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ON THE DEITY AS JURISTIC PERSONALITY: THE RELIGIOUS, THE SECULAR AND THE NATION IN THE AYODHYA DISPUTE AND THE AYODHYA JUDGMENTS (2010 AND 2019)[1]

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Socrates: Tell me then, by Zeus, what is that excellent aim that the gods achieve, using us as their servants?

Abstract The following paper will analyse the concept and context of the 'juristic person' as it takes form in the Ayodhya case and the Ayodhya judgments (2010 and 2019) thereby revealing in a concrete sense the deep and dense entanglement of the religious, the secular, and the national. After a brief introduction to the case, where the title was given to Ramlalla as a juristic person by the Supreme Court, the paper moves on to show that the concept had arisen in Europe which had provided the historical and theoretical context for its employment in relation to the Hindu deity in colonial and post-colonial Indian jurisprudence. The next section will analyse the applicability of limitation on the plaintiffs Ramlalla and Janmasthan (as juristic persons) as discussed and adjudicated upon by the judgments of the High Court as well as Supreme Court. This will be followed by a discussion of the argument of the continuity of faith, belief, and worship at the disputed site 'since time immemorial'. The penultimate section will focus on the implications of the Supreme Court's denial of juristic personality to plaintiff 2 (Janmasthan) and its affirmation of plaintiff 1 (Ramlalla) as a juristic person in the 2019 judgment. It will argue that the very

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same reasons which led to the denial of juristic personality, which would require precise evidence of a founding moment, to Janmasthan were equally applicable to Ramlalla who by the same logic should have been denied a juristic personality. The conclusion shows that notwithstanding the Supreme Court's stated commitment to secularism in the judgment and its cognizance of the case as one over title to immovable property, the only (unstated) 'rationale' for its findings lie in the acceptance of 'belief and faith'; a faith and belief which is ultimately subtended by a conflation between the religious and the national. This reveals a central contradiction at the heart of the judgment, with unstated and questionable assumptions about the national and the religious.

I. INTRODUCTION

For some decades now, literature around the relationship between religion and secularism, has been proliferating. There remains a dominant paradigm of interpreting secularism as the historical emergence of law and rationality transcending a religious world.[2] The revival of the works of Carl Schmitt in the English-speaking world, and his rehabilitation, most insistently through Giorgio Agamben, offers a different perspective. Schmitt had argued in *Political Theology*, that "all significant concepts of the modern theory of state are secularised theological concepts", not merely because of their "historical development" but also because of their "systematic structure". "God became the omnipotent law giver" and "the exception in jurisprudence is analogous to the miracle in theology".[3] Interestingly, much of this discussion on the analogy

[2] *See*, Jonathan Israel, *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man, 1670– 1752* (Oxford 2006); Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (Vintage 2008); Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity Press 1992); John Rawls, 'The Idea of Public Reason: Postscript' in J Bohman and W Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 131–141. Historians and thinkers in India who have critiqued the category of secularism, have often done so on the basis of an understanding of the 'separation' between Church and State that took place in Reformation Europe, an understanding that has proved false in many ways. *See*, TN Madan, 'Secularism in its Place' (1987) 46(4) Journal of Asian Studies 747; A Nandy, 'The Politics of Secularism and the Recovery of Religious Tolerance' (1998) 13(2) Alternatives 177 for such a perspective. For a recent corrective to the position that there occurred in Europe any clear-cut separation of Church and State, and therein the implicit dominant paradigm, *see*, W Cole Durham Jr, 'Patterns of Religious State relations' in John Witte and M Christian Green (eds), *Religion and Human Rights: An Introduction* (OUP 2011). On the long life of religious justifications for warfare, *see*, Philippe Buc, *Holy War Martyrdom and Terror: Christianity, Violence and the West* (University of Pennsylvania Press 2017).

