STATE EXPENDITURE ON RELIGION: A COMPARATIVE CONSTITUTIONAL ANALYSIS

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ABSTRACT

State expenditure on religion has always been a sensitive and contentious subject. However, it is often observed that even secular states indulge in one or more forms of the same. This leads to a conflict between State action and the provisions of a secular Constitution. In India, Haj subsidy is one of the controversial forms of state expenditure. Although opposed from many corners, the subsidy policy has still not been struck down by the Supreme Court of India. The liberal approach followed by the Supreme Court has been discussed in this article, followed by a comparison of the position of state expenditure on religion in the United States of America and Japan. In the comparison with the U.S.A., the authors have analyzed the development of case laws over the years, which have laid down various tests such as The Lemon Test and The Private Choice Test. In the comparison with Japan, the inconsistency between the Japanese constitutional provisions and the judicial interpretation of the same has been scrutinized.

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INTRODUCTION

Freedom of religion is one of the foundational stones on which a secular state is built. Secularism, in its strictest sense, means separation of religion and state. The purpose of secularism is to ensure that the state neither glorifies nor vilifies any religion. However, an attempt to adhere to an absolute separation of state and religion proves to be problematic in practice. Is it practical or desirable for the state to abstain from any and all religious activities? Is there a degree, if any, of state interference which can be deemed to be permissible in religion? Who is to decide this permissible limit? Is secularism an end in itself or merely the means to the end of creating an environment of equal respect for all religious groups?

This article intends to resolve the aforementioned issues. However, the authors wish to limit the scope of this article to one specific issue in which religion and state overlap in the public sphere, i.e. state expenditure of public money on religion. In order to facilitate a better understanding of the nuances of the issues, this article will include a comparative study of the positions of state expenditure on religion in the United States of America (hereinafter referred to as US) and Japan. Our reason for choosing US and Japan is the similarities shared by the two countries with India, which provide for a common point of departure. The Establishment clause of the First Amendment of the US Constitution has been used to challenge government taxation and expenditure on religion, similar to what is prohibited by Article 27 of the Indian Constitution. The United States has grappled with the issue of state expenditure on religion for several decades and the US Supreme Court has over the years interpreted the Establishment clause in myriad, often conflicting, ways. Interesting parallels were observed, leading to the authors' choice of the US jurisprudence.

The two provisions of the Japanese Constitution that concern religion, namely Articles 20 and 89, have been principally shaped by the American religious jurisprudence. The

aforementioned provisions share similarities with the Indian constitutional provisions on secularism, *albeit* with one crucial difference. Unlike the Indian Constitution, the Japanese Constitution mandates a strict wall of separation between religion and the State. However, the excessively liberal interpretation accorded to Articles 20 and 89 by the Japanese Supreme Court has led to problematic issues in the Japanese jurisprudence on state expenditure on religion. The existence of striking parallels, along with complications caused by divergent judicial interpretation, led us to our next choice of study as Japan for a comparative study.

The article is divided into three parts. The first part will deal with the position in India. In order to enable a detailed analysis, we will restrict the scope of this part to analyzing one particular avenue of Government expenditure on religion, i.e. the Haj subidy. We will review the history and politics of the Haj subidy, the secularism debate surrounding the subsidy and the two landmark cases of *Prafull Goradia v. Union of India*[1] and *Union of India v. Rafique Sheikh Bhikan*[2]. The second part scrutinizes the jurisprudence in the US. *Inter alia*, the influential cases of *Everson v Board of Education of Ewing*[3], *Lemon v Kurtzman*[4] and *Zelman v Simons-Harris*[5] are discussed. The third part analyzes the constitutional provisions and the celebrated case of *Kakunga v. Sekiguchi*[6] in Japan.

[1] (2011) 2 S.C.C. 568 [Hereinafter "Prafull v. UOI"].

[2] (2012) 6 S.C.C. 265 [Hereinafter "UOI v. Rafique"].

[3] 330 U.S. 1 (1947). [Hereinafter "Everson v. Ewing"].

[4] 403 U.S. 602 (1971). [Hereinafter "Lemon v. Kurtzman"].

[5] 536 U.S. 639 (2002). [Hereinafter "Zelman v. Harris"].

[6] 31 Minshu 533 (G.B. 13 July 1977). [Hereinafter ""Kakunga case"].

INDIA

A. Introduction

A week after the new moon rises in *Dhu'l-Hijjah,* the final month of the Muslim lunar calendar- approximately three million Muslim pilgrims travel to the city of Mecca.[7] Haj, often referred to as the fifth pillar of Islam, constitutes one of the five essential tenets of Islam along with *shahadah*, *salat*, *zakat* and *sawm.*[8] Every sane, financially stable and adult Muslim has the duty to perform Haj at least once in his or her lifetime.[9] The annual five-day pilgrimage, which takes place in the plain of Mount Arafat, is the world's largest yearly gathering.[10]

The Ministry of External Affairs of Government of India, which handles the administration of Haj affairs through its Haj Cell, provides an airfare subsidy on chartered flights to Indian Muslim Haj pilgrims, which is known as the 'Haj subsidy.' In the past, Haj pilgrims used to both sail and fly to Jeddah.[11] However, the former has stopped after 1995 pursuant to a

[7] Zahra Jamal & Rizwan Mawani, *Hajj Diaries: The Multiple Dimensions of Muslim Pilgrimage,* HUFFINTON POST (July 11, 2011), *available at* http://www.huffingtonpost.com/dr-zahra-n-jamal/hajj-diaries-muslim-pilgrimage_b_1077913.html.

