Understanding Constitutional Secularism in 'Faraway Places': Some Remarks on Gary Jacobsohn's *The Wheel of Law**

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§ The Promise and the Peril of Comparative Constitutional Studies

As is generally well-known, the tasks of comparison are neither easy nor ever fully done. *What to compare and how* and *why* remain difficult questions in the larger sphere of comparative law. The rather nascent tradition of doing comparative constitutional studies (COCOS) revives these concerns in some new ways.

COCOS shares with the spheres of comparative law generally, concerns about historical method (the choice of telling stories– doing microhistory or metahistory), ways of periodization, and the unit of comparison (that is whether one focuses on the history of ideas or mentalities, or of political and social action, or further the making of institutional and popular cultures[1].) It also shares more generally the problem of hegemonic intent resulting often in imposition of law, carrying large potential side-effects. Further, the virtue of eternal reflexive vigilance is difficult to cultivate even for the best of comparativists, given the fact they, as also for the lesser comparative beings, remain encased within traditions of sensibility shaped by religion, culture, and language. The moderation of the hegemonic intent in fashioning comparative narratives is never an easy task and the discourse concerning the universal and the particular does not provide any safe harbour for comparativist odyssey.

COCOS confront in addition different orders of difficulty. In the *first* place, the term 'constitution' signifies three different 'things.' I have named this elsewhere I terms of the three 'Cs': C1 standing for the constitutional texts, C2 for both the orders of official (constitutional 'law') and citizen interpretations (constitutional insurgencies); and C3 signifying 'constitutionalism' standing for distinct theories/ideologies, which shape as well as remain shaped by C1 and C2, which also shape these[2]. Even within-

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* Gary Jacobsohn, The Wheel of Law: India's Secularism in Comparative Constitutional Context, 2003, Oxford University Press, New Delhi.

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1 See, Upendra Baxi, 'The Craft of Disinterested History: *Jury Trials and Plea Bargaining: A True History* by Mike McConville and Chester L. Mirsky' *Kings College Law Journal* 17:1, 155-165 (2006.)

2 See, Upendra Baxi 'Constitutionalism as a Site for State Formative Practices' *Cardozo Law Review* 21, 1183-1210 (2000.)

nation studies of constitutions at work remain besieged by the dialects and dialectics of the three Cs; for the practices of COCOS these present an immensely difficult realm.

Second, COCOS address publics or communication constituencies. The first constituency of course comprises the charmed circle of COCOS specialists. The second public may be designated as the official publics. These remain heterogenous, indeed. Because I find the term 'elected public officials' too restrictive (for example this does not typically include appellate as well as apex Justices) I here suggest that a more helpful distinction is between constitutional *oath taking* public officials and the *oathless* ones, that is others who do not swear affirm the obligation to uphold the constitution, without fear or favour. The latter constitute a vast series of publics: the so-called 'civil servants' or more accurately uncivil masters (because for a large body of Indian people these are neither truly 'civil' nor' servants'), the varieties of legal professionals, the owners, operators, and independent contractors (public intellectuals writing for the press or regular participants in TV talk-shows) of the print and electronic mass media, social and human rights activist networks, and some self-styled custodians of ongoing traditions of legal education and research, including the inter-disciplinary communities of social and cultural sciences concerned with wider issues of symbolization of law in society. These may be described as the unofficial bodies of deliberative publics via the Rawlsian notion of constitutional 'public reason,' or in Habermasian terms as exploiting the 'discursive community will formation.' One way then of understanding constitutional formations invites sustained grasp of deliberative/reflexive patterns of interaction, or the moral trafficking in ideas between the deliberative official and non-official publics.

All this in turn offers a tangled web through which constitutional normativity stands further socialized. Put another way, constitutional acts, performances, and even interpretive feats constitute new forms of political desire, even utopic imagination, concerning constitutional futures. We ought to pause to note at least four consequences. First, the multiplex process of commoditization via news/views production of constitutional forms of actions via the mass media promoting the folklore of constitutionalisms; second, forms of NGO-ization of constitutions; third, as offering contentious registers of judgements concerning the success or failure of constitutions put to work or sleep as the case may be; and fourth, as providing ambivalent sites of critical judgement concerning liberal and less liberal, even illiberal practices of constitutionalism.

