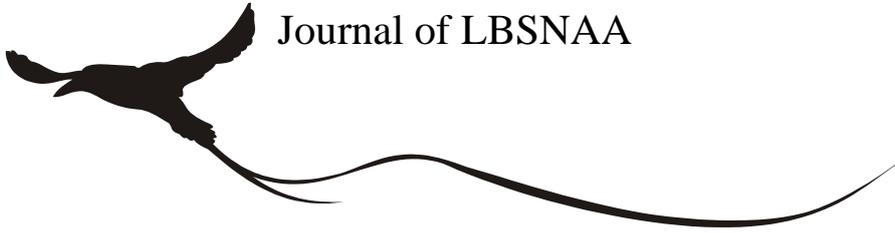




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# THE ADMINISTRATOR

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# The Administrator

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## Political and administrative will in land reforms

**Naresh Chandra Saxena, IAS (Retd.)**  
68, Friends Colony, New Delhi – 110 065

This case study describes the efforts made by the Revenue Secretary towards land reforms in the state of Uttar Pradesh (UP) during 1980–81. 75% of the total population in UP was dependent on agriculture at that time. 50% of the rural population had either no land or owned less than one acre. 20% of the total arable land was held by one per cent of rural population in holdings of 30 acres and above. The state government introduced ceiling legislation in 1972, which should have yielded a surplus of about 10 lakh acres; however, till 1982 only 2 lakh acres land could be distributed to about 2 lakh families. Another 50,000 acres of land was involved in litigation. It was generally believed that the best quality land was either not declared surplus or possession could not be taken because of legal hurdles.

N. C. Saxena, Secretary of the Revenue Department<sup>1</sup>, was convinced that other programmes to help the rural poor will not have much impact unless assets in the form of land are transferred to them. Although legislation against absentee landlordism was carried out successfully in the state in the 1950s, yet the Revenue Secretary had estimated that share cropping was still being practised on about 5% of the total cultivated land, which was about forty million acres in the state. According to state laws, renting out of land was prohibited, but the legal position about share cropping was not clear. If the share cropping arrangement amounted to lease, it was unlawful, but if it amounted to a licence, whereby both the owner and the tenant were participating in crop production, it was not illegal. The general impression in the rural areas was that share cropping was not permitted under law. Since the state laws did not admit of sub-tenancy, it was not considered necessary to record the names of sub-tenants and share-croppers. If, however, in a court of law it was proved that a person had leased out his

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<sup>1</sup>This department in the states looks after rural land related issues, including land reforms. In UP, this is not considered to be a high priority department, as the Revenue Secretary does not deal with transfers and postings, and land revenue is no longer an important source of state revenues.

land, he would immediately lose ownership which would either pass on to the sub-tenant or to the state government. Because of such stringent law, no cultivator would permit the share-cropper to cultivate the same piece of land over a considerable period of time.

The Revenue Secretary put up a proposal before the cabinet suggesting that leasing out of land should be made lawful and names of the sub-tenants and share-croppers should be recorded. He pleaded with the cabinet that such recording could be feasible only if it was known to the land owners that they would not lose ownership and no rights would accrue to the sub-tenants or the share-cropper. During the discussions before the cabinet, he was asked what useful purpose would be served by recording if no rights are to be given to the sub-tenants. He explained his scheme by stating that once 5 to 10 lakh people are recorded as sub-tenants, as in West Bengal, they would immediately be eligible for short-term credit from the financial institutions and it was likely that after a period of 5 or 10 years a pressure lobby would emerge of such identified sub-tenants and they would then ask the government for occupancy rights for a longer duration, and may be, in due course of time the state government would not hesitate to grant them permanent rights, just as it was done by the British government in stages between the period 1873 to 1936. The then Chief Minister, V. P. Singh (who later became the Prime Minister of India in 1989), felt it was not proper for the government to tell the land owners at the time of recording that no rights would accrue to the share-croppers and then gradually give rights in a phased manner under pressure. It was obvious that the cabinet ministers did not wish to disturb the existing power equations in the village. The proposal was therefore not accepted by the cabinet.

Despite such a decision, Saxena issued orders to all the collectors (many of his colleagues thought that this step to issue the circular was unethical and against the spirit of the cabinet decision) to record the names of such land owners who owned more than 5 acres of land but were not living in the villages. Such lists were compiled and it showed that roughly 10 lakh acres of land (8% of the total in that category) was involved in such arrangements. He thought that perhaps some absentee land owners would get scared because of the circular and sell out their lands to such people who were living in the villages. Although land would thus not pass on to the landless but at least if ownership was transferred from absentee landowners to progressive cultivators living in the villages, production will go up. Later,

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informal enquiries from the field officers showed that there was hardly any sale of land. However, the scheme of recording absentee landowners did increase corruption at the lower levels, as many clever revenue officials threatened rich land owners and extorted money from them for not recording them as absentee landowners.

Decision making in the state of UP was by and large in the hands of bureaucrats. The Revenue Minister was highly sympathetic to the cause of weaker sections and this helped the Secretary in issuing many orders for ensuring benefits to the rural poor. Some of the new government orders initiated by him were as follows:-

- i) In addition to ceiling land, the state government had distributed wasteland or land meant for common utility to the rural poor. It was common knowledge that wherever land was of better quality possession was still with the powerful people in the village. In order to ensure transfer of effective possession to the beneficiaries, the Secretary suggested to the cabinet that such people who have illegally occupied common utility land should be prosecuted and a minimum punishment of 6 months imprisonment should be awarded to them. This suggestion was promptly accepted by the cabinet and was in fact highly publicised by the Chief Minister as one of the achievements of his government. The Secretary made it compulsory for senior officers like collectors and commissioners to visit the villages personally and take action against subordinate officers for reporting bogus figures regarding possession.
- ii) Wages in the agricultural sector were very low in many parts of the state. Implementation of Minimum Wages Act was not the responsibility of the Revenue Department, yet orders were issued making it compulsory for all revenue officials to prosecute landowners paying less than the wages prescribed in law. The entire procedure was explained and constant follow-up was attempted. As the sub-divisional officers were themselves competent to impose fines and the recovery was upto ten times the amounts not paid by land owners, it was thought that implementation of this scheme would not cause much problem.

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- iii) The Ceiling law provided that wherever irrigation facilities have been introduced because of state government's efforts like canals, state tube wells, etc., the ceiling limit would get reduced from 30 to 18 acres. No effort was made since 1972 to enforce this clause. Detailed instructions were issued on this point asking the collectors to open up fresh ceiling files against those who had benefitted by state irrigation works.
  - iv) Legal provision existed for realising heavy fines against those who encroached upon public utility land. In the past fines had been imposed but no effort was made to realise the arrears. Attention of the field staff was drawn to this aspect also.
  - v) The performance sheet on which the evaluation of revenue officials upto the collectors was based was revised thoroughly so as to give greater importance to schemes which would benefit the rural poor.

However, most of the above schemes remained on paper. The field staff had no faith in the measures which the Revenue Department had been suggesting. Some of the collectors agreed in principle to what was being suggested but they had no time to go through the circulars or to monitor their implementation. They soon discovered that their superiors like the divisional commissioners or members, Board of Revenue, had themselves not read the circulars and never asked any question during their visit to the districts about speedy implementation of the new measures which the government had initiated. Short tenures in the field meant that officers did not wish to involve themselves in schemes which would upset the prevalent social power structure. The "urgent" work was given priority over "important" work. After some time the government orders which were issued by the Revenue Department became a source of amusement to the field staff. Such circulars were seen by them not as government orders but as arising out of the personal whims of Saxena, the Revenue Secretary. He was seen to be attempting "revolution" through government circulars. However, one or two collectors took these instructions seriously and tried to enforce them despite indifference and hostility from the lower staff. There is no evidence to show that such collectors were summarily transferred from the districts. On the other hand, their work was appreciated by the Chief Minister.

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Saxena was convinced that any effort to lower the ceiling limit would either not be politically accepted or will not yield much land for the landless. He was also aware of the enterprising nature of the rich farmers who were controlling the village institutions and the political apparatus of the countryside. Therefore, he thought that the best way to get more land for the poor would be to attack such urban people who have got a good source of income from non-agricultural sources but are still holding land in rural areas. He issued a circular in September 1980 asking the collectors to examine a proposal to debar such people from holding agricultural land whose income from non-agricultural sources was more than Rs.10,000 a year<sup>2</sup>. News about this circular got leaked to the press in due course of time and Kuldip Nayyar in Indian Express commented upon it adversely in its issue dated 7th December 1980. One of his points of criticism was that identifying such landowners would lead to corruption. He wrote, "Since village level functionaries are to provide the information, it is feared that information would be fudged and many of those who fall in the Rs. 10,000 and above category may go undetected because of pressures or bribe."

On that particular day, a large number of Congress MPs from the state had gathered in the national capital for a meeting called by Rajiv Gandhi, the then Secretary of the Congress Party, to discuss the threat of agitation given by the rich farmers against low prices of commercial crops like sugarcane, potato, onion, etc. They were shocked at the steps which the Revenue Department was planning to take and they unanimously decided to ask the government to withdraw the circular. The Chief Secretary of the state was present in the meeting and he was also horrified at the cheeky and totally unwarranted circular from Saxena. It is learnt that Rajiv Gandhi also scolded the Chief Secretary at this "socialistic" but impractical initiative. The Chief Secretary promptly asked Saxena from Delhi itself over the telephone to withdraw the circular. Saxena, however, refused to budge and wrote a long note justifying the circular and pleaded with the government not to act in haste. However, he was over-ruled in writing on the file and ultimately the controversial circular was withdrawn.

The orders of the Chief Secretary on the file on the note of Saxena were as follows:-

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<sup>2</sup>The median per capita income in rural UP in 1980 was about Rs. 1500 a year, and the class IV government employee earned about Rs. 4,000 a year.

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*“I had communicated the orders of the Chief Minister to the Revenue Secretary. It is unfortunate that these orders have not been complied with. It is rather strange that a circular hinting at the intention of the government has been issued without obtaining orders of the cabinet. In such important matters, before collecting information from the field the proposal should have been referred to the cabinet. Order of the Chief Minister to withdraw the circular must be complied with immediately.”*

In retrospect Saxena thought that if he had kept the income limit as Rs.100,000 per annum instead of Rs.10,000 there would have been a greater chance of the acceptance of the scheme. Although very little land would have been available through a higher income level, yet at a later stage this could have been reduced by a more progressive government.

In the tarai of district Nainital of the state, most of the cultivated land till 1950 was in possession of the tribals, Bhoksas and Tharus. The area was full of health hazards till 1960. The government started an ambitious colonisation programme by improving health and communication in that area and encouraged people from other areas to settle down. Gradually people from Punjab, who were known for their enterprising qualities, settled in that area. They were allotted farms of 100 to 5000 acres by the government. Gradually they also occupied land which was till then being cultivated by the tribals. In 1969, the Government of India issued guidelines to the state governments for preventing alienation of the land from the tribals to the non-tribals. In pursuance of these guidelines, the state government passed a law declaring further transfer of land from tribals to non-tribals as unlawful. However, all transfers to the enterprising immigrants till 1969 were regularised instages.

Illegal transfer of land from the tribals to the non-tribals continued even after 1969. In many cases, the tribals were evicted by for ceandin many other cases they were paid paltry sum of Rs.500 per acre, for handing over possession to the non-tribals, most of whom were from Punjab. Market value of land in that area in 1980 wasRs.40,000 to Rs.1,00,000 per acre. However, in all such cases of transfer of land, the revenue records still showed the tribals as owners of land because of the restriction imposed under law in 1969. According to the estimates available, about 15000 acres of land was in possession of about 500 non-tribals taken from about 5000tribals.

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Since the problem was confined by and large to one district only and the number of people concerned was not high, Saxena thought that it could be possible to restore possession to the tribals without hitting at the power structure of the ruling elite. He studied the laws made by other state governments and analysed the reasons for non-implementation of this programme. According to his analysis, a large number of loop-holes existed in the law itself which resulted in delay. Since detailed drafting of such laws is done at the officer level, he was optimistic in getting the sanction of the cabinet on an amendment which eliminated the loopholes in the laws of other state governments. The new law, that he suggested, read as follows:-

- (1) *“211. Where any land held by a tenure-holder belonging to a scheduled tribe is in occupation of any person other than such tenure-holder, the Assistant Collector may, SUO MOTU or on the application of such tenure-holder put him in possession of such land after evicting the occupant and may, for that purpose use or cause to be used such force as may be considered necessary, anything to the contrary contained in this act notwithstanding.*
- (2) *Where any person, after being evicted from any land under sub-section (1), re- occupies the land or any part thereof without any lawful authority, he shall be punishable with imprisonment for a term which may extend to three years but which shall not be less than six months and also with a fine which may extend to three thousand rupees but which shall not be less than one thousand rupees.*
- (3) *Any court convicting a person under sub-section (2) may make an order to put the tenure-holder in possession of such land or any part thereof and such person shall be liable to eviction without prejudice to any other action that may be taken against him under any other law for the time being inforce.*
- (4) *Every offence punishable under sub-section (2) shall be cognizable and non-bail able.”*

Thus, unlike other state laws, the above draft empowered administration to physically throw out the encroacher and restore possession without waiting for any court order. This was he sitantly approved by the state cabinet (although one of the ministers warned that it would lead to a bloody class

war) and an ordinance was issued in June 1981, which was subsequently ratified by the assembly and become part of the Zamindari Abolition Act in August 1981.

