

Representation and Legitimacy in the Supreme Court: Adjudicating Law and Religion in India

Studies in Indian Politics
1–14

© 2022 Lokniti, Centre for the
Study of Developing Societies

Reprints and permissions:

in.sagepub.com/journals-permissions-india

DOI: 10.1177/23210230221083064

journals.sagepub.com/home/inp



Raeesa Vakil¹

Abstract

This article presents the argument that the Supreme Court of India's jurisprudence on procedural bars to litigation is insufficient to address challenges that arise in cases involving religious rights. Examining the Court's views on standing (the right to litigate) in three key public interest decisions (the *Sabarimala Temple* case, the *Ram Janmabhoomi* case, and the *triple talaq* case), I argue that the Court has privileged a discretionary, ends-based reasoning over an approach based on principle and law, resulting in erratic and inconsistent outcomes. The result is an uncertain level of protection to minority rights in judicial processes.

Keywords

India, constitution, law, religion, majoritarianism, Supreme Court

Introduction

The Indian Supreme Court's well-established practice of relaxing procedural constraints in litigation concerning the public interest has allowed individuals to assume the right to represent groups without proving their credentials. In such public interest litigation ('PIL'), the petitioners are no longer required to establish their standing, and the Court is not required to consider their individual interest before hearing the case. The removal of these procedural bars allows the Court to proceed with exercising wide judicial review over such cases without pausing to establish whether the case can be heard by them or whether the petitioner is acting for the greater good (Craig & Deshpande, 1989; Divan, 2020; Sathe, 2002). Arguments in support of the relaxation of rules of standing are premised on improving access to justice and democratizing the judicial process by expanding it out of the reserve of elite and wealthy litigants and enabling those with power to represent the otherwise disempowered (Baxi, 1985; Cunningham, 1987). At the same time, recent critiques of the Court's disregard for procedural constraints

¹ Yale Law School, New Haven, CT, USA.

Corresponding author:

Raeesa Vakil, Yale Law School, New Haven, CT 06511, USA.

E-mail: raeesa.vakil@yale.edu

on litigation have focused on how judges privilege interventions by certain elite groups of legal scholars and practitioners, casting doubt on whether access to justice has, in fact, improved in all ways (Bhuwania, 2017, p. 39).

Critiques of the Court's approach to procedure in matters of public interest are more complicated when the Court engages in programmatic reform in the specific field of religion. In such cases, it is far more difficult to negotiate the assumption that any individual—particularly one that does not belong within a religious group—can litigate on the subject of religious rights in the 'public interest', particularly when the Indian Constitution explicitly protects both individual and group religious rights. Three recent cases demonstrate the challenges before the Court when it comes to understanding the nuances of this debate. In 2017, the Supreme Court ruled in the *Shayara Bano* case that the Muslim practice of 'talaq-e-biddat', or instantaneous unilateral divorce declared by a husband, was not an 'essential religious practice' within Islam, and consequently not protected under the Constitution. This case was at the instigation of the court, and involved the government, several women directly impacted by such divorces, and several religious groups arguing for and against the practice (Supreme Court of India, 2017). In 2019, the Supreme Court ruled in the *Sabarimala Temple* case that restrictions based on notions of religious purity that prohibited women between the ages of 10 and 50 years from entering a place of worship and worshipping there were also unconstitutional, and ordered religious authorities to grant them entry, resulting in widespread protests, 51 petitions for review, and the reference for an authoritative ruling by a nine-judge bench (Supreme Court of India, 2019). This case was instigated by a group of lawyers and was opposed by local and religious authorities who invoked their religious rights to argue that the petitioners who had instituted the case could not do so, as it did not personally affect them. Finally in 2020, the Supreme Court contravened settled positions on property law, ruling that while the destruction of a medieval Muslim mosque, the *Babri Masjid*, by a mob of Hindu rioters was unlawful, equity demanded that they cede to Hindu majoritarian claims concerning the site (Supreme Court of India, 2020a). The litigation encompassed multiple religious and political figures, all of whom made competing and various cases of representation in the litigation. Although this was a property litigation and not a classic PIL, it certainly affected the public interest and was procedurally managed in a manner similar to PILs.

In all these three cases, the Court found, despite precedent on the irrelevance of standing, that it was in fact necessary to examine the legitimacy of the petitioners' suits, with particular reference to their ability to successfully contest the rights of religious groups. Existing jurisprudence on the irrelevance of standing in public interest matters was of little or no benefit in navigating these questions, leaving the Court to evolve an episodic, case-specific response in each case. The result has been an absence of a principled, coherent understanding of the question of standing in religious matters, and one that specifically results in more concessions to majoritarian claims over minority rights. As a consequence, the procedural holdings in these three cases reflect significant concerns about how the Supreme Court of India navigates majoritarianism in cases concerning religion and the law.

In this article, I discuss these three recent cases and the Court's approach on standing, to argue that the Indian Supreme Court's usual, instrumental understanding of procedure in public interest matters is insufficient to address questions that religious conflicts can present in the judicial process. In the first part, I consider the Supreme Court's views on the issue of standing in existing literature on PIL, demonstrating the Court has, perhaps unfairly, eschewed the question altogether. In the second part, I study the three cases of *Shayara Bano*, *Sabarimala Temple*, and *Ram Janmabhoomi*, examining how the Court has dealt with the issue of standing in each instance. In the third part, I conclude by arguing that inconsistent, often erratic jurisprudence on standing is insufficient to enable the Court to act in its mandate as a counter-majoritarian institution. In the context of rising majoritarianism, I argue that the

Court's ability to navigate this issue attains increasingly pressing relevance, as minority religious groups come under increasing pressure from religious majorities.

