A fraught timeline

The stage is set for a final hearing on the title suit to the disputed site in Ayodhya

The Supreme Court's refusal to refer some questions of law in the Ram Janmabhoomi-Babri Masjid dispute to a seven-judge Bench has one immediate consequence: it could expedite the final hearing in the appeals against the Allahabad High Court's compromise judgment of 2010 in the main title suit. The two-judge majority opinion has fixed the date for the hearing as October 29, a development that may mean that a final verdict is not far off and it could have a bearing on political events in the run-up to the general election due next summer. The final hearing ought to have begun a year ago, but was delayed because some parties wanted the reference to a larger Bench so that certain observations in a Constitution Bench decision in *Ismail Faruqui* (1994) could be reconsidered. The apprehension was that remarks to the effect that "a mosque is not an essential part of the practice of Islam" and that *namaz* can be offered anywhere, even in the open, would influence the outcome of the appeal. Justice Ashok Bhushan's main opinion has sought to give a quietus to the controversy by declaring that "the questionable observations" were to be treated only as observations made in the context of whether land on which a mosque stood can be acquired by the government. It should not be taken into account while deciding suits and appeals. It is difficult to fault this approach, as it is a fact that the respective claims of the U.P. Sunni Central Wakf Board, Nirmohi Akhara and Ram Lalla, the deity, can only be tested against evidence adduced during trial and not by pronouncements on the significance of places of worship or practices in a particular religion.

At the same time, can one brush aside the possibility that observations on a sensitive religious issue would be exploited by one side to gain legal advantage? In his dissenting opinion favouring a reconsideration of *Ismail Faruqui*, Justice Abdul Nazeer notes that its observations have permeated the High Court judgment. *Ismail Faruqui* was a ruling on petitions challenging the validity of a Central law that acquired the land on which the Babri Masjid stood before it was razed by a frenzied and fanatical mob on December 6, 1992. The judgment was notable for upholding the rule of law by restoring the title suits that had been declared as having "abated" in the Act. It also declined to answer a Presidential reference on whether a Hindu temple stood on the disputed site before the mosque was built. Any observation made in the course of such a decision is bound to have a profound impact on the courts below. It is easy to contend that courts should work to their own timelines and not be influenced by such things as election season. But in the life of this nation, the Ayodhya dispute has gone through dark political phases and been more than a mere legal issue. The onus is on the apex court to dispose of the appeals at its convenience without giving any scope for the exploitation of religious sentiments.

Not a crime

By decriminalising adultery, the Supreme Court strikes a blow for individual rights

The cleansing of the statute books of provisions that criminalise consensual relations among adults continues, with the Supreme Court finally striking down a colonial-era law that made adultery punishable with a jail term and a fine. In four separate but concurring opinions, a five-judge Bench headed by the Chief Justice of India, Dipak Misra, finally transported India into the company of countries that no longer consider adultery an offence, only a ground for divorce. They have removed provisions related to adultery in the Indian Penal Code and the Code of Criminal Procedure. According to Section 497 of the IPC, which now stands struck down, a man had the right to initiate criminal proceedings against his wife's lover. In treating women as their husband's property, as individuals bereft of agency, the law was blatantly gender-discriminatory; aptly, the Court also struck down Section 198(2) of the CrPC under which the husband alone could complain against adultery. Till now, only an adulterous woman's husband could prosecute her lover, though she could not be punished; an adulterous man's wife had no such right. In a further comment on her lack of sexual freedom and her commodification under the 158-year-old law, her affair with another would not amount to adultery if it had the consent of her husband. "The history of Section 497 reveals that the law on adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife," Justice D.Y. Chandrachud wrote. "It was aimed at preventing the woman from exercising her sexual agency."