The district administration was not very keen to implement such an ordinance. Many officers at the district level thought that tribals would not cultivate land intensively and therefore production would suffer. Saxena himself visited the district a number of times and tried to convince the officers about the need to restore at least some of the alienated land to the tribals.

Before any action could be taken, representatives from the non-tribals met powerful ministers of the Government of India and gave a number of representations. N. D. Tewari, who was MP from the Nainitalterai and thus depended upon the support of powerful non-tribal rich farmers, was then an important minister at the centre. Saxena had worked under him as DM Aligarh when Tewari was the Chief Minister. He called Saxena to Delhi and politely pleaded with him to withdraw the ordinance. He even advised Saxena to take leave from the IAS and do research on land alienation so that concrete facts could be brought to surface.

Zail Singh, who knew many immigrants personally, was the Home Minister and also incharge of tribal welfare, as this subject in 1981 was with the Home Ministry. He asked the Chief Secretary to withdraw the ordinance, who in turn asked Saxena to put up a letter to the central government explaining the position of the state government. Since restoration of land to the tribals was one of the important policy directions of the central government itself, and since the ordinance was approved by the state cabinet, Saxena was in a strong position this time and he put up a strong worded draft in justification of the ordinance. He quoted figures stating that about 1.50 lakh acres of land had already been passed on from tribals to the non-tribals which was not being restored. The operation was going to be a limited one and confined only to about 15,000 acres which has been alienated recently. In his draft Saxena included one para which read as follows:

*“The district administration has been instructed to carry out the eviction operation in stages after careful verification of revenue records. The state government has taken all possible precautions to avoid violence, but in view*

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*of the high prices of land and the economic and political muscle which the non-tribals have acquired in that area, a situation of confrontation between non-tribals and district administration cannot be ruled out. The government is committed to protecting the interests of the tribals and weaker sections and, if need be, force shall be used to evict the unauthorised occupants over the triballand.”*

The above paragraph was however not included by the Chief Secretary in his letter to the Home Minister.

Against the opposition of the Chief Secretary to use police force in that area to restore possession, Saxena appealed to the Chief Minister and got orders from him for posting six companies of police force in that area. Despite the presence of force practically nothing was happening in the district. Saxena was in touch with the collector practically every day. He was informed by the collector that although force had been posted yet the I.G. had instructed his subordinates not to use force. Once he was told by the collector that the Chief Minister had himself stayed the entire operation, he contacted the I.G. and the Chief Minister's Secretariat and was informed that no such orders were issued by them. It was obvious that the collector was not very keen to implement the provisions of law.

Saxena was summoned to Delhi a number of times. He explained his view point to the central ministers and officers and drew their attention to a large number of circulars issued by the central government in favour of the tribals. The Government of India officials appeared to be sympathetic but they did not want confrontation with the powerful non-tribals. Saxena felt as if the GOI authorities were saying, “We issue guidelines in favour of tribals with the understanding that these will not be taken seriously by the implementation agencies. Please do not embarrass us by acting upon our policy prescriptions.”

In the meantime, the non-tribals obtained a stay order from the High Court, thus saving the central and UP ministers from further embarrassment. Saxena continued as Revenue Secretary for a few more months. In October 1981, Saxena was transferred to a more important job as Food Secretary. His transfer had nothing to do with the efforts made by him to implement land reforms in the state. In fact, transfer was seen as a "promotion" by his peer group.

The High Court issued a notice to the state government to file a counter affidavit while maintaining the stay order. However, the state government took no interest in the case and ultimately the court passed exparte order sometime in 2011 repealing the law.



# The Anatomy of Capital Punishment in India

**Dr. Saumitra Mohan, IAS**

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Prison administration is an alienable part of our justice delivery system, which, many feel, calls for urgent relook and attention. The prison administration in India has existed almost unchanged since its inception, though a nomenclatural change has been implemented in the meanwhile. Our prisons are no longer called 'jails' and have been christened as correctional homes today in keeping with the changed ethos.

Even though the prison infrastructures have improved drastically over the years, we still have a long way to go as far as our treatment of the inmates inside these correctional homes is concerned. Whatever has come out through a recent study titled 'The Death Penalty Research Project' is definitely not very uplifting. The researchers at Delhi's National Law University (NLU) in this first ever comprehensive study of the socio-economic profile of prisoners serving death sentence in our jails have found most of them to be from economically vulnerable sections, backward communities and religious minority groups.

The said study found our prison administration plagued by fundamental flaws where the death penalty seemed to be an instrument in systemic marginalization of prisoners from vulnerable backgrounds. Almost 75 per cent of the prisoners interviewed were from 'economically vulnerable' and socially disadvantaged groups. Over half the death sentence awardees worked in unstable unorganised sector and worked as auto drivers, brick kiln labourers, street vendors, manual scavengers, domestic workers and construction workers. About 19 per cent of those on death row had attended only primary school. Many prisoners were disadvantaged on both counts; nine out of ten who had never attended a school were also economically vulnerable. This is important because a prisoner's economic status and level of education directly affect his ability to effectively participate in the criminal justice system to secure a fair trial.

Delineating their socio-economic background, the resultant report discovered that more than 80 per cent of the prisoners facing capital punishment never completed their schooling and nearly half of them began working before they became a major. Moreover, around 25 per cent of the convicts were juveniles between the age of 18 and 21 or above 60 years when the crime was committed. Among those facing death penalty, dalits and tribals constituted 24.5 percent while over 20 percent belonged to religious minorities. As it appears from the report, Indians belonging to the economically backward and vulnerable sections have found it difficult to bear the burdens imposed by our criminal justice system while handing out death sentences. As a result, it has been noticed that the death penalty often disproportionately affects those who have the least capabilities to negotiate our criminal justice system.

Talking about the right to be present at one's own trial to defend oneself properly, only one out of the four interviewed had attended all their hearings. Some prisoners would merely be taken to the court premises by the police and then confined to a court lock-up without ever being produced in the courtroom. Of 189 prisoners, 169 did not have a lawyer. Again, although anyone being arrested has to be informed the reason for the arrest, 136 prisoners said they were taken away to 'sign papers' and were never allowed to go home again.

Besides, 166 prisoners were not produced before a magistrate within 24 hours of the arrest as is mandatory. Weeks and months passed before they were produced; sometimes the arrest was recorded only then. The interim period was often spent in torture. The researchers interviewed a majority of the 385 prisoners on death row, of whom one said he would be happy to be killed rather than being tortured every day. One woman had a miscarriage. Of 92 prisoners who had confessed in police custody, 72 had made statements under torture. Death row prisoners were often kept locked while the trial proceeded, and two were so far removed from the stand that they followed nothing of their own trial.

Even when prisoners were present in court, the report says, "the very architecture of several trial courts often prevents any real chance of the accused participating in their own trial." The accused were often confined at the back of the courtroom while proceedings between the judge and the lawyers took place in the front. It is notable that everyone charged with a

crime has the right to an interpreter if she/he does not understand the language used in court, and to translated documents. But this requirement is seldom met. Over half the prisoners interviewed said they did not understand the proceedings at all—either because of the obstructive court architecture or the language used (often English).

Part of an accused's right to a fair hearing is the right to challenge evidence produced against them. In India, trial courts can question the accused directly at any stage, and the Supreme Court has ruled that accused persons must be questioned separately about every material circumstance to be used against them, in a form they can understand. The study found that these provisions were routinely dishonoured. Over 60 per cent of the prisoners interviewed said they were only asked to give yes/no responses during their trials, with no meaningful opportunity to explain themselves.

Most of the prisoners (seven out of ten) said their lawyers did not discuss case details with them. Almost 77 percent never met their lawyers outside court, and the interaction inside the court was perfunctory. Many of the prisoners preferred to engage private lawyers notwithstanding their economic vulnerability because of the putative incompetence of the underpaid legal aid lawyers. Higher the courts, lesser the information prisoners have about their cases, often finding out about trial developments through prison authorities or media reports, though it is not just death row prisoners who face these violations.

Using statistics, case studies and one-to-one interviews, the project has brought forth a rich resource for a close appreciation of the administration of the death penalty in India. The project team interviewed, between July 2013 and January 2015, all prisoners and their families to comprehend the sociology and psychology of the death penalty in this country. The research team identified 385 prisoners and got access to 373 of them. Surprisingly, there was no reliable database of the total number of death row prisoners in India nor was there any official record or details with any agency of the total number of prisoners executed since independence. The insights of the study are based on the primary and secondary data as accessed through the National Legal Services Authority (NLSA), state and district level legal authorities, prison visits, RTI applications and the High Court.

As per another interesting finding, there is still no exhaustive list of offences punishable by death. 59 sections in 18 central laws, including 12 sections under the Indian Penal Code, including both homicide and non-homicide offences, carry the death penalty. Provisions under provincial legislations are separate, and have not yet been put together in a list. The constitutionality of death sentence was last upheld in May 1980 by the Supreme Court. In the said judgement, the apex court ruled that the death penalty did not infringe the right to life as guaranteed by Article 21 of the Indian Constitution. However, the same should be imposed only in the 'rarest of the rare' cases. Surprisingly, most prisoners sentenced to death in India are not eventually executed. Less than 5 per cent of those sentenced to death by Indian trial courts have actually been executed. In most of the cases, their death sentences were commuted by the higher courts following appeals.

The NLU report makes it clear that its findings do not necessarily suggest that the state authorities intentionally discriminate against poor or less educated prisoners. But the report does allege that the system is so loaded that there is a degree of indirect discrimination at work which worsens the chances of fair trial for prisoners from disadvantaged backgrounds. Yet issues pertaining to fair trial rights and treatment of prisoners on death row by the criminal justice system are almost never discussed with the required gravitas. Indirect discrimination happens against such prisoners when a seemingly impartial and innocuous practice impacts particular groups negatively, even if it is not purposely directed at the groups.

But given the irreversible nature of the death penalty, it is particularly important that fair trial rights are scrupulously safeguarded in such cases. International human rights discourse agrees that every death sentence imposed following an unfair trial violates the right to life. Hence, it is suggested that the only way to end this injustice is to impose an immediate moratorium on the use of the death penalty as a first step towards abolition of the same. The Law Commission of India, in a report last year, recommended the abolition of the death penalty in phases, beginning with ending it for all offences except those related to terrorism.

Indian criminal justice is said to follow several practices which hurt the poor and the marginalised much more than others. What needs investigation is whether these practices are the outcomes of entrenched social and

economic inequalities or whether they have become a form of institutionalised indirect discrimination? The Law Commission said in a report last year on the death penalty, “The vagaries of the system also operate disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an adversarial criminal justice system.”

In the vaguely feel-good ambience, the Death Penalty India Report comes as a rude shock. Principles of custodial care remain theoretical for them, although it is obligatory for the police to take care of their well-being and health. One just hopes that the findings of the report would nudge the prison administrators and policy makers to sit up and take notice to make meaningful interventions to ensure the rights of the people undertrials to have a well-oiled justice delivery system in the country.

\*Dr. Saumitra Mohan is an IAS officer, presently working as the Commissioner of School Education, West Bengal. The views expressed here are personal and don't reflect those of the government.



# The Causal Role of Gender towards Health Inequalities

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## Abstract

The societies do witness disparities in life expectancy, well-being, health indicators, mortality, and morbidity risks. These disparities exist due to the socially constructed roles of men and women, the accepted norms of relationships between them, and socially accepted deprivation and relative availability of necessary resources. These norms positively and negatively affect the health conditions of individuals that are susceptible to, as well as have access to and uptake of necessary nutritional, livelihood, and health services.

The social structures of the various societies carry on the marginalisation and oppression of girls within their variety of cultural ethos and legal practices. As a result of this unequal social order, women are typically relegated into situations wherein they remain deprived of basic facilities to sustain their good health and protect from illness, leading to situations of high health risks as compared to men. Apart from socio-economic reasons, various physiological and genetic reasons have also been found to contribute to the disparity in health indicators of men and women.

*Keywords: Morbidity, Mortality, Inequality, Social, Physiological, Marxist-Feminism, Capitalism*

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## Introduction

World Health Organisation defines health as "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity". Illness and infirmity among the population are unequally distributed and these inequalities are in fact rising rather than coming down in UK since the inception of NHS (Black, [1980] [GMI]). Important factors which generate health inequalities are classified on various social gradients; education, employment, income, neighbourhood, ethnicity, race, religion, and gender (Marmot, 2010). These factors contribute to health inequalities among the people who are vulnerable and suffer deprivation, resulting in poorer health for them. Among wide range of factors influencing health inequalities, gender stands out as an important one (Mathews D, 2015).