Standing, Public Interest and Religion at the Supreme Court of India

India's Constitution, enacted in 1950, provides for the protection of group and individual religious rights, and the inclusion of the description of the Indian state as 'secular' by Constitutional amendment in 1976 is considered largely to be a reflection of the principles inherent in the Constitution's framework. The commitment to balancing group and individual rights, or claims of majority and minority religious groups, did not come easy. In the Constituent Assembly, debates over a proposition for a 'common civil code' covering aspects of personal law such as marriage, divorce, succession and inheritance ultimately floundered, surviving only as an unenforceable exhortation to the State in the constitutional text (Article 44). Challenging the notion that Parliament could legislate, and courts could adjudicate over personal life, one member said, 'What purpose is served by this uniformity except to murder the consciences of the people and make them feel that they are trampled upon as regards their religious rights and practices? Such a tyrannous measure ought not find a place in our Constitution' (Sahib, 1948)

In place of this 'tyrannous' uniformity, India has instead a plural legal regime: under the Constitutional framework, it is not just the profession of faith but also its practice that is protected. The plural legal framework governing religion in India protects individual as well as group rights in the Constitutional text, but leaves sufficient ambiguity that necessitated judicial interpretation over the years to balance both concerns. Articles 14–21 of the Constitution protect the individual's right to equality, to speech and against discrimination on grounds including gender and religion. Articles 25 to 27 establish a protective regime around religious rights, permitting communities to 'practice, profess and propagate' their religion and permitting them to establish religious institutions. Apart from these, a series of statutory codifications of religious practice govern personal life: laws such as the Hindu Marriage Act of 1955 or The Muslim Women (Protection of Rights on Divorce) Act, 1986 lay down codes for individuals to follow within their faiths. Even without a 'uniform civil code', the state has evolved, over the years, certain secular laws that apply to those who choose them: The Special Marriage Act, 1954, for instance, may be used to solemnize interfaith marriages, or intra-faith marriages for those who prefer not to have a religious ceremony. All statutory enactments remain vulnerable to constitutional challenge: a religious custom so recorded is unambiguously vulnerable to judicial review on the grounds that it violates one or more constitutional rights. Religious rights, additionally, are subject to judicial review on the grounds of public health, morality, and order, as interpreted by the Supreme Court (Article 25)

In testing religious laws against the Constitution, the Supreme Court has taken the view that its role is to interpret religious texts and authorities in order to determine whether customs and practices are 'essential' to that religion, and are therefore protected. This doctrine of 'essential religious practices' (Dominic, 2020; Sen, 2019, pp. 75–90) has attracted substantial criticism: the Court has been described as engaging in a project of religious reform by several scholars (Dhavan & Nariman, 2000, pp. 258–259; Galanter, 1992, pp. 247–250) who see this variously as an attempt to expand judicial review, or as an inevitable consequence of the lack of unified institutional structures within diverse religious groups that are capable of taking on such reform projects themselves (Mehta, 2005, p. 64). The Court's substantive jurisprudence on religious rights has been the subject of extensive academic review, and Ronojoy Sen in particular has argued that the essential religious practices test works to '...legitimise a rationalised form of high Hinduism', (Sen, 2019, p. 73) co-opting the role of a religious interpreter to determine legal rights and privileges. In such cases, the Court has found it necessary to determine what is 'essential' to a

religion by investigating religious texts and doctrine. Nariman and Dhavan have therefore criticized the Court for acting as a religious authority, noting that ‘.... With a power greater than that of a high priest, maulvi or dharmashastri, judges have virtually assumed the theological authority to determine which tenets of a faith are “essential” to any faith and emphatically underscored their constitutional power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority’ (Dhavan & Nariman, 2000, p. 259).

The Supreme Court’s attempts at programmatic reform on questions of religion can be contextualized in their broader interventionist work in judicial review. The ‘public interest litigation’ petition (PIL) is a form of litigation in India, in which procedural constraints on litigation are relaxed in order to permit claims in the public interest to be raised by any concerned citizen. Chief among the relaxed procedural constraints is the rule of standing, or *locus standi*, which ordinarily requires a petitioner to demonstrate that the case they raise personally affects them. The Supreme Court’s evolving jurisprudence in PILs has established that this is no longer necessary; the petitioner is not required to show that they are personally affected by the legal issues raised, but only that the issue is one that falls within the Court’s jurisdiction and its powers to provide remedies (Bhuwania, 2017, pp. 42–45; Sathe, 2002, p. 201). This relaxation of standing was not one based on a systemic reform in procedure but rather, a discretionary power asserted by the Supreme Court, which determines on a case-by-case basis whether the petitioner is in fact motivated by the public spirit, or in their formulation of the concept in 1984, is a ‘...a meddlesome interloper or busybody...’ (Supreme Court of India, 1984).

Initial conceptions of PIL, such as those by Upendra Baxi demonstrated a preoccupation with the suffering of the disadvantaged. As Baxi notably argued, ‘taking suffering seriously’ was the Court’s objective in intervening in executive action and overruling legislative intention (Baxi, 1985, p. 120). In one of the earliest decisions on this question, the Court held that a liberalized view of procedure, and especially standing was the only way that the Court could invest ‘...law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality’.² Removing the procedural bar on standing allowed the Court to intervene in cases that might not have otherwise found their way to the higher judicial system. Often led by concerned civil society groups or individuals, these PILs were described by Dhavan as being ‘...led essentially by middle-class judges, academics, newspapermen and social activists’ (Dhavan, 1987, p. 745) who were not required to establish their credentials, either procedurally as standing, or in principle, for the Court to justify their intervention on questions of policy.

