***‘Court’ing Hindu Nationalism*: law and the rise of modern *Hindutva*[[1]](#endnote-1)**

**Abstract**

This paper emphasizes the role of the Courts in lending currency to the politics of *Hindutva* in the 1990s. It focuses on some of the significant and connected cases of the Ayodhya dispute and the infamous *Hindutva* judgments to illustrate how the court legitimised, perhaps inadvertently, a jingoistic and intolerant ideology as an acceptable political strategy. The rise and electoral successes of the Bharatiya Janata Party (BJP) post-emergency accompanied the party’s reliance on the judicial instruments to make its Hindu nationalist ideology palatable to a larger audience and the ‘secular’ citizen. Contrary to the stance of Hindu nationalist organisations against codification of Hindu law and any state interference in matters of religion at the time of independence, in the 1990s the movement relied significantly on judicial instruments for its own legitimacy and for expanding the domain of religion by seeking the patronage of ‘law’. The Court, in what came to be known as the *Hindutva* judgments, attempted to separate ‘Hindutva’ from ‘Hinduism’, thereby aiding the launch of a new dawn of *Hindutva* which could then become synonymous with democracy and development. Most significantly, it also opened the doors for electoral promises to be routed through the courts.

Bio:

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**Introduction**

The dispute over the site of the Babri Masjid-Ramjanmabhoomi[[2]](#endnote-2) has languished in Indian courts for over a century. The construction of a Ram temple in Ayodhya continues to feature in election manifestos as well as in local, national and judicial vocabulary. This essay, however, is not about the dispute itself but focuses on the role of the courts vis-à-vis emerging political formations of the 1990s that galvanized around the issue of Ayodhya. By analysing a few of the most significant and controversial judgments in Indian legal history, the essay illustrates that case law was welded into the narrative of political debate as political ideologies became reliant on the Court’s approval or patronage for electoral successes.

In the 1990s, defining the role of religion and of religious identities in public life was increasingly left to the courts. This interface of organised religion and courts can be understood through a series of judgments where the courts try to respond to paradox; a democratic upsurge (Yadav 1999) on the one hand and a threat to secularism and consequently a threat to democracy itself, on the other (Hansen 1999).[[3]](#endnote-3) In the famous *SR Bommai[[4]](#endnote-4)* case the Court attempted to recover India’s constitutional commitment to ‘secularism’ which was compromised with the rise of Hindu nationalism. However, the same court acquitted the term *Hindutva* from its religious underpinnings by giving it a broader interpretation and holding it synonymous with Indianisation in three judgments which came to be known as the *Hindutva* cases. The court accepted the definition of *Hindutva* to mean a ‘way of life’ rather than ‘religion’, making the term immune from scrutiny under the Representation of People’s Act, 1951, which deemed the use of religion in elections as a ‘corrupt practice’. This granted the Hindu nationalists the foothold in the legal realm that they so keenly desired, thus ushering in a new dawn of *Hindutva*.[[5]](#endnote-5)

The judgment not only recognised the distinction between *Hindutva* and Hinduism but also held the term *Hindutva* to be synonymous with ‘Indianness’ or patriotism, thereby allowing Hindu nationalism to inhabit the vocabulary of ‘development’, ‘a strong army’, ‘national integration’, ‘uniform civil code’ and much else. Constitutional questions of secularism, federalism and free speech were all brought into a conversation in these judgments and fresh definitions of old concepts were also laboured by the Court. While the Indian courts had historically leaned towards a ‘broad’ understanding of Hinduism (Sen 2010), the *Hindutva* judgments allowed the term ‘Hindutva’ to expand beyond religion altogether.

It was precisely this redemption of ‘Hindutva’ by the courts that permitted the appropriation of secularism by the *Hindutva* ideologues, such that ‘secularism’ as hitherto understood could be caricatured as ‘pseudo-secularism’, and authentic secularism became one with *Hindutva*. More importantly, it permitted a judicial route to the legitimation of *Hindutva* even before it was politically tested.[[6]](#endnote-6)

The first section of the essay discusses the lead up to the *Hindutva* judgments, which are analysed against the backdrop of the precedents of the *SR Bommai* and *Ismail Faruqui[[7]](#endnote-7)* cases. In the next section the essay turns to the terminology of secularism and *Hindutva*, and how these ideas have evolved through the courts’ precedents, but now, the Court’s enthusiastic intervention in redefining *Hindutva* hangs like an albatross around its neck.

**Demolition and the Supreme Court: Secularism, Federalism, and Free Speech**

*Let me interpret the decision of the Supreme Court for you... It does not ask us to stop the Karseva.[[8]](#endnote-8)[in Ayodhya] In fact, Supreme Court has given us the right to perform Karseva.. Tomorrow, by performing Karseva we are not violating the order of the Court, we are honouring it. It is true that the court has said do not do any construction work. But the Supreme Court has said that we can sing bhajans,[[9]](#endnote-9) and perform kirtan[[10]](#endnote-10). Now, one person alone cannot sing bhajans, and kirtan cannot be performed standing upright. Till when will we keep standing? There are sharp stones emerging from the ground. We will have to make the land hospitable, a yagya[[11]](#endnote-11) will need to be organised and the ground will have to be levelled.*

-Atal Bihari Vajpayee, 5December 1992, Lucknow. [[12]](#endnote-12)

On the morning following Vajpayee’s speech, 6 December 1992, approximately 150,000 (*BBC News*, 5 December 2002) *karsevaks* (volunteers) with sickles, sticks and stones attacked the sixteenth century mosque, the Babri Masjid. Riots between Hindus and Muslims broke out in Ayodhya and spread to neighbouring districts, then to cities across India, and the repetitive invocation of the Supreme Court order in public speeches served to steadily make the Court complicit in the event in the public eye. It is, therefore, in this context of bitter communal violence that characterised the final decade of the twentieth century that Hindu nationalism looked for an anchor in the ‘law’ for its political strategies and cultural claims.

Two days after the demolition of the mosque, 8 December 1992, Parliament was in disarray. The leader of the opposition from the Bharatiya Janata Party (BJP), L.K. Advani, was taken into judicial custody for inciting the violence that led to the demolition of the Babri Mosque. In the wake of communal riots that broke out in many parts of India the government imposed a ban on all activities of the Hindu nationalist organisation, the Rashtriya Swayam Sewak Sangh (RSS) (*The Times of India*, December 9, 1992*)*.[[13]](#endnote-13) Narhsimha Rao’s Government further imposed President’s Rule, (Article 356) that is, the declaration of internal emergency in Uttar Pradesh, due to the ‘break-down of law and order’. Subsequently, the central government also dismissed the governments of four other states on account of the Chief Ministers of these provinces being members of the RSS.[[14]](#endnote-14)

The 8th and 9th December witnessed absolute pandemonium when members of Parliament began sloganeering as they congregated in the central well of the chamber. By mid-day on the 9th, owing to the level of disruption, the Speaker adjourned the house.[[15]](#endnote-15) When it reconvened on the 16th December, there remained a complete deadlock on the issue of the demolition. Parliamentary debates conveyed a sense of betrayal of constitutional values of ‘federalism’, in the dismissal of the provincial governments;[[16]](#endnote-16) ‘secularism’, in the demolition of the mosque[[17]](#endnote-17) and the failure to prevent it;[[18]](#endnote-18) and of ‘free speech’ with respect to LK Advani’s arrest.[[19]](#endnote-19) The very foundations of democracy and principles of the constitution were in jeopardy.

The cry of ‘*bring in the leader of opposition’* was met by ‘*he is the leader of demolition!’.*[[20]](#endnote-20) Shivraj Patil, the Speaker of the House, declared ‘we condole the deaths. We cannot take pride in the incident which took place on 6th December.’[[21]](#endnote-21) To which the opposition members responded that it was the dismissal of the governments of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh where democracy had been ‘murdered’:[[22]](#endnote-22) ‘we must condole (sic) *this* act.’[[23]](#endnote-23) Congress Party politician Ghulam Nabi Azad presented the final resolution on Babri Masjid in Parliament:

This House strongly and unequivocally condemns the desecration and demolition of Babri Masjid at Ayodhya by and at the instigation of forces represented among others VHP, RSS and Bajrang Dal, which has caused communal violence in the country. Such acts of vandalism was (sic) carried out not only in the violation of the orders of the Supreme Court but amounted to an attack on the secular foundations of our country. […]. [[24]](#endnote-24)

Members thumped the desks and the house was adjourned.[[25]](#endnote-25)

**SR Bommai and the capaciousness of secularism:**

In his speech on the night before the demolition which provoked the crowds to level the land in Ayodhya, Vajpayee had repeatedly invoked the Supreme Court order, which had forbidden any construction on the site but permitted a peaceful prayer.[[26]](#endnote-26) In public statements the BJP declared that it had not anticipated the demolition of the mosque but sought the restoration of the temple by the *due process of law* (Advani 2008)*.* Not only did this prevent Vajpayee’s arrest, but it allowed the responsibility of the demolition to become completely decentralised. No one knew who launched the first stone or struck the first blow to the mosque.[[27]](#endnote-27)

At the same time, Prime Minister Narhsimha Rao had also hesitated in preventing the *Shila puja* (offering of prayers) scheduled on the 6th of December, since the Supreme Court had expressly granted permission for prayers as long as no construction work was undertaken.[[28]](#endnote-28) In granting the plea to offer prayers and perform Kar Seva, the Court had granted the opportunity for demolition.[[29]](#endnote-29)

All accused parties took refuge in one court order or another. Judicial activism in the period, therefore, did not emerge just as a consequence of Public Interest Litigation or post-emergency catharsis (Baxi 1985), or because of the efforts of individual judges (Mehta 2015), or the court’s own neoliberal sympathies (Bhuwania 2017); it also emerged because political parties and civil society movements proactively sought judicial interventions to legitimise their political strategies. The public unrest and communal riots after the demolition of the Babri mosque in 1992 and 1993 raised questions about the political will to contain communal violence, particularly when the Ram temple was central to the BJP’s political campaign.[[30]](#endnote-30) This distrust in the political dispensation also granted salience to the court’s ability to determine what religious organisation, trust, individual or community, had a rightful claim to the disputed land of Babri Masjid-Ramjanmabhoomi.