[3] Carl Schmitt, *Political Theology – Four Chapters on the Concept of Sovereignty* (University of Chicago Press 1985) 36. The literature surrounding Schmitt is too vast to record or comment upon, but Hans Blumenberg's early critique, in *The Legitimacy of the Modern Age* was that there was an ambiguity regarding Schmitt's conceptualisation of the relationship between

between the theological and the legal takes place within the perimeter of law and the state, and does not dwell as much on the emergence of the nation as a category or experience in this context. On the other hand, given the historical experience of India, there has been much academic and critical discussion on religion and nationalism from the perspective of the 'riots' and the state, collective memory, conversion and anthropologically lived experience. There has been less discussion, however, notwithstanding the citations given below, on religion as it emerges as a category in jurisprudence in an avowedly secular state, and the very real consequences and implications of such a jurisprudential understanding. Any position arguing for the essential difference between historical developments in Europe and India fail to take into account the deep and complex ways in which crucial notions that had their historical origins elsewhere, have in fact grown within India on the registers of law and jurisprudence. Arguments of essential difference also tend to have a historical and indefensible ideas on what constitutes 'indigeneity', being unable to provide a criterion for the latter.[4]

An incursion is attempted into this treacherous terrain, particularly of the distinctions between the religious and the political, through a close reading of four judgments of a judicial case of immeasurable magnitude for modern India i.e., the Ayodhya case. It came to a close through a 5 judge Supreme Court Bench judgment on November 9, 2019,[5] even as it began on 16th January 1950, few days before the birth of the Republic of India. The case essentially concerned the title to a certain piece of land in the city of Ayodhya, on which stood a Mosque that was constructed in the medieval period. Hindu parties claimed that this was the very place where Hindus had always believed to be the birthplace of their God Rama. The Supreme Court finally awarded the disputed land to *Ramlalla*, a juristic person, who was also a plaintiff in Suit 5.

This paper offers a critique of the High Court and Supreme Court judgements. It is a critique of the Courts' understanding of juristic personality in its application to *Ramlalla* and *Janmasthan*. Towards this end, it undertakes an analysis of the notion of juristic person. For this, it has been found necessary to begin by studying the conceptualisation of juristic personality as it arose in Europe, which provided the broader historical and theoretical context for its employment in relation to the Hindu deity in colonial and postcolonial Indian jurisprudence. After a brief introduction of the general problem of the juristic personality in the case in Section 2, Section 3 will study the historical context of Europe and colonial India. Section 4 will analyse the applicability

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theology and the modern state, an ambiguity about whether the relation was one of historical derivation or systematic analogy.

4 For important and influential arguments on such foundational difference, *see*, the papers by TN Madan and A Nandy (n 2). There is also less attention here to the operations of caste or the normative limits to what is considered the indigenous.

5 *M Siddiq v Suresh Das* (2019) 4 SCC 641.

of limitation on the plaintiffs *Ramlalla* and *Janmasthan*, as discussed and adjudicated upon by the judgments of the High Court as well as Supreme Court. Section 5 will discuss the argument of the applicability of juristic personality in Hindu law to the case and the presumed continuity of faith, belief, and worship at the disputed site "since time immemorial". The penultimate Section 6 will focus on the implications of the Supreme Court's denial of juristic personality to plaintiff 2 (*Janmasthan*) and its affirmation of plaintiff 1 (*Ramlalla*) as a juristic person in the 2019 judgment. It will argue that the very same reasons which led to the denial of juristic personality to *Janmasthan* ought to have led to a denial of juristic personality to *Ramlalla*. The conclusion argues that notwithstanding the Supreme Court's stated commitment to secularism in the judgment and its cognizance of the case as one over title and immovable property, the only (unstated) rationale, if it can be called that, for its findings lie in the acceptance of 'belief and faith'; a faith and belief which is ultimately subtended by a conflation between the religious and the national. This reveals a central contradiction at the heart of the judgment, with unstated and questionable assumptions about the national and the religious.