But the challenge before the court was not to equalise the right to file a criminal complaint, by allowing a woman to act against her husband's lover. It was, instead, to give the IPC and the CrPC a good dusting, to rid it of Victorian-era morality. It is only in a progressive legal landscape that individual rights flourish – and with the decriminalisation of adultery India has taken another step towards rights-based social relations, instead of a state-imposed moral order. That the decriminalisation of adultery comes soon after the Supreme Court judgment that read down Section 377 of the IPC to decriminalise homosexuality, thereby enabling diverse gender identities to be unafraid of the law, is heartening. However, it is a matter of concern that refreshing the statute books is being left to the judiciary, without any proactive role of Parliament in amending regressive laws. The shocking message here is not merely that provisions such as Section 497 or 377 remained so long in the IPC, it is also that Parliament failed in its legislative responsibility to address them.

Finding an equilibrium

The Supreme Court's verdict in the Aadhaar case is best read in light of the dissenting opinion

UPENDRA BAXI

A thicket of Aadhaar litigation has now ended with the decision of a five-judge Supreme Court Bench comprising the Chief Justice of India Dipak Misra and Justices A.K. Sikri, A.M. Khanwilkar, D.Y. Chandrachud and Ashok Bhushan, which had reserved its order on May 10, after a marathon 38-day hearing. The victory of the right to privacy was presaged by *K.S. Puttaswamy v. Union of India* (2017), but that nine-judge Bench had left open the question of Aadhaar: whether the "national security" perspective (the vital role of surveillance to curb terror and prevent money laundering and crime financing) and "social welfare state" perspective (Aadhaar ensured that subsidies went to the right people) provided constitutional grounds for "reasonable restrictions" (reasonable because non-arbitrary).

Although conceived and executively implemented during the UPA-2 regime, the project got coercive statutory backing only during the NDA regime, in 2016. The Aadhaar Act has now been upheld, and Aadhaar is mandatory for all government benefits, as somewhat narrowly re-crafted by the majority. "[A]nnoyance, despair, ecstasy, euphoria, coupled with rhetoric, [were] exhibited by both sides", but Justice Sikri rightly stressed the "posture of calmness"; the political fallouts of a decision, even in an election year, cannot be a matter for judicial concern.

The court examined only whether the entire scheme was constitutionally valid under the nine-judge Bench enunciation of the right to privacy and whether the decision of the Speaker of the Lok Sabha to pass the Aadhaar Act as a Money Bill was declared so "final" by the Constitution as to exclude even the jurisdiction of the apex court.

The Money Bill question

Whether this decision disappoints those who had high expectations or remains enigmatic on key aspects is a question which will be debated for long. But clearly the majority disappoints with the lack of constitutional scrutiny on the finality of the Speaker's decision on what amounts to a Money Bill under Article 110(3) of the Constitution.

No one doubts the high constitutional status of the Speaker, but a very expansive view suggests that any bill which involves recourse to Consolidated Fund of India is a Money Bill and the finality of the Speaker's decision is virtually unchallengeable. The other view is that the Speaker, like all constitutional functionaries, is bound to exercise the discretion reasonably; purposive as well as strict pragmatic scrutiny carrying "lethal emanations" from Article 14 and 21 must ensue when a large number of bills are tagged with Money Bills. This is dangerous because it removes the rationale for bicameral legislatures, because the Constitution does not foreclose the Rajya Sabha's collective right to meaningfully deliberate legislative change. The Constitution is not a political tactic, it is not a mere 'play thing' of a special majority as Justice M. Hidayatullah said in *Sajjan Singh v. State of Rajasthan* (1965), laying the foundations of what became the doctrine

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of basic structure and essential features. Perhaps, T.S. Eliot's words regarding Shakespeare remain apt for constitutional interpretation: "...if we can never be right, it is better that we should, from time to time, change our way of being wrong".

But the majority led by Justice Sikri gives a short shrift to the finality argument. Both Justice Chandrachud and Justice Bhushan refer to a set of decisions which subject 'finality' to judicial review and even the basic structure but Justice Bhushan while ruling that the decision of the Speaker is not "immuned [sic] from Judicial Review" still takes the view that the Speaker's decision "does not violate any constitutional provision, hence does not call for any interference in this proceeding".

