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The "Ayodhya" Case: Hindu Majoritarianism and the Right to Religious Liberty

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INTRODUCTION

"Here is a small piece of land (1500 square yards) where angels fear to tread . . . It is full of innumerable landmines."

-Justice Sibghat Ullah Khan[1]

The long-standing contest over a 1500 square yard plot of land, situated in the city of Ayodhya, located in the district of Faizabad in the state of Uttar Pradesh in north India, has become a site where religious groups, pilgrims, lawyers, and even gods are battling to establish their claims of rightful ownership. The issue has been simmering in independent India since its birth in 1947 and arose well before that time. The courts have been called upon time and again to adjudicate on this fraught issue, where their decisions are not only defining the parameters of the right to freedom of religion, but are implicated in the very construction of faith and belief.

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1. Visharad v. Ahmad, O.O.S., No. 1 of 1989, All. H.C., 4 (2010) (Khan, J.) [hereinafter Ayodhya]. The Ayodhya Judgment is a consolidation of opinions from 1986 and 1989, and these consolidated opinions may sometimes be referred to as the "Decision of Honorable Special Full Bench Hearing Ayodhya Matters."

In this article, I examine how the right to freedom of religion has emerged in law, focusing on the 125-year-old property dispute in Ayodhya, which Hindu nationalist parties, amongst others, claim as the birthplace of the Hindu god Ram. A sixteenth century mosque—the Babri Masjid—was destroyed by hard-line Hindu activists on December 6, 1992, on the grounds that the mosque had been constructed by the Mughal Emperor Babur on the site of a twelfth century Hindu temple that marked the birthplace of Ram. Various legal challenges to the legal title and ownership over the disputed land were eventually heard by the Allahabad High Court, the highest court in the state of Uttar Pradesh, which delivered its decision on September 30, 2010. The majority held that the property in question be split three ways, with one portion going to the Muslims and two portions going to two of the Hindu parties. More specifically, a one-third share in the disputed land was given to the idols, which had been placed under the central dome of the mosque when it was still standing. The decision was based on the central claim put forward by the Hindu parties that idols (and the birthplace) were juridical entities who could be given legal title to the property and also that the disputed site was a place of worship for Hindus and a core ingredient of the Hindu faith. One-third share was also given to the Sunni Waqf Board, which argued that it held full title to the land where the mosque once stood,[2] as well as to the Nirmohi Akhara (Group without Attachment), which declared that it was the manager and guardian of the birthplace of Ram as well as the idols.

Two of the judges, Justices S.U. Khan and Sudhir Agarwal, held that the area where the central dome of the three-domed structure or mosque once stood and where the idols were placed belonged to the Hindus. Justice Dharam Veer Sharma, the dissenting judge, held that the birthplace and the idols were juristic persons and that the disputed land in its entirety belonged to both.[3] The case raised issues of the

2. A waqf is a gift or donation by a Muslim to a religious, educational, or charitable cause.

3. The existence of a Hindu idol as a juristic person capable of having rights and discharging duties through a "next friend," "best friend," or trustee was established in law as early as 1922. In the common law system, there are two types of persons—one natural and the other legal. A natural person is a human being, while legal persons (or juristic persons) are beings, things, or objects that are treated as persons by law, such as a company, which have the capacity for entering into legal relationships. This capacity includes holding property, suing as well as being sued in a court of law, as well as to address issues of taxation, allotment of land, and alienation of property. The treating of Hindu idols as juristic personalities

construction of the meaning of secularism and the right to freedom of religion in Indian constitutional discourse and the construction of religious identity, as well as the essential or core practices of both the Hindu and Muslim faith in law. Given the centrality of the historicity of the claims of all parties as well as the structures to the case, the construction of the historical narrative was also implicated in the decision.

I discuss how the reasoning of the Allahabad High Court judgement partly resulted in reproducing and reinforcing Hindu majoritarianism through its interpretation of the right to freedom of religion and the broader implications of the decision on the meaning and definition of secularism in Indian constitutional discourse. I also underscore how the law and judicial discourse has played a central role in enabling the Hindu Right, a right wing political and ideological movement intent on establishing India as a Hindu State and a key player in the Ayodhya dispute, to successfully pursue its agenda through the right to freedom of religion. In making a muscular and robust argument in favour of its own collective right to worship at the spot in Ayodhya designated as the "Ramjanmabhoomi," or the place where god was born, based on the idea that it is a core or essential ingredient of the Hindu faith, the Hindu Right has been able to define the parameters of the Hindu faith as monotheistic and institutionalised. They have also succeeded in diminishing the rights of worship of the Muslim minority community. Their interventions are justified in and through the discourse of secularism in ways that seem reasonable, logical, and highly persuasive, while at the same time based on Hindu majoritarianism.

My discussion illustrates how the enemies of religious pluralism are increasingly and successfully waging their war not simply in opposition to the rights of religious minorities, but in and through the legal discourse of secularism, and quite specifically, the right to freedom of religion. In the mammoth decision of the Allahabad High Court, the right to freedom of religion became the court's focus,

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requires a "next friend" to represent the idol in any legal or other proceeding. *See*, *e.g.,* Vidya Varuthi Thirthia Swamigal v. Baluswami Ayyar, A.I.R 1922 P.C. 123 (India) (holding that a Hindu deity is a juristic person); Sri Radhakhanta Deb v. Comm'r of Hindu Religious Endowments, A.I.R. 1981 S.C. 798 (India) (where the Supreme Court recognized a Hindu deity as a juristic person); Shiromani Gurdwara Parbandhak Comm. Amritsar v. Som Nath Dass, A.I.R. 2000 S.C. 1421 (India) (finding the mosque and Sikh scriptures to be juristic persons); Sri Adi Visheshwara of Kashi Vishwanath Temple v. State of Uttar Pradesh, (1997) 4 S.C.C. 606 (India) (where the court recognized the right of a deity to move the court in a case involving a challenge to the Kashi Temple Act of 1983).

despite the fact that the case was primarily a dispute about title to property and not a constitutional matter. I offer a detailed account of the arguments presented by the respective parties in an effort to unravel the ways in which the right to freedom of religion as manifested in the *Ayodhya* case has long lasting implications on the meaning of secularism in India as well as on the ways in which religion itself is shaped and constructed through the discourse of secularism and the right to freedom of religion.

The struggle over the meaning of the right to freedom of religion has also involved a struggle over the contours and content of religion. Quite specifically, it has involved a contest over the meaning of Hinduism and a battle over what constitutes its core or essential elements. A number of scholars have located the definition of Hinduism within the colonial context, arguing that Hinduism is a colonial construction adopted by the Europeans as a name for the religions of India towards the end of the eighteenth century.[4] The constructionists have argued that the attributes of Hinduism were based on Christian understandings of what constituted religion, and focused on those properties that were regarded as usually associated with a religion, that is sacred texts, doctrines and priests. While these features could be attributed to a Brahmanical tradition, they came to be imagined as the beliefs and practices of the people of the subcontinent and formed one pan-Indian religion.

Similarly, in the context of the late-nineteenth and early-twentieth-century anti-colonial struggles, Hindu nationalists sought to retrieve an authentic past based on Hindu traditions and practices as the basis for constructing the identity of the newly emerging Indian

4. *See, e.g.,* Richard King, *Orientalism and the Modern Myth of 'Hinduism,'* 46 NUMEN 146, 146 (1999) (arguing that the construction of the concept of "Hinduism" as a single religion was based on Christian presuppositions); *See also* Gauri Viswanathan, *Colonialism and the Construction of Hinduism, in* THE BLACKWELL COMPANION TO HINDUISM 1, 23-44 (Gavin Flood ed., 2003) (cautioning against explaining the idea of Hinduism as a hegemonic religion exclusively as an outcome of colonial intervention in tradition); David Ludden, *Ayodhya: A Window on the World, in* CONTESTING THE NATION: RELIGION, COMMUNITY, AND THE POLITICS OF DEMOCRACY IN INDIA, 1, 6–8 (David Ludden ed.,1996) ("Under British rule, 'Hindu' became a category for people in India who were not Muslims, Christians, Sikhs, Jains, Parsis, Buddhists, or others."). *See generally* RICHARD KING, ORIENTALISM AND RELIGION: POSTCOLONIAL THEORY, INDIA AND "THE MYSTIC EAST" (1999); RETHINKING RELIGION IN INDIA: THE COLONIAL CONSTRUCTION OF HINDUISM (Esther Bloch et al. eds., 2011).

nation-state.[5] This move was in part an effort to counter the colonial representation of India as a barbaric and civilizationally backward society because of its beliefs, practices, and traditions, a move that simultaneously served as a justification for the continuance of colonial rule. While there was a Brahmanical collaboration with the Hindu nationalist movement at the time of independence that led to the sanskritization, textualization, and unification of so-called Hindu traditions, what is significant is that this construction was thoroughly modern in its genesis.[6] These contests over the core or essential ingredients of religion continue to play out doctrinally in law in the contemporary period through the "essential practices" test.[7]

This paper is divided into three sections. In the first part, I set out the constitutional jurisprudence on Indian secularism, briefly summarizing three significant decisions of the Indian Supreme Court: the *Bommai* decision,[8] a cluster of decisions collectively described as

5. *See generally* VINAYAK DAMODAR SAVARKAR, HINDUTVA: WHO IS A HINDU? (1929); MADHAV SADASHIV GOLWALKAR, WE OR OUR NATIONHOOD DEFINED (1939); Christophe Jaffrelot, *The Idea of the Hindu Race in the Writings of Hindu Nationalist Ideologues in the 1920s and 1930s: A Concept Between Two Cultures, in* THE CONCEPT OF RACE IN SOUTH ASIA 327–54 (Peter Robb ed., 1995).

6. *See generally* GEOFFREY A. ODDIE, IMAGINED HINDUISM: BRITISH PROTESTANT MISSIONARY CONSTRUCTIONS OF HINDUISM, 1793–1900 (2006); WENDY DONIGER, THE HINDUS: AN ALTERNATIVE HISTORY (2009) (discussing the wide range of texts and unwritten traditions that challenge the idea of a monolithic tradition); LATA MANI, CONTENTIOUS TRADITIONS: THE DEBATE ON SATI IN COLONIAL INDIA 2–7 (1998) (describing the effect colonialism had in shaping the perception of India's history).

7. *See* RONOJOY SEN, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT 40–72 (2010).

The historical basis for the "essential practices" test is found in the colonial era where the colonial courts attempted to identify and define religious identities and in the process augment their role in disciplining and managing each community. In the process they also ended up constructing in law the very religious identities that they were regulating. In the contemporary moment, the "essential practices" test was largely developed by Justice P.B. Gajendragadkar, Chief Justice of India from 1964 to 1966, to expunge superstitious and irrational elements from different religions and provide them with a rational basis. As discussed later in this paper, in the context of Hinduism, this process resulted in producing a modern, monotheistic, and institutionalized tradition in line with other Abrahamic traditions. In the process of trying to demarcate the line between religion through the essential practices test, as distinct from the secular functions of religious denominations in which the State could interfere, the courts were drawn into inquiring into the contents of religious beliefs and in the process to actually construct the tradition as well as the religious identity.

8. S. R. Bommai v. Union of India, (1994) 3 S.C.C. 1 (India) (involving a challenge to the validity of the presidential declaration dismissing the governments in four states led by the Bhartiya Janata Party (BJP) (Indian People's Party), the

the *Hindutva* cases,[9] and *Ismail Faruqui v. Union of India.*[10] In the second part, I discuss the *Ayodhya* case, setting out the background to the dispute and the competing legal claims of the respective parties. In the third section, I discuss the reasoning and holdings of each of the three judges in the decision of the Special Full Bench Hearing of the Ayodhya property dispute, which consisted of four suits, by the High Court of Allahabad in 2010.[11] In the final part, I examine the implications of the *Ayodhya* decision on the meaning of the right to freedom of religion as well as its implications on the meaning of secularism in India. While the Supreme Court of India has subsequently stayed the decision of the Allahabad High Court,[12] the

political wing of the Hindu Right, following the destruction of the Babri mosque at Ayodhya in December 1992 and the ensuing communal riots). In Bommai, the Constitutional Bench of the Supreme Court upheld the validity of the declaration, and in so doing passed considerable comment on the meaning of secularism in Indian constitutional life. *Id.*

9. The Hindutva cases involved a series of challenges to the election of Shiv Sena (foot soldiers of Shiva) and BJP candidates in the December 1987 State elections in Maharashtra on the grounds that the candidates had committed corrupt practices in violation of section 123 of the Representation of the People Act, 1951. Section 123(3) of the Act prohibits candidates from any appeal to his or her religion, race, caste, community, or language to further his or her prospect for election or for prejudicially affecting the election of any other candidate. The collection of thirteen cases that came before the Supreme Court of India include Manohar Joshi v. Nitin Bhaurao Pati, (1996) 1 S.C.C. 169 (India); Ramesh Yashwant Prabhoo v. Prabhakar Kasinath Kunte, A.I.R. 1996 1 S.C. 1113 (India); Bal Thackeray v. Prabhakar Kasinath Kunte, (1996) 1 S.C.C. 130 (India); Ramchandra G. Kapse v. Haribansh Ramakbal Singh, (1996) 1 S.C.C. 206 (India); Pramod Mahajan v. Haribansh Ramakbal Singh, (1996) 1 S.C.C. 206 (India); Sadhvi Ritambhara v. Haribansh Ramakbal Singh, (1996) 1 S.C.C. 206 (India); Ramakant Mayekar v. Smt. Celine D'Silva, (1996) 1 S.C.C. 399 (India); Chhagan Bhujbal v. Smt. Celine D'Silva, 1 S.C.C. 399 (India); Pramod Mahajan v. Smt. Celine D'Silva, 1 S.C.C. 399 (India); Balasaheb Thackeray v. Smt. Celine D'Silva, 1 S.C.C. 399 (India); Moreshwar Save v. Dwarkadas Yashwantrao Pathrikar, (1996) 1 S.C.C. 394 (India); Chandrakanta Goyal v. Sohan Singh Jodh Singh Kohli, (1996) 1 S.C.C. 378 (India); Shri Suryakant Venkatrao Mahadik v. Smt. Saroj Sandesh Naik, (1996) 1 S.C.C. 384 (India).

10. A.I.R. 1995 S.C. 605 (India).

11. Gopal Singh Visharad v. Zahoor Ahmad, O.O.S., No. 1 of 1989, All. H.C. (India); Nirmohi Akhara v. Baboo Priya Datt Ram, O.O.S., No. 3 of 1989, All. H.C. (India); Sunni Central Board of Waqfs, U.P v. Gopal Singh Visharad, O.O.S., No. 4 of 1989, All. H.C. (India); Bhagwan Sri Ram Virajman v. Rajendra Singh, O.O.S., No. 5 of 1989, All. H.C. (India). The judgment was delivered in the High Court of Judicature at Allahabad (Lucknow Bench), on September 30, 2010.

12. Appeals against the High Court decision were filed by all sides of the case, including Hindu and Muslim organizations, and the Court directed the parties to

decision remains relevant in terms of its ability to influence the understanding and meaning of secularism in both judicial and popular discourse.

I. THE JUDICIAL (RE)SHAPING OF INDIAN SECULARISM

Increasingly, the struggle over the meaning of secularism and the place of religion has been fought out in the legal arena. This section focuses on three significant Supreme Court decisions that highlight this contest, including *Bommai*, the *Hindutva* cases, and *Ismail Faruqui v. Union of India.* The increasing influence of the Hindu Right, which has become a central player in defining the scope and parameters of the various components of secularism in law in India, has exposed how the discourse can be used to advance a majoritarian political agenda. The Hindu Right consists of three primary actors, including the *Bharatiya Janata Party* (BJP) (Indian Peoples Party), which is responsible for formulating and pursuing the political agenda of the movement; the *Rashtriya Swayamsevak Sangh* (RSS) (National Volunteer Organization), which was established in 1925 to build a strong Hindu community to counter British rule as well as Muslim separatism and responsible for developing and expounding the ideological doctrine of the Hindu Right; and the *Vishwa Hindu Parishad* (VHP) (World Hindu Council), founded in 1964 to popularize the Hindu Right's religious doctrine and consolidate its support at a grassroots level.[13] The VHP also includes a militant youth wing, the *Bajrang Dal* (Hanuman gang) established in 1984.[14] There are several other peripheral players associated with the Hindu right parties, including the militant and virulently anti-Muslim *Shiv Sena* (Foot soldiers of Shiva).[15] The movement collectively promotes the ideology of *Hindutva*—which posits Hinduism not simply as a religion but as a nation and a race that is indigenous to India.[16] This

maintain the status quo at the site, although it added that the Hindu prayers currently being conducted at the makeshift temple on the dispute cite could continue without interference. The stay was granted on the grounds that the High Court, in partitioning the land, had granted a relief that no party had requested. The decision is to be listed before a larger bench of the Supreme Court for arguments.