This last, in my considered view, is a distinction of *degree* rather than of *kind* if only because the so-called *liberal* constitutionalism capaciously

accommodates toleration of the intolerable *illiberal* practices. The United States constitutionalism during the Cold War and now under the aegis of the 'war on terror' furnishes one example; the routinization of the exceptional state in the Indian instance (for example by the massive constitutionalization of dragnet security legislations under Article 22, which mocks the precious assurances of Article 21 rights to life and liberty.[3]) In saying this, I do not wish to gainsay some residuary legatees of the Third Reich constitututional 'paradigms' of military constitutionalisms in the Global South; rather, I insist from the perspectives of subaltern constitutionalism that the normative distinctions between liberal and illiberal constitutional forms furnish partial and ideologically incomplete narratives[4]. I wish to go so far as to suggest that in a grounded subaltern COCOS perspective all contemporary state formations constitute 'failed states.' Any elaboration of this thematic remains the task for another day!

Rarely, do COCOS seek to address counter-publics, specially the militant counter-publics which deploy collective political violence as an act of political communication which interrogate entrenched iniquitous systems of domination legitimated by the constitutionalism/good governance, and the rule of law talk/discourse. Understandably, the COCOS traditions play safe, even as rebels with a cause confront forms of *predatory* constitutionalism. Probably, Professor William Dicey in the late 19th century summated this best when he urged that those who govern should never make the mistake of 'weighing the butcher's meat in diamond scales.' The sufferings of the rightless peoples everywhere remain that meat which ought not to contaminate the finely calibrated scales of constitutional rights jurisprudence!

Third, by now a thriving law and economics type genre, which entails the application of statistical and econometric theoretic models in the tasks of comparing constitutional formats at cross-national levels, makes a pertinent contribution[5]. However, most COCOS studies remain encased in qualitative rather than quantitative comparison. How may each tradition learn from the other is an important question, which I do not pursue in this essay save saying that this divide itself remains rather difficult to bridge if only because the everyday experience of life under constitutionalism is not just a domain of reason but also a realm of politics of passion .

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3 See K.G. Kannabiran, Wages of Impunity (Hyderabad, Orient Longman, 2003).

4 See concerning the notion of subaltern constitutionalism, Upendra Baxi, 'The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlesness in India' in C. Raj Kumar and K. Chockalingam (ed.) *Human Rights, Justice,& Constitutional Empowerment* 3-25 (Delhi, Oxford University Press, 2007.)

5 See, Torsten Persson and Guido Tabellini, *The Economic Effects of Constitutions* (2003; Cambridge, The MIT Press); and Darron Acemoglu, 'Constitutions, Politics, and Economics: A Review Essay on Persson and Tabellini...' *Journal of Economic Literature* 4: 1025-1048 (2005.)

Fourth, COCOS, perhaps more than other realms of comparative law studies need to maintain claims of ontologically robust constitutional identity even amidst throes of constant transformation. Both permanence and flux need to be simultaneously addressed. The aspect of permanence is often seized by identification of C3 genres, for example summed up by terms such as 'liberal,' 'socialist,' 'postcolonial,' 'postsocialist,' 'supranational,' 'revolutionary,' and 'transitional' constitutionalisms. This last category is the puzzling because, truth to say, all constitutions remain *transitional*. They remain always work-in-progress, despite some fantastic claims of their identity. Constitutional development everywhere remains always in a state of crises in terms of respect for the values, norms, and standards of human rights and of responsibility for tasks of re-distributive justice.