In 1993, the national president of the Janata Party, S.R. Bommai filed a case imploring the application of the emergency provisions or ‘President’s rule’ (Article 356) in riot-affected states, which brought the state’s administration under the central government’s authority.[[31]](#endnote-31) The *SR Bommai versus the Union of India*[[32]](#endnote-32) case came to be known as one of the most significant rulings that influenced the relationship between the central and provincial governments in India. Article 356, which detailed the provisions in the case of failure of constitutional machinery in a particular province, had historically been subject to controversy for undermining the federal character of the country. Under Indira Gandhi’s regime this Article was invoked thirty-nine times, and was directly aimed at dismissing state governments ruled by her political opponents.[[33]](#endnote-33) The Article’s imposition after the demolition of the mosque was premised on a ‘threat to secularism’, and the public unrest that the demolition had posed. Owing to the overuse of the vocabulary of secularism with no consensus over its meaning in public discourse, the courts took it as their own prerogative not only to interpret and reflect on secularism, but to execute it, alongside its pronouncements on federalism. The *SR Bommai* judgment opened the issue with a quote from former President, Dr. Radhakrishnan:

When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that Secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, *the Indian State will not identify itself with or be controlled by any particular religion.*[[34]](#endnote-34)

The Bommai judgment stressed the fact that the addition of the word ‘secular’ in the preamble only made explicit what was already implicitly embedded in constitutional philosophy. ‘Articles 25-30 of the Constitution are precisely about protection of the rights of minorities and these do constitute the basic structure of the Constitution.’[[35]](#endnote-35) The term ‘secular’, the judgment stated, ‘has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined.’ And indeed when secularism was incorporated in the preamble in 1976, the speeches emphasised precisely this indefinability.

HR Gokhale, advocating for the addition of the terms ‘secular’ and ‘socialist’ to the preamble of the Constitution in 1976, had argued:

[..] let anyone say that socialism and secularism are incapable of definition. Well if that argument were to be accepted, even democracy in that sense is incapable of definition, because is it not understood in different ways in different countries [..] But we understand what kind of a democracy we stand for. In the same way we understand what socialism stands for and what secularism stands for.[[36]](#endnote-36)

Bhargava’s reading of the distinctiveness of Indian secularism suggests that India was committed to a ‘contextual’ doctrine of secularism, which advocated ‘principled distance’ from all religions and ‘equal respect for all religions’. This was more than merely a doctrine of ‘tolerance’; it also permitted the respectful transformation of religions, even religious reform (Bhargava 2007). This enabled the state to establish a relationship with religion that was shaped temporally and contingent on circumstance rather than fixed in letter or spirit. The parliamentary debates of the 1970s suggest that members were conscious of the extent of the import of political ideas, and that ideas acquired different meanings and interpretation in Indian experience.

Defenders of the 42nd Amendment termed the addition of the term secularism to the Constitution as something that was historically amiss, and the correcting of this fallacy addressed the unintended neglect of a crucial concept.[[37]](#endnote-37) Swaran Singh[[38]](#endnote-38), a Congress member, elaborated that the political content of the two new words added to the preamble were vital for the country to remain a ‘united and a strong nation’[[39]](#endnote-39) and the emphasis remained on multiculturalism.

So far as secularism is concerned I would at the very outset clarify that our secularism is not synonymous with the dictionary meaning of the word secular and that word flows from a historical background that was faced by several European countries […] But ‘secular’ now I think is a word that has become a part of Indian language. You go from Punjab to Gujrat even to South; when they make speeches in their own languages they always use the word secular because it has assumed a definite meaning […] more than that there is no connotational (sic) element of anti-religious feeling but there is respect for all religions. It is a concept that is broadly accepted by our country as a whole and therefore we thought it was necessary that it should find a place of pride in the preamble of our country.[[40]](#endnote-40)

The addition of the term ‘secular’ to the preamble of the constitution was a distinctly ‘Indianised’ understanding, that it had shed its colonial or protestant underpinnings.[[41]](#endnote-41) Jambhuwantrao Dhote[[42]](#endnote-42) from the Forward Bloc argued: ‘The word ‘secular’ has no exact Hindi translation, the translation used suggests ‘religion-lessness’ which is unfair to the term secular.’[[43]](#endnote-43) The discussion implied that if at all secularism is invoked in the Indian context, its implication is never the classical understanding (Smith 1965) of a divorce between state and religion; rather it is seen as a negotiation between them. Indian secularism therefore, had everything to do with religion.

On the 18th of December 1976, the 42nd Amendment Bill became an Act, and with this India *officially* included the word secularism in its constitution. Rajeev Bhargava has argued that the problem of Indian secularism only began with the insertion of the term in the Indian constitution because this opened it for appropriation by all sides, leading to the distortion of the label of secularism. He writes that the cultural evolution of the term ‘secularism’ is not just the work of a single political regime, but rather a collective work of meanings formulated by courts, groups, and governments (Bhargava 2007).

Thus, the *Bommai* judgment conveyed that judicial opinion was not too distant from legislative discussions of the 1970s, favouring wider and capacious definitions of secularism. While the verdict was definitely not the first engagement of the Indian courts or legislature with secularism, it has since become the yardstick against which levels of religious tolerance are measured. The judgment reiterated the ‘constitutional status’ of the term secular as a legal and philosophical principle - not an ideology but a constitutional commitment. This was significant and even distinct from earlier judicial dealings with secularism, because here the court confronted vocally non-secular state governments. Therefore, it was not the definition of secularism alone that had to be laboured, but its implementation - not merely for the sake of a single constitutional commitment, but also in relation to preambular commitments to equal citizenship, national integrity and fraternity that secularism enabled. Secularism therefore once embedded in the Constitution had an instrumental value, as law. Thus, while *implementing* secularism the Supreme Court concluded, “In matters of State, religion has no place. No political party can simultaneously be a religious party.”[[44]](#endnote-44)

The judgment upheld the imposition of President’s Rule in the states of Himachal Pradesh, Madhya Pradesh, and Rajasthan. In these states, not only was the law and order situation plummeting out of control; the Court also took into account the fact that their Chief Ministers were members or sympathisers of the RSS, the organisation which had been instrumental in the demolition of the Babri Mosque. The Court stated ‘[..] It is neither possible nor realistic to dissociate the Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh from the acts and deeds of their party.’[[45]](#endnote-45)

While India was one among many examples that illustrate that separation between state and religion is not a precondition for democracy (Asad 2003), in this context democracy had become contingent on secularism, as the BJP’s campaign (and electoral success) made realisable the idea of ‘Hindu rashtra’. Democracy had yielded an outcome so majoritarian, that it had put its own existence in peril.[[46]](#endnote-46) Secularism therefore was also the language in which the courts articulated the threats to Indian democracy. Secularism became synonymous with democracy, so much so that for many (Shourie 2012)[[47]](#endnote-47) the judgment’s upholding of the dismissal of state governments was seen as a compromise on federalism in order to accommodate secularism. This however was an unfair assumption.

While the Supreme Court in the *Bommai* judgment acknowledged that the provincial governments were co-opted into the Hindu nationalist agenda of temple reconstruction, the judgment also emphasized an obligation to seek the consent of both Houses of Parliament within two months of the imposition of President’s Rule.[[48]](#endnote-48) This caveat made it extremely difficult for the central government to impose Article 356. The Supreme Court, while defending secularism, also positioned itself against the emergency powers of the state in the provinces, responding to the number of provincial governments that had been toppled by the Government of India during Indira Gandhi’s regime. It is precisely this feature of putting a leash on legislative authority on the one hand and reprimanding *Hindutva* propagandists on the other that rendered the courts very powerful in the 1990s.

The Supreme Court clarified in this judgment that the demolition was the culmination of a sustained campaign and not a sudden, unprecedented event. The BJP and its allied organisations had consistently expressed a desire to construct a Ram temple in the place of the mosque. The judgment quoted from the BJP’s manifesto released in 1993 that had condoned the demolition of the mosque and contained the following statement in the manifesto under the heading ‘Ayodhya’:

On December 6, 1992 kar-sevaks from all over India assembled in Ayodhya to begin the reconstruction of the Rama Temple [..]. Matters took an unexpected turn when, angered by the obstructive tactics of the Narasimha Rao government, inordinate judicial delays and pseudo-secularist taunts, the kar-sevaks took matters into their own hands, demolished the disputed structure and constructed a makeshift temple for Lord Rama at the garbha griha (sanctum sanctorum). This BJP (sic) is the only party which is categorical in its assurance to facilitate the construction of the Rama Temple at the site of the erstwhile Babri structure. *This is what the people desire*.[[49]](#endnote-49)

The court stated that it felt compelled to intervene, arguing that the RSS leadership in the affected states posed serious questions about the will of the state’s administration to offer protection to minorities given the RSS’s complicity in the demolition and the riots. Thus, the Court’s decision was a response to what it felt was a genuine threat to law and order by the common public which was provoked to constitute riotous communities through a sustained campaign.

**Ismail Farooqui and legality of demolition:**

The central government’s response to the threat to law and order was to hurriedly issue an ordinance which was later turned into the Acquisition of Certain Area at Ayodhya Act, 1993 (Ayodhya Act), to acquire 67.7 acres of land within Ayodhya, of which 2.77 acres comprised the site of the Babri mosque. Further, on January 7, 1993 the then President, Shankar Dayal Sharma, made a ‘presidential reference’ to the Court to inquire into whether indeed a Hindu temple existed at the disputed structure. The Ayodhya Act was subsequently challenged in Court in the *Ismail Faruqui* case; its validity was upheld barring one section[[50]](#endnote-50), and the bench ‘respectfully’ declined to respond to the presidential reference, citing that determining whether a structure or indeed a Hindu structure or Ram temple existed prior to the mosque had to be established by archaeologists and not the courts.[[51]](#endnote-51)

The Court’s decision to uphold the validity of the Ayodhya Act, however, meant that the demolished mosque would not simply be re-erected. The Act’s objects and reasons made it clear that on the disputed land, now, a mosque, a temple and much else would be accommodated:

There has been a long-standing dispute relating to the erstwhile Ram-Janma Bhumi-Babri Masjid structure in Ayodhya which led to communal tension and violence from time to time and ultimately led to the destruction of the disputed structure on 6th December, 1992. … As it is necessary to maintain communal harmony and the spirit of common brotherhood amongst the people of India, it was considered necessary to acquire the site of the disputed structure and suitable adjacent land for setting up a complex which could be developed in a planned manner wherein a Ram temple, a mosque, amenities for pilgrims, a library, museum and other suitable facilities can be set up.