13. Ratna Kapur, *Normalizing Violence: Transitional Justice and the Gujarat Riots*, 15 COLUM. J. GENDER & L. 885, 890–91 (2006).

14. *Id.*

15. *Id.*

16. *See generally* JYOTIRMAYA SHARMA, HINDUTVA: EXPLORING THE IDEA OF HINDU NATIONALISM (2003). *See also* CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT IN INDIA 27 (1998) (discussing V.D. Savarkar's definition of Hindutva as "an ethnic community possessing a territory and sharing the same racial and cultural characteristics").

logic has allowed the ideologues of the Hindu Right to construct Muslims and Christians as foreigners, aliens, and invaders and their religious presence in the country as a threat to the Hindu nation.[17] While the movement has been variously labeled as, inter alia, Hindu fundamentalist, Hindu fascist, and Hindu nationalist, I use the term "Hindu Right" to indicate the anti-Muslim, communal as well as highly conservative nature of the movement's agenda.[18]

A. Indian Secularism

The *Ayodhya* decision and the meaning ascribed to the right to freedom of religion in India need to be understood against the backdrop of competing understandings of secularism and the emergence of the Hindu Right. The separation of religion from the state, and state neutrality in the sphere of religion (*sarva dharma nirpekshtha)*, has not informed the dominant understanding of secularism in India.[19] The state neutrality model does not prohibit the making of laws that protect the rights of religious minorities, including, for example the regulation of free speech through hate speech laws to prevent hatred and violence against religious and other

17. *Supra* note 5. V. D. Savarkar was the ideological leader of the Hindu nationalists during the struggle for freedom from colonial rule. He later became leader of the Hindu Mahasabha, a Hindu communalist party that was intensely involved in the Independence struggle. His writings on Hindutva continue to represent the ideological foundations of the contemporary Hindu Right. *See* SAVARKAR, *supra* note 5, at 3–4, 92. Savarkar asserted that for Hindus the fatherland (pitribhumi) and religious land (punyabhumi) are the same. Muslims on the other hand have their religious fealties elsewhere, (i.e. Mecca) and hence are not part of the same civilizational fabric. M.S. Golwalkar was an active member of the RSS, the ideological wing of the Hindu Right. He became the second Supreme Chief (Sarsangchalak) of the RSS from 1940-1973 and a major exponent of the ideological doctrine to establish India as a Hindu State (Rashtra). *See generally* GOLWALKAR, *supra* note 5; M.S. GOLWALKAR, BUNCH OF THOUGHTS 130 (1966) (where he called upon the religious minorities to give up their "foreign mental complexion and merge in the common stream of our national life.").

18. *See generally* TAPAN BASU ET AL., KHAKI SHORTS AND SAFFRON FLAGS (1993) (discussing the history and political thought of the Hindu Right).

19. The Resolution on Fundamental Rights and Economic and Social Change was adopted in 1931 in Karachi, which provided: "The state shall observe neutrality in regard to all religions." *See also* Asghar Ali Engineer, *Secularism in India—Theory and Practice, in* SECULARISM AND LIBERATION: PERSPECTIVES AND STRATEGIES FOR INDIA TODAY 38, 44–45 (Rudolf C. Heredia & Edward Mathias eds., 1995) ("The Indian state, hence could not remain indifferent to religion, and in the Indian situation secularism would mean equal protection to all religions so far as the state was concerned.").

minorities or state support to state recognized religions. This liberal democratic understanding of secularism does however prohibit state involvement in the sphere of religion. This model is based on the assumption that these protections emanate from a neutral state—it does not acknowledge the presence of majoritarianism as structuring secularism and thus the position of the state.[20]

In contrast, since independence, almost all debates on the subject of secularism have been based on the idea of equal treatment of all religions (*sarva dharma sambhava*) within both the public and private spheres.[21] Like the liberal democratic vision of secularism,

20. It is important to recognize that this dominant concept of secularism based on the notion of separation from religion and state is a contested one that many critics have questioned, challenged and rejected. *See generally* TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 181–204 (2003) (examining secularism in reference to formation of modern nationalism); ELIZABETH SHAKMAN HURD, THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS 13–14 (2007) (looking beyond the contemporary European view of secularism as the separation of church and state); CRAIG CALHOUN ET AL., INTRODUCTION, IN RETHINKING SECULARISM 1, 3– 27 (Craig Calhoun et al. eds., 2011) (discussing how the assumptions about secularism have recently come under scrutiny).

21. The argument that secularism in India does not mean a wall of separation between religion and politics, but rather, the equal respect of all religions is common throughout the legal literature. *See* Engineer, *supra* note 19, at 40. Engineer argues that the western concept of secularism, which involves indifference to religion, has never taken root in India. *Id.* According to Engineer, "[t]he concept of secularism in India emerged, in the context of religious pluralism as against religious authoritarianism in the west . . . . It was religious community, rather than religious authority, which mattered in the Indian context." *Id.* It is important to recognize that this dominant understanding of Indian secularism also remains. *See also* R.L. CHAUDHARI, THE CONCEPT OF SECULARISM IN INDIAN CONSTITUTION 169–70 (1987) ("[T]he absence of complete separation between the State and the Religion is because of the character of Indian Society which is basically religious. . . . Separation of the State from the religion is not the basis of Indian Secularism, as it is in other countries. Indian Constitution does not reject religion. On the contrary, it respects all religions."); T.N. Madan, *Whither Indian Secularism*, 27 MOD. ASIAN STUD. 667, 677 (1993) (stating that Indian secularism "stands for equal respect for all religious faiths"); Sumit Ganguly, *The Crisis of Indian Secularism*, 14 J. DEMOCRACY, OCT. 2003, at 11, 13 (stating that while the constitution granted freedom of religion and provided rights to religious minorities, the constitution was not religiously neutral). *See also* GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 91–121 (2003) (providing a comparative analysis and discussing the difference between Indian secularism from the U.S. and Israeli models).

the Indian model is based on equality and freedom of religion.[22] However, unlike the liberal model, the Indian model does not adopt a position of state neutrality.[23] The state can interfere to promote equal treatment of all religions. This concept was propounded by Mahatma Gandhi and has been the governing model of secularism in postcolonial India.[24]

Within the context of Indian constitutional law and discourse, discussions of secularism typically focus on the right to freedom of religion and the right to equality. The literature typically highlights the various provisions of the Constitution that are considered relevant to the principle of the equal respect of all religions: Articles 14–15 guaranteeing the right to equality and non-discrimination;[25] Articles 25–26 guaranteeing the right to freedom of religion and the right of religious denominations to organize their own affairs;[26] Article 30

22. Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. INT'L L. J. 113, 141 (1997).

23. *See id*. at 141–42 (discussing how India has adopted its own distinct version of secularism which does not separate state and religion but rather respects all religions).

24. *Id.* at 142. *See generally* DONALD EUGENE SMITH, INDIA AS A SECULAR STATE (1963) (discussing the contested approaches to secularism in India).

25. Article 14 provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." INDIA CONST., art. 14. Article 15 provides:

> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them; (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—(a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public; (3) Nothing in this article shall prevent the State from making any special provision for women and children; (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Id. art. 15.

26. *Id*. arts. 25–26. These constitutional guarantees contemplate both individual and collective rights to freedom of religion that extend well beyond the limited right to worship. Article 25 enshrines the right to individual freedom of religion, but also permits the state to regulate the "economic, financial, political or other secular activity which may be associated with religions practice" and to specifically intervene in Hindu religious institutions. *Id*. art. 25. The right under

prohibiting religious instruction in state schools, or taxation in support of any particular religion;[27] and Article 51A, prohibiting the establishment of a state religion.[28] The right to equality and the right to freedom of religion are, within this vision, seen as fundamentally interconnected—that is, all citizens must have the equal right to freedom of religion and the State must not discriminate on the basis of religion. Following from the dominant understanding of secularism as equal treatment of all religions, the constitutional discourse does not insist on a wall of separation between religion and politics.[29] Rather, discussions tend to emphasize the principle of toleration—that is, the equal toleration of all religions, and Articles 30 and 51A are generally highlighted.[30] The constitutional guarantees on equality and freedom of religion that are seen to frame this

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Article 26(a) is a group right and available to every religious denomination. Article 26(b) guarantees every religious denomination the right "to manage its own affairs in matters of religion." *Id.* art. 26(b). "The expression 'matters of religion' includes 'religious practices, rites and ceremonies essential for the practicing of religion.'" Articles 25 and 26 accord primacy to public interest over religious claims and hence provide a wide margin of appreciation for the State to sponsor reforms.

27. Article 30 provides:

> (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
>
> (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
>
> (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

INDIA CONST., art. 30.

28. *See id*. art. 51(A)(e) ("It shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities.").

29. *See, e.g.*, P.B. Gajendragadkar, *Secularism: Its Implications for Law and Life in India, in* SECULARISM: ITS IMPLICATIONS FOR LAW AND LIFE IN INDIA 1, 4 (G.S. Sharma ed., 1966) ("The State does not owe loyalty to any particular religion as such; it is not irreligious or anti-religion; it gives equal freedom for all religions and holds that the religion of the citizen has nothing to do in the matter of socio-economic problems.").

30. *See, e.g.*, S.P. Sathe, *Secularism, Law and the Constitution of India, in* SECULARISM IN INDIA 39, 45–46 (M.S. Gore ed., 1991); *see also* Upendra Baxi, *The "Struggle" for the Redefinition of Secularism in India: Some Preliminary Reflections, in* SECULARISM AND LIBERATION, *supra* note 19, at 54, 61–62.

principle of equal toleration are also again highlighted. Secularism in the constitution can then be seen to be characterized by three principles: (1) freedom of religion; (2) equality and non-discrimination; and (3) toleration. Toleration thus comes to displace neutrality that is present in the model of secularism based on a separation of religion and state as the third principle of secularism. Although there are some echoes to the principle of neutrality within constitutional discourse, these discussions tend to infuse the concept of neutrality with the spirit of *saarva dharma samabhava* or equal treatment of all religions. Neutrality to all religions tends not to be associated with a wall of separation, as it is in the American or French contexts, but rather with the idea that the State must not discriminate against any religion. It is this subtle but important shift from neutrality to toleration that captures the essence of the equal treatment of all religions vision of secularism in post-colonial India and its conceptualization of the appropriate relationship between religion and state. In stark contrast to the liberal democratic model, which insists that the relationship must be characterized by non-intervention, the equal respect of all religions model allows for state intervention in religion, provided that such intervention is in accordance with the requirements of equality and freedom of religion.[31]

The meaning to be given to secularism in India depends to a large extent on the meaning given to each of these constituting principles. To some extent, the meaning of secularism turns on the meaning of equality. If equality is understood in the formal sense—treating likes alike—then secularism will insist on treating India's various religious communities alike. By contrast, if equality is understood in a more substantive sense—of addressing disadvantage—then secularism will allow for an accommodation of difference between religious groups and the rights of religious minorities. In law, Indian secularism has, to a large extent, been based on a more substantive approach to the principle of equal treatment and toleration of all religions, which has allowed for the protection of religious minority rights, including special provisions

31. SMITH, *supra* note 24, at 133. Smith has argued that the third principle of liberal democratic secularism regarding the "[s]eparation of religion and state includes two distinct principles: (1) the non-interference of the state and religious organizations in each other's affairs; (2) the absence of a legal connection between the state and a particular religion. The Indian Constitution . . . does not subscribe to the first principle; it does, however, uphold the second." *Id.* at 132.

under the Constitution. Some of these provisions include the rights of religious minorities to establish and administer their own educational institutions,[32] to personal status laws, as well as the special autonomous status for the Muslim dominated state of Kashmir.[33]

B. The Role of the Hindu Right

The Hindu Right has increasingly been trying to cast itself as the true inheritors of India's secular tradition. Secularism in its vision requires that all religious communities be treated the same. Any laws that are designed to protect the rights of religious minorities are attacked as "special treatment" and as a violation of the constitutional mandate of equal treatment.[34] The vision of secularism within the discourse of the Hindu Right comes to equate secularism with a Hindu state.[35] This vision requires that religious minorities must be treated the same as the Hindu majority (i.e., where those religious minorities are effectively assimilated into the Hindu majority), and that any protection of the rights of religious minorities amounts to "appeasement," and a violation of the "true spirit" of secularism. By emphasizing the model of formal equality—that is, the formal equal treatment of all religions—the Hindu Right's vision of secularism operates as an unmodified majoritarianism whereby the majority Hindu community becomes the norm against which all others are to be judged and treated.[36] The result is that the project of secularism becomes a project about assimilating religious minorities rather than about the protection of the rights of religious minorities. Secularism ends up as a powerful tool in the Hindu Right's quest for discursive political power.[37] Armed with the ideology of *Hindutva*, the Hindu

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32. INDIA CONST., art. 30.

33. *Id.* art. 370.

34. Ratna Kapur, *The Fundamentalist Face of Secularism and Its Impact on Women's Rights in India*, 47 CLEV. ST. L. REV. 323, 326 (1999) ("Any protection of the rights of religious minorities is cast as 'appeasement' and a violation of the 'true spirit' of secularism.").

35. *Id*. ("Religious minorities are to be treated the same as the majority. Within this formal approach to equality, then, the majority becomes the norm against which all others are judged. Secularism, then is no longer about the protection of rights of religious minorities, but rather, becomes about the assimilation of minorities.").

36. *See generally* Cossman & Kapur, *supra* note 22 (discussing in detail the Hindu Right's pursuit of secularism in and through liberal rights discourse).

37. *See, e.g.*, Balraj Madhok, *Secularism: Genesis and Development, in* SECULARISM IN INDIA: DILEMMAS AND CHALLENGES 110 (M. M. Sankhdher ed., 1992); Gyan Prakash, *Secular Nationalism, Hindutva, and the Minority, in* THE CRISIS OF SECULARISM IN INDIA 177 (Anuradha Dingwaney Needham & Rajeswari

Right has argued that, unlike Christianity and Islam, Hinduism is the only religion in India that is committed to the value of religious tolerance because it does not aim to proselytize or gain converts. According to this logic, since secularism is about toleration, and only Hindus are tolerant, then only Hindus are truly secular. The principle of protecting minorities virtually disappears.

The Supreme Court has been called upon to adjudicate on the competing understandings of secularism being advanced by different actors. In particular, it has been called upon to decide whether the strategies of the Hindu Right violate previous instantiations of this basic constitutional principle.

C. The Bommai Decision

Initially, the Supreme Court's position on secularism differed substantially from that promoted by the Hindu Right. The key political moment that drew international attention to Ayodhya occurred on December 6, 1992, when the self-described "foot-soldiers" of the Hindu Right destroyed a sixteenth century mosque, the Babri Masjid, on the grounds that it had been constructed on the exact spot where Ram was born.[38] The act of vandalism not only resulted in the complete demolition of an historical edifice, but also constituted a direct assault on the rights of religious minorities.[39] In light of the resulting violence that followed the destruction of the mosque and subsequent aggravation of religious tensions, presidential rule was declared in four states ruled by the BJP.[40] Presidential rule allows the federal government to dismiss the state government when there is a perceived breakdown or failure in the constitutional functioning of a state.[41] In a subsequent challenge to this decision, the

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Sunder Rajan, eds., 2007); SHABNUM TEJANI, INDIAN SECULARISM: A SOCIAL AND INTELLECTUAL HISTORY 1890-1950 10–11 (2008).

38. *See* THE BABRI MASJID QUESTION, 1528–2003: A MATTER OF NATIONAL HONOUR 1–6 (A.G. Noorani ed., 2003) (describing the 1992 destruction of the Babri Masjid mosque); Nandini Rao & C. Rammanohar Reddy, *Ayodhya, the Print Media and Communalism, in* DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY 139, 147 (Robert Layton et al. eds., 2001) (same).

39. *Id*.

40. *See* THE BABRI MASJID QUESTION, *supra* note 38, at 4 (stating that the state was brought under presidential rule).

41. INDIA CONST., art. 356. Under presidential rule, the central government rules the state through the governor of the state, the official representative of the president at the state level.

