 1961 that talks with respect to a comprehensive civil rights legislation began so as to provide for effective anti-discrimination measures in the country. There was an initial delay by Kennedy government in addressing the issue and racial tensions in the states like Alabama started getting out of hand with protests consisting of elementary school students being brutally tortured by the police using water hoses and dogs on students<sup>xxix</sup>. Since these protests and corresponding counter measures by the police were widely televised, it led to an outburst with civil rights movement reaching a scale of national uprising with civil rights leaders like Dr. Martin Luther King leading "Birmingham Campaign" and further publishing the details of state brutality on members of the African

American community involved in protests<sup>xxx</sup>. The federal government could no longer delay the legislative measures to ease instances of racial segregation and discrimination. Finally on June 11, 1963, President John F. Kennedy in his address to the nation accordingly declared that *“those who do nothing are inviting shame as well as violence and those who act boldly are recognizing right as well as reality”*<sup>xxxii</sup> and thus paved a way for Civil Rights Act from an era of racial tension and violence. Although with assassination of President Kennedy, this cause was further taken by President Lyndon B. Johnson and even after a strong resistance from southern members in both House of Representatives and the Senate, Civil Rights Act 1964 was signed into a law in July 2, 1964.

Pursuing its primary objective, Civil Rights Act 1964 prohibited segregation on the grounds of race, religion or national origin in places of public accommodation such as courthouses, schools, parks and restaurants etc. under Title II and Title IV. Our primary focus for the purpose of this article will be on employment discrimination under the Act. Title VII of the Civil Rights Act 1964 prohibits discrimination by employers towards their employees on the basis of their protected characteristics including race, color, religion, sex or national origin.<sup>xxxii</sup> In its original draft, Title VII provided for preventing discrimination on grounds of race, religion or national origin in Government employment<sup>xxxiii</sup>. Current provision of the 1964 act only took place after a long and extensive debates and amendments including ‘Gender Equality’ as a ground of discrimination in the last moment before act was passed. In its recent form, Title VII covers and applies to employers in both public as well as private sector with a condition that that employer has 15 or more than 15 employees.<sup>xxxiv</sup> It provides for establishment of a statutory authority called Equal Employment Opportunity Commission (EEOC) which acts as an effective administrative agency aiding the workers who are victims to discrimination or harassment at their workplaces based on their protected characteristics by processing the complaints and engaging in settlement with employers. If negotiations or settlement fail in providing effective remedy to the aggrieved employee, EEOC further aids the aggrieved employee in filing the claims of discrimination or harassment with courts via issuing a ‘*right to sue*’ letter provided to the plaintiff.

One of the most basic form of discrimination on the basis of religion is the refusal or failure by an employer to ‘reasonably accommodate’ the religious practices or beliefs of an employee. Thus whenever there is a situation of conflict between a religious practice and belief of the employee and workplace policies or guidelines of the employer, it is the duty of the employer

to provide for reasonable accommodation of such nature which helps in easing the conflict. These accommodations include different arrival or departure timings, days off, grooming policies or policies with respect to wearing religious garb etc. Now this provision of providing for a 'reasonable accommodation' by the employer is not an absolute right of the employee. The employer has to provide 'reasonable accommodation' to an extent that it does not lead to any '*undue hardship*' for the employer. Although defining 'undue hardship' is a complex issue as it can only be ascertained on a situational basis but it majorly means '*more than minimis cost*' i.e. an additional cost incurred by the employer in providing such accommodation<sup>xxxv</sup>.

Apart from monetary costs, it also includes non-monetary costs such as reduction in efficiency of the business or affecting the safety of other workers as well as harming the public image of the employer<sup>xxxvi</sup>. In an instance, a court held that providing a private prayer space to a Muslim employee when the employee is allowed to take time off from work to go out and pray will qualify as an '*undue hardship*' and the employer does not have to accommodate the same.<sup>xxxvii</sup>. The statute expressly prohibits disparate treatment on the basis of religion in employment processes such as hiring, promotion, benefits, training, job duties or terminations as well as workplace or job segregation on the basis of an employee's religion. Now there might be an instance where an employer takes an adverse employment action against the aggrieved employee because of the fact that he had complained against the employer at first place. So as to provide for situations like this, Title VII also prohibits any form of retaliation against the employee for requesting such accommodation irrespective of the fact that whether such accommodation was granted or not, filing a complaint with the EEOC or testifying, assisting or participating in any form of discrimination proceedings against the employer.