[8] Encyclopaedia Britannica, *Pillars of Islam*, *available at* http://www.britannica.com/EBchecked/topic/295625/Pillars-of-Islam.

[9] Berkley Center for Religion, Peace & World Affairs, Georgetown University, *Hajj*, *available at* http://berkleycenter.georgetown.edu/resources/essays/hajj.

[10] *Hajj Pilgrimage 2011: By Numbers*, THE TELEGRAPH (November 3, 2011), *available at* http://www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/8867639/Hajj-pilgrimage-2011-by-numbers.html.

[11] *Haj Operations in India,* MINISTRY OF CIVIL AVIATION PRESS RELEASE (December 22, 2006) *available at* http://www.pib.nic.in/newsite/erelease.aspx?relid=23577. (Hereinafter PRESS RELEASE, CIVIL AVIATION MINISTRY)

Cabinet decision and Haj travel is now restricted to air.[12] While the number of pilgrims has been rising[13], the amount of subsidy per pilgrim has also been observing an upward trend.[14]

B. History and Politics of Haj Subsidies

The total expenditure that the government has incurred on providing Haj subsidies has been estimated at Rs. 600 crores for 2010, Rs. 692 crores for 2011 and Rs. 835 crores for 2012.[15] In May 2012, the Supreme Court in *Union of India v. Rafique Sheikh Bhikan*[16] directed the Central government to steadily diminish the meting out of Haj subsidies "*so as to completely eliminate it*" within ten years, and ensure that the money is used for the "*upliftment of the community in education and other indices of social development*."[17] However, the Bench noted that the subsidy *per se* is constitutionally valid.[18]

In order to glean a clearer understanding of the issues of secularism associated with Haj subsidies, it is essential to examine its history. The policy of providing Haj subsidy is not recent. In 1959, instead of repealing the redundant Port Haj Committee Act of 1932, which had been enacted by the British to appease the Muslims and gain their favour, Nehru enacted the Haj Committee Act of 1959.[19] This Act began providing subsidized airfares to Haj

[12] PRESS RELEASE, CIVIL AVIATION MINISTRY, *supra* note 11. (While there were 71,924 pilgrims in 2000, the number rose to 99,926 in 2006).

[13] PRESS RELEASE, CIVIL AVIATION MINISTRY, *supra* note 11.

[14] *See* UOI v. Rafique, *supra* note 2.

[15] Unstarred Question 1140:Subsidy for Haj Quota, MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA, http://www.fsi.mea.gov.in/rajya-sabha.htm?dtl/21296/Q+1140+SUBSIDY+FOR+HAJ+QUOTA.

[16] UOI v. Rafique, *supra* note 2.

[17] UOI v. Rafique, *supra* note 2.

[18] UOI v. Rafique, *supra* note 2.

[19] P. B. Menon, *Meaning of Secularism*, THE HINDU (January 30, 2001), *available at* http://hindu.com/2001/01/30/stories/13300612.htm.

pilgrims. In 1992, P.V. Narasimha Rao increased the subsidy considerably, both in terms of money and the number of pilgrims.[20]

The government has maintained that Muslims are among the poorest sections of Indian society and need financial assistance, as they would not be able to afford the Haj pilgrimage without it.[21] However, it is ironic that the subsidy is being paid without considering the economic position of the pilgrim.[22] Also, the Koran does not impose a compulsory obligation on every Muslim to undertake Haj. Only those Muslims who can afford to pay for the journey through their own means are enjoined to undertake the pilgrimage.[23] It is interesting to note that some of the most vociferous critics of the Haj subsidy have been Muslims themselves, as they opine that it is violative of the tenets of Islam.[24]

C. The Secularism Debate

According to the eminent Indian jurist M.C. Setalvad, the importance of the concept of secularism was revealed by the bloodstained partition India was witness to.[25] During the Constituent Assembly Debates, Pandit Lakshmi Kanta Maitra elucidated the meaning of

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[20] Swaraj Thapa, *Phasing Out Haj*, THE INDIAN EXPRESS (May 17, 2012), *available at* http://www.indianexpress.com/news/phasing-out-haj/950173. *See also*, Rashtriya Swayamsevak Sangh (R.S.S.), *Haj Subsidy: Phase it out faster*, ORGANIZER, *available at* http://organiser.org//Encyc/2012/5/12/EDITORIAL.aspx?NB=&lang=4&m1=&m2=&p1=&p2=&p3=&p4= (last updated Dec. 5, 2012).

[21] Vibhuti Agarwal, *Does the Haj Subsidy Undermine Secular India?*,WALL ST. J. (April 16, 2010),*available at* http://blogs.wsj.com/indiarealtime/2010/04/16/does-the-haj-subsidy-undermine-secular-india/.

[22] *Id.*

[23] Berkley Center for Religion, Peace & World Affairs, Georgetown University, *Hajj*, *available at* http://berkleycenter.georgetown.edu/resources/essays/hajj.

