"Complete Justice"? Silences And Erasures In The Ayodhya Judgment

—Amit Bindal*

I. An Introduction To The Ayodhya Dispute In Independent India

The Ayodhya dispute appeared before the Indian judiciary at the cusp of the emergence of the Indian republic. The dispute has its roots in the nineteenth century but it was the installation of the idols of infant Lord Ram (Ram Lalla) inside the central dome of the Babri mosque by a few Hindu devotees, at the dead hour of December 22, 1949 that revived the dispute and brought it before the courts of independent India.[1]

The surreptitious and clandestine idol installation escalated tensions in mohalla Ramkot of the Faizabad district in the city of Ayodhya, Uttar Pradesh where the Babri mosque was situated. The local administration failed to stop the installation of idols or their removal from the mosque.[2] An official receiver took charge and legal custody of the premises of the mosque was attached under the Criminal Procedure Code.[3] The receiver, taking legal custody till the final settlement of the dispute, insisted and ensured that the *puja* (worship)—which started on the day of installation—of the illegally instituted idols should continue.

Various civil suits in the district court of Faizabad followed. All the suits were eventually decided in 2019 by the Supreme Court of India.[4] The District

---

* Associate Professor, Jindal Global Law School (JGLS) of O.P. Jindal Global University (JGU). The author is grateful to John Sebastian and Rakesh Ankit for carefully reading the first draft of this article and providing useful comments and Ashley Tellis for finely editing the final manuscript.

1 *See*, Krishna Jha and Dhirendra K. Jha, *Ayodhya: The Dark Night* (2012, Harper Collins) [The authors provide a detailed ethnographic account of the events that took place on 22/23 December, 1949, and the political backdrop of these events]. [Hereafter, "Jha & Jha"]; Arun K. Patnaik and Prithvi Ram Mudiam, "Indian Secularism, Dialogue and the Ayodhya Dispute", Religion, State & Society (2014), 42:4, 374-388.

2 Peter Van Der Veer, "Ayodhya and Somnath: Eternal Shrines, Contested Histories", Social Research, Vol. 59, No. 1 (Spring 1992) at ¶ 99. [Hereafter, "Ayodhya and Somnath"].

3 Under S.145 of Criminal Procedure Code, 1898 (CrPC) as a temporary measure to restore peace in the district. However, this situation of status quo continued till 1986.

4 The first suit (Suit No. 1) was filed on January 16, 1950 by Gopal Singh Visharad in the capacity of a Hindu devotee who sought the removal of obstacles created by local government for Hindus

Court allowed the maintenance of status quo, which in effect, meant the continuation of the worship of idols despite their wrongful installation in the first place. The gate of the mosque was locked, excluding both Hindus and Muslims generally from offering prayers or visiting the premises. However, a few *pujaris* (Hindu priests) were permitted to enter the premises to offer worship, allowed by the official receiver, in whose custody the mosque (euphemistically described as "disputed site") was handed over. This implied that "the mosque had de facto been converted into a temple, since Hindu worship had replaced Muslim worship."[5] For over three decades, this situation continued while the civil suits were pending in district courts.[6]

In the 1980s, the Ayodhya dispute took a new political turn. Various Hindu nationalist organisations appropriated this issue through a carefully orchestrated campaign of reclaiming the birthplace of Lord Ram.[7] The Vishwa Hindu Parishad (VHP), a Hindu nationalist organisation formed in 1964, organised various events mobilising Hindus for the construction of a Ram temple at Ayodhya. "The historical argument put forward by the VHP [was] that the mosque had replaced a temple which was demolished by a general of Babar, the first Mughal emperor."[8]

The legal dispute entered a new phase in 1986 when an application was filed by Umesh Chandra Pandey, a complete stranger to the dispute, who sought permission from the district court for general public to worship at the disputed

---

to perform worship of the idols. Another Hindu plaintiff filed a similar second suit in 1950 (Suit No. 2) pleading permission for worship. But this suit was withdrawn later. In 1959, the chief priest (*mahant*) of Nirmohi Akhada (a religious sect) filed the suit in the capacity of the *shebait* (managers) of the Ram Janam Bhumi (birthplace of Lord Ram) claiming the management rights and the title to the land and the structure over it. In 1961, the Central Sunni Waqf Board filed the fourth suit (Suit No. 4) claiming the title of the land and the mosque built over it. Finally, on July 1, 1989, a suit was instituted by the deities themselves (Suit No. 5). The plaintiff, Sri Deoki Nanadan Agarwala, a former judge of the Allahabad High Court, acted as their next friend in filing Suit No. 5. The idol, Sri Ram Lalla Virajman, was the first plaintiff and the second plaintiff was the land itself, Asthan Sri Ram Janambhumi, Ayodhya. The petition argued that the land in and of itself constitutes a juristic person as it possesses the "divine spirit".

5 Peter Van Der Veer, "Ayodhya and Somnath" at ¶ 99.

6 The civil suits or title suits in Ayodhya dispute must be distinguished from the criminal prosecution initiated against those involved in the demolition of Babri mosque on December 6, 1992. The accused include prominent leaders of Bharatiya Janata Party (BJP) such as Lal Krishna Advani, Uma Bharati, Vinay Katiyar, Murli Manohar Joshi, etc. These cases are still pending in the trial court for almost three decades. In 2017, a two-Judge Bench of the Supreme Court in *State v. Kalyan Singh*, (2017) 7 SCC 444, decreed for an expedited hearing of the case. Despite the judgment of the Supreme Court, the verdict in the criminal trial is yet awaited. For a recent critical discussion, *see*, Mahtab Alam, "Now That Title Suit is Resolved, Can We Talk about Babri Masjid Demolition Case?", *South Asia Journal* (2019) <http://southasiajournal.net/india-now-that-title-suit-is-resolved-can-we-talk-about-babri-masjid-demolition-case/>.

7 *See* generally, K.N. Panikkar, "Religious Symbols and Political Mobilization: The Agitation for a Mandir at Ayodhya", *Social Scientist*, 21: 7/8 (Jul.-Aug., 1993), 63-78.

8 Peter Van Der Veer, "Ayodhya and Somnath" (1992) at ¶ 88. "The VHP often cites a precedent in which a Hindu temple, destroyed by a Muslim ruler, has been reconstructed in independent India. This is the temple of Somnath in Saurashtra in which the installation ceremony was performed by the then President of India, Dr. Rajendra Prasad." *Id.* at 89.

premises which was locked since 1949. The district magistrate of Faizabad, K.M. Pandey, allowed the petition without the case file or hearing the other side. This was clearly in gross violation of all the principles of natural justice and judicial propriety. "The Congress-led state government in Uttar Pradesh decided to break open the gates within two hours and allowed the Hindus to worship."[9] This allowed the Hindu community in general to offer worship to the idols placed inside the mosque to the complete exclusion of Muslims. This fuelled the Ram Janambhumi movement spearheaded by Hindu majoritarian organisations.[10] In 1989, the Allahabad high court transferred all the suits to itself for a consolidated decision.

The VHP elicited mass appeal for the project since 1989 when the bricks of Lord Ram were worshipped in various north Indian villages (*shilanyas*).[11] "In August 1990, L.K. Advani, the leader of the Bharatiya Janata Party (BJP), decided to start a procession from Somnath to Ayodhya, through ten states with its goal as the construction of the temple…"[12] The Hindu nationalist sentiment escalated to such heights that despite the court orders of a status quo, a Hindu mob successfully demolished the mosque on December 6, 1992.

Following this, the disputed land was acquired by the central government under the Acquisition of Certain Area at Ayodhya Act, 1993. This legislation and the consequent land acquisition was upheld with a majority of 3:2 by the Supreme Court of India in its 1994 decision in *M. Ismail Faruqui v. Union of India*.[13] The majority judges (J. S. Verma, J. wrote the opinion on behalf of himself, M. N. Venkatachaliah, C. J., and G. N. Ray, J.) upheld the provisions of the enactment providing for land acquisition (by the central government) and the maintenance of status quo from the date of enactment. This meant that Hindu worship of the idols continued despite the demolition. The dissenting judges found the maintenance of status quo as violating constitutional secularism and declared the entire legislation as unconstitutional.[14] This judgment gave rise to enormous literature on

---

[9] Arun K. Patnaik and Prithvi Ram Mudiam, "Indian Secularism, Dialogue and the Ayodhya Dispute", Religion, State & Society (2014), 42:4, at ¶ 375.