These arguments were persuasive, powerful accounts of how structural and institutional inequities in access to justice could be countered. They still remained vulnerable to the critique that the relaxation of procedural norms left PILs vulnerable to abuse of processes, with unfair and ill-considered outcomes resulting from a failure to take into account all affected parties while such cases were being decided. Critiques ranged from arguments resting on the separation of powers and the limits of judicial review, to criticisms of the Court’s capacity to determine complex questions of policy, and finally, to the tendency of courts to engage selectively with evidence based on the identity of the persons appearing before them. An increasingly common practice in PILs has been for the court to appoint its own experts as *amici curiae* (friends of the court) who participate in the proceedings not to represent any party, but to assist the court with complex legal questions. Along with these, the Court routinely creates investigative commissions of experts to discern facts, and such experts are appointed in an opaque, discretionary

² This case was a public interest petition filed by an association of lawyers, challenging the Union Government’s policy on the transfers of judges from one posting to another and the role of the Union Government in appointing judges in High Courts and the Supreme Court (Supreme Court of India, 1981).

manner. The creation of a heavily privileged judicial process in which participation is not guaranteed to any person or institution except state functionaries is also accompanied by a rise in *suo motu* petitions, in which the Court raises litigation on its own accord. In a recent anthropological study of the practice of PILs at the Indian Supreme Court, Bhuwania describes this shift from a public-spirited representative to judicial self-instigation of public interest cases, marking the petitioner as an ‘...increasingly redundant figure’ (Bhuwania, 2017, p. 39). A common criticism of such PIL has consequently been that it is fundamentally undemocratic in nature, with some scholarly accounts criticizing the expansion of judicial review into questions of policy by arguing that the Court, in overstepping its bounds, has actively harmed or impeded democratic process, privileging elite litigants who present selective facts to the Court to achieve projects of reform (Bhuwania, 2017, pp. 140–142). As Mehta has argued, much of the Court’s decision-making in these contexts is consequently characterized by accommodative bargaining with political actors, and not by ‘...a clear and consistent constitutional vision’ (Mehta, 2007, p. 76).

The Court has found it reasonably easy to ignore the question of standing when determining what lies in the interests of the public in secular contexts. When determining whether an individual fairly represents a religion’s ‘essential’ concerns, the Court has found it far more challenging. In questions concerning public interest and religious rights, however, the ‘increasingly redundant’ petitioner has re-attained significance. Most religious groups in India lack organized institutional structures, and fragmented, diverse identities result in multiple paths of representation in the public sphere (Mehta, 2005). In such cases, establishing the standing of the petitioner is fundamental not only to creating the foundation for the Court’s intervention, but also to determine whether the affected religious groups are being represented adequately in proceedings at the Court. Standing, therefore, becomes not only a procedural hurdle to litigation, but also a substantive question of individual and group rights, that the Court can no longer avoid navigating, even in the public interest. Although existing literature has not grappled with this question deeply, in the next section I demonstrate that three recent cases make a pressing case for re-examining standing in cases concerning religion.

The Supreme Court on Religion and Standing: Three Recent Cases

Shayara Bano

The *Shayara Bano* case initially began when the eponymous petitioner and four other Muslim women challenged the practice of ‘talaq-e-biddat’ or instantaneous unilateral divorce initiated by Muslim men, after each of them had undergone such divorces. The arguments that they presented were broadly two-fold; firstly, that this customary form of divorce violated their individual constitutional rights to equality and against discrimination on the ground of sex, and secondly, it was not sanctioned with the religion of Islam, and consequently was not protected as a religious practice within the Constitution (Supreme Court of India, 2017, pp. 101–106, Writ Petition (Civil) No. 118 of 2016 on file with the author).

Although it began as individual litigation by affected persons, the case was later converted into a PIL, not at the instance of concerned petitioners but at the behest of the Court. In a previous case concerning the application of a law governing succession of property for Hindu women, the Court made some observations on what it described as an ‘...important issue of gender discrimination, which though not directly involved in this appeal, has been raised by some of the learned counsel, which concerns the rights of Muslim women’ (Supreme Court of India, 2016, p. 53). The Supreme Court chose to combine Bano’s, and four other individual cases, with the PIL, hearing both sets of claims together, and allowing multiple interventions from parties who were concerned about the legal issues at stake during the

proceedings (Supreme Court of India, 2017, p. 54, per Nariman J.). While there is precedent for such *suo motu* interventions, they have met with varying success, a major critique being that the Court does not always allow representation from those who are affected by the outcome of the case (Bhuwania, 2017, p. 116).

A number of additional parties and organizations were permitted by the Supreme Court to be involved in the PIL. These included, for instance, the All-India Muslim Personal Law Board (AIMPLB), a privately constituted organization, which asked to impleaded in order to support the practice of 'talaq-e-biddat'. Its argument rested on a claim that Islamic law recognized and accepted the practice (Supreme Court of India, 2017, p. 195, per Khehar CJI and Nazar J.). Opposing the practice, the Bharatiya Muslim Mahila Andolan (BMMA), a women's organization, intervened after leading a public campaign that collected 50,000 signatures condemning 'talaq-e-biddat' as a custom in Islam (Johri, 2016). No test was applied to determine the qualifications of these intervenors to represent their claims; indeed, the Court did not, for instance, investigate arguments that challenge the authority of the AIMPLB to represent Muslim views on their religious laws (Jones, 2010). The decision on allowing petitioners was purely discretionary, and not justified or explained in any context.

The Court ultimately premised its decision on talaq-e-biddat on the submissions by these various parties, striking down the practice not because it impinged on the constitutional guarantee to equality that Shayara Bano had asserted, but because it was, as she and others had argued, inconsistent with the tenets of Islamic law. The significance of the challenge being raised by both, individual Muslim women, and organized groups of Muslim women, according to scholars like De and Divan, was radical because it demonstrated the '...recognition of religious, secular and female interpretative authority...challenging both the ability of the state or a religious leader to be the sole spokesman for Islamic law' (De, 2017; Divan, 2020).

In this view, the persuasiveness of the judgement draws from the internal demand for reform, one in which De argues that the Court, by '...respecting the authority of both religious and constitutional law, preserves the legitimacy of the forum' (De, 2017). Indeed, in an interview after the case, Bano expressed her approval for the decision, describing how she faced opposition from the AIPLMB outside courtroom proceedings, and how they accused her of 'going against Islam' (Rashid, 2017). Undeniably, the relief that Shayara Bano sought from the Court was granted, yet Shayara Bano herself finds no mention in either of the majority opinions: she is invisible in the Court's judgement, only appearing in the dissenting opinion, where her arguments are comprehensively rejected (Supreme Court of India, 2017, pp. 101, 155–163, 293–294 per Khehar, CJI and Nazar J.). As another commentator put it, the judgment, delivered by five male judges, was '...a classic case of a gender-just outcome without a gendered reasoning' (Sen, 2017).