In this perspective, I know of *no* actually existing constitution that in this sense is *not* transitional because all nations emerge on the contemporary world historic theatre as *equal strangers* to the tasks of promotion and protection of the internationally enunciated human rights norms and standards[6]. If so, the COCOS enterprise may have prospect of some success when fully informed by a spirit of humility in the task of informed comparative judgement concerning constitutional development as well as failure.

The Wheel of Law makes a noteworthy contribution to the emergent COCOS tradition. Its principal intendment is to foster cross-cultural understanding of constitutions as work-in-progress. This study also brings home the utility and value of thematic cross-cultural comparison; through the prism of constitutional secularism, it traces the complexity of constitutional development and change across India, Israel, and the United States. Further, because 'constitutionalism in faraway places seems finally to have come of age among all kinds of scholars of public law,' the claims of American exceptionalism, and I may equally add the comparative European disregard, become problematic. Jacobsohn, additionally, as we note briefly in the next section, redefines the COCOS mission both as a new pedagogy and high theory.

The Wheel of Law revisits secularism as an essentiality contested concept. It traces its some distinctive genealogies, or more precisely the iconography of Indian secularism. It complicates the difficult notion of constitutional politics in a comparative setting. It shows fully the competitive production of the 'truths' about constitutional secularism and the ways in which

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6 The standard narrative device that distinguishes changes *in* from changes *of* constitutions does not quite help. See Sanford Levinson, 'How Many Times Has the United States Constitution Been Amended? in Sanford Levinson ,Ed., *Responding to Imperfection: The Theory and practice of Constitutional Amendment* ,13-36 (1995; Princeton, Princeton University Press); Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court In the mid Eighties* (1985; Bombay ,N.M. Tripathi.)

adjudicatory power prevails over other forms of state power and authority. Further, as I read his work, Jacobsohn rather fully disrupts (to invoke here the Prince of Demark) the 'stale, weary and unprofitable uses' of the American scholarly discourse concerning the 'counter-majoritarian' character of 'judicial review' power and process. As Jacobsohn brings home in this imaginative as well as painstaking exploration, the 'politics' of constitutional interpretation emerges as a *sword* and a *shield*. If in certain historic conjunctures, C2 combats corruption of the first principles that seek to justify the unjustifiable, that is, the practices of constitutional politics which are directed to reproduce human rightlesness and promote inequity, in certain other situations C2 defers to expedient regime oriented negotiation of rights to freedom of conscience and religion[7].

§ Iconography of Indian Secularism

Constitutions are not mere assemblages of words. They also thrive on symbolic representations: the flag, the anthem and the linkages between 'nature' and 'nation' as provided by laws protecting national birds, animals, rivers, and mountains. Jacobsohn looks at the imageries of constitutional identity as symbolized by various national flags, which provide passional forms of loyalty to the idea of a nation-peoples and serve also as a marker of the 'membership in the national community' (p.9.) Jacobsohn here mediates on the colours and figuration in the Indian national flag; if the colours signify 'the unfinished business of national integration. (p.6), the figuration of the Ashoka wheel convey in more determinate sense ' a message about the conceptualization of secular democracy that is significantly different from the approaches intimated by the American and Israeli flags'(p.7.) He thus strives to offer a distinct message: COCOS ought to attend seriously to constitutional iconography placed in service of 'comparative reflection on the alternative experience of other constitutional systems' (p.8.) Jacobsohn, this context, as also in a comparative focus, suggests that one way to understand and even secure Indian constitutional secularism is to mediate on aspects of constitutional iconography.

However, it is the Ashoka wheel that engages him the most. Upon independence, the search begins for the replacement of Mahatma Gandhi's *charkha* or the spinning wheel which appeared in the flag of the Indian National Congress during the freedom struggle (p.6.) A crucial question thus arises: what led to the search for an alternate icon? Perhaps, the *charkha* was

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7 The Indian Supreme Court has thus upheld anti conversion state legislations that criminalize conversion by 'force' and 'fraud.' Proselytizing religious practices that appeal to divine displeasure for refusal to convert would thus amount to 'force.' Appeals to Hell and Heaven would constitute 'fraud' because there is no forensic way to site and prove the existence of these entities!

too humble a symbol to convey this first twentieth century inaugural postcolonial state[8]; perhaps, it did not accord with the Nehruvian vision of Indian economic development; perhaps too it may have been thought that the nation may not be symbolized after all by a party flag.