Supreme Court in 1994 upheld the declaration of presidential rule in all four states.[42]

In the *Bommai* decision the full constitutional bench of the Supreme Court declared the integral importance of the place of secularism in the Constitution.[43] In the course of lauding the importance of secularism based on religious tolerance and equal treatment of all religious groups, the Supreme Court also strongly condemned the political forces committed to undermining a more pluralistic instantiation of this constitutional ideal.[44] The Court remarked on the distinctness of the concept of secularism in India—that is, the equal treatment of all religions and tolerance.[45] For example, Justice Sawant echoed the common view that in India secularism does not involve a complete separation of religion and the state, but rather the notion of treating all religions equally:

> [T]he ideal of a secular State in the sense of a State which treats all religions alike and displays benevolence towards them is in a way more suited to the Indian environment and climate than that of a truly secular State by which [is] meant a state which creates complete separation between religion and the State.[46]

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42. *See* S. R. Bommai v. Union of India, (1994) 2 S.C.C. 1 (India) (establishing a significant precedent on the limits of Article 356 and stipulating the circumstances under which presidential rule could be declared). *See* Praveen Swami, Protecting Secularism and Federal Fair Play, FRONTLINE, Nov. 14, 1997, (Magazine), available at http://www.frontline.in/static/html/fl1422/14220170.htm.

43. Bommai, (1994) 2 S.C.C. 1.

44. *Id*.

45. The opinions in Bommai were delivered by Justice Sawant, with Justices Kuldip and Singh concurring; Justice Jeevan Reddy, with Justices Agrawal and Pandian concurring; and Justice Ramaswamy.

46. Bommai, (1994) 2 S.C.C. at 146 (Sawant, J.). Justice Sawant further wrote:

> [S]ecularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited. This is evident from the provisions of the Constitution to which we have made reference above. The State's tolerance of religion or religions does not make it either a religious or a theocratic State. When the State allows citizens to practice and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life…. This is also clear from sub-section (3) of Section 123 of the Representation of the People Act, 1951… [and] sub-section

This understanding of secularism as based on both religious tolerance and equal treatment of all religious groups, included an assurance of the protection of life, property, and places of worship for all religious groups. According to Justice Sawant, any act of state government "calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution."[47] In a similar vein, the opinions of Justice Jeevan Reddy and Justice Ramaswamy similarly condemned the strategies of the Hindu Right as non-secular. For example, Justice Jeevan Reddy stated:

> [I]t is clear that if any party or organization seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution it would certainly be guilty of following an unconstitutional course of action . . . . Introducing religion into politics is to introduce an impermissible element into body politic and an imbalance in our constitutional system. If a political party espousing a particular religion comes to power, that religion tends to become, in practice, the official

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3(A) of the same section…. [R]eligious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution.

Id. at 146–48.

47. *Id*. at 149. Although each of the judges echoed the general idea of Indian secularism as the equal respect of all religions, there were slightly different emphases in each of their respective decisions. For example, while Justice Sawant most strongly emphasized the equal respect of all religions, and its requirement of toleration, Justice Jeevan Reddy's decision placed some emphasis on the idea of the separation of religion and politics. After a long discussion of the requirement of equal respect, Justice Jeevan Reddy stated, "In short, in the affairs of the State . . . religion is irrelevant; it is strictly a personal affair. In this sense . . . our Constitution is broadly in agreement with the U.S. Constitution, the First Amendment whereof declares that 'Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof . . . .' Perhaps this is an echo of the doctrine of separation of Church and State; maybe it is the modern political thought which seeks to separate religion from the State—it matters very little." *Id.* at 235 (Jeevan Reddy, J.). By way of contrast again, Justice Ramaswamy's opinion, while also speaking of the equal respect of all religions, included several references to the concept of neutrality. *See, e.g., id*. at 161–62 (Ramaswamy, J.).

> religion . . . . This would be plainly antithetical to Articles 14 to 16, 25 and the entire constitutional scheme adumbrated hereinabove. Under our Constitution, no party or organization can simultaneously be a political and a religious party.[48]

Justice Ramaswamy's decision also strongly condemned the rise of fundamentalism as a violation of the constitutional principle of secularism. For example, he writes: "[The] rise of fundamentalism and communalization of politics are anti-secularism. They encourage separatist and divisive forces and become breeding grounds for national disintegration and fail the Parliamentary democratic system and the Constitution."[49]

In *Bommai*, the Indian Supreme Court lamented the destruction of the mosque. Not only was the act of vandalism described as a "national shame," the Court expressed the view that the destruction of the mosque shook the faith of the minorities in justice and the constitutional process.[50] The significance of *Bommai* lies in its recognition and reassertion of the importance of secularism in Indian constitutional law, as well as its restatement of the core ingredients that constitute the very specific "Indian" version of secularism: religious tolerance and equal treatment of all religions. It also underscored the right to freedom of religion as an integral component of secularism in India.

Bommai represents a landmark moment in the Court's protection of a specifically Indian model of secularism at a time when the country was experiencing the violent convulsions of communal politics. The Hindu Right's majoritarian march towards establishing its understanding of secularism in Indian constitutional law, was temporarily thwarted by the extraordinary levels of death and destruction brought on by its public arguments and campaigns. The case suggested that the Court was committed to holding back the tides of intolerance and Hindu majoritarianism in the name of secularism.

D. Ismail Faruqui Case

In the Supreme Court's 1994 decision in *M. Ismail Faruqui v. Union of India (U.O.I.)*, there appears to be a substantial shift from its earlier position and reflects a discursive tension in the judicial

48. *Id*. at 236 (Jeevan Reddy, J.).
49. *Id*. at 175 (Ramaswamy, J.).
50. *Id*. at 141 (Sawant, J.).

understandings of secularism. The case involved a constitutional challenge to the central government's acquisition of the land at Ayodhya as well as the adjoining area following the destruction of the mosque.[51] The acquisition was justified in the interests of maintaining public order and communal harmony in the wake of the demolition of the mosque.[52]

The constitutional validity of the Acquisition of Certain Area at Ayodhya Act 1993 was challenged on the grounds that the acquisition was anti-secular as it interfered with the right to freedom of religion, in particular the right to worship, of the Muslim community.[53] The land acquired included the site where the mosque once stood. The petitioner stated that the site continued to belong to the Muslims and a place where they could continue to perform their prayers or *namaz.* The petitioner stated that a mosque enjoyed a special position in Muslim law and that once it was established and prayers were offered in the mosque, it would remain the property of Allah for all time and that any person of the Islamic faith could offer prayers at such a place even if the structure had been demolished.[54]

Alongside the constitutional challenge to the Act, a Presidential Reference under Article 143 of the Constitution was also made to the Court.[55] The reference sought the Court's opinion on "[w]hether a Hindu temple or any Hindu religious structure" existed prior to the construction of the disputed structure.[56] The reference provided stated that the request was being made in light of the fact that "a dispute has arisen whether a Hindu temple or any Hindu religious structure existed prior to the construction of the structure (including the premises of the inner and outer courtyards of such structure, commonly known as the Ramjanmabhoomi-Babri Masjid) in the area in which the structure stood in village Kot Ramachandra in Ayodhya."[57] The Court was thus invited to consider an issue of faith and religion and in the process articulated the essential ingredients of the religion in a manner that also implicated the meaning of

51. A.I.R. 1995 S.C. 605, 612 (India).

52. *Id*. at 636.

53. The acquisition was implemented through the enactment of the Acquisition of Certain Area at Ayodhya Act, 1993, which was the subject matter of the challenge.

54. *Id*. at 640.

55. *Id*. at 616.

56. *Id*.

57. *Id*. at 616–17.

secularism.

The majority rejected the arguments that the Act in any way violated the constitutional principle of secularism. Speaking for the majority Justice Verma held that "the right to worship is not at any and every place, so long as it can be practiced effectively, unless the right to worship at the particular place is itself an integral part of that right."[58] Justice Verma went on to discuss the position in Muslim law stating firstly that "[u]nder Mohammedan law applicable in India, title to a mosque can be lost by adverse possession,"[59] and secondly 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 [sic]."[60] He concluded that the acquisition of the disputed areas as well as the surrounding land did not violate the religious freedom of Muslims and therefore, the acquisition was not prohibited under the Indian Constitution.[61] While the majority recognized that the offering of prayer is a religious practice, it held that such an offering at all locations where such prayers can be offered was not an essential or integral part of the Muslim faith. Only if the place had a particular significance for the religion so as to constitute an essential or core practice could the interference be considered as in violation of the communities right to freedom of religion.

At the same time the Court also entered into a discussion of the Hindu belief that the disputed site was the birthplace of Lord Ram and that therefore Hindus had the right to worship at the disputed site. In upholding the constitutional validity of Section 7(2) of the Act stating that the position existing prior to the destruction of the mosque should remain in place, the Court protected the worship of the idols planted on the site of the demolished mosque.[62]

The Court upheld the constitutional validity of the Act but

58. *Id*. at 641.

59. *Id*. The doctrine of adverse possession permits a person who is in possession of land that is legally owned by someone else, to acquire valid title to it so long as the common law requirements are complied with and the adverse possessor has been in continuous possession of the land in question for a sufficient period of time as defined by law.

60. *Id*.

61. *Id*. at 644–45.

62. Section 7(2) states, "[I]n managing the property vested in the Central Government, the Central Government or the authorised person shall ensure maintenance of the status quo in the area on which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as the Ram Janma Bhumi-Babri Masjid, stood." *Id.* at 624–25.

declared Section 4(3) of the Act, which compulsorily abated the suits and legal proceedings pertaining to the disputed structure, to be invalid.[63] The Court ordered the revival of all pending suits and legal proceedings before the Allahabad High Court to be heard on merits. It simultaneously declared the Presidential Reference as "superfluous and unnecessary" in view of the Court's decision to uphold the validity of the Act.[64]

In sharp contrast, the minority opinion in the case concluded that:

> When, therefore, adherents of the religion of the majority of Indian citizens make a claim upon and assail the place of worship of another religion and, by dint of numbers, create conditions that are conducive to public disorder, it is the constitutional obligation of the State to protect that place of worship and to preserve public order, using for the purpose such means and forces of law and order as are required. It is impermissible under the provisions of the Constitution for the State to acquire that place of worship to preserve public order. To condone the acquisition of a place of worship in such circumstances is to efface the principle of secularism from the Constitution.[65]

The dissenting opinions delivered by Justice S.P. Bharucha on behalf of Justice A.M. Ahmadi and himself further observed that section 7(2) of the Act perpetuated the performance of the Hindu prayers or puja on the disputed cite: "No account is taken of the fact that the structure thereon had been destroyed in a most reprehensible act. The perpetrators of this deed struck not only against a place of worship but at the principles of secularism, democracy and the rule of law..."[66] The decision did not take account of the fact there was a dispute with respect to the site on which the idols were placed and that the Muslim community continued to regard the mosque as legally belonging to them even after the idols were placed inside the mosque in 1949.

In the course of his discussion, Justice Verma quoted with approval a speech from the Indian President Shankar Dayal Sharma,

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63. *Id*. at 637.
64. *Id*. at 641.
65. *Id*. at 655–66 (Barucha, J. dissenting).
66. *Id*. at 655 (internal quotations removed).

who defined secularism in India by drawing considerably on Hindu scriptures, and held that the principle of religious toleration found in Hindu scriptures was an integral feature of Indian secularism.[67] The speech also drew from a more eclectic set of resources, including Islam, Christianity and Zorastrianism.[68] However, towards the end of his decision, Justice Verma proceeded to observe that Hinduism is a tolerant faith that has enabled all of these religions to find shelter and support in India.[69] While the discussion was intended to support the dominant model of secularism based on the equal treatment of all religions, the Court ended up interpreting this model along the lines of a Hindu majoritarian sensibility—holding for example that tolerance, a central component of Indian secularism, had its roots in Hinduism. The argument ends up aligning religious toleration with the Hindu faith and beliefs and subsuming other faiths within this logic. Implicit in this logic is that as Hindus are tolerant, and tolerance is a central component of Indian secularism, then only Hindus are truly secular.

The Court also articulated the narrative of the demolition in terms that cast it as aberrational and an act of miscreants. Justice Verma stated:

> [T]he act of vandalism so perpetrated by the miscreants cannot be treated as an act of the entire Hindu community for the purpose of adjudging the constitutionality of the enactment. . . .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.[70]

Thus the Court reduced the demolition of the mosque that was driven by an ideological agenda to establish India as a Hindu state, to the acts of miscreants for which the entire Hindu community could not be held responsible.

The case reinforced a normative conception of secularism together with the right to freedom of religion almost exclusively within majoritarian terms while simultaneously reducing the attack on Muslim religious sensibilities that was enacted through the

67. *Id*. at 627–28 (Verma, J.).
68. *Id*. at 628.
69. *Id*. at 658.
70. *Id*. at 634.

demolition of the mosque as entirely unrelated to religiosity and the pursuit of Hindu majoritarianism through liberal rights discourse. The injury caused to the Muslim religious minority community not only becomes unintelligible; the act is reduced to an act of destruction of property that in any case had little significance to the essential practices of the Muslim community. At the same time the religious sensibilities of the Hindu majority remain both understood and protected by ensuring that there would be no interference with the continued offering of their prayers at the disputed site.[71]

E. The Hindutva Cases

The shift in the judicial approach to secularism was accentuated in the Supreme Court's unanimous 1995 decisions in what came to be known as the *Hindutva* cases, the central case being *Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*.[72] These cases involved a series of challenges to the election of several members of right wing parties to the state legislature on the grounds that they had appealed to religion in the course of their election campaigns and incited religious enmity and hatred, in violation of the provisions of the Representation of Peoples Act of 1951.[73] A number of the campaign speeches appealed to the idea of *Hindutva*, arguing that the Muslim religious minorities in India were receiving special treatment under various provisions of the Constitution and in law. These provisions included separate personal status laws that governed familial and domestic concerns, as well as provisions that accorded the Muslim dominated state of Jammu and Kashmir special status under the Constitution.[74] These were examples of the practice of appeasement and exceptional treatment that the candidates alleged

71. In a subsequent case, the Supreme Court issued an order directing that no religious activity of any kind by anyone either symbolic or actual be allowed to take place on the 67 acres of land adjacent to the disputed site. It further clarified that even though no title rights were in dispute in the adjacent land, and that the order amounted to denying real property holders from worshipping on their own land, the restriction was necessary to ensure that (approvingly quoting from the Ismail Faruqui judgment) "the final outcome of the adjudication should not be rendered meaningless by the existence of properties belonging to Hindus in the vicinity of the disputed structure in case the Muslims are found entitled to the disputed site." Mohd. Aslam, alias Bhure v. Union of India, A.I.R. 2003 S.C. 3413.

72. A.I.R. 1996 S.C. 1113 (India).

73. The Representation of the People Act, No. 43 of 1951, INDIA CODE (1951), § 123(3).

74. *See* INDIA CONST. art. 370; The Muslim Women (Protection of Rights on Divorce Act), No. 25 of 1986, INDIA CODE (1986).

were both intolerant and discriminatory.[75] The difference in treatment of religious minorities was stated to be in violation of the Constitutional mandate of equal treatment of all religions, based on sameness in treatment, which was a central component of Indian secularism.[76] The Court held that several candidates were guilty of appealing to religion to gain votes. At the same time, it also held that *Hindutva*—the ideological linchpin of the Hindu Right—simply represented "a way of life of people of the subcontinent" rather than an attitude hostile to persons practicing other religions or an appeal to religion.[77] The Court held that, in fact, the speeches at issue appealed to the principle of secularism and to violations of the right to equality.[78] According to the Court, election speeches that referred to religion during the course of the election campaigns with a secular stance that alleged discrimination against any religion and promising to remove that imbalance was consistent with secularism and outside the purview of section 123(3).[79] As the speeches did not include an appeal to vote for or against a candidate on the basis of his religion it was not caught within the terms of the section.[80] In other words, in criticizing the "pseudo-secularism" of their political opponents by pointing out the discrimination against Hindus that this version of secularism encouraged meant that the speech was of a secular nature.[81] By validating the secular nature of the Hindu Right's version of secularism, the Court allowed the Hindu Right's version of secularism to officially enter into legal discourse.

In arriving at its' conclusions about *Hindutva,* the Court quoted extensively from two earlier decisions by the Constitutional Bench of the Supreme Court. The decision in *Shastri Yagnapurushadji v. Muldas Bhudardas Vaishya*[82] included a lengthy discussion about the identities of Hindus and provided extensive commentary involving the definition of Hinduism to demonstrate that the Hindu religion "does not appear to satisfy the narrow traditional features of any religion or creed" and therefore it could be broadly described as a way of life.[83] Similarly, in the *Comm'r. of Wealth Tax, Madras v.*

75. Prabhoo v. Kunte, A.I.R. 1996 S.C. 1113, 1119–20 (India).
76. *Id*. at 1123.
77. *Id*. at 1127.
78. *Id*. at 1131.
79. *Id*. at 1132.
80. *Id*.
81. *Id*.
82. A.I.R. 1966 S.C. 1119 (India).
83. Prabhoo, A.I.R. 1996 S.C. at 1127 (quoting Yagnapurushadji v. Vaishya, A.I.R. 1966 S.C. 1119).