II. INTRODUCING THE JURISTIC PERSON

Perhaps the first question that arises when one is examining the case of the applicability of juristic personality to *Ramlalla* is the following: ought not one distinguish a belief in Rama from a belief in *Ramlalla*, since there is no necessary step between the former and the latter? One may believe in a deity but not worship the deity in the form of an idol at a particular physical site where the deity may be believed to have been born or might have been consecrated. The concept of the deity/idol and/as 'juristic personality' clearly allows for this distinction between one and the other because as a 'fiction of law' (to be discussed in the next section), 'juristic personality' will have to fulfil conditions other than a subjective belief which might serve as a norm to order one's own behaviour or dictate actual worship at a site. Worshipping at the site may not be legally allowed if it is deemed to be the property of another who does not give such permission. As a 'juristic personality', the deity, in his representative, is recognised by — and subject to — the law on the registers of property right and public order among other things. *Ramlalla* and *Janmasthan* were the first and second plaintiffs of Suit 5 in the Ayodhya case, and one of the key issues discussed in the judgments of the Allahabad High Court (2010)[6] and

[6] *Gopal Singh Visharad v. Zaroor Ahmad* 2010 SCC OnLine All 1919. he three parties, who had filed suits, were given one-third of the property each by the Allahabad High Court, in its majority judgment (Justices Khan and Aggarwal), in 2010. The parties were, 1) Nirmohi Akhara (a Hindu party which claimed to be the shebaits/managers/priests of the temple at the site and did not recognise the existence of a Mosque), 2) The Sunni Waqf Board (claiming the Mosque to have been built by Babur and having legal sanctity and continuous worship until it was desecrated in 1949 with the land going into receivership), and 3) *Ramlalla* and *Janmasthan*.

the Supreme Court (2019) concerned the very nature of the deity as a juristic person.

It is in this context that there needs to be greater reflection on the legal category 'juristic personality' as predicated of the Hindu 'deity'. There are difficulties encountered here since there are differences in the construal of the legal amplitude of the deity as juristic person and its applicability in the three judgments by Justice Khan, Justice Aggarwal, and Justice Sharma of the Allahabad High Court. Furthermore, the recent Supreme Court judgment explicates the legal category of the deity as a juristic person. Even while it is critical of the three judgments of the Allahabad High Court it also, at crucial junctures, follows the reasoning of those very judgments. This paper, in its discussion of the legal category of juristic personality and in its analysis of all these judgments, will hope to establish that there is an unfortunate and irredeemable inconsistency in the Supreme Court judgment, between its theoretical clarification of the category of the juristic person and its application of this category to *Ramlalla* i.e., the case at hand. In other words, it will argue that *Ramlalla* could not be cognised as a juristic person, even if one accepted the evidence of faith, belief, and worship at the site.

III. THE HISTORICAL AND CONCEPTUAL DEVELOPMENT OF JURISTIC PERSONALITY IN EUROPE AND ITS GRAFTING ONTO COLONIAL JURISPRUDENCE

The notion of juristic personality as it functions in contemporary jurisprudence and judgments emerged from the conceptualisation of a corporation in Europe.[7] As a 'fiction' of law, the deity as juristic person, is subject to law, and therefore the category of the deity can only be recognised in this context. The notion of a corporation addressed the intellectual and legal challenge of conceptualising a distinct identity of the corporation that is to be distinguishable from its members which 'constitute' it, allowing this distinctive identity — legal as distinct from natural person — to exist across time. To therefore understand the notion of juristic personality, one would need to have a conception of a perpetual legal order which gives legal force to an entity

[7] It will not be possible to address the contemporary jurisprudential problems — tempting as it is to expose its intimate history with religious worship — regarding joint-stock companies, that emerge from the conceptual challenges present in *thinking* the corporation. As some of the literature around Company Law asks: how is one to understand the share in a joint stock company as an 'income right' and the share-holder as a 'rentier' and thereby under contract law generally, when the historical and institutional context has been one of a movement away from 'partnership' towards the increasing role of law through limited liability? One must remember that Maitland and Pollock in *The History of English Law before the Time of Edward I* (CUP 1895) have historically documented what we would consider cases of both limited liability and 'unlimited' liability.

(corporation/juristic person) that is itself conceptualised as perpetual, despite visible changes in the latter's constituents (member-constituents of the corporation). As detailed below, corporatinist ideas in turn affected the way the sovereign or the state was itself conceived, as a perpetual, secular order.