Powerful interventions to improve health and decrease inequalities have been applied for long and have been estimated by having a comparison of the information on mortality and morbidity as an indicator of socio-cultural status and their well-being (LGB4, 2012). Instances have been found wherein the health inequalities are prolific when male is compared with female. Surprisingly, the mortality rates of women are lower than men (Annandale & Kuhlman, 2015), however, their morbidity rates are comparatively higher and have a great share in the health statistics (Manoux AS et al., 2008). This statement has an inference; men die quicker but women are sicker (Bartley, 2004) and this initiates a debate on how gender can be an important attribute influencing health inequality.

Talking beyond mortality and morbidity issues, various health and well-being issues have differential impacts on both the sexes. Physiological statuses like depression, dementia and arthritis are more prominent in women, whereas cardiovascular disease, lung cancer, and suicide are more related to men (Broom, 2012). The causal relationship between inherent physiology and health differences has led to overemphasis on the physical contrasts between the genders (Annandale & Kuhlman, 2015), which have been probably overplayed in order to justify the social difference between the two genders (Mathews D, 2015). It is very important to realise that despite the fact that it impacts well-being, genetics does not decide it (Annandale & Kuhlman, 2015). Health disparities between the genders depend on genetics and society both, and how the society structures and impacts our lives (Mathews D, 2015). This paper attempts to analyse the

impact of gender in introducing health inequalities among men and women both as a social and physiological construct.

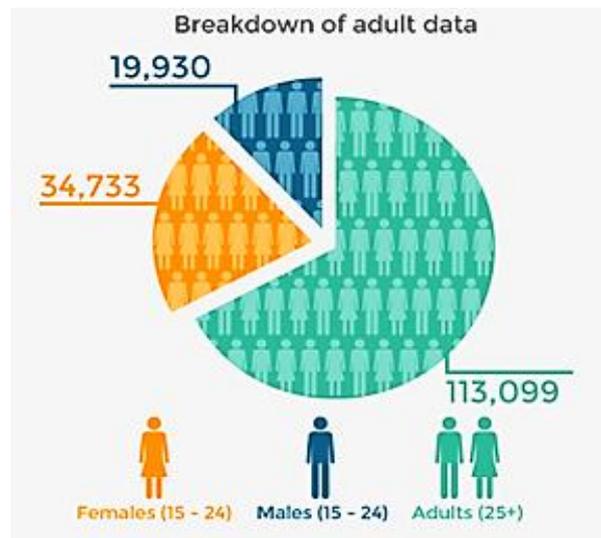
To start with, we must understand the contrast between sex (physiological) and gender (social) to find out whether the inequalities in health have both the societal and biological reasons. Women's reproductive role is a natural fact; however the way it is socially comprehended and understood has significantly influenced their quality of health (Izzati F F, 2016). Reproductive nature of women has been given a medical connotation. Mood change during the menstrual cycle is no longer a natural phenomenon but a medical problem (premenstrual syndrome) (Morrell et al., 2009). This medicalisation implies women counsel doctors and go to hospitals all the more regularly than men (Wang Y et al., 2018). On the other hand, women due to their societal constraints have less access to various basic health needs, which adversely affects their health. They are considered economically unproductive in various societies and therefore don't deserve better resources than men. This actually places women at a different pedestal to men due to their inferior social status.

### **Social Construct**

An important aspect to understand is the relation between the social construct of femininity and the health status of women, which is an important element of study on health inequality influenced by gender (Annandale & Hunt, 2000). On the other hand, masculinity is another social construct which induces men to become more "risk-taking" in order to display machoism by excessive alcoholism, rash driving, drugs, etc., which has resulted into higher deaths due to accidental or other kinds of mishaps (Broom, 2012). Women are more likely to express their extreme feelings by social means but men are more prone to internalising their anguish leading themselves to alcohol and drug abuse and even resorting to suicides (White, 2006). Men are supposed to get into more hazardous and physically challenging jobs than women who are more into household and have less physically tough jobs. Out of 350,000 occupational deaths occurring every year in the world, 90% constitute of men (Mathers et al., 2002). Also, women who have taken full-time working status have better socio-economic status and difference in health status than those who are part-timers and take care of their children and have the household responsibilities, though the data to support this assertion are limited

(Annandale, 2014). This inequality is more prominent for single mother than women who are married and are supported by a partner, even if they are lower to him socio-economically. It is interesting to realise that the varied social situations do induce disparity between the health conditions.

It is found that in developing countries the health awareness and level of education are highly important in creating gender based health inequality. Nigeria has the second highest number of HIV infected people in the world. The pie chart given below shows that young females infected by HIV are more in number than the young males. This is due to their less awareness of the HIV protection and practice of unsafe sex along with low education level as compared to their male counterparts (Nwanna RC, 2010).



*Figure: No. of infected adults in Nigeria*

*Source: Nigerian National Agency for control of AIDS, 2015*

Another interesting theory which ratifies the existence of health disparity among genders is Marxist-feminism interaction base, which believed that the position of women in society is largely based on the influence of patriarchy (male domination) and the needs of capitalism which consequentially maintains this inequality against the women in order to make societies sustain (Miliband, 1982; Callinicos, 1995). Various feminist schools of thought believe that the reproduction process is primarily in

control of men and accessibility to contraceptive, prenatal/postnatal care and nutrition is very limited to women (Abbot et al., 2005), and reproductive health matters make them to completely depend on men (White, 2006) leading to poor health. The access to various preventive mechanism and health awareness tools remains elusive for women due to their subordinate status in the society and therefore they eventually land up in higher health risk zone.

Similarly, the theory of capitalism believed that the division of labour with the work done outside of home by men adds to the value of the economy and work done at home by women doesn't (Zaretsky, 1976). This framework of women as "carer" leads to their socio-economic deprivation and eventually having adverse effect on their health (Cudd A E, 2014; Doyal, 1985), as shown in figure below. The caring duties involve long hours of devotion without proper sleep and no attention towards self-nourishment leading to serious health risks for the women both physiologically and psychologically (Laraia A Barbara et al., 2017). Surely, the effect of the caring role on psychological health may be related to the higher rates of despondency in women of reproductive age (Bebbington, 1996). In many societies women solely take care of their children, elderlies and disabled at home and in some societies even their men also (Carers UK, 2004).

#### *Carers' risk of distress relative to non-carers*

Risk of distress increases with intensity of caregiving.

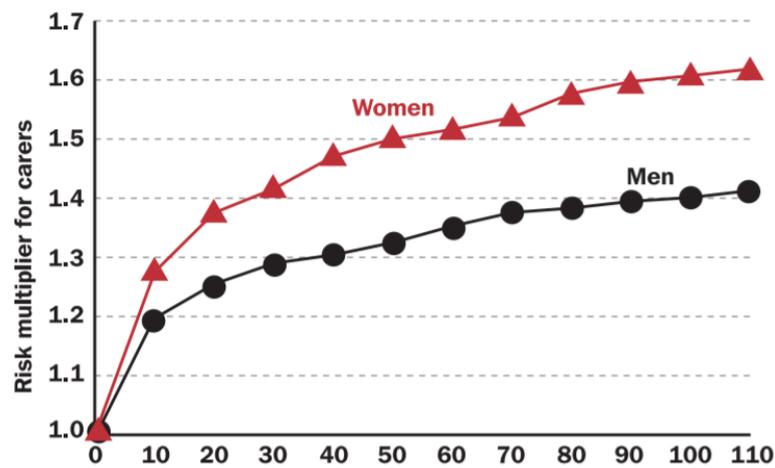


Figure: Carer's distress level

*Source: Social Policy Research Unit, University of York*

An interesting study conducted by WHO (57 countries from years 2002–2004) on various social and economic parameters came out with inference that women have poorer health indicators than men irrespective of their comparative social and economic predominance.

<b>Age</b>	<b>Men</b>		<b>Women</b>	
	<b>Mean</b>	<b>SE</b>	<b>Mean</b>	<b>SE</b>
18–19 years	83.2	0.4	80.1	0.5
20–29 years	81.4	0.2	77.1	0.2
30–39 years	79.3	0.2	73.8	0.2
40–49 years	76.0	0.2	70.9	0.2
50–59 years	73.1	0.3	67.2	0.3
60–69 years	68.4	0.3	63.2	0.3
70+ years	63.4	0.3	59.0	0.3
<b>Marital status</b>				
Married/cohabiting	76.0	0.2	72.2	0.2
Never married	81.4	0.2	78.2	0.3
Divorced/separated/widowed	71.0	0.4	64.4	0.2
<b>Education</b>				
No/incomplete primary education	74.1	0.3	69.2	0.2
Primary completed	76.9	0.2	72.1	0.2
Secondary/High school completed	79.5	0.2	75.3	0.2
College completed or above	79.6	0.4	74.1	0.4
<b>Employment</b>				
Currently in paid employed	78.3	0.2	74.2	0.2
Not working for pay	74.1	0.3	70.9	0.2
<b>Household economic status</b>				
Lowest quintile	75.1	0.3	69.8	0.3
Second quintile	75.9	0.2	70.9	0.3
Middle quintile	77.0	0.3	71.7	0.2
Fourth quintile	78.5	0.3	73.0	0.3
Highest quintile	79.6	0.3	74.6	0.2
<b>Urban-rural residence</b>				
Rural area	77.1	0.2	71.0	0.2

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*Table: Multivariate linear regression analysis on various social and economic parameters*

*Note: 0 to 100 score denotes health status, 0 is least healthy and 100 is most healthy.*

*Source: Hosseinpoor et al., 2012*

Reading from the above table, the health status of a woman (who has completed her college) was as good as that of a man who had an incomplete primary education. Similarly, the health status of a woman in the highest quintile was slightly worse than the man in the lowest quintile of household economic status (Hosseinpoor et al., 2012). Also, both developed and developing countries have relatively poorer health of women in comparison to men. Tudor's inverse law says that those who need medical care most are receiving it least and women in various parts of the world are not able to receive adequate health care leading to poorer health indicators (Wijk van et al., 1996).

### **Physiological Construct**

Apart from socio-economic determinants of inequality, various studies have also revealed that the physiological and genetic reasons do also contribute to gender inequalities. Coronary heart disease (CHD) is a serious medical problem for adults. With rise in age, the chances of CHD rise and presence of overt CHD would be among 27% of men and 17% of women (Web and Williams, 2001). As per Framingham heart study, the incidence of CHD for men increased from 24 per 1000 in age group 65–74 years to 35 per 1000 in age group 85–94 years. In women, the incidence of CHD increased from 14 per 1000 in age group 65–74 years to 28 per 1000 in age group 85–94 years (Vokonas et al., 1988). This implies that women have less cases of CHD during the above age brackets as compared to men, which is merely due to physiology. It is also found that men gain weight in the middle of the body in the form of a fat called visceral, a heart disease risk factor which most women don't have (Lemieux et al., 1994).

Incidences of Parkinson's disease have been found to be greater in men than in women due to estrogen, which protects this neurological capability in women with the help of presence of a specific protein, which is not found in men (Wooten et al., 2004). Male X chromosomes also help in building this

neurological disorder (Gillies et al., 2014). Research on autism has found that the ratio of cases in boys to girls is 3:1 and also indicates upon the non-availability of clinical advice at the right time (Loomes et al., 2017). Cases of stroke in men are more than women in US, and at later age (>85 years) this trend gets reversed in favour of women (Reeves et al., 2008). Nearly 80% of 10 million osteoporosis patients in US are females. Bones in women are protected by estrogen and after menopause this protection weakens and incidences of bone fracture become common (Cawthon, 2011). Cases of migraine are higher in women than men by two to three times due to their hormonal fluctuations during menstrual cycles (Mac Gregor et al., 2012).

Another interesting finding shows that cigarette smoking also has varying influence on men and women with respect to the cases of CHD. There are a billion adults worldwide who smoke (Eriksen M et al., 2012) and are susceptible to coronary heart disease. One study has shown that the risk of coronary heart disease is more in women than men for low consumption (1 cigarette per day to 5 cigarettes per day). Women are more prone to endothelial injury and atherosclerosis (as a result of smoking) and have more chances of developing a CHD (Jee SH et al., 1999). This shows that physiology precedes social construct in introducing health disparity. However, this health inequality can be controlled by means of adequate awareness among women about the risks they carry. These studies infer that physiology does play an important role in making health indicators vary for men and women.