[24] The Indian Express, *Muslim MPs welcome SC order on Haj subsidies* (May 8, 2012), *available at* http://www.indianexpress.com/news/muslim-mps-welcome-sc-order-on-haj-subsidies/946848/. *See also*, The Hindu, *Mixed reaction to gradual elimination of Haj subsidy* (May 10,2012), *available at* http://www.thehindu.com/news/cities/Hyderabad/mixed-reaction-to-gradual-elimination-of-haj-subsidy/article3401673.ece.

[25] Ismail Faruqui v. Union of India AIR 1995 SC 605, ¶ 33.

secularism to mean that "no particular religion in the State will receive any State patronage."[26] It is crucial to note that Indian secularism is of a distinct mould, insofar as it differs from the French and the American model of secularism. Instead of a rigid wall of separation between the church and the state, it is the responsibility of the Indian State to ensure equal religious freedom for all.[27]

In *S.R. Bommai v. Union of India*,[28] the nine-judge Bench laid down six ingredients of secularism. For the purpose of the present discourse, three relevant ingredients have been referred to. First, not only is the State prohibited from adopting a State religion, it is also prohibited from "*identifying itself with*" or "*favouring any particular religion*", because it is "*enjoined to accord equal treatment to all religions*."[29] Second, secularism under the Indian Constitution means equal status for all religions, without any preference in favour of or discrimination against any of them.[30] Third, secularism is a basic feature of our Constitution.[31]

Article 25(1) of the Constitution of India guarantees to every person "freedom of conscience" and the right to freely profess, practice and propagate any religion. In *Commissioner of Police v. Acharya Jagadishwarananda,*[32] the Court said that the protection guaranteed under this Article is not confined to matters of doctrine or belief only, but extends to acts done in pursuance of religion and, therefore contains a guarantee for rituals, observances, ceremonies and modes of worship which are an essential or form an integral part of a religion.[33] Since

[26] S.R. Bommai v. Union of India AIR 1994 S.C. 1918 at ¶ 28. [Hereinafter "Bommai v. UOI"].

[27] P. ISHWARA BHAT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP 418 (2004).

[28] Bommai v. UOI, *supra* note 26.

[29] Bommai v. UOI, *supra* note 26 at 146.

[30] Bommai v. UOI, *supra* note 26 at 194.

[31] Bommai v. UOI, *supra* note 26 at 124.

[32] (2004) 12 S.C.C. 770, p. 782 ¶ 9.

[33] *Id.*

Haj is a compulsory obligation on the part of every sane, able-bodied and financially sound Muslim[34], it can be called "*an act done in pursuance of*" Islam. Therefore, it falls within the ambit of Article 25(1). Moreover, Article 25(1) reads that the freedom of religion is "*subject to other provisions*" of Part III of the Constitution. Therefore, the freedom of religion is, *inter alia,* subject to Articles 14, 15 and 27.

Haj subsidies have raised two key issues: first, the existence of discrimination on the basis of religion and second, the Constitutional validity of using the general revenue of the State to support religious activity. Both these issues were raised in the landmark case of *Prafull Goradia vs. Union of India.*[35]The petitioner's arguments rested on Articles 14, 15 and 27 of the Constitution. His grievance was that the Haj Committee Act, 2002 is unconstitutional and that he being a Hindu "*has to pay direct and indirect taxes, part of whose proceeds go for the purpose of the Haj pilgrimage, which is only done by Muslims*."[36] Article 14 of the Constitution provides for equality before the law and the equal protection of the laws.[37] Article 15 complements Article 14 by prohibiting precise forms of discrimination. In the instant case, in order to satisfy Article 15(1) the petitioner was required to show (i) the existence of discrimination and (ii) that the discrimination is only on the basis of religion or one of the prohibited grounds in Article 15(1).[38]Article 27 guarantees the freedom from being compelled to pay any taxes for the promotion or maintenance of any particular religion or religious denomination.

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[34] Berkley Center for Religion, Peace & World Affairs, Georgetown University, *Hajj*, *available at* http://berkleycenter.georgetown.edu/resources/essays/hajj.

[35] Prafull v. UOI, *supra* note 1.

[36] Prafull v. UOI, *supra* note 1.

[37]INDIA CONST, Art. 14.

[38]Manavi Belgaumkar & SudhirKrishnaswamy, *Prafull Goradia vs. Union of India, (2011) 2 S.C.C.. 568,* 3 J.IND.L.SOCIETY, 337 (2012), *available at* http://jils.ac.in/wp-content/uploads/2012/11/manavi-sudhir1.pdf.

The Court in the aforementioned case held that Haj subsidy is constitutional and it did not violate Articles 14, 15 and 27. This is because similar "*facilities are given and expenditures are incurred*" by the government for other religious groups as well. Absolute equality cannot be insisted upon in a situation of diverse contingencies.[39] With regard to Article 27, the Court held that "[I]n our opinion Article 27 would be violated if a substantial part of the entire income tax collected in India, or a substantial part of the entire central excise or the customs duties or sales tax, or a substantial part of any other tax collected in India, were to be utilized for promotion or maintenance of any particular religion or religious denomination. In other words, suppose 25 per cent of the entire income tax collected in India was utilized for promoting or maintaining any particular religion or religious denomination that, in our opinion, would be violative of Article 27 of the Constitution."[40]

The authors opine that the judgment in the *Prafull Goradia case*[41] is inadequate due to two reasons. *Firstly,* it restricts itself to Article 14, and does not provide elaboration on the relation between religious subsidies and Article 15(1). The Government's assertion only sustains the conclusion that the policy of utilising State funds to finance religious pilgrimages satisfies the Article 14 requirement of equality before the law.[42] It does not address the requirements of Article 15(1) that the State cannot discriminate against any citizen on the ground of religion alone.[43] It is a fact that only Muslims can claim the Haj subsidy while only Hindus can claim the Manasarovar subsidy.[44] Hence, in both the cases the State is distinguishing between persons on the basis of their religion. This is violative of the essence of Article 15(1) and cannot be justified on the basis that while discriminating, the State is

[39]Prafull v. UOI, *supra* note 1.