In any event, the Ashoka wheel as a 'wheel of law' when especially situated in the Sarnath configuration, does not logically carry the interpretation associated with philosopher Radhakrishnan in whose view the law as *dharma* signifies a kind of virtue-ethics, a *dharma* that is 'constantly moving,' reminding that 'there is life in movement' (p.7.) It is however not self-evident that the wheel should represent the law/*dharma*.

On standard and readily available and official and other Internet descriptions[9], the Sarnath icon consists of 'four lions, standing back to back, mounted on an abacus with a frieze carrying sculptures in high relief of an elephant, a galloping horse, a bull and a lion separated by intervening wheels over a bell-shaped lotus. The wheel appears in relief in the centre of the abacus with a bull on right and a horse on left and the outlines of other wheels on extreme right and left. The bell-shaped lotus has been omitted.' And the fourth lion remains invisible. How may one fully grasp the reduction of all these elements into a representation of the wheel as the wheel of law/ *dharma*? May not the wheel equally yield other interpretive readings – for example, the wheel of *dukkha*, the eternal recurrence of suffering, or wheel of God that in Rabindranath Tagore's famous aphorism that grinds exceedingly slowly but it grounds fine! One wonders whether there exists any tradition of subaltern iconography that may offer us different significations of the wheel. The Mahatma's *charkha*s, as well as the potter's wheel, perhaps indicate different ways of some proletarian approaches to understanding the wheel. All this entails re-visitation of constitutional iconography. I remain singularly untrained and incompetent to explore alternate readings.

What interests Jacobsohn, however, is the question: what kind of law/ *dharma* that the wheel may signify? Jacobsohn recalls and reiterates the Ashokan conception of *dharma* as a 'concept intended for secular teaching,' 'directed towards amelioration of social injustices embedded in a status quo of religiously based hierarchy' (p.8.) But this does not quite tell us why 'secular teaching' may not merely subvert hierarchy but also reinforce it[10].

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8 I need to put the matter thus way because many American students and colleagues insist that theirs was the first world historic postcolonial constitution!

9 For a representation and detailed description of the Ashoka wheel see http://en.wikipedia.org/wiki/Dharmacakra, http://en.wikipedia.org/wiki/Ashoka_Pillar (last visited 27th March 2007).

10 A monumental example is offered by the Indian constitution itself when it speaks variously of the 'scheduled *castes*,' thus creating all sorts of new constitutional caste orderings in the pursuit of complex and contradictory affirmative action programmes.

The wheel of law even as it rotates on the axes of indissoluble bounds of the 'spiritual and temporal domains' may in the end help to develop a positive sense of national identity (p.285.) But as concerns the 'underlying premise of ameliorative secularism' that strives to 'reduce inequalities' and to promote 'just social order' (p. 287) the wheel of law may perhaps more aptly be understood as a roulette wheel! Its constant motion rewards more often than not the constitutional-*haves* rather than the *have-nots*[11] . At the same moment, this rotational movement also swings the fortunes of state neutrality obligations. The wheel then shapes an immense multiplicity into a singularity of constitutional secularism, in itself subject to different rhythms of historic time, both the accelerated catastrophic political time and the glacial quotidian time both of competitive party politics and reasoned adjudicative interpretation.

§ Understanding Theory and Practice of Secularism

Two COCOS pertinent messages follow from this important work. First, cross-cultural constitutional comparison entails considerable conceptual innovation and second comparative learning best occurs when the models are constantly set against the realities of political, economic, and social development.