[10] The Ramjanambhumi Mukti Yagna Committee served an ultimatum to Uttar Pradesh Government to deliver the possession of the mosque to the Hindu community. They urged as a "display of generosity" that Muslims can be allotted a different land where the mosque can be constructed. *Organiser*, August 25, 1985.

[11] Peter Van Der Veer, "Ayodhya and Somnath"(1992) at ¶ 102.

[12] *Ibid.*

[13] (1994) 6 SCC 360. [Hereafter, "*Ismail Faruqui*"] The Court had refused to answer the question, asked by the President under Art.143 of the Constitution whether there existed an ancient temple on the site of the mosque suggesting that the answer would not aid in the settlement of the dispute as to the title of the land.

[14] *Ibid.* (A.M. Ahmadi and P. Bharucha, dissenting "…no account is taken of the fact that the structure thereon has been destroyed in a most reprehensible act (sic)…No account is taken of the fact that there is a dispute in respect of the site on which puja is to be performed…the disputed structure was being used as a mosque; and that the Muslim community has a claim to offer *namaz* thereon." (para 138).

the subject critiquing the reasoning of the majority opinion.[15] This paper focuses on and analyses the judicial reasoning in the judgment on the title suits by the Supreme Court on November 9, 2019 in the case titled *M. Siddiq v. Suresh Das*.[16]

On September 30, 2010, the Lucknow bench of the Allahabad High Court, by a majority of 2:1, decreed a tripartite partition of the entire land. The majority judges (Sudhir Agarwal and Sibghat Ullah Khan, JJ.) gave one third portion to the Hindu idols, represented by the next friend (suit no. 5).[17] One third of the open area of the land in the outer courtyard was decreed in favour of Nirmohi Akhada (suit no. 3) who claimed the land as managers/*shebaits* of the idols/temple. Finally, the last one third was awarded to the Sunni Waqf Board (suit no. 4) representing the Muslims. Dharam Veer Sharma, J. dissented and dismissed the case of the Muslim side in totality deciding the title of the entire land in favour of Hindus.[18] An appeal was filed against the High Court judgment.

The Supreme Court, through a five-judge bench[19] delivered the final verdict of the dispute on November 9, 2019. The Supreme Court decided the title *in its entirety* (inner courtyard where the mosque was situated as well as the outer courtyard) in favour of Hindu parties, more specifically in favour of the plaintiff in suit no. 5, representing the deity.

The Court made it clear that the idol as a juristic person - Sri Ram Lalla Virajman - must be distinguished from land or immovable property - Asthan Sri Ram Janambhumi, Ayodhya - as juristic person in and of itself.[20] On this point, the Supreme Court overruled the decision of the Allahabad High Court which unanimously affirmed the juristic personality to the land itself due to its sacred geography (the land being the *janamasthan* or place of birth of Lord Ram). The court explained that granting juristic personality to land *per se* would

---

[15] *See*, Ratna Kapur,"The 'Ayodhya' Case: Hindu Majoritarianism and the Right to Religious Liberty", 29 Md. J. Int'l L. 305 (2014); G. Arunima, "Ayodhya Verdict: Bad Theology, Without Justice," Eco. & Pol. Weekly, Vol. XLV No. 41 (2010) 13-14.

[16] (2020) 1 SCC 1. Available at <https://www.sci.gov.in/pdf/JUD_2.pdf> (Hereafter *"Ayodhya judgment"*).

[17] The juristic personality of the idol/deity has for long been recognised in Indian law. *See*, *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, 1925 SCC OnLine PC 23 : (1925) 52 IA 245.For a critical discussion, *see*, Deepak Mehta, "The Ayodhya Dispute: The Absent Mosque, State of Emergency and the Jural Deity", Journal of Material Culture, 20: 4, 397-414; Gautam Patel, "Idols in Law" Eco. & Pol. Weekly,Vol. 45, No. 50 (Dec 11-17, 2010), ¶¶ 47-52.

[18] There is no question that the terms "Hindus" or "Muslims" do not represent the voice of the entire community. Indeed, we will notice that at various moments in the dispute, the party representing the deities (Suit No. 5) were in conflict with the managers (Suit No. 3). Similarly, there was a conflict on certain issues between the Shia and Sunni Muslims in the dispute. The judgments of High Court and the Supreme Court used the terms loosely and I will follow the usage in this article only for the sake of clarity.

[19] The five judges who delivered the judgment were Ranjan Gogoi, C.J., Abdul Nazeer, D.Y. Chandrachud, Ashok Bhushan and S.A. Bobde, JJ.

[20] The Court, following the Roman law, distinguished between property which is vested in the deity as opposed to property in itself as deity. *Ayodhya judgment*, at ¶ 216.

fundamentally alter its status as immovable property making the laws of the land (limitation, adverse possession etc.) inapplicable to the property.[21] The "land as a legal person" would become incapable of being possessed and be placed "outside the reach of law…denuding the efficacy of judicial process."[22] This seems to be the most welcome aspect of the Supreme Court decision as a precedent for the future. A declaration that the land itself constituted a juristic person would have had fatal consequences. Many places in the country would have become amenable for acquisition if such a claim were accepted. As any claim on the ground of any god or deity having lived, ruled, taken a sojourn or married etc. on a particular place would be sufficient to claim the property.[23]

The Supreme Court directed the Central Government to formulate a scheme for, *inter alia*, "the construction of a temple" and handing over of five acres of land to Sunni Central Waqf Board "out of the land acquired" or at a "suitable prominent place" to be decided by the state government of Uttar Pradesh.[24] The latter direction has been given under Article 142 of the Indian Constitution which empowers the Supreme Court to pass any order *necessary for doing complete justice*. The curious expression "complete justice" is what drives this essay. Did the Supreme Court do "justice" in this case? Was this "complete justice"? The framers of the Constitution had reposed complete faith in the highest court of the country, allowing it to issue *any* extraordinary order to do justice; but does this power include bypassing the question of historical wrong(s) which must be acknowledged as well as addressed in secular, democratic constitutional polity? This essay argues that far from doing "complete justice", this judgment remains uninformed by *any* sense of justice in its systematic erasure and willful silencing of majoritarian violence. The lack of justice engulfs the Ayodhya dispute. How did the Supreme Court manage to do justice without righting the wrongs of the Babri demolition? How did the court think it legally fit and constitutionally appropriate to issue the direction of constructing a temple when it was only required to decide the title?

Many scholars have argued that the claim of the litigating Hindu community against the mosque as the birthplace of Lord Ram is a recent phenomenon motivated by political considerations. For instance, A.G. Noorani argues that the claim of the mosque as the birthplace of Ram arose from the propaganda of Hindu nationalist political organisations in the latter half of the twentieth century.[25]

---

[21] *Id.* at ¶ 218.

[22] *Id.* at ¶ 219.

[23] The Court recognised the dangers of this proposition as myriad beliefs in the land would become a basis to claim "place of birth, place of marriage, or a place where human incarnation of a deity departed for heavenly abode." This would make it impossible "to draw the line to assess the significance of the belief as the basis to confer juristic personality…" *Id.* at ¶¶ 220.

[24] *Ayodhya judgment* at ¶¶ 925-928.