Late R. Sridharan,[84] Hinduism was described as "doctrinally tolerant, leaving others-including both Hindus and non-Hindus- whatever creed and worship practices suit them best."[85]

Relying on these two decisions, the Court in *Prabhoo* concluded that it could not give a precise meaning to the terms Hindu, Hinduism, or Hindutva:

> No meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the term Hindutva is related more to the way of life of the people in the sub-continent. It is difficult to appreciate how in the fact of these decisions the term "Hindutva" or "Hinduism" per se, in the abstract, can be . . . equated with narrow fundamentalist Hindu religious bigotry, or [how it might] . . . fall with the prohibition of . . . Section 123 of the [Representation of the People Act].[86]

In citing these two decisions to justify its' holding that the *Hindutva* was a "way of life," the Constitutional Bench in *Prabhoo* seemingly ignored the fact that neither decision mentioned the word "Hindutva." In eliding its discussion of the meaning of Hinduism with the meaning of *Hindutva*, the Court ignored the historical and political context within which the concept of *Hindtuva* had acquired meaning that cannot be separated from its appeal to religion or from its assault on the legitimacy of religious minorities.

The Supreme Court's judgment was problematic in three respects. Firstly, the Court erred in concluding that *Hindutva* constituted a way of life of the people of the subcontinent, and that its deployment amounted to neither a violation of the prohibition on appealing to religion to gain votes nor a violation of the prohibition on promoting religious enmity and hatred. It failed to recognize that the term has historically had a specific meaning associated with the political philosophy of the Hindu Right, in particular its early ideologues V.D. Savarkar and M.S. Golwalkar.[87]

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84. (1976) 4 S.C.C. 478 (India).

85. Prabhoo, A.I.R. 1996 S.C. at 1127.

86. *Id*. at 1129.

87. Anil Nauriya, *The Hindutva Judgments: A Warning Signal*, ECON. & POL. WKLY. Jan. 6, 1996, at 10, 11.

The Court's discussion of Hinduism was also ubiquitous. It conflated the term "Hinduism" with "Indianess," closing off any discussion on the possibility of non-Hindu forms of Indianess.[88] The construction of a uniform Hindu culture instantiated an erasure of Muslim identity and religion. It constituted a majoritarian move where "Indianisation" was uncritically assumed to represent the cultural and political aspirations of all Indians, and the norms of the majority applied to all Indians, irrespective of their religious or cultural identity.[89] The formulation that Hinduism as a "way of life" allows for an argument to be made that because it is so extant to the Indian way of life there is no distinction between "Indian culture" and Hinduism *per se*.[90] Through this assimilation, Hinduism, the religion of the majority of Indians comes to reflect the way of life of all Indians.

In accepting the secular nature of the speeches, the Court did not appreciate the broader discursive struggle over the meaning of secularism in India, in which the Hindu Right has been a very active player.[91] The Hindu Right parties appropriated the dominant understanding of secularism as the equal respect for all religions to promote their vision of *Hindutva* and advance their agenda of establishing a Hindu state. Their emphasis on formal equal treatment of all religions on which Indian secularism is based operates as an unmodified majoritarianism whereby the majority Hindu community becomes the norm against which all others are to be judge and treated.

In a subsequent petition filed in the Supreme Court to a larger bench of judges, seeking a review of the *Hindutva* judgment, the petitioner argued that the decision was inconsistent with the Court's earlier ruling in the *Bommai* case.[92] The review petition was rejected on technical grounds. However, in its order the Court observed that there was no inconsistency between the two decisions. In the Court's

88. Prabhoo, A.I.R. 1996 S.C. at 1129–30.

89. *Id*. at 1130.

90. *See id*. (discussing the contest over the meaning of Hinduism).

91. *See generally* Gary Jeffrey Jacobsohn, *By the Light of Reason: Corruption, Religious Speech, and Constitutional Essentials, in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 294 (Nancy L. Rosenblum ed., 2000) (conducting a comparative study with U.S. cases and examining the justifications for constraining religious speech under the Representation of People Act as a constitutional essential but not interrogating the majoritarian instincts that inform the application of the regulation of free speech.).

92. Mohammad Aslam v. Union of India, A.I.R. 1996 S.C. 1611 (India).

view, the *Bommai* case did not relate to the interpretation of the provisions of the Representation of the People Act 1951, and therefore there was nothing in the *Bommai* decision that was of assistance for constructing the meaning and scope of these provisions.[93] At the same time, the Court sought to clarify its decision in the *Hindutva* cases, stating that it was simply based on earlier decisions of the Supreme Court that it was bound to follow and that in no way had it condoned the appeal to religion to gain votes in an election.[94] The Court did not take up the opportunity to address a central contradiction in the *Hindutva* cases: the interpretation on the meaning of *Hindutva* and the secular nature of the speeches of the Hindu Right. The Courts conclusion in the *Hindutva* cases thus effectively vindicated the profoundly anti-secular vision of secularism that the Hindu Right has long been trying to promote and unwittingly left the door ajar for the Hindu Right to continue their discursive strategy in pursuing secularism for their distinctively anti-secular ideological agenda.

The Hindu Right hailed the decision in the *Hindutva* cases as a victory and continue to deploy the decision in its political advocacy not only as an endorsement of the "true meaning and content of *Hindutva* as being consistent with the true meaning and definition of secularism" but also to vindicate and validate its movement to begin the construction of the temple at Ayodhya.[95] Their campaign to construct a Hindu temple where the Babri mosque once stood, by alleging that the mosque was built on the site of the birth of the Hindu god Ram, has generated broad-based support for the Hindu Right. Throughout the campaign some of their supporters have followed the marches to Ayodhya while other others have sent money and bricks to Ayodhya to help construct the new temple.[96] The campaign, which eventually culminated in the destruction of the Babri Masjid on December 6, 1992, was cast by the Hindu Right as a

93. *Id*. at 1612.

94. *Id*.

95. BHARATIYA JANATA PARTY MANIFESTO 1998, available at http://bjpelectionmanifesto.com/pdf/manifesto1998.pdf. *See* BHARATIYA JANATA PARTY MANIFESTO 2009, available at http://www.bjp.org/images/pdf/election_manifesto_english.pdf (making no mention of the term "Hindutva" but referring to the true meaning of secularism within the framework of cultural nationalism).

96. Cossman & Kapur, *supra* note 22, at 118.

legitimate expression of the sentiment of the majority.[97] While the demolition of the mosque triggered massive communal riots around the country in which thousands were killed, the subsequent decision by the Allahabad High Court appears to have conferred some legitimacy on the destruction.

II. THE AYODHYA CASE AND DETERMINING *THE SPOT* WHERE GOD WAS BORN

A. The Historical "Truth Claims" and Legal Narrative

The *Ayodhya* case involves a dispute over the legal title to a property approximately 1500 square yards in size.[98] Hindu parties claim that this particular spot is the *janamsthan* or birthplace of Ram, that they have a right of worship at the site, and that the title and possession of the site itself belongs to Hindu deities.[99] While there are no less than four million gods and goddesses who live with Indians on the sidewalks, streets, and even travel with passengers in taxicabs, Ram has been accorded the status of übergod, especially in the discourse of the Hindu Right and those who have sought to consolidate the tradition under one god and one institution.[100] This consolidation move is a thoroughly modern as well as Semitic move and has been enacted partly in and through the right to freedom of religion. Muslims have continued to assert that they have enjoyed exclusive legal title to the property ever since the Babri mosque was constructed in 1528.

The assertion of the right to freedom of religion is advanced partly through the submission and reliance on a virtual mountain of historical documents and archaeological evidence. For example, the

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97. *See* Shri L.K. Advani, Statements on the Babri Masjid Demolition, BJP TODAY, Jan. 15, 1993, reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 44–45 (defending those who pulled down the mosque as "exasperated by the tardiness of the judicial process, and the obtuseness and myopia of the executive").

98. Visharad v. Ahmad, O.O.S., No. 1 of 1989, All. H.C., 232 (2010) (Khan, J.).

99. *Id*. at 72–73, 77–78.

100. As a number of historians have argued, the claim that Ram is the central Hindu deity runs counter to the polytheist character of Hinduism, transforming its pluralist character that accords well with a modernist and monotheist construction of religion. *See* Romila Thapar, *Syndicated Moksha?*, 313 SEMINAR 14, 15 (1985). *See also* Romila Thapar & Bipan Chandra, *The Political Abuse of History, in* BABRI MASJID/RAMA JANAMABHUMI DISPUTE 235 (Asghar Ali Engineer, ed., 1987); Chetan Bhatt, *Primordial Being: Enlightenment and the Indian Subject of Postcolonial Theory, in* PHILOSOPHIES OF RACE AND ETHNICITY 40, 60–61 (Peter Osborne & Stella Sandford eds., 2002).

Hindu parities relied heavily on the Archaeological Survey of India's findings produced through its court mandated excavations in 2003, which indicated that remnants of a twelfth century temple dedicated to *Ram Lalla* (Infant Ram) existed and stood at the cite that marked the birthplace of Ram.[101] The evidence is used to bolster the arguments made by some Hindu parties that in 1528 a temple was destroyed to build a mosque in its place. Other groups, such as the Nirmohi Akhara (Group without Attachment), used the historical material to claim that no mosque existed at the site and that the Akhara has been the sole custodian of it ever since the time of Ram.[102] They partly relied upon a reference by Joseph Tiffenthaler, a European traveller who visited the town between 1766 and 1771, to the existence of a platform (referred to as the *Ram Chabutra* or Ram platform in later accounts) at the site.[103] The significance of this reference rests in it being located at the site that Hindu parties subsequently claimed to be the birthplace of Lord Ram. Thus, while the historical and archaeological documentation was used by the Hindu parties primarily to demonstrate title and ownership of the disputed site, it was simultaneously also used to advance a claim to the sanctity and sacredness of the site for Hindus and that worship at the site represented a core and essential feature of the Hindu religion and its adherents. In contrast the Muslim parties used the historical material primarily to establish their legal title to the disputed site, rather than to assert their right to religious freedom.[104] They claimed that Mir Baqi Isfahani, a general in the army of the Mughal Emperor Babur, constructed a mosque at the site in 1528 and that the title over it rested with the mosque ever since that time.[105]

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101. Sunni Central Waqf Board v. Gopal Singh Visharad, O.O.S. No. 4 of 1989, All. H.C., Mar. 5, 2003, reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 135–139.

102. Ayodhya, (2010) All. H.C at 59 (Agarwal, J., Vol. 1). The Nirmohi Akhara was to become one of the main claimants in the Ayodhya legal dispute. They represent one of seven cloisters or akharas in Ayodhya, who worship Vishnu, and Ram as Vishnu's avatar or incarnation. Hence the site is of particular relevance to Vaishnavite Hindus. *See* Hans Bakker, *Ayodhya: A Hindu Jerusalem: An Investigation of "Holy War" as a Religious Idea in the Light of Communal Unrest in India*, 38 NUMEN 80, 89–90 (1991) (stating that they view Ayodhya as sacred because Vishnu was born there and that Ram is Vishnu's incarnation).

103. Ayodhya, (2010) All. H.C at 20–23 (Sharma, J., Vol. 4).

104. *Id*. at 29–30 (Agarwal, J., Vol. 1).

105. *Id*.

The historical claims provide the backdrop to the legal contest that has been in existence since the latter part of the nineteenth century.[106] In 1857, a series of skirmishes took place when Hindu ascetics occupied the alleged birthplace of Ram and the Muslims in the area retaliated.[107] A compromise was reached whereby a partition was constructed on the disputed land in two equal parts.[108] The inner portion or inner courtyard was allotted to the Muslims and the outer portion or outer courtyard was allotted to the Hindus.[109] In 1885, Raghubar Das, the Hindu Mahant (head priest), sought permission from the district court to build a temple over the *Ram Chabutra* in the outer portion, that is, the land adjoining the Babri mosque.[110] The suit was filed when some Hindu ascetics attempted to extend the boundary of the outer courtyard that would have also incorporated a Muslim cemetery that existed on the site.[111] This case marks the first moment when the dispute was initiated into the legal arena. The *Mutwalli* (manager) of the Babri Mosque contested the suit claiming that the entire land belonged to the mosque.[112] He argued that merely because Hindus had been allowed to pray in the mosque from time to time they could not acquire title over the property. A map submitted to the court indicating the demarcation of the land into two equal parts was not however disputed.[113] While the possession of the land by the Hindus was accepted, the suit was denied on public policy grounds that the construction of a temple would lead to the performance of noisy rituals including the blowing of conch shells, and since Muslims were praying nearby, their service would be disrupted. The court held that the construction would aggravate the already pervasive ill will and tension between the two communities.[114]

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106. *See* Parmanand Singh, *The Legal History of the Ayodhya Litigation, in* RAM JANMABHOOMI BABRI MASJID: HISTORICAL DOCUMENTS, LEGAL OPINIONS AND JUDGMENTS 29 (Vinay Chandra Mishra ed., 1991) (noting that a lawsuit was bought in 1885 regarding an attempt to construct a Ram Temple on the site of the Babri-Masjid).

107. Ayodhya, (2010) All. H.C. at 6 (Khan, J.). *See* THE BABRI MASJID QUESTION, *supra* note 38, at (173–175).

108. Ayodhya, (2010) All. H.C. at 6–7.

109. *Id*. at 7.

110. *Id*. at 9–12.

111. *Id*.

112. *Id*. at 16; THE BABRI MASJID QUESTION, *supra* note 38, at 178–181.

113. Ayodhya, (2010) All. H.C. at 13–15, 17.

114. *See* A.G. Noorani, *Legal Aspects to the Issue in* ANATOMY OF A CONFRONTATION: THE RISE OF COMMUNAL POLITICS IN INDIA 65 (Sarvepalli Gopal ed., 1991) (discussing the judge's reason for declining to decree the suit).

A similar logic was adopted in subsequent court appeals. In the first appeal, Judge F.E.A. Chamier visited the disputed spot and admitted, "[i]t is most unfortunate that a Masjid should have been built on the land especially held sacred by the Hindus. But as that occurred 356 years ago, it is too late now to remedy the grievance. All that can be done is to maintain the parties in status quo."[115] A further appeal was also dismissed, with the Judge stating:

> This spot is situated within the precinct of the ground surrounding a mosque erected some 350 years ago owing to the bigotry and tyranny of the emperor who purposely chose this holy spot, according to Hindu legend, as the site of his mosque. The Hindus seem to have got very limited rights of access to certain spots within the precinct adjoining the mosque and they have for a series of years been persistently trying to increase those rights and to erect buildings on two spots in the enclosure namely: (1) Sita- ki-Rasoi (kitchen of Sita) and (2) Ram- Chander-ki-Janmabhoomi (birthplace of Lord Ram). The executive authorities have persistently refused these encroachments and absolutely forbid any alteration of the status quo.[116]

He further added that there was nothing on record to show that the plaintiff Raghubar Das was a proprietor of the land.[117] The proceedings represented the first time when the disputed land was formally divided into a Hindu and a Muslim portion and also marks the emergence of the legal contest over the content of religious liberty. The modes of worship of the Hindus and Muslims would become a focus of judicial attention in the subsequent legal narrative of the case, with a persistent question remaining as to how these modes of worship and claims to property could be evaluated. The visit to the disputed site by the judges, as well as the recording of identifying marks and inscriptions on the monument, the routines of prayer and their timings, and the drawing up of procedures for regulating entry into the disputed site, were all used to construct the terms of the dispute and the content of the right to freedom of religion.

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115. *Id*.
116. *Id*. at 66.
117. *Id*.

