Religious Equality and Secularism in India: A Critical Review of the *Ayodhya-Babri Mosque* Judgment

Dr M Jashim Ali Chowdhury*
Jubaer Ahmed**
Dr Md. Abdullah Al Mamun***

Abstract

In the 1950s, India's founding fathers spent considerable time secularising its national identity. Later in 1976, a constitutional amendment placed 'Secularism' in the Preamble of the Indian Constitution. The Indian Supreme Court showed a strong reverence for Secularism from the 1970s to early 1990s. However, the post-1995 Supreme Court got swayed away by the rise of extremist Hindu nationalism, craftily limited the ambit of Secularism, and endorsed an alternative definition of religious tolerance based on the teachings of ancient Hindu texts. We argue that while the mid-1990s' *Hindutva* judgments of the Indian Supreme Court have permanently damaged the face of Indian Secularism, the later decisions of the Court, including the recent *Ayodhya-Babri Mosque* judgement, show an unprecedented disregard for constitutional equality for India's religious minorities, particularly the Muslims. This critical evaluation of the *Ayodhya Babri Mosque Judgment* shows that almost all of the legal and historical arguments offered by the Indian Supreme Court there are either wrong or deeply flawed. The paradigm shift in Indian Supreme Court's jurisprudential commitment to secularism and religious equality could only encourage more anti-minority onslaught in the days ahead.

Keywords

Secularism, Hindutva, Babri Mosque, Communalism, Religious Equality, Fundamentalism, and Faith based judicial activism.

1. Introduction

British India was divided on divisive rhetoric of the 'Two-Nation Theory'.[1] However, the framers of the Indian Constitution showed greater sensitivity to religious diversity and Secularism.[2] In the Constitution of 1950, the Indian leaders affirmed their commitment to a common Indian Nationhood without officialising any particular religion.[3] They later expressly endorsed Secularism as a constitutional principle through the 42nd Amendment in

* Lecturer in Law, University of Hull, UK. Email: j.chowdhury@hull.ac.uk
** Advocate of the Supreme Court of Bangladesh. Email: jubaer.ahmed1076@gmail.com
*** Professor, Department of Law, University of Chittagong. Email: mamunlaw1977@yahoo.com

[1] Two-Nation theory is a political doctrine which rationalized the division of Indian subcontinent into two independent nations *i.e.,* India and Pakistan based on religious alignment of the majority in each country. This theory is based on the assumption that the Hindus and Muslims of the subcontinent needed separate states.

[2] The Constitution of India 1950 art 25, 26, 27 & 28 (guaranteeing "right to freedom of religion" as one of the fundamental rights).

[3] Bhavya Gupta, 'Secularism as an Ideology: A Global and Indian Perspective', (2018) Social Science Research Network <https://ssrn.com/abstract=3334461> accessed 3 January 2022.

1976.[4] In 1973, the Indian Supreme Court played its part by identifying Secularism as one of the basic structures of the Constitution[5]. In 1993, the position was reiterated a landmark judgment named *S.R. Bommai v. Union of India.*[6] However, the question whether Indian Secularism meant a watertight wall of separation between the state and religion or whether it was a mere principle of religious tolerance remained a recurring one for the judiciary.

The Indian Supreme Court has long been seen as a powerful vanguard of the country's liberal constitutional values. However, much of its secularist enthusiasm started to wane with the emergence of the *Rashtriya Swayamsevak Sangh* (RSS), *Visha Hindu Parishad* (VHP), *Shiv Sena* (S.S.) and their political affiliate *Bharatiya Janata Party* (BJP) to the forefront of India's national politics. By the mid-1990s, it became apparent that Indian Supreme Court started to see Secularism as a mere principle of tolerance within the parameters of the Hindu religious texts. In 1996, the Court officially endorsed Hinduism as the sole philosophy of Indian nationalism through a series of cases collectively known as *Hindutva* Judgements.[7]

This paper critically analyses the recent *Babri Mosque* judgment of the Court, which seems to put a decisive blow to the Indian Secularism and ensure a permanent relegation of the minority Muslims to second-class citizenship in the Indian state. The next part of the paper (Part 2) outlines the existing literature in this area and indicates the methodological approach taken in this paper. Part 3, then, briefly outlines the Indian Supreme Court's jurisprudential paradigm shift over the principle of Secularism. Part 4 reviews the *Babri Mosque* judgment at length to show how the Indian Supreme Court consciously officiated the brain death of Indian Secularism and religious equality in that case. The concluding part of the paper argues that the judgment will likely marginalise Indian Secularism and religious freedom beyond redemption.

2. Existing Literature and Methodology

Indian and international legal and political science scholars have paid extensive attention to the original and evolutionary position of the Indian Supreme Court on Secularism.[8] While these literatures point out the Indian Supreme Courts inconsistency with the constitutional principle of secularism and provide contextual explanations of the phenomena, this article aims to understand the Court's recent *Babri Mosque Judgement* within those socio-political contexts. We consider it important because, the judgement clearly rested more on the

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[4] The 42nd amendment of 1976 amended the Preamble to change the description of India from 'Sovereign Democratic Republic' to a 'Sovereign, Socialist Secular Democratic Republic').

[5] *Kesavananda Bharati v. the State of Kerala* (1973) 4 SCC 225.

[6] *S.R. Bommai v. Union of India* (1994) 3 SCC 1.

[7] *Ramesh Yashwant Prabhoo (Dr.) v. Prabhakar K. Kuntel*, (1996) 1 SCC 130; *Manohar Joshi v. Nitin Bhau Rao Patil*, (1996) 1 SCC 169; *Ramchandra K. Kapse v. Haribansh R. Singh*, (1996) 1 SCC 206. For a detailed examination of the *Hindutva* cases see: Barbara Cossman and Ratna Kapur, *Secularism's Last Sigh? Hindutva and the (Mis) Rule of Law* (Oxford University Press 1999).