## **Conclusion**

This article has attempted to highlight the role of gender on the health inequality prevalent in the society. Women have faced adversities in their health status due to social deprivation and the economic utility bogey. This inequality has various social and physiological reasons and these reasons are areas of great challenge despite of gradual enhancement in the quality of life and empowerment of women (BMJ, 2015). Social interpretation of gender, which is more tilted towards the biological definition and having influence of economic utility of the gender, has been an important reason for placing women at considerably inferior health status than men. Various instances of diseases and infirmity among women as compared to men have their reasons in the way society has been structured. Expecting erosion of these disparities and making women find their way to social and physical

prosperity thereby leading to enhanced health indicators and diminishing the health inequality looks an area of immediate attention. The role of socio-economic reasons for this health inequality seems to have strong foothold and has led to disastrous consequences towards women health, apart from the concept of medicalisation of women's health which has actually placed constraints on tackling the problem judiciously (Bell et al., 2012). It is also important to understand that the social construct of gender is not the only reason for the disparity, as some part of it is also influenced by the inherent physiology a male or female has. However, the adverse impact of this physiological differentiation could be averted by having adequate interventions in the form of awareness and education. Though there are many parts of the world where this problem still persists and inequalities lead to extreme consequences, the efforts are on for reducing it by necessary steps being taken by the society and various organisations, specially being pioneered by World Health Organisation.

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## The Binary That Matters

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*Picture Courtesy: Author*

“What was there to say?... Only that once again they broke the Love Laws. That lay down who should be loved. And how. And how much.”(Roy A., 1997).

The laws have been rewritten. At least for the queer community. At least in some measure.

In the landmark Supreme Court Judgment, Section 377 of IPC has been read down and consensual sexual acts between adults have been decriminalized. Right to privacy being a fundamental right, the Supreme Court has upheld bodily autonomy and sexual orientation as fundamental rights and re-affirmed that societal stereotypes cannot be the basis of suppression of individual liberties and freedoms (Krishnadas R., 2018).

The judgment is said to have unshackled the human instinct to love, yet it is ‘just a step’ for the sexual minorities, and for the society as a whole.

Because change is on one hand, its acceptance by the society is on the other (Krishnadas R., 2018).

In the words of Australian stand-up comedy artist Hannah Gadsby, who herself identifies as gay, “This is bigger than homosexuality. This is about how we conduct debate in public about sensitive things”. Indeed (Boren R., 2018).

### **PERSONAL CHOICE, SOCIETY AND LAW**

Not very long ago, in early 2018, Arundhathi, 25 years, a transgender woman assigned male at birth, exercised her personal choice of coming out as a woman. Distraught by her son’s assertion, the mother filed a Habeas Corpus petition in the Kerala High Court. Arundhathi had to undergo ‘humiliating’ medical and psychological tests, before the court pronounced her a free woman (Shaheed G., 2018).

In this background, the *questions* that I seek to explore in the paragraphs that follow are:

Love, sex, sexuality and marriage being matters of personal choice, to what extent the society and law have a stake in imposing restrictions on such choices? What can be the possible reasonable grounds for such restrictions? Finally, are we moving in the right direction in this context? This article seeks to ask more questions than answer them.

When Akhila Ashokan, a 24-year-old homeopathy student, converted to Islam, renamed herself Hadiya and married Shafin Jahan, her father approached the Kerala High Court with a Habeas Corpus, alleging that his daughter has been a victim of radicalisation, indoctrination and trafficking. The Kerala High Court not only annulled the marriage but directed that Hadiya live in house arrest in the custody of the Dean of her college.

The solitary confinement lasted 9–10 months for her until the Supreme Court judgment in her case. “Can a court say a marriage is not genuine or whether the relationship is not genuine? Can a court say she [Hadiya] did not marry the right person? She came to us and told us that she married of her own accord,” Justice D.Y. Chandrachud observed. From the beginning, she consistently maintained that she married with her *consent* and that she wants to live with her husband.

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Would the things have happened differently if Hadiya had been a man (Economic and Political Weekly, 2017)?

What do the innumerable cases of 'honourcrimes' point to? Crimes against adults marrying not so 'appropriate' partners and without the family's consent. Adults breaking the love laws, and being abducted, beaten up and killed by family members for doing so. More often than not, by the family members of the woman in question (Krishnan K., 2018).

According to a study of Economic and Political Weekly (EPW), "Although the legal system formally defends the rights of individuals as to who they want to live with or marry, it does pose various impediments in the path of those who choose against the will of their parents or the dictates of society. The abuse of process by parents and even third parties goes unpunished by the legal system, only creating new hurdles in the free exercise of the individual's rights" (Kumar A. Prasanna, 2018).

But are legal systems always designed to defend a consensual relationship between adults?

An 'internal circular' from the Office of the Inspector General of Registration, Tamil Nadu, dated September 28, 2017, makes it mandatory to produce original documents of parents, dead or alive. In effect, this amounts to introducing parental consent 'by stealth', before registration of Hindu marriages between legally eligible brides and grooms (Srividya P. V., 2018).

How about adultery—*a married woman* engaging in sexual relationship outside of her marriage? Under the Adultery Law, Section 497 of IPC, the husband of the woman in question alone can bring about charges of adultery, and only against the adulterous man. Though, it is a consensual relationship between an adult man and an adult woman (Economic and Political Weekly, 2018).

In September 2018, the Supreme Court pronounced Section 497 of the Indian Penal Code as unconstitutional, saying that, "while adultery could be a ground for civil issues, including dissolution of marriage, it could not be a criminal offence"(The Indian Express, 2018).

Although the Central Government had defended Section 497 as being important for safeguarding the institution of marriage, hence, important for the ‘collective good’.

How would the society disentangle these legal issues that are ‘enmeshed with issues of privacy, gender discrimination and assumptions of morality’ (Economic and Political Weekly, 2018)?

### THE BINARY THAT MATTERS

**The larger question that needs to be answered is *not* whether it is good or bad sex, moral or immoral sex, natural or unnatural sex, reproductive or non-reproductive sex, romantic or recreational sex, within caste or out of caste sex; but, *whether it is consensual or non-consensual sex. While the former are shaped by cultural and social norms and we may continue to debate what is right from wrong, the latter is crucial for the wellbeing and safety of all concerned.***

According to Section 375 of the Indian Penal Code, *consent* means an unequivocal voluntary agreement when a woman by words, gestures or any form of verbal or non-verbal communication communicates willingness to participate in the specific sexual act, provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact be regarded as consenting to the sexual activity.

In the case of rape of a US scholar Christine Marrewa Karwoski by Mahmood Farooqui, the conviction by the trial court was overturned by the Delhi High Court and the accused was exonerated on the following grounds: “It remains in doubt as to whether such an incident, as has been narrated by the complainant, took place and if at all it had taken place, it was without her will/consent, and if it was without her consent, whether Farooqui could discern/understand the same”. The court also added, “Instances of woman behavior are not unknown *that a feeble ‘no’ may mean a ‘yes’*” (Butalia Urvashi, 2018).

Does a feeble ‘no’ stand the test of ‘unequivocal voluntary agreement’?

In any intimate relationship involving two partners, the *consent* of both partners is paramount. But when applied to diverse contexts, cultures and times, *consent* may be a very nuanced concept that needs to be understood

and interpreted carefully and cautiously, particularly by the practitioners of law.

Sexual act by a husband with his wife without her consent does not amount to rape, even when accompanied with use of force. This is so, despite the recommendation of the Justice Verma Committee to make marital rape an offence. Is it a legal blind-spot or is it important for protecting the institution of marriage, and hence, the 'collective good' (The Hindu, 2013)?

*Consent* is about power or lack of it. And when deciphering *consent*, can law turn a blind eye to the intersectionalities of age, gender, sexuality, caste, class, nationality and so on (Vahabzadeh A., 2015)?

## **GENDER BASED VIOLENCE**

Human beings have more similarities than differences based on sex and gender. Yet, sex and gender play a disproportionately significant role in determining one's choices of clothes, interests, education, profession and practically one's course of life. And most unfortunately, the benign variations in sex and gender form basis of gender based violence, which is prevalent in various forms.

The Criminal Law Amendment Act (CLA) of 2013 gave legal protection to the women of this country from gender based violence, like acid attack, voyeurism, disrobing, stalking, rape, gang rape, rape by husband after separation. Many of these forms of gender based violence were hitherto unrecognized by law.

Unfortunately these legal protections are not available to those from the LGBTQIA community, who are not located strictly on the female side of the typical sex or gender binary; though they clearly are victims of gender based violence in much the same way (McConnell Fred, 2014).

A Karnataka based study of 2012 found that men who have sex with men and transgendered individuals are highly vulnerable to sexual violence and are unable to report the same due to the social stigma attached with men acknowledging being victims of sexual violence (Shaw S. Y., 2012).

Protection against nonconsensual sexual intimacies is a natural corollary to the freedom of consensual sexual intimacies between adults. Then protection of the queer community from gender based violence may be another legal blind spot.

So, yes, it is ‘just a step’. If the sexual minorities are to exercise bodily autonomy and sexual orientation as fundamental rights, laws need to be written, rewritten and read down, even if one step at a time.

And with each step, the social structures, families and parents need to become tolerant of diversities and foster inclusion. In these times of social churning and transition, the onus is on each one of us, to go beyond ‘who we are, to become who we can be’ (Bhan Gautam, 2018).

To quote Justice D.Y. Chandrachud in the Supreme Court Judgment on Section 377 IPC, “We must, as a society, ask searching questions to the forms and symbols of injustice. Unless we do that, we risk becoming the cause and not just the inheritors of an unjust society”.

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# The importance of establishing an office of the chief of defence staff in an age of integrated warfare

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## EXECUTIVE SUMMARY

War in today's world cannot be fought with outdated organisations and structures, wherein as per the existing strategies, the army, navy and air force conduct operations in a linear stand-alone mode, with coordination and cooperation only being achieved based on personalities<sup>1</sup>. The dynamics of modern battles calls for joint planning and conduct of operations by amalgamating all three services—the Army, Navy and Air Force—under a joint commander. It also calls for joint training, integrated logistics and compatible equipment. This can only be achieved by creating tri-service integrated theatre commands to synergise the capabilities and combat potential of the individual services. This synergy of resources towards higher level of efficiency can be best achieved by aligning the authority and accountability by appointing a single authority to ensure operational preparedness in the form of a Chief of Defence Staff (CDS).

## OUTLINE OF THE PROBLEM

1. **Statement of the Problem.** There is a requirement to carry out restructuring of the armed forces of India, as summarised below:-
  - (a) Carry out review and rebalance force structures to optimise the combat power and synergise all assets to transform the armed forces from three individual military services to a

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<sup>1</sup>Centre for Joint Warfare Studies (CENJOWS) Paper on Defence Reforms by Lt. Gen. Vinod Bhatia, PVSM, AVSM, SM (Retd.) dated August 2017.

military power capable of performing across the field spectrum of conflict.

- (b) The restructuring should aim to ensure synergy, integration and jointness among the three services, both inter and intra as well as with the Ministry of Defence. This would require creation of integrated joint service commands to better manage the future challenges and vulnerabilities.
- (c) To create a single authority to head the armed forces and plan and conduct joint operations, prioritize and allocate war efforts of the three arms, as also be the single point advisor to the government on military matters.

2. **Current System of Managing the Defence of the Country.** There are currently three layers of managing the armed forces.

- (a) There are three individual armed forces layered with the three services having their own chiefs (chiefs of Army, Navy and Air Force). The armed forces are currently organised into their respective theatre commands. There are a total of 13 theatre commands, seven of the Army, and three each of the Navy and the Air Force.
- (b) The senior most of the three service chiefs officiates as the Chairman, Chiefs of Staff Committee (CoSC). The Chairman COSC is served by Headquarters Integrated Defence Staff (IDS). He, therefore, does the dual task of looking after his own service and has the additional responsibility of the Chairman CoSC.
- (c) Above them is the political layer with the Defence Minister and the Prime Minister supported by the bureaucratic layer (Defence Secretary) being ultimately responsible to the people for the defence of the nation.

3. **Root Causes of the Problem.** Major military changes and restructuring of the armed forces need to be regularly carried out with the evolving nature of warfare. Changes in the Indian forces have been carried out in the past: the restructuring of the Indian

Army after the 1962 war; and structural changes as a follow-up of the 1975 Krishna Rao Committee report<sup>2</sup>.

4. In the last two decades, there have been three committees which have recommended organisational changes in the armed forces aimed to bring in jointness for fighting the future integrated wars. However, these recommendations are yet to be implemented. These are as under:-
  - (a) **Kargil Review Committee (KRC) Report** of the year 2000 recommended the establishment of the post of Chief of Defence Staff (CDS)<sup>3</sup>.
  - (b) **Naresh Chandra Task Force's Report on National Security** in the year 2012 recommended the appointment of a four star general as Permanent Chairman of the Chiefs of Staff Committee (CoSC)<sup>4</sup> with a fixed tenure of 2 years, rotated among the three services. The Committee also recommended the creation of a separate special operations command.
  - (c) **Lt. Gen. (Retd.) D. B. Shekatkar Committee Report** submitted in the year 2017 recommended the appointment of a CDS<sup>5</sup>.
5. **The Stakeholders.** The stakeholders in the uniformed fraternity are the three services and the individual service chiefs. Then there is the Chairman Chiefs of Staff Committee. Among the civil functionaries affected by the post of the CDS are the Defence Secretary and the civilian staff of the MoD.

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<sup>2</sup>The text of the K.V. Krishna Rao Committee is classified and not available in public domain.

<sup>3</sup>Kargil Review Committee Report.