In 1934, there were further riots between Hindus and Muslims at the disputed site, which caused severe damage to the mosque.[118] The damage occurred when some *sadhus* (holy men) led by the Nirmohi Akhara forcefully occupied the mosque. Some of the Hindu parties claimed that the structure ceased to exist as a place of worship for Muslims from that time and as Hindus continued to hold their prayers at the disputed spot they could claim possession of the entire property.[119] Muslim parties, in particular the Sunni Central Waqf Board, claimed that Muslims had continued to offer *namaz* (prayers) in the inner courtyard and remained in possession of the property.[120] In addition, in 1936, the board claimed that the mosque was *waqf* property and that the Sunni Board was its sole legatee.[121]

In 1947, the City Magistrate of Faizabad ordered that the *Ram Chabutra* could not be converted into a permanent structure. Muslims were at the same time prohibited from re-building the damaged section of the mosque.[122] The order further embedded the dispute within the legal process. In 1949, there were a series of further disturbances that culminated in some Hindu worshippers placing the idols from the outer area into the inner courtyard under the central dome of the mosque during the night of December 22, claiming the spot to be *the* exact birthplace of Ram.[123] The court immediately issued a notice to attach the disputed property and handed temporary possession to a government appointed receiver.[124]

A few days after the installation of the idols, K.K.K. Nayar, the District Magistrate of Faizabad in correspondence with the Chief Secretary of Uttar Pradesh, requested that the Hindus be given permission to erect a "decent and *vishal* (large) temple," stating that

118. *See* Parmanand Singh, *Legal History of the Ayodhya Litigation*, 18 INDIAN BAR REV. 31 (1991), reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 189 (noting that the riot was sparked by the slaughter of a cow during a Muslim festival).

119. Ayodhya, (2010) All. H.C at 48–49 (Agarwal, J., Vol. 1).

120. *Id*. at 21–22; *Id.* at 52 (Khan, J.).

121. *Id*. at 30 (Agarwal, J., Vol. 1). Waqf means a "permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable . . ." Wakf Act, No. 43 of 1995, INDIA CODE (1993), available at http://indiacode.nic.in. Each waqf has a trustee and each mosque, a keeper or mutawalli. *Id*. Unlike a Hindu mahant, the mutawalli or manager has no propriety interest in the property nor is he allowed to derive any profit or financial gain from the property. *Id*.

122. Order of City Magistrate, Faizabad (Apr. 28, 1947), reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 202.

123. Ayodhya, (2010) All. H.C. at 23–24 (Khan, J.).

124. *Id*. at 36–37.

the removal of the icons would amount to a "step of administrative bankruptcy and tyranny," and produce immense suffering.[125] Nayar mentions the slogans raised by the crowds demanding that he "open the doors of the lord."[126] Implicit in this request is that Hindus would be deeply affronted should the idols be removed and that such an act would be regarded as a violation of a deeply held belief that the site of the idols marked the spot where god was born. The state took possession of the mosque on January 5, 1950, and neither of the groups was allowed to worship at the site.[127] However, while the enclosure where the idols were placed was fenced off, Hindu worshipers were permitted to worship from outside the fenced off area.[128] Muslims were no longer able to offer any prayers inside the mosque.[129] The Additional City Magistrate of Faizabad and Ayodhya also appointed a Hindu receiver to take care of the property until the court had determined the right to ownership.[130] While the original division of the land into Hindu and Muslim sections was retained, the appointment of a Hindu receiver, together with the installation of the deities under the central dome of the mosque and the legal recognition of their installation represented a shift from the status quo towards an acknowledgement of the claim that the right to worship at the spot where the idols were installed was integral to the Hindu faith.

The legalisation of the dispute through the local district courts continued between 1950 up until 1986. In 1950, a suit was filed claiming that the right to worship the idols was denied to Hindus by the order of receivership by Gopal Singh Visharad, a Hindu Mahasabha Member, and Parmahans Ramchandra Das, head of the Ram Janmabhomi Nyas (Ram Birthplace Trust).[131] They claimed an

125. Letter from Deputy Commissioner, Faizabad, to Chief Secretary, Government of Uttar Pradesh (Dec. 27, 1949), reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 215–18.

126. *Id*. at 217. K.K.K. Nayar went on the contest the Utter Pradesh assembly elections in 1950 supported by Hindu organizations.

127. S.K. Tripathi, *Magistrate Markandey Singh's Order under Section 145 of the Criminal Procedure Code 1898*, INDIAN EXPRESS, Mar. 30, 1986, reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 218; Noorani, *supra* note 114, at 74–75.

128. Ayodhya, (2010) All. H.C. at 41 (Khan, J.).

129. *Id*. at 40–41.

130. *Id*. at 40; THE BABRI MASJID QUESTION, *supra* note 38, at 218.

131. Ayodhya, (2010) All. H.C. at 42–44. The right was allegedly denied because of § 145 of the Code of Criminal Procedure, 1898, which permitted a

unobstructed right to worship the idols at the place where the main dome of the mosque once stood.[132] In 1959, the Nirmohi Akhara filed a suit against the court receiver and the state government of Uttar Pradesh claiming to be the religious order traditionally charged with the maintenance and management of the Ram Janamsthan.[133] They claimed that a Hindu Temple dedicated to *Ram Lalla* (infant Ram) stood at the disputed spot ever since the twelfth century, marking his birthplace.[134] In the alternative, they argued that Babur, the first Moghul emperor, had tried to unsuccessfully convert the temple into a mosque.[135] Moreover, they argued that as Hindus had continued to pray and worship at the spot and no *namaz* (prayer) had been held inside the mosque since 1934, the Akhara was the sole owner of the Ram Janamsthan, as well as the temple and idol.[136] In 1961, the Sunni Central Waqf Board filed a suit seeking a declaration that the disputed structure was a mosque and that possession of it be handed over to the Board.[137] They stated that the structure was built on barren land or, in the alternative, on the ruins of a temple and that Muslims had been praying at the Babri Masjid since 1528, a practice that was halted after the idols were installed.[138] They claimed that they had exclusive possession of the premises though Hindus had prayed in the outer courtyard.[139] The four suits were consolidated with the suit of the Sunni Waqf Board being treated as the leading case.[140]

The last suit was filed in 1980 on behalf of the idol, Ram Lalla, and the Ram Janamsthan, with the petitioner claiming that both were juristic entities, as deities were legally capable of holding land in

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magistrate to order that the devotees could only practice worship from behind the railing that had been installed.

132. *Id*. at 44.

133. *Id*. *See* Nirmohi Akhara v. Baboo Priya Datt Ram, O.O.S., No. 3 of 1989, All. H.C. (India).

134. While the Archeological of India (ASI) came to the ambiguous conclusion that its excavations revealed the existence of remnants of a temple-like structure in the place where the mosque was constructed, these findings remained disputed throughout the course of the proceedings by the Sunni Central Wakf Board as well as various academics. *See* Supriya Varma & Jaya Menon, *Was There a Temple under the Babri Masjid? Reading the Archaeological "Evidence,"* ECO. & POL. WKLY., Nov. 11, 2010, at 61, 61–71 (2010).

135. Ayodhya, (2010) All. H.C. at 32 (Agarwal, J., Vol. 1).

136. *Id*. at 47–49 (Khan, J.).

137. *Id*. at 50–51, 58–59 (citing Sunni Central Board of Waqfs, U.P v. Gopal Singh Visharad, O.O.S., No. 4 of 1989, All. H.C. (India)).

138. Ayodhya, (2010) All. H.C. at 1 (Sharma, J., No. 2, Vol. 1).

139. *Id*. at 55–56 (Khan, J.).

140. *Id*. at 78–79.

their own name and of suing and being sued.[141] They acquired a legal personality with the attributes of real individuals, backed by administrative doctrines.[142] The petitioner filed the suit as "a friend" of the idol, seeking title and possession of the disputed property solely in favour of Ram. The petitioner was a member of the VHP, established in the mid-1960s to popularize the message of the Hindu Right.[143] The relevance of this suit lay partly in the fact that the VHP did not trust the Nirmohi Akhara, whose interest seemed to be in asserting a religious claim and not with the broader political agenda of the VHP. This suit was filed at a time when the political climate in India had changed considerably as a mass based agitation had been launched for the construction of the temple spearheaded by the BJP and led by its former head L.K. Advani.[144]

141. *Id*. at 69–70. A deity has the identity of a juridical entity, who can be both sued and also sue. The deity can be represented by a qualified person, who is known as the Shebait/Dharmakarta, and whose responsibility it is to protect the idol's property. The origin of the notion that idols are juristic persons in law seems to be based in Roman law, where a similar concept operated with respect to churches. *See* FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 481 (1895) ("Perhaps the oldest of all juristic persons is the god, hero or the saint."). However, over the years, the notion of a juristic person for the idol has been developed by Indian courts as one based on the religious customs of the Hindus themselves. *See, e.g*., Pramatha Nath Mullick v. Pradyumna Kumar Mullick, (1925) 52 I.A. 245 (India) (stating that a Hindu idol has the power to sue and be sued); Kalanka Devi Sansthan v. Maharashtra Revenue Tribal, Nagpuri, A.I.R. 1970 S.C. 439, 441 (India) ("[W]hen property is given absolutely for the worship of an idol it vests in the idol itself as a juristic person.").

142. Hindu religious idols and images are considered animate and capable of making economic, political, and legal claims. *See* J. DUNCAN M. DERRETT, RELIGION, LAW AND THE STATE IN INDIA 484–85 (1968) (discussing the legal personality of Hindu idols).

143. *See generally* MANJARI KATJU, VISHVA HINDU PARISHAD AND INDIAN POLITICS (2003) (providing a detailed discussion on the role of the VHP in Indian politics).

144. L.K. Advani was the leader of the opposition BJP in September 1990. He launched a rath yatra (journey of the charioteer) across a number of states in India to garner support for the construction of the Ram temple in Ayodhya. *See* Pinarayi: Sudheeran's Remarks a Challenge to Secularism, HINDU (March 19, 2014), http://www.thehindu.com/todays-paper/tp-national/tp-kerala/pinarayi-sudheerans-remarks-a-challenge-to-secularism/article5803249.ece (stating that Advani, along with former Prime Minister A.B. Vajpayee that created "communal agitation all over the country for constructing a Ram temple in Ayodhya").

From the mid-1980s, the Hindu parties stepped up their rhetoric and sought court sanction over the performance of specific rituals at the site. These interventions coincided with the rise of the Hindu Right as a powerful political force in contemporary Indian politics. Some of these interventions included a suit seeking the removal of the locks that had been placed on the fenced off portion.[145] In 1986, the local district Judge directed that the locks of the mosque be opened, without hearing the application for impleadment made by interested Muslim parties as well as the Waqf board. The Judge urged the Muslims to recognize the fact that the idols and site were juristic entities and had a legal personality, and that they should permit Hindu worshippers to access the site. He stated that the Muslims would not be affected in any manner if the locks of the gates were to be opened and pilgrims and devotees allowed inside the premise to worship. The court added:

> It is undisputed that the premises are presently in the court's possession and that for the last 35 years Hindus have had an unrestricted right of worship as a result of the court's order of 1950 and 1951. If the Hindus are offering prayers and worshipping the idols, though in a restricted way for the last 35 years, then the heavens are not going to fall if the locks of the gates are removed.[146]

In the process of delivering its order, the court initiated a process of universalizing the practice of worshipping at the site as an essential practice and an experience and belief of all Hindus. The locks were broken open within half an hour of the pronouncement of the order.[147]

Thereafter, in 1989, the VHP, one of the parties to the *Ayodhya* dispute, conducted an event consecrating the bricks to be used for the construction of the temple and invited villagers and communities around the country to make bricks for the temple that would be transported to the site.[148] The Allahabad High Court refused a request for an injunction against the consecration and transportation of the bricks, while it also directed that the status quo over the disputed site

145. Umesh Chandra Mishra Pandey v. State of Uttar Pradesh, 1991 L.L.R. 638 (India) reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 267–69.

146. NOORANI, *supra* note 114, at 79.

147. Ayodhya, (2010) All. H.C. at 88 (Khan, J.). Mohammad Hashim filed a write petition in the Allahabad High Court challenging the order. *See* THE BABRI MASJID QUESTION, *supra* note 38, at 270.

148. DIANE P. MINES, FIERCE GODS 203 (2005).

be maintained.[149] Hundreds of thousands of bricks poured into Ayodhya and in October 1990 several workers belonging to the Hindu Right parties stormed the mosque and placed three saffron flags on the domes of the mosque, damaging them in the process.[150] The process of acquisition and legitimation of their claim to worship at the exact spot where the idols were lodged had acquired a significant momentum and was gradually being consolidated.

The Uttar Pradesh state government also helped in the consolidation move by acquiring almost three acres of land including the cemetery and outer portion of the mosque, ostensibly to provide facilities for the pilgrims visiting the site and to accommodate tourism.[151] This move was challenged on the grounds that the land was *waqf* property and hence could not be acquired by the state government.[152] The petition further alleged that the acquisition was motivated by a bigger design to ensure the construction of a temple.[153] While the court issued an interim order upholding the acquisition of the land, it also held that the possession would be subject to further orders and that the land could not be alienated or transferred.[154]

On December 6, 1992 the mosque was demolished by Hindu *karsevaks* (volunteers), after the BJP and other members of the Hindu

149. *See* Sunni Central Board of Waqfs, U.P v. Gopal Singh Visharad, O.O.S., No. 4 of 1989, All. H.C. (India).

150. THE BABRI MASJID QUESTION, *supra* note 38, at 331–33; Krishna Pokharel & Paul Beckett, *Ayodhya, the Battle for India's Soul: Chapter Four*, WALL ST. J. (Dec. 6, 2012), http://blogs.wsj.com/indiarealtime/2012/12/06/ayodhya-the-battle-for-indias-soul-chapter-four/; Mark Tully, *Ayodhya Showed that Mixing Religion and Politics is Playing with Fire*, INDIA TODAY (Dec. 17, 2012), http://indiatoday.intoday.in/story/mark-tully-ayodhya-babri-masjiddemolition/1/236638.html.

151. Uttar Pradesh State Gov't Notification No. 3814/XLI-33-86, dated Oct. 7, 1991, reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 334–36.

152. Mohd. Hashim v. State of Uttar Pradesh, Order on Writ Petition 3540 (M/B) of 1991, reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 337.

153. *Id*. (the notification said the purpose of the acquisition was for developing tourism and providing amenities to pilgrims).

154. In a separate writ filed by the Sakshi Gopal Temple ensuring that the acquisition would not affect the religious character of the site, the court held that the acquisition would be subject to the caveat that the deity in the temple would be preserved and that no permanent structure would be constructed at the site. Shakshi Gopal v. State of Uttar Pradesh, Writ Petition No. 3579 (HB) of 1991, reprinted in THE BABRI MASJID QUESTION, *supra* note 38, at 344.

Right organized a religious prayer ceremony that was to mark the symbolic construction of the temple.[155] The destruction of the mosque was partly facilitated by the history of the legal dispute that preceded it, where the courts invariably decided in favour of the Hindu parties, together with the ideological zeal of the Hindu Right, which remained determined to establish the site as integral to the Hindu faith and identity.

As discussed earlier, the government subsequently issued an ordinance to acquire the disputed site and adjacent lands following the destruction of the mosque, and a constitutional challenge to the act was dismissed. The Court however invalidated section 4(3), which provided for the abatement of all pending suits and legal proceedings pertaining to the disputed structure.[156] In light of this decision, in 1995, a three-judge bench of the Allahabad High Court re-commenced proceedings to hear the arguments in the dispute and delivered its decision on September 30, 2010.

B. The Judicial Holdings

On September 30, 2010, the decision in the Ayodhya land-holding case was delivered by a three-member bench of the Allahabad High Court, located in India's western state of Uttar Pradesh, amidst tight security.[157] The three judges included: Justice Khan, a Muslim; Justice Agarwal, who delivered the majority opinion; and Justice Sharma, who was the dissenting judge in the case. The decision ran into a staggering 8,189 pages, the longest being 5,238 pages and delivered by Justice Agarwal. While there was no outbreak of public violence after the decision was pronounced, appeals were filed by all sides in the Supreme Court, reflecting considerable dissatisfaction over the ruling.

On the specific issue of the right to freedom of religion, the "Muslim" parties did not advance any arguments based on the freedom of religion clauses. And Justice Khan was the only one of the three judges who did not address the arguments made in relation to

155. *Id*. at 254. Dilip Awasthi, *Babri Masjid Demolition - 1992: A Look at the Countdown to Disaster*, INDIA TODAY (Dec. 5, 2011), http://indiatoday.intoday.in/story/babri-masjid-demolition-1992-ayodhya-shame/1/162900.html.

156. Ismail Faruqui v. Union of India, (1994) 6 S.C.C. 360, 383 (India).

157. Several companies of the Central Security Paramilitary forces as well as the police were deployed across the state and through different parts of the country, and special security was provided to the three judges who rendered the decision in the title disputes. *Tight Security Across the Country amid Appeals for Peace*, HINDU (Sept. 30, 2010), http://www.thehindu.com/news/national/tight-security-across-the-country-amid-appeals-for-peace/article804415.ece.