[40] Prafull v. UOI, *supra* note 1at ¶ 6.

[41] Prafull v. UOI, *supra* note 1.

[42] BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

[43] BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

[44] BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

maintaining uniformity of discrimination among religions.[45] The core question before the Court was whether *all* such religious subsidies and state support to specific religions amounted to discrimination between citizens on the ground of religion. However, the Court failed to tackle this crucial issue. *Secondly*, Katju J.'s interpretation of Article 27, where he holds that Article 27 will be violated only if a '*substantial*' portion of the general tax is utilized for religious purposes, is problematic. In spite of his insistence on not interpreting the Constitution in a narrow or pedantic manner,[46] he held that Article 27 had not been violated because the petitioner had failed to mention in his Writ Petition exactly what percentage of any particular tax was being utilized for the Haj subsidy.[47] Also, he ended up giving an excessively broad interpretation to Article 27 by not laying down the parameters of what will constitute a 'substantial' portion of a tax.[48]

In *Union of India v. Rafique Sheikh Bhikan,*[49] which is the most recent decision on Haj subsidies, the Supreme Court held that it sees no justification in the Haj subsidy and it is "*something best done away with*." The Central government has been directed to progressively reduce the amount of subsidy so that it is completely eliminated within a period of 10 years. However, the Court did not touch upon issues of secularism in this case.

At this juncture, it is essential to distinguish between State policy for giving subsidies, and State policy for facilitating travel. There might be certain special cases when it is essential for the government to spend state funds for the benefit of a religious group. A case in point is the Amarnath Yatra. In *Court On Its Own Motion v. Union of India*[50] the Supreme Court took *suo moto* action against the Union of India, in light of the rising number of deaths of Amarnath

[45] BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

[46] Prafull v. UOI, *supra* note 1 at ¶ 4.

[47] Prafull v. UOI, *supra* note 1 at ¶ 5.

[48] BELGAUMKAR & KRISHNASWAMY, *supra* note 38.

[49] UOI v. Rafique, *supra* note 2.

[50](2012)12 S.C.C. 503.

Yatris. The Court noted that the "*lack of necessary facilities, essential amenities and the risk to the lives of the yatris was leading to a loss of lives*."[51] Accordingly, the court issued guidelines to the Centre and the State of Jammu and Kashmir to ensure that there are adequate health facilities so that religious freedom is ensured effectively. Here, the government is not conferring an exclusive benefit on the Amarnath yatris, but merely facilitating their travel, to effectuate their right to life under Article 21 and religious freedom under Article 25. This case does not hit Article 15(1) of the Constitution. But in case of Haj and Kailash Manasarovar subsidies, the State funding of pilgrimages does violate Article 15(1).

D. Conclusion

Haj subsidy has been one of the most controversial forms of state expenditure on religion in India. While some accuse the government of indulging in religious populism, others accuse it of violating the well-established constitutional principles of secularism. Haj subsidies have raised two primary issues; first, the practice of discrimination on the basis of religion and second, the constitutional validity of using the general revenue of the State to support religious activity. In the *Prafull Goradia case*,[52] the Supreme Court held Haj subsidies to be constitutional. More recently, in the *Rafique Sheikh Bhikan case*[53], the Supreme Court has ordered the Central government to phase it out by 2022. In our opinion, religious subsidies like Haj subsidy and Mansarovar subsidy are violative of Article 15(1) of the Constitution as they are tantamount to the State discriminating between persons on the basis of religion. Politicians have started using religious subsidies as a tool of religious populism to gain votes.

[51] *Id.;See also Amarnath Yatra: SC shocked over increasing number of pilgrims' death,* THE TIMES OF INDIA (July 23, 2012), *available at* http://articles.timesofindia.indiatimes.com/2012-07-23/india/32803333_1_amarnath-pilgrims-amarnath-yatra-shri-amarnath-shrine-board.

[52] Prafull v. UOI, *supra* note 1.

[53] UOI v. Rafique, *supra* note 2.

What remains to be seen is whether the Supreme Court's direction in *Rafique Sheikh Bhikan*[54] is implemented or not.

THE POSITION IN THE UNITED STATES OF AMERICA

A. The Landmark Judgment in Everson v Board of Education of Ewing

In the celebrated case of *Everson v Board of Education of Ewing*[55], a New Jersey taxpayer challenged the state's statute which provided for the reimbursement for transportation of students attending public and not-for-profit private schools. This had led to establishment of an education board authorizing reimbursement for transportation to public and Catholic schools. The Catholic schools, it is important to note, were providing secular as well as religious education.

The Establishment Clause of the First Amendment to the US Constitution states that "Congress shall make no law respecting an establishment of religion". Pursuant to this, the US Supreme Court upheld that statute by a slim 5-4 majority. Justice Black's majority opinion interpreting the Establishment Clause is worth quoting:

> *The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, **large or small**, can be levied to support any religious activities or institutions, whatever they may be called,*

[54] UOI v. Rafique, *supra* note 2.