[25] *See*, A.G. Noorani (ed.), *The Babri Masjid Question, 1528-2003: "A Matter of National Honour"*(2003, Tulika Books, New Delhi) ¶¶ xvii-xlix; A.G. Noorani, *The Destruction of the*

Anupam Gupta, has claimed the absence of any assertion regarding *janma-bhoomi* in the works of Swami Vivekananda "who visited Ayodhya in 1888, and again in 1890, as a *parivrajaka*, or wandering monk."[26] He points out to a similar absence even in the writing of Vinayak Damodar Savarkar, who "writing in 1908 on the first war of independence 51 years earlier, devoted a whole chapter titled 'Ayodhya' to the havoc wrought by the British in Oudh before 1857."[27] Gupta concludes that the "absence of any allusion to the Ram janambhoomi issue in their speeches and writings is an eloquent reminder of the artificiality of the main issue…"[28]

An important preliminary point that must be taken into consideration is the division of the disputed land into inner and outer courtyard. Sometime in 1856-57, the colonial government divided the premises into two parts to avert acrimony between Hindus and Muslims. The Babri mosque (situated in the inner courtyard) was given to the Muslims. It remained in their possession and there is evidence of their offering *namaz* (prayers) till the incident of 22/23 December, 1949.[29]

The outer courtyard was given and remained in the possession of the Hindus (except access to passage for the Muslims to enter the mosque). It included some prominent places such as *Ram chabutra* (the platform of Lord Ram) and *Sita rasoi* (Sita's kitchen or shrine) situated near the northern gate of the outer courtyard.[30] As already stated, after the clash of the devotees a "'fragile truce' was arrived at between the two religious communities who 'agreed to worship' in different places within the Babri complex."[31] As a part of this arrangement, a grill/railing wall was erected by the colonial administration in 1885 separating the inner from the outer courtyard. This arrangement continued till 1949.

The distinction between the inner and outer courtyard is central to the Ayodhya title suit. This demarcation was largely accepted throughout British colonial history. The events of 1949 disrupted this, leading to the attachment of the inner courtyard. The Supreme Court in its judgment has not accepted this division of the land and considered the property as a "composite whole." It decided the title rights of the entire land, both the outer as well as the inner

---

Babri Masjid: A National Dishonour (2014, Tulika Books: New Delhi) ¶¶ 1-44.

[26] Anupam Gupta, "Dissecting the Ayodhya Judgment", Eco. & Pol. Weekly, Vol. 45, No. 50 (2010) at ¶ 35.

[27] *Ibid.* V. D. Savarkar was a prominent member of the Hindu Mahasabha espoused the cause of India as a Hindu nation. For a brief biographical sketch of V.D. Savarkar, *see*, Nilanjan Mukhopadhyay, *The RSS: Icons of the Indian Right* (2019, Westland: Chennai) ¶¶ 53-97.

[28] *Ibid.*

[29] The outer courtyard also came under receivership in 1982.

[30] The patriarchal demarcation of the geographical space remains too obvious to the modern reader!

[31] Arun K. Patnaik and Prithvi Ram Mudiam, "Indian Secularism, Dialogue and the Ayodhya Dispute", Religion, State & Society (2014), 42:4, at 375.

courtyard, in favour of what the judgment constantly described as "the Hindu side."[32] I will argue that the rejection of the colonial division is problematic when the judgment otherwise accepted the continuity of the colonial legal framework in Independent India.

Section I focuses on the court's reading of the colonial history of the dispute. I argue that the court subjected the Muslim and Hindu communities to differential standards in establishing their respective claims. Section II reads the discourse of the court on constitutional secularism where I show what the Court tries to hide, suppress, and erase. In section III, I briefly discuss how the court dealt with the issues of sovereignty and jurisdiction across historical regimes. Section IV scrutinises the unprecedented anonymous *addenda* which, I argue, wholly betrays the reasoning of the main judgment. The *addenda*, *contra* Upendra Baxi, is *not* "not a part" of the judgment; it is instead the "unconscious" that lays bare the obscene underside of the court where all distinctions between faith-fact, mythology-history, and belief-evidence are diluted to arrive at a partisan verdict. Finally, Section V foregrounds the historical realities of the Ayodhya dispute, already a part of judicial memory and record, which the Supreme Court unfortunately chose to ignore. In doing this, I will focus on the judgment delivered by S.U. Khan, J. in the Allahabad High Court decision, which had raised some uncomfortable issues of political and judicial complicity in the Ayodhya litigation.

II. Judicial (MIS)Readings Of Colonial History

In this section, I will analyse how the court dealt with the issue of possession of the inner and outer courtyards demarcated for Muslims and Hindus respectively by the colonial government. There was no real dispute with respect to the outer courtyard after the erection of a fence, except a few complaints by the Muslim community which will be discussed. The real question was that of the inner courtyard where the mosque was situated. The Hindu community claimed that the mosque was built after razing a temple and (later) asserted that the site of the mosque was the birthplace of Lord Ram. The Court remains unclear in the way it proceeds to analyse the issue of possession. The Muslim community was asked to furnish proof of "exclusive possession" with respect to the inner courtyard.

However, one cannot find a similar requirement expected from the other side. Instead, some acts of trespass by the Hindu community inside the inner

[32] The term "Hindus" is used loosely following the usage in the Supreme Court decision. Technically, the final verdict accepted the contentions of Suit No. 5 which is filed by the deities (by the plaintiff claiming to be their next friend). This plaint, filed in 1989, argued for the title of the land to be given to the deities as the contesting the claims of Nirmohi Akhada as well as Muslims side.

courtyard were condoned as enthusiastic attempts driven by their faith and belief, "contesting" the possession of Muslims.[33]

It is necessary to understand the colonial context of the dispute to appreciate the reasoning of the Supreme Court with respect to possession of the inner courtyard. The East India Company took over Oudh but the British authorities denied any interest in the land situated at Ayodhya. The land was shown in official records as *nazul* (owned by the government) and the British provided financial assistance for the upkeep of the mosque. As stated earlier, sometime in 1856-57, following a dispute between Hindus and Muslims, the colonial administration divided the land into two halves: the inner courtyard (where the mosque was situated) was exclusively handed over to the Muslims while the outer courtyard to the Hindu community.[34]

The Supreme Court insisted throughout the judgment that the land would be evaluated as a "composite whole" as "the railing set up in 1856-57 did not either bring about a sub-division of the land or any determination of title."[35] One remains unsure of this insistence as the Court accepts the colonial laws as well as the line of continuity of the settlements (decision of non-interference) made by colonial administration. This point is discussed more elaborately in Section III.

Soon after the segregation, the Supreme Court noted that Nihang Singh unlawfully entered the inner courtyard in 1858.[36] He organised a *hawan* (fire worship) and erected Hindu symbolisms (Hindu flags) inside the mosque. An official complaint on November 30, 1858 against this unlawful act was filed by the then *moazzin* (priest) of the Babri mosque. The colonial administration acted swiftly and Nihang Singh was taken out and the flags stamped on the mosque uprooted. The Supreme Court regarded this incident of stubborn insistence as sufficient "documentary evidence" of the division not being "absolute" and proof of Hindu contestation on the possession of the inner courtyard:[37]

> The documentary evidence also shows that the setting up of the railing did not as a matter of fact result in an absolute division of the inner and outer courtyards as separate and identified places of worship for the two communities. Soon after the incident of November 1858 in which the Nihang Singh is alleged to have organised a hawan puja and to have erected a symbol of Sri Bhagwan within the premises of the mosque is the commencement of a series of

---

[33] On this point, *see*, John Sebastian and Faiza Rahman, "The Babri Masjid Judgment and the Sound of Silence" *The Wire*, 6th December 2019. <https://thewire.in/law/the-babri-masjid-judgment-and-the-sound-of-silence>. [Hereafter "Sound of Silence"].

[34] The division of 1856-57 oddly reminds one of foreshadowing the division of partition on the eve of Independence in 1947 between Hindus and Muslims.

[35] *Ayodhya judgment*, at p. 915.

[36] *Ayodhya judgment*, ¶¶ 888-889.

[37] *Id.* (para 777).

> episodes indicating that the exclusion of the Hindus from the inner courtyard was neither accepted nor enforced as a matter of ground reality.