The idea of juristic personality has been traced by Otto Gierke to the *persona ficta* of Roman (private) law and its mediation by the canonists to help formulate the nature and laws around corporations in later medieval Europe.[8] The 'fiction' and the idea of a (legal) 'person' allowed for the corporation (*universitas*) to exist across time, enabling the continuity of a group beyond the mortality of its individual members. An artificial creature of law it had the legal attributes of a natural person. Gierke discusses the shift from the civilian theory of corporations (requiring a sovereign grant through which the corporation is incorporated) to natural law conceptions of the state as a 'moral person'.[9] There were various shades among natural law writers regarding corporations when it came to the question of how to legally ground the 'group' by giving it an identity that was distinguishable from the members of the group. While some writers required much more explicit sanction from the state for this legal grounding others attempted to preserve some form of autonomy for the corporation-group. However, notwithstanding such attempts at preserving the autonomy of the corporation-group, these writers all the same recognised its necessary subjection to the state/law as sovereign.[10] For instance, Maitland

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[8] Otto Gierke, *Political Theories of the Middle Ages* (CUP 1927) xic, 67; Otto Gierke, *Natural Law and the Theory of Society* (Beacon Press 1957) 162-195; FW Maitland and Pollock, *The History of English Law before the Time of Edward I* (CUP 1895). Otto Gierke offers differentiating conceptions on the relations between corporations and the state as well as conceptions of the *'persona moralis'* (most prominently in Pufendorf). As Gierke argues, even Nettelbladt's view, which is most 'inimical' to the corporation, could not rid itself of the challenges of forming a corporate personality. He states, in *Natural Law and the Theory of Society* 194:

> Finally in cases where it was forced to postulate a Group-unity which was independent of the sum of the members for the time being, the theory was forced to go altogether outside the bounds of the *persona moralis*, and set over against it a *persona repreaesentativa*, as an 'institutional unity' [i.e., a unity not inherent, but due to State-institution, and thus] created by an act of commission and delegation.

[9] 'Moral Person' was the category most fully developed in Pufendorf and "simply means a non-physical person — a person such as exists in the world of men's thoughts (and particularly of their legal thought), but not in the world of physical nature"; Otto Gierke, *Political Theories of the Middle Ages* (CUP 1927) 97. These natural law conceptions were based on a fundamental individualism — vesting foundational value in the idea of contract or '*societas*' (partnership) — that in turn led to various forms of state absolutism. Absolutism was a result of the fact that society was a result of a contract between themselves as well as with the sovereign to give up liberties to the latter in exchange for protection, who, through such a contract becomes absolute. While this minimal sense of the moral person is retained, for a sophisticated recent interpretation of the 'moral person' and the role of the intellect and the will in conceptualising the state, *see*, Ben Holland, *The Moral Person of the State* (CUP 2017).

[10] Otto Gierke, *Political Theories of the Middle Ages* (CUP 1927) 67; Otto Gierke, *Natural Law and the Theory of Society* (Beacon Press 1957). W Friedmann, *Legal Theory* (CUP 1967), perhaps for pedagogic reasons, opposes what he calls the 'fiction theory' of Salmond et al

speaks of the possible autonomy of corporations even as he speaks of the formula of incorporation involving the Royal will.[11] It is not possible to enter into this thicket where there is many an ineluctable slip between normative horizon and historical ground. Suffice to state that the conceptualisation of the corporation required 'incorporation' by the sovereign/state in some form. And the problem of the 'one' uniting — yet distinct from — its many members resulted in strained and strenuous attempts at resolution. How was one to conceive something remaining the same when all its constituents — say members in a corporation — were changing? It was to meet the need of a conceptual continuity in the face of undeniable and experienced change that the English doctrine of fictions too was developed; emerging from an entire philosophical and jurisprudential tradition where fiction referred not to an illusion but the means whereby truth is revealed even in the course of change in time i.e., *figura veritiatis*.[12] And insofar as several corporations existed in the country, from universities to boroughs to Abbeys and hospitals, each with the features

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to the 'realist or organic' theory of Gierke, stating that "the corporate body, *reale verbandsperson* does not owe its personality to state recognition, it is not a fictitious legal creation" (512). However, in his examination of Gierke, he discerns the attempt to combine "all corporate groups with the legislative supremacy of the state", seeing the state "as a corporate group in itself but at the same time, comprises, and is therefore superior to, all corporate groups within its sovereignty" (513). In his earlier analysis of Gierke too, he had recognised that as the "highest corporate unit" and possessing sovereignty, the state's "power over legal bodies" is not giving them legal existence, but "of superintending the purposefulness and legality of their actions" (188). What Friedmann sees as a 'principle weakness' and 'strained reasoning' in Gierke — between state sovereignty and local autonomy — may well be seen as an index of conceptual and institutional problems not wholly resolved even in contemporary times. On the other hand, while Friedmann calls the 'fiction' theory 'politically neutral' (513), Kantorowicz, and more recently Halliday, establish that this was hardly the case in England and English history.