Sabarimala Temple

The claim that the outcome of *Shayara Bano* was just is hard to deny. Even as the Court preferred a religious interpretation over constitutional law as the basis of their holding, it ended a historically discriminatory practice that stood in direct violation of the fundamental rights to women. Yet, ends-based justifications in the outcome of this case, such as De's, leave the Court vulnerable to criticisms about how this power is exercised when the outcome is less widely accepted. This was evident in the *Sabarimala Temple* case, in which, unlike *Shayara Bano*, the Court faced, and was forced to address a direct challenge to the standing of the petitioners to intervene in a matter concerning religious rights. Dedicated to the celibate deity, Lord Ayyappa, the Sabarimala Temple is a site of pilgrimage,

administered and managed by a temple board in which the government plays a significant role in funding, and appointing authorities. A governing state legislation prohibited discrimination in access to the temple; a subsequent rule framed under the law allowed temple authorities to regulate entry for women in accordance with custom. The temple authorities accordingly issued notifications, barring women between the age of 10 and 50 from entering the temple to worship, premised on religious understandings of purity and uncleanliness associated with menstruation (Supreme Court of India, 2019, pp. 165–168 per Chandrachud J).

The *Sabarimala Temple* case arose as a pure PIL filed by a group of lawyers on the basis of newspaper reports regarding the discriminatory practice of denying entry to women. Unlike the *Shayara Bano* case, it was not the product of sustained litigation or campaigning by affected individuals, but a petition filed by a group of young lawyers, who worked on issues concerning gender equality and justice (Supreme Court of India, 2019, p. 245 per Malhotra J.). Challenging their standing to file the case altogether, the respondent temple authorities argued that none of the petitioners had in fact been denied entry to the temple, and consequently could not challenge a rule for being discriminatory, if it had not discriminated against them (Supreme Court of India, 2019, p. per Nariman J.). The Court ultimately ruled 4:1 that the restriction was discriminatory, and struck down the rule in question. For Justice Nariman, concurring with the majority, the challenge to the petitioner's standing to file the PIL was a mere technicality, one that could not stand in the way of ‘...a constitutional court applying constitutional principles’ (Supreme Court of India, 2019, p. 150 per Nariman J.). The majority opinion of Chief Justice Dipak Misra and A. M. Khanwilkar did not even consider the objection.

Justice Chandrachud's concurring opinion, however, articulated a complex set of reasons which supported the petitioner's claim to legal standing in the case. Unlike *Shayara Bano*, here Justice Chandrachud identified access to public spaces as a matter of public interest (Supreme Court of India, 2019, pp. 152–153 per Chandrachud J.). Social structures such as patriarchal systems or caste-based discrimination, which limited such access, could not be permitted and were issues in which every citizen had a stake. ‘To allow practices derogatory to the dignity of women in matters of faith, and worship’, he held, ‘would permit a conscious breach of the fundamental duties of every citizen’ (Supreme Court of India, 2019, pp. 152–153 per Chandrachud J.). To Justice Chandrachud, the Constitution was a document of transformation; the Court, accordingly, could, and should facilitate these social transformations in the pursuit of constitutional principles, by enforcing fundamental rights claims over discriminatory practices by groups against individuals within those groups. This principle of anti-exclusion, he held, was the method through which the Court could fulfil its constitutional obligations to protect fundamental rights.

It is difficult to disagree with this persuasive account of the judiciary's role in challenging and prohibiting discriminatory religious practices. Yet, in the singular dissent in the *Sabarimala Temple* case, Justice Malhotra does warn convincingly of how the procedural implications of allowing this case might result in dangerous, populist, consequences. To allow this case, she holds, would be to ‘... require this Court to decide religious questions at the behest of persons who do not subscribe to this faith’ (Supreme Court of India, 2019, p. 256 per Malhotra J.). Opening cases to ‘interlopers’, further, would open floodgates to majoritarian challenges: ‘The perils are even graver for religious minorities if such petitions are entertained’ (Supreme Court of India, 2019, p. 256 per Malhotra J.). To commentators like Bhatia, Justice Chandrachud provides the more persuasive account for allowing petitioners to challenge faiths that they do not subscribe to, taking into account the inextricable linkage between Indian society and religion. To accept Justice Malhotra's dissent would be to ignore ‘...how deeply intertwined religious, social, and public life is in India, and how discrimination within one sphere inevitably spills over into other spheres’ (Bhatia, 2018).

Justice Chandrachud's account of representation permits challenges to religious customs which do not apply to the challenger but also articulates a standard on which these challenges may be tested. It was not well-received, however, with both ends of the political spectrum challenging the Kerala government's decision to implement the case instead of seeking a review, and public rallies that directly opposed the Supreme Court's exercise of jurisdiction in the case, and according to some, represented a '...a full-throated mobilisation against the authority of the court itself' (Krishnakumar, 2018; Mehta, 2018b). Mehta, while agreeing with the outcome of the *Sabarimala Temple* case, was concerned that the consequence would be '...a recipe for whole scale statism in the name of social reform' (Mehta, 2018a). Malhotra's judgement, in one sense, was more allied to De's argument on *Shayara Bano*, which argued that legitimacy for judiciary-led reform on religion was stronger when it was presented from sources internal to the religion.

It is evident that the question of representation gains greater significance when determining disputes that relate to religious practices, such as in *Sabarimala Temple* or *Shayara Bano*. In *Sabarimala Temple*, when elaborating on the manner of determining religious dispute, Justice Nariman asserts first, the primacy of the individual, and then, the primacy of the judge. 'Every member of a community has a right', he holds, 'to practice the religion so long as he does not, in any way, interfere with the corresponding right of his co-religionists to do the same' (Supreme Court of India, 2019, p. 140 per Nariman J.). How then does the court navigating contested claims within the community? Nariman's response is that in such cases, '...the Court is to decide whether such matter is or is not essential' (Supreme Court of India, 2019, p. 140 per Nariman J.). His position is reiterated by Chandrachud J, who holds that '...while the view of a religious denomination are to be taken into consideration in determining whether a practice is essential, those views are not determinative of its essentiality' (Supreme Court of India, 2019, p. 187 per Chandrachud J.). It is a framework that provides security for individuals seeking judicial review to secure their own rights, but one that does not accommodate cases that present more complex questions involving minority and majority groups.