Jacobsohn invites us to fully consider the idea of secular constitution as signifying a 'polity where there exists a genuine commitment to religious freedom that is manifest in the legal and political safeguards put in place to enforce that commitment' (p.28.) While this enables us to distinguish a non-secular from secular constitutionalism, within the latter form neither the 'commitment' nor the 'safeguards' emerge as self –evident and deciphering them requires recourse to indicators of the 'consequential dimension of religiosity (pp.28-29) Further ideal-type construction yields different models of constitutional secularism. Chapter 3 offers three models: the 'visionary' (Israel) 'assimilative' (the United States) and the 'ameliorative' (India.) Jacobsohn distinguishes the Turkish context of 'reformist secularism' (p.107, fn. 131.[12]) Recourse to high political/juristic theory concerning the place and role of autonomous judicial interpretation becomes necessary because secularism entails normative interpretation and even definitional re-articulation. A considerable merit of this work is the re-visitation of John Rawls's germinal notions of 'constitutional essentials' and the doctrine of 'public reason (see, Chapters Seven and Eight.)

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11 See for this distinction, Upendra Baxi, 'Violence, Constitutionalism, and Struggle' or How to avoid Being a *Mahalmuwckha* in S.P. Sathe and Sathya Narayan, ed., *Liberty, Equality, and Justice: Struggles for a New Social Order* 9-27 (2003; Lucknow, Eastern Book Co.)

12 Jacobsohn also refers somewhat approvingly to 'positive secularism' (p.151.) All this makes the notion of ameliorative secularism a trifle unwieldy, perhaps?

A COCOS theorist going beyond the Euroamerican shores confronts at least two related hurdles. One is that even eminent Euroamerican political theory producers remain somewhat insular; the frameworks they offer to understand the world rarely address histories of South constitutionalisms. Second, while the South scholarship rightly decries the latent or manifest hegemonic intent or the universalizing effect of Euroamerican theory, it has little demonstrable to offer by way of an alternate and explicit way of theorizing[13].

Jacobsohn offers some ways out of this *impasse*. He suggests, first, some India-based ways of interrogating the doctrine of constitutional essentials; second, at the same moment, he asks us to consider ways of interactive understanding between high liberal theory and the somewhat hard and parlous experience of the Indian, and Israeli, and American adjudicatory experience in construction of secularism. This is indeed a brilliant feat at once constantly alerting Euroamerican theory producers against their insularity and urging the South decision-makers and scholarship to avoid de-privileging approaches to 'theory' as a hegemonic contagion. Both sides have much to learn from each other and this defines the COCOS mission. I may only urge the reader to fully ponder this high order of Jacobsohn achievement[14]. Overall, I endorse the observation: 'If under the rubric of constitutional essentials in India are not to be found principles regulating basic matters of social and economic equality, then much of the history of the Indian constitution will need to be rewritten' (p.171)

Further, the importance of historical narrative, experience, and imagination may not be gainsaid. Thus both the United States and Israel stand constitute 'immigrant societies' but vast differences inform their historic and cultural composition. Terms like 'multi-ethnic,' 'multi-religious,' 'multicultural' that may be used for many societies; these descriptions remain superficially useful but also profoundly deceptive. Thus, while the United States remains admittedly multi-religious, minority religious traditions there never acquire either a 'formidable presence' or a 'substantial minority of American people' confronting the 'vast majority' 'with a rival constitutive culture' (p.105.) Jacobsohn goes so far as to say that the American C1, and even C2, would have *otherwise* followed the Indian constitutional provisions.

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13 Of course, subaltern, feminist, and postcolonial approaches to constitutionalism exist and some doctrinal commentation on law contains elements of an implicit theory. The question is how far all this may provide a normative/ philosophical perspective on understanding C3? To what extent do these provide a general theory of and about constitutionalism, here understood as a complex relationship between the key ideas of governance, rights, development, and justice?

14 This work does not merely address the re-working of the 'liberal' tradition by Rawls; it is replete with many useful asides concerning contributions of Charles Taylor, Will Kyamicka, though Jurgen Habermas remain conspicuous by the lack of reference.