[11] FW Maitland, *Township and Burrough* (The University Press 1898) 18. Maitland argues that with regard to charters, in *Township and Burrough*, 18, "The King makes something. He constitutes and erects a body corporate and politic in deed, fact and name (*in er, facto, et nominee*)". More recent studies such as that of Paul Halliday, in *Dismembering the Body Politic* (CUP 1998), 31, reconfirms that historically in England, only the sovereign had the power to make corporations. As an aside, there is thus no basis for the popular argument that the East India Company was legally independent, since it remained subject to Crown and Parliament as a chartered corporation throughout its existence, and only therein could legally undertake its violent conquests. On the other hand, one also found in England forms that would not have been intelligible to continental lawyers and historians such as the 'unincoporated body' and the famously 'freakish' (Maitland) case of the 'corporation sole' (a 'juristic abortion' in *Maitland: State Trust and Corporation* 30, or a 'ghost of a fiction' to use those other phrases that Maitland uses). However, for the development and intelligibility of the 'corporation sole' as Crown/King, *see*, E Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press 1957).

[12] *See*, Kantorowicz's discussion of this 'formula' where he traces the discussion back to Aristotle before engaging with Augustine and Aquinas apart from the jurists. Kantorowicz (n 11) 306. For a discussion of the use of fictions into the 20th century, *see*, Sidney T Miller, 'The Reasons for Some Legal Fictions' (1910) 8(8) Michigan Law Review 623. This use of legal fictions thus continued notwithstanding Bentham's well-known critique of them; and here, as in elsewhere, the study of Bentham's work appears inversely proportional to the work's capacity to historically illuminate legal practice.

of 'perpetuity' and 'personality', the question of how these several unities were themselves unified led to the emergence of a theory of Kingship and the body-politic as the 'state'.

It is to Kantorwicz's masterful study, *The King's Two Bodies* that one might turn to, to find an emplotment of this development in England. While corporations were themselves being defined, one sees the slow emergence of the explanation of the state too, which, as sovereign, was required to allow corporations, in corporate terms. This state as a 'unity of unities', as a problematic, takes on a singular intensity when 'the people' — beyond specific corporations — are themselves conceptualised as a 'corporation'; therein a body in perpetuity.[13] Yet if this were so, one would have to simultaneously conceive of the perpetuity of the 'head' of the body-politic (people), since only through such a 'figure' (fiction) could the corporation *act*, and *complete* its personality. This was thought to be analogous to the requirement of a guardian for a minor, an analogy that is to be traced back to the statute of the Roman emperors Diocletian and Maximianus, where the *res publica* was seen to have the rights of minors in that they needed a natural person as a guardian. Cities, the mad, and minors were therein equiparated. And with time, and with considerable legal dexterity, the Church (Church as simultaneously people and property with Christ as the head) and the (English) Crown (the people and the King as head) were similarly characterised.[14] A 'legal fiction' was a 'figure of truth' and to cite its employment in a case relevant to our study of Ayodhya, the guardian and the minor were treated as one according to law i.e., this treatment of two as one was a legal fiction.

In Europe, the 'perpetual minor' was but a way to conceptually formulate the body-politic existing through time; to recognise its perpetuity even while its (temporal) origin had to be acknowledged. This had its origins in sempiternity, which in Christian theology was that which had an origin in time as a creature — angels were exemplary — and perpetual thereon. Sempiternity was therein distinguished from the divine characteristic of eternity. Aristotelian notions of time as perpetuity appeared to displace Augustine's fundamental critique of the 'secular' in the name of the 'City of God' in/as the *nunc stans*.[15] That is to say, while for Augustine the time of this-world (the 'secular') was always transitory by nature and defective in relation to the eternity of God, with the re-introduction of Aristotelian notions, one could conceive of a perpetuity and continuity of time in this-world (the 'secular' domain). This was crucial for jurists because it now became easier for institutions such as

[13] Kantorowicz (n 11) 312-315. It should be evident that such a train of reasoning is not incompatible with certain arguments in Gierke on the state as highest corporation. The attempt at distinguishing German from English thought is perhaps traceable to the attempt at distinguishing between liberal and state-centred positions. This is clearly fallacious in light of the record of English history and empire.