[8] Bhavya Gupta (n 3); Barbara Cossman and Ratna Kapur (n 7); Sanghamitra Padhy, 'Secularism and Justice: A Review of Indian Supreme Court Judgments' (2004) 39 (46-47) Economic and Political Weekly 5027; Ramesh Thakur, '*Ayodhya* and the Politics of India's Secularism', (1993) 33(7) Asian Survey 645; Donald Eugene Smith, *India as a Secular State* (Princeton University Press, 1963); Arun Patnaik and Prithvi Ram Mudiam, 'Indian Secularism, Dialogue and the *Ayodhya* Dispute', (2014) 42(4) Journal Religion, State & Society 374; Veit Bader, 'Constitutionalizing Secularism, Alternative Secularisms or Liberal-Democratic Constitutionalism - A Critical Reading of Some Turkish, ECTHR and Indian Supreme Court Cases on Secularism' (2010) 6 Utrecht Law Review 8; Ronojoy Sen, 'Defining Religion: The Indian Supreme Court and Hinduism', (2006) *Heidelberg Papers of South Asian and Comparative Politics* (Working Paper No 29); Thomas Blom Hansen, 'Globalisation and Nationalist Imaginations: Hindutva's Promise of Equality through Difference', (1996) 31(10) Economic and Political Weekly 608.

historicity and faith, rather than on the concrete rules or abstract principles of law. As Deepak Mehta put it earlier, "The Ayodhya dispute is located neither solely within the institutions of the nation state, nor within networks of religious associations, but at the crossroads of secular and religious culture in India."[9]

Regarding the judgement itself, at the time of writing this paper, there has been several newspapers articles, opinion pieces and blog comments which take for and against positions about the outcome. The paper has relied on and cited those in appropriate places later. However, by the time the peer review and revision of this article was done, the authors have noticed some elaborate reviews of the judgement appearing in scholarly journals. In one of those, Satyam Agrawal and Akansha Mittal briefly touches upon the facts and key findings of the judgement and then seem to conclude by saying that sometimes the interest of peace and moving forward outbids the interest of undoing and injustice.[10] Another significant review of the judgment is that of Ratna Kapur who very closely read the judgement and argued that through this judgement, the Indian Supreme Court "sanctioned the development of a narrow, nationalist and modernist understanding of the 'Hindu' faith to prevail"[11]. However this review is exclusively focused on the doctrinal or jurisprudential lens the court took in the case – preference of religion and faith over the historic claims of possession and title over a place of worship. Similarly, Varun Srivastava has called the judgement a victory of faith over facts.[12] In another noticeable review, Christopher Fleming dealt with a specific aspect of the judgement – granting the Hindu deity of Ram a legal personality.[13]

Compared to the reviews or commentaries noted, this article proposes to test the veracity of the Supreme Court's conclusion over five fundamental facts or disputes of the case by extensively referring to the relevant pages and paragraphs. In this sense, this paper perhaps constitutes most comprehensive treatment of the full text judgement and the most direct account of how the Indian Supreme Court erred in almost every one of its conclusions. The paper adopts descriptive as well as analytical approach to the study of the judgement relying on both primary source - the judgement itself, and other secondary sources such as journal articles, books and commentaries etc.

3. The Indian Supreme Court's slippery notion of Secularism

The Indian Constitution promotes a secular and pluralist society based on principled neutrality towards all religions.[14] The Preamble of the Indian Constitution recognises the freedom of faith, belief, and worship.[15] The fundamental Constitutional rights provide detailed protection to the minority.[16] Religious minorities are given further protection through articles 25-28 of the Indian Constitution.[17] On top of that, as mentioned earlier, Secularism

[9] Deepak Mehta, 'The Ayodhya Dispute: The absent mosque, state of emergency and the jural deity', (2015) 20(4) Journal of Material Culture 397.
[10] Satyam Agrawal and Akansha Mittal, 'Fairness and Peace: Ayodhya Verdict', (2020) 16 Supremo Amicus 259.
[11] Ratna Kapur, 'The Ayodhya Case, freedom of religion, and the making of modernist 'Hinduism'', (2023) Contemporary South Asia 1 <https://doi.org/10.1080/09584935.2023.2227127> accessed 20 December 2023.
[12] Varun Srivastava, 'Ayodhya Case- A Victory of Faith over Facts?' (2020) 2 JudicateMe 1.
[13] Christopher T. Fleming, 'Dharmaśāstra and the legal personality of deities in the Ayodhya verdicts (2010 & 2019), (2023) Contemporary South Asia <https://doi.org/10.1080/09584935.2023.2281649> accessed 20 December 2023.
[14] Sanghamitra Padhy (n 8).
[15] Ramesh Thakur (n 8).
[16] ibid.
[17] ibid.

was inserted in the Constitution's text through the 42nd Amendment of 1976. However, the meaning of Indian Secularism remained contested.[18] The Indian political parties and the judiciary have struggled over whether the concept meant a total separation of religion from the state or whether it meant a mere religious non-preference system.[19] This confusion has led some to argue that India's constitutional Secularism is practically meaningless and should be replaced with more practically achievable principles like equality, religious freedom etc.[20]

The Supreme Court of India endorsed Secularism as a constitutional "basic structure" in *Keshavananda Bharati v. the State of Kerala*.[21] However, the judges in *Keshavananda* defined the concept inconsistently. While Chief Justice Sikri, Justice Shelat and Justice Grover mentioned the "secular character"[22], Justice Jaganmohan Reddy mentioned the "liberty of thought, expression, belief, faith and worship"[23] as one of the Constitution's many basic structures.

After the *Keshavananda* case, the Indian Supreme Court switched back and forth between liberal and restrictive readings of Secularism. For example, in *Ahmedabad St. Xaviers College Society* v. *State of Gujarat,*[24] a case concerning the minorities' educational rights, the Court preferred the limited reading of Secularism. Justice Matthew and Chandrachud directly questioned the secular character of India:

> The Constitution has not erected a rigid wall of separation between the Church and the State. It is only in a qualified sense that India can be said to be a secular State. There are provisions in the Constitution which make one hesitate to characterise our State as secular.[25]

However, the Court endorsed the most liberal interpretation of Secularism in *S. R. Bommai*[26]. The Congress government of P V Narashima Rao moved to dismiss the four BJP led state governments after the destruction of the *Babri Mosque* in December 1992. In this case, the Indian Supreme Court upheld the dismissal of the BJP led state governments for their failure to uphold the "secular character" of the Republic. This time the Court canvassed Secularism as a "wall of separation"[27] between state and religion.[28] The Court held that it was duty-bound to bring a deviant political party into line had it tried to thrive on religious antagonism.[29]

Bommai's secularist zeal, however, started fading away soon. In another contemporary case - *Dr Ismael Faruqui v. Union of India*[30] - the Muslim parties challenged the Narasimha Rao government's decision to acquire the destroyed *Babri Mosque*'s premises. The decision essentially foreclosed the Muslims' right to reclaim their place of prayer. The Supreme Court held that a mosque had no "unique or special status, higher than that of the places of worship

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[18] Donald Eugene Smith (n 8) 381.
[19] Arun Patnaik and Prithvi Ram Mudiam (n 8).
[20] Veit Bader (n 8).
[21] *Keshavanand Bharati v. State of Kerala* (1973) 4 SCC 225.
[22] ibid para 292, 582.
[23] ibid para 1159.
[24] *Ahmedabad St. Xaviers College Society v. State of Gujarat* (1974) 1 SCC 717.
[25] ibid, para 139.
[26] *S R Bommai* (n 6)
[27] ibid para 29 [Ahmadi J], para 146 [Sawant and Kuldip Singh, JJ], para 178 [Ramaswamy J], para 304 [Jeevan Reddy and Agrawal, JJ].
[28] ibid para 148 [Ramaswamy, J].
[29] ibid para 252.
[30] *Dr Ismael Faruqui v. Union of India* (1994) 6 SCC 360

of other religions in secular India to make it immune from acquisition by the exercise of the sovereign power of the State." As will be seen in our discussion of the *Babri Mosque* judgement in the next part, this deprivation of the Muslims from accessing the mosque site (while the Hindus continued to access the demolished site unrestricted) proved legally consequential for the Muslim parties.