Justice Chandrachud fully dissents and holds the law invalid as a "fraud on the Constitution", that is a colourable exercise of constitutional power. He maintains that the "notion of absolute power" is anathema to the Constitution and that there is need to "liberate its founding principles from its colonial past". Its purpose cannot be to shield an excess of power from being questioned before the court, nor to clothe a high functionary with utter impunity.

The 'ultimate test'

Memorably, he says that the "ultimate test" is whether the ouster of "judicial review is designed to achieve a constitutional purpose" that "meets the test of functionality, assessed in terms of a constitutional necessity". Pointedly, Justice Chandrachud says: "In the seventh decade of the republic, our interpretation of the Constitution must subserve the need to liberate it from its colonial detritus." Accordingly, he holds that the decision to give the Aadhaar Bill the status of a Money Bill violates the principle of bicameralism, declared as a part of basic structure, and an aspect of federalism and entails a "debasement of a democratic institution" which "cannot be allowed to pass. Institutions are crucial to democracy. Debasing them can only cause a peril to democratic structures". Why was the majority not persuaded by the Chandrachud dissent is a question that will for long haunt those who prize democracy and rule of law values as essential for the future of putting the Constitution to work.

The proportionality test

Perhaps, a salient reason for the majority decision is to be found in 'balancing' interests under the 'proportionality test': simply put, any conflict of interest requires balancing, keeping in view constitutional first principles and its vision, values, and the mission. In Justice Sikri's dexterous judicial hands, this leads to many welcome invalidations and dilutions of some important sections of the Act (like non-application of the Act to situations where no direct benefits are claimed by beneficiaries, minimal data sharing, prohibitions on corporates from acquiring metadata, of opting out of children when they attain majority, and equality of esteem for other means of identification when Aadhaar is not available). But on the main aspect whether the right to privacy is violated, there is now posited a conflict with privacy and dignity, which only 'harmonious construction' may reconcile. Their Lordships also felt that some loss of privacy is constitutionally permissible to achieve the public good to the "marginalised sections of society" and there was a collective right to privacy which may override the individual right.

Apart from the fact that the right to privacy decision foregrounds privacy and regards dignity as an integral aspect of privacy, the majority opinions ignore the message of the great sociological jurist Roscoe Pound, who developed the theory of law as an ad hoc balancing of the interests – sacrificing some, and supporting others for the time being – justified only when interests in conflict are put on the same plane (intertranslatability); the tasks of balancing begin only when all interests are translated as individual, social, or public. True, the "sanctity of privacy lies in its functional relationship with dignity". But this relationship is "functional" only when "undue intrusion" into the "autonomy on the pretext of conferment of economic benefits" is avoided. Surely, there are other ways to achieve privacy and autonomy save the mandatory and ubiquitous Aadhaar number?

The majority decision offers a harmonious construction, but the dissenting opinion shows why this is not the only or necessarily the best way. Do the ways of upholding the Aadhaar also open the floodgates of being constitutionally *nir-aadhaar*?

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Idlib, the final frontier

The Putin-Erdogan deal may have postponed a battle, but the war is far from over

STANLY JOHNY

The September 17 agreement between Russian President Vladimir Putin and his Turkish counterpart Recep Tayyip Erdogan to prevent an all-out attack on Idlib, the last major enclave held by anti-government militants in Syria, signals a major realignment of the power dynamics within the Syrian theatre. The agreement, according to which Russia and Turkey will establish a demilitarised zone along the line of contact between Idlib's militants and regime forces, has averted an imminent humanitarian crisis, but it also shows the increasing uneasiness in Russia's policy towards a conflict which has bogged it down.