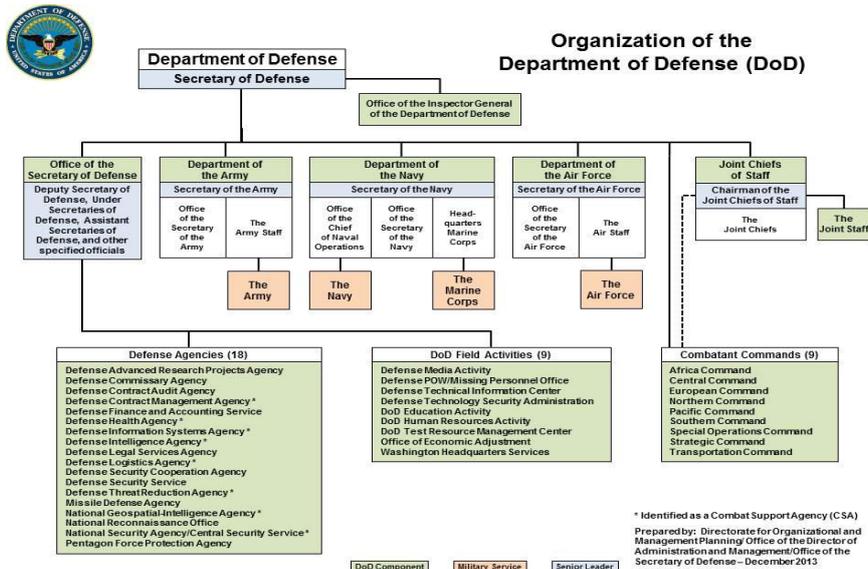
<sup>4</sup>The text of the Naresh Chandra Task Force Report is classified and not available in public domain. The inputs on the same have been obtained from an article "An Appraisal of the Naresh Chandra Task Forces' Report on National Security" dated 16 July 2012 by Mr. Nitin Gokhale.

<sup>5</sup>The Shekatkar Committee Report is not placed in public domain due to operational aspects contained in it. The inputs on the same have been obtained from the abridged script of the talk given on 20 Sep 2017 at the Centre for Joint Warfare Studies on "Transforming the Indian Armed Forces for Meeting Future Security Challenges" by Lt. Gen. Vinod Bhatia, PVSM, AVSM, SM (Retd.) who was a member of the committee.

## REVIEW OF CURRENT SCENARIO

### Various Models of CDS in Other Nations

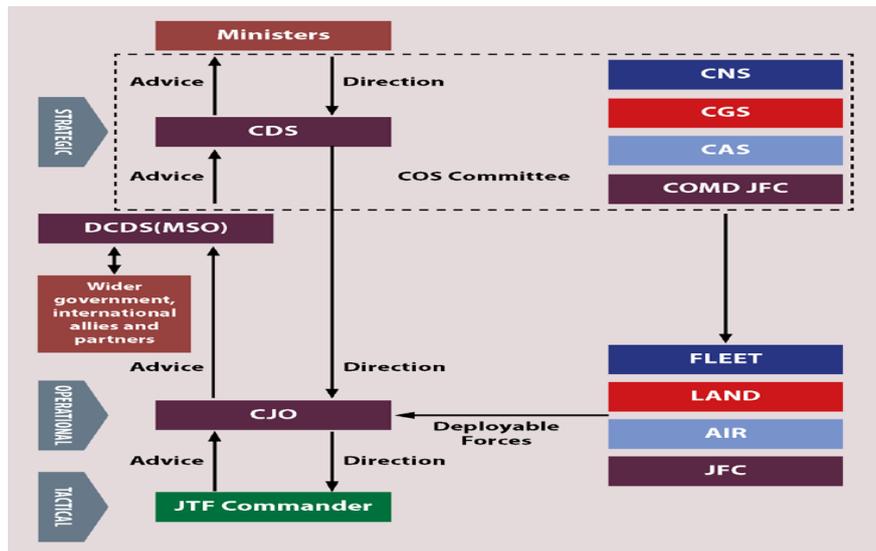
6. Over 65 countries, including all the major powers, have gone in for joint models each suited to their own conditions. These include our two main potential adversaries, i.e., Pakistan and China.
7. **USA Model.** In USA, the Chairman of the Joint Chiefs of Staff (CJCS) is the highest military designation who acts as the Principal Military Advisor to the President, the National Security Council (NSC) and the Secretary of Defence<sup>6</sup>. The CJCS does not have military command over the armed forces and his role is mainly towards planning, advice, policy formulation, requirements, doctrine, training, education, etc. The US model is as shown in the figure below:-



### Organisational Structure of Ministry of Defence in USA

<sup>6</sup>[http://history.defence.gov/portals/70/Documents/dod\\_reforms/Goldwater-NicholasDoD\\_Record\\_Act\\_1986.pdf](http://history.defence.gov/portals/70/Documents/dod_reforms/Goldwater-NicholasDoD_Record_Act_1986.pdf)

8. **The UK Model.** In UK, Chief of the Defence staff (CDS) is the head of the British Armed Forces and advisor to the Secretary of State for Defence and the Prime Minister. Defence Council is the apex decision making body<sup>7</sup>. The individual service chiefs develop forces to meet defence needs through recruitment, education, training, etc. The structure of defence during operations is depicted below:-



### Chain of Command for Joint Operations in the UK

9. **The Australian Model.** In Australia, the organisation of Ministry of Defence flows from Defence Act 1903, as amended from time-to-time and subordinate legislation<sup>8</sup>. The Chief of Defence Forces (CDF) is the advisor to Defence Minister and also possesses command authority over the Australian Defence Forces (ADF). The Defence Secretary and the CDF jointly administer the defence

<sup>7</sup>[https://publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/484941/20151208\\_How\\_Defence\\_WorksV4\\_2.pdf](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/484941/20151208_How_Defence_WorksV4_2.pdf)

<sup>8</sup>Refer [https://s3-ap-southeast-2.amazonaws.com/ad-aspi/import/12\\_53\\_35\\_PM\\_ASPI\\_defence\\_almanac\\_2011\\_12.pdf?vNzXEQtA5bqdxWO9r60xyDAD45g2\\_d1H](https://s3-ap-southeast-2.amazonaws.com/ad-aspi/import/12_53_35_PM_ASPI_defence_almanac_2011_12.pdf?vNzXEQtA5bqdxWO9r60xyDAD45g2_d1H).

forces in a manner that matters falling within the command of forces are handled by CDF.

### **ALTERNATIVE SOLUTIONS, EVALUATION AND RECOMMENDATION OF STRATEGY**

10. It is important that India reflects on the security challenges that confront it, undertakes the necessary reforms urgently, reap the benefits of holistic thinking and synchronized action, and have a coherent long term security strategy<sup>9</sup>.

#### **The Process of Integration**

11. Based on the recommendations of the Group of Ministers under the KRC in the year 2000, the Integrated Defence Staff (IDS) has already been created with two new integrated commands, Andaman, Nicobar Command (ANC) and Strategic Forces Command (SFC) with considerable devolution of financial and administrative powers<sup>10</sup>.
12. In 2003, Nuclear Command Authority (NCA) comprising political and executive council was established and the SFC was made a part of the NCA. However, instead of the CDS heading the IDS, the Chief of Integrated Staffs Committee (CISC) was created to run the IDS. The Defence Intelligence Agency (DIA) is also placed under the CISC.
13. **Options.** Jointmanship is characterized by trust, confidence, mutual respect and synergy rather than competition. If jointmanship is to progress, there are two options as given below:-
- a. **Option 1.** To appoint a permanent Chairman, COSC, with no say in operational matters.
  - b. **Option 2.** To appoint a CDS (with a rank higher than the armed forces chiefs), who would be the final authority on

<sup>9</sup>Arun Prakash in "India's Higher Defence Organisation", Journal of Defence Studies, Vol. No. 1, pp. 1-30.

<sup>10</sup>[http://idsa.in/resources/speech/civil\\_military\\_relations\\_NN\\_Vohra](http://idsa.in/resources/speech/civil_military_relations_NN_Vohra) (2013) in USI National Security lecture on Civil Military Relations: Opportunities & Challenges, pp. 1-15.

operational planning, intelligence and force allocation in conjunction with integrated theatre command that will replace our existing system of separate command headquarters of all the three services<sup>11</sup>.

14. There has been a recent development of setting up of Defence Planning Committee (DPC) headed by NSA. DPC is responsible for the country's military and security strategy, drafting capability, development plans and accelerating defence equipment acquisitions, some tasks also earmarked to be performed by the CDS. However, it does not cater for integration, synergy and jointness of critical agencies, significant to national security, and is hence not considered as an alternative to the CDS.

#### **Recommended Restructuring**

15. The appointment of CDS as the Principal Military Advisor to the political leadership is recommended, being critical to integrating and synergizing the armed forces. The political leadership with the institutional support of both the CDS and the Defence Secretary benefits from the right kind of operational and administrative policy advices and inputs<sup>12</sup>.
16. The issue that jointness and CDS will adversely affect civil military relationship is misplaced. All armies around the world, which have undergone a similar restructuring, have a vibrant civil–military combination, which works well. There are adequate checks and balances, diversity of opinions and views, objective and analytical debate, which lead to better policy advice to policy makers.
17. We need to develop our own model of defence management which vigorously promotes and sustains balance of power, military professionalism while being fully in tune with our constitutional

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<sup>11</sup><https://www.dailyo.in/politics/chief-of-defence-staff-army-navy-airforce-india/story/1/18095.html> by Brig. S. K. Chatterji (Retd.) on 30 June 2017.

<sup>12</sup>Raj Shukla, paper on “Civil Military Relations in India”, Manekshaw paper at Centre for Land Warfare Studies, No. 36, 2012, KW Publishers Pvt Ltd. New Delhi.

framework and in harmony with the glorious traditions of the armed forces<sup>13</sup>.

### **Restructured Model**

18. Tri-service integrated theatre commands should be created to synergise the capabilities and combat potential of the individual services<sup>14</sup>. The IDS, ANC and the SFC have already been created. These should be continued along with the creation of a tri-service Aerospace Command, Cyber Command and Nuclear Command. These tri-service joint commands will need the support of a tri-service Logistics and Maintenance Command<sup>15</sup>.
19. The CDS will be created and be the head of all the armed forces, including the joint integrated commands. The recommended role of the CDS should be<sup>16</sup>:-
  - a. To be the Principal Military Advisor to the Prime Minister and the Government.
  - b. Be responsible for all strategic perspective planning, operational, contingency planning, training, logistics and procurements of arms, ammunition, military hardware, supplies and fuel requirements.
  - c. Be responsible for financial planning, budgetary allocations and force structures of the three services and have a primary role in formulation of defence policies.

### **Conclusion**

20. The appointment of a CDS as the Principal Military Advisor to the political leadership is recommended, being critical. The political leadership, while working with the institutional support of both the

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<sup>13</sup>[http://idsa.in/resources/speech/civil\\_military\\_relations\\_NN\\_Vohra](http://idsa.in/resources/speech/civil_military_relations_NN_Vohra) (2013) in USI National Security lecture on Civil Military Relations: Opportunities & Challenges, pp. 1–15.

<sup>14</sup>Centre for Joint Warfare Studies (CENJOWS) paper on Defence Reforms by Lt. Gen. Vinod Bhatia, PVSM, AVSM, SM (Retd.) dated August 2017.

<sup>15</sup>Ibid.

<sup>16</sup>Ibid.

CDS and the Defence Secretary, will benefit from both operational and administrative policy advices and inputs.

21. With the MoD already integrated, the establishment of the appointment of the CDS is the essential precursor to kick-start the process for integration of the armed forces leading to integrated theatre commands, and has to be implemented in that order.



# Trysts of Courts with Religious Freedom in India and the US: A Comparative Analysis

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**Abstract:** Religion is regarded as a crucial aspect of one's identity. It is protected constitutionally in India as well as in the United States of America (USA). Religious freedom has been contentious as well as a constant source of discord in both India and the US. The tenuous relationship of religion of individual vis-à-vis state adjudicated by the respective Supreme Courts has far reaching effects in liberal democracies. Both the constitutions expressly recognise religious autonomy of an individual with his or her relationship with god. The contours of such a conscience, i.e., moral autonomy have been subjected to judicial scrutiny, yielding subjective standards for testing religion's compatibility within secular framework. The court's interpretation on the scope of religious freedom and constitutionalism in respective countries has led to vibrant discord in its understanding as well as controversy, as the court is seen as interloper by some. The article seeks to highlight the tensions, which have prevailed over constitutional interpretations of secular and sacred.