Another altercation followed this incident in 1860 and Mir Rajjab Ali filed an official complaint against the blowing of the conches by the Hindus when the call for Muslim *azaan* (call to prayer) was made. In March 1861, Mohd Asghar and Rajjab Ali together filed a complaint against the construction of a new *chabutra* in the graveyard[38] near the mosque without any permission. The *subedar* had sent a report for the eviction of the person who had attempted to erect the *chabutra*. In 1866, the *mutawalli* again complained that a new *kothari* (small room) has been constructed by the *bairagis*[39] inside the doors of the mosque in order to place idols. The Court reads these incidents as matters of contestation sufficient to award the Hindu community the title of the inner courtyard in determination of the title claim of the property as a composite whole.[40]

In a passage that seems contradictory to the overall logic of the judgment, the court observed that the damage done to the mosque in 1934 by Hindus, and the events leading up to idol installation on November 22-23, 1949, demonstrate "contestation" by the Hindus and lack of "exclusive possession" of the Muslims over the inner courtyard.[41]

> The riots of 1934 and the events which led up to 22/23 December 1949 indicate that possession over the inner courtyard was a *matter of serious contestation* often leading to violence by both parties and the Muslims did not have *exclusive possession* over the inner courtyard. From the above documentary evidence, it cannot be said that the Muslims have been able to establish their possessory title to the disputed site as a composite whole.

The question of possessory title of the purported Hindu community, exclusive or otherwise, remained shrouded in mystery. All that the judgment reiterated was that the Hindu community contested the exclusive possession (for the inner courtyard) of their counterparts. One is left wondering how the acts of trespass, unlawful aggression and violence qualify as "contestation"? This

---

[38] Previously, this area was also a part of the contested site but the Supreme Court judgment in *M. Ismail Faruqui v. Union of India*, (1994)6 SCC 360 confined the dispute to the inner and outer courtyards.

[39] The term *bairagi* refers to the ascetics of Vaishnavite Ramanadi sect which arrived at Ayodhya in the eighteenth century and opposed the Shaivite Naga ascetics eventually becoming dominant in the city. The recent study on the militancy of asceticism in north India is elucidated by Dhirendra K. Jha, *Ascetic Games: Sadhus, Akharas and the Making of the Hindu Vote* (2019, Westland Publication: Chennai).

[40] The Court is not suggesting that colonial separation is unacceptable to the post-colonial Indian judiciary. This is clear, discussed in Section III, as the Court accepts the colonial continuity of this dispute in clear terms.

[41] *Ayodhya judgment*, at ¶ 892 (para 781).

'reasoning' suggests that violent intrusions of one side will deny "exclusive" possession of the other side. Such interpretive malfeasance poses a dangerous precedent.

A. The Suit Of 1885

A civil suit was filed by Mahant Raghubar Das (suit of 1885) in the court of the sub-judge of Faizabad on January 29, 1885. It sought permission for the construction of a temple at the *chabutra* situated in the outer courtyard. Since the status of the entire land was *nazul,* such a construction required the official permission of the colonial government. This suit was dismissed on December 24, 1885. The appeal filed was also dismissed.[42] What is noteworthy is that the plaint referred to the platform as "Chabutra Janam Asthan" ("chabutra which is the birthplace") of Lord Ram. There was no demand, claim, or even mention of the mosque in the inner courtyard as the birth place of Lord Ram in the plaint. This strengthens the argument that the site of the mosque being regarded as the birth place of Lord Ram was a subsequent development lacking any historical basis. The Supreme Court never noticed this aspect. The contradiction in the Hindu claim appears of arise if the suit of 1885 is analysed with careful attention: earlier in time the outer courtyard (*chabutra*) was revered as the birthplace of Lord Ram, while later the birthplace was claimed as inside the mosque situated in the inner courtyard.

The court is correct in its technical conclusion that the judgment in suit of 1885 does not operate as *res judicata* to the present case as the questions raised in the two judgments are substantially different. However, the absence of any contestation over the inner courtyard in the plaint filed by a devout Hindu priest is an important fact left unnoticed by the court.

B. The Mughal Era

The preliminary point with respect to this time period was the existence of a mosque on disputed land. Curiously, the two parties allegedly representing the Hindu community were at variance on this issue. Nirmohi Akhada (Suit no. 3) denied the existence of any mosque and pleaded that "at all material times" there was a Hindu temple on the site and they have been managers of that temple.[43] They also denied any installation of idols on December 22/23, 1949. However, the fact that "the mosque was raised in 1528 A.D. by or at the behest of Babur" was not denied either in Suit No. 5, filed on behalf of the deities, or in Suit no. 4

---

[42] For an easy access to the entire text of the plaint titled *Mahant Raghubar Das, Mohanth, Asthan, situate Ayodhya*, *plaintiff v. Secy. of State for India in Council, Defendant* dated January 29, 1885 and the judgments. *See*, A.G. Noorani (ed.), *The Babri Masjid Question, 1528-2003: "A Matter of National Honour"* (2003, Tulika Books, New Delhi) ¶¶ 175-188.

[43] *Ayodhya judgment* at ¶ 103 (para 68).

representing the Sunni Waqf Board.[44] The Supreme Court rejects the claim made by Nirmohi Akhada denying the presence of the mosque. The Court accepts the existence of mosque as an established fact.[45] However, it asserts that for the determination of title the existence of the mosque is not sufficient. This is because, according to the Court, "a claim to possessory title has to be based on *exclusive and unimpeded possession* which has to be established by evidence."[46]

Nevertheless, an adverse inference was drawn against the Muslim parties on account of their inability to prove the offering of *namaz* before 1856. "But, a crucial aspect of the evidentiary record," the court observes, "is the absence of any evidence to indicate that the mosque was, after its construction, used for offering namaz until 1856-57."[47] The existence of the mosque was not denied by the Court. Why would the presence of the mosque constructed by a Muslim ruler during Mughal regime not be sufficient, on balance of probabilities, to deduce that it must have been used to offer *namaz*?

Such a conclusion becomes even more compelling when the offering of *namaz* during the colonial times till December 1949 was not disputed by the Court.[48] Why did the Court never presumed, on balance of probabilities, the offering of *namaz* before 1856-1857? After all, the standard of balance of probabilities had been used by the Court in order to eventually decide the case in favour of the Hindu side. Such a presumption would have shifted the burden of proof to the other side/s to disprove that *namaz* was offered at a site which was a mosque. Would such a course not be fair given the logic of the judgment which accepts the presence of the mosque and prayers in it being offered till 1949?

Even the availability of documentary evidence regarding the upkeep of the mosque in form of financial aid provided by the colonial government did not convince the court: "the High Court has noted that the documents would show that *financial assistance was provided by the British for the purposes of the maintenance of the mosque*, but this would not amount to proving that the structure was

---

[44] *Id.* Suit No. 4 (Sunni Wakf Board) had sought a declaration of the presence of the mosque in 1528 A.D. and that it has been used by the Muslim community for offering prayers.

[45] *Id.* At ¶ 79 (para 51). The Court did not accept the argument (advanced in Suit No. 5) that the mosque was not constructed under the tenets of *Shariat*: "The belief and faith of the worshipper in offering namaz at a place which is for the worshipper a mosque cannot be challenged. It would be preposterous for this Court to question it on the ground that a true Muslim would not offer prayer in a place which does not meet an extreme interpretation of doctrine selectively advanced by Mr Mishra…. We must firmly reject any attempt to lead the court to interpret religious doctrine in an absolute and extreme form and question the faith of worshippers. Nothing would be as destructive of the values underlying Article 25 of the Constitution." *Id.* at ¶ 114-115 (para 77).

[46] *Ayodhya judgment*, ¶ 884 (para 772). (Emphasis added)

[47] *Ayodhya judgment* at ¶ 791 (para 678).

[48] *See* ¶ 79 (para 51) where the Court categorically accepts that the last *namaz* was"offered in the mosque was on 16 December 1949."

used for the purpose of offering namaz."[49] In the light of the British grant for the upkeep of the mosque, what is the expected standard of proof for the proof of *namaz* being offered? Why did the standard of "balance of probabilities", constantly iterated by the court in this judgment, not suffice?