Babri Masjid

The 2020 *Babri Masjid* case demonstrates the limits of the nuanced approach on representation that was apparent from the opinions in the *Sabarimala Temple* case. The case was framed at the Supreme Court as a dispute over property, in which competing claims to the title of a disputed land were to be adjudicated. Decades of legal contestation over the site can be traced to political claims from the Hindu right that the mosque was built over the remains of a demolished temple that marked the site of birth of the Hindu god, Ram Lalla, and to claims from Muslims that there was no temple, but instead a mosque with an unbroken tradition of worship dating back to the 1500s (Noorani, 2003). In an act of astonishing violence, reflected in political conflict across the country with resonating effects, the mosque was demolished by Hindu mobs in 1992. A parallel criminal proceeding concerning the demolition continues until date, with key political leaders of the present named as active participants. Moreover, the construction of a temple on the site of the demolished mosque was a key component of the Hindu-right Bharatiya Janata Party's manifesto, when they won their second term to constitute the present government in India (Press Trust of India, 2019).

The *Babri Masjid* case raises questions of conflicts between majoritarian and minority communities as well as competing claims of religious rights to worship, and as has been noted by Sebastian and Rahman, concern acts of violence at its core that militate against the suggestion that it is purely a property dispute (Sebastian & Rahman, 2019). Over 50 litigants concerned with various stages of the suit appeared

before the Supreme Court, including the three chief parties who had been allocated one-third of the disputed land, each, during a prior High Court decision, which was being appealed here. As part of the set of cases concerning this dispute, the Supreme Court had already ruled that it would not revisit an earlier finding in which it had held that mosques were not an essential element to worship in Islam (Supreme Court of India, 2020a). In the course of this case, which inextricably linked questions of land, with criminal law, and religious rights to worship, the Court, unlike *Sabarimala Temple* and *Shayara Bano*, refused to hear a group of intervention applications filed by varied political actors. One such intervention application filed by a group of scholars and activists sought inclusion in the case so that they could argue that the site should be granted to neither party, but instead directed towards a ‘non-religious use’, while expressing concern about the majoritarian pressures operating in the case (Benegal et al., 2017). This and other interventions were rejected, with the Court affirming its view that it intended to decide the case only between the parties that were already involved in the appeal, and a direction to the registry not to entertain any more intervention applications. Less than a year later, the Court had apparently backtracked to allow a Buddhist petitioner to raise a fresh claim in the suit, despite no indication of any evidence that the disputed mosque had connections to ancient Buddhist lands (Supreme Court of India, 2020a). It is apparent that it is difficult to reconcile Justice Chandrachud’s expansive view of judicial proceedings as being available to enforce every individual’s claim on equality, dignity and against discrimination in *Sabarimala Temple*, with the eventual outcome of the *Babri Masjid* case, in which he was one of five judges who issued a unanimous opinion. The rejection of intervention applications and the Court’s repeated affirmations that the suit was limited to questions of title to property are undermined by the manner in which the Court examined and accepted evidence of ownership of the land, and with their eventual disposition of the case. While insisting that the laws being applied were not those concerning faith, and were purely considerations of property, the court effectively demanded two different standards of evidence from the Muslim and Hindu parties to accept the Hindu claim to worship there on a ‘a preponderance of probabilities’ (Pasha, 2019; Supreme Court of India, 2020a, p. 740). Having found, regardless, that the desecration of the mosque, and its destruction, were in fact illegal, the Court decides to provide ‘restitution’ for the destruction by relocating the Muslim claim to a plot of land to be allotted by the State Government, at its discretion (Supreme Court of India, 2020a, p. 741). This ‘restitution’ does not actually restore; rather, it reallocates, and to a specific claimant (the Sunni Waqf Board) with the Court failing to acknowledge the competing Muslim claims by other organizations within the dispute. Similarly, the administration of the original disputed site, now dedicated to a Hindu temple, is vested in a trust, to be established by the Central Government (Supreme Court of India, 2020a, p. 741). It is a resolution that has no footing in law but is validated by the Court because the Constitution empowers it to do ‘complete justice’ (Supreme Court of India, 2020a, pp. 662–664). An anonymous addendum, attributed only to ‘one of us’ by the Court, explores statements of faith by Hindu parties, treating these as ‘oral evidence’ of the existence of a Hindu religious structure on the site (Supreme Court of India, 2020a, p. 792) It implicitly rejects the judgment’s holding that the court cannot ‘...reduce questions of title to a question of which community’s faith is stronger’ (Supreme Court of India, 2020a, p. 313).

The conflict at the heart of this resolution, despite the praise that it has received for balancing competing claims to arrive at a socially negotiated solution (Baxi, 2019; Staff, 2019), lies in its actual rejection of legal principles to endorse majoritarian claims (Bhatia & Parthasarathy, 2021). Riddled with internal inconsistencies, iniquitously applied standards of evidence, and thin reasoning, the Court’s most dangerous holding in *Babri Masjid* was to dismiss the violence that resulted in the denial of access to the mosque’s site by Muslims, and then, as Rahman and Sebastian demonstrate, use that lack of access as evidence that they did not hold unbroken possession of the land (Sebastian & Rahman, 2019). Justice

Chandrachud's concurring opinion in *Sabarimala Temple* recognizes the structural inequality inherent in systems of patriarchy and caste oppression. This stands in stark contrast with the failure to accordingly recognize the structural inequalities that arise from claims by majoritarian groups against religious minorities in *Babri Masjid*. Even if we accept the argument that this is purely a title suit, his position about the '...adjudicatory role of this Court in defining the boundaries of religion in a dialogue about our public spaces' is still a convincing, if ignored, argument that the apparent property dispute could have been opened to wider representations, and considerations of the '...structures of oppression and domination' that he had invoked (Supreme Court of India, 2020a, p. 243 per Chandrachud J).