[14] E Kantorowicz (n 11) 374.

[15] ibid 279.

Churches, Kingdoms, and corporations with their properties to claim rights to perpetuity in these things in this-worldly earthly terms. Cities were now compared to angels and the mad or minors so as to conceptualise such perpetuity in and through time.[16] Lands/rights of the country/Kingdom could not be alienated and the rights of prescription could never hold here. These legal entities were incapable of maturity and therefore perpetual, unlike the case of the natural (biological) minor. This city/country however would be intelligible only if one were to simultaneously conceive of a guardian who was as perpetual as the Crown/state lands, which would always be there to protect and represent the perpetual minor that was the Crown (the body-politic as people/lands/rights). As a way to conceptualise the very basis of the body-politic, the possibility of adverse possession could not ever be allowed — "time does not runneth against the King". Thus, the Crown (land/rights/people/corporations), was forever underage and the King never underage, always protecting, acting, and representing. The conception of the minor and time as perpetuity combines to secure certain forms of rights and properties in the face of any visible changes or unexpected contingencies. It is only in this sense that certain forms of 'juristic personality' — as a creature of law — could claim rights against prescription or adverse possession. It has been necessary to give some detail of the reasoning involved in the conceptualisation of the juristic personality which involved specific notions of time, perpetuity, and fiction, because it will be established below in section 4, that any claim of juristic personality as being an immemorial feature of Hindu law and correlatively Hindu practice is contestable- a claim that underlies some of the reasoning behind the basis for the judicial decisions on the Ayodhya case.

It is this problematic — of a corporate personality/identity distinct from the individual, continually changing members of the corporation created by law — which is the legal context of the deity as juristic personality; this developed in colonial courts beginning in the mid-late 19th century India. The characterisation of the deity as a 'juristic person' has been conventionally traced to the 1887 *Dakor Temple* case,[17] where the judgment finds precedent for its reasoning in Hindu and Roman law. Explaining the legal situation, the judgement states that property rights of a corporation may be distinguished from that of the individual members, and this distinct *form* of property would require a person, which, as construed in law, is called an artificial person, a juristic person.[18] It is only through this 'juristic person' that property or quasi-propriety rights could be recognised. A corporation is legally formed through such 'incorporation' i.e. the constitution of the legal person in the form of the deity.[19] This vesting of property with the juristic person of the deity implied

[16] ibid 275-284.

[17] *Manohar Ganesh Tambekar v Lakhmiram Govindram* 1887 SCC OnLine Bom 1 : ILR (1888) 12 Bom 247.

[18] ibid.

[19] ibid.

that the management of the property by the *shebait*/guardian, who claimed proprietary right over the endowment and offerings made by worshippers, could be subject to scrutiny by the worshippers of the deity, as well as the courts/state institutions who had the right of jurisdiction if complaints of fraud, waste, and the like were made. This formulation of the diety as juristic person enabled the worshipping community to have a claim to the management of the religious endowment and property/offerings of/to the deity. The case law since then documents a range of such actions, including alienation of the endowed lands as well as idols.[20] In the said 1887 case, the judgment also made clear that British laws followed native precedent in recognising religious endowments to have their origins and/or legitimacy and protection from native rulers.[21] Fundamentally, therefore, 'juristic personality' meant that the deity as a fiction/figure of law was subject to and protected by legal institutions, juridical and administrative. It also was a recognition of the rights and claims of the worshipping community through the 'juristic personality' of the deity. The possibility of the continuity of the worshipping community was intelligible only through the reasoning behind the conceptualisation — the worshipping community as a corporation, as an identity that remains, notwithstanding the changes in constituents i.e., the birth and death of the worshippers. All of this required the specific notions of time and law as discussed above and one has to examine whether, by these criteria, *Ramlalla* and *Janmasthan* could be held to be juristic persons.