The judgment of *Ismail Farooqui versus Union of India*,[[52]](#endnote-52) had started giving way to the argument that the demolition was the work of a few ‘miscreants’, overlooking the BJP’s manifesto that claimed ‘this is what the people desire’. The process of absolving the involvement of an organised political campaign that directly precipitated the demolition had begun. For instance, the minority judgment in the *Faruqui* case contained the paragraph:

We have no doubt that the moderate Hindu has little taste for the tearing down of the place of worship of another to replace it with a temple. It is our fervent hope that that moderate opinion shall find general expression and that communal brotherhood shall bring to the dispute at Ayodhya an amicable solution long before the Courts resolve it……The miscreants who demolished the mosque had no religion, caste or creed except the character of a criminal and the mere incident of birth of such a person in any particular community cannot attach the stigma of his crime to the community in which he was born….. The Hindu community must, therefore, bear the cross on its chest, for the misdeed of the miscreants reasonably suspected to belong to their religious fold.[[53]](#endnote-53)

….the word ‘Hindutva’ is used and understood as a synonym of ‘Indianisation’, i.e., development of uniform culture by obliterating the differences between all the cultures co-existing in the country.[[54]](#endnote-54)

The judgment also cited the existence of religions other than Hinduism in India as an example of the ‘tolerance’ enshrined in Hinduism, which essentially is responsible for ‘enabling’ Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to exist in the country.[[55]](#endnote-55) The use of words like ‘shelter’ and ‘support’ to describe the accommodation of non-Hindu religions in India betrayed the refugee status accorded to other religions in the perception of the Court.

The principle of ‘adverse possession’ meant that if one’s property is taken by another, and no suit is filed within twelve years, then the possession would be lost under the Indian Limitation Act, 1908. In 1940, this had been applied in the *Shahid Ganj* case,[[56]](#endnote-56) a similar dispute between a Mosque and Gurudwara, and the land was restored to the Sikhs on the ground that the building had been used like a Gurudwara for more than 12 years. The *Farooqui* judgment held that given the mosque had also not been in use since the 1950s it could be acquired now by the state as any other religious place could be. However, it infamously made the unnecessary observation that;

A mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India.[[57]](#endnote-57)

While it steered clear of presidential reference, the *Farooqui* judgment once again confirmed that the mosque would not be restored, and passed the responsibility of managing the disputed area to the government. Simultaneously, the Court read down a section of the Ayodhya Act that prevented further litigation on the matter, thus reviving all pending petitions.[[58]](#endnote-58) The Court thus continued to remain central to the dispute, even as political parties promised to build a temple or rebuild a mosque or protect the minorities in their respective manifestos.

**The *Hindutva* Judgments: undoing secularism**

In the run-up to the Maharashtra State Assembly Elections scheduled in 1990, some of the speeches made by local candidates of two Hindu nationalist political parties, the BJP and the Shiv Sena, provoked communal hostilities. While Article 19(1)(a) of the Indian Constitution guaranteed the fundamental right to freedom of speech and expression, Article 19(2) provided a few exceptions on grounds of decency, morality, or public order. Moreover, under the Representation of People Act, 1951, Section 123 (subsection 3and 3A) defined the use of religion in election campaigns as a ‘corrupt practice’.[[59]](#endnote-59) The speeches were acerbic enough to qualify for this exception, and this led the opposing candidates who lost the election to file three petitions against candidates of the BJP and Shiv Sena. These were collectively referred to as the *Hindutva* cases 1994.

Yashwant Prabhu, a candidate of the Shiv Sena, won a by-election in 1987. In the course of his campaign, Bal Thackeray, the founder and leader of the party, declared in a series of speeches that they campaigned solely for the votes of Hindus:

‘We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so[..] All my Hindu brothers, sisters and mothers gathered here. .... here one cannot do anything at anytime about the snake in the form of Khalistan and Muslim. .... The entire country has been ruined and therefore we took the stand of Hindutva and by taking the said stand we will step in the legislative Assembly. ....Who are (these) Muslims. Who are these ‘lande’[[60]](#endnote-60)…. They should bear in mind that this country is of Hindus, the same shall remain of Hindus....’[[61]](#endnote-61)

... The victory will not be mine or of Dr. Prabhu or of Shiv-sena but the victory will be that of Hinduism. … today we are standing for Hinduism. ...[[62]](#endnote-62).

.... You must take only Dr. Ramesh Prabhu of Shiv-sena, otherwise Hindus will be finished. It will not take much take form Hindustan to be green.[[63]](#endnote-63)

In *Yashwant Prabhu*[[64]](#endnote-64) the Bombay High Court declared the election of Prabhu as invalid under section 123, on the basis that the use of religion was a corrupt practice. Prabhu’s subsequent appeal to the Supreme Court was also dismissed. The Supreme Court expressed ‘distress’ at the nature of the speeches given, and ‘condemned’ the derogatory terms attributed to religious minorities.[[65]](#endnote-65) In the end, however, the Court in its observations accepted the use of the term ‘Hindutva’ as one that did not necessarily refer to a religion, but to a ‘way of life’.[[66]](#endnote-66) The court, even as it dismissed Prabhu’s appeal, concluded that the use of the term alone did not amount to invocation of religious identity for votes.

‘[..] ‘Hindutva’ is related more to the way of life of the people in the sub- continent. It is difficult to appreciate how in the face of these decisions the term ‘Hindutva’ or ‘Hinduism’ per se, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or be construed to fall within the prohibition in sub-sections (3) and/or (3A) of Section 123 of the R.P. Act.

Considering the terms ‘Hinduism’ or ‘Hindutva’ per se as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism, proceeds form an improper appreciation and perception of the true meaning of these expressions emerging from the detailed discussion in earlier authorities of this Court. [..] The *mischief* resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use. It is indeed very unfortunate, if in spite of the liberal and tolerant features of ‘Hinduism’ recognised in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage.

Bound by secular commitments that had been painstakingly established in *Bommai,* Hinduism had to be separated from *Hindutva* in order for it to remain a legitimate campaign without attracting penalties under Section 123 of the Representation of People Act. The courts entered into the definition of *Hindutva*/Hinduism when the requirement was only that of ascertaining the ‘corrupt’ practice of using religion in a campaign. Thus, the Court deeming *Hindutva* a ‘secular’ campaign strategy was crucial for the political and electoral success of the Hindu Nationalist movement . The Court observed:

.…It may well be, that these words are used in a speech to promote secularism or to emphasise the way of life of the Indian people and the Indian culture or ethos, or to criticise the policy of any political party as discriminatory or intolerant…...[[67]](#endnote-67)

The decisions for the other candidates followed a similar line of argument. In the Manohar Joshi case in 1990,[[68]](#endnote-68) Joshi in his speeches had repeatedly expressed a desire for a nation constituted by and for Hindus. However, the Supreme Court took a rather sympathetic tone towards Joshi’s use of the term ‘Hindu state’.

In our opinion, a mere statement that the first Hindu State will be established in Maharashtra is by itself not an appeal for votes on the ground of his religion but the expression, at best, of such a hope. However, despicable be such a statement, it cannot be said to amount to an appeal for votes on the ground of his religion.[[69]](#endnote-69)

The Court concluded that his election was valid.

In the third case,[[70]](#endnote-70) the speeches of two prominent leaders of the Hindu nationalist movement, Sadhvi Rithambara[[71]](#endnote-71) and Pramod Mahajan[[72]](#endnote-72), had called for Hindu votes to be cast in favour of the BJP candidate, Kapse, who responded to these speeches by standing and acknowledging the crowds. The Bombay High Court concluded that the two public speeches were aimed at specifically seeking the votes of the Hindu community for Kapse. The Supreme Court reversed this ruling and concluded that the candidate was, in fact, ‘not liable’ for Rithambhara’s or Mahajan’s speeches and concluded that the election was valid.

Earlier precedents also reveal an underlying will of the courts to accept the universality or the flexibility of Hinduism (Sen 2010).[[73]](#endnote-73) In the Satsang case of 1966, the ‘Satsangis’, petitioned to be treated as a separate community outside of Hinduism, and expressed a desire to be governed by separate contractual and inheritance laws.[[74]](#endnote-74) Similarly, the Ramakrishna Mission, another sect, claimed to be distinct from Hinduism with respect to their ‘way of life’.[[75]](#endnote-75) However, in both cases the court concluded that these sects were mere branches of Hinduism and favoured a wider interpretation of Hinduism. The *Hindutva* cases on the contrary had narrowed the definition of Hinduism in order to yield that characteristic to *Hindutva*.

The capacious definitions that were attributed to secularism in the *Bommai* came to be attributed to *Hindutva* in the 1990s. The *Hindutva* judgments in effect had offered a narrower view of Hinduism and dissociated *Hindutva* from any religiosity. The umbrella of *Hindutva* could then become so big that it would practically become the new ‘secular’, if not the ‘national’. The observation of the Court in effect embraced Savarkar’s theorization of ‘Hindu’, as a sub-set of *Hindutva* (Savarkar 1923). VD Savarkar described the concept *Hindutva* as not a mere word but a history, of which Hinduism is merely a derivative form.[[76]](#endnote-76)

Once the courts dissociated *Hindutva* from religion, it could be treated like any other political ploy which could be subject to criticism without the guilt of blasphemy, real or metaphorical. The real win for the *Hindutva* ideologues was not merely that their philosophy was deemed by the Courts as synonymous with Indianisation or Indian culture, but rather that it was deemed a ‘secular’ ideology. The one obstacle that lay in the path of Hindu nationalism transitioning from movement to government was its questionable relationship with the constitutional commitment to secularism. The judgments made that commitment irrelevant by equating *Hindutva* with secularism. And since secularism was argued to be a defence of democracy in *Bommai*, the Hindu nationalist movement became that self-styled ‘democratic voice’ which was committed ironically to ‘liberal’ constitutional values of equality. This claim over ‘equality’ was established by dismissing affirmative action or special provisions as compromise on the constitutional commitment to equality while re-casting itself as that suppressed, vulnerable, democratic voice in need of protection (Jacobsohn 2004).