Conclusion

The three cases discussed in this article present a set of varied concerns about how the Supreme Court of India hears and navigates contested religious claims, and raises questions about whether it can, and does, adequately protect the individual against the group, resolve conflicts within groups, or protect the minority against the majority. The Court's ultimate jurisdiction extends to 'doing complete justice' under Article 142 of the Constitution. In PILs, the Court has used this power as an authorization to relax procedural requirements in the interests of addressing structural concerns in the inequitable access to justice. Yet, the power to 'do complete justice' is inherently linked to the Court's obligation to protect fundamental rights, of which an essential component is protecting fair and just procedures that ensure justice to all participants in the judicial process. In cases concerning religion and standing, negotiating these two aspects requires the Court to consider and evolve principles on the basis of which it can allow petitioners to present their claims without excluding or ignoring the voices of others who may be affected by such petitions. In *Shayara Bano*, *Sabarimala Temple*, and *Babri Masjid*, we see that the Court, time and time again, privileges a discretionary approach over a principled one. The weaknesses of this approach are evident from the long afterlives of these three cases, in which doors that the Court left open to do discretionary justice have instead allowed majoritarian politics to creep in to this jurisprudence.

In *Shayara Bano*, rightly decided for the wrong reasons, the Court chose to give greater weight to the consistency of the practice of 'talaq-e-biddat' within religious doctrine, rather than consider and adjudicate on the strength of constitutional claims. In an interview shortly after the case, Bano spoke about how she had been opposed by those who considered it one more step in the BJP's attack on a Muslim minority, expressing her hope that the decision would not be politicized. Speaking of the BJP's embrace of this judgment, she said, 'It was a social fight, not a political one. It should not be made into a political agenda' (Rashid, 2017).³ Despite this, in 2019, the BJP government promulgated first, an ordinance, and then a stringent law, titled The Muslim Women's (Protection of Rights on Marriage) Act 2019, by which it not only forbade talaq-e-biddat again, but criminalized it, adding a term of imprisonment for three years, and a possible fine. A representative of the BMMA, which had argued in favour of the judgment, was of the view that the law was ineffective and that criminalizing the practice did not resolve the problem they were trying to address, which was to '...give a just and fair deal to women', in the course of divorce instead of embroiling them in a criminal suit (Ara, 2020). The Act, ironically, came under criticism because it raises potential questions of discrimination, this time criminalizing the abandonment of a marriage by a Muslim man, without having similar consequences for men belonging to any other religion, where structures of gendered discrimination are also evident (Schultz, 2018). The

³ Bano has since joined the BJP as a state government minister (Press Trust of India, 2020).

litigation on talaq-e-biddat, welcome and just, was the product of a hard-fought women's campaign at the Supreme Court. The law is instead one that operates to criminalize acts by one religious group alone, even as the government not only refused to criminalize the same acts when committed by the majority, but also consistently refused to intervene in legislating on the subject of marriage in other aspects, such as arguing that marital rape ought not be criminalized on the grounds that marriage is treated as a 'sacrament' by society (Ministry of Home Affairs, Government of India, 2015).

A similar conflict lies in the afterlife of the *Sabarimala Temple* case, in which the Central Government's Home Minister described the Kerala Government's attempts to enforce the ban on discrimination in entry as 'suppression' of the religious rights of the Hindu temple devotees (Special Correspondent, 2018). The criminalization of talaq-e-biddat was justified on the grounds that the Supreme Court's ban was not being implemented; on Sabarimala, the government took the position that the courts should '... desist from pronouncing verdicts which cannot be implemented' (Philip, 2018). The Supreme Court's own judgments in *Shayara Bano*, *Sabarimala Temple*, and the *Babri Masjid*, grounded in exceptionalism, popular politics, and religion instead of constitutional law, provide no answer to these consequences.

The long afterlife of these judgements continues within the courtroom as well. In July 2019 Chief Justice Dipak Misra, who had refused to engage with questions of maintainability during the *Sabarimala Temple* case, dismissed a plea led by a Hindu political group, the Akhil Bharatha Hindu Mahasabha, seeking a declaration to allow all Muslim women entry into mosques. Relying on the *Sabarimala Temple* case, they argued that the practice of excluding Muslim women breached their individual fundamental rights to religion under the Constitution. Chief Justice Misra was not convinced that they had established such a practice existed to the Court's satisfaction, but was more immediately concerned with their standing. The petitioner, he held, had not '...satisfactorily established his credentials', pointing to the petitioner's lack of prior PILs (LNN, 2019; Mandhani, 2019). 'Let a Muslim woman challenge it', he was reported to remark, before accusing the petitioner of being motivated '...by a desire...to have cheap publicity' (LNN, 2019). In 2020, this was reversed yet again by the Supreme Court, which undertook the exceptional move of agreeing to constitute an authoritative bench of nine judges to determine conflicting questions of law and religion that were left undecided by *Sabarimala Temple* and *Shayara Bano*. The reference, itself controversial for violating well-established constitutional procedure concerning reviews of cases, will include a review of *Sabarimala Temple* case as well as hearing fresh claims about the access of Muslim women to mosques, of Parsi women to Parsi temples, and against the practice of female genital mutilation among the Dawoodi Bohra community (Supreme Court of India, 2020). As review petitions in India are permitted on narrow grounds that relate to the original case alone, the dissenting judges—and commentators—raised concerns that this combining of causes was unlawful and would not allow Parsi and Muslim women petitions to effectively present their case. The Court responded with a following judgment, 'clarifying' that the reference was justified, stating that 'Being a superior Court of record, it is for this Court to consider whether any matter falls within its jurisdiction or not' (Supreme Court of India, 2020b).