IV. JURISTIC PERSONALITY, THE HINDU DEITY AND LIMITATION IN THE AYODHYA CASE: THE HIGH COURT AND SUPREME COURT JUDGMENTS.

The Ayodhya case in the words of the Supreme Court judgment (2019) is a dispute over the title of immovable property. *Ramlalla* and *Janmasthan* as plaintiffs 1 and 2 in Suit 5 claimed the disputed land and claimed to *be* the disputed land as juristic personalities. It is important to note right away — something that we will examine in detail later — that the nature of the claim in Suit 5 does not appear to have been a property claim because the second plaintiff claimed to be the land itself as a deity/juristic person (*Janmasthan*). It was therein worded as a right to religion/worship.

Filed in 1989, one of the issues to be decided was whether Suit 5 was within time and whether it would be subject to the Limitation Act.[22] It will soon be

[20] JDM Derrett, 'The Reform of Hindu Religious Endowments' in DE Smith (eds), (Princeton University Press 1966) 311-337.

[21] *Ganesh Tambekar* (n 17).

[22] There is much literature that has clearly documented the political nature of the case i.e., the involvement of political parties and the political mobilisation of people for the case; an entry point into which could well be AG Noorani's several works. Though this is crucial to

clear that the problems germane to the construction of juristic personality are all present in this case. That is to say, the ways in which law is forced to address the problem of the unity of the worshipping community across time in disputes about the ownership and management of religious endowments as property. Yet when deciding the question as to whether limitation is applicable to plaintiff 1 and 2 as juristic persons, the preliminary issue to be decided is whether *Ramlalla* and *Janmasthan* are indeed legally valid juristic persons. It will be examined how this issue was taken up by the High Court and Supreme Court one after the other. There has been a rich and critical discussion of the Allahabad High Court judgment.[23] While drawing upon this literature, the focus below is on the context and concept of juristic personality and its employment in the case.

In addressing the pleading that as a deity, the plaintiff is a perpetual minor attracting provision 6 (creating an exception for minority) of the Limitation Act, and therefore, within time, the three High Court Judges of Allahabad responded differently in 2010. Justice Khan gave copious judicial and statutory precedent so as to hold that the Limitation Act (and the possibility of adverse possession/prescription) would apply to the deity as minor.[24] He however held that Suit 5 (*Ramlalla* and *Janmasthan*) was not barred by limitation and based his conclusion on his criticism of the Magistrate's judicial order on July 30, 1953, which was, according to him, without jurisdiction and led to the "matter pending indefinitely".[25] Justice Khan held that this "wrong order", as well as the judicial precedent disallowed the barring of Suit 5 (plaintiffs 1 and 2) on grounds of limitation;[26] without fully addressing the question as to why the plaintiffs would have to be treated as (legally valid) juristic personalities in the first place.

Justice Aggarwal, while giving similar precedent on the question of whether the deity as juristic person was a minor/perpetual minor for the purposes of limitation, took a contrary stand to such precedent by holding that the Limitation Act need not apply to the deity as a minor since it could attract provision 6.[27] He also held that the English concept of the deity as juristic personality was merely a confirmation of the concept which had already existed historically in Hindu Law. However, for the purposes of adjudicating the

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understanding the history and nature of the dispute, the present paper is more invested in the particular legal reasoning involved in the case by the plaintiffs as well as the courts.

23 *See*, Ratna Kapur, 'The "Ayodhya" Case: Hindu Majoritarianism and the Right to Religious Liberty' (2014) 29 Maryland Journal of International Law 305; G Arunima, 'Ayodhya Virdict: Bad Theology, without Justice' (2010) 45(41) Economic and Political Weekly 13; Nivedita Menon, 'The Ayodhya Judgment: What Next' (2011) 46(31) Economic and Political Weekly 81; G Patel, 'Idols in Law' (2010) 45(50) Economic and Political Weekly 47.

24 *Visharad* (n 6) [165-189] (Justice Khan).

25 *Visharad* (n 6) [148] (Justice Khan).

26 *Visharad* (n 6) [164-5] (Justice Khan).