[55] Everson v. Ewing, *supra* note 3.

> *or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State.*[56] *(emphasis supplied by author)*

This is in complete contrast to Justice Katju's observations in *Prafulla Goradia*[57] where he laid down the substantiality test, holding that the Haj subsidy is constitutionally valid as the amount of subsidy as a portion of the general revenue of the State is not '*substantial*'. The majority opinion in *Everson v Board of Education of Ewing*[58] clearly states that a tax, large or small, cannot be levied for any religious purpose. Even his minority opinion, Justice Rutledge states that:

> *Madison and his co-workers made no exceptions or abridgments to the complete separation they created. Their objection was not to small tithes. It was to any tithes whatsoever.* [...] *"If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies"* [...] *In view of this history, no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises.*[59]

Rutledge noted that the purpose of the amendment was to ban *any and every form of public aid or support* for religious purposes.[60]

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[56] Everson v. Ewing, *supra* note 3.

[57] Prafull v. UOI, *supra* note 1.

[58] Everson v. Ewing, *supra* note 3.

[59] Everson v. Ewing, *supra* note 3.

[60] Everson v. Ewing, *supra* note 3.

Overall, Justice Black in his majority opinion upheld the statute by holding that the reimbursement was offered to all students irrespective of their religion and that the payment was made to the parents and not to the institutions. The strong dissenting opinions of Justice Jackson and Rutledge, while agreeing with the definition and explanation of the Establishment Clause, opined that the definition ought to invalidate the law, arguing that the funds are raised by taxation and it in turn aids the students in a substantial way in receiving religious instruction. The case is famous as the First Amendment was applied for the first time to state law through the Due Process Clause (Fourteenth Amendment). It was applied previously only to Federal laws.

Subsequent cases in the US have allowed aid and support programmes if the aid is generic in nature and is neutral with respect to all citizens who can by their independent choice, choose to direct the aid for religious schools or institutions.[61] If there is an incidental encroachment into the field of religion due to individual choices, it is constitutionally valid.[62]

B. The Lemon Test

In *Lemon v Kurtzman*[63], two Acts were challenged including the Rhode Island's Salary Supplement Act, 1969, which provided for a 15% salary supplement to teachers in non-public schools where the average per pupil expenditure on secular education is below the average in public schools. The eligible teachers had to teach only secular materials as taught in public schools. The lower Court had found that out of the 25% who attended non-public schools, 95% were attending Roman Catholic schools and 250 teachers of Roman Catholic affiliated schools were the sole beneficiaries. The other was Pennsylvania's Non-public Elementary and Secondary Education Act, 1968, which permitted the state Superintendent of Public

[61] *See* Muller v Allen 463 U.S.388 (198) and Zelman v Harris, *supra* note 5.

[62] *Id.*

[63] Lemon v. Kurtzman, *supra* note 4.

Instruction to reimburse non-public schools (the vast majority of which were Catholic) for instructors' salaries, textbooks, etc., this being limited to secular teaching in secular subjects approved by the superintendent.

In order to strike down the law, the Court evolved, based on previous cases, three tests which are now cumulatively known as the '*Lemon test'*, which lays down the requirements of a legislation concerning religion. Laid down by Chief Justice Warren Burger, it reads as follows:

1. The government's action must have a secular legislative purpose;
2. The government's action must not have the primary effect of either advancing or inhibiting religion;
3. The government's action must not result in an "*excessive government entanglement*" with religion.[64]

The Court held that the impugned legislations resulted in "*excessive government entanglement*" and hence, struck down both the laws.

This was followed by cases like *Mueller v Allen*[65] where the US Supreme Court examined whether state tax deduction (for taxpayer parents) for public and private school expenses was constitutional. The petitioner contended that the tax was in fact subsidizing religious education, as religious schools included tuition fee but public schools did not, resulting in larger deductions for religious schooling. The petitioner claimed, based on the *Lemon test*,

[64] The Lemon test has been in multiple cases. See for example, *Texas Monthly v Bullock* 489 U.S. 1, where the Supreme Court struck down a tax exemption for religious publications, *Van Orden v Perry* 545 U.S. 677, where the display of the Ten Commandments on a monument was held to be constitutional, as it had historical value in addition to purely religious value, and *McCreary County v ACLU of Kentucky*, 545 U.S. 844, where religious displays were held to be unconstitutional. Incidentally, *McCreary County* was decided on the same day as *Van Orden.* In *McCreary County*, the judges also declined to overrule the Lemon test.

[65] Muller v. Allen, *supra* note 61.

that the tax deduction had a '*primary effect'* of advancing religion. By a 5-4 majority, the Court held that the law passed the primary effect test as well as the other two tests, as the subsidy was available to all parents and the benefits did not go directly to the religious institutions, but to the parents. The dissenting opinion however strongly criticized this stand and embarked on an empirical analysis to show that the law in substance was made for students of religious schools and that there were no safeguards preventing the use of deduction for religious purposes.

The Court in *Muller v Allen* and *Bowen v Kendrick*[66] can be said to have taken the 'total subsidy'[67] position, where, as G. Sidney Buchanan argues[68], the aid must be only for secular activities of religious institutions and the same aid must be offered under the same or similar conditions for non-religious public and private institutions.