These judgments came under severe criticism for lending legal currency to the term *Hindutva*, which signalled the collapse of secularism in India (Kapur and Cossman 1999, Dhawan 1994). Sitapati argues that the *Hindutva* judgments put clauses of free speech and freedom of expression and the constitutional commitment to secularism in a hierarchy (Sitapati 2008). He argues if a ‘justification’ of the judgments lay in a ‘liberal’ narrative, that is, defence of freedom of speech and expression[[77]](#endnote-77), its flaw can be discovered in the ‘secular’ narrative which took a strict view of ‘religion’ under the Representation of People Act’s clause[[78]](#endnote-78) that characterised the ‘use of religion’ as a corrupt election practice. The ‘secular’ considerations were therefore made subservient to a ‘liberal’ reading of the law.

For Jacobsohn too, India’s restrictions on religious speech in the *Hindutva* judgments were derived from ‘content-neutral principles’ that are in conformity with the contemporary conceptualizations of the ‘liberal State’. This was justified by the Court with a repeated insistence on freedom of speech while simultaneously criticising the ‘content’ of the speech and also holding its content and intent off limits for being tested under constitutional provisions. The bench employed strict ‘statutory standards’ in assessing the speeches on the limited point of whether the speeches used religion in a way that such use could be characterised as a ‘corrupt practice’ under the Representation of People Act (Jacobsohn 2004). However, in its bid to prevent censorship of controversial ideas the Court offered a sympathetic or a secular reading of a blatantly anti-secular speech. Jacobsohn illustrates this with remarkable precision when he states that if it were ‘*Chief Minister* Joshi, rather than *Candidate* Joshi, who had expressed the aspiration for a Hindu state of Maharashtra, a dismissal of his government under President’s Rule could, following *Bommai*, plausibly be upheld by the Supreme Court (Jacobsohn 2004, 195).’

The *Hindutva* judgments not only salvaged the term *Hindutva* from its anti-secular underpinnings, it in fact helped construct a fresh benign meaning of the term (Noorani in Jacobsohn 2004, 209). While the purpose for which the term was deployed may have in fact been to create feelings of religious hatred, the Court extended a new meaning to the term arguing that the intention or the ‘true meaning’ of the term was not conveyed in the way *Hindutva* was used in the electoral speeches. While scholarship has focused on arguments of ‘free speech’, ‘secularism’ [ameliorative (Jacobsohn 2004) or equidistance (Varshney 1993), or contextual (Bhargava 2007))], the *Hindutva* judgments, were in fact a powerful endeavour to separate Hinduism from religious fundamentalism. In order to do this, the bench had necessarily to separate *Hindutva* from Hinduism as well.

In one sense, the bench drew two opposing conclusions. One, that invocation of *Hindutva* was not the same as Hinduism and therefore there were no ‘corrupt’ practices deployed in the election campaign that sought votes on grounds of religion. On the other hand, the judgment simultaneously said that Hinduism and *Hindutva* had both historically been difficult to define and ascribe a structure to. *Hindutva* could stand for ‘Indianness’, and Hinduism shares many a principle with *Hindutva*, and therefore the Hindu religion itself was rather secular.

In principle *Hindutva*, much like Hinduism, was difficult to define, with no central canonical text or single deity, but in practice it could be the creation of a ‘Hindu state’. The underestimation of religious fundamentalism blinded the bench to the possibility that the emerging movement could become the government, and if it did, a Hindu state would be a policy goal rather than a humble ‘hope’.

Similarly, the bench also drew a distinction between benign and violent *Hindutva* without labouring over the difference between the two. The court ‘condemned’[[79]](#endnote-79) the vitriol, the potential of violence and racial supremacy, but permitted the benign philosophical values of *Hindutva* as valid invocations to a cultural idea which can be deployed in elections. To the common public this distinction may well have been irrelevant. The ‘way of life’ that *Hindutva* espoused may have had completely different meanings for the subscribers or sympathisers of *Hindutva* which could range from hatred towards minorities to shared cultural heritage, to national pride, to secular coexistence and simultaneously a Hindu state. The presumption that for most of the population it was the benign meaning of the term that appealed, was a fallacious one, especially given that speeches extolled the idea of a Hindu rashtra cautioning against the idea of a ‘green’ Hindustan.[[80]](#endnote-80)

Jacobsohn points out that Justice Verma’s interpretation that most Hindus would understand *Hindutva* was derived from his own sensibilities as a member of the judicial elite. The “intelligent and virtuous” *Hindutva*, “would have to be associated with a more elevated and edifying message, highlighting aspirations for cultural unity that emphasized positive aspects of the Hindu tradition” (Jacobsohn 2004). Thus the Court presumed that the ‘enlightened Hindu’ who would hope to propagate the philosophy would never have intended for it to assume such an anti-minority stance. It also presumed that most people espousing *Hindutva* were ‘sort-of secularist’, whereas most people practicing it could indeed be communal and genuinely share the hope that Muslims are that small hindrance between majority and totality that deserve to be eliminated, lynched or converted (*Ghar wapasi*) to Hinduism.[[81]](#endnote-81)

The court, also tried to protect the category of religion by dissociating it from *Hindutva,* which could then be invoked in questionable campaigns without demeaning ‘Hinduism’ and without attracting penalties for ‘using religion in electoral campaigns’. But when it came to recognising religious fundamentalism the Court held both Hinduism and *Hindutva* as distinct. Redeemed by the courts, in the 1998 manifesto the BJP declared:

Every effort to characterize Hindutva as a sectarian or exclusive idea has failed as the people of India have repeatedly rejected such a view and the Supreme Court, too, finally endorsed the true meaning and content of Hindutva as being consistent with the true meaning and definition of secularism. In fact, Hindutva accepts as sacred all forms of belief and worship. The evolution of Hindutva in politics is the antidote to the creation of vote banks and appeasement of sectional interests. Hindutva means justice for all.[[82]](#endnote-82)

**The Saffron Surge**

Within a year of the judgments, the BJP had successfully mastered the politics of religious symbolism, which was particularly visible in Uttar Pradesh where popular actors from Ramanand Sagar’s televised adaptation of the religious epic, ‘*Ramayana’* were made candidates for the upcoming elections. The BJP cashed in on not just the symbolism of Sita’s character but the popularity of the actor who played the character (Rajagopal 2001). This yielded electoral dividends as both actors portraying ‘Sita’ and ‘Ravana’ won from their respective constituencies. The fine legal line between *Hindutva* - the ‘way of life’ – and Hindu mythology was fast obliterated, and for a large section of the electorate the two could well be the same (McGuire 2002).

The Sangh applied a series of populist tactics in order to control and co-opt the identity of Ram, the most popular and uniformly (across castes) accessible Hindu God, in order to prevent the slipping away of lower caste votes towards newly ascendant lower caste parties that emerged in the aftermath of the Mandal Commission (Vanaik 1997) to question the myth of a homogenous Hindu majority (Corbridge and Harriss 2000). This was a turning point for the Indian elite, who looked to Hindu nationalism to guarantee the continuation of the privileges available to the dominant strata - the upper-caste middle class of Indian society (Hansen 1999), who could now borrow the vocabulary of vulnerability and suppression.

Jaffrelot theorises the BJP’s opposition to affirmative action as the growing ‘inferiority complex’ among upper-caste Hindus that developed over the Harijan/Dalit conversions to other religions, the aid from the Gulf to Indian Muslims, the Shah Bano case and the State’s accommodation of Muslim personal law, and also the banning of Rushdie’s *Satanic Verses* to assuage Indian Muslims. The use of the militant symbolism of *Rath-Yatras* for the ‘liberation’ of temples was to re-assert upper-caste Hindu supremacy while simultaneously establishing its vulnerability against the purported centrality of Muslim and backward caste issues in the legal domain (Jaffrelot 1996).

There were stories propagated of the numerous struggles to ‘free’ the Janmabhumi during the Mughal period, but with little convincing evidence (Thapar 1989).[[83]](#endnote-83) Myths around the ‘rediscovery of Ayodhya’ were popularised by the RSS through the distribution of pamphlets that sought to attribute ‘sacredness’ to the site of Ayodhya, and illustrate the ‘historical injustice’ that the Hindus had had to suffer, having been denied access to their holy land. The Ramjanmabhoomi movement then further deployed this rhetoric of denial and loss as a mobilising tactic that could transcend the geography of Ayodhya, by seeking symbolic support through the ‘blessing of bricks’ or ‘offering of prayers from ones’ home’ as a gesture of contribution to temple building (Basu 2001, in Kohli (ed.) 2001).

The Ramjanmabhoomi campaign articulated the temple construction as ‘justice for all’, rather than that for Hindus, because the rhetoric of inclusivity was precisely the means by which Muslim distinctiveness was sought to be eliminated. Thus, the Court’s acceptance of the pervasiveness of *Hindutva* strengthened the argument that protection of minorities through seemingly special privileges such as the preservation of ‘differential’ personal law, or the reservation of seats, was pseudo-secular, and the BJP’s election manifesto included a section on ‘genuine secularism’ which was distinct from such ‘minority-appeasement’.[[84]](#endnote-84) The success of the Hindu nationalist campaign lay precisely in the fact that it gained access to the ‘universal’. *Hindutva* ideologues appropriated secularism as a *Hindu* edict of ‘Sarva Dharma Sambhav’ or ‘tolerance/respect for all religions’ in its election campaign. MK Gandhi, who was chiefly responsible for popularising ‘Sarva Dharma Sambhav’, was conveniently dropped from the Hindu nationalist narrative, which rests centrally also on its opposition to Gandhi.

**What Happened to Secularism?**

In Habermas’s influential study of religion in the public sphere, he recognises religious and secular citizens, where the obligation of balancing secular citizenship with religious faith is the responsibility of the citizens who may recognise themselves as ‘religious’ (Habermas 2006).[[85]](#endnote-85) Such citizens could participate in public discourses and justify their convictions in religious languages if they cannot find secular ‘translations’. Habermas suggests that citizens who negotiate faith and secular citizenship are not the ‘default citizens’, as they attempt to harmonise their own sense of religious piety with an outward acceptance of secular citizenship (Habermas 1995).

Such a binary, however, fails to capture the complexity of the *spectrum of religiosity* as he views the ‘secular’ and ‘religious’ as mutually exclusive categories. Moreover, if this categorisation was to be applied to the Indian case, Habermas’s ‘default citizen’ would, in fact, bethe religious citizen, who aspired for constitutional secularism in principle but was unwilling to compromise the sphere of religion in the private or public realm. Such a citizen would not achieve a ‘theo-ethical equilibrium’ (or reconciliation of their religion with secular ethics) by aligning beliefs with secular citizenship. Instead they would require that their secular citizenship should not disqualify their religious beliefs (Kaviraj 2013).