One of the significant aspects of Title VII is that it applies to all the components of religious observance, practice and belief and does not limit the definition of religion to organized sects such as Christianity, Islam or Hinduism etc. but also to remote and unorganized sects such as Rastafarians or Native Indian beliefs which may appear unreasonable or illogical to others.<sup>xxxviii</sup>. These practices include for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities and accords a practice or belief by an individual as 'religious' even if it is not followed by the members of a similar religious community<sup>xxxix</sup>.

Now a crucial aspect of providing accommodation to a religious belief or grooming practice is that employer had sufficient information that such a garb or grooming practice by a particular employee has religious significance i.e. he is holding it, wearing it or practicing it because of his religious beliefs. Suppose if a particular firm has 'clean -shaven' policy for its employees and a certain employee following Sikhism cannot abide by it as his religion requires him to keep unshaven beard. He should explain it to his employer about the situation as to why he can't abide by the policy because of his faith. Here if he fails to inform his supervisor or employer about same, he will not be entitled to be accommodated for the same by the employer. But in a situation where he informs the employer that he keeps his beard for religious reason as he is a Sikh and it is a sincere religious belief held by him, this is sufficient for accommodation by making an exception unless doing so is an 'undue hardship'<sup>xi</sup>. Thus Civil Rights Act 1964 effectively provides for prohibition on discriminatory conduct faced by an employee working with public as well as private organization and further mandates for 'reasonable accommodation' to be provided by the employer unless causing so would lead to 'undue hardship'. After analyzing this federal legal machinery it becomes crucial to discuss an effective state model which has adopted these provisions in form of a specific statute and provides for an even better protection to the employees irrespective of the government or private employer that they are employed under.

### **c. STATE OF CALIFORNIA AND RELIGION**

Federal structure of US governance accordingly provides more autonomy to state governments than as compared to countries with a hybrid or purely union form of administration. State of California thus accordingly provides for a necessity to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination on account of protected characteristics such as race, religious creed, color or disability etc. as an essential element of public policy<sup>xlii</sup>. Main objective for providing anti-discrimination laws that they prove as an effective tool in maintaining social peace and harmony and protecting both the employees as well as employers from falling a victim to adverse effects from promoting a workplace with discriminatory conditions or treatment. Promoting such a policy helps in attracting effective employee workforce from all aspects and walks of life<sup>xlii</sup>.



In pursuant to effective application of its public policy ,state thus provides for one of the most comprehensive bodies of statutes ensuring adequate protection to the employees from discrimination in their workplace environment based on their protected characteristics such as race, religion, gender, disability or sexual orientation etc.<sup>xlili</sup>. California Fair Employment and Housing Act (FEHA) thus applies to both public and private employers in addition to labor organizations and employment agencies with five or more employers<sup>xliv</sup> .Similar to EEOC established by the Civil Rights Act 1964, FEHA provides for establishing a Department of Fair Employment and Housing (DFEH) which acts as an administrative agency assisting various employees in the process of filing complaints with respect to harassment or discrimination<sup>xlv</sup> .Taking into consideration both actual discriminatory conduct as well as neutral policies which might be discriminatory in implementation i.e. Disparate *Treatment* Discrimination as well as Disparate *Impact* Discrimination. FEHA covers acts or conduct based on discriminatory intent<sup>xlvi</sup> as well prima facie neutral policies which have negative impact on individuals with certain protected characteristics as compared to others<sup>xlvii</sup> .On similar lines with the federal law, FEHA also provides that employee cannot be discriminated on the basis of their religion or religious beliefs in pre- as well as post recruitment and accordingly provide for *reasonable accommodation* of religious beliefs to an extent that it does not result in any *undue hardship*.<sup>xlviii</sup> It provides for accommodation of religious beliefs which includes both actual as well as perceived belief and expands the concept of belief to a philosophy or way of life which an individual employee holds sacred<sup>xlix</sup> even covering outward signs of customs and manner of grooming such as religious garbs<sup>l</sup>. This provision of religious accommodation is not an absolute right as employer is not required to reasonably accommodate his employee's religious belief if it leads to segregating the employee from public or other employees<sup>li</sup> or violate any law prohibiting discrimination at federal level<sup>lii</sup> and of course leads to more than *de minimis cost* for the employer .