If one goes by the principle of "exclusive and uninterrupted" possession as the *sine qua non* for establishing title, then the same should apply to both sides. However, the evidence of Hindu worship during 1528-1856 inside the mosque, either exclusive or uninterrupted, was never presented before the Court. On the failure of the Hindu side to provide exclusive evidence of possession, the judgment remains silent. The basis of Hindu worship in the inner courtyard appears to have been established with references to travelogues and some observations made by the Archeological Survey of India (ASI). The problem of the judgment is compounded as the Supreme Court contradicts itself on relying on these. Contradictory and unclear propositions by the court abound in the reading historical evidence. With respect to the ASI report, the Court finds the Allahabad High Court's observations "worthy of acceptance" that the mosque "was not constructed on a vacant land…[and]…the underlying structure was not of Islamic origin."[50] The Court refers to the ASI report suggesting that "recoveries are suggestive of a Hindu religious origin comparable to temple excavations…"[51] But later, in categorical terms, it stated that any "finding of title cannot be based in law on the archaeological findings which have been arrived at by ASI."[52]

Similarly, on the one hand, in the section on "conclusion on title" it observes that the "court does not decide title on the basis of faith or belief but on the basis of evidence".[53] On the other, it wholeheartedly accepts the account of Joseph Tiefenthaler, a Jesuit missionary who travelled India in the eighteenth century, as "certainly of significant value when it adverts to the existence of the faith and belief of the Hindus in Lord Ram."[54] and that the "account has a reference to the form of worship, by circumambulation and to the assembly of devotees at the site."[55]

In conclusion, the court accepts the travellers' accounts (Tiefenthaler and Montgomery Martin) as indicative of the "*existence of the faith and belief* of the Hindus that the disputed site was the birth-place of Lord Ram."[56] On the same

---

[49] *Id.* at ¶ 796 (para 680). This point is rhetorically made by Noorani in his review of the Supreme Court decision where he asks: "[d]id the British spend money for the upkeep of a mosque in which none prayed?" A.G. Noorani, "Supreme Court Denies Justice," *Frontline*, December 6, 2019.

[50] *Ayodhya judgment*, at ¶ 595 (para 508).

[51] *Id.* at ¶ 906 (para 788).

[52] *Id.* at ¶ 907 (para 788).

[53] *Id.* at ¶ 921 (para 796).

[54] *Id.* at ¶ 683 (para 573).

[55] *Id.* at ¶ 684 (para 573).

[56] *Id.* at ¶ 908 (para 788). (Emphasis added)

page, it reiterates that "[t]itle cannot be established on the basis of faith and belief above."[57] But these narratives "are indicators towards pattern of worship at the site on the basis of which claims of possession are asserted."[58] In the words of the Court:[59]

> As regards the inner courtyard, there is evidence on a *preponderance of probabilities* to establish worship by the Hindus prior to the annexation of Oudh by the British in 1857. The Muslims have offered no evidence to indicate that they were in *exclusive possession* of the inner structure prior to 1857 since the date of the construction in the sixteenth century.

The standard of "preponderance of probabilities" is used for establishing worship by the Hindus. The Muslims were expected to show "exclusive possession" to the complete exclusion of Hindu devotees. Mere Hindu presence at the site was sufficient for the Court. But the co-presence of Muslims was not enough as it was not exclusive. It becomes extremely difficult for any reader of the judgment to fully appreciate this reasoning of the Court, although the court enthusiastically accentuated on the equal treatment of religions as a cardinal constitutional value. Its treatment of the two claims, however, disavows these constitutional aspirations. In the next section, I will analyse how even the aspirational discourse of the court on constitutional secularism contains stark gaps requiring critical attention.

III. Gaps In The Supreme Court's Discourse On Constitutional Secularism

Under a separate section titled 'The Places of Worship Act,' the Supreme Court delves into a discourse on constitutional secularism by elaborately discussing the Places of Worship (Special Provisions) Act, 1991. The fact that this legislation is inapplicable to the present dispute[60] makes the discussion aspirational and not immediately relevant. Nevertheless, the court explains and elucidates the various provisions of the enactment and dwells upon the legislative intent, referring to Lok Sabha and Rajya Sabha debates. The court describes the legislation as fostering the "constitutional basis of healing the injustices of the past" and a commitment towards "every religious community" in safeguarding places

---

57 *Ibid.*

58 *Ibid.*

59 *Id.* at ¶ 921 (para 798). (Emphasis added)

60 This legislation prohibiting the conversion of place of worship from one religion or denomination to another is an important legislation. However, the legislation is not applicable to the present dispute as S.5 of the Act in specific terms excludes its application to Ram Janma Bhumi-Babri Masjid.

of worship "designed to protect the secular features of the Indian polity, which is one of the basic features of the Constitution."[61]

A sub-section titled "Secularism as a constitutional value" aptly begins with the reference to *S.R. Bommai v. Union of India*[62] which affirmed secularism as a part of the basic structure of the Constitution. But unfortunately, *Bommai* is merely a decorative precedent for the court. Quoting from Justice B.P. Jeevan Reddy's opinion in *Bommai*, the court reiterates: "Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions."[63] The Supreme Court neither provides the context (despite its immediate relevance) for this quote nor does it devote a single line on the passage selected from *Bommai*. This observation, in the overall context of the *Bommai* decision, meant "for the majority of justices…that the State was to be encouraged to act in furtherance of the basic features of the Constitution, not simply to refrain from acting in ways that threaten fundamental rights…In the Indian context, this meant an injunction to advance the ideal of a welfare State by conjoining secularism and egalitarianism."[64]

Let alone foregrounding the context, the court did not find it worthy to even mention what led to *Bommai*. After a solitary, abrupt quote from *Bommai*, the discussion safely returns to the Places of Worship Act and its relevance to secularism, something on which the court had already spent substantial judicial ink. The case of *Bommai* is never to return in the judgment thereafter.

It is important to note that the *Bommai* case remains crucially significant for the Ayodhya case given its connection with the demolition of the Babri mosque. In *Bommai*, the nine-judge bench of the Supreme Court, by majority, validated the suspension of elected governments in three Indian states[65] on account of the "failure of Constitutional machinery". This resulted from their failure to safeguard the secular principles during the demolition of the Babri mosque on December 6, 1992.

The *Bommai* court took into account the actions and deeds of high government functionaries in reaction to the destruction, the party manifesto of the BJP committed to "build[ing] Sri Ram Mandir at Janmasthan", and the speeches and actions of the leaders while arriving at its verdict.[66] Thus the

---

61 *Ibid.*

62 (1994) 3 SCC 1. (Hereafter "*Bommai*").

63 *Bommai* cited in *Ayodhya judgment* at p. 123 (para 83).

64 Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (2003, Princeton University Press: New Jersey) at pp. 281-282. [Hereafter, "*The Wheel of Law*".]

65 Madhya Pradesh, Rajasthan and Himachal Pradesh. All the three States were ruled by the Government of Bharatiya Janata party.

66 *Bommai* (Jeevan Reddy, J., para 433) "…the BJP Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot dissociate themselves from the action and its consequences and that these Governments, controlled by one and the same party, whose leading lights were actively

relevance of *Bommai* lies in *not* shying away from the political context and engaging in a direct confrontation with political [in]action if it infringes upon the essential aspects of the Constitution. The *Bommai* court described the process resulting in eventual demolition as "serious blow" to the peace and harmony of the nation and an event having adverse international reverberations.

The Ayodhya judgment in its discourse on secularism devotes nine full pages to a legislation that in explicit terms excludes the present controversy while giving only half a page, bereft of any context, to the case where the discussion of secularism appeared in the context of demolition of the Babri Mosque. This fugitive approach to *Bommai* is another symptom in the judgment representative of its larger attempt to bury the past and silence the political dynamics, making it complicit in maintaining the insular approach in comprehending the Ayodhya dispute.

In the *Ayodhya* case, the Court does not want to confront the atrocious event of the mosque demolition which is integral.[67] Would it be possible for the Supreme Court to arrive at a similar conclusion if the mosque were not demolished in 1992? That would have required the demolition of the existing mosque in order to execute the order of the Court.[68] These and many other questions remain muted in the uncomfortable silence on *Bommai* and the court's lack of engagement with the Babri question.

IV. Sovereignty And Jurisdiction Of Courts Across Historical Regimes

What is the extent to which courts should assess the past to decide rights and liabilities arising from previous legal regimes? This question is significant for the Ayodhya dispute as it traverses various historical regimes. The court acknowledges that the present dispute spans four different legal regimes: the regime of King Vikramaditya, who allegedly constructed the Hindu temple on the site; the Mughal empire; the British colonial regime; and independent India.