Post *Muller v Allen,* it is important to note that when the law or government aid was religiously unbiased and was available to all equally, the Court generally ruled in favour of the law, if the direct benefit accrued to the people or individuals rather than religious institutions or interests.[69]

C. The Private Choice Test

In the case of *Zelman v Simons-Harris*[70] , the issue was the constitutionality of a voucher program which was introduced due to the failing public school system. Vouchers were given to parents of students for attending participating public and non-public schools. Ultimately, however, the schools that participated were mostly private schools, a large number being

[66] Muller v. Allen, *supra* note 61.

[67] G. Sidney Buchanan, *Governmental Aid to Religious Entities: The Total Subsidy Position Prevails*, 58 Fordham L. Rev. 53 (1989).

[68] *Id.*

[69] Zelman v. Harris, *supra* note 5.

[70] Zelman v. Harris, *supra* note 5.

private religious schools. The issue being whether this violated the Establishment Clause of the First Amendment, the US Supreme Court by a 5-4 majority upheld the law, and developed the '*Private Choice test'* after analyzing several precedents. In this regard, the opinion of the Court delivered by Justice Rehnquist sums it up best:

> *In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.*[71]

Since the voucher program satisfied all the elements of the test and fulfilled the criteria of neutrality and availability of private choice, the program's constitutionality was upheld. In this case, the funding was given to the parents, whereas in *Lemon v Kurtzman*[72] the funding was given to the schools directly, and therefore this case highlights the importance of the legislative intent.

In the dissenting judgement, it was opined that the precedent in *Everson*[73] has not been followed, and that even though the choice is private and voluntary, the government was paying for religious instruction which is constitutionally impermissible.

D. Issue of Locus Standi

Article III of the US Constitution grants Federal Courts the jurisdiction to hear 'cases' and 'controversies'. Thus the interpretation has been that the petitioner or the person bringing a suit has to show 'standing'. Thus the particular person (or a group of persons) has to show injury to himself/ herself (or to the group) in particular.

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[71] Zelman v. Harris, *supra* note 5.

[72] Lemon v Kurtzman, *supra* note 4.

[73] Everson v. Ewing, *supra* note 3.

In one of the earlier cases, *Frothingham v Mellon*[74], it was held that a taxpayer does not have the standing to challenge government expenditure only on the ground that it is unconstitutional, unless 'direct injury suffered or threatened' is shown. Later in *Flast v Cohen*[75], an exception was carved out for the establishment clause of the first amendment, as the primary purpose of the clause was to *specifically limit* government taxing and spending for religious purposes. However *Flast v Cohen* has been read narrowly in subsequent cases. For example, in the popular *Hein v Freedom from Religion Foundation*[76], the foundation was held not to have standing to sue, and the plurality opinion ruled that constitutionality of expenditure by the executive branch cannot be challenged by taxpayers. This generated much public attention the expenditure challenged was used to fund President Bush's 'Faith-Based and Community Initiative'. This was seen as a case that closed the door for taxpayers to bring establishment clause lawsuits against the executive branch. In *Arizona Christian School Tuition Organization v Winn*[77], taxpayers challenged a law which gave 'tax credits' to people or residents who funded charities that in turn funded non-public education, including religious education. The Supreme Court held that the taxpayers did not have standing, as tax credits did not 'extract and spend' taxpayers' money on religion.

It is interesting to draw a parallel with the petitioner in *Prafull Goradia.* As the judgment explains, the petitioner contended that "he is a Hindu but he has to pay direct and indirect taxes, part of whose proceeds go for the purpose of the Haj pilgrimage, which is only done by Muslims"[78]. The locus standi issue did not arise in this case. It known however that our superior courts have relaxed norms for *locus standi* and even in this judgment the *locus*

[74] 262 U.S. 447.

[75] 392 U.S. 83 (1968).

[76] 551 U.S. 587 (2007). [Hereinafter "Hein v. Foundation"].

[77] 131 S.Ct. 1436. [Hereinafter "Arizona v. Winn"].

[78] Prafull v. UOI, *supra* note 1.

standi issue is not discussed. In being different from the decision of the US Courts, this is a positive difference in India, as *any* taxpayer can challenge the constitutionality of state action on the grounds of violation of Article 27. Strict restrictions would lead to difficulties for challenging violation of Article 27, as seen in the US jurisprudence. It will be difficult for a taxpayer to show a direct injury as well as a direct extraction of that particular taxpayers' money on an impugned government spending.

THE POSITION IN JAPAN

A. Articles 20 and 89 of the Japanese Constitution

Japan's contemporary post-war Constitution contains two provisions that concern religion, namely Articles 20 and 89, both of which have been largely influenced by the American jurisprudence on religion. Article 20 of the Constitution of Japan guarantees freedom of religion to all. *Inter alia*, it separates religion from the State and mandates that no religious organization "*shall receive any privileges from the State, nor exercise any political authority.*"[79] Article 89 further fosters the freedom of religion by stating that public money or property shall not be utilized for the benefit or maintenance of any religious institution or association.[80] On a comparison of Article 20 of the Japanese Constitution with Article 25 of the Indian Constitution, it is noticed that while the latter carves out exceptions and restrictions in the form of public order, morality, health and contents of other Fundamental Rights in Part III, the language of the former does not reflect any restrictions or exceptions. On a textualist reading of Article 20, the Japanese Constitution appears to grant absolute

[79] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20(" Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The State and its organs shall refrain from religious education or any other religious activity").