## I. Introduction

Religious freedom is considered as foundational principle of the liberal democratic societies. Religion is axiomatically related to identity of both as an individual as well as a member of a group professing the same religion. Religion is the focal point of identity of an individual and the state where religion has played definite role in history. The rise of Islam as an official religion based on the conception of homogeneity as well as the arrogation of Europe as being civilized is rooted in their Christianity, but 'historically freedom of religion evolved through the competition of state sovereign power and religious communities, depending upon the nature and intensity of religious beliefs and the social function of religion'<sup>1</sup> (Sajó and Uitz 2012:909). The identity of state was inextricably linked with the idea of religious and cultural similarity and now has metamorphosed into

constitutional prerequisite, as to what Ran Hirschl calls ‘theocratic governance, with the constitutional courts and judges emerging as prominent translators of constitutional provisions into guidelines of public life’<sup>ii</sup> (Hirschl 2010:2). Hirschl further rightly cites the places like India, Turkey and Indonesia, where no particular religion is granted formal status but the *religious affiliation is pillar of collective identity* (Ibid 4). India has emerged as a model in the study of secularism in religiously diverse society for the west of interreligious coexistence when religion is prominent in public sphere (Berman, B., Bhargava, R. *et al.* 2013:1–8).

Courts have sat as an arbiter of religious rights where more than often they are asked to adjudicate as Constitutional Court more often than not the thin line between sacred and secular, with competing claims between the individual, state and religious group. While secularism is in domain of the state, religious freedom is the right of the individual guaranteed by the state and courts adjudicate upon with often curious and sometimes tragic results.

Constitutional architecture in liberal democracies has right to religion as crucial civil liberty. Exercise of religious freedom is circumscribed and secular state is presupposed to be agnostic.

Within secular liberal constitutions, where individual autonomy is prioritised and the state is agnostic, religious freedom is predicated on voluntarist conceptions of religious identity. Profession of religion is safeguarded as an absolute freedom, while religious action is qualified by reference to public good (Wen-Chen Chang *et al.*:782).<sup>iii</sup>

In 2015, the Supreme Court of the US grappled with the issue of religion couched in terms of discrimination in employment. Samantha Elauf who applied for job was denied due to headscarf, which was essentially a manifestation of her religious belief.<sup>iv</sup> The essentiality of headscarf in Islam desiring accommodation, which should be sole criterion instead of active knowledge of the same by the employer in *Equal Employment Opportunity Commission v Abercrombie and Fitch Stores, Inc.*,<sup>v</sup> was held by the Supreme Court speaking through Anton Scalia by 8:1. Religion, as elucidated by Anton Scalia, meant ‘*includ [e] all aspects of religious observance and practice, as well as belief...*’<sup>vi</sup>

The Supreme Court of India in recent past has dealt with not only competing claims of freedom of religion but also other competing fundamental rights. Since 2017, multi faith Constitutional Bench of the Supreme Court has struck down triple talaq in *Shayara Bano v Union of India*,<sup>vii</sup> by 3:2. In 2018, a woman judge dissenting in 4:1 judgment, which prohibited menstruating women entry in Sabrimala temple in *Indian Young Lawyers Association v State of Kerala*<sup>viii</sup>. On the question of whether reconsideration of five-judge bench in aftermath of Babri demolition, *Dr. M. Ismail Faruqui v. Union of India*,<sup>ix</sup> on question that mosque was not an “essential part of the practice of the religion of Islam”, three judge bench in *M. Siddiq v Mahant Suresh Das*,<sup>x</sup> sole Muslim Judge dissented while majority refused reconsideration. The common thread in all the cases is discernment of test of ‘essential religious practice’<sup>xi</sup> and extracting the same from examination of religious scholarship, i.e., doctrine, tenets and beliefs of the religion. Unless the essential religious practise test is passed, no protection can be offered under freedom of religion. Thus, separating the sacred from secular, personal and public domain leads to raucous polarising public discourse in both public as well as parliament, aided by muddled understanding of test by the Supreme Court due to its subjectivity. Hinduism has been defined to be all encompassing homogeneous construction of religion precluding any sect’s attempt to exit. The court has advocated uniformity over acceptance of religious and legal pluralism,<sup>xii</sup> thus stifling ‘the institutional space for personal faith’<sup>xiii</sup> (Mitra 1997:91).

As Gary Jeffrey Jacobsohn summarises and distinguishes the Indian and the US Court’s approach towards religion:

American approach to the Church/State divide recalls its western roots in assuming that religion can be distilled from public sphere...in India, where faith and piety are more directly inscribed in routine social patterns, judges cannot avoid the perilous jurisprudential vortex of theological controversy as conveniently as their American counterparts...more frequently than American judges, Indian jurists in religion cases are burdened by interpretative responsibilities that exceed their field of expertise...American comparison reveals an important constitutional reality: liberal indifference to the substance of religious belief more readily thrives where social conditions are less dictated by religion<sup>xiv</sup> (Jacobsohn 2003:xii).

I will argue that religious freedom in the US has been very elastic and accommodative of the rights of individuals and groups to pursue their religion unlike in India, which is influenced by proclivities and ideologies of the judges, arrogating (re)interpretation of religion itself. My main case of reference will be the cases involving the Jehovah's witnesses in both the jurisdictions and the differential reasoning they adopted to reach the same conclusion that their religious freedom however incoherent or abhorrent to popular sentiments must be upheld.

## **II. Freedom of religion**

The engagement of world's largest and world's oldest democracy: India and the US, respectively, with religion, secularism and an integral part of the idea of nationalism.<sup>xv</sup> In this backdrop, I seek to study the approaches adopted by the Supreme Courts across two jurisdictions seeking commonalities or contradictions.

### **Constitutional architecture of freedom of religion in India and the US**

#### **I. Constitutional freedom of religion in India**

During the Constituent Assembly debates, the Chairman of the Drafting Committee and architect of the Indian Constitution, the inimitable Dr. B. R. Ambedkar declared that the 'individual' and not 'group' was the basis on which India's constitution is designed.<sup>xvi</sup>

The religious freedom is enshrined in Articles 25 and 26 of the Indian Constitution. Article 25 guarantees to every person the freedom of conscience, free profession practice, and freedom of and propagation of religion, while Article 26 gives the freedom to manage the religious affairs. Articles 27 and 28 make India secular, since it is securing citizens from any payment of taxes for promotion of any religion, while Article 28 prohibits religious instruction or religious worship in certain educational institutions maintained by state funds.

The freedom guaranteed by Article 25(1) is not only the right to entertain such religious beliefs as may appeal to one's conscience but also affords him the right to exhibit his belief in his conduct by such outward acts as

may appear to him proper in order to spread his ideas for the benefit of others. H.M. Seervai, one of the authoritative commentators on Indian Constitution argues, 'India is a secular but not an anti-religious state, for our constitution guarantees the freedom of conscience and religion'<sup>xvii</sup> (Seervai 2013:1259). Thus, the Constitution by excluding all secular activities from purview of religion and practices, which are repugnant to morality, health and public order, emphasized on human rights and dignity as embodied in the fundamental rights guaranteed by the Constitution<sup>xviii</sup> (Reddy 2008:154).

Thus, it can be said that the 'full concept and scope of religious freedom is that there are no restraints upon the free exercise of religion according to the dictates of one's conscience or upon the right freely to profess, practice and propagate religion saving those imposed under the police power of the state and the other provisions of Part III of the Constitution. This means the right to worship god according to the dictates of one's conscience. *Man's relation to his God is made no concern for the State.*'<sup>xix</sup> Whilst this conception is well suited for monotheistic religions, i.e., Christianity, Judaism and Islam, it may be difficult to apply to polytheistic religion like Hinduism or atheism which is manifestation of one's conscience. Notwithstanding the same, Justice Chandrachud in right to privacy case and Hadiya case where right to privacy has been interpreted to include choice of faith or belief and reserving the right to express or not express the [same] [GMI].<sup>xx</sup>

## II. Constitutional freedom of religion in the US

The freedom of religion is couched in minimalist term when compared to India where it is substantially defined as distinct fundamental right. This left the task of defining the scope to future statutes and judgments in the US. The neutrality of state in religious matters is entrenched firmly in the First Amendment of the Constitution. The First Amendment<sup>xxi</sup> is:

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.

It protects the freedom of religion by prohibiting the establishment of an official or exclusive church or sect. Congress cannot dictate any law

instituting a particular religion or prohibiting the free exercise of any particular religion. The freedom of religion in constitutionalism in the the US is quite similar in terms of origin and purports as is evident from intentions of the founding fathers. Any imposition of particular religion was resisted due to social and cultural heterogeneousness. The intentions varied—some viewed freedom of religion as bulwark against nefarious influence of nascent state, while others feared religious polarisation and fear of majoritarianism. For James Madison who advocated strict separation of church from state, it was due to mutual convenience, but for Thomas Jefferson, it was to save and guarantee its citizens free choice between distinct political options<sup>xxii</sup>(Gargella 2012:310).

Freedom of religion and its unique position in the polity were not missed by the founding father of the US. The freedom of religion is sourced in freedom of conscience and foundational personal autonomy from which dignity flows, allowing an individual personal space for most ‘intimate and personal choices’<sup>xxiii</sup> rooted in individual liberty. An individual, along with his or her choices, constitutes society and the state. The society and government are burdened with respecting personal autonomy and choices consequently, including religion (Sajó and Uitz 2012:914).

**a) The contours of conscience and national anthem cases**

The freedom of conscience connotes a person’s right to entertain beliefs and doctrines concerning matters which are regarded by him to be conducive to his spiritual well-being.<sup>xxiv</sup>As observed by Lord Acton, the freedom of conscience is “*the assurance that every man shall be protected in doing what he believes to be his duty against the influence of authority and majorities, custom and opinion*”<sup>xxv</sup> (Acton 1909:3). Constitutional protection afforded to freedom of religion also extends to atheists and non-believers equally (Bhaskar and Kumar 2018:16-20).<sup>xxvi</sup>

Resorting to court for determination of legal rights within the religious freedom doctrine is not very often but with Jehova’s Witnesses. It has been a common who believes that they ‘adhere to the form of Christianity that Jesus taught and that his apostles practiced.’<sup>xxvii</sup> They are abhorrent to idea of holding public office, controversial refusal of blood transfusion and military service and neither do they subscribe to the idea of showing respect for national flag and national anthem. They have been in the US involved in

plethora of cases wherein they sought protection under First Amendment of the US constitution, i.e., freedom of speech, press and religion.<sup>xxviii</sup> They have been persecuted globally<sup>xxix</sup>, which led them to have legal offices across world<sup>xxx</sup> as Jehovah's Witnesses, 'wherever they are, do hold religious beliefs which may appear strange or even bizarre to us.'<sup>xxxi</sup>

The issue of freedom of conscience of the 'Jehovah's Witnesses' arose before our Supreme Court in the landmark decision of *Bijoe Emmanuel v. State of Kerala*<sup>xxxii</sup>. In *Bijoe Emmanuel*, three children belonging to the Jehovah's Witnesses used to stand up in respect when the National Anthem was sung in their morning assembly, but did not participate in singing the anthem as it is against the tenets of their religious faith to sing the national anthem. The school took disciplinary action against them, which they challenged in court. The High Court held the expulsion to be valid and in doing so ignored the importance of the religious beliefs of the children. The Supreme Court reversed the view of the High Court and held that if the *belief is genuinely and conscientiously* held it attracts the protection of Article 25 of the Constitution. The decision in *Bijoe Emmanuel* case emphatically declares that 'any official compulsion to affirm what is contrary to one's religious beliefs is the *antithesis of freedom of conscience*'. The case made express references to cases across jurisdictions to emphasise the quest by Jehovah's Witnesses for recognition of freedom of conscience. In doing so the Court accepted the view of the U.S. Supreme Court in *West Virginia State Board of Education v. Barnette*,<sup>xxxiii</sup> wherein by 6:3, it was held that the action of the state in making it compulsory for children in public schools to salute the national flag and pledge allegiance constituted a violation of the liberty of religion. The *West Virginia State* case is renowned for the emphatic opinion of Justice Robert H. Jackson on free speech consecrated in the First Amendment's freedom of religion. This judgment overruled second *Minersville School District v. Gobitis*,<sup>xxxiv</sup> which was delivered by 8:1 with Justice Felix Frankfurter writing the majority opinion. Two children in a public school of Pennsylvania were expelled from school when they refused to salute the US flag as forbidden by scripture. The Court held that the school children be compelled to salute the flag of the US and they can be expelled from the school for refusing to salute the American flag and pledging allegiance to it even if it is against the religious belief of having no reverence other than their God, Jehovah.

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Interestingly, Justice Frankfurter who authored majority opinion was in sole dissenting voice in this case.

Walter Barnette along with other Jehovah's Witnesses brought a suit challenging the mandatory flag salute law in West Virginia, the lower court rejected the Gobitis and ruled in favour of parents. State went in appeal where the Court ruled that the West Virginia statute is unconstitutional by invoking the *wide free speech clause of the first amendment rather than relying on the religion clause*. Saluting the flag was held to be form of a speech which the government could not compel citizens to express contrary to their beliefs whether religious or otherwise. The freedom has to be respected irrespective of its grounding.