For months, war clouds were gathering over Idlib, which has been out of the Syrian government's control for over three years. The regime of President Bashar al-Assad has practically won the civil war. If it were on the brink of collapse in September 2015 when Russia made its intervention, the regime has recaptured most major population centres including Aleppo, Daraa and Eastern Ghouta, ever since. The areas that lie outside the government control can be divided into three: Idlib, which is run by militants, including thousands of jihadists; the Kurdistan area controlled by Kurdish rebels, who are not hostile to Damascus but want more autonomy; and border towns such as Afrin and Jarabulus, which are under Turkish control. Of these, the regime doesn't have any immediate plan to attack the Kurds, who also have the backing of the U.S. It can't afford to attack Turkey either and provoke a bigger war. So the obvious choice for the next battle, or perhaps the last of the Syrian civil war, was Idlib. Iran backed this plan as it wants Mr. Assad to re-establish his authority over the whole of Syria.

Turkey factor

In the previous battles of the civil war, Russia fully backed the regime. The brute bombing that the Russian war planes carried out in Aleppo and Eastern Ghouta was vital for regime victories. But in Idlib, the situation is different. After the initial flare-up in ties, Russia and Turkey have warmed up to each other over the past two years. Last year, Russia, Turkey and Iran agreed on a de-escalation plan for Idlib which kept the province out of Russian-Syrian attacks. Under the terms of the agreement, Turkey set up 12 observation points on the front line. When rebels elsewhere struck surrender deals with the Syrian government, those who did not want to live under regime-held areas were bused into Idlib. At present, the province has some three million residents, half of them internally displaced people. Turkey,

AFP

which already has 3.5 million of Syrian refugees, fears that an all-out assault on Idlib will trigger another massive refugee flow. Idlib shares a border with Turkey, which is now shut. In the event of a war, refugees will flow into the Turkish border or to the neighbouring Afrin and Jarabulus areas, which are controlled by Turkey. Either way, Turkey will be hit by an attack on Idlib, and doesn't want a crisis of that proportion on its doorsteps.

Also, Idlib has a sizeable number of jihadists. Hyat Tahrir al-Sham (HTS), formerly Jabhat Al-Nusra which was the al-Qaeda arm in Syria, is one of the most powerful militant groups in the province. Turkey fears that an all-out attack could disperse them, prompting some of them to cross the border into Turkish land, posing new security challenges to the country, which is yet to recover from a series of terrorist attacks in 2016. So Turkey's interest lies in finding a non-violent solution to Idlib.

Russia, on the other side, is in a dilemma. It wants Mr. Assad, who it calls the legitimate ruler of Syria, to win the civil war. But it also knows that the campaigns in Aleppo and Eastern Ghouta have spilled enough blood, and Idlib, given the size of its population, would be more disastrous. Such a violent campaign will also throw a spanner into its reconstruction plan for Syria with help from European powers. Besides, Mr. Putin values Russia's emerging bonhomie with Turkey, a NATO member that's growing increasingly hostile towards the U.S. Unlike the erstwhile Soviet Union, Russia is not in West Asia for any ideological reasons. It has cultivated good ties with both Iran and Israel. And a growing partnership with Turkey is vital for its force projection in the region as a hostile Turkey can shut Russia's access to Bosporus and jeopardise its Mediterranean strategy. Just as it took a relatively independent line towards the Iran-Israel rivalry within Syria – by allowing Israel to target Iranian positions while at the same time supporting Iran in battles against rebels – Russia finally sided with Turkey over Idlib, while not giving up its commitment to the Syrian state. This is not the first time that Russians are doing this. When Turkey carried out an attack on Afrin in early January, Russia just looked away, allowing Mr. Erdogan to capture the Syrian town.

What's next

To be sure, the Idlib deal has averted an all-out attack – for now. But it hasn't provided any realistic solution to the crisis. Part of the problem is the HTS presence in Idlib. Neither the Syrian government nor Turkey can allow an al-Qaeda-linked group to continue to have a safe haven in Idlib. According to the UN, there are about 15,000 HTS fighters in Idlib. The government's plan is to attack all militant groups, including HTS and the Turkey-supported rebels, and retake the province – the Aleppo model. Turkey, however, proposes using non-violent tactics to draw HTS fighters away from its organisational fold and also empower non-HTS rebels to take the jihadists on.