Very few human societies are monocultural. If the pluralities sought to be conveyed by the prefix 'multi' is to have any pertinent meaning at all, it lies in an opposition to a 'universalist political creed' that separates citizenship (in the words of Michael Walzer) from 'every sort of particularism' and justifies a liberal state which remains 'nationally, ethnically, racially, and religiously neutral' (p.65.)

The point surely is not that state neutrality in the state–religion nexus is unimportant but that in these three units of comparison it necessarily assumes some staggeringly diverse forms. No 'comparison' may ignore some specific cultural sedimentation of state power. The question then is, from a COCOS perspective, how high theory may keep good company with lived social histories. Towards this end of grasping fractured normative histories of the idea of constitutional secularism, Jacobsohn offers a magisterial contribution.

§ The Indian Story

Unlike most narratives of Indian constitutional secularism, Jacobsohn does not detail or distress us with the decisional law concerning the distinction between religious belief and practice, denominational rights, idols and shrines as property, and the 'dangerous supplement' (to evoke Derrida) of gender equality in India's major religious traditions. The three sub-plots of the Indian story that interest Jacobsohn the most are the Uniform Civil Code, the *Bommai* decision, and the emergence of 'Hindutva' as a 'way of life.' In terms of a recent distinction that I draw, Jacobsohn is more directly concerned with governance oriented secularism (GOS) rather than rights oriented secularism (ROS. [15])

ROS seeks to make the best complete sense of the normative proclamation of the right to freedom of conscience and to religious belief and practice. The elaboration of the ROS dominates much of the Indian Supreme Court's work for its three decades; it also entails complex interface between rights to religion and other related rights, such as the claims over the near-absolute Article 30 minority rights to establish and administer educational institutions of their own choice, claims to immunity from use of public revenues for renovation of religious shrines or celebrations of historic memory of inaugural figures of religious traditions, contestation over definitions of public order as a ground of regulating associational and movement rights, and claims concerning property rights. ROS signify, overall, claims and contentions about the integrity of rights-structures.

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15 See, U. Baxi, 'Savarkar and the Supreme Court? – Comment on R. Sen, *Legalizing Religion'* East-West centre, Monograph Series (Washington D.C., in press, March, 2007.)

In contrast, GOS seeks to codify the limits of political practices that craftily appeal to religion as a resource for the acquisition, exercise, and management of political power. GOS no doubt remains related to ROS; but the main remains focussed on the preservation of the integrity of secular governance structures and processes. The GOS formations explicitly remain subject to adjudicatory surveillance. The distinction needs to be developed much further. However, it may be said that the spirit and scope of such surveillance over governance practices [see Chapters Five, Six, and a part Chapter Four (pp.104-121)] provide a principal focus.

I do not, for reasons of space, here examine Jacobsohn's analysis of the Uniform Civil Code debates save to note that this stands here reframed in terms of distributional questions: 'Who gets what, when, and how?' The issue then, in terms familiarised as well as probelmatized so much by Nancy Fraser, concerns scrupulous forms of avoidance of both *misrecognition* and *misdistribution*[16]. For Jacobsohn, the principal issue is not the framing of the Code itself but rather how this 'might affect achievement of ameliorative secular aspirations' (p.110.) These aspirations are encased no doubt in "the complicated hierarchies of age, gender and caste" taken by almost everyone at their face value (p.119.)