Dr Ismail Faruqui case also marked a contrasting deviation from *S. R. Bonmai*'s wall of separation understanding. In this case, Verma, J., Venkatachaliah, C.J. and Ray, J. quoted extensively from ancient Hindu scripture *Veda* to justify secularism as a principle of religious tolerance (*Sarwa Dharma Sambhava*).[31] Later in 1996, the Indian Supreme Court's *Hindutva* judgements will seize upon this interpretative technique and identify the Indian secularism as a grant of the dominant religion. In 2019, the *Babri Mosque* judgment will show that the approach has placed the minority at the risk of permanent subordination in the Indian state.

The seven *Hindutva* cases of 1996 were about some BJP leaders and candidates using *Hindutva* rhetoric and religious hatred as electoral propaganda tools. The Court upheld the BJP's extremist *Hindutva* rhetoric as secular speeches. In one of the seven cases – the *Prabhoo's Case* - Verma J. argued that alleging discrimination against a particular religion and pledging to remove that discrimination should rather be considered a thrust for promoting Secularism.[32] The problem with this formulation was that it was not the minority's religion that the BJP leaders were projecting as a discriminated religion. While the *S. R. Bommai* Court took upon itself a constitutional duty to bring the deviant political parties in line with Secularism, this time the Court merely appealed to the BJP leaders to be "more circumspect and careful in the kind of language they use"[33] In another of the seven cases - *Manohar Joshi* case[34]- speech like "[T]he first Hindu State will be established in *Maharashtra*" was interpreted as a legitimate political pledge.[35]

The most striking aspect of *Hindutva* judgment, however, was the presentation of *Hindutva* as an alternative coinage of common Indian nationhood:

> The words 'Hinduis' or 'Hindutva' are not necessarily be understood and construed narrowly, confined only to the strict Hindu religious practices, unrelated to the culture and ethos of the people of India."[36]

By identifying the *Hindutva* ideology with India's common nationhood, the Indian Supreme legitimised the ideological base of BJP and *Sangh Paribar*.[37] Identifying the divisive rhetoric of *Hindutva* as the force of cultural unification put India's cultural and religious diversity at risk.[38] In 2004, the RSS Chief K S Sudarshan relied on these *Hindutva* judgments to claim that Indian Muslims and Christians must be called *Hindus*.[39] Therefore, it appears that except

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[31] ibid para 31.
[32] *Ramesh Yashwant Prabhoo (Dr.) v. Prabhakar K. Kunte*, (1996) 1 SCC 130, para 16
[33] ibid para 62.
[34] *Manohar Joshi v. Nitin Rao Bhau Pate*, (1996) 1 SCC 169
[35] ibid para 62.
[36] *Ramesh Yashwant* (n 32) paras 39, 42.
[37] Ronojoy Sen (n 8) 24.
[38] Thomas Blom Hansen (n 8); Sanghamitra Padhy (n 8).
[39] Sandeep Mishra, 'RSS chief redefines 'minorities'', *The Times of India* (Kolkata Edition, 25 January 2004) <https://timesofindia.indiatimes.com/india/rss-chief-redefines-minorities/articleshow/443736.cms> accessed 04 January 2022.

in its short-lived position in *SR Bommai*, the Indian Supreme Court's understanding of Secularism shifted with India's rising tide of religious nationalism.[40]

4. The *Babri Mosque* Dispute

While disputing parties in a high-profile political controversy like *Babri Mosque* are not unexpected to see the facts through their subjective politico-religious prisms, a cursory look on the 1045-page judgement[41] of the Indian Supreme Court, in this case, shows that the Court saw the facts through the eyes of the dominant party – something akin to Upendra Baxi's idea of "demosprudence over jurisprudence"[42]. Therefore, a prudential approach for this paper would be to rely only on those facts that the Muslim parties presented and the Court accepted as true. This paper will argue that the Indian Supreme Court could not have logically made the decision it ultimately made, even on the basis of those agreed facts that are mentioned throughout the judgement.

The Babri Mosque was built in *Ayodhya* on or around 1528 A.D. by Mir Baqi, a ruler under India's Mughal emperor Babar. The city is also believed to be the birthplace (*Jammasthan*) of Lord Ram, a highly revered Hindu deity. However, no specific place of *Ayodhya* is specified in any religious or ancient text as the birthplace of Lord Ram. By 1855 A.D., a temple known as *Sita Rasoi Mandir* existed across the street on a mound facing the Mosque. The Sita Rasoi temple was popularly admired as the *Jammasthan.* The claim of Ram *Jammasthan* was shifted towards the Mosque's courtyard in 1855. Important to note that Ayodhya came under British rule after Wajid Ali Shah, the Muslim Nawab of Ayodhya, died in 1855. In 1856, a seventeen by twenty-one feet corner of the Mosque courtyard was forcefully designated as the Ram *Jammasthan* and partitioned. It was named *Ramchabutra*.[43] After that, a series of communal conflicts during 1856-1857 led the British government to construct a railing to bifurcate the place between the two communities.[44]

Despite the railing, Hindu *sadhus* and priests kept pushing the boundary of *Ramchaburta*. A Hindu God's symbol was forcefully placed inside the Mosque, and a *hawan puja* was attempted by one Nihang Sing in 1858. The British government evicted him under a petition from the Muslim community.[45] In 1861, the Muslims complained of building another Chabutra within the compound. The British government demolished it.[46] In 1866, another attempt to place idols inside the doors of the Mosque was resisted through government support.[47] Encroachments around the Mosque precinct and adjacent graveyard continued throughout 1868, 1870 and 1873.[48] By 1877, structures were erected in two more spots within the Mosque's outer courtyard.[49]

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[40] Rehan Abyeratne, 'Rethinking Judicial Independence in India and Sri Lanka', (2015) 10(1) Asian Journal of Comparative Law 99, 133-34.
[41] *Dr M Siddiq v. Mohont Suresh Das and others* (2019) 4 SCC 641 (The full text of the Judgment is available at <https://www.scribd.com/document/434115777/Ayodhya-Verdict#from_embed> accessed 02 January 2022). All the paragraph and page reference given in this paper correspond to the full text judgment available online).
[42] Upendra Baxi, 'Demosprudence versus Jurisprudence: The Indian Judicial Experience in the context of comparative constitutional studies', *Annual Tony Blackshield Lecture* (Macquarie University Law School, 21 October 2014) <http://classic.austlii.edu.au/au/journals/MqLawJl/2014/13.pdf> accessed 20 December 2023.
[43] *Dr M Siddiq v. Mohont Suresh* (n 41) para 42 (page 53-54).
[44] ibid para 781 (page 891-92).
[45] ibid para 777 (page 889).
[46] ibid.
[47] ibid.
[48] ibid para 778 (page 890).
[49] ibid para 46 (page 71).