Articles 25 and 26, but focused exclusively on the issue of title.[158] Justice Khan held that neither party was able to demonstrate exclusive title to the disputed property.[159] The available evidence indicated that by the middle of the eighteenth century there existed a mosque at the site and that by the middle of the nineteenth century Hindus were claiming that this site was the birthplace of Ram.[160] Since 1855, both parties appeared to be in joint possession of the site.[161] Justice Khan decided to divide the disputed property into three equal parts: one part was awarded to the Muslim parties; one part was given to the Hindu Idols, with the caveat that their part should include the land under the central dome; and one part was handed over to the Nirmohi Akhara with the caveat that their part should include the outer courtyard.[162] Justice Khan based his decision on the issue of title and possession, rather than on considerations of the right to freedom of religion, although he recognised the significance of the site for Hindus.[163]

Justice Khan's decision to divide the property into three parts is curious and there is no real explanation for altering the situation from 1949 when the property was divided into two nearly equal parts between the Hindu and Muslim communities. In permitting the area under the central dome to be given over to the idols, the judge's decision is contrary to the acknowledged fact that the idols had been placed there illegally and only in 1949. Justice Khan's decision placed the onus on the Muslim community to make all the necessary adjustments in relation to the dispute.[164]

Justice Agarwal accepted that there was a non-Islamic, ancient structure that stood where the mosque once stood.[165] While the earlier

158. Ayodhya, (2010) All. H.C. at 250–55 (Khan, J.) (addressing the issue of title); *id*. at 4997–98, 5043–44 (Agarwal, J.) (discussing protections under Articles 25 and 26); *id*. at 166 (Sharma, J.) (noting the differences in protection provided by Articles 25 and 26).

159. *Id*. at 255, 283 (Khan, J.).

160. *Id*. at 206, 281, 283.

161. *Id*. at 250, 260.

162. *Id*. at 275–76, 284–85.

163. *Id*. at 243–44, 250–56.

164. *See id*. at 279–80 ("Indian Muslims … are therefore in the best position to tell the world the correct position. Let them start with their role in the resolution of the conflict at hand.").

165. *Id*. at 4414–15 (Agarwal, J., Vol. 18); *see also* ALIGARH HISTORIANS SOCIETY, HISTORY AND THE JUDGEMENT OF THE ALLAHABAD HIGH COURT, (LUCKNOW BENCH) IN THE RAMJANMABHUMI–BABRI MASJID CASE iii–iv (2010)

structure appeared to be a Hindu religious place, the ruins could also be evidence of other non-Islamic traditions or practices.[166] He also accepted that there was evidence of persistent practice as well as a strong belief on the part of Hindus that the disputed spot, particularly the spot under the central dome, was the birthplace of Ram.[167] This faith was borne out by ancient literature that Justice Agarwal stated should be "accepted on its face without any 'tinkering.'"[168] He thus implied that such persistent practice and faith was enough to deify the place and give it a juridical personality.

Justice Agarwal addressed the issue of whether a deity has a right to file a suit, a right that was contingent on whether the idol had been properly consecrated and hence acquired a juristic personality. The Judge observed that a determination whether the idol had been properly consecrated could only be made according to the doctrine and belief of the respective religious denomination.[169] In considering this issue, Justice Agarwal involved himself in the construction of Hindu tradition and belief. The Hindu parties contended that the entire site would be regarded as a temple and have a juristic personality.[170] During the course of the proceedings, Justice Agarwal asked the Hindu parities whether the worship of rivers and hills by Hindus, would render all such places juristic persons?[171] In response, the defendants stated:

> [I]t is the belief of the Hindu people that the fort of King Dashrath situated at Ayodhya included the part of the building wherein Lord Rama was born according to Hindu belief and the disputed area covered that house. It is believed that it is this place which is so pious and sacred for Hindu people being the birthplace of Lord Rama and, therefore, in this particular case, it is not necessary to go into larger question since it is not the claim of the Hindu parties that the entire city of Ayodhya or the entire locality is birthplace of Lord Rama. He was born at Ayodhya is a well-known fact. In Ayodhya, it is the disputed place

(discussing Judge Agarwal's judgment and how his reasoning and understandings of the dispute are historically flawed).

166. Ayodhya, (2010) All. H.C. at 4414–15.

167. *Id*. at 4436.

168. *Id*. at 3502.

169. *Id*. at 2173.

170. *Id*. at 1807, 1831, 1975 (Agarwal, J., Vol. 8).

171. *Id*. at 1974–75.

> where the Lord of Lords was manifested in the form of natural person and, therefore, it is believed to be the birthplace of Lord Rama by Hindus for time immemorial and they visit it to worship and Darshan. This satisfy [sic] the requirement of a 'deity.' He submits that 'deity' in the name of birthplace of Lord Rama is a legal person considering the concept of legal personality of Hindu deity…[172]

The Judge accepted this argument (while construing the spiritual nature of Hinduism) and held that "[i]f the public goes for worship considering that there is a divine presence and offer worship thereat believing that they are likely to be the recipient of the bounty of God then it satisfies the test of a temple. Installation of an idol or the mode of worship are not the relevant and conclusive test."[173] Justice Agarwal also held that the deity was a perpetual minor and therefore no claim of adverse possession could be made against the deity.[174] For the same reason the suit on behalf of the Lord Ram filed in 1989 was not time-barred and a next of friend was entitled to represent the deity.

Various Indian courts have recognised a temple deity as a legal entity and that even a devotee or a regular worshipper can move the court on behalf of the presiding deity.[175] Justice Agarwal's holding could have serious implications with regards to claims being made all over India in relation to Islamic structures and historical monuments. He also cited the right to freedom of religion and the view that the right to worship at the birthplace of Ram constituted a core ingredient

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172. *Id*. at 1975.

173. *Id*. at 1977.

174. *Id*. at 2031–33.

175. *Id*. at 2034. There have been several cases recognizing that all deities are perpetual minors, not only child deities such as Lord Ram. As a result the courts have held that no suit filed on their behalf can be treated as time-barred. Sri Adi Visheshwara v. State of Uttar Pradesh, 1997 (4) S.C. 124 (where the Court ruled that a deity could move the court and that the properties of endowment vested in the deity). Several scholars have disputed the equation of idols with minors. *See, e.g.*, Gautam Patel, *Idols in Law*, ECO. & POL. WKLY 49 (2010); Debaashish Bhattacharya, *God of Small Things*, THE TELEGRAPH (Nov. 7, 2010), http://www.telegraphindia.com/1101107/jsp/7days/story_13147783.jsp; J. Venkatesan, *Suits on Behalf of Deities Can't be Treated as Time-Barred*, HINDU (Oct. 3, 2010), http://www.thehindu.com/todays-paper/tp-national/suits-on-behalf-of-deities-cant-be-treated-as-timebarred/article810107.ece.

of the Hindu faith.[176] To allow a claim of adverse possession would extinguish a core feature of the religion and hence the religion itself, and would be contrary to the fundamental right of freedom of religion protected under articles 25 and 26 of the Constitution. He further stated that while the state could acquire any property that belonged to a particular religious group for public purpose, it was refrained from doing so if the property was of "special significance" to the community.[177] Such state intervention would violate Article 26 that protected the essential features of a religion. Justice Agarwal thus held that, "Undoubtedly, Asthan Ram Janma Bhumi . . . belongs to this very category of Deity – Class entirely by itself; hence the State cannot acquire either the Deity or its property."[178]

Justice Agarwal also held that the statute of limitation, which bars a suit from being filed after a specific period of time has passed (usually three years from the date of the initial wrong or violation), would not apply in this case as it would violate the fundamental rights of the Hindus to worship at the site.[179] Justice Agarwal stated:

> It is a deity, which has filed the present suit for enforcement of its rights. The religious endowment in the case in hand so far as Hindus are concerned, as they have pleaded in general, is a place of a peculiar and unique significance for them and there cannot be any other place like this. In case this place is allowed to extinguish/extinct [sic] by application of a provision of statutes, may be of limitation or otherwise, the fundamental right of practicing religion shall stand denied to the Hindus permanently since the very endowment or the place of religion will disappear for all times to come and this kind of place cannot be created elsewhere.[180]

Justice Agarwal further stated that a similar argument could have been available to the Muslim parties had they been able to show that that the mosque was of special significance to them:

> In fact this reason could have been available to the plaintiffs (Suit-4) also had it been shown by them that the mosque in question for them was a place of special

176. Ayodhya, (2010) All. H.C. at 2617 (Agarwal, J..Vol. 12).
177. *Id*. at 2551–2552 (Vol. 11), 2615–17 (Vol. 12).
178. *Id*. at 2552 (Vol. 11).
179. *Id*. at 2611–15.
180. *Id*. at 2615.

> significance but this has already been observed by the Apex Court in respect to this particular mosque that like others it is one of the several mosques and by acquisition of the place it will not have the effect of depriving such fundamental right of Muslims. It is always open to them to offer prayer at any other place like they could have done here but Hindus are not placed on similar footing. According to Hindus, this is a place of birth of lord Rama and that be so, there cannot be any other place for which such belief persists since time immemorial. Once this land is allowed to be lost due to the acts of persons other than Hindus, the very right of this section of people, as protected by Article 25, shall stand destroyed.[181]

Referring to the Supreme Court decision in *Ismail Faruqui* discussed earlier in this article, Justice Agarwal further stated:

> 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. . . . [U]nless the right to worship at a particular place is itself an integral part of that right, i.e., the place is of a particular significance, its alienability cannot be doubted.[182]

Implicit in Justice Agarwal's reasoning is that the offering of *namaz* by Muslims is not as significant to their religion as is worship at the birthplace of Ram for Hindus. The holding suggests that the individual right to worship is an inferior right to the Hindu's collective right to worship at the site where god was ostensibly born. The decision suggests that the Muslim's individual right to worship is an inferior right to the Hindu's collective right to worship at the site where god was ostensibly born. Justice Agarwal's reasoning reflects that what is at stake is nothing less than the epistemological basis and competing truth claims of different religious traditions.

Justice Agarwal proceeded to articulate how the fundamental right to freedom of religion gets established and protected. He stated that:

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181. *Id*. at 2617.
182. *Id*. at 4412 (Agarwal, J., Vol. 18).

> It may be noticed at this stage the scope of judicial review about what constitute religious belief or what [are] essential religious practices or what rites and ceremonies are essential according to the tenets of a particular religion. It is not the subject to the belief or faith of a judge but once it is found that a belief, faith, rite or ceremony is genuinely and consciously treated to be part of the profession or practice of a religion by the segment of people of distinct group, believing in that particular religion, suffice it to constitute 'religion' within the term of Article 25 of the Constitution whereunder the persons of the said segment have a fundamental right to practice their religion without any interruption from the State. This right is subject only to public order, morality and health and to the other provisions of Part III of the Constitution as well as the power of the State to make laws in respect to the matter provided in Article 25(2) of the Constitution. This right is conferred to the persons professing, practising and propagating the concerned religion.[183]

He further added:

> [O]nce such belief gets concentrated to a particular point, and in totality of the facts, we also find no reason otherwise, it partakes the nature of an essential part of religion particularly when it relates to a matter which is of peculiar significance to a religion. It, therefore, stands on a different footing. Such an essential part of religion is constitutionally protected under Article 25.[184]

Having held that the Hindu parties had established their fundamental right to worship at the site on the grounds that it was an essential feature of their faith, Justice Agarwal addressed the other arguments of the Muslim parties. He proceeded to hold that the Muslim parties had not proved that Babur had title over the land nor had they successfully challenged the argument that the construction of the mosque failed to adhere to the principles of Islam. Hence, he declared that the structure was not a legitimate mosque and that it was non-existent. He held that the area under the dome had to be

183. *Id*. at 1036–37 (Agarwal, J., Vol. 5).
184. *Id*. at 4997–98 (Agarwal, J., Vol. 20).

given to the idols, the inner courtyard to be shared between Hindus and Muslims and the outer courtyard to be shared between the idols and Nirmohi Akhara.[185] However, he also stated that the Muslim parties should be given at least a third of what the other parties were being given, and requested the government to ensure land was made available for such a purpose.[186] This last move was more of an act of Solomonic justice, rather than based on the facts and legal questions raised in relation to possession and title.[187]

In his dissenting opinion set out in 2,666 pages, Justice Sharma held that the disputed site had long been believed to be the birthplace of the "Lord of the Universe"—Shri Ram.[188] He explicitly treats the dispute as not between private parties but between religious communities, stating that "the present suit is a representative suit and plaintiffs are representing the interest of Muslims and defendants have been arrayed representing the interest of Hindus."[189] He further stated that the "the dominant issue in the present dispute pertains to the legal adjudication of matters relating to the Hindu faith."[190] In this regard, he noted, approvingly quoting from B.K. Mukherji's *The Hindu Law of Religious and Charitable Trusts*, that the Court was obliged to "act upon the belief of the members of the community concerned, and unless these beliefs are per se immoral or opposed to public policy, it cannot exclude those who profess any lawful creed from the benefit of charitable gifts..."[191] Justice Sharma also placed considerable reliance on the historical documentation. In this regard, he pointed out that the Court had decided to take the assistance of archeological "science," since according to him, archeology would deliver accurate answers to the dispute.[192] On the basis of the

185. *Id*. at 5077.

186. *Id*. at 5077–78.

187. Implicit in Justice Agarwal position is that while the disputed site was sacred to Hindus and that worship there was an essential practice of the Hindu faith, the Muslims should not feel that they were being deprived of all rights. Given that a mosque had been destroyed, some level of compensation needed to be provided to the Muslim groups to assuage the sense of injustice they were experiencing, but it would not be at the cost of the Hindu right to worship precisely at the spot where the mosque once stood.

188. *Id*. at 192 (Sharma, J., Vol. 1).

189. *Id*. at 206. Notably, the Muslims did not contest this position.

190. *Id*. at 28 (Vol. 4).

191. *Id*. at 29–30.

192. *Id*. at 28. ("It is not a matter of dispute now that in the modern age Archaeological Science has achieved the great accuracy. Thus with the assistance

Archaeological Survey of India report that there existed a temple before the mosque and parts of the temple were used in the construction of the mosque, Justice Sharma concluded that a Ram Janambhoomi temple was destroyed in order to construct the mosque.[193] Relying on excerpts from the report and statements made by the various officials working under the ASI, Justice Sharma, showed how the various artifacts discovered during the ASI excavation of the site, left "no doubt" that the structure was a temple.[194] He treated the report and statements of ASI officials as expert evidence and also held that there was no evidence that the report was biased, but was "scientific."[195]

Based on his broad reading of Article 25, and tenets of Hindu faith, Justice Sharma held that:

> [E]ach and every thing connected with the Lord of Universe is of great value to the Hindus and extinction of the most holiest shrine Sri Ramajanamsthan will deprive the Hindus from acquiring unparallel merit and salvation which can be obtained only by visiting the said sacred shrine and performing customary ritual there.[196]
>
> . . .
>
> [A]s the Suit premises is the Birth Place of the Lord of Universe Sri Rama and his invisible power is present in the said Sthandil [sic. a piece of open ground] the Hindus have superior fundamental right to worship at that sacred place according to injunctions of their Sacred Scriptures in comparison to the fundamental

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of Archaeological Science, one can answer up to the considerable degree of certainty about various past activities of people for which material evidence is available.").

193. *Id*. at 160–61.

194. *Id*. at 80.

195. *Id*. at 94 ("The main thrust of the plaintiffs is that there was a structure which was not a Hindu religious structure is not believable for the reasons that certain images were found on the spot were there. Hundreds of artifacts which find mention in the report were recovered during the excavation that denote the existence of Hindu religious structure."); *Id*. at 96 ("The Court is taking full care and issued specific directions to maintain transparency. . . . The excavation was conducted in presence of the parties, lawyers and their nominees. Thus, no body can raise a finger about the propriety of the report on the ground of bias. There is nothing on record to suggest that the scientific report is incorrect.").

196. *Id*. at 203 (Sharma, J., Vol. 4). .

> right of the Muslims to offer their prayer at that place which in not integral part of Muslim religion.[197]

Finding that there was adequate proof the disputed area was the birthplace of Ram, and as the birthplace of Ram itself was a deity for purposes of holding property, Justice Sharma held that the property belonged to the deity itself.[198] Like Justice Agarwal, he also found that for the purposes of limitation a deity was a perpetual minor and thus its land could never be taken away by adverse possession.[199] Therefore, the title of the land never passed either by conquest or by adverse possession.