Now as a Californian employee facing discrimination on the basis of religious beliefs, issue arises with respect to what law to pursue the claim under so as to get an effective remedy for the same. Federal laws do not bar the states in formulating their own model laws to provide employees with equal or even greater protection<sup>liii</sup>. Thus the employees are protected equally by both state as well as federal laws .One of the major difference in both the laws is that while Civil Rights Act 1964 applies to employer with 15 or more employees, FEHA on the other hand applies to employer with mere 5 or more employees. Generally Californian employees

are more inclined towards filing their claims under FEHA and thus pursuing the case in a state court as they are considered to be more considerate towards plaintiff's case and juries in a federal court has to reach a unanimous verdict<sup>liv</sup> in comparison with three-fourths majority<sup>lv</sup> in Californian State Courts. Thus a Californian employee enjoys dual layer of protection of his religious beliefs in his workplace and claim compensation for the discrimination on the basis of same.

### III. INDIAN 'SECULAR' MODEL

Coming back to the Indian scenario, it has been the birthplace for some major world religions such Hinduism, Jainism, Buddhism and Sikhism. It has historically been one of the most tolerant and diverse nations in terms of religion or religious tolerance ensuring fundamental unity and synthesis of religion. As we have earlier discussed that there is no universal accepted definition of 'religion' but almost every theory on religion zeroes down to a belief or faith system based on existence of supernatural being and end goal of attaining 'salvation'. Hon'ble Apex Court of India held that 'religion' is majorly a matter of faith held close by an individual or a community and may not be necessarily linked to theistic ideologies.<sup>lvi</sup> . Thus it a system of belief system laid down in the form of ethical code of conduct followed by its follower in the form of certain rituals or practices which majorly extent to certain grooming techniques, food choices or clothing etc.

Framers of Indian Constitution took this religious diversity of Indian subcontinent and accordingly provided for philosophies of '*justice, equality and liberty*' in the Preamble. Maintaining religious harmony becomes a crucial aspect of fraternity and respecting individual dignity which is clearly evident with fundamental right of 'freedom of religion'<sup>lvii</sup> . It was only after the 42<sup>nd</sup> amendment<sup>lviii</sup> that the elements of 'socialism' and secularism were introduced in the Preamble. Similar to First Amendment of the US Constitution, secularism in the Indian Constitution prohibits a state sanctioned religion and creates much needed diversion between the state and religion. Apex Court of the country held that 'secularism' means that in any scenario "state shall have no religion of its own and all persons of the country shall be equally entitled to the freedom of their conscience and have the right freely to profess, practice and have the right freely to profess, practice and propagate any religion"<sup>lix</sup>. So spirit of the Indian constitution is based on an effective philosophy of religious harmony ensuring adequate

protection in practice and propagation of religious beliefs as well as practices essential to one's faith so as to provide for an effective administrative machinery in ensuring that all religions coexist with each other without any form of conflict or disputes as well as prevention of unnecessary government interruption unless such a restriction is based on reasonable grounds of national interests and integrity.