At this stage, the local British administration granted a petition of the *Hindus* to open a gate through the northern boundary wall of the Mosque. It was argued that the increase of Hindu devotees in *Ramchabutra* made it necessary to open another gate for public safety.[50] As will be seen later, the British government's erection of the wall to bifurcate the Mosque compound into inner and outer courtyards in 1857 and also the granting of permission to open a second gate in 1877 will be used by the Indian Supreme Court to offer a twisted account of possessory title in favour of the Hindu claimants and effectively ignore around 400 years of undisputed existence of the Mosque.

In 1885, a legal claim by a Hindu litigant was dismissed by the local Court.[51] By 1930s, the British rule was approaching its end in India. Political conflict and communal riots between the Hindu and Muslim communities would become more of a regular phenomenon. In 1934, domes of the Mosque were damaged by the Hindu extremists. Those were, however, renovated at the behest of the British government and the Hindus were made to pay for the cost.[52] By the late 1940s, things went from bad to worse.

In November 1949, around two years after the separation of India and Pakistan, several *hawan kund*s (fire pits) were constructed all around the Mosque.[53] The target was to surround the Mosque so that Muslims would be forced to abandon it.[54] The Muslims had not completely lost access to or abandoned the disputed property despite all of these.[55] The *Juma* prayer continued to be held in the Mosque until 16 December 1949.

Rioters forcefully broke into the Mosque on 22 December 1949 and placed an idol just beneath its central dome.[56] A week later, on 29 December 1949, the Mosque's inner courtyard was attached by the Indian government under section 145 (a peace maintenance provision) of the Indian Criminal Procedure Code. However, the outer courtyard accommodating the *Ramchaburta* and other installations was spared *pujas* and other rituals. The official receiver charged with the inner courtyard also ensured that the idols placed under the central dome remained as those were forcefully placed. Since then, *puja* continued from the iron grill door dividing the inner and outer courtyards. Priests, however, were allowed to enter the Mosque's central dome for worshipping the idols placed there. On 1 February 1986, the District Judge directed the removal of locks and opening of doors to permit the mass Hindu devotees to pray to the idols in the inner courtyard.[57]

Therefore, the attachment order of 1949 meant that the Indian government had effectively dispossessed the Muslims from the site and handed it over to the Hindu community. An unlawful encroachment into the Mosque's inner premises and forceful placement of idols therein was thereby effectively legitimised by the Indian government abusing its \peace maintenance power. As will be seen by the end of this part, the Indian judiciary, in its turn, would facilitate the process by every "latest status quo"[58] that the encroachers were creating.

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[50] ibid paras 690 (page 807), 779 (page 890).
[51] ibid para 433 (page 485-487)
[52] ibid paras 699, 700 (page 813)
[53] ibid para 48 (page 72).
[54] ibid para 49 (page 74).
[55] ibid para 718 (page 830).
[56] ibid para 554 (page 657).
[57] ibid para798 (page 922).
[58] Faizan Mustafa and Aymen Mohammed, 'Ayodhya judgment is a setback to evidence law', *The Indian Express* (10 November 2019) <https://indianexpress.com/article/opinion/columns/supreme-court-ayodhya-verdict-ram-mandir-muslims-hindu-babri-mosque-demolition-6112170/> accessed 04 January 2022.

The remnants of the Mosque – its three iconic domes – were entirely demolished by an RSS-BJP led mob on 6 December 1992.[59] To borrow the words from the Indian Supreme Court itself:

> During the pendency of the suits, the entire structure of the Mosque was brought down in a calculated act of destroying a place of public worship. The Muslims have been wrongly deprived of a mosque which had been constructed well over 450 years ago.[60]

4.1. Three Parties and Five Issues

The case regarding the possession and title of the *Babri Mosque* premises dragged on for decades. The case involved three parties. The Uttar Pradesh Sunni Waqf Board, representing the Muslim community, was the only side of the argument that relied on law, history of possession, and its proprietary interest over the disputed land. *Nirmohi Akhara*, the second party, claimed a title through its possessory rights and administrative control over the Hindu temples and religious establishments built on the premises since 1949. They were in control of those temples since the government attachment of the premises in 1949. An extraneous party to the case was *Ram Lalla Birajman*- a trust constituted at the behest of BJP affiliated *Vishva Hindu Parishad* (VHP), who started claiming an interest in the premise in 1986. *Ram Lalla Birajman* postulated itself as the legal person of Lord Ram and asserted a faith-based interest in the case. In 2010, the Allahabad High Court ordered to divide the site into three equal shares among Muslims and two contender Hindu groups. In 2019, the Indian Supreme Court decreed the case favouring the third-party intervener – the *Ram Lalla Birajman* - and excluded the two other parties more directly related to the conflict.[61] This rather strange outcome of the case demonstrates how the Indian Supreme Court prioritised the *Hindutva* political sovereignty over the rule of law and constitutional equality of faiths.[62]

Issues for determination in the case were five. *First*, was the Mosque sitting over the "birthplace" of Lord Ram? *Second*, was the Mosque built by destroying a "temple" beneath? *Third*, could the Court decide the proprietary title over *Babri Mosque* site merely on "faith and belief" of one community of the premise as Lord Ram's birthplace? *Fourth*, even if the Court accepts the faith as capable of vesting proprietary title, could it reopen India's pre-independence propriety disputes? *Fifth*, if the Court could reopen such title disputes, which party possessed the Mosque's inner and outer courtyard at the independence of India in 1947?

This analysis will explain how the Indian Supreme Court failed to find any possible earthly reasons for adjudicating the questions in the *Hindu* claimants' favour, and still, it ended up evicting the Mosque from its site and sanctioning a *Jammasthan* temple there.

4.2. *Issue One: What is the exact birthplace of Lord Ram?*

In the Indian Supreme Court's narrative, belief regarding the city of *Ayodhya* as the birthplace of Lord Ram is based on ancient scriptures like Valmiki's *Ramayan*, which does not pinpoint any specific place of *Ayodhya* as the birthplace of Lord Ram. A witness for the Hindu claimants, Mr Satya Narain Tripathi, confirmed that other ancient scriptures like *Ramacharitnama* or any other Hindu *Purans* did not mention any specific place in

[59] *Dr M Siddiq v. Mohont Suresh* (n 41) para 797 (Page 922).
[60] ibid.
[61] Hilal Ahmed, 'There are 3 claims to Ayodhya — Law, Memory and Faith: It's not a simple Hindu-Muslim Dispute', *The Print* (14 October 2019) <https://theprint.in/opinion/3-claims-to-ayodhya-law-memory-faith-not-a-simple-hindu-muslim-dispute/305258/> accessed 04 January 2022.
[62] Moiz Tundawala and Salmoli Choudhuri, 'Ayodhya Judgment and the Legalisation of Hindutva Sovereignty', *The Wire* (18 November 2019) <https://thewire.in/law/supreme-court-ayodhya-judgement-hindutva-sovereignty> accessed 04 January 2022.