Relying upon a few judgments of the Privy Council, the court accepted the following proposition: "Where there is a change of sovereignty from a former sovereign to a new sovereign, the municipal courts of the new sovereign will not enforce the legal rights of parties existing under the former sovereign absent

---

campaigning for the demolition of the disputed structure, cannot be dissociated from the acts and deeds of the leaders of BJP" at p.295. For a discussion on use of party manifesto for proclamation of emergency, *see*, Gary Jacobsohn *The Wheel of Law* at p. 132.

[67] Jacobsohn describes the event in the following terms: "Not since partition had so much blood flowed through the streets of Indian cities and towns. The orgy of Hindu-Muslim rioting and tumult was a chilling reminder of the awful circumstances that accompanied the birth of independent India…", *id.* at 129.

[68] As A.G. Noorani asks, "Would and could the court have passed this order if the masjid had not been destroyed?" Noorani, "Supreme Court Denies Justice" op cit.

an express recognition by the new sovereign of such legal rights."[69] The Court clarified that the rights and liabilities arisen during the previous regime may also continue in an implied manner through the conduct of the subsequent regime.[70]

The conduct of the colonial government provided the continuity to the Ayodhya dispute, despite the regime change from the Mughals to East India Company.[71] After "the annexation of Oudh by the British sovereign, no actions were taken to exclude either the Hindu devotees of Lord Ram from worship nor the resident Muslims offering *namaz* at the disputed property."[72] The continuity of the dispute was never disrupted. Even on change of sovereignty from the British government to the Republic of India, the continuity of colonial laws was approved by Article 372 of the Constitution.[73] The continuity provided the Supreme Court jurisdiction over the Ayodhya dispute.

No such continuity existed, either express or implied, in the change of regime from King Vikramaditya to the Mughals. This absence of evidence of continuity forbade the court from inquiring into the ancient Hindu temple on the site.[74] The court iterated that "no evidence has been led by the plaintiffs in Suit 5 to establish that upon the change in legal regime to the Mughal sovereign, such rights were recognised."[75] More precisely, the court asserted that this "Court cannot entertain or enforce rights to the disputed property based *solely* on the existence of an underlying temple dating to twelfth century."[76]

The above assertion demolished the cornerstone of the Ayodhya/Ram janambhumi movement – the claim of the temple – as it seemed to have lost ground before the court. But, as we have already seen, the Supreme Court goes into the ASI report assessing the question of existence of material, suggesting an inference of non-Islamic foundations beneath the mosque (however, after spending scores of pages on the discussion on the ASI report, it eventually describes it as not of much relevance in determination of title suit).

---

69 *Ayodhya judgment* at ¶ 761.

70 *Id.* at 765. ("Municipal courts will only recognise those rights and liabilities which have been recognised by the new sovereign either expressly or *impliedly through conduct* established by evidence.").

71 "…on 13 February 1856 with the annexation of Oudh by East India Company, which later became the colonial government of British sovereign."

72 *Ayodhya judgment at* ¶ 768.

73 *See*, Art.372, Constitution of India. It permits continuation of "all the law in force" on the Indian Territory during the colonial times unless it is "altered or repealed or amended" by the competent legislative authority.

74 Absent such recognition [of continuity], the change of sovereignty is an act of State and this Court cannot compel a subsequent sovereign to recognise and remedy historical wrongs." *Ayodhya judgment* at ¶ 766.

75 *Id.* at ¶ 767.

76 *Id.* at ¶ 768. (Emphasis in original). A few pages later, the Court observes, "The acts of the parties *subsequent* to the annexation of Oudh in 1856 form the continued basis of the legal rights of the parties in the present suits and it is these acts that this Court must evaluate to decide the present dispute." *Id.* at 771. (Emphasis in original).

The judgment is suffused with such internal tensions and contradictions. But the most conspicuous of all such incongruities can be found in the *addenda* written again anonymously, except with the indication by the court that it is written by 'one of us.' It is this novel adjunct, unique in the history of the judicial process, appearing at the end of the judgment that we will analyse in the next section.

V. The Grammatology Of The Addenda

If psychoanalysis as a reading practice has taught us anything, then the 'little details, which are never foregrounded, are the key to understand the deeper malaise of the *analysand*. In this sense, the *addenda* become the discursive *unconscious*, in the psychoanalytic sense, of the main judgment.

The additional *addenda* after the end of main judgment is a mysterious document demanding Herculean labours to be fully decoded. The authorial secrecy is another issue as all we are given to understand is that it is written by one of the five judges. The deliberate erasure of authorship is reflective of insecurity of the institution duty-bound to strive for security and justice.

We are told that one of the five judges "while being in agreement" with the reasons given in the main judgment preferred to record "separate reasons"[77] A more than a hundred pages long separate opinion addresses the question if "the disputed structure is the birthplace of Lord Ram according to the faith and belief of Hindu devotees." If the anonymous author is a signatory to the main judgment, then why should he write a separate opinion? He ought to accept that "faith and belief" cannot be of help in deciding the title suit. How then should we make sense of the fact that the *addenda* considers the issue of Hindu faith and belief as central question when we are told in the main judgment that this has little relevance in the outcome of the suits?

The *addenda* not only poses or considers this question but emphatically approves the existence of the Hindu temple on the basis of Hindu faith and belief. The contradiction can be seen in the diction of the *addenda* which, unlike the main judgment, is suffused with Sanskrit *slokas* and references to ancient Hindu texts such as *Vedas and puranas*. Even the font of the text is different, marking a clear departure from the main judgment. This surplus or excess seems to distinguish itself from the judgment while at the same time is a part of the whole. After all, the *addenda* is not written as a dissenting opinion but and additional supplement from one of the five judges who., we are told, is "in agreement with the above reasons"[78] given in the judgment. This unique innovation in the history of judgment writing of Indian courts, if not the entire

[77] *Ayodhya judgment* at ¶ 929.
[78] *Ayodhya judgment* at ¶ 929.

common law tradition, despite its distinguishing markers, implicates all the judges who permitted it within the judgment without a word of dissent.

The *addenda* poses such difficulties in making sense of the Supreme Court pronouncement that one is tempted to deny its presence altogether. Even as acute a scholar as Upendra Baxi falls into this temptation and denies the *addenda* as part of the judgment.[79] Such an attitude is merely reflective of legal non-reflexivity in covering and hiding the scar that illuminates the wound that the judgment inflicts. Observed carefully, this surplus exposes the faultlines and injustices of the entire pronouncement of the Supreme Court. The *addenda* functions as a *synecdoche*, a part which simultaneously affirms as well as denies the logical coherence of the judgment as a whole. It is a slip which is indicative of the crisis and antagonisms immanent in the judgment. At another level, it explains the schizophrenic outburst of the main text which seemingly speaks in multiple voices, as I have indicated in this paper. The *addenda* purports to agree not only with the operative *directions* but with the *reasoning* of the main judgment as well. Reading the judgment along with the *addenda* makes one feel that it cannot be seen as coherent and it falls apart due to an inner split. In a strange juxtaposition of fact and faith, mythology and history, the judgment becomes impossible in itself.

A. Mythology As/Of The Judicial Discourse

The text of the *addenda* begins with re-statement of pleadings of the parties.[80] This non-analytical restatement is followed by a mythological supplement difficult to comprehend coming from a judge who is also signatory to the main judgment. The central question that this supplement tries to address is that of the faith and belief of the Hindus (the term again used as monolithic and univocal) in Lord Ram and his place of birth.[81]

The *addenda* asserts that "[f]aith and belief foster and promote the spiritual life of the soul."[82] This is followed by an extensive quote from a previous

---

[79] "This, clearly, cannot be part of the judgment because anonymous judicial opinions are constitutionally impermissible." Upendra Baxi, "Award of Five Acres for Masjid in Ayodhya is an Effort to do Complete Justice" *The Indian Express*, November 12, 2019. Indeed, with respect to the *Ayodhya judgment*, Baxi demonstrates an extraordinary capacity to get everything wrong in his celebration of the judgment doing 'complete justice.' For a longer, but equally unconvincing reading of the judgment, *see*, Upendra Baxi, "Ayodhya Verdict Must Be Seen Dispassionately from the Prism of Law, Constitutionalism," *Outlook*, November 14, 2019. Sebastian and Rahman have correctly rejected Baxi's argument explaining to him the reason why the judgment "looks strange to non-lawyers, maybe it is only lawyers who can claim the neutrality of the rule of law in the face of such inequality." John Sebastian and Faiza Rahman, *Sound of Silence*, op cit.