Justice Jackson was aware about the arson and rioting against the Jehovah's Witnesses in wake of rise of patriotic fervour in wake of World War II, with official threatening to send the non-conformist Witnesses' children to reformatories for juvenile delinquents, the meeting places of Witnesses' burned and leaders shunned out of town, the backlash of Gobitis case was immense. Around the same time in 1943 in *Murdock v. Pennsylvania*,<sup>xxxv</sup> the Supreme Court by 5:4 (Justice Frankfurter in dissent) struck down the application of city ordinance requiring Jehovah's Witnesses and other proselytizers to pay license tax.

The national anthem case became highpoint in the Indian jurisprudence, for religious freedom and beacon of hope for accommodating religions in disputatious democracy. The Courts' decision is quite rich in terms of religious interpretation, theological debate, what constitutes religion, balancing of secularism<sup>1</sup> and religious freedom of individual. Justice

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<sup>1</sup>Bhargava, Rajeev (2006): "The Distinctiveness of Indian Secularism" in T.N. Srinivasan (ed.) *The Future of Secularism* (Delhi: Oxford University Press, Delhi, 2006)<sup>7</sup> (Indian secularism is unique and distinct from any other secularism—'Indian secularism is distinguished from others versions by five features. First is its explicit multivalued character. Second, the idea of principled distance that is poles apart from one-sided exclusion, mutual exclusion and strict neutrality. Third, its commitment to a different model of moral reasoning that is highly contextual and opens up the possibility of multiple secularisms, of different societies working out their own secularisms. Fourth, it uniquely combines an active hostility to some aspects of religion with an equally active respect for its other dimensions. Finally, it is the only secularism that I know attends simultaneously to issues of intra-religious oppression and inter-religious domination. In my view, these are path-breaking features of any model of secularism').

O.Chinnappa Reddy who held that the children should be readmitted was vitriolically censured by high ranking leader in the ruling party, Mohammed Yunus as having forfeited his right to be called 'either as an Indian or a Judge,'<sup>xxxvi</sup> which was published by national newspaper. A contempt petition was filed against him was dismissed on specious grounds. The Court did not take *suo moto* cognizance.

Whilst being correct in law, both West Virginia and Bijoe Emmanuel cases were resented in large section of public. Resultantly, the children were never admitted back in school in spite of the direction of the Supreme Court of India. Thus, as Fali S. Nariman wryly observes, 'Jehovah's Witnesses had won their constitutional case in the Supreme Court, but lost their constitutional right which the decision had affirmed.'<sup>xxxvii</sup>

This case was cited by three judge bench modifying its previous order which had mandated that every cinema hall shall play the National Anthem before start of movie for showing due respect to the National Anthem. The judgment made it optional instead of mandatory in the case of *Shyam Narayan Chouksey v Union of India*,<sup>xxxviii</sup> 'no shadow of doubt that one is compelled to show respect whenever and wherever the National Anthem is played' with exemption was granted to disabled people who cannot stand continued.

Robert Jackson's opinion is illuminating as champion of individual liberty against the jingoistic tyranny of state in name of inculcating patriotism when the country is involved in war would become one of the greatest statements written in American constitutional law and history. He would later be appointed by the US government to be Chief Prosecutor at Nuremberg Trials.

In the US, Jehovah's Witnesses, determined to claim their First Amendment rights, waged a tenacious legal campaign that led to twenty three Supreme Court rulings between 1938 and 1946.<sup>xxxix</sup> Their repeated litigations broadened and defined the contours of religious freedoms. They seek legal refuge and quite successfully so to protect their religion, which is akin to denouncing the citizenship entailing responsibilities and obligations but accruing the benefits of the legal system. India has definitely benefitted

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from the same and the judgement of Supreme Court advocating the centrality of one's conscience in matters of religion against nationalistic fervour is duly noted and celebrated.

### **III. Religious freedom in the US Constitution through constitutional adjudication**

As previously discussed, the US Constitution in the First Amendment talks about the free exercise of religion and prohibits a federal establishment of religion. Unlike India, the freedom of religion is not subjected to any restrictions. Freedom of religion includes freedom not to follow any religion as well as strict wall of separation between the state and religious institutions.

Between 1938 and 1947, religion was treated as free speech; during the same time Jehova's Witnesses legally pursued recognition and protection. First Amendment's guarantee of free speech was applicable to states through the Fourteenth Amendment. In *Lovell v Griffin*,<sup>xl</sup> religion was treated as free speech. It was only in 1947 that the US Supreme Court "incorporated" the Establishment Clause of the First Amendment in *Everson v Board of Education*<sup>xli</sup>. Before 1947, i.e., *Everson* case, the prohibition on establishing a religion was only on the national governments, while the state governments remained free to do so which percolated into seven states retaining some form of religious establishment (Hall 2004: 69). In *Everson* case where New Jersey law that authorised reimbursement of transportation fee including those parents whose children went to Catholic parochial church was held to be violative of the Establishment Clause. It was the first case in which the Supreme Court engaged comprehensively with the constitutional separation between the Church and the State.

More than twenty years later after *Everson*, Supreme Court added third criteria whether the action created an 'excessive entanglement between religion and government,' which came to be known as *Lemon Test* in *Lemon v. Kurtzman*<sup>xlii</sup>. The *Lemon Test* added a new "excessive entanglement" prong to the existing requirements that such laws be for a secular legislative purpose (*Abington School District v. Schempp* 1963)<sup>xliii</sup>—declaring that school sponsored Bible reading in public school is unconstitutional, their primary effect neither advance nor inhibit religion (*Board of Education v. Allen* 1968)<sup>xliiv</sup>—challenging the New York statute

requiring public schools to lend textbooks to private schools students. As it stood, it is a three-pronged test employed by the Supreme Court in deciding Establishment Clause disputes, such as state aid to parochial schools, public financing of religious displays, and school prayers and Bible reading. Under the Lemon Test, for a statute not to be a violation of the Establishment Clause, it must meet the following conditions:

- (1) It must have a secular legislative purpose.
- (2) Its principle or primary effect must be one that neither advances nor inhibits religion. (3) It must not foster an excessive entanglement with religion.

The structure of the Lemon Test has now come under sustained attack by members of the Court. Chief Justice William Rehnquist has challenged the test's historical and constitutional validity, most notably in his lengthy dissent in the school prayer case, *Wallace v. Jaffree (1985)*<sup>xlv</sup> (Hall, Ely *et al.* eds. 2005: 578–579). In this case, the silent school prayer was held to be unconstitutional, as it violated the First Amendment.

Another famous and controversial series of cases of the Warren Court<sup>xlvi</sup> involved prayer in the public schools. The Warren Court eliminated organised state run school sponsored and directed prayer in the public schools in the early 1960s. *Engel v. Vitale*<sup>xlvii</sup> and *Abington School District v. Schempp*<sup>xlviii</sup> are two landmark cases in this regard. In the former, the Supreme Court ruled that it is unconstitutional for state officials to compose an official school prayer and encourage its recitation in public schools, while in the latter, it was held that school sponsored Bible reading in public schools is unconstitutional.

On 25 June 1997, by 6:3 majority, the Supreme Court through Justice Kennedy invoking *Marbury v Madison*<sup>xlix</sup> held that Religious Freedom and Restoration Act passed by Congress in 1993, which expressly forbade control of religious uses of land by local governments, as unconstitutional, since the Congress exceeded its authority. The Congress responded by passing the Religious Land Uses and Institutionalised Persons Act in 2000 whose constitutionality was upheld<sup>l</sup> in *Cutter v. Wilkinson*<sup>li</sup>.

Issues of Sunday being declared holiday have been under intense scrutiny due to religious overtones. The U.S. Supreme Court, in *McGowan v.*

*Maryland*<sup>lii</sup>, upheld a Maryland Sunday Closing Law which was used to prosecute employees of a department store chain who worked on Sunday on the grounds that the law was motivated by the *secular concern* of providing a uniform day of rest for all citizens and therefore bore no relationship to the establishment of religion. When First Amendment liberties are at issue, this Court accepts the determination of the State Supreme Court that the present purpose and effect of the statute here involved is not to aid religion, but to set aside a day of rest and recreation’.<sup>liii</sup> The stores being closed on Sunday was due to historic and religious reason of attendance of the Church.

Thus, the First Amendment Clause has been used as bulwark against the State—especially the local governments for surreptitious and camouflaged religion inspired teaching and conduct. Religion is strictly private matter which has no place for state sponsorship in any form in public life, as it automatically would violate the religious right of the minority or non-subscriber to such religious teaching. Freedom *of* religion connotes and equates with freedom *from* religion.

#### **IV. Religious freedom in India and the US: Comparison**

The religious freedom in India is marred by the vague conceptions ‘what is religious’ and ‘what is essential’ and sometimes even determining whether a particular belief system is religion and hence has to be protected against the encroachment of rights of the state. The religious inquiry which the Court takes comes with pre-conceived notion of creating a society as enumerated in the Preamble of the Constitution. The Court, in words of Faizan Mustafa, becomes a clergy<sup>liv</sup> when concerns itself with the onerous task of determination of whether a practise is secular or religious through ‘essential practices test’<sup>lv</sup>, which has mutated over the years and is not what it was at inception.<sup>lvi</sup> Thus, the judges task themselves to decide and dissect what is the law of god and whether it qualifies their test. Justice Chandrachud, while holding that the practice of excluding women from the temple at Sabarimala is not an essential religious practice, nevertheless sought the revision of the test itself. Justice Indu Malhotra, in her dissenting opinion held that ‘the practise of restricting entry of women between the age group of 10 and 50 years is an essential religious practise of the devotees of Lord Ayyappa at the Sabarimala Temple being followed since time immemorial’ and sought restraint for the courts in secular polity to

have non-interference with 'deep religious faith and sentiment' irrespective the practise being rational or logical. Judges of constitutional courts are supposed to be neutral without any cognitive inherent bias which has been summed up by O. Chinnapa Reddy, 'But my views about religion, my prejudices and my predilections, if they be such, are entirely irrelevant'<sup>lvii</sup>. Rarely the question on deep religious overtones especially when it involves gender discrimination has been unanimous, be it triple talaq case (3:2) or Sabrimala case (4:1).

While in the US, the religious freedom has been mellowed and moulded against the time in its history, geopolitical conditions, as well as proclivities of the judges. While the Judges had their leaning and ideologies, they went great extent to justify why they were in majority or minority. Even in cases where the friction between the Judges was well known, they stood ideologically on determination of issues on merits rather than their beliefs. The jurisprudence of the US Supreme Court respects theological totalitarianism with respect to the cases brought before it. Unlike in India, where the cases on religion were seek and validate a religious practise, or have something from state, the cases in the US have been more on the belief system, conscience and dignity. It's the freedom to profess and practise religion as one sought rather than the ends which one sought to achieve vis-à-vis state. The separation between the Church and the State has quite curious manoeuvres as seen from the genealogy of cases it has adjudicated even declaring a law unconstitutional under judicial review. Contrary, in India, most of the cases on religion have been won by the State like Aurobindo case and Ramkrishna Mission case<sup>lviii</sup> by declaring a particular system of belief and practise as not a religion hence its followers not as religious denomination which have constitutional protection under Article 26 of Indian Constitution. In the US, cases concerned the sponsorship, tacit, subtle to explicit of any of the activities which could be construed to threaten the secular fabric by giving preference to particular religion or its sect. It does not encumber itself to adopt progressive, tolerant, harmonistic approach which the Indian Supreme Court has been doing. With religious profile unlike any other, the Supreme Court judges of India make canonical choice in terms of their reference of material to determine what qualifies as religion and what does not qualify as religion or religious denomination.

With respect to the US experience, Gary Jeffrey Jacobsohn remarks while terming the US secularism as assimilative one whose

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‘appeal lies in its functional value, as it exploits the pervasive religiosity of the American people to solidify the consensus underlying the national creed...Judges will be set up as arbiters of theological doctrine, determining which religious opinions are, in effect, safe, and which threaten to divert from the goal of political assimilation...law might still not know heresy, but in determining policy in relation to the civil religion, some beliefs would obviously come to be perceived as heretical...judges will not be expected to intervene with regard to the substance of religious opinions’<sup>lix</sup>(Jaconsohn 2003:68–71).

Thus, wherein India, the test from qualifying the nature of practise in ‘essential practises test’ went to become anthropological inquiry to find the importance of the same within the religion, hence, technically the courts are tasked with deciding the very nature of religion, enquiry that should be avoided altogether.

## V. Conclusion

The conflation<sup>lx</sup> and speculation, especially on religious matters which are of supreme importance to common people or large section of people, have invited criticisms by the approach adopted by the Supreme Court. The Supreme Courts of both India and the US are more than often seized with matter wherein right of individual is pitted against the state but the approaches which they adopt is illuminating. While one adopts liberal, individualistic and ameliorative approach (the US), while other adopts majority appeasement (barring few notable exceptions), more than often populist approach conflating and probably confusing. Whenever the Supreme Court of India goes on determination of ‘essential religious practises’, it appears to be making more of moral judgement rather than a legal one based on deep seated religious bias towards their understanding of religion. Essential religious practises test, which has survived over six decades, needs to be seriously reconsidered by nine judges bench and maybe adopt ‘principled distance’<sup>lxi</sup> model of secularism proposed by Rajeev Bhargava as opposed to strict separation of the Church from the State in the US.<sup>lxii</sup>

Courts cannot become arbiters of religious teachings and truth in this process, nor can they pass judgment on the legitimacy, value, or utility of religious teachings for the state or society. Thus, courts should not assess

the contents of religious doctrine and teachings, but appear to focus on the function that a particular belief has in the individual's self-perception (Sajó and Uitz 2012: 916). Perhaps it's time for the Supreme Court to realise in spirit rather than in letter what it cites tritely "...what is religion to one is superstition to another..."<sup>xiii</sup>—the subjectivity of religion and its respect for personal beliefs and not seeking rationality or cogency on the anvil of its own design and invention—the essential religious practice test.