Ayodhya.[63] Then, how did the place beneath the very central dome of Babri Mosque become known as the birthplace? Both the Allahabad High Court and the Indian Supreme Court noted the opinion of four prominent Indian historians[64] who wrote a "Historians' Report to the Indian Nation" just one year before the demolition of the Mosque in 1992. The four historians unequivocally claimed that "the legend" of Lord Ram being born under the central dome of *Babri Mosque* arose only in the late eighteenth century:

> The claim that a temple was destroyed to build a mosque popped up only at the beginning of the nineteenth century. The full-blown legend of a destroyed temple beneath the Mosque dates to 1850, when attacks on the Mosque formally started. After which, there was a - progressive reconstruction of imagined history based on faith.[65]

Sudhir Agarwal J. of Allahabad High Court ignored the Historians' Report on the excuse that it was not signed by one of four professors.[66] The Indian Supreme Court, however, found it "unjustifiably harsh". It rather observed that the four historians could not benefit from drawing from the findings of a government-sanctioned archeologic study conducted later.[67]

Failing to find any convincing clue to the specific location of *Ram Jammasthan*, Agarwal J. of the Allahabad High Court argued from a frustratingly fallback position that though there was no mention of any exact birthplace in any religious or historical text, it could be "reasonably assumed" that *there must be a place within Ayodhya* where Lord Ram was born. Given the impossibility of pinpointing a myth of such antiquity, the Supreme Court opted for a "preponderance of probability"[68] test. As will be seen in the discussion of Issue Two, a "preponderance of probability" was dug out of a vague opinion expressed in the Indian government's archaeological report.

4.3. *Issue Two: Was the Babri Mosque built by destroying a Jammasthan temple?*

The Archeological Survey of India (ASI)'s excavation found some artefacts and structures beneath the Mosque. As admitted by the ASI, some were from a possibly 8th-century structure, while others could be from a 12th-century one. While some of the artefacts bore a resemblance to Islamic, Buddhist and Jain architects, few of them resembled the remnants of a palace-like structure. Most importantly, the ASI opined that "there was no specific finding that the underlying structure was a temple dedicated to Lord Ram".[69] In one of the early reviews of the 2010 Allahabad High Court judgement, which read the ASI report in details, Anupam Gupta argued that the judges there (particularly Justice Agarwal) was 'selective', 'graceless', 'unmerited' and 'unkind' to some compelling expert critiques of the report.[70]

Despite all these, the closest possible opinion of the ASI that might lend a tiny bit of support to the alleged temple-destruction hypothesis was that some of those artefacts could be "indicative of remains which are distinctive features found associated with the temples of

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[63] *Dr M Siddiq v. Mohont Suresh* (n 41) para 554 (page 656).
[64] They included Professor R S Sharma (Delhi University and Chairperson of the Indian Council of Historical Research), Professor M Athar Ali (Aligarh Muslim University and a former President of the Indian History Congress), Professor D N Jha (Delhi University) and Professor Suraj Bhan (Dean, Faculty of Social Sciences, Kurukshetra University, Haryana, India).
[65] *Dr M Siddiq v. Mohont Suresh* (n 41) para 595 (page 703-704).
[66] ibid para 596 (page 704).
[67] ibid para 598 (page 705-706).
[68] ibid para 557 (page 660).
[69] ibid para 509 (page 596).
[70] Anupam Gupta, 'Dissecting the Ayodhya Judgement' (2010) 45(50) Economic and Political Weekly 33, 40.

north India".[71] Unsurprisingly, the Indian Supreme Court featured this single line of vague "indicative" reference to distinctive North Indian temple-like features was featured prominently throughout its judgement, and on this basis, the judges found their "preponderance of probability" test satisfied:

> On a preponderance of probabilities, the archaeological findings on the nature of the underlying structure indicate it to be of Hindu religious origin, dating to the twelfth century A.D.[72]

The shakiness of this preponderance thesis was so exposed that the Court could not help inviting more confusion while justifying this. While inviting the parties to read and interpret the archaeological report "in its entirety and overall findings",[73] the Court ended up ignoring the Islamic, Buddhist, Jain or palace-like features of the artefacts in the rumble and relying on the guess-like opinion of some artefacts having distinctive features of a typical North Indian temple. Yet in another place, the Indian Supreme Court accepted that the Archaeological Report was "no conclusive historical account"[74] of the existence of the alleged temple beneath the Mosque, and also there was no clear finding of the destruction of a temple for building the Mosque.[75]

Therefore, the Hindu litigants' mythical narratives of *Jammasthan* and the archaeological finding of "preponderance of probability" were futile. The Court had to move on to the legal questions of the case – the questions of title and possession.[76] It observed:

> No argument other than a bare reliance on the ASI report was put forth. No evidence was led by the plaintiffs in Suit 5 [the Hindu claimants] to support the contention that even if the underlying structure was believed to be a temple, the rights that flow from it were recognised by subsequent sovereigns. The mere existence of a structure underneath the disputed property cannot lead to a legally enforceable claim to title today. Subsequent to the construction of the ancient structure in the twelfth century, there exists an intervening period of four hundred years prior to the construction of the Mosque.[77]

4.4. *Issue Three: Is "faith and belief" enough to constitute a proprietary title?*

The Hindu litigants pressed their faith, not possession, as a creator of their proprietary rights over the premise. The Court held that faith by itself was not enough to such conferment, and a secular court could not reduce it into a question of the title without subjectively delving into the religious question of whose faith is stronger.[78] The Court also refused to endorse any community's faith as constituting a title upon any land:

> [I]n a country like ours where contesting claims over property by religious communities are inevitable, our courts cannot reduce questions of title, which fall firmly within the secular domain and outside the rubric of religion, to a question of which community's faith is stronger.[79]

Now, the faith and belief rooted claim to the title being a failure, the Court had no way except move on to the next one – adverse possessory claim to disputed land:

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[71] *Dr M Siddiq v. Mohont Suresh* (n 41) para 509 (page 596).
[72] ibid para 788 (page 906-907).
[73] ibid para 508 (page 594-95).
[74] ibid para 557 (page 659).
[75] ibid para 509 (page 597) para 788 (page 905).
[76] ibid para 299 (page 345).
[77] ibid para 648-49 (page 767-68).
[78] ibid para 200 (page 222).
[79] ibid para 205 (page 223-224).