Matters do of course get further complicated by considerations of 'social comity' (p.105) directed at 'preserving political space for religious identity' (p.108.) The judicial forfeiture of this complexity moves our otherwise reticent author to a sharp criticism of Justice Kuldeep Singh's remarks in *Sarla Mugdal* reiterating the need for a Code; what is lamentable, says Jacobsohn, is not this strong commendation but rather 'a serious misconstruction of Article 44 that bespeaks a broader failure of imagination regarding how one might conceptualize legal uniformity in the Indian context' (p.116.) Far from envisaging either possibility that Article 44 is 'unrealizable' and 'unenforceable,' Jacobsohn suggests a third way that 'does not expend political capital in seeking to divest religion from social relations, but rather deploys it to mandate uniform standards without requiring uniform behaviour' (p. 119.[17]) Incidentally, I cannot let go this theme without inviting your attention to some concerns for judicial political correctness variously raised by Soli Sorabjee and Tahir Mohamed (pp.114-115) and Jacobsohn's rather spirited protest against the imposition of the 'veil of silence' (p.110). I like and endorse Jacobsohn's approach to Article 44 as inviting the Supreme

16 Nancy Fraser, 'From Redistribution to Recognition?: Dilemmas of Justice in a Post-socialist Age,' 1 *New Left Review* 212 (1995); and 'Social Justice in the Age of Identity Politics,' in Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political- Philosophical Exchange* 7-109 (2003, London, Verso)

17 Drawing here of course upon the high authority of the lamented Professor S.P. Sathe.

Court to 'function as an official *constitutional gladfly*' (p.111, emphasis added.)

If the UCC clearly concerns GOS, so does the *Bommai* decision, which dealt not with any specific constellation of individual or group rights to freedom of conscience or religion but rather with the issue of secularity of governance practices. No doubt the context was catastrophic not just in the sense of the demolition of the Babri Masjid and the carnage that followed but also in the sense that some BJP led state governments and the Party itself proceeded with some abundant and insidious justifications for this. The dismissal of three BJP governments in the state and the imposition of the President's Rule were upheld by the Supreme Court on the ground of their violation of 'secularism' as the essential feature of the basic structure of the Constitution. The issue posed in terms of conflict between 'democracy' and 'secularism'—both essential features—was appropriately handled 'at least' by some of the Justices who "were inclined to comprehend democracy and secularism as conceptually intertwined, in effect rejecting a fundamentally process-based definition of 'the provisions of this Constitution' " in Article 356 (pp. 134-135.) Further, Jacobsohn writes approvingly of the *Bommai* linkage of the basic structure doctrine with the working of Article 356 (p.143.)

While I broadly agree with this last observation, even as votary of judicial activism Indian-style, I remain uncomfortable with the manner in which the *Kesavananda* ruling now stands extended. The basic structure doctrine extends *only* to judicial review of constitutional amendments; the *Bommai* Court was clearly bound by this as well as by the minimal deference to the doctrine of precedent which requires judicial deference by smaller Benches to a Full Court decision. Article 356 is a *constitutional*, not by any means a *constituent*, power. I believe that the eminent Justices had ample authoritative legal materials before them to have arrived at much the same result, without claiming the high authority of that doctrine; since Bommai even a more fantastic recourse to the doctrine converts it into a canon of constitutional construction and even statutory interpretation! I essay a fuller review of these trends elsewhere[18] .

Perhaps, more to the point is Jacobsohn's elaborate analysis of judicial understanding of the *Bommai* brand equity 'secularism' (pp. 145-160.) This should be compulsory reading for all COCOS community because at stake remain 'the long-term consequences of the unchallenged ethnoreligious nationalism on the prospects of social reform and reconstruction' (p.134.)[19]

18 See Upendra Baxi, 'The Routinization of the Basic Structure Doctrine With and Since Bommai,' being a paper presented to S.P. Sathe first death Anniversary, ILS Law College, Pune, March 8-11, 2007.

19 In this sense, *Bommai* invites comparison with the 2003 European Court of Human Rights decision in *Refeh Partis (The Welfare Party)* and *other v. Turkey*.

The so-called *Hindutva* judgment manifests yet another domain of GOS. No doubt, there was involved the question of the individual claim to freedom of speech and expression in electoral political campaigns in the face of a statutory prohibition of appeals to religion, which stand described as 'corrupt practice.' The brilliance of Jacobsohn's contribution lies in meditations on 'corruption.' This political evil has many faces. Quoting Dobel, Jacobsohn reminds us that 'systematic corruption' serves a source of 'certain patterns of inequality' (p. 163, fn. 3.) Evoking the difficult notion of Dworkin that struggles to speak to us of 'law as integrity' Jacobsohn also suggests that 'corruption, in short, represents the loss of integrity' (p. 166, fn. 9.) Echoing Montesquieu, he says that corruption violates the 'constitutive commitments that establish a polity's constitutional identity' (p.165.)