Almost all theorists on secularism have laboured over the distinctiveness of Indian secularism. Jacobsohn contrasts India’s ameliorative secularism to its assimilative counterpart in America, indicating a process of constant negotiation of secularism with religion. Nandy (1995) would dub all allegiance to secularism as a dubious commitment to a neo-liberal ideology. For Nandy, it was religious traditions in Indian society that allowed for ‘religious tolerance’, whereas Bhargava (2006) notes that secularism is so central to conversations on Indian democracy that it is invoked by all participants, albeit in contrasting and often contradictory ways. Bhargava speaks of ‘principled distance’ from religion, but presumes a definite engagement between the state and religion.

Bhargava’s argument would hold for even the Hindu nationalist campaigns in the 1990s, which put forth versions of secularism in the form of ‘sarva dharma sambhav’, or Hinduism as a ‘secular-religion’, but never quite abandoned their claim to the terminology of secularism. However, the ‘contextual’ idea of secularism has historically and so frequently been invoked in deeply religious contexts that the terminology of ‘secularism’ has to essentially be hollowed out from all other meanings and connotations to fit the into its Indian distinctiveness.

For instance, attempts to invoke the universality of Hindu religion in the Constituent Assembly debates suggest that the distance between the state and religion was not always ‘principled’, and that the ‘way of life’ interpretation of religion was applied more favourably to Hindus than to minorities, as seen in the case of the ban on cow slaughter.[[86]](#endnote-86) In substantial extracts of the Constituent Assembly debates the repeated invocation of Hindu religion or religious practices as most ‘liberal’ and ‘sensible’ remained notoriously consistent. In the discussion on the clause allowing one to freely practice, profess and propagate one’s religion,[[87]](#endnote-87) Lokenath Misra, a member from the Swatantra Party, attributed the partition of India expressly to the spread of Islam. He claimed, ironically, that had Islam not come to India it would be a ‘perfectly secular’ state, betraying the uncertainty that surrounded secularism post-partition.[[88]](#endnote-88) This is precisely the sentiment that the *Hindutva* judgments endorsed, except they embellished it and concluded that if Hinduism was a ‘secular *religion’*, *Hindutva* was *the* secular.

Thus, neither the conflation of *Hindutva* and secular, nor the appropriation of secularism by Hindu nationalism was exclusive to the 1990s. But the *Hindutva* judgments’ explicit acceptance of *Hindutva* as secularism now meant that the Hindu nationalist ideology could no longer be called out for perpetuating religious intolerance towards minorities or women, as it had historically been in the Hindu code bill debates, debates on the 42nd amendment or on the mobilisation around Ramjanmabhoomi through the instrument of legal or constitutional secularism.

It may instead, therefore, be a more fruitful exercise to view Constituent Assembly, legislative debates, and court precedents as the making of a religion-state relationship without ascribing any secularisation theories of ‘contextual doctrine’, ‘religious tolerance’, or ‘multiculturalism’ to the discussions.[[89]](#endnote-89) ‘Distance from’ secularisation theories allow us to see that for many, religion remained the framework within which rights were discussed. Mahmood’s (2016) influential critique of secularism also dismisses it as a universalising project which is frequently understood through a civilizational lens.[[90]](#endnote-90) In the Constituent Assembly Debates there was no real consensus on what secularism meant, except that as Pakistan moved towards unity as a theocratic state, ‘secular’ India also sought a unitary identity (Gould 2004). If the state was to be defined by what it opposed (as culture is by what it exterminates, Das 1995, 55), a secular status for India at the time of independence was the negation of theocracy, thus escaping the need to define secularism or pluralism, and this was reiterated overtime in both legislative debates and judicial pronouncements. However, with the Court’s acceptance of a ‘hope’ for a Hindu state as legitimate, the doctrine of secularism no longer remained a negation of theocracy.

*Hindutva* as ‘Indianness’ is an idea that has crystallised over time to the extent that rather than provoking scepticism amongst media commentators in statements such as ‘a Hindu Rashtra is not possible with minorities’ (*Indian Express* September 20, 2018) a claim made by RSS chief, Mohan Bhagwat, at a recent conference, the statement was treated largely as evidence of how secular the organisation is. To the counter question on why the RSS refuses to admit Muslims and Christians Bhagwat responded ‘can boys be admitted to girls’ schools?’ Thus, the idea of a Hindu state that is benevolent to minorities but sees them as distinct now defines the new secular. Bhagwat further stated ‘Everyone who lives in India is Hindu by identity, nationality’. Thus, the very language in which *Hindutva* was opposed for decades (that is, secularism) was handed over by the courts to the Hindu nationalists to appropriate.

Even when the Court had the opportunity to revise its stance on *Hindutva*, in the case of *Abhiram Singh v. CD Commachen*,[[91]](#endnote-91) the court expanded the scope of Section 123 of the RP Act, to say that not only the use of one’s own religion to gather votes is a corrupt practice, but also invoking one’s opponent’s, or the voter’s religion to seek or discourage votes would qualify as a corrupt practice. It did not however, even by implication in its discussions on secularism, overturn the *Hindutva* judgments, or recognise that provisions against the use of religion in electoral campaigns are rendered irrelevant when *Hindutva* is equated with secularism.

For instance, the BJP Member of Legislative Assembly, Surendra Singh, at a recent rally in Ballia, Uttar Pradesh commented: ‘People of India, take a decision, will Islam win or Bhagwan’[[92]](#endnote-92), and later in his speech he went on to call the opposition ‘anti-national’ (*Times of India*, April 13. 2018). By accepting *Hindutva* as Indianness, the discourse eventually transformed from a secularism versus *Hindutva* binary to a ‘pseudo-secularism’ versus ‘nationalism’ binary in popular vocabulary. ‘True’ secularism became the preserve of Hindu nationalism, whilst any other invocation of it was termed as ‘sickular’, a term popularised on social media in the 2014 election campaign (*thescroll.in* May 30, 2014) While *Hindutva* ideologues had historically identified themselves as nationalist, the Court’s acceptance of this view broadened the vocabulary of *Hindutva*, enabling it to access the law for whatever it could frame as a ‘national’ concern, such as the law on sedition, in order to counter threats to ‘national’ security[[93]](#endnote-93); in support of the uniform civil code, in order to promote ‘national integration’; or the prevention of conversions to Islam, in order to counter a ‘national threat’ from the Islamic State.[[94]](#endnote-94) Not accidentally, when the BJP formed a government in 2014, all these ‘nationalist’ conversations were not integrated into ‘state policy’ or ‘law’ by the legislature, but were routed through petitions before courts.

**Manifestos and Judgments: Judicial Activism or Judicial complicity?**

In 1967, the Madhya Pradesh and Orissa governments enacted the Freedom of Religion Acts to check allegedly fraudulent conversions of ‘vulnerable sections of Hindu society’ to Christianity. These enactments were challenged in *Reverend Stanislaus v. State of Madhya Pradesh* which was decided in 1977, immediately after the Emergency. The Supreme Court upheld the validity of Freedom of Religion Acts in both the states.

The judgment came under criticism for not recognising the ‘right to propagate one’s religion’ as an absolute right (Seervai 1996)[[95]](#endnote-95) despite ‘freedom of religion’ being included as part of the fundamental rights in the Indian constitution. The wider definitions that had been attributed to Hinduism in the Satsang case or the Hindutva judgments did not, here, apply to Christianity. The enactments were prejudiced against the work of Christian missionaries, because the right to freedom of religion included the right to propagate one’s religion, therefore conversion as a result of such propagation could be a logical consequence of ‘freedom of religion’. The Court, however, was positioned against the central government and supported the state governments’ autonomy, particularly, when both these states had non-Congress governments that enacted the Freedom of Religion Act. The rise of the BJP too was fortuitously tied to the rise of the judicial element of the state, and the Party could piggy-back on the post-emergency judicial overdrive which was then committed to the preservation of opposition parties and federal difference. Baxi (1985) terms the Supreme Court’s zealous interventions particularly in the context of public interest litigations (PIL) as a post-emergency ‘catharsis’. He argues that judicial populism led Courts to acquire legislative characteristics in order to counter ‘governmental lawlessness’.

Sathe’s (2002) work on judicial activism provides an account of how the Supreme Court has historically also helped maintain the separation of political parties in the majority, and the governments they constitute, to the extent that it has found itself accused of judicial overreach. For instance, in the *Aruna Roy versus Union of India*[[96]](#endnote-96) case in 2002 the court stalled the BJP government’s attempt to introduce changes to the secondary school syllabus in order to include a more Hindu inflected interpretation of history. The Court held that such recommendations would offend Article 28(3)[[97]](#endnote-97) of the constitution, which provided that educational institutions recognised or aided by the State could not subject their students to any religious instruction or worship without the consent of their guardians.

However, the idea that the judiciary in recent years assumed the role of the watchdog over an uncertain or insincere executive is no longer unchallenged. Mehta (2015) takes the view that often the principles on which the judiciary asserts its authority and independence such as ‘basic structure’, or ‘separation of powers’, and ‘public interest’, are far too abstract and therefore have been inconsistently applied: ‘Many of the high principles that the Supreme Court invokes are more like dice throws in a judicial roulette’ (260).

In the *Stanislaus* case,[[98]](#endnote-98) for instance, the Court had favoured a very narrow definition of ‘propagation of religion’ as ‘dissemination’ not amounting to conversion, thereby curbing the activities of the Christian missionaries. The same court encouraged a ‘broader’ interpretation of Muslim personal law for granting maintenance to divorced wives in the *Bai Tahira[[99]](#endnote-99)* and *Fazlunbi[[100]](#endnote-100)* cases, and in the triple *talaq*[[101]](#endnote-101) case again took a ‘narrower’ view of Islam to conclude that triple *talaq* was a customary-arbitrary practice that is not an essential part of Islam. Therefore, the Court has historically pursued progressive interpretations of religion (Sharafi 2009, Menski 2006), but not attempted to separate Islam from Islamiyat, or the Christian ‘sentiment’ of charity from the proselytising agendas of missionaries (*Stanislaus*), as it did in the Hindutva cases.