#### **a. CONSTITUTION AND FREEDOM OF RELIGION**

Following the spirit of Preamble, Constitution of India accordingly provides for an individual's right to practice, profess and propagate his religious beliefs enshrined in the Part III i.e. Fundamental Rights. However this fundamental right of 'freedom of religion' is not an absolute right as it has to be subjected to public order, morality, health and all other rights enshrined as fundamental rights<sup>lx</sup>. Similarly an individual or an institution possesses the right to establish and maintain institutions for religious and charitable purposes and to manage its affairs accordingly coupled with acquiring property for similar purposes and administering same in accordance with law<sup>lxi</sup>. Courts of the country have always accorded efficient protection to an individual seeking protection of his right to practice religious beliefs which has to be efficiently balanced with a policy of social welfare. If any religious practices lead to contravention of public order or morality then they lose state's protection. Thus similar to American interpretation a sharp distinction needs to be drawn between religious faith and its actual practice as state protects only the faith or belief<sup>lxii</sup>. Similarly the practices pursuant to belief or faith are only accorded protection when they form an essential or integral part of the religion thus saving genuine religious practices from non-religious accretions and even superstitions<sup>lxiii</sup>.

In pursuant to this freedom granted to an individual or an institution to practice, propagate and profess religious beliefs, Indian Constitution further recognizes religion as an essential protected characteristic and thus prohibits state from discriminating against an individual on the basis of his or her religion along with other protected characteristics like race, caste, sex or place of birth<sup>lxiv</sup>. Thus it has been made explicitly clear that no Indian can be discriminated by the 'state' or in a 'public place' owing to the fact that he belongs to a particular religion or holds certain beliefs which are sacred to him. There have been numerous occasions where the Hon'ble Apex Court of the country has supported and upheld this provision by striking legislative provisions targeting or differentiating between individuals on basis of their religion

like when certain provisions of Indian Succession Act 1925 were held to be violative of Article 15 since it only allowed members of Christian community to bequeath their property on their deathbed under religious influence, all the other communities were excluded and further no acceptable reason was provided as to why only Christian community was regulated alone for such charitable or religious bequests<sup>lxv</sup>. Obviously any law or statute challenged under this provision has to be tested on a '*strict scrutiny*' standard. It is a basic and extremely demanding standard by which courts presume that a particular law is discriminatory and thus invalid until the State can prove that the impugned law was enacted in the pursuit of a 'compelling state interest', with minimal interference with the right in question, in the absence of any alternative, and was proportionate.<sup>lxvi</sup>

Similar to the enforceability of First Amendment of the US Constitution, Article 15 in the Indian Scenario is enforceable against the 'state' only. Indian Constitution further lays down as to what constitutes 'state'<sup>lxvii</sup>. It includes

- I. The Government and Parliament of India
- II. The Government and the Legislature of a State
- III. All local authorities; and
- IV. Other authorities within the territory of India;

Going by the elements of the 'state' under the Constitution, it is expressly clear that it is confined to the central and state governments and their associated departments along with the local authorities. Issue clearly arises with respect to private entities or organizations forming an essential part of this country's employment sector. Even with the most widest possible and expansive interpretation accorded to the term 'other authorities' with the 'instrumentalities of the government' standard<sup>lxviii</sup> and the purpose or functions of the state i.e. sovereign functions<sup>lxix</sup>, purely private bodies or organizations are not covered within the ambit of the 'state'. Now since the entire private sector escapes from the ambit of being held as instrumentalities of state or sovereign function test, any violation of fundamental right cannot be enforced against them in the high courts or the Apex court under Article 226 or Article 32 respectively. The main rationale behind such exemption is that any form of relationship with a private entity forms a type of 'private contract' which acts as barrier for application of Part III of the Indian Constitution. Private party discriminating can always defend such acts on basis of their liberty or freedom to act as per their own sense of conscience. Similar stand was taken