27 *Visharad* (n 6).

specific case, Justice Aggarwal held that it was not necessary to get into the question of whether the deity attracted provision 6 of the Limitation Act since when the deity was itself as the plaintiff asking for declaration i.e., when it was asking declaration as to its very existence, limitation could not possibly apply. Moreover, he held that limitation could not apply in the case of a deity being "*Svayambhu*" (self-created) as *Janmasthan*. And finally, Justice Aggarwal held that if Article 25 was involved, the Limitation Act could not apply.[28] Justice Sharma, in complete agreement with the plaintiffs of Suit 5, held that the deity as juristic personality was indeed a "perpetual minor" in Hindu Law as well as contemporary jurisprudence, and therefore attracted provision 6 of the Limitation Act, which meant that the latter was inapplicable to the plaintiffs.[29]

In 2019, the Supreme Court Judgment confirmed the opinion of Justice Khan in holding that the Hindu deity as a juristic personality could not be treated as a minor/perpetual minor for the purposes of limitation. However, it also explicitly confirmed aspects of the reasoning and certain findings of Justice Aggarwal in holding that the Suit was not barred by limitation, even while the Court invalidated Justice Aggarwal's holding of the *Janmasthan* (Plaintiff 2) as a juristic personality. Therefore, in accepting Justice Aggarwal's reasoning regarding the inapplicability of limitation, this acceptance was with regard to *Ramlalla* (Plaintiff 1) and not with regard to *Janmasthan* (Plaintiff 2). In order to fully understand this, we now proceed to examine the reasoning of Justice Aggarwal on the nature of juristic personality and its relationship to the fundamental issue of the presumed continuity of Hindu faith and worship at the disputed site.

V. JURISTIC PERSONALITY IN HINDU LAW, HINDU WORSHIP AND THE HINDU TEMPLE

Justice Aggarwal's 2010 judgment was in agreement with the arguments of the plaintiffs of Suit 5 that juristic personality and the idea of the deity as minor was a concept in Hindu Law and was merely confirmed by colonial and thereafter postcolonial jurisprudence. In the words of Justice Aggarwal,

> We have referred to some of the ancient Hindu scriptures to throw some light on the concept, status and position of the idol in Hindu religion for the purpose that the idol was treated to be in the position of a minor not because of the recognition or declaration by British Indian Courts about its being a legal person or juridical person but because of the then existing and continuing position of the idol in Hindu law being treated as minor and capable of holding and acquiring

[28] *Visharad* (n 6).
[29] *Visharad* (n 6).

> property and in furtherance therefore, its recognition as legal person was granted.[30]

Justice Aggarwal points to statements in Hindu scriptures regarding the property of minors and temples not being "lost" due to adverse possession.[31] But along with minors and temples, the property of Brahmins and Kings are also mentioned in Hindu scriptures as similarly not subject to adverse possession.

Crucially for our purposes, the concept of the juristic personality of the deity requires the treatment of the deity as a (perpetual) minor so as to safeguard the rights of a worshipping community conceptualised as a corporation existing continuously across time; as discussed above in Section 2. This was absolutely critical for the interrelated concepts of juristic personality, minority, and corporations. None of this is established in Justice Aggarwal's reading of the Hindu scriptures. As is shown below, the conceptual framework required for juristic personality did not exist historically in Hindu Law (as exemplified by the Hindu scriptures). Yet, construing juristic personality as a legal concept in Hindu law enabled a questionable assumption about the unity of the Hindu community — through law and worship — from the time before the construction of the Mosque. In such a reading, the (Hindu) legal recognition that is required for the concept of juristic personality is satisfied and is meant to have continued — along with faith, belief, and actual worship — unimpeded from pre-Mughal times to the present.[32]

The set of contentions in Justice Aggarwal's opinion is open to serious doubt from several fronts. His argument regarding the pre-British historical existence of juristic personality of the Hindu deity and the continuity of worship and proprietorship of the community may be questioned on four fronts: 1) the concept of juristic personality in Hindu Law; 2) the unity and continuity of a Hindu worshipping community from pre-Mughal times at the site; 3) the continuity of modes of Hindu worship at the site; and 4) the trans-historical nature of the temple from pre-Mughal times. The lack of concrete evidence regarding the legal existence of a specific