The Court bowing to what Bhuwania (2017) recognises as ‘neoliberal sensibilities’ or the urban elite’s urge to inhabit a clean, smart city has been well explored in his fine grained analysis of the recent PILs, filed in relation to issues such as the removal hawkers and venders, cleaning the streets, and saving heritage buildings. It demonstrated also that the Court picks its ‘vulnerable minorities’ selectively. For instance, in the *Naz v. Koushal[[102]](#endnote-102)* case the Court recriminalized homosexuality arguing that repealing the law is a legislative prerogative and the criminalisation of homosexuality under Article 377 affects a ‘miniscule minority’.[[103]](#endnote-103) The same Court however intervened to set aside the practice of triple *talaq* – eventhough this is indeed a relatively rare procedure for divorce. The inability to confirm judicial leanings also leads us to the personal political leanings of members of the judiciary,[[104]](#endnote-104) and that frequently judicial rulings may be an embodiment of the will of the judge.

The pursuit, however, here is not to determine whether the Hindutva judgments were the work of judicial populism or activism; or of the judiciary playing the role of a watch dog; or a sporadic ally of social movements (Kapur and Cossman 1996); or the work of individual judges and their politics. Rather, it is simply to identify the Hindutva judgments as a moment which allowed for the judiciary to be used for delivering promises straight out of election manifestos. The Hindutva judgments dented Sathe’s thesis that the Courts have historically positioned themselves as the institutions that maintained the distance between the government and the political party in power.

The BJP, since it came to power in 2014, has systematically taken a judicial route in order to propagate its political and historical narrative, and for the fulfilment of election promises that could not be granted through legislative endeavours. Its first major promise was that of a uniform civil code and yet no debate was initiated on a uniform civil code in Parliament. The government instead became a co-petitioner in the *Shayara Bano* case, where a woman petitioned against the practice of triple *talaq* or oral divorce that was unilaterally given by a man to his wife. The government’s participation in the hearing became yet another way to delegate to the judiciary the troubling contradictions of religious personal laws. Subsequently, after failing to enact a law confirming the Supreme Court decision on triple *talaq*, the government promulgated an ordinance to criminalise the practice, again evading the rigour of legislative debate. Later the same year, a member of the BJP challenged the practices of *nikah halala[[105]](#endnote-105)* and polygamy under Muslim personal law, again, before the Supreme Court rather than presenting a bill to criminalise the practice.[[106]](#endnote-106)

Thus, the BJP’s vocal opposition to polygamy among Muslims is not presented before Parliament, where it may need to confront the fact that polygamy among Hindus remains higher in absolute numbers (*scroll*.*in* June 24, 2018); instead, party members now tie themselves (often as a joint petitioner) to Muslim women’s existing petitions before court. The court’s intervention on a religious practice is then usurped by the party members involved in the case. Cherry-picking the ambiguities and disparities in family law, with a targeted focus on minority law, camouflages the *Hindutva* agenda as a secular response to religious dogma.

Similarly, in the Hadiya case conversion of a Hindu girl to Islam became a threat not to Hinduism but to national security, as the government suspected that conversion was part of a recruitment mission by the Islamic state (*India* *Today* January 6, 2018). The petition stated that this was part of a “well orchestrated and well oiled scheme”,

It is submitted that the Applicant has also been following media reports of similar cases from India and various other countries where young and vulnerable girls are identified and trapped by coercion or fraud marriages, indoctrinated and used for the purpose of propagating terrorist and anti-national activities of Jihad.[[107]](#endnote-107)

The Supreme Court subsequently ordered a probe by the National Investigation Agency to look into fraudulent conversions. Unlike the Freedom of Religion Act which was challenged in the *Reverend Stanislaus* case, in this case there was no existing state government law that were challenged before a court, yet the court was moved for an ‘enquiry’ rather than determining the validity of the marriage which was in question. The *Hindutva* terminology of ‘love-jihad’ for describing all marriages between Hindu women and Muslim men was in one sense made palatable through the Court’s intervention, by permitting such a marriage to be imagined potentially as a threat to national security by the Islamic state.

What the *Hindutva* judgments set in motion was a problematic process: that which didn’t get democratic sanction could be ushered through the courts. Both laws promised by the legislature can effectively take this route, but perhaps more significantly political narratives and ideologies are also sought to be popularised and legitimised through courts. For instance, in September 2017 the Supreme Court admitted a petition by a self-proclaimed Savarkarite to review the historical facts regarding the assassination of MK Gandhi, in order to absolve Nathuram Godse of the Hindu Mahasabha of the crime (*The Indian* *Express* May 28, 2017).

In 2014, the BJP politician Subramaniam Swamy wrote a letter to Prime Minister Narendra Modi seeking a day-to-day urgent hearing on the matter of the Ram temple (*Times of India*, 23 August 2014). The hearing was a dramatic one, where the counsels for the Babri Masjid Action Committee demanded that the case be heard by a larger bench of 5-7 judges and that the Court must explain why it is yielding to the demand of an ‘urgent hearing’ timed conveniently before the Indian states of Gujarat and Himachal Pradesh went into election.

The Court granted time for translation of the various impleadment applications and interventions that have been filed.[[108]](#endnote-108) On the next date, the Court clarified its intention to hear the suit as a ‘land dispute’ alone and allotted time until March 20, 2018 for documents to be transferred to the Supreme Court from the High Court. A lot transpired between the two dates of hearing. A *Ram Rajya Rath Yatra* commenced from Maharashtra supported by the VHP and its affiliates which passed through six states, in a repeat of the events of 1989 (ndtv.com February 13, 2018). The only difference was that in its time as the opposition party, the BJP had remained sceptical of judicial intervention in the Babri matter (*Frontline* January 5, 2018) but as it formed the Government, the party began to insist upon the Court’s intervention in sanctioning the new construction.

The BJP has not initiated any debate on the Acquisition of Certain Area at Ayodhya Act, 1993 in Parliament despite forming government both at the centre as well as in Uttar Pradesh. So insistent is the BJP on taking a judicial route that judges themselves are beginning to hint towards out-of-Court settlements to escape the Ayodhya albatross (*Indian* *Express* March 22, 2017). The next appointed Chief Justice also deferred the verdict until after his retirement, and also declined to refer the matter to a larger constitutional bench (*Indian* *Express* September 28, 2018). The present Chief Justice again rejected an early hearing on the matter declaring that “the court has its own priorities” (*Economic Times*, October 29, 2018).[[109]](#endnote-109) The BJP’s insistence on judicial pronouncement on the matter conveys not just the legislative inability to resolve the dispute, but also that the outcome, if in favour of BJP’s position, can be appropriated by the party, since party members are at the forefront of the judicial battle; and if it is against, the Supreme Court takes the blame for the party’s unfulfilled election promise.

**Conclusion**

The period post 1990s witnessed public spectacles such as *Rath Yatras*, couriering of blessed bricks and offering of prayers to miraculously appearing deities. The call for the construction of a grand temple dedicated to Lord Ram was an example of theatrics that expanded the public life of organised religion, in which the Supreme Court became an invested audience. These mobilisations introduced religiously inspired definitions of political principles of freedom, rights, democracy, and secularism and the Court assisted in popularising these definitions.

The initial secular space afforded to *Hindutva* ideologues by the *Hindutva* judgements was later abandoned by its recipients, who discarded secularism as an exhausted ideal and the intellectual vocabulary of the urban, privileged, and unpatriotic elite. *Hindutva’s* pursuits could now be termed as ‘nationalist’ not only in their own vocabulary but in that of the Court. Such a reading of *Hindutva* meant that there needed to be a separate, narrower category of ‘miscreants’ who brought down the mosque. But is it now the ‘miscreants’’ demand for a Ram temple that the Court shies from? What the *Hindutva* judgments did not foresee was that once the movement becomes the government, the ambiguous category of the ‘miscreant’ would have not only the political party’s patronage, but the state’s patronage, parliamentary majority, and administrative-police control. This became apparent in a recent incident of lynching and death of a Muslim man, where later the BJP’s Union Minister, Jayant Sinha, was photographed garlanding the murder accused (*India Today* July 6, 2018).

While the court continues to be hailed for its gender battles,[[110]](#endnote-110) it has not redeemed itself from having rendered secularism incoherent by making *Hindutva* all pervasive. Even in the recent much celebrated judgment decriminalising homosexuality[[111]](#endnote-111) the judgment emphasized the acceptance of sexual diversity within Hinduism, complete with references to the figure of ‘Shikhandi’ from the Mahabharata; squarely pinning the criminalisation of homosexuality on colonial-Christian morality (Fernandez 2018). Thus, at their best the *Hindutva* judgments paved the way for a benign celebration of Hinduism’s secularity; at their worst they rendered minorities significantly more vulnerable. *Hindutva’s* ‘electoral’ victory granted salience to the persecution of minorities through draconian legislation (triple *talaq* ordinance),[[112]](#endnote-112) and a hostile executive (anti-Romeo squads)[[113]](#endnote-113), but, significantly, the ‘judicial’ precedent is fast becoming the preferred route to law making. This therefore cannot be written off simply as an unholy alliance between political parties and courts, or a compromise on the separation of powers, because the concern here is not with judicial overreach or compromise, but the slippery slope that the Hindutva judgments enabled of campaigning through courts.