[80] *Addenda* ¶¶ 2-16 (paras 3-26).

[81] The *addenda* itself cites pleadings from Nirmohi Akhada which are in direct contradiction with pleadings of the Deities' pleadings.*Addenda* ¶ 8-10 (paras 14-20). Despite this a monolithic Hindu belief was sought and established without any reference to the internal conflict between the Hindu parties representing Suit No. 3 and Suit No. 5.

[82] *Addenda*, ¶ 16, (para 28).

judgment which has no relevance to the present case[83] elucidating upon the content of Hindu religion. Immediately thereafter, we are told that in "this case, it is not necessary to dwell upon the concept of Hinduism."[84] Competing with the ancient scriptural tradition, the *addenda* scans and cites ancient Hindu epics and texts in original Sanskrit along with the English translations. Textual history is seamlessly tied with mythology, transforming the judicial opinion into an ecclesiastical exegesis to establish how Hindu belief and faith strongly believes in the disputed site as the birthplace of Lord Ram.

The anonymous judge quotes from *Brihad-dharmottara Purarna*: "Ayodhya, Mathura, Maya (Haridwar), Kashi, Kanchi, Avantika (Ujjain) and Dvaravati (Dwarka) are seven most sacred cities"[85] This passage from an ancient scripture where Ayodhya finds mention as a sacred city for the Hindus becomes an 'argument' in favour of the plaintiffs. In such sweeping citation of various sacred cities, the *addenda* aligns itself with the Hindu nationalist movement.

The reader is further invited to the universe of astrological preciseness as Valmiki Ramayan, it is elaborated, provided even the "planetary situation" of the birth of Lord Ram.[86] If this mythology leaves any doubt about the mosque as the birthplace of Lord Ram, then a historical fact is mentioned by way of corroboration. The visit of Guru Nanak, the founder of Sikhism, to the birth place (during 1510-11) provides validation that "the faith and beliefs of the Hindus… cannot be held to be groundless."[87]

The *addenda* becomes ghoulish in its articulation of the acts of illegal trespass by, what the judgment describes as the Hindu community in the inner courtyard over the course of history. They are described as instances of *persistent protest*, or *actions of worship* of the Hindu devotees.[88] The 1934 affront to the Babri mosque by members of Hindu community (who were fined by the colonial state) was turned on its head by the description of the destruction as "testimony of *differences and dispute* between the parties which took place in 1934 damaging the Mosque…"[89] The erasure of violence, visible in the main judgment, assumes

---

[83] The case of *Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya*, AIR 1966 SC 1119 was cited by the Court. This judgment was related to temple entry laws and has no relevance to the present question. For an analysis of how even previously the Supreme Court misquoted from *Yagnapurushadji* in a different but not unrelated context, *see*, Gary Jeffrey Jacobsohn, *The Wheel of Law* at ¶ 207.

[84] *Addenda*,¶ 8 (para 30).

[85] *Id*. at¶ 19.

[86] *Id*. at¶ 31.

[87] *Id*. at ¶ 65. "It can, therefore, be held that the faith and belief of Hindus regarding location of birthplace of Lord Ram is from scriptures and sacred religious books including Valmiki Ramayana and Skanda Purana, which faith and belief (sic.), cannot be held to be groundless." *Id*.(para 72).

[88] *Addenda*, p. 99, para 130.

[89] *Id*. at ¶ 99. Emphasis added. The documents concerning the mosque's repairs were put on record by the plaintiffs of Suit No. 4 to show their possession prior to 1949.

a new level when the evidence of the mosque is read by the Court as suggesting "that within the premises of Mosque, the Hindus were visiting and worshipping in the period in question."[90] The *addenda* takes a quantum leap in practices of reading evidence:

> "The above documentary evidence are testimonial of faith and belief of the Hindus that the Mosque was on the janamsthan of Lord Ram. Their *protests, persistence and actions to worship* within the Mosque is testimony of their continued faith and belief that premises of the Mosque is Janmasthan of Lord Ram."[91]

The notion of faith, belief and trust itself are wounded when the *addenda* characterises riotous mobs as devotees of Lord Ram. If this is the notion of faith that the Court wants us to believe as "the nourishment to the soul" then the propaganda of annexation camouflages itself successfully in the judicial discourse which becomes a manifesto for a militant empire of the soul.

VI. Silencing Regime-Sponsored Violence

"One must exercise caution before embarking on the inclination of a legally trained mind to draw negative inferences from the silences of history. *Silences are sometimes best left to where they belong - the universe of silence.*"[92] This is a confession of the court's limitation in reading ancient historical material. But silence on the issue of violence is conspicuous throughout the judgment.[93] I argue that this banishment, exile, and exclusion of violence constitutes the *positive unconscious* of the judgment. The "language of law carries with it all that is unsaid, that has been driven within, hidden from view: it carries its failures within as an indelible past, as a memory of battle, as litigation."[94] The following section, drawing from the Allahabad High Court judgment of Justice S.U. Khan and the work of historians of Ayodhya dispute, throws light on the "unsaid" of the judgment on the question of violence.

---

90 *Ibid.*

91 *Id.* at ¶¶ 99-100.

92 *Id.* ¶ 700 (para 593, emphasis added).

93 Even the term "violence" evades the text of the judgment. It appears four times in the judgment (including the *Addenda*). Twice it appears in relation to other cases cited by the court, once in description of Carnegy's account of 1857 and finally in suggesting that "possession over the inner courtyard was a matter of serious contestation often leading to violence by both parties.…" *Id.* at ¶ 892 (para 781).

94 Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* 16 (1990).

A. Illegalities Of 1949 And Judicial Mala Fides Of 1986

On 1st June 1949, K. K. K. Nair took charge as the deputy commissioner-cum-district magistrate of Faizabad district. He was outspoken about his sympathies for the cause of the Hindu communalists.[95] His active role in the incident of December 22/ 23, 1949, made him take voluntary retirement from public life in months following the event.[96] On August 14, 1949, the United Province Hindu Mahasabha passed a resolution, widely circulated, demanding "the restoration of the temples of Shri Vishwanathji at Kashi, Shri Ram Janma Bhumi at Ayodhya, and Sri Krishna mandir at Mathura which were converted into mosques in Mughal times."[97]

S.U. Khan, J. in the Allahabad High Court judgment, takes judicial notice of the partisan attitude of the district magistrate both prior to and after the night of idol installation.[98] The original file regarding the incident made some startling revelations. A letter written by the superintendent of police, Kripal Singh, addressed to K.K.K. Nair, clearly anticipated mosque capture by Hindu ascetics. There is a mention of the dismantling and digging of several Muslim graves during the grand event organised by the Hindu community.[99]

> "Several thousand Hindus, Bairagis and Sadhus…intend to continue the present Kirtan [worship accompanied with music] till Puranmashi. The plan appears to be to surround the mosque in such a way that entry for the Muslims will be very difficult and ultimately they might be forced to abandon the mosque."

Khan, J. elaborately cites from the report/diary prepared by Nair after the incident feigning complete ignorance of this apprehension. The news came to him as a "great surprise". His "surprise does not appear to be genuine as there was a clear mention of such a plan in the above letter of [the] S.P."[100] Khan, J. further highlights the flagrant contradiction in Nair's previous letter, written to the state government on December 16, 1949, giving reassurance of things being under control and his later surprise over the incident.[101] High-level administrative

---

[95] *See*, Harold A. Gould, "Religion and Politics in a U.P. Constituency', in D.E. Smith (ed.) *South Asian Politics and Religion* (1966, Princeton University Press, Princeton) at ¶ 62.

[96] *Id.* at ¶ 63.

[97] Hindu Mahasabha Papers, File No. 120 (I), Resolution passed on 14 August 1949, NMML.

[98] *Gopal Singh Visharad v. Zahoor Ahmad*, 2010 SCC OnLine All 1935 (*Allahabad High Court judgment*)(per S.U. Khan, J. at ¶ 25. The judgment also points out that the incident was apprehended by the Muslim community almost a month before its occurrence. This suggests that the incident was not an episodic one but a planned conspiracy.