by Hon'ble Apex Court when it ruled in favor of a bye-law of a Parsi housing society that prohibited the sale of the property to non-Parsis and found it to be non violative of Article 15<sup>lxx</sup> even though it satisfied all the elements of discrimination on basis of religion. Such horizontal effects of fundamental rights lead to a problematic situation as individual rights or a private aspect of an individual's life is not backed by justification of a democratic state and no matter how much we try to expand the domain of 'state' there will always be an individual conduct, choice or preferences which will be out of the bounds of the law and guarded by the realm of personal rights.<sup>lxxi</sup> Another major issue of opening the barriers of private domain to fundamental rights is management of case load burden. In such cases of discrimination by a private entity being allowed to sustain under fundamental rights, courts of this country will be swamped by the complainants. Since Indian courts are already burdened under the pending case load, such a step of opening the floodgates will increase the amount of cases which the current Indian legal system won't be able to sustain<sup>lxxii</sup>. Now if we start analyzing the appropriate solution to this issue, one of the most effective solution is to establish a private apparatus or mechanism for enforcement of these rights accordingly structure it on authority of law. This is exactly what US Congress did by passing the Civil Rights Act 1964, providing for a statute which lays down much needed groundwork of protecting fundamental rights equally against the state as well as private entities is the most efficient solution to bridge the gap in equal application of fundamental rights and accordingly protect an individual from facing discrimination on the basis of a protected characteristic like religion in a private sector employment and this is exactly the issue faced by the private employees in India.

#### **b. LACK OF ANTI- DISCRIMINATION LEGISLATION**

Even after more than 70 years of independence, private sector employees suffer from discrimination or harassment on the basis of their protected characteristics like religion. This is all due to a major absence of anti-discrimination laws in India which holds private employer liable for indulging in discriminatory conduct towards their employees. This is where we come back to the Zeeshan's case as discussed before, since he was rejected from the job out rightly due to the reason that he belongs to Muslim community, it is a clear case of discrimination in pre recruitment process by a private export company. Now Zeeshan can't approach the Supreme Court or his state's High court under Article 32 or Article 226 receptively to enforce his fundamental right against discrimination under Article 15 of the Indian Constitution as his

employer who discriminated is a 'private' export company and doesn't come within the ambit of 'state' under Article 12 of the Constitution. So clearly Zeeshan lacks *locus standi* to even approach any court of the law in this country and get adequate remedy for legal injuries faced by him due to his religious beliefs. In terms of criminal sections, closest legal provision which punishes such conduct is that it is an offence to publish or put in written form that person should be deprived of their citizen's rights due to the reason that they follow a certain religious community<sup>lxxiii</sup>. However pursuing such a charge in court of law will be a failed attempt at getting justice since constitution itself does not guarantee such right to equality to the employees of the private sector and thus there is a minute chance of getting convictions for the company or its directors for publishing such discriminatory content.

This leads to a dangerous situation in private sphere of employment where employer or supervisors can indulge in any form of discriminatory conduct or harassment by tangible employment actions or any sought of conduct based upon religion of the employee and face no legal consequences under the garb of private liberty or choice of conduct. Zeeshan is just a tip of much larger iceberg, with all the diverse religions present in the Indian subcontinent, workforce in the Indian employment sector is bound to be diverse. With members of different religious communities working together, certain instances of religious clash or intolerance is bound to occur between them. Such intolerant conduct usually stems from person's perception of a community, casual stereotyping and conservative insecurities a person might hold for his community. Nowadays all the major corporate giants are getting conscious of discriminatory conduct based on protected characteristics and thus laying strict policy guidelines to counter such situation and provide for an adequate internal remedy. But even after this, there is a dire need for a statute by the legislature to provide for an effective combination of administrative structure with adequate legal provision expressly stating such form of discrimination as an illegal conduct and providing adequate compensation or damages to the aggrieved employees facing such conduct due to their religion,

Now closest we have come to talking about discrimination in workplace on basis of protected characteristics was when Sachar Committee set up in 2005 for studying social, economic and education conditions of the Muslim community in India submitted its report in 2006. Highlighting the plight of Muslims as the biggest minority community in the form of low participation in workplaces it accordingly suggested for establishing an EOC (Equal Opportunity Commission) to provide for redressal to the aggrieved people. In pursuant to this