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1. **Notes**

   This article draws from the author’s doctoral thesis ‘The politics of personal law in post-independence India c.1946-2007’. University of Cambridge, 2016. [↑](#endnote-ref-1)
2. The birth place of Ram. [↑](#endnote-ref-2)
3. For the rise of the Hindu Nationalist Movement and mobilisation around the issue of the Ram temple see also, Corbridge, and Harriss 2013, Kohli, 1990. [↑](#endnote-ref-3)
4. *SR Bommai v. Union of India* (1994)3SCC1. [↑](#endnote-ref-4)
5. Representation of People Act, Section 123, 3A read as follows: ‘The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.’ BJP could circumvent this clause since *Hindutva* was deemed separate from Hinduism. [↑](#endnote-ref-5)
6. This is not to argue that Hindutva had not been *electorally* tested before this moment, but the BJP had not as of then, formed government. [↑](#endnote-ref-6)
7. *Ismail Faruqui v. Union of India* AIR 1995 SC 605 [↑](#endnote-ref-7)
8. Voluntary work for the construction of the Ram temple. [↑](#endnote-ref-8)
9. Hymns and prayers. [↑](#endnote-ref-9)
10. Chanting of prayers, generally accompanied by musical instruments *dholak* or *dhol* (percussion rhythm instruments) and *Manjeera,* a pair of small hand cymbals. [↑](#endnote-ref-10)
11. Prayer ceremony centred around fire. [↑](#endnote-ref-11)
12. Vajpayee’s Speech delivered on 5 December 1992, Lucknow, Uttar Pradesh. Abp News coverage. <https://www.youtube.com/watch?v=-EhMmJEwbTg> (Translation mine). AB Vajpayee was a veteran leader of the BJP. He was later the Prime Minister of India briefly in 1996 and 1998, and later for a full term 1999-2004. [↑](#endnote-ref-12)
13. The ban was enforced under the Unlawful Activities [Prevention] Act, 1967 and was lifted in June 1993. The ban was previously imposed in the aftermath of the assassination of Gandhi in 1948, and again during the years of the emergency (1975-77). [↑](#endnote-ref-13)
14. *Lok Sabha debates* 5th session 10th Lok Sabha, Tenth series vol. XVII No. 12, 8December 1992. [↑](#endnote-ref-14)
15. *Lok Sabha debates*, 9 December 1992. Speaker of the house, Shivraj Patil: ‘I will allow you but after I have spoken.. Interruptions.. Don’t do like this.. Don’t act like this.. I appeal to all of us.. Nobody has precedence over the speaker.. Well, if you do not want to sit down I would like to say that the leaders of the parties and the business advisory committee have decided that the house should be adjourned… to give members the opportunity to go back to their constituencies up to 16th December. Is this the wish of the house?’. col. 540. [↑](#endnote-ref-15)
16. Ibid. Jaswant Singh continued to remind the house about the dismissal of the BJP governments as a step borne out of ‘political malice’. [↑](#endnote-ref-16)
17. *Lok Sabha debates* 16 December 1992, Anbarasu Era a member from Madras, responded to the BJP ‘You betrayed parliament and you have betrayed the Supreme Court!’ col 2-28. [↑](#endnote-ref-17)
18. Ibid. Ram Vilas Paswan of Lok Janshakti Party accused the Congress Prime Minister of bringing on this catastrophe, by delaying the imposition of President’s rule in Uttar Pradesh; ‘you first ask the PM to resign and then start the business of the house.’ [↑](#endnote-ref-18)
19. Ibid. AB Vajpayee: ‘Heavens will not fall if Shri Advani attends the house!’ col. 2-28. [↑](#endnote-ref-19)
20. *Lok Sabha debates,* E Ahamad, col. 12. [↑](#endnote-ref-20)
21. *Lok Sabha debates*. col.1-7. [↑](#endnote-ref-21)
22. Madan Lal Khurana, Senior leader of the BJP. [↑](#endnote-ref-22)
23. *Lok Sabha debates* col. 1-7. [↑](#endnote-ref-23)
24. *Lok Sabha debates* 5th session 10th series Vol. 17 PT1 nos/ 11-13, 16 December 1992 col. 1928-1930. [↑](#endnote-ref-24)
25. The Srikrishna and Parekh committees were set up to look into the riots that followed demolition of the Babri Masjid and the issue was later reopened by the Liberhan Commission Report, 2009. See ‘Commissions Committees of Ministry of Home Affairs’ <http://mha.nic.in/cc>. ML Fotedar and MJ Akbar were two prominent members who resigned from the Congress, protesting the inaction by the Government of India in preventing the demolition. For the functioning and impact of inquiry committees (Srikrishna Committee) see Thomas Blom Hansen, 2001. [↑](#endnote-ref-25)
26. *Naveed Yar Khan and Anr. Vs State of Uttar Pradesh* 1992 Supp SCC 221. para 6. [↑](#endnote-ref-26)
27. See also Hansen, 2008 on the spontaneity of violence in the context of riots that followed the demolition of the Babri Mosque in Bombay in 1993. [↑](#endnote-ref-27)
28. *Naveed Yar Khan and Anr. Vs State of Uttar Pradesh* 1992 Supp SCC 221. Para 6. [↑](#endnote-ref-28)
29. See also, ‘Supreme Court could have prevented demolition of Babri Masjid, says Ahmadi’ *The Hindu* October 24, 2010, by former Chief Justice of India, A.M. Ahmadi. [↑](#endnote-ref-29)
30. A significant finding of the Srikrishna Commission Report on the 1992 riots was that the police inaction was common to many instances of violence and the Liberhan Commission Report (2009) reiterated this. [↑](#endnote-ref-30)
31. Article 356. Provisions in case of failure of constitutional machinery in State (Province), also referred to as ‘President’s rule’. [↑](#endnote-ref-31)
32. *SR Bommai v. Union of India* (1994)3SCC1. [↑](#endnote-ref-32)
33. See Chapter VI of the Sarkaria Commission Report, Ministry of Home affairs, [www.mha1.nic.in/par2013/](http://www.mha1.nic.in/par2013/) accessed in December 2015. [↑](#endnote-ref-33)
34. Cited in SR Bommai judgment, Emphasis supplied in the case description. [↑](#endnote-ref-34)
35. Article 25 provided, subject to public order, morality and health, that all persons shall be entitled to freedom of conscience and the right to profess, practice and propagate religion. Article 26 grants to every religious denomination or any section thereof, the right to establish and maintain institutions for religious purposes and to manage its own affairs in matters of religion. These two articles clearly confer a right to freedom of religion. Article 27 provides that no person shall be compelled to pay any taxes, the proceeds whereof are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Article 28 relates to attendance at religious instructions or religious worship in certain educational institutions. Articles 29 and 30 refer to cultural and educational rights. [↑](#endnote-ref-35)
36. *Lok Sabha debates* Volume 65 Nos 1-6, 5th Series, 18th session 42nd Amendment Act, 1976. col. 56. [↑](#endnote-ref-36)
37. *Lok Sabha debates*, 25-39th October 1976, 5th Series 18th Session Volume 65. [↑](#endnote-ref-37)
38. Swaran Singh, was a senior member of the Congress who headed the committee on study of the Constitution, instituted by Indira Gandhi, for introducing the 42nd Amendment Act. [↑](#endnote-ref-38)
39. *Lok Sabha debates* Volume 65. Nos 7-11, col. 22. [↑](#endnote-ref-39)
40. Ibid. col. 22. [↑](#endnote-ref-40)
41. For secularism as a ‘protestant ethic’ see Asad, 2003. [↑](#endnote-ref-41)
42. Politician from the Forward Bloc, later joined the Congress in 1979. [↑](#endnote-ref-42)
43. Jambhuwantrao Dhote: *Secular shabd ka anuvad Hindi mein ‘dharm nirpeksha’ kiya gaya hai. Yye secular shabd ke saath insaaf nahi karta. [..] Iska arth hai iss desh ke sare dharmon bhavnao aur bunyadi baton ka aadar karne wala, sab dharmon ka rajya. Dharm nirpeksha ya nidharmi ka matlab hai jiska koi dharma nahi.* (Translation mine) col. 70. [↑](#endnote-ref-43)
44. *SR Bommai v. Union of India* (conclusion p.10). [↑](#endnote-ref-44)
45. *SR Bommai v. Union of India* para 141. [↑](#endnote-ref-45)
46. On the ramjanmabhoomi movement, Hindu nationalism and democracy see also, Hansen 1999;Jaffrelot 1999; Bhattacharya 1991; Bose 1997; Ludden1996; Saxena 2013. [↑](#endnote-ref-46)
47. See also, Arun Shourie’s interview in Jacobsohn2004. [↑](#endnote-ref-47)
48. ‘Though the power of dissolving of the Legislative Assembly can be said to be implicit in Clause (1) of Article 356, it must be held, having regard to the overall constitutional scheme that the President shall exercise it only after the proclamation is approved by both Houses of Parliament under Clause (3) and not before.’ para 365. [↑](#endnote-ref-48)
49. Ibid. para 85-86. Emphasis added. [↑](#endnote-ref-49)
50. *Ismail Faruqui v. Union of India* AIR 1995 SC 605 para 99. (l)(a) Sub-section (3) of Section 4 of the Act abates all pending suits and legal proceedings without providing for an alternative dispute resolution mechanism for resolution of the dispute between the parties thereto. This is an extinction of the judicial remedy for resolution of the dispute amounting to negation of rule of law. Sub-section (3) of Section 4 of the Act is, therefore, unconstitutional and invalid. [↑](#endnote-ref-50)
51. Ibid. para 154. ‘The Court being ill equipped to examine and evaluate such material, it would have to appoint experts in the field to do so, and their evaluation would go unchallenged.’ [↑](#endnote-ref-51)
52. *Ismail Faruqui v. Union of India*, AIR 1995 SC 605. [↑](#endnote-ref-52)
53. Ibid. para 55-56 [↑](#endnote-ref-53)
54. p19. [↑](#endnote-ref-54)
55. Ibid. para. 159. p442 [↑](#endnote-ref-55)
56. *Masjid Shahid Ganj Mosque v. Shiromani Gurdwara Parbandhak* (1940) 42 BOMLR 1100. [↑](#endnote-ref-56)
57. Ibid. para 75. [↑](#endnote-ref-57)
58. Ibid. para 98 (3). [↑](#endnote-ref-58)
59. Corrupt practice in section 123 is defined as: ‘The appeal by a candidate or his agent […] to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols [..] for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate. (3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.’ [↑](#endnote-ref-59)
60. A derogatory term used to refer to men who have undergone circumcision. Here, a reference to Muslim men. [↑](#endnote-ref-60)
61. First speech on 29.11.1987 Translation in judgement. para 57. [↑](#endnote-ref-61)
62. Second speech of 9.12.1987 Translation in judgement. para 57. [↑](#endnote-ref-62)
63. Third speech of 10.12.1987 Translation in judgement. para 57. The colour green being the colour associated with Muslims or perhaps Pakistan. [↑](#endnote-ref-63)
64. *Dr. Ramesh Yashwant Prabhu v. Shri Prabhakar Kashinath Kunte* 1996 SCC (1) 130. Kunte was the Congress Party candidate who lost the election to Prabhu from the constituency Vile Parle, Bombay. [↑](#endnote-ref-64)
65. Ibid. para 62. [↑](#endnote-ref-65)
66. Ibid. para 37, 39. 42. [↑](#endnote-ref-66)
67. Ibid. para 42-43. Emphasis mine. [↑](#endnote-ref-67)
68. *Manohar Joshi v. Nitin Bhaurao Patel and another* 1996 SCC (1) 169 in ‘Concluding remarks’. [↑](#endnote-ref-68)
69. Ibid. para. 62. [↑](#endnote-ref-69)
70. *Prof. Ramachandra G. Kapse v. Haribansh Ramakbal Singh* 1996 SCC (1) 206. [↑](#endnote-ref-70)
71. The founding chairperson of *Durga Vahini* (Durga’s army), the women's wing of the Vishwa Hindu Parishad. [↑](#endnote-ref-71)
72. A veteran leader of the BJP in the 1980s and 1990s; also a member of the RSS. [↑](#endnote-ref-72)
73. See also, *Kultar Singh v. Mukhtiar Singh*, 1965 AIR 141. In this case there was a similar disagreement on the use of the term ‘panth’ and whether it referred to religion itself or the political party (Akali Dal in Punjab), the court had held that ‘Panth’ in this case, did not refer to religion. [↑](#endnote-ref-73)
74. *Shanti Sarup v. Radhaswami Satsang Sabha* on 22 March, 1968: AIR 1969 All 248. [↑](#endnote-ref-74)
75. *Sri Ram Krishna Mission and Anr. v. Paramanand and Ors*. AIR 1977 All 421. [↑](#endnote-ref-75)
76. For a critical analysis of the historical evolution of the term, see Hansen. 1999, chapter two. [↑](#endnote-ref-76)
77. Article 19 of the fundamental rights. [↑](#endnote-ref-77)
78. Section 123 (3A) [↑](#endnote-ref-78)
79. *Yashwant Prabhu v. Kashinath Kunte,* p. 21. “We cannot help recording our distress at this kind of speeches given by a top leader of a political party. The lack of restraint in the language used and the derogatory terms used therein to refer to a group of people in an election speech in indeed to be condemned.” [↑](#endnote-ref-79)
80. *Dr. Ramesh Yashwant Prabhu v. Shri Prabhakar Kashinath Kunte* 1996 SCC (1) 130. para 57 [↑](#endnote-ref-80)
81. See Appadurai, 2006,,where he defines a minority as that small difference between majority and totality. For reporting on mob lynchings and conversions see “What is lynching and why killer mob goes unpunished”, *India Today*, July 17, 2018. “Yogi effect: RSS men convert 43 Muslims in Uttar Pradesh to Hinduism”, *Scroll.in* July 23, 2018. [↑](#endnote-ref-81)
82. Chapter Two of the Bharatiya Janata Party Manifesto 1998, [www.bjp.org/en/documents/manifesto/1998](http://www.bjp.org/en/documents/manifesto/1998) [↑](#endnote-ref-82)
83. Romila Thapar’s seminal work on Ayodhya indicated that the presence of a Hindu shrine was not archaeologically verifiable, thus suggesting that the contemporary search for sacred topography could be a mobilisation tactic in the 1980s where first religious sentiment had to be cultivated and then capitalised on, for political power. See also ‘Babri Masjid and Its Aftermath Changed India Forever​’, *The Wire* 7 December 2017. [↑](#endnote-ref-83)
84. <http://www.bjp.org/en/documents/manifesto/nda-agenda-for-a-proud-prosperous-india-lok-sabha-1999> ‘We will truly and genuinely uphold and practise the concept of secularism consistent with the Indian tradition of 'Sarva panth samadara' (equal respect for all faiths) and on the basis of equality of all. We are committed to the economic, social and educational development of the minorities and will take effective steps in this regard.’ [↑](#endnote-ref-84)
85. Habermas borrowed the term ‘theo-ethical equilibrium’ from Audi, See also, Audi, R. 2005.. [↑](#endnote-ref-85)
86. CAD Vol, VII. Wednesday, the 24th November 1948 Pandit Thakur Das Bhargava (East Punjab): p. 1997 [↑](#endnote-ref-86)
87. Constituent Assembly debates, Volume VII (here on, CAD, Vol.) 3 December 1948 KT Shah, p. 2279. [↑](#endnote-ref-87)
88. Ibid. Lokenath Misra p. 2284. [↑](#endnote-ref-88)
89. As was also seen the discussion on addition of ‘secularism’ to the Preamble of the Indian Constitution. [↑](#endnote-ref-89)
90. Saba Mahmood’s work on political secularism questions the ‘neutrality’ that has accrued to the concept, despite its western or even protestant underpinnings. Her argument that secularism can be seen as the modern state’s power to reorganise substantive features of religious life is also visible in the Indian court’s dealings with secularism. But this essay focusses on deployment of the vocabulary of secularism by courts and political parties rather than the genealogy of secularism. See, Mahmood 2015and Agrama 2012. [↑](#endnote-ref-90)
91. *Abhiram Singh v. CD Commachen* 2017(2)SCC 629. [↑](#endnote-ref-91)
92. ‘Bharat ke logon, nirnay kar lena, ki Islam jeetega ya bhagwaan jitega’ translation, mine. [↑](#endnote-ref-92)
93. *Kanhaiya Kumar* v. *State (NCT of Delhi)*, (2016) 227 DLT 612. A student leader of the Jawaharlal Nehru University was arrested for allengedly making ‘anti-national’ slogans, and tried under the sedition law. [↑](#endnote-ref-93)
94. *Shafin Jahan v. Asokan K.M. and others* SLP (Crl) No. 5777 of 2017. A Hindu woman married a Muslim man, her father moved court alleging that his daughter’s husband had links with the Islamic State, the Court ordered a Special Investigation Team Probe into the matter. [↑](#endnote-ref-94)
95. H. M. Seervai,an eminent jurist, offered a substantive definition of the word ‘propagate’ ‘To propagate religion is not to impart knowledge and to spread it more widely, but to produce intellectual and moral conviction leading to action, namely adoption of religion.’ See *Constitutional law of India: A critical commentary.* [↑](#endnote-ref-95)
96. *Aruna Roy v. Union of India* (2002) 7 SCC 368. [↑](#endnote-ref-96)
97. Article 29 (3) provides that: No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto. [↑](#endnote-ref-97)
98. *Rev Stanislaus v. Madhya Pradesh*, 1977 SCR (2) 611. [↑](#endnote-ref-98)
99. *Bai Tahira A v.Ali Hussain Fissali Chothia* 1979 AIR 362. [↑](#endnote-ref-99)
100. *Fazlumbi Biwi Fazlunbi v. K.Khader Vali* AIR 1980 SC 173. [↑](#endnote-ref-100)
101. *Shayara Bano v. Union of India* Writ Petition (C) No. 118 of 2016*.* [↑](#endnote-ref-101)
102. *Suresh Kumar Koushal vs. Naz Foundation* (2014) 1 SCC 1. [↑](#endnote-ref-102)
103. See also, Khaitan 2015.The ruling was reversed on 6th September 2018, and consensual sex between same-sex individuals was decriminalised in the judgment *Navtej Singh Johar v. Union of India.* Writ Petition (Criminal) No*.* 76 of 2016. [↑](#endnote-ref-103)
104. For a critical discussion on judiciary see Cardozo, 2010, Baxi 1980, Jacobsohn 2004 Chapters 5-7 and Mehta 2015. [↑](#endnote-ref-104)
105. A practice under customary Muslim law under which a divorced woman, in order to reconcile with her husband, must have an intervening marriage with another man which she must consummate and be freely given a divorce, to reconcile with her former husband. [↑](#endnote-ref-105)
106. See *Sameena Begum v. Union of India* Writ Petition(s)(Civil) No(s).222/2018 Para 57.“The Constitution makers wanted to establish a ‘Secular State’ and with that purpose they codified the Article 25(1) which guaranteed freedom of religion, freedom of conscience and freedom to profess, practice and propagate religion, to all persons. But at the same time they sought to distinguish between the essence of a religion and other secular activities, which might be associated with religious practice but yet did not form a part of the core of the religion, and with this end in view they inserted Clause 2(a) as thus: “Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activities, which may be associated with religious practices.”” [↑](#endnote-ref-106)
107. Crl.M.P. No. of 2017 in SLP (Crl.) NO.5777/2017; *Shafin Jahan vs. Asokan K.M. &amp; Ors.* [↑](#endnote-ref-107)
108. List of impleadment / intervention applications:

     1.IA NO. 1-2 OF 2016 filed by Subramanyam Swamy (Application for directions)

     2.IA No, 33-34 Of 2016 for Intervention filed by Swamy converted into W.P. 105 of 2016

     3.IA No. 5827 of 2017 for intervention filed by Purshottaman Mulloli

     4.IA No. 923432 of 2017 for intervention filed by M/S Manoj Swarup & Co.

     5.IA No. 127588 Of 2017 for impalement filed by Yakub Habeebuddin Tucy

     6.IA No. 130831 Of 2017 for intervention on behalf of 32 applicants filed by Ms. Aparna Bhat, Advocate

     7.IA No. 131186 of 2017 for intervention filed by Mr. Praveen Kumar Shrivastava

     8.IA No. 131419 and 131424 Of 20017 for Intervention and Permission to appear and argue in person (Name of intervener not mentioned in office report)

     9.IA NO. 129876 Of 2017 to Implead Babri Masjid Foundation as a party.

     10.IA No. 10 Of 2017 for Intervention(Name of intervener not mentioned) [↑](#endnote-ref-108)
109. During the writing of this article there have been a number of current and ongoing modifications as regards the Ayodhya case. As it stands, the case is due to be heard again in the first week of January 2019 by the appointed bench which will determine the schedule for the subsequent hearing. [↑](#endnote-ref-109)
110. In two recent judgments the Supreme Court decriminalised homosexuality *Navtej Singh Johar v. Union of India* 2018(1) SCC 791. and ruled that menstruation cannot be grounds on which women can be denied entry into the Sabrimala temple in Kerala. ‘*Young India Lawyer’s Association and Ors v. State of Kerala’.* 2018 SCC OnLine SC 1690. [↑](#endnote-ref-110)
111. *Navtej Singh Johar v. Union of India* 2018(1) SCC 791. [↑](#endnote-ref-111)
112. The Bill criminalised ‘pronouncement’ of triple *talaq*, by punishment of up to three years and arrest without warrant on any complaint. For a criticism of the Bill see, ‘The triple talaq Bill: A mediocre legislation and a missed opportunity’ *The Indian Express*, January 9, 2018. [↑](#endnote-ref-112)
113. These were created by The Uttar Pradesh government ostensibly for the protection of women, but most arrested by the police were Muslim men in consensual relationships with Hindu women. See also, ‘UP’s anti-Romeo squads strike terror: A quiet, gloomy Sunday at Ghaziabad’s biggest park’ *Hindustan* *Times*, May 30, 2017. [↑](#endnote-ref-113)