Perhaps most importantly, Justice Sharma held that to dispossess Hindus from the land would be to extinguish a core ingredient of the Hindu religion, which is the birthplace of Ram. He states, "Lord Ram as the Avatar (Reincarnation) of Vishnu, having been born at Ayodhya at the Janmasthan is admittedly the core part of Hindu belief and faith which is in existence and practiced for the law thousands of years."[200] In his decision, Justice Sharma adopts an expansive definition of religion, which is not in his view only confined to opinion, doctrine or belief, but also includes religious practices.[201] As the Constitution did not set out a definition of religion, it included any act "in pursuance of religious belief as part of religion."[202] He added that no secular authority of the State could restrict or prohibit such essential practices or extinguish the same through a suit or by transfer to another party.[203] In the process of declaring that the right to worship at the disputed site was a core ingredient of the Hindu faith, Justice Sharma essentialized and ossified the Hindu tradition against any notions of plurality, diversity or fluidity.

While the right to worship is an important component of freedom of religion, both Justice Agarwal and Justice Sharma held that the right to worship on the exact spot where god was born was a core or essential ingredient of the Hindu faith and part of the

197. *Id*. at 215.

198. *Id*. at 182.

199. *Id*. at 167; *Id*. at 2031–33 (Agarwal, J.) (determining that the a deity is a perpetual minor for purposes of adverse possession).

200. *Id*. at 121.

201. *Id*. at 126 ("Religious practices are as much part of religion as faith or belief in actual doctrine.").

202. *Id*. at 128.

203. *Id*. at 128–29.

collective belief of the community.[204] In the process they not only rejected the plurality of tradition within the Hindu faith, they centred one particular position. Hindus and scholars alike have contested the position taken by the two judges, who considered worship at the site a core ingredient.[205] The fact that large tracts of Hindus do not worship Ram nor even recognize him as a noted deity challenges the claim that worship at his ostensible birthplace is a core ingredient of the Hindu tradition.

While the *Ayodhya* decision has been stayed by the Supreme Court on grounds that partition of the property was not a relief claimed by any of the parties, the broader discursive struggle over the meaning of freedom of religion and the Hindu Right's pursuit of a more robust understanding of this concept have implications for the meaning of secularism in Indian Constitutional law well beyond the decision.

III. THE RIGHT TO FREEDOM OF RELIGION: CONSTRUCTING HINDU MAJORITARIANISM THROUGH SECULAR LAW

The meaning of secularism is structured by majoritarianism whether it is based on the model of equal treatment of all religions or state neutrality. Not only does religion remain present in both models, the unstated norms of the dominant religion also remain present. Scholars have demonstrated how state neutrality has served to reinforce majority practices and the power of the majority to define the norms.[206] State neutrality does not readily acknowledge the

204. Both judges relied on the Supreme Court's decision in Ismail Faruqui v. Union of India, (1994) 6 S.C.C. 360, 417 ("While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof."). Ayodhya, (2010) All. H.C. 161, 164 (Sharma, J.); *id*. at 2551–52 (Agarwal, J.).

205. *See* Kumkum Roy, *Issues of Faith*, ECON. & POL. WKLY., DEC. 11, 2010, at 53 (2010) (who argues that the court ignored the polytheisim in Hindu religion and de-recognized the diversity of faith. She posits a critical question as to whether the recognition of a personal god is intrinsic to secularism); *see also* Nivedita Menon, *The Ayodhya Judgement: What Next?*, ECO. & POL. WKLY., July 30, 2011 at 81, 86–87 (2011). At the same time, some progressive scholars have also argued that the case opens the possibility of recognizing the importance of faith in individual human life. *See* Lata Mani, *Where Angels Fear to Tread: The Ayodhya Verdict*, ECO. & POL. WKLY., Oct. 16, 2010, at 10, 11 (2010); Ashish Nandy, *The Judges Have Been Injudicious Enough to Create a Space for Compassion and Human Sentiments*, TEHELKA, Nov. 6, 2010, at 16.

206. Some scholars have unpacked the majoritarianism implicit in the American model of secularism, which is ostensibly based on state neutrality.

presence of religion since its very premise is about the prohibition of religion in politics. It is thus unable to resolve the problem of majoritarianism.[207]

In contrast, the model based on equal treatment, though it is also complicit in majoritarian politics, is better able to acknowledge the presence of religion in politics. The extent to which this model has been used to advance the cause of the Hindutva parties and the role of the courts in enabling the advance of Hindu majoritarianism requires serious consideration in light of the Ayodhya decision.[208] In this section, I elaborate on how the right to religious liberty has served as a significant arena for the advance of Hindu majoritarianism. This effort has been enacted partly through the Supreme Court in its elaboration of the "essential practices of the religion" test and partly through the aggressive engagement of the Hindu Right in fleshing out the content and meaning of the right to freedom of religion.

A. Essential Practices Test

Freedom of religion by the Indian Supreme Court has been addressed through the "essential practices of the religion" test devised by it in order to allegedly protect the right to freedom of religion. As I demonstrate, in applying this test, the Court has continually engaged in determining the core of religious belief for a given religious community. I argue that through the essential practices test the Supreme Court has been actively involved in the construction of the religion that is to be recognized and in the process enacted a series of erasures as well as a tended to homogenize religious categories.

In *Shirur Mutt*,[209] the Supreme Court posed itself the question "What is the line to be drawn between what are matters of religion and what are not?"[210] The idea that religion referred to ones

207. WINNIFRED SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 154 (2005) (discussing the problems with legally enforced religious freedom requirements in the U.S. context).

208. For a discussion of the dangers of majoritarianism that lie within this vision of secularism, *see* Prakash Chandra, *The Politics of Indian Secularism*, 26 MODERN ASIAN STUD. 815, 830–37 (1992); Cossman & Kapur, *supra* note 22, at 160–62.

209. Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt, (1954) S.C.R. 1005 (India).

210. *Id*. at 1022–23 (sanctioning, for the first time, the elaborate regulatory regime for Hindu temples and maths, while also widening the definition of religion to include rituals and practices).

relationship to god or a higher being was rejected in light of the fact that some religions such as Jainism and Buddhism do not have a belief in a higher god.[211] The Court collapsed the distinction between belief and practice.[212] While it recognized that religion had its basis in a system of beliefs or doctrines, it was also more than this system.[213] The Court stated that, "A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion."[214] The Supreme Court rejected the idea that the mere assertion that a practice was part of a religious belief would be sufficient to warrant constitutional protection.[215] Instead, the Court formulated the "essential practices test," whereby a policy or law could only be struck down if it could be demonstrated that it violated one of the essential practices of a religious faith, which was to be ascertained by the doctrines of that religion itself.[216] No outside authority had the right to say what was or was not an essential practice.[217]

While initially, in the 1950s there was some indication that essentiality would be tested on the basis of a community's own beliefs and popular practices, over time the courts have taken on the

211. *Id*. at 1023. The same is true of a number of philosophical positions in India such as the Advaita tradition or notion of non-duality.

212. *Id*. at 1025.

213. *Id*. at 1023–24.

214. *Id*. at 1024.

215. *Id*. at 1028–29.

216. *Id*. As discussed earlier the doctrine of "essential practices" finds its origins in the colonial period as a technique of governance over the native population. *See* SEN, *supra* note 7. The process of codification and rationalization begins with Warren Hastings, the first governor general of India, in 1772, and the translation of all Sanskrit and Persian texts into English. *See generally* NATHANIEL BRASSEY HALHED, A CODE OF GENTOO LAWS OR ORDINATIONS OF THE PUNDITS (1776); S.N. MUKHERJEE, SIR WILLIAM JONES: STUDY IN EIGHTEENTH CENTURY BRITISH ATTITUDES TO INDIA (1968) (on the work of the Orientalist William Jones and his codification of Muslim and Hindu law).

217. Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt, (1954) S.C.R. 1005,1025 (India). This test was reiterated in Ratilal Panachand Gandhi v. State of Bombay, (1954) S.C.R. 1055, 1065 (India), and Shastri Yagnapurushdasji v. Muldas Bhudardas Vaishya, (1966) 3 S.C.R. 264 (India). *See* Marc Galanter, Hinduism, Secularism and the Indian Judiciary 21(4) SYMPOSIUM ON LAW AND MORALITY 467-487 (1971) (analyzing the reformist approach adopted by Justic Gajendragadkar in this decision) This line of cases was relied upon by Agarwal J. and Sharma J. in the Ayodhya dispute in declaring worship at the site an essential or core ingredient of the Hindu faith.

task themselves. The essential practices test was elaborated upon in the decisions of Justice Gajendragadkar, who became its primary architect.[218] In the case of *Durgah Committee, Ajmer* v. *Syed Hussain Ali,*[219] Justice Gajendragadhkar stated that the test excluded those practices, which "though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself."[220] The Justice stated that in order for a practice to be regarded as a part of a religion it had to be regarded by that religion as essential and integral to its faith. With these words the Court established itself as the gatekeeper of religion and would take upon itself the role of determining what was "real" religion as distinct from mere superstition.[221]

The cases discussed above demonstrate the unwillingness on the part of the Supreme Court to accept the mere assertion of the significance of a particular practice by a group or individual, thus placing the judges at the centre of determining what constitutes religion. The cases also illustrate the ways in which religion continues to be remade by the Court and over time have taken what Ronojoy Sen describes as a textual turn.[222] As Sen argues, this textual

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218. *See* SEN, *supra* note 7, at 28 (stating that he "whittle[d] the protection of essential practices to those that the court would deem suitable").

219. (1962) 1 S.C.R. 383 (India).

220. *Id*. at 412.

221. Judge Gajendragadkar further reinforced this process of "rationalizing" religion in Tilkayat Shri Govindlalji Maharaj v. The State of Rajasthan and Others, (1964) 1 S.C.R. 561, 622–23 (India). *See also* Mohammad Hanif Quraishi v. State of Bihar, A.I.R. 1958 S.C. 731 (where the Court dismissed a claim by Muslims who argued that a law prohibiting cow slaughter violated their right to freedom of religion as Muslims were compelled by their religion to sacrifice cow at Bakr-Id, a religious festival, was not an essential practice for Muslims). A later Supreme Court decision followed this move. D.A.V. College, Bhatinda v. State of Punjab, A.I.R. 1971 S.C. 1731 (rejecting the argument that the Arya Samaj is a separate religion, a status that they sought in order to claim the autonomy that is granted to religious minorities in respect of establishing and administering their own educational institutions).

222. *See* SEN, *supra* note 7, at 49–50. This turn becomes evident in a case by a woman who claimed to have the right to have worship conducted in perpetuity at the Samadhi (a place where realization and state of consciousness free from the creation is attained) of her late husband. While the case did not involve an interpretation of the freedom of religion clauses, the Court took on the role of determining whether or not such a practice was an essential practice of the Hindu faith. It held that only practices that had a basis in the shastras or sacred texts would be allowed. The recognition of a ground for the perpetual dedication of the claimant's husband for the purpose of acquiring religious merit was not such a

turn was similar to the move by colonial judges to ascertain the validity of religious practices.[223]

This feature of modern states and laws making scripture the linchpin for their definition of what is or is not a religion is a longstanding characteristic of liberal secularism. Hinduism does not have a central scripture, and hence this modern construction of Hinduism as text based is dramatic in the shift that it stages. The tension is explicitly demonstrated in the *Satsangi* case involving the regulation of entry into a temple. The petitioners challenged legislation that was enacted in Bombay in 1947 which was directed at ensuring that Hindu temples were opened to individuals of all castes.[224] They claimed that as they were not Hindus the act did not apply to them. The Court held that the Satsangis were in fact Hindus.[225] In coming to this determination, the bench was compelled to consider who was a Hindu. It declared that the teachings of the Satsangis were identical to Hinduism and also that its leader was simply one of many reformers of Hinduism.[226] The petitioners tried to distinguish themselves by stating that they initiated women and also permitted Muslims and Parsis to become full members of the sect without forcing them to forsake their own religion. They also argued that the founder of the sect was worshipped as a god in the temple. The decision written by Justice Gajendragadkar held that all of these arguments were consistent with Hinduism and its basic claim

practice. Saraswathi Ammal v. Rajagopal Ammal, (1954) S.C.R. 277, 288 (India); *see also* Sri Venkataramana Devaru v. State of Mysore, (1958) S.C.R. 895 (India) (validating a state law allowing Harijans (untouchables) unrestricted access to enter a temple that was founded by upper cast Brahmins, despite the right to determine who can enter temples, conduct the worship and how to conduct the worship being matters of religion, because Article 25 (2)(b), which deals with the State's right to open public temples to all Hindus, took precedence over Article 26).

223. For a discussion of the academic debates on this issue, *see generally* Bloch, *supra* note 4.

224. *See* Shastri Yagnapurushdasji v. Muldas Bhudardas Vaishya, (1966) 3 S.C.R. 242, 264 (India). In India, a category of people described as untouchables (Harijans or dalits) who were considered to be unclean, and excluded from access to common public spaces including temples. These castes were relegated to low-status jobs and experienced restricted social mobility on the grounds that they were regarded as untouchable. British colonial rule strengthened this caste based politics as a measure by which to consolidate their political power over the native subject. In post-independent India, the practice of untouchability was banned under Article 17 of the Constitution and the community has mobilized and become a significant political force in mainstream politics, though they still suffer the effects historic and systemic disadvantage.

225. *Id*. at 271.

226. *Id*. at 271–74.

to being tolerant and accommodating. The Judge referred to the *Gita* as a central Hindu text to substantiate the idea that the worship of other deities was not proscribed by Hinduism and in the process also cast Hinduism as accommodating and progressive.[227] On the basis of this reasoning any discrimination or socially regressive practice could be cast as a misunderstanding of the "true" faith and teachings.[228]

Relying on a text-based approach, the courts have continued to set out the distinction between the true religious experience as opposed to rituals and symbols.[229] In the case of Hindus, this approach is directly connected to the way in which Hinduism was articulated by reformists in the nineteenth and twentieth centuries through an anti-colonial nationalist lens.[230] Hinduism does not have a single foundational scripture, yet as many historians of modern religion have noted Hinduism during the colonial period came to acquire a form modeled on the Abrahamic religions, Christianity in particular. Lata Mani has argued that statist projects directed at regulating religion since the colonial period have tended to essentialize religious claims. In her work on the regulation of *sati*, the practice whereby a widow would immolate herself on her husband's funeral pyre, under colonial rule, she shows how the British, as much as the Indian nationalist (primarily Bengali) elite, reified "scripture" as the primal source of religion thereby homogenizing and essentializing the polivocality of the tradition.[231] As a result *sati* came to be equated with Indian culture and ideal Indian womanhood that was disconnected from the reality of its actual practice. Similarly, Mrinalini Sinha's work illustrates how the contest over the scriptural basis of a tradition was central to the legal reform of women's

227. The Court was unable to resolve the tension raised in Sri Venkataramana Devaru, which involved a similar issue, where in upholding the constitutional validity of the Act, the Court acknowledged that the Act may be violating the right to religious freedom. (1958) S.C.R. 895, 920–21 (India).

228. *Id*. *See also* Seshammal v. State of Tamil Nadu, (1972) 3 S.C.R. 815, 833–34 (India) (referring to scriptural authority to justify upholding a state act abolishing hereditary appointments of temple priests, according to which the mode of appointment of a priest was a secular and not a religious function and thereby could be regulated).

229. *See* Shri A.S. Narayana Deekshitulu v. State of Andhra Pradesh and Others, (1996) A.I.R. 1765 (India) (identifying the rituals involved in an appointment process as not being an essential part of religion or religious practice).

230. *See, e.g*., King, *supra* note 4, at 177–79.

231. *See* LATA MANI, CONTENTIOUS TRADITIONS: THE DEBATE ON SATI IN COLONIAL INDIA 25–26 (1998).

rights.[232] The nineteenth century colonial encounter came to inform the ways in which the Hindu religion has come to be understood and taken up in the postcolonial present in law.

In the contemporary moment, core religious practices have come to be identified in Supreme Court decisions as based on foundational documents and the construction of a common Hindu belief and culture. While the earlier cases tended to offer a wider understanding of religion as including rituals and superstitious practices, the Supreme Court gradually whittled down the scope of what constitutes religion by introducing a requirement that the practice must have a scriptural or textual basis.[233] In the process a juridically constructed "rational Hinduism" has come to define the parameters of legitimate faith.[234] In articulating a common Hindu culture and belief, the Court has cast Hinduism in the same framework as Semitic traditions—that is, as a monolithic religion based on foundational documents.[235] It is also a position that ends up converging with the position of the Hindu nationalists.[236] The doctrine of essential practices is reflective of a "secular rationality" that has emerged with the modern state and in the process it has rearticulated religion and its content. In other words, rather than being opposing ideologies or understood as unalterable essential concepts, secularism and religion have both been mutually constitutive.[237]

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232. *See generally* MRINALINI SINHA, COLONIAL MASCULINITY: THE "MANLY ENGLISHMAN" AND THE "EFFEMINATE BENGALI" IN THE LATE NINETEENTH CENTURY 138–80 (1995).