[99] Letter by Kripal Singh, S.P. to K.K.K. Nair, DM dated 29th November 1949 quoted in the *Allahabad High Court judgment* at ¶ 27.

[100] *Allahabad High Court judgment*, (per S.U. Khan, J.) at ¶ 28.

[101] K.K.K. Nair's letter to the State Government dated December 16, 1949, demonstrating the manner in which, instead of taking action, Nair blamed the Muslims for "exaggerating these

functionaries formed the backdrop of the installation of idols and this finds a mention even in the judicial archive.

Nair even refused the request of the state government for removal of idols. In his report/diary on November 27, 1949 he noted: "if the Government still insisted that removal should be carried out in the face of these facts, I would request to replace me with another officer."[102] Nair's "solution to offer for government's consideration" involved the attachment of the premises of the mosque excluding both Hindus as well as Muslims, "with the exception of the minimum number of *pujaris*…who would offer *pooja* and *bhog* before the idol…"[103]

On November 29, 1949 the property was attached under section 145 of Criminal Procedure Code (CrPC).[104] After taking charge, he submitted a 'scheme' of arrangements stating that "*the most important* item of management is the maintenance of Bhog and puja in the condition in which it was carried on when I took over charge."[105] Less than two weeks old Hindu worship superseded the *status quo* that existed over several hundred years. In accordance with Nair's proposition, two or three pujaris were permitted inside to the exclusion of all others who were not permitted to cross the grill brick wall. This position continued for another three decades.

On January 25, 1986, Umesh Chandra Pandey, a practicing lawyer in Ayodhya, filed an application in the court of the deputy munsif to open the locks and allow access to the Hindu community in general to perform worship. Pandey was neither a party nor was he representing any of the parties. The court did not pass any orders because the matter was pending in the Allahabad High Court. This led to his filing an appeal in the court of district judge in Faizabad on January 31, 1986. On the very next day, the district judge,

K.M. Pandey, without having the case file, allowed the appeal and passed an order for the opening of the locks on the gate of the mosque. "If the Hindus

---

happenings," due to the heightening of the Muslim anxiety "by the recent Navanh (sic.) Ramayan Path, a devotional reading of the Ramayana by thousands of Hindus.…" Dismissing the complaints from the Muslim community as "grossly exaggerated" he assured that "the situation was entirely in control and police picket was functioning efficiently." *Id.* at 29-31.

[102] *Allahabad High Court judgment*, at ¶ 34. Nair's letter to the Chief Secretary of the U.P. Government, pleaded for continuation of the Hindu worship to the deities.

[103] *Ibid.* (Emphasis in original).

[104] The Allahabad High Court judgment mentions another act of judicial impropriety in this order by the judicial magistrate. "At the end of the order…there was a line which was admittedly scored off by the Magistrate himself…. The Magistrate stated that he scored off the sentence before signing the orders as it was redundant…[But]…the cutting does not bear initials." Nevertheless, the High Court managed though with "great difficulty" to make sense of the scored off sentence. "It is to the effect that *puja darshan* shall continue as was being done at that time (presently)." *Allahabad High Court judgment* (per, S.U. Khan, J.) at ¶¶ 39-40. (Emphasis in original).

[105] *Id.* at ¶ 40. (Emphasis added)

are offering prayers and worshipping the idols, though in a restricted way, for the last 35 years, the heavens are not going to fall…if the locks are removed."[106]

Mohammed Hashim, a plaintiff in suit no. 4, filed the application to be impleaded in the case on the very next day, February 1, 1986. But the district judge rejected the application on the ground that it was unnecessary and improper. Other than the technical glitches in the order,[107] S.U. Khan's opinion of Allahabad High Court found it appalling that "a person who was a party in the connected suit which was leading case (sic) was not considered to be a necessary and proper party by the district judge. At the same time, Mr. Umesh Chand Pandey, who was not a party in the suit, was held entitled to file an appeal which was allowed."[108] This partisan judicial interruption of the thirty-five years of *status quo* provided the necessary stimulus to the eventual demolition of the mosque, as this was the time when the *Ayodhya Ram Janam Bhumi* movement was gaining momentum.[109]

S.U. Khan's, J. precise and brief analysis, in eight pages, of the incident of unlocking of doors, exposes how the judiciary became implicated in the failure for a just resolution of this conflict. He rhetorically points out that the proverbial wisdom of justice not only being done but seeming or appearing to have been done is mutilated in the *modus operandi* of the district judge.[110] Staying clear from the political backdrop of the times,[111] this opinion does great service by inaugurating the tradition of critical analysis in judicial reasoning which unfortunately found no echo in the judgment of the Supreme Court.

Khan described this farcical order by the district judge, K.M. Pandey, as a "real tragedy" because this "shook the faith" of the affected parties, largely unaware, in the judicial system itself. The Supreme Court which invested much of its intellectual labour on "faith and belief" did not find this landmark event shaking the faith of people in the judiciary as worthy of any elaboration. No

---

[106] *Umesh Chandra Pandey v. State of U.P.*, Civil Appeal No. 66/1986. Available in A.G. Noorani, *The Babri Masjid Question, 1528-2003*, Vol.I, ¶¶ 267-269.

[107] The order of the munsif never decided anything and therefore appeal cannot lie against it. It was passed without the file of the case available to the judge as it was in the High Court which makes it even more suspect.

[108] *Allahabad High Court judgment* (per S.U. Khan, J.) at ¶ 90.

[109] Since 1983, the Vishwa Hindu Parishad (VHP), a Hindu nationalist organisation, began its movement to *liberate* Babri Masjid and mosques at Varanasi and Mathura. An ultimatum was served to the U.P. Government "to restore the birthplace of Lord Rama in Ayodhya to Hindus by Shivratri Day (March 8, 1986) or face the consequences in the shape of massive agitation led by religious leaders of the country." *Organizer*, August 25, 1985. This and other relevant documents regarding the Ram Janam Bhumi movement are in A.G. Noorani (ed.), *The Babri Masjid Question, 1528-2003*, Vol.I, 252-266.

[110] *Allahabad High Court judgment* "Before passing the judgment dated 1.2.1986 the learned District Judge first buried the second limb of the principle (appearance of justice) very deep." at 91.

[111] The assurance given by the then Prime Minister, Rajiv Gandhi, of the Congress Party for opening of locks and the ascendency of the issue by Hindu Right wing organisations.

critical comment on this sordid episode exists in the judgment which otherwise is eager to imagine law as healing the injustices of the past.

VII. Conclusion

The Supreme Court quite artistically observed that "in matters of faith and belief, the absence of evidence may not be evidence of absence."[112] However, what we find is that the evidence of *absences* finds an alarming presence in the entire judgment. Other than the erasure of state-sponsored violence, as described in the previous section, various other absences are spread over the judgment. The judiciary became complicit in deepening the scars of majoritarian violence.

However, despite the Supreme Court's efforts at sanitising and silencing the varieties of violences that mark this conflict, their traces remain in the legal archive which haunt this judgment's 'complete justice.'

It is a historical irony that a report in the *Organiser*, mouthpiece of the Hindu Right in India, in 1985, described the "display of generosity" which one could find in the "offer of the Hindu religious bodies to Muslims to allot them a different land and get a mosque of their choice design (sic.) constructed through donations raised by Hindus, if they withdraw their claim…over the birthplaces of Shri Rama in Ayodhya, Shri Krishna in Mathura and the Vishwanath temple in Varanasi."[113]

The vocabulary of Hindu 'generosity' in 2019 acquired a constitutional language of "complete justice" in the judgment delivered by the highest Court of the land. However, the traces in the legal archive of the 'logic' that underpins this 'generosity' show that the attempts at erasures of historical record and the silences on crucial issues show that this triumphal judgment remains testimony to the failed attempts of a psychically fragile nation attempting to mask genocide as generosity.

---

[112] *Ayodhya judgment* at 215 (para 192).

[113] *Organiser*, August 25, 1985 cited in A.G. Noorani, *The Babri Masjid Question, 1528-2003* at 258.