> "[T]he only legal question for determination by the court in this case was whether there existed a proprietary claim of the Hindus over the disputed property."[80]

However, like the "preponderance of probability test" earlier, the Indian Supreme Court collected some spill-over from this faith and belief issue as well:

> The cross-examination of the witnesses has not established any basis for the Court to be led to the conclusion that the faith and belief of the Hindus, as portrayed through these witnesses is not genuine or that it is a mere pretence.[81]

As we proceed towards the next issues and the decisional part of the judgment, we will see the so-called "preponderance of probability" and "genuineness" of the faith and belief about a mythic birthplace and temple beneath the Mosque would constitute the cornerstone of the outcome in the case. Of course, the Indian Supreme Court tried unsuccessfully to convince the public that those myths and beliefs were not the basis of its decision.

4.5. *Issue Four: Could the Court reopen a pre-independence propriety claim?*

This fourth issue was a question of jurisdiction. Could the Indian courts judge the validity of the Mughal conquest of *Ayodhya* and the construction of the Mosque hundreds of years ahead of India's coming into existence in 1947? It was answered in the plain negative:

> The Mughal conquest of the territories was a supra-national act between two sovereigns subsequent to which, absent the recognition by the new sovereign of pre-existing rights, any claim to the disputed property could not have been enforced by virtue of the change in sovereignty. This Court cannot entertain or enforce rights to the disputed property based solely on the existence of an underlying temple dating to the twelfth century.[82]

Despite this, the Court found a way out through the preservation clause (Article 372) of the Indian Constitution: "[T]he court cannot take cognisance of historical rights and wrongs unless it is shown that their legal consequences are enforceable in the present".[83] As the disputes and fallouts of 1855-56 conflicts continued from British rule to the Indian rule,[84] the Court found continuity between the British sovereign and the Republic of India under Article 372 of the Indian Constitution.

Additionally, articles 296 and 367 of the Constitution permit the continuation of "private property claims" (not public disputes) that existed during the rule of the British sovereign. The Indian Supreme Court argued that the *Babri Mosque* case between Sunni Waqf Board, *Ram Lalla Birajman* and *Nirmohi Akhara* was a "private claim over property"[85] whose legal consequences were continuing from the British era to the Indian state.

Interestingly, while the Allahabad High Court would divide the property equally among the three contesting claimants,[86] the Supreme Court would find it "legally unsustainable"[87] and practically unsound. *Nirmohi Akhara*, which was in charge of the temples and religious establishments, was excluded because apart from its religious and administrative rights over

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[80] ibid para 3 (page 7).
[81] ibid para 555 (page 658).
[82] ibid para 648-49 (page 768-69), para 74 (page 113) (quoting Sudhir Agrawal, J's opinion expressed in para 3405 of the Allahabadh High Court Judgment).
[83] ibid para 633 (page 756).
[84] ibid para 650 (page 769).
[85] ibid para 651 (page 770).
[86] ibid para 321 (page 378).
[87] ibid para 799 (page 922).

the temples, they failed to show any proprietary interest in the premise.[88] The BJP affiliated *Ram Lalla Birajman,* who never had any possessory claim over the property nor had any administrative control over the temples in the premise, was awarded the land as a deity of Lord Ram, but the fruit of the decree was taken away almost immediately. The Court ordered the Indian government to frame a scheme under Sections 6 and 7 of the Acquisition of Certain Area at *Ayodhya* Act, 1993 and set up a new trust to whom the land would be handed over.[89]

This rather peculiar outcome of the case raises a serious question on the jurisdictional basis of the judgment. The Court seized the jurisdiction over a "private claim to property" and then treated it as a public property claim – which is not covered by articles 296 and 327 of the Indian Constitution. Once the jurisdiction was established, the Indian Supreme Court proceeded to the final question of the case – *Who was in possession of the Mosque?*

4.6. *Issue Five: Who had the Mosque's inner courtyard at India's independence?*

As mentioned earlier in the facts, the Court was quick in seizing upon the bifurcation of the Mosque compound into inner and outer courtyards in 1877. In many places of the judgment, the Court robustly and consistently interpreted the incident as the final and conclusive determiner of the possessory title of the Hindu communities over the outer courtyard.[90] The 1877 permission to open a gate through the northern wall of the Mosque was seen as a corroboration to the possession of the outer courtyard. In the words of the Court:

> The sequence of events emanating from the installation of an idol in 1873, the specific permission to the Hindus to open an additional access on the northern side and the observations in the appeal that the objections to the opening were baseless are significant. The presence and worship of the Hindus at the site was recognised, and the appellate order rejected the attempt to cede control over the entry door to the Muslims as this would make the Hindu community dependent on them. The administration, in other words, recognised and accepted the independent right of the Hindu worshippers over the area as a part of their worship of the idols.[91]

Surprisingly, the same wall-building incident did not raise a similar presumption of possessory title for the Muslim community over the inner courtyard.[92] At one place, the Indian Supreme Court accepted the Muslim community's possession of the inner courtyard:

> In so far as the inner courtyard is concerned, it appears that the setting up of the railing was a measure to ensure that peace prevailed by allowing the worship of the Muslims in the Mosque and the continuation of Hindu worship outside the railing. In so far as the worship by the Muslims in the inner courtyard is concerned, the documentary material would indicate that though obstructions were caused from time to time, there was no abandonment of the structure of the Mosque or cessation of namaz within.[93]

But the Court actively undermined the above-admitted fact in all other places of its judgment. For example, the Supreme Court ignored the wall itself in one place and saw the inner and

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[88] ibid para 254 (page 304).
[89] ibid. para 802 (page 923-924).
[90] ibid para 742 (page 853), para 759 (page 869), para 773 (page 884-85), para 777 (page 888-92).
[91] ibid para 691 (page 808).
[92] John Sebastian and Faiza Rahman, 'The Babri Masjid Judgment and the Sound of Silence', *The Wire* (6 December 2019) <https://thewire.in/law/the-babri-masjid-judgment-and-the-sound-of-silence> accessed on 04 January 2022).
[93] *Dr M Siddiq v. Mohont Suresh* (n 41) para 721 (page 837).

outer courtyard as a "composite whole".[94] Interestingly, the "composite whole" argument was advanced only to help extend the Hindu community's claim over the inner courtyard, not the Muslim community's claim over the outer courtyard. For the Muslims, the wall prevented their claim over the outer courtyard, but it did not prevent the Hindus' claim over the inner courtyard! In the words of the Court:

> [T]he claim of the Sunni Central Waqf Board to the disputed site is based on the *Janmasthan* temple of the Hindus being outside the courtyard and the offering of namaz by the Muslim in the Mosque. The submission that the temple of the Hindus - was outside the courtyard is ambiguous and contrary to the evidence. If the expression – courtyard is used to denote both the inner and outer courtyards, the submission is belied by the fact that there was a consistent pattern indicating possession and worship by the Hindus at the outer courtyard after the setting up of the railing in 1856-7.[95]