recommendation, an expert committee was set up the leadership of Prof N.R. Madhava Menon by the Ministry of Minority Affairs. Developing on the idea of EOC, committee accordingly drafted a model EOC statute providing for structure, scope and functions of the proposed commission backed by appropriate legislative framework. Operating in a wide ranging jurisdiction in terms of social groups and sectors, scope of EOC should extend to both public and private sector. Endowed with the powers of civil court for inquires and investigations, EOC will be modelled on advisory, advocacy and auditing functions rather than just focusing on redressal<sup>lxxiv</sup>. Although this initiative did not see end of the day but even if it had been put to application and an EOC would be established, it would still not solve the crisis. The bill never out rightly stated that ‘discrimination ‘*per se*’ is illegal and relied on constitution philosophy of ‘equality’ which have discussed above can be enforced against state actions and not private sections. Although vision was sourced from the constitution, in order to implement such vision in the domain of individual or personal rights there is a need of comprehensive anti-discrimination statute laying down as to what constitutes a discriminatory conduct with various procedures and definitions as well as adequate form of remedy i.e. compensation ,front or back pay or punitive damages etc. which will be effective for all the existing commissions to aid in dispute resolutions such as Commissions for minorities ,women and children who are also helpless due to such absence of proper procedure<sup>lxxv</sup>

#### IV. CONCLUSIONS AND SUGGESTIONS

If we compare Zeeshan’s situation with that of Gurdit’s, it throws much needed light on lessons needed to be learned from US anti-discrimination scenario. Administrative and legal recourse available at Gurdit’s disposal is clearly evident of an effective and efficient anti- discrimination scheme which is a top notch solution to India’s discrimination scenario. Although originating from the ‘race’ factor, US Civil rights movement was an effective solution in bridging constitutional right of ‘*freedom of religion*’ enforceable against both state and private entities. Title VII of the Civil Rights Act 1964 clearly states that any form of discrimination or harassment faced by an employee working in private or public sector based on his protected characteristic of religion is ‘illegal’. Building on this base of illegality, the statute then provides for an administrative authority i.e. EEOC which helps in filing and processing the complaints and decide further course of action. It is mandatory for the employee to exhaust his

administrative remedy first and then proceed to actual courts of law if he/she is not satisfied with the settlement provided by the EEOC. Although employees have an option of obtaining a 'right to sue' letter and proceed directly to court for legal remedies but it is still a significant help to the courts in managing the burden of cases once the trial actually starts. Further the statute dwells much deeper into tackling the scenario by defining '*Religious Beliefs*', '*Reasonable Accommodation*' and '*Undue Hardship*' and thus expands the scope of 'religion' over majority beliefs and inculcating every belief which an employee holds sacred to his faith. Further Californian model took this protection of Federal statute and adopted as well as expanded it at the same time into application on public as well as private employees of state of California. Expanding the scope of '*undue hardship*', amendment in California Fair Employment and Housing Act focuses on a majority of factor such as nature and cost of accommodation, operations as well as financial resources of the employer and raises the stringent bar of federal *de minimis* standard to a much higher level. Further EEOC's guidelines explaining the scope of 'religious belief' also interpreted religious garb and grooming techniques as an essential part of 'religion; and is thus protected as a protected characteristic. It also finally provides for a variety of remedies available to the aggrieved employee including compensation, front pay, back pay and punitive damages etc.

Now what India needs to counter its religious discrimination in private workplaces is clearly a comprehensive legislation covering government (central and states) and private employment sector and further extending the protections of Article 25 and Article 15 of the Indian constitution to private employees by declaring 'discrimination' as an illegal conduct *per se*. Taking into consideration both actual conduct as well as impact of a neutral policy, such a legislation should also provide for much needed administrative machinery similar to EEOC or DFEHA which implements these standards and routes all the complaints through its apparatus to tackle the extensive litigation load problem already being faced by Indian legal system. India through its rich history has always been home to a diverse population of religious communities. This has led to many inevitable disputes altering the course of governance and politics and clearly indicating that 'religious intolerance' has been a major issue in Indian subcontinent. Now if United States of America can tackle this issue back in 1964 with 'race' as the center theme. Real question to be asked here is that what is stopping Indian lawmakers from taking similar steps keeping 'religion' as the center theme and assuring that no other employee like Zeeshan has to go through a job rejection or any discriminatory conduct at a private company