[80] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 89 ("No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority").

religious freedom.[81] A rigid wall of separation between religion and the State has been constructed through the language of these two Articles in the *Kenpo* (Constitution), which seems to strictly exclude religion from the public arena.[82]

B. The decision in Kakunga v. Sekiguchi

On an examination of the relevant case laws, it is noticed that the interpretation given to Articles 20 and 89 of the Constitution by the Supreme Court of Japan has resulted in the violation of the legislative intent outlined in the said provisions. *Kakunaga v. Sekiguchi*[83] was the first case in which the issue of constitutional separation of the church and the State came to the fore in Japan. The dispute in that case arose when the mayor of Tsu City expended public money on a *Shinto* ceremony for purifying the building site of a gymnasium. It was alleged that this amounted to contravention of Articles 20 and 89 of the Constitution of Japan because the former establishes freedom of religion by separating religion and State and the latter, *inter alia*, forbids the use of public money for the benefit or maintenance of any religious institution or association. While the appellate court held the action of the mayor unconstitutional, the Supreme Court adopted a more lenient approach and held that the action did not contravene the provisions of the Constitution.

The Supreme Court agreed with the stance that the language of Articles 20 and 89 of the Japanese Constitution reflects the notion of total separation between the religion and the State.[84] However, the Court found such a watertight separation to be both detrimental and

[81] Andrew B Van Winkle, *Separation of Religion and State in Japan: A Pragmatic Interpretation of Articles 20 and 89 of the Japanese Constitution*, 21 Pac. Rim. L. Poly. J. 363 (2012).

[82] Hiroaki Kobayashi, Religion in the Public Sphere: Challenges and Opportunities in Japan, 2005 BYU L. REV. 3.

[83] Kakunga case, *supra* note 6.

[84] Kakunga case, *supra* note 6.

unattainable and therefore, chose not to abide by strictly. In an attempt to secure a balance, the Court developed the "*purpose and effects test*" and held that when state action:

> *exceeds reasonable limits and which has as its purpose some religious meaning, or the effect of which is to promote, subsidize, or conversely, to interfere with or oppose religion* **....** *[It is not enough that the procedure of the activity is] set by religion. The place of conduct, the average person's reaction to it, the actor's purpose in holding the ceremony, the existence and extent of religious significance, and the effect on the average person, are all circumstances that should be considered to reach an objective judgment based on socially accepted ideas*.

Relying on a modified adaptation of the *Lemon v Kurtzman*[85] "*purpose and effects*" test, the Supreme Court held that the mayor's action was constitutional as it neither had the purpose nor the effect of promoting religion.[86] This decision was challenged and opposed by several liberal constitutional scholars on the ground that it virtually rewrote Articles 20 and 80 of the Japanese Constitution.[87]

The decision in *Kakunaga v. Sekiguchi*[88]has been largely affirmed and followed in subsequent decisions like the *Self-Defense Forces Enshrinement*[89] case and the *Daijo Sai*[90] case. It has not been overruled and the "purpose and effects" test constitutes the law of the land with regard to the interaction between the religion and the State in general, and state expenditure on religion in particular. The said test has been criticized as being impractical

[85] Lemon v. Kurtzman, *supra* note 4.

[86] Brent T White, *Reexamining Separation: The Construction Of Separation Of Religion And State In Post-War Japan*, 22 UCLA Pac. Basin L.J. 29 (2004).

[87] *Id.*

[88] Kakunga case, *supra* note 6.

[89] Saiko Saibansho [Sup. Ct.] June 1, 1988. [Hereinafter "Self-defence case"].

[90] Saiko Saibansho [Sup. Ct.] July 9, 2002. [Hereinafter "Daijo case"].

and ad-hoc due to its usage of the "*average Japanese person*" as a yardstick for deciding cases involving religion and the State.[91] The Court bases the outcome of a case on whether "*the average Japanese person*" is offended by the said religious practice and views it as a religious act or not. This is problematic due to its excessive subjectivity.

On a comparison between the Japanese and the Indian positions on state expenditure on religion, remarkable similarities come to the fore. While both the Constitutions mandate a secular state, in reality the States do spend public money on religious activities. We are of the opinion that the constitutional command of secularism has been diluted and tempered in both the countries. The Haj subsidy discussed in the preceding part of the article has been consistently held constitutional by the Supreme Court of India and *intra vires* Articles 14, 15 and 27. Public spending on religion has also been largely held constitutional in Japan, in spite of the explicit constitutional mandate to the contrary. However, it is essential to distinguish the positions in India and Japan on one count. While the Indian Constitution does not provide for absolute and unfettered religious freedom, the Japanese Constitution does. Therefore, it is justifiable to affix a more severe standard of review while examining the manner in which the Japanese Supreme Court has interpreted Articles 20 and 89.