233. *See* SEN, *supra* note 7, at 14–18.

234. *Id*. at 18–25.

235. In contrast to the endless efforts by the Supreme Court to construct an essential or authentic faith, Balagangadhara argues that Hinduism is neither a religion nor collection of religions, but a construction of Europeans and their Christian theology, which compelled them to look for and see religion in India. It is an entity that exists in the western experience of India and writings of scholars, and tells us more about the west than about India and Indians. Balagangadhara thus argues that the construction of Hinduism had little to do with the demands of colonialism or the goals and motives of Indian/Hindu nationalists. *See* S.N. BALAGANGADHARA, "THE HEATHEN IN HIS BLINDNESS": ASIA, THE WEST AND THE DYNAMIC OF RELIGION 507 (2005). *See also* S. N. Balagangadhara & Jakob De Roover, *The Secular State and Religious Conflict: Liberal Neutrality and the Indian Case of Pluralism*, 15 J. POL. PHIL. 67, 83 (2007).

236. *See* SEN, *supra* note 7, at viii.

237. *See* Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?* in IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 64 (Talal Asad et al., eds. 2009).

There has been some dissent in the case law from the essential practices test and how far the judiciary should be allowed to interfere in and reform religion. In *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay,*[238] which was a challenge brought by the head of the Dawoodi Bohra community to the Bombay Prevention of Excommunication Act of 1949, the majority declared that Act was unconstitutional as excommunication was a core ingredient of the religion and central to the preservation of the community.[239] The dissent by Justice Sinha focused on how the right to excommunication affected the civil rights of the members of the community and constituted the basis for upholding the constitutionality of the Act on grounds of public welfare.[240] The judgment crystallises the tension produced by the essential practices test and the difficulty in separating "pure" religion from the secular sphere, a tension that has produced considerable legal controversy. The resort to the texts or scriptures to resolve competing views assumes that there is a central text and that a "right" answer can be excavated from it.

Similar sorts of scriptural reification in the context of both Islam and Christianity in the modern period have also been enacted and such a turn appears to be a development that is internal to the "secularization" of world religions. In relation to Muslims, the Supreme Court restricted the protection of Article 25 to the Quran in the few decisions that it has delivered, and over time tended to reject practices that were not specifically stated in the Quran as not being essential to Islam and therefore, not within the protective sphere of Article 25.[241] In the famous case of *Shah Bano v. Union of India*, which involved the issue of the right to maintenance of a divorced Muslim woman, the Court attempted to interpret the Quran to

238. (1962) 2 S.C.R. Supp. 496 (India).

239. *Id*. at 499.

240. *Id*. at 528 (Sinha, J., dissenting).

241. *See, e.g*., Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 S.C.C. 556, 566–68 (stating that there is no greater authority for judging religious obligations for Muslims than the Quran); Mohd. Quareshi v. State of Bihar, 1958 A.I.R. 731, 1959 S.C.R. 629 (where the constitutional validity of the law preventing cow slaughter was challenged as violating the fundamental rights of Muslims under Article 25 of the Constitution). The Muslim parties claimed that the sacrifice of a cow on the occasion of Bakr-Id day was a significant custom. The Court found no scriptural reference that made the sacrifice of a cow obligatory, either in the Quran or other scriptural texts. While accepting that the practice was a custom, it was optional, and not an essential practice as it had no scriptural basis. *Id*.

determine whether such a right was religiously prescribed.[242] In coming to the conclusion that only a limited right existed, and that the secular law would take effect at the point at which religious personal law ceased to operate, the Court triggered a national controversy and cries of "religion in danger" from the Muslim minority community.[243]

Pratap Bhanu Mehta argues that the essentiality test serves several functions.[244] It enables the courts to decide whether a particular practice is entitled to the Constitutional protections under the freedom of religion clause.[245] Such decisions have included determinations on whether the setting up of a trust to provide milk to cobras in a temple constitutes part of the Hindu religious tradition or whether a particular dance form constitutes an essential practice of a specific religion.[246] At the same time, as Mehta argues, the test has enabled the courts to claim that the public purposes of the state are the most suitable expressions of the free exercise of a particular religion, that is, if the essentials of a religion were properly comprehended, then those practices deemed essential would in fact justify the legitimate public purpose of the state.[247] However, the wide berth bestowed on the courts to determine and regulate the meaning of religion has raised the question of the possibility of religious freedom. While the test has been developed ostensibly to narrow the gap between the right to religious liberty and what is identified as a public purpose served by the state, there is an arbitrariness built into the test that enables judges to discard practices that are not proved to their satisfaction to be essential.[248]

The move by the Indian Supreme Court to formulate an "essential ingredients test" that actually constitutes religion is part of a

242. *Id*. at 566–68.

243. *Id*. at 571; Nawaz B. Mody, *The Press in India: The Shah Bano Judgment and Its Aftermath*, ASIAN SURV., Aug. 1987, at 935, 950 (1987).

244. Pratap Banu Mehta, *Passion and Constraint: Courts and the Regulation of Religious Meaning, in* POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 311, 323 (Rajeev Bhargava ed., 2008).

245. *Id*.

246. *See* Acharya Jagdishwaranand Avadhuta v. Comm'r of Police, Calcutta, (1983) 1 S.C.R. 447, 463 (India) (finding that performing the andava dance in street processions and public gatherings is not an essential rite observed by a spiritual organization).

247. *See* Mehta, *supra* note 244, at 323.

248. *See* DERRETT, *supra* note 142, at 447 ("[T]he courts can discard as non-essentials anything which is not proved to their satisfaction . . . to be essential, with the result that it would have not constitutional protection.").

larger development internal to secular modernity. The attempt by the secular state to define "religion" in defence of freedom of religion is a necessary and essential quality of almost all adjudications in this area. The "essential practices" test finds expression in other jurisdictions and is used to construct religion (and secularism) through law. As Sullivan argues, when courts have to decide between competing religious claims, they ultimately get involved in deciding whether a particular religious claim is true to the tradition or not.[249] This means deciding what is properly religious. As a result the idea of religious freedom becomes impossible to realize as the court is in fact fabricating all religious traditions.[250] The continuous adjudication of what is true religion or not points to the way in which no form of secularism is devoid of religion; that in fact all forms of secularism regulate religion and in doing so, change its meaning, practice and substance.

Examples of this practice are found in a number of cases decided by the European Court of Human Rights at Strasbourg upholding the ban on the wearing of the headscarf on the grounds that it is imposed on individuals and incompatible with the democratic values of a liberal state.[251] As Peter Danchin points out, such holdings ignore the fact that the veil has no singular or fixed meaning.[252] Muslim girls and women who wear the veil may do so for multiple and contradictory reasons. To ascribe it with a single unitary meaning, "says more about a particular liberal conception of religion" and religious activity and its deep links with Christianity than about

249. SULLIVAN, *supra* note 207, at 147–48 (discussing the application of a text-based standard for determining religious beliefs and how it excluded typical American forms of religious conduct).

250. *Id*.

251. *See, e.g*., Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 449, 463 (finding that "the measure prohibiting the applicant from wearing a headscarf while teaching was 'necessary in a democratic society'"); Refah Partisi v. Turkey, 37 Eur. H.R. Rep. 1, 29 (2003) (agreeing with case law that a state in a democratic society may limit the ability to wear a headscarf if doing so "clashes with the aim of protecting the rights and freedom of others, public order and public safety"); Şahin v. Turkey, 44 Eur. H.R. Rep. 99, 137 (2007); Dogru v. France, 49 Eur. H.R. Rep. 179, 197 (2008). *See also* Carolyn Evans, *The 'Islamic Scarf' in the European Court of Human Rights*, 7 MELB. J. INT'L. L. 52, 65–71 (2006).

252. Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1, 9 (2008).

coercion or harm in Islamic religious practices.[253] What is distinct in the Indian example is that its model of secularism explicitly recognizes the importance of religion to the operation of state governance and stands in stark contrast to the neutrality of the state model.

B. Hindu Right and the Right to Freedom of Religion

The specific ways in which the Supreme Court has determined the contours of faith in India also converges with the singular, monotheistic, and institutionalized construction of Hinduism being pursued by the Hindu Right. As discussed throughout this article, in the contemporary moment, the Hindu Right has increasingly emerged as a significant player in determining the contours and parameters of the right to freedom of religion and in turn how Hinduism itself is to be defined. Initially, surprisingly little emphasis was placed on the right to freedom of religion in the Hindu Rights struggle to pursue its understanding of Indian secularism. The BJP, the political wing of the Hindu Right, refers to "liberty of faith" in its party constitution as a basic objective, but the term is not synonymous with the Indian constitutional guarantees of freedom of religion.[254] And this term is used in three highly restricted and specific ways. Firstly, the idea of "liberty of faith" or "freedom of worship" is cast in individualistic terms: it is the individual's right to pursue his or her own spiritual path; it is not the collective rights of a religious community to any form of self-determination.[255] In fact, collective rights, such as the right of religious and linguistic minorities guaranteed under Article 30 of the Constitution to set up and administer their own schools and colleges using state subsidies and for the purpose of preserving their community identity, have been challenged by the BJP as violating the Constitutional principle of equality.[256]

A second move on the part of the Hindu Right parties is to bring the right to freedom of religion under the rubric of Hinduism. Hinduism alone is argued by the Hindu Right to provide the toleration that is required for individuals to be able to pursue their own faith or spiritual path. The Hindu Right's argument that

253. Peter Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L LAW 663, 747 (2011).

254. BHARATIYA JANATA PARTY, CONSTITUTION AND RULES ART. II, (Sept. 2012), http://www.bjp.org/images/pdf_2012_h/constitution_eng_jan_10_2013.pdf.

255. Cossman & Kapur, *supra* note 22, at 149.

256. *Id*. *See, e.g*., BJP ELECTION MANIFESTO 1998, *supra* note 95, at 36 ("Amend Article 30 of the Constitution suitably to remove any scope of discrimination against any religious community in matters of education.").

Hinduism is the only truly tolerant tradition, as it does not proselytize like other traditions, allows them to claim that only Hindus are truly secular, given that tolerance is the basis of Indian secularism.[257]

A similar reasoning is used to advance a third and related argument that the right to freedom of religion does *not* include the right to propagate one's religion. Rather, the propagation of religion, specifically by Christians and Muslims, is cast as a violation of toleration, as the inability of some religions to tolerate others. The objection to the propagation of religion has found practical expression in the enactment of anti-conversion laws in a number of BJP-run states that are specifically directed at curtailing the conversions.[258] The sphere of freedom of religion for religious minorities was thus radically curtailed within the discourse of the Hindu Right. The movement retained just enough of the constitutional guarantee to freedom of religion (construed narrowly as the individual right to worship) to maintain its claim to secularism, and to distinguish itself from religious fundamentalism.

In the *Ayodhya* case, the claims of the Hindu Right were based on a more muscular and substantive notion of freedom of religion than had previously been pursued. While the Hindu Right initially paid little attention to the right to freedom of religion, preferring to focus on the meaning of equality and tolerance, in the *Ayodhya* case they began to argue that freedom of religion was to mean more than an *individual* right to worship. While they continue to use the right to freedom of religion to push back against the claims of religious minorities for special treatment or accommodation of their religious practices, they have simultaneously sought to assert a more robust and substantive claim to freedom of religion in their own interests, a position recognized most explicitly by Justice Agarwal in the

257. Cossman & Kapur, *supra* note 22, at 147–48.

258. Six states in India have now enacted anti-conversion laws, including one that was ruled by the Congress Party. Goldie Osuri, *Secular Interventions/Hinduized Sovereignty: (Anti) Conversion and Religious Pluralism in Jodhaa Akbar*, 81 CULTURAL CRITIQUE 70, 78 n.15 (2012). These "Freedom of Religion" laws that restrict the religious freedoms of religious minorities, paradoxically claim to derive their validity from Article 25 of the Indian Constitution. *See generally* GAURI VISWANATHAN, OUTSIDE THE FOLD: CONVERSION, MODERNITY, AND BELIEF (1998); Laura Dudley Jenkins, *Diversity and the Constitution in India: What is Religious Freedom?* 57 DRAKE L. REV. 913, 937 (2009); Laura Dudley Jenkins, *Legal Limits on Religious Conversions in India*, 71 LAW & CONTEMP. PROBS. 109, 123–24 (2008).

Ayodhya case. The Hindu parties have pursued a more substantive notion of freedom of religion which recognizes that religious identity is necessarily constituted in and through a broader community, that is, it is a matter of the group's collective survival: their right to practice their religion collectively, including to worship in a place that has deep reverence and meaning to the Hindu tradition. The Muslim parties did not argue "essentiality" or core ingredients in the *Ayodhya* case. They were more focused on title and possession, rather than the right to worship, though providing evidence of worship was used to try to establish title/adverse possession. In the *Ayodhya* case, the right to freedom of religion played a much more significant role in the arsenal of the Hindu Right than in the hands of the Muslims.

The argument by the Hindu parties represents a broader tension between the individual and collective right to religious freedom that is internal to the very secular conceptualization of religious liberty. It is a tension that is a feature of religious freedom cases that define religion, which is at work in different legal contexts. In other words, what is once again evident is that the decision is not simply a case of Indian peculiarity or exceptionalism, but is a feature of disputes involving religious freedom across the Western and non-Western divide. What is interesting in the Indian example is how the Hindu Right has been moving between these two articulations to simultaneously limit the right to freedom of religion for religious minorities, while making more muscular claims to freedom of religion for Hindus. Their argument that the majority community needs religious freedom in order to protect its traditions is consistent with the group formulation of religious freedom. This is an inversion of the group conception of religious liberty propounded by the Indian constitution in the 1950s as a means to protect minority traditions from being destroyed through force or assimilation.

There is of course nothing extreme in this argument. To insist on such a vision of freedom of religion is to do little more than insist on the rights that are already recognised and articulated within the Indian Constitution under Articles 25 and 26 and is consistent with secular modernity. These constitutional guarantees contemplate both individual and collective rights to freedom of religion that extend well beyond the limited right to worship. But it is the Hindu Right that uses the claim of collective rights in the *Ayodhya* case to pushback against what it has perceived to be Muslim appeasement and also to more aggressively pursue its claims by appealing to a consolidated, homogenous, monotheistic and thoroughly modern religious identity.

CONCLUSION

The Hindu Right has pursued an understanding of the right to freedom of religion that is consistent with its broader political project to redefine the basic ingredients of secularism in majoritarian terms. The inroads of the Hindu Rights have been primarily in relation to the concepts of equality and toleration. They have emphasised a formal approach to equality, and argued that any recognition of religious differences—differences that require recognition in accordance with the Constitutional requirement of freedom of religion—becomes a violation of the Constitutional guarantee of equality. In a similar vein, it is through their understanding of Hinduism as the only tolerant religion that the right of religious minorities to profess and propagate their "intolerant" religions is cast as a violation of freedom of religion. The Hindu Right has effectively inverted the concept of toleration to argue that the practices of the religious majority, in this instance to worship at the spot where a god was born, is a core ingredient of the Hindu faith and hence toleration must be extended in the direction of the majority, and not exclusively in favour of the religious minorities. In the context of the *Ayodhya* case, we witness a strategic shift in the Hindu Right's approach to secularism. They focus on pursuing a more robust understanding of group rights in and through the right to freedom of religion than they had previously done.

In the *Ayodhya* decision, the Hindu Right's mobilization of the right to freedom of religion at one level appears to revitalize and democratize secularism. It implies that the playing field for minorities and majorities is equal. Yet the trouble with *Ayodhya* case is not one of legal discourse alone. The problem is a broader political one in which the Hindu Right has succeeded in capturing the popular imagination. The fact that the discourse of Indian constitutionalism and secularism can be co-opted by the Hindu Right has forced its champions to critically examine the structural possibilities internal to Indian secularism that can provide for this cooptation.

The Hindu Right has enacted some undemocratic and politically dangerous encroachments on secularism and the right to freedom of religion. To push back against these advances requires nothing short of reversing the growing domination of freedom of religion as defined in majoritarian terms and set out in this article. A re-democratised revision of freedom of religion will need to break its association with formal equality and religious toleration, both of which disavow any recognition of religious/group difference.

Freedom of religion needs to be seriously engaged with to expose how secularism is serving to advance the project of anti-democratic majoritarian politics. These politics are increasingly staking a claim to define and determine the contours, features, and limits of the legal and political management of religious difference through Indian law and politics. There is a pressing need to re-appropriate the right to freedom of religion to argue for a legal and political order that defends the ways of life of Muslims and others who do not share the Hindu Right's majoritarian impulses.