The assertion that judicial discretion is absolute in this reference is the underlying, and now explicit assumption, in *Sabarimala Temple*, *Shayara Bano* and *Babri Masjid*. A court that is answerable not to law but its own authority can determine at will, who may or may not be a part of a suit, and by implication, whose voice may be heard and considered in issues affecting wider unrepresented communities. In both, *Shayara Bano* and *Babri Masjid*, the Court applies an ends-based reasoning to disregard, in turn, procedure, evidence and law. In *Shayara Bano*, the outcome is to prohibit an enduring wrong, and in *Babri Masjid*, the prohibition sustains enduring harm. In each of these three cases, the representation of parties demonstrates a retreat from constitutionality and towards deepening judicial discretion. *Sabarimala Temple*, in particular, attempts to undo the wrongs, by grounding such departures in the

'transformative potential' of the Constitution, but makes the dangers of this self-evident. Justice Chandrachud points out in *Sabarimala Temple* that '.... In a constitutional transformation, the means are as significant as our ends. The means ensure that the process is guided by values. The ends, or the transformation, underlie the vision of the Constitution' (Supreme Court of India, 2020a, p. 153 per Chandrachud J).⁴ The inability to frame questions of conflict regarding religion as constitutional doctrine is liable, he warns, '...to lead us to positions of pretense, or worse still, hypocrisy' (Supreme Court of India, 2020a, p. 153 per Chandrachud J). As the Supreme Court's subsequent opinion in *Babri Masjid* demonstrated, this principle is difficult to implement without a commitment to determining cases on the basis of legal principles, as opposed to the demands of a select few voices.

Declaration of Conflicting Interests

The author declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

Funding

The author disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: The author received an honorarium from the Carnegie Endowment for International Peace (via a grant from the Henry Luce Foundation) to research and contribute this article to a symposium on religion and citizenship in India.

References

- Ara, I. (2020, October 23). A year later, are instant triple talaq culprits actually going to jail? *The Wire*. Retrieved August 25, 2021, from <https://thewire.in/religion/a-year-later-are-instant-triple-talaq-culprits-actually-landing-in-jail>
- Baxi, U. (1985). Taking suffering seriously: Social action litigation in the Supreme Court of India. *Third World Studies*, 4, 108–132. <https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1125&context=twls>
- Baxi, U. (2019, November 12). Award of five acres for masjid in Ayodhya is an effort to do complete justice. *Indian Express*. Retrieved August 25, 2021, from <https://indianexpress.com/article/opinion/columns/ayodhya-verdict-babri-masjid-ram-janmabhoomi-supreme-court-6115052/>
- Benegal, S., Sen, A., Dharker, A., Setalvad, T., Thanvi, O., Guzder, C., Roy, A., Devy, G., Naik, B., Patkar, M., Ketkar, K., Patwardhan, A., Ghosh, J., Kannabiran, K., Haragopal, J., Babaiah, N., Sreekumar, R., Nagarkar, K., Raina, M., & Jafri, T. (2017). *Intervention application in Civil Appeal No. 10866-10867*. Lawyers' Collective. Retrieved August 25, 2021, from <http://www.lawyerscollective.org/wp-content/uploads/2017/12/CJP-Ayodhya-Petition-171201-FINAL.pdf>
- Bhatia, G. (2018, September 29). The Sabarimala Judgment II—Justice Malhotra, group autonomy and cultural dissent. *Indian Constitutional Law and Philosophy*. Retrieved August 25, 2021, from <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/>
- Bhatia, G., & Parthasarathy, S. (2021, April 14). Peace bought by an unequal compromise. *The Hindu*. Retrieved August 25, 2021, from <https://www.thehindu.com/opinion/lead/peace-bought-by-an-unequal-compromise/article29975254.ece>
- Bhuwania, A. (2017). *Courting the people*. Cambridge University Press.
- Craig, P. P. & Deshpande, S. L. (1989). Rights, autonomy and process: Public interest litigation in India. *Oxford Journal of Legal Studies*, 9(3) 356–373 <https://doi.org/10.1093/ojls/9.3.356>
- Cunningham, C. D. (1987). Public interest litigation in Indian supreme court: A study in the light of American experience. *Journal of the Indian Law Institute*, 29(4), 494–523 <https://www.jstor.org/stable/43951123>

⁴ *Sabarimala Temple*, page 153 per Chandrachud J., concurring.