How could the Hindu community's possession of the outer courtyard also mean the possession of the inner courtyard? The Supreme Court claimed that it was by dint of the "faith"(!) of the Hindu devotees and their intermittent forceful violation of the wall over the years:

> Despite the setting up of the grill-brick wall in 1857, the Hindus never accepted the division of the inner and the outer courtyard. For the Hindus, the entire complex as a whole was of religious significance. A demarcation by the British for the purposes of maintaining law and order did not obliterate their belief in the relevance of the sanctum sanctorum.[96]

Additionally, the Indian Supreme Court never explained why the Muslims (in actual possession), not the Hindus (pushing boundary from outside), had to prove their possession of the inner courtyard?[97] This type of reasoning appears "a setback to evidence law for the differential burden of proof it vested on different parties."[98] As noted earlier in the admitted facts, Muslims had repelled, with the aid of the police and civil authorities, at least three attempts by the Hindus to desecrate the three-domed structure between 1856 and 1949. However, the Supreme Court used those three incidences as evidence that Hindus continued to dispute the Muslims' possession of the inner courtyard, not as evidence that the Muslim's were successfully resisting the aggression! A reasonable conclusion from the incidents should have been that until 1949, the Muslims were in exclusive possession of the inner courtyard and resisted successive attempts to interfere with their possession.[99]

Also, various interpretative pretexts the Supreme Court used in purposefully disputing the Muslim party's claim over the inner courtyard sometimes appear to be a charade on judicial fact-finding. However, the Indian Supreme Court's interpretative charade did not end with the bifurcating wall or the northern gate alone. It went even further to claim that Hindus had access to the inner Court even before the very first recorded invasion of the Mosque in 1855:

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[94] Suhrith Parthasarathy and Gautam Bhatia, 'Peace bought by an unequal compromise' *The Hindu* (New Delhi 15 November 2019) <https://www.thehindu.com/opinion/lead/peace-bought-by-an-unequal-compromise/article.ece> accessed 04 January 2022.

[95] *Dr M Siddiq v. Mohont Suresh* (n 41) para 720 (page 836).

[96] ibid para 773 (page 884-85); para 788(VI) (page 909).

[97] Sruthisagar Yamunan, 'Ayodhya verdict is silent on why Muslims must prove exclusive possession of site – but not Hindus', *The Scroll In* (9 November 2019) <https://scroll.in/article/943177/ayodhya-verdict-is-silent-on-why-muslims-must-prove-exclusive-possession-of-site-but-not-hindus> accessed 04 January 2022.

[98] Faizan Mustafa and Aymen Mohammed (n 58).

[99] Nizamuddin Pasha, 'The Ayodhya Verdict: Beyond the Walls of Our Imagination', *The Quint* (10 November 2019) <https://www.thequint.com/voices/opinion/ayodhya-verdict-grill-brick-wall-mosque-temple> accessed 4 January 2022.

> From the documentary evidence, it emerges that:
> (i) Prior to 1856-7, there was no exclusion of the Hindus from worshipping within the precincts of the inner courtyard.[100]

The Indian Supreme Court would dig out this "documentary evidence" from a criminal case lost by the Hindu intruders in 1858. In his criminal complaint against Mr Nihang Singh's attempt to install the *Jammasthan* symbol within the Mosque in November 1858, the then Moazzin of Babri Mosque allegedly stated that "previously the symbol of *Janamsthan* had been there for hundreds of years and Hindus did *puja* inside the three-domed structure".[101] Despite Sunni Waqf Board's counsel Nizamuddin Pasha's challenge to this translation of the statement,[102] the Court showed little interest in changing this peculiar translation of the Moazzin's statement. While it was an admitted fact that the *Sita Rasui* Mandir, known as the *Ayodhya Jammasthan* temple, was situated on the other side across the mound facing the *Babri Mosque* for hundreds of years, the first-ever encroachment within the precinct of *Babri Mosque* was made only in 1855. If the *Moazzin* of the Mosque talked about "*hundreds of years"* in 1858, it could only mean the *Sita Rasoi* mandir on the other side of the road. No reasonable stretch of judicial imagination could interpret Moazzin's statement as establishing hundreds of years of *puja* "inside" the Mosque itself. If pujas were being held inside the Mosque for hundreds of years, why would the Moazzin complain about this in 1858? And why the Court would order the eviction of the intruder, Mr Nihang Singh, then? It simply does not make sense.

The Moazzin's abundantly clear criminal complaint was not the only example of fact twisting by the Court. A similar technique was applied over the arguments of Sunni Waqf Board's lawyer Mr Advocate Jilani. At one point of his submission, Mr Jilani argued that "the claim of Lord Ram's birthplace was shifted to the middle dome of the mosque only in 1949, prior to which *Ramchaburta* [forcefully built in the outer courtyard in 1855] was considered the birthplace."[103] Any reasonable appreciation of Advocate Jilani's claim would accept it as an explanation of the claim shifting tendency of the Hindu intruders over the years. However, the Court put it in the Muslims' mouth that they have accepted the composite whole of *Babri Mosque* as the birthplace of Lord Ram. The words of the Court read as follows:

> The formulation of Mr Jilani that the Ramchabutra is the birthplace will assume significance from two perspectives: the first is that the entire site comprising of the inner and outer courtyards is one composite property, the railing being put up by the colonial government only as a measure to protect peace, law and order. The second perspective is that Mr Jilani's submission postulates: (i) the acceptance of the position that the birthplace is at an area within the disputed site (the *Ramchabutra*, according to him); and (ii) there is no denying the close physical proximity of *Ramchabutra*, which was set up right outside the railing.[104]

The Supreme Court applied this dubious interpretative technique in yet another place. In one place of the judgement, the Court accepted the post-1934 records relating to the payment of Imam's salary as proof that there was no abandonment by the Muslims of the Mosque as a place for offering *namaz.*[105] Yet, at another place, it would strenuously argue that the Muslim parties did not provide any evidence showing that the Mosque was used for prayer since its

[100] *Dr M Siddiq v. Mohont Suresh* (n 41) para 781 (page 892).
[101] ibid para 773 (page 883-84).
[102] ibid para 46 (page 67-68).
[103] ibid para 583 (page 691).
[104] ibid.
[105] ibid para 780 (page 891).

establishment in 1528 and until the conflict of 1855.[106] While the Court's attention was drawn to the British government's grants for the upkeep of the Mosque,[107] the Court opined that the grant did not prove that the structure was used to offer *namaz* before 1855![108]

This observation is a highly objectionable way of framing and appreciating the evidence in dispute. Why would a Mosque be maintained through government grants if there was no prayer, especially when the Court notes that a Pesh Imam was appointed and continued to draw salaries? The Islamic concept of Mosque seems to become total redundancy in this peculiar observation of the Court. In another place of the judgment, the Court contradicted itself by accepting the British government grant as proof of the entry of Muslims into the inner courtyard for *namaz*.[109] Secondly, why would Muslims need to prove their *namaz* in a mosque standing there for more than 350 years and before the rise of the first-ever dispute in 1855? Especially when only the incidents after 1855 and during the British rule were relevant for the case?