The burden of implementing the deal is also on Turkey. It has to prompt rebels to withdraw heavy weapons from the proposed demilitarised zone and then come up with a road map to defeat HTS inside the province. This may not be easy. Turkey-backed militants, including the Free Syrian Army, say they outnumber the HTS. But HTS militants are battle-hard ideologically charged jihadists who were in the forefront of the conflict at least since 2013. Earlier they had fought with both the Syrian regime and other militant groups, including the Islamic State, and survived. Idlib has been their haven for a long time. If Turkey fails to honour its commitments, that will give an excuse to Russisa to go back to the original plan – the Aleppo model. The Putin-Erdogan deal may have postponed a battle, but the war is far from over.

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LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Aadhaar remains

It was perhaps inevitable that the Supreme Court would uphold the constitutionality of the Aadhaar project given that the government and private entities managed to coerce us to get Aadhaar cards and link them to everything ("Aadhaar survives", Sept. 27). It is surprising that only Justice D.Y. Chandrachud pulled up the various government agencies which repeatedly and blatantly violated the court's order that enrolment should be voluntary. As the editorial pointed out, Aadhaar has already become too big a project to be scrapped. The judges who upheld Aadhaar would not have wished to be seen asking for the impossible: a reversal of all the effort that has already gone in expanding the project. What is worrying is that all these data have been proven to be insecure and prone to misuse. It is crucial now to see how such data are protected.

THOMAS THARU,
Chennai

Using biometric details to prove one's identity is somewhat dehumanising. Impoverishment validates social welfare schemes. The possession of an identity proof should be only incidental to the delivery of benefits. It should not be impossible to prove one's identity by means other than biometric information. It is unfair and unjust to make the survival of the country's poor dependent on Aadhaar. It is unfortunate that Justice Chandrachud was in the minority despite the greater reasonableness of his views. One positive about the verdict is that private firms cannot ask for our Aadhaar data.

G. DAVID MILTON,
Maruthancode

The court has ruled that linking Aadhaar with mobile phones is unconstitutional. Some of us had to run from pillar to post to get our Aadhaar numbers linked to our mobile phones. According to reports, 85.7 crore mobile connections have been linked to Aadhaar. Will mobile companies that are illegally holding vital information about us assure us that our data will be destroyed?

C.V. VENUGOPALAN,
Palakkad

While the apex court's decision is welcome, it is still unclear how loopholes are going to be plugged. I know a 92-year-old man who got his Aadhaar card from Mumbai a few years ago. But that Aadhaar card is not accepted in Tamil Nadu for reasons not known to any of us, and his ration shop has denied supplies to him over the past two years. It would have been better if the court had ordered the setting up of new government agencies in each State to redress such grievances; the existing online service for registering complaints is useless. Mere issue of an Aadhaar card is not enough; it should be made available for use.

J. EDEN ALEXANDER,
Thanjavur

Speak out about abuse

Padma Lakshmi's deeply personal account ("I was raped at 16 and I kept silent", Sept. 27) has sent out a strong message that women must speak up if they are abused. Only if more women do so will it help powerless women to report abuse. And if they speak about their abuse soon after the incident, the abuser can be punished. Many ask why women don't speak earlier. This is not the issue at hand, it is the abuse which must be the focus.

N. VIJAI,
Coimbatore

MORE LETTERS ONLINE:
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CORRECTIONS & CLARIFICATIONS: The second sentence in the last paragraph of the Sports page story titled "I fight my body to overcome my opponent, says Shatabdi" (Sept. 27, 2018) needs to be amended. The reference to support by Project Divyang should read as support by Cairn, under Project Divyang.

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