- De, R. (2017, September 15). A nuanced judgment. *Frontline*. Retrieved August 25, 2021, from <https://frontline.thehindu.com/the-nation/a-nuanced-judgment/article9834610.ece>
- Dhavan, R. (1987). Means, motives and opportunities: Reflecting on legal research in India. *Modern Law Review*, 50(6), 725–749.
- Dhavan, R., & Nariman, F. (2000). The Supreme Court and group life: Religious freedom, minority groups and disadvantaged communities. In B. Kirpal, A. Desai, G. Subramaniam, R. Dhavan, & R. Ramachandran (Eds.), *Supreme but not infallible: Essays in honour of the Supreme Court of India* (pp. 256–287). Oxford University Press.
- Divan, M. (2020). Triple talaq. In S. Kirpal (Ed.), *Sex and the Supreme Court: How the law is upholding the dignity of the individual*. Hachette.
- Dominic, M. (2020). ‘Essential religious practices’ doctrine as a cautionary tale: Adopting efficient modalities of socio-cultural fact-finding. *Socio-Legal Review*, 46–75.
- Galanter, M. (1992). *Law and society in modern India*. Oxford University Press.
- Johri, A. (2016, June 9). Meet the ordinary Muslim women fighting an extraordinary case against triple talaq in India. *Scroll.in*. Retrieved August 25, 2021, from <https://scroll.in/article/809530/meet-the-ordinary-muslim-women-fighting-an-extraordinary-case-against-triple-talaq-in-india>
- Jones, J. (2010). ‘Signs of churning’: Muslim personal law and public contestation in twenty-first century India. *Modern Asian Studies*, 44(1), 175–200.
- Krishnakumar, R. (2018, October 26). End of exclusion. *Frontline*. Retrieved August 25, 2021, from <https://frontline.thehindu.com/social-issues/gender/article25166412.ece>
- LNN. (2019, July 8). SC dismisses Hindu Mahasabha’s plea for allowing Muslim women’s entry into mosques. *LiveLaw*. Retrieved August 25, 2021, from <https://www.livelaw.in/top-stories/sc-dismisses-hindu-mahasabha-plea-for-allowing-muslim-womens-entry-in-mosques-146162?infinitescroll=1>
- Mandhani, A. (2019, July 8). In echo of Sabarimala Dissent, SC junks plea seeking entry of Muslim women in mosques. *The Print*. Retrieved August 25, 2021, from <https://theprint.in/judiciary/in-echo-of-sabarimala-dissent-sc-junks-plea-seeking-entry-of-muslim-women-in-mosques/260284>
- Mehta, P. B. (2005). Hinduism and self-rule. In L. Diamond, M. F. Plattner, and P. J. Costopoulos (Eds.), *World religious and democracy* (pp. 56–69). Johns Hopkins Press.
- Mehta, P. B. (2007). India’s unlikely democracy: The rise of judicial sovereignty. *Journal of Democracy*, 18(2), 70–83.
- Mehta, P. B. (2018a, October 1). Liberty without statism. *Indian Express*. Retrieved August 25, 2021, from <https://indianexpress.com/article/opinion/columns/sabarimala-gay-rights-adultery-supreme-court-constitution-liberty-without-statism-chandrachud-5380460/>
- Mehta, P. B. (2018b, October 24). The Sabarimala aftermath. *Indian Express*. Retrieved August 25, 2021, from <https://indianexpress.com/article/opinion/columns/the-sabarimala-aftermath-5415090>
- Ministry of Home Affairs, Government of India. (2015, April 29). Women subjected to marital rape. *Press Information Bureau*. Retrieved August 25, 2021, from <https://pib.gov.in/newsitem/PrintRelease.aspx?relid=119938>
- Noorani, A. (2003). *The Babri Masjid question: 1958–2000*. Tulika Books.
- Pasha, N. (2019, November 10). The Ayodhya verdict: Beyond the walls of our imagination. *The Quint*. Retrieved August 25, 2021, from The Quint: <https://www.thequint.com/voices/opinion/ayodhya-verdict-grill-brick-wall-mosque-temple#read-more>
- Philip, S. (2018, October 28). Amit Shah asks on Sabarimala: Why issue orders that can’t be enforced. *Indian Express*. Retrieved August 25, 2021, from <<https://indianexpress.com/article/india/amit-shah-asks-on-sabarimala-why-issue-orders-that-can't-be-enforced-5421715/>
- Press Trust of India. (2019, April 8). BJP releases manifesto, promises to build Ram Temple: PM says nationalism ‘our inspiration’. *The Times of India*. Retrieved August 25, 2021, from <https://timesofindia.indiatimes.com/elections/news/bjp-releases-manifesto-promises-to-build-ram-temple-pm-says-nationalism-our-inspiration/articleshow/68779183.cms>
- Press Trust of India. (2020, October 21). Anti-triple talaq crusader Shayara Bano gets Minister rank in Uttarakhand. *The Hindu*. Retrieved August 25, 2021, from <https://www.thehindu.com/news/national/other-states/anti-triple-talaq-crusader-shayara-bano-gets-minister-rank-in-uttarakhand/article32906809.ece>

- Rashid, O. (2017, September 2). Who is Shayara Bano, the triple talaq crusader. *The Hindu*. Retrieved August 25, 2021, from <https://www.thehindu.com/news/national/who-is-shayara-bano-the-triple-talaq-crusader/article19611402.ece>
- Sahib, B. P. (1948, November 23). Constituent assembly of India debates (Vol. 7). *Constitution of India*. Retrieved August 25, 2021, from https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-23?paragraph_number=137#7.58.137
- Sathe, S. (2002). *Judicial activism in India*. Oxford University Press.
- Schultz, K. (2018, September 20). India criminalizes instant ‘talaq’ divorces for Muslim men. *The New York Times*. Retrieved from <https://www.nytimes.com/2018/09/20/world/asia/india-talaq-muslim-divorce.html>
- Sebastian, J., & Rahman, F. (2019, December 6). The Babri Masjid and the sound of silence. *The Wire*. Retrieved August 25, 2021, from <https://thewire.in/law/the-babri-masjid-judgment-and-the-sound-of-silence>
- Sen, J. (2017, September 15). The gender question. *Frontline*. Retrieved August 25, 2021, from <https://frontline. thehindu.com/the-nation/the-gender-question/article9834658.ece#>
- Sen, R. (2019). *Articles of faith: Religion, secularism and the Indian Supreme Court* (Revised ed.). Oxford University Press.
- Special Correspondent. (2018, October 28). Kerala government suppressing Ayyappa devotees, says Shah. *The Hindu*. Retrieved August 25, 2021, from <https://www.thehindu.com/todays-paper/tp-national/kerala-govt-suppressing-ayyappa-devotees-says-shah/article25350267.ece>
- Staff, T. W. (2019, November 9). Judgment of balance: Legal minds weigh in on SC’s Ayodhya verdict. *The Wire*. Retrieved August 25, 2021, from <https://thewire.in/law/supreme-court-ayodhya-verdict-lega>
- Supreme Court of India. (1981). S. P. Gupta vs. Union of India, Supp. SCC 87. <https://indiankanoon.org/doc/1294854/>
- Supreme Court of India. (1984). Bandhua Mukti Morcha vs. Union of India, 3 SCC 161. <https://main.sci.gov.in/jonew/judis/9643.pdf>
- Supreme Court of India. (2016). Prakash vs. Phulawati, 3 SCC 36. <https://indiankanoon.org/doc/143363828/>
- Supreme Court of India. (2017). Shayara Bano and Others vs. Union of India, 9 SCC 1. <https://indiankanoon.org/doc/115701246/>
- Supreme Court of India. (2019). Young Indian Lawyers’ Association and others vs. Union of India, 11 SCC 1. <https://indiankanoon.org/doc/163639357/>
- Supreme Court of India. (2020a). M. Siddique vs. Mahant Suresh Das and others, 1 SCC 1. <https://indiankanoon.org/doc/107745042/>
- Supreme Court of India. (2020b). Kantaru Rajeevaru and Others vs. Young Indian Lawyers’ Association, 9 SCC 121. <https://indiankanoon.org/doc/120364030/>
- Supreme Court of India. (2020c). Kantaru Rajeevaru and Others vs. Young Indian Lawyers’ Association, 3 SCC 52.