## Endnotes

<sup>i</sup>Sajó, András, and Uitz, Renáta (2012): "Freedom of Religion" in Michel Rosenfeld and AndrásSajó (eds). *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press) 909.

<sup>ii</sup>Hirschl, Ran (2010): *Constitutional Theocracy* (Cambridge: Harvard University Press) 2.

<sup>iii</sup> Chang, Wen-Chen, Li-ann Thio, Kevin Y.L. Tan, and Jiunn-rong Yeh , (eds) (2014): *Constitutionalism in Asia: Cases and Materials* (London: Hart Publishing) 782.

<sup>iv</sup> The case received widespread traction in media due to its ramifications for religious minority and practises. See Syed, Nafees and Syed, Safa K. (2015), *The Supreme Court Used to Oppose Discrimination. What Happened?*, viewed on 27 December, 2018 (<https://www.nytimes.com/2018/06/26/opinion/travel-ban-muslim-discrimination-precedent.html>), Adam, Liptak (2015), *In a Case of Religious Dress, Justices Explore the Obligations of Employers*, viewed on 28 December, 2018 (<https://www.nytimes.com/2015/02/26/us/in-a-case-of-religious-dress-justices-explore-the-obligations-of-employers.html>), Levine, Marianne (2015), *Supreme Court rules against Abercrombie in hijab case*, viewed on 28 December, 2018 (<https://www.politico.com/story/2015/06/ambercrombie-fitch-hijab-case-supreme-court-ruling-118492>), Kaplan, Sarah (2015), *The rise and fall of Abercrombie's 'look policy'*, viewed on 28 December, 2018 ([https://www.washingtonpost.com/news/morning-mix/wp/2015/06/02/the-rise-and-fall-of-bercrombies-look-policy/?utm\\_term=.862d19a5bea2](https://www.washingtonpost.com/news/morning-mix/wp/2015/06/02/the-rise-and-fall-of-bercrombies-look-policy/?utm_term=.862d19a5bea2)).

<sup>v</sup> *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.* 135 S. Ct. 2028, 2032 (2015) ( <http://www.scotusblog.com/case-files/cases/equal-employment-opportunity-commission-v-bercrombie-fitch-stores-inc/>).

<sup>vi</sup> *Equal Employment Opportunity Commission v Abercrombie and Fitch Stores, Inc* [https://www.supremecourt.gov/opinions/14pdf/14-86\\_p86b.pdf](https://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf), 6.

<sup>vii</sup>(2017) 9 SCC 1.

<sup>viii</sup>2018 SCC OnLine SC 1690.

<sup>ix</sup>(1994) 6 SCC 360.

<sup>x</sup>2018 SCC OnLine SC 1677.

<sup>xi</sup> The term was first articulated in *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*, 1954 SCR 1005 (7 Judge bench), Sri

Venkataramana Devaru v State of Mysore, (1958) SCR 895, Mohd. Hanif Quareshi v State of Bihar, (1959) SCR 629 (Court placed reliance upon Islamic religious texts to determine that the sacrificing of cows at Bakr-Id was not an essential practice for Muslims), Durgah Committee, Ajmer v Syed Hussain Ali, (1962) 1 SCR 383 (Court for first time distinguished, between ‘superstitious beliefs’ and religious practice), Sardar Syedna Taher Saifuddin Saheb v State of Bombay AIR 1962 SC 853, Tilkayat Shri Govindlalji Maharaj v State of Rajasthan (1964) 1 SCR 561, Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya (1966) 3 SCR 242 (prohibition of Dalits from entering temple on ground that Swaminarayan Sect is not part of Hinduism), Acharya Jagdishwaranand Avadhuta v. Commissioner of Police, Calcutta, (1983) 4 SCC 522 (tandava dance not an essential religious practice of Anand Margis), Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v State of Uttar Pradesh, (1997) 4 SCC 606, N Adithayan v Travancore Devaswom Board, (2002) 8 SCC 106, Commissioner of Police v. Acharya Jagdishwarananda Avadhuta, (2004) 12 SCC 770, Adi Saiva Sivachariyargal Nala Sangam v. Government of Tamil Nadu, (2016) 2 SCC 725; see also Sen, Ronojoy (2012): *Articles of Faith :Religion, Secularism, and the Indian Supreme Court* (Delhi: Oxford University Press).

-Ronojoy Sen (2016): “Secularism and Religious Freedom” in Choudhry, S., M. Khosla, and P. B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, (Delhi:Oxford University Press) 902

<sup>xiii</sup>Mitra, Subrata (1997): “Religion, region and Identity: Sacred Beliefs and Secular Power in Regional State Tradition of India” in Noel O’ Sullivan (ed), *Aspects of India: Essays on Indian Politics and Culture* (Ajanta Publications 1997)91; see also Mitra, Subrata(1991): “Desecularising the State: Religion and Politics in India after Independence”, *Comparative Studies in Society and History*, Vol. 33(4) (1991), 755–777.

<sup>xiv</sup>Jacobsohn, Gary (2003): *The Wheel Of Law: India’s Secularism In Comparative Constitutional Context* (Oxford: Princeton University Press) xii.

<sup>xv</sup> See generally on nationalism Anderson, Benedict (2006): *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (London: Verso Books); Balakrishnan, Gopal (ed.) (2012): *Mapping the Nation*(London :Verso Books).

<sup>xvi</sup>B.R. Ambedkar, Speech to the Constituent Assembly, VII C.A.D. 38-9 (4 November 1948) available at <http://parliamentofindia.nic.in/ls/debates/vol7p1m.htm>.

<sup>xvii</sup>Seervai, H.M. (2013) *Constitutional Law of India* (volume 2) (Delhi: Universal Law Publishing)1259.

<sup>xviii</sup>Reddy, O. Chinnappa (2008): *The Court and the Constitution of India Summits and Shallows* (Delhi: Oxford University Press)154.

<sup>xix</sup>Commissioner of Police v. Acharya Jagdishwarananda Avadhuta (2004) 12 SCC 770.

<sup>xx</sup>Justice K S Puttaswamy (Retd) v Union of India, 2017 (10) SCC 1, Shafin Jahan v Ashokan K.M., 2018 SCC On Line SC 343 (Hadiya case).

<sup>xxi</sup> See First Amendment in the US Constitution, 1789 available at [https://www.senate.gov/civics/resources/pdf/US\\_Constitution-Senate\\_Publication\\_103-21.pdf](https://www.senate.gov/civics/resources/pdf/US_Constitution-Senate_Publication_103-21.pdf)

<sup>xxii</sup>Roberto Gargarella, ‘The Constitution and Justice’ in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012 ) 310.

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- <sup>xxiii</sup>Planned Parenthood v. Casey 505 U.S. 833 (1992).
- <sup>xxiv</sup>Ratilal Panachand Gandhi v. State of Bombay AIR 1954 SC 388.
- <sup>xxv</sup>Dalberg-Acton, Edward (1909) :The History of Freedom and Other Essays (London: MacMillan and Company)3.
- <sup>xxvi</sup>Bhaskar, Anurag and Kumar, Shubham, Rights of Atheists and Non-believers, Economic and Political Weekly, Vol. 53, Issue No. 38, 22 Sep, 2018.
- <sup>xxvii</sup>What Do Jehovah's Witnesses Believe? <https://www.jw.org/en/jehovahs-witnesses/faq/jehovah-witness-beliefs/>.
- <sup>xxviii</sup>Jamison v. Texas, 318 U. S. 413, (1943); Schneider v. New Jersey, 308 U. S. 147 (1939) ; Lovell v. City of Griffin, 303 U. S. 444 (1938); Stromberg v. California, 283 U. S. 359 (1931); Gitlow v. New York 268 U. S. 652 (1925).
- <sup>xxix</sup>Legal Developments and Human Rights by Region <https://www.jw.org/en/news/legal/by-region/>.
- <sup>xxx</sup>Legal Offices <https://www.jw.org/en/news/legal/legal-resources/legal-office/britain/>.
- <sup>xxxi</sup>OP Chinappa Reddy in Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615.
- <sup>xxxii</sup>(1986) 3 SCC 615.
- <sup>xxxiii</sup>319 US 624 (1943).
- <sup>xxxiv</sup>310 U.S. 586 (1940).
- <sup>xxxv</sup>319 U.S. 105 (1943).
- <sup>xxxvi</sup>Conscientious Group v Mohammed Yunus, AIR 1987 SC 1451.
- <sup>xxxvii</sup>Nariman, Fali (2013): The State of the Nation (New Delhi: Hayhouse ) 256.
- <sup>xxxviii</sup>2018 (2) SCC 574.
- <sup>xxxix</sup> See generally Shawn Francis Peters, Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution, (University Press of Kansas 2000).
- <sup>xl</sup>303 U.S. 444 (1938).
- <sup>xli</sup>Everson v. Board of Education of the Township of Ewing 330 U.S. 1 (1947).
- <sup>xlii</sup>403 U.S. 602 (1971).
- <sup>xliii</sup>374 U.S. 203 (1963).
- <sup>xliv</sup>392 U.S. 236 (1968).
- <sup>xlv</sup>472 U.S. 38 (1985).
- <sup>xlvi</sup> Refers to Earl Warren time as Chief Justice of United States Supreme Court between 1953–1969.
- <sup>xlvii</sup>370 U.S. 421 (1962).
- <sup>xlviii</sup>374 U.S. 203 (1963).
- <sup>xlix</sup>5 U.S. 137 (1803).

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<sup>i</sup> Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act, United States Department of Justice September 22, 2010 [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa\\_report\\_092210.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa_report_092210.pdf).

<sup>ii</sup> 544 U.S. 709 (2005).

<sup>iii</sup> McGowan v. Maryland 366 U.S. 420 (1961) <https://supreme.justia.com/cases/federal/us/366/420/>

<sup>iiii</sup> Hall, Kermit L. (2004): Oxford Companion to American Law, (Oxford University Press) 69.

<sup>lv</sup> Mustafa, Faizan and Sohi, Jagteshwar Singh (2018) : “Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy”, 2017 Brigham Young University Law Review 915, 915–956.

<sup>lv</sup> See the criticism of essential religious practise test in Jaelyn L Neo, Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication, International Journal of Constitutional Law, Vol. 16 (2018), at pages 574–595.

<sup>lvi</sup> See the concurring opinion of Justice Chandrachud and Rohinton Nariman in Sabrimala case.

<sup>lvii</sup> SP Mittal v Union of India [1983] AIR SC 1.

<sup>lviii</sup> Bramchari Sidheswar Shai v State of West Bengal AIR 1995 SC 2089.

<sup>lix</sup> Jacobsohn, Gary (2003): The Wheel Of Law: India’s Secularism In Comparative Constitutional Context (Oxford: Princeton University Press) 68,71.

<sup>lx</sup> See opinion of PB Gajendragadkar in Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya (1966) 3 SCR 242 (inclusive nature of Hinduism- a way of life), Hinduism was equated with Hindutva by JS Verma as ‘way of life’ in Ramesh Yeshwant Prabhoo v Prabhakar Kashinath Kunte (1996) 1 SCC 130. For criticism of this ignominious inclusivist conflation, see Cossman, B. and Kapur, R. (1999), Secularism's Last Sigh?: Hindutva and the (Mis) Rule of Law (New Delhi: Oxford University Press).

<sup>lxi</sup> Berman, B., Bhargava, R., and Laliberté, A. (eds) (2013), Secular States and Religious Diversity (Vancouver: UBC Press) 21, Rajeev Bhargava, ‘India’s Secular Constitution’ in Sridharan, E., Hasan, Z., Sudarshan, R. (eds), ‘India's Living Constitution: Ideas, Practices, Controversies, (Permanent Black 2002) 327.

<sup>lxii</sup> See generally the scholarship of Rajeev Bhargava on secularism of India and its distinctiveness. His works include Bhargava, Rajeev (1999): Multiculturalism, Liberalism and Democracy (Delhi: Oxford University Press), Bhargava, Rajeev (2008): Politics and Ethics of the Indian Constitution (Delhi: Oxford University Press), Bhargava, Rajeev (2010): The Promise of India's secular democracy (Delhi: Oxford University Press).

<sup>lxiii</sup> Latham, C.J. in Adelaide Company of Jehovah’s Witnesses Incorporated v. The Commonwealth, [1943] HCA.

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