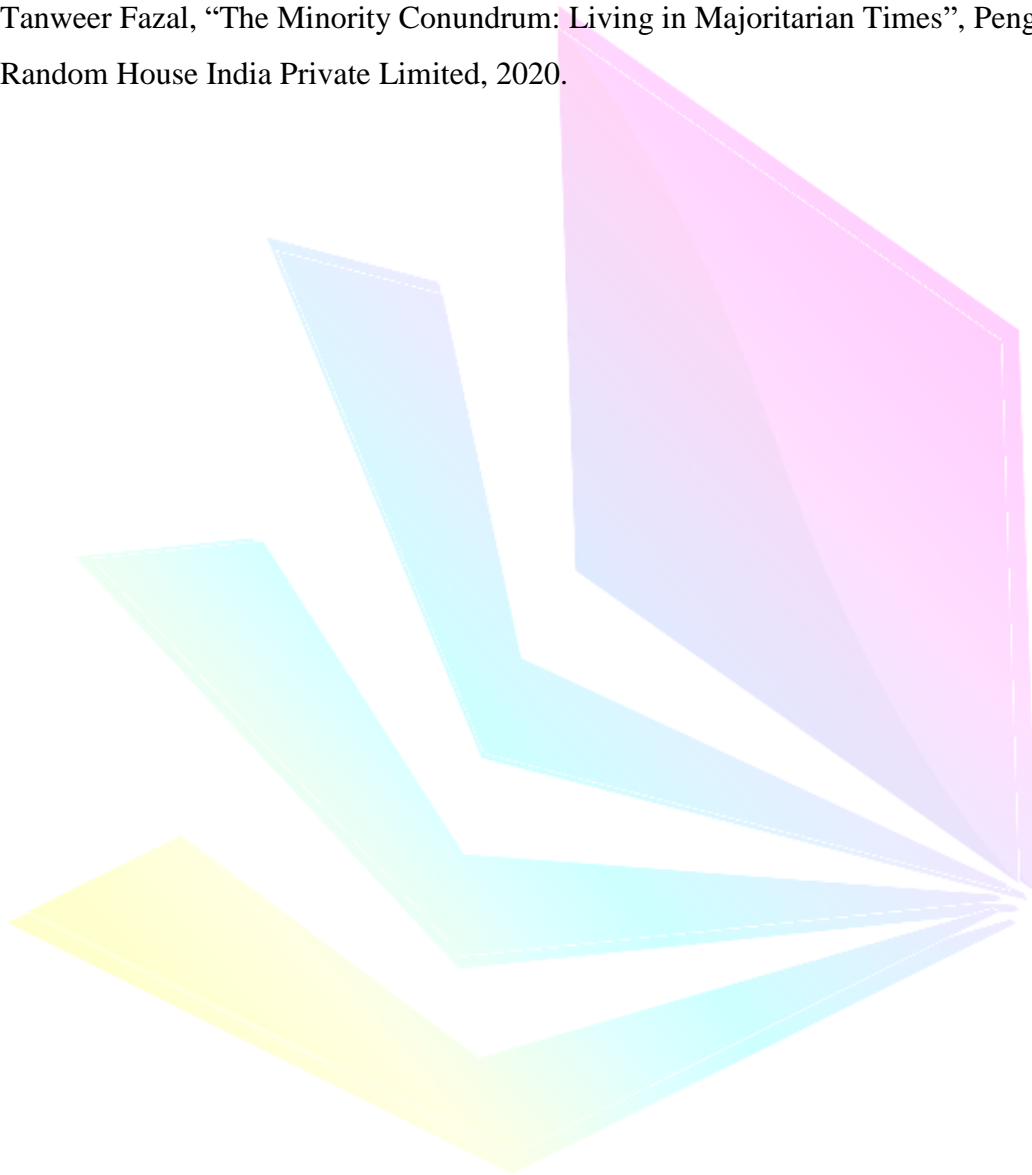


just because he or she hails from a particular community or holds certain belief sacred on account of his/her faith.

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