CONCLUSION

Even though it violates the strict and puritan definition of secularism, State expenditure on religion is a common thread binding several 'secular' States. This article has analyzed the position relating to State expenditure on religion prevalent in India, U.S.A. and Japan. In India, while Articles 15(1), 25 and 27 mandate a secular State, the State has been spending public money on religion, the most controversial of which has been discussed in detail in this

[91] Andrew B Van Winkle, *Separation of Religion and State in Japan: A Pragmatic Interpretation of Articles 20 and 89 of the Japanese Constitution*, 21 Pac. Rim. L. Poly. J. 363.

article. In the *Prafull Goradia*[92] case, the Supreme Court of India upheld the Haj subsidy and ruled that it did not violate Articles 14, 15 and 27 of the Constitution. However, the Court's decision was not based on sound legal reasoning as it condoned State expenditure on the Haj subsidy on the ground that the State was incurring expenditure for other religious groups too. The correct reasoning would have been to hold that in light of the constitutional provisions on religion, State expenditure on any and every religious group cannot be condoned. The Supreme Court's decision in the *Rafique Sheikh Bhikan*[93] case is laudable as it rules that the Haj subsidy is unjustified and should be abolished by 2022.

In the US, the Establishment clause of the First Amendment governs the issue of State expenditure on religion. The jurisprudence has evolved since the early cases such as *Everson v Board of Education*[94], where the Supreme Court explained the Establishment clause with respect to State funding on religion, to latter cases such as *Lemon v Kurtzman*[95] wherein a law was struck down due to excessive entanglement with religion. More recently, in *Zelman v Simons-Harris*[96], the Supreme Court decided to follow a policy of non-interference when there is firstly, neutrality of a subsidy/aid with respect to religion, and secondly, the presence of a private choice.

The authors opine that, despite the recent decision of *Rafique Sheikh Bhikhan*[97] in India, it is useful to adapt some of the important principles laid down by US case laws. In the cases of *Prafull Goradia*[98] and *Rafique Sheikh Bhikan*[99], it is acknowledged that Article 27 does not

[92] Prafull v. UOI, *supra* note 1.

[93] UOI v. Rafique, *supra* note 2.

[94] Everson v. Ewing, *supra* note 3.

[95] Lemon v Kurtzman, *supra* note 4.

[96] Zelman v. Harris, *supra* note 5.

[97] UOI v. Rafique, *supra* note 2.

[98] Prafull v. UOI, *supra* note 1.

[99] UOI v. Rafique, *supra* note 2.

have precedents which analyze or discuss the Article in depth. In light of the lack of precedents, it will be useful to compare some of the observations of the US Supreme Court. In *Everson v Board of Education*[100], Justice Katju's observations in *Prafull Goradia*[101] are directly contradicted, and the points of conflict between the two are worth considering. The authors submit that the Supreme Court of India has lost a valuable opportunity to lay down tests or criteria to reduce the scope for subjectivity in future cases. This has been the endeavour of the US cases, which have laid down the 'Lemon test', and 'Private Choice test' *inter alia*.

Another interesting parallel is that of 'standing' before the Courts. The U.S. Courts have long restricted the scope for challenging state expenditure by maintaining strict norms for *locus standi*. *Fronthingham v Mellon*[102] first laid down that a taxpayer will not have standing unless a direct injury is shown. The landmark case of *Flast v Cohen*[103] carved out an exception to this rule with respect to Establishment Clause cases. However in subsequent cases, like the recent popular cases of *Hein v Freedom from Religion Foundation*[104] and *Arizona Christian School Organization v Winn*[105] have read *Flast v Cohen*[106] narrowly, thus reducing the scope of challenges under the Establishment Clause. The issue of *locus standi* has no mention in the Indian cases like *Prafull Goradia*[107], which is interesting as the petitioner probably did not have a direct injury. The norms of *locus standi* have been relaxed in the Indian courts.

[100] Everson v. Ewing, *supra* note 3

[101] Prafull v. UOI, *supra* note 1.

[102] Fronthingham v. Mellon, *supra* note 74.

[103] Flast v. Cohen, *supra* note 75.

[104] Hein v Foundation, *supra* note 76.

[105] Arizona v. Winn,*supra* note 77.

[106] Flast v. Cohen, *supra* note 75.

[107] Prafull v. UOI, *supra* note 1.

In Japan, Articles 20 and 89 of the *Kenpo* are couched in absolute terms and mandate a rigid wall of separation between religion and the State. However, in *Kakunga v. Sekiguchi*[108] and subsequent cases like the *Self-Defense Forces Enshrinement*[109] case and the *Daijo Sai*[110] case, the Supreme Court has attempted to dilute the strict mandate by creating a contrasting legal trajectory in the form of the "*purpose and effects test*". Particularly problematic is the Court's reliance on the ad-hoc rubber yardstick of whether the "average Japanese person" views the said act as a religious act or not. At this juncture, the authors would like to point out that though most of the literature on this topic is severely critical of the Japanese Supreme Court's stance, it is important to appreciate the motive behind the Japanese Supreme Court's liberal interpretation. In *Kakunga*[111], The Court has emphasised that a strict separation between religion and State is not only unachievable, but also undesirable. This is because state regulation will inevitably overlap with religious practices in certain circumstances. This has prompted the Court to arrive at a practical middle ground by evolving the "*purpose and effects*" test. The authors opine that in order to arrive at a reasoned conclusion in the controversial question of whether a secular State should spend on religion, it is important to appreciate the contours of the Japanese debate on the same due to the intricate social and legal issues involved.

[108] Kakunga case, *supra* note 6.

[109] Self-defence case, *supra* note 89.

[110] Daijo case, *supra* note 90.

[111] Kakunga case, *supra* note 6.