While the Imam's salary of the Imam and government grants for maintenance failed to prove the Muslim community's prayer inside the Mosque for centuries, a controversial translation of a single line from the Moazzin's complaint paper in 1858 was considered enough to establish a "preponderance of probabilities" of worship by the Hindus before the annexation of Oudh by the British in 1857.[110] Also, while the Indian Supreme Court pretended that it had no scope to recognise someone's faith and belief as a title creating fact, it ultimately used the same "faith and belief" as a mighty expression of the *animus possidendi* (intention to possess) sufficient of destroying the Muslim communities' *corpus possidendi* (physical possession) over the inner courtyard of the Mosque.[111]

5. Concluding Remarks: A death kneel on Indian Secularism?

While the Indian Supreme Court's mid-1990s' *Hindutva* judgments practically sealed the fate of Indian Secularism, the later decisions of the Court, including the *Babri Mosque*, show an unpalatable disregard of equality and fair play for the Muslim minorities. The judgment would permanently impact Indian Secularism, minority rights, constitutional equality, and the rule of law. To take an example, during the final hours of the Supreme Court hearings, the Waqf Board chairman signed an *ex parte* "mediation" proposal under which it consented to withdraw the appeal against the Allahabad High Court judgment in exchange for assurances that no other Muslim places of worship would be taken over after that.[112] *Vishwa Hindu Parishad* was not even prepared to sign such an assurance.[113] It indicated the unchanged Hindu majoritarian sentiment and the travesty of *Babri Mosque* judgement that fuelled this extremist sentiment. Soon after the judgment, one of the BJP legislators, JP Garg, demanded to rename Agra - a city founded by a Muslim ruler during the 17th century,

[106] ibid para 798 (page 921).
[107] ibid para 678 (page 793).
[108] ibid para 680-681 (page 796), para 741 (page 476-477).
[109] ibid para 610 (page 735).
[110] ibid para 773 (page 885).
[111] Faizan Mustafa and Aymen Mohammed (n 58).
[112] Siddharth Varadarajan, 'What the Supreme Court's Ayodhya Judgment Means for the Future of the Republic', *The Wire* (9 November 2019) <https://thewire.in/communalism/supreme-court-ayodhya-babri-masjid-ram-janambhoomi> accessed 04 January 2022.
[113] ibid.

famous for *Taj Mahal*.[114] Taj Mahal is also being claimed to be originally a Hindu temple called *Tejo Mahalaya*.[115] These trends show strong resemblance to what Christopher Fleming predicts in his review of the Babri Mosque judgement:

> Although the Supreme Court, argued that the 'law cannot be used as a device to reach back in time and provide a legal remedy to every person who disagrees with the course which history has taken', this is precisely what has happened subsequently. Faith-based applications of Sanskrit jurisprudence have been employed to expand the Hindu community's constitutionally-protected rights to freedom of religion into a legal weapon with which to assert control over India's contested geography and this lies at the heart of lawsuits filed in the name of deities at Mathurā and Vārāṇasī.[116]

In this sense, the judgment represents a fundamental change in the constitutional characteristics of India.[117] The imposture of crude majoritarian sovereignty over the lawful entitlement of a minority community in the *Babri Mosque Case* will be "troublesome to India's secular cause for many years to come".[118] The judgment has shaken India's religious "tolerance and mutual co-existence"[119] beyond reparation. Although it was an unfounded claim that there was a Hindu temple beneath the Babri mosque, there will be no doubt that the Babri Mosque would lie beneath the newly constructed Ram Mandir.

In one of their recent articles, David Landau and Rosalin Dixon talked about a global phenomenon of "abusive judicial review" where judges join the authoritarian governments in accelerating democratic erosion or backsliding by issuing calculated decisions. While Landau and Dixon were testing their thesis against the U.S. Supreme Court, at the end of this analysis, we feel it appropriate to conclude this paper by quoting Landau and Dixon's concluding lines:

> A passive judiciary in the face of illiberal or anti-democratic action would be a perilous outcome for ... constitutionalism. But there is in fact an even more troubling possibility, ... Courts may go so far as to become active participants in the destruction of the liberal democratic order. … Comparative experience teaches us that under the right conditions, previously independent courts can quite quickly and effectively become the enemies, rather than allies of democracy.[120]

Post-script:

At the time of post-peer-review revision of this paper, several developments came to the authors' notice. On 20 May 2022, a Mathura District Court permitted a 'next friend' of two deities - *Bhagwan Shrikrishna Virajman* and *Asthan Shrikrishna Janam Bhoomi* – to sue for part of the Shahi Idgah Mosque on the allegation that this was birthplace of Lord Shri Krishna. Earlier on 9 April 2021, a Varansi court order another ASI survey in the site of Gyanvapi Mosque. This time the court permitted a next friend of another deity - Lord

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[114] Aarti Betigeri, 'Ayodhya verdict and unruly consequences', *The Interpreter* (15 November 2019) <https://www.lowyinstitute.org/the-interpreter/ayodhya-verdict-and-unruly-consequences> accessed 04 January 2022.

[115] ibid.

[116] Christopher Fleming (n 13) 9.

[117] Zia Haq, 'Nothing Wrong in Calling Indians Hindu: Heptulla' *The Hindustan Times* (29 August 2014), <https://www.hindustantimes.com/india/nothing-wrong-in-calling-indians-hindu-heptullah/story-i0XW0RyaJaZYkDb4E3F03M.html> accessed 01 January 2022.

[118] Moiz Tundawala and SalmoliChoudhuri (n 62).

[119] Prannv Dhavan and Parth Maniktala, Ayodhya Verdict: Secularism, Rule of Law and Faith of Minorities, *The Bar & Bench* (17 November 2019) <https://www.barandbench.com/columns/secularism-rule-of-law-and-the-ayodhya-verdict> accessed 04 January 2022.

[120] David Landau and Rosalind Dixon, Abusive Judicial Review: Courts Against Democracy, (2019) 53 University of California Davis Law Review 1313.

Vishweshvar Kashi Vishwanath. The petitioner claimed that the water fountain in the Mosque's ablution area is a self-revealed Shiblinga. On 19 December 2023, the Allahabad High Court rejected the petitions by the Muslim parties arguing that the case is not barred by the Places of Worship (Special Provisions) Act 1991 – which was passed to give protection to the places of worship that existed at the time of Indian independence in 1947.[121]

[121] For a clearer picture of these developments see: Shashank Rai, Shabarna Choudhury and Sai Snigdha Kantamneni, 'Aftermath of Ayodhya Verdict: Impact on Kashi and Mathura' (2020) 1 Jus Corpus LJ 90.