

The narrow and the transformative

Upon reopening in July after its annual summer break, the Supreme Court has immediately found itself back in the spotlight. If the first half of the year (occupied entirely by the Aadhaar hearings) raised critical questions about the relationship between the individual and the state, then the second half — involving the (concluded) challenge to Section 377 of the Indian Penal Code, the (ongoing) Sabarimala case, and the (scheduled) constitutional challenge to adultery — has placed the court at the heart of the culture wars. While the Aadhaar challenge was argued on the relatively straightforward basis of when and to what extent the state can exercise its coercive power over individuals, the 377 and Sabarimala hearings have seen clashes between the invocation of personal rights and the claims of cultural and religious groups. This is set to continue with the forthcoming adultery hearings, where the state's objection to the decriminalisation of adultery is premised on the argument that it would destroy the institution of marriage.

When a constitutional challenge pits individuals against the state, the court's task is clear: if it finds that there has been a breach by the state, it must strike down the offending law (or rules), and vindicate the rights at issue. When, however, the court is called upon to settle a battle in the culture wars, the task is fraught with greater complexity. This is because these conflicts often represent deep, long-standing and irreconcilable divisions in society, touching issues of personal belief and conviction. Constitutional documents often consciously refrain from directly addressing them: for example, the framers of the Constitution deliberately placed the provision for a uniform civil code in the unenforceable "Directive Principles" chapter, thinking that it was too divisive to be made a fundamental right.

This strategy of containment creates a situation where, for the most part, these conflicts remain submerged. The fear of permanent defeat prompts all parties to maintain a tense equilibrium. At times, however, the equilibrium is shattered when someone finally decides to break the stalemate, and raise the stakes towards a clear resolution. One method of resolution is through the courts. But ironically, it is the battles of the culture wars that are particularly ill-suited for resolution through the zero-sum game of courtroom litigation. Unlike in political or economic disputes, a decisive loss in a matter involving personal belief risks creating deeply embittered and alienated communities, and risks an erosion of faith in the neutrality and impartiality of state institutions.

For this reason, there is a popular school of thought that asks the court to tread with particular caution when questions of culture are at stake. As far as possible — or so this school of thought holds — the court should avoid hearing and deciding such questions altogether. However, if it must decide, then it should do so on the narrowest grounds possible. Ideally, its reasoning should be limited to technical points of law, avoid constitutional questions, decide only the case before it, consciously eschew establishing precedent, and, above all, refrain from expressing any opinion on the validity of any personal belief or conviction. The role of the court, in short, is to do everything it can to lower the stakes, and take a pragmatic, problem-solving approach to the conflict rather than an ideal-oriented, expansive one.

This narrow approach has been in play in both the cases that the court has heard so far, this July. In the Section 377 hearings, the government stated that it would not oppose the "reading down" of Section 377 as long as it was confined to same-sex relations between consenting adults in private. During oral arguments, every time the petitioners pressed for something more, government counsel urged the court to limit itself to simple decriminalisation, and nothing more. Similarly, in the Sabarimala hearings, what is at issue is the validity of a piece of subordinate legislation (specifically, a rule), on the basis of which women of a certain age are denied access to Sabarimala. While arguments before the court have, of course, been pitched upon the touchstone of religious freedom and non-discrimination, it is equally open to the court (if it so desires) to

simply hold that the rule exceeds the scope of the parent law, and is therefore invalid on purely statutory grounds. This would enable the court to avoid reaching any determination on whether Sabarimala is entitled to invoke the authority of religion (in this case, lord Ayyappa's vow of celibacy) in order to deny girls/women between the ages of 10 and 50 the right to worship at the shrine. Indeed, this is precisely what the narrow approach would advocate.

There is, however, a rival philosophy of constitutional adjudication. This philosophy holds that the Constitution is a transformative document, whose goal is to erase and remedy long-standing legacies of injustice. A particular feature of these injustices is their deep-rooted, social and institutional character. In the Indian context, the most obvious example is that of caste. The pervasive and corrosive influence of caste-discrimination in our society not only prompted the inclusion of a specific article in the Constitution abolishing untouchability (Article 17), but over and above that, gave rise to a constitutional vision of equality that specifically included affirmative action.

Consequently, where the narrow approach sees a culture war triggered by the disruption of a carefully-maintained accommodation of cultural difference, the transformative approach sees a long-suppressed protest against a system of hierarchy and subordination that has found its utterance in the language of constitutional rights. For the transformative approach, it would be a betrayal of the Constitution's transformative purpose if the court were to retreat in the face of strident claims to cultural integrity, and duck deciding the "real" questions before it.

In the 377 hearings, for example, the transformative approach was articulated by counsel representing mental health professionals, who argued that decades of social exclusion and ostracism of the LGBT community could not be remedied simply by "decriminalisation". Rather, it would require a declaration by the court that no institution — public or private — would henceforth be permitted to discriminate on grounds of sexual orientation, or deny any person their civil rights. This would accomplish two crucial things: first, it would be a small step towards removing the structural and institutional barriers that continued to stand between the LGBT community and equal moral membership in the community; and second, it would serve as a public acknowledgement of a wrong that society had been complicit in, and which society was not determined to remedy. Similarly, in the Sabarimala case, counsel have urged the court to hold that religion cannot be invoked to shield a discriminatory practice from constitutional scrutiny; and that, at the end of the day, constitutional morality must prevail over precepts that are rooted in any particular religion.

In these cases, therefore, the court is faced with a stark choice between the narrow and the transformative approaches to navigating the choppy waters of culture and the Constitution. Which direction it chooses to take depends upon what it believes the Constitution is for — and will have profound consequences in the years to come.

Disclaimer: Gautam Bhatia was part of a group of lawyers involved in the 377 challenge

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