All this, put together, ought to guide a COCOS type understanding of systemic political corruption. More specifically, it helps elevate the more mundane electoral law judicial interpretation to some lofty heights. The *Prabhoo* decision is significant precisely because it scales these heights by establishing some normative linkages between democracy and secularism' (see the quote from the decision at p. 167.) In the Court-bashing that followed a decision misread and miscalled as the Hindutva decision this dimension stands near completely ignored and surely scrupulous Indian constitutionalists ought to revisit this in fullness.

GOS again becomes pertinent in *Prabhoo*. I invite you to cheerfully study Jacobsohn's exegesis (especially, pp.163-202). This brings to a full view the difficulties of constitutional justicing in less ontologically robust constitutionalisms than characterised by the American First Amendment. I have yet to be convinced about the indictment of judicial 'conflation between Hinduism and Hindutva' (pp. 203-209) for the very same reasons that lead Jacobsohn to cite my *Indian Express* article on the decision in the context of my other related writings (pp. 233-234.) I continue to think that too much is made of Brother Verma's references to Hindutva as 'way of life.' It was neither a kiss of life to the Hindutva forces nor a kiss of death for Indian constitutional secularism; rather, the issue concerned invocation of differently constituted Utopias during the campaign speech-making; how may Justices and legislators prohibit freedom of speech and expression as forms of constitutionally dreaded Dystopia[20]? The issue remains: how may appeals to constitutional secularism remain subject to the constitutional discipline of the rights to freedom of speech and expression, association and movement? Put another way, when as a matter of principle may Justices draw bright lines between the utopic and the dystopic?

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20 Raising this question is certainty not to ally myself with the highly partisan interrogatcns of Arun Shourie, profusely, and fortunately dismissively, cited by Jacobsohn on this count.

There is of course no question that the political right everywhere appropriates the 'liberal' discourse to its own distinctive 'undemocratic' ends. One may say that the doctrine of basic structure remains crucial as setting standards for judging the issue of appropriation and *The Wheel of Law*, overall, provides a devastatingly accurate understanding of how this actually happens in the Indian case. In this, it remains a safe companion in decoding the crises of Indian constitutional secularism in some comparative settings. It, overall, constitutes a remarkable COCOS genre.

I must conclude by a small reference to some remarkable pedagogic turns and twists in this text. Readers are constantly asked to switch scenarios (see especially pp.125-30.) They are afforded no safe harbour for understanding 'secularism' in comparative contexts (Chapter Seven.) Most startling remains the device of 'chronological manipulation' (p. 259) which furnishes in the Indian context a most exciting tool for 'teaching' constitutional secularism by raising the question: what if the sequences of judicial enunciation in these three GOS cases here (including for this purpose the Ayodhya decisions) studied were to be contingently re-ordered?

The *Wheel of Law* is indeed a *rare* COCOS treatise. In the Indian context, it signifies the need for transition from genocidal politics to a regime of relatively non-violent transformative state formative practices. In this, it is a call for résistance to the *Modi-fication* of Indian constitution and constitutional secularism imaginers[21]. Surely, this study remains especially crucial for the nascent COCOS subaltern Indian constitutional scholarship.

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21 The reference here is to Narendra Modi Gujarat 2002 catastrophic political management. See Upendra Baxi, The Gujarat Catastrophe: Notes on Reading Politics as Democidal Rape Culture,' in Kalpana Kannabiran (ed.) *The Violence of Normal Times: Essays on Women's Lived Realities*. 332-384 (New Delhi: Women Unlimited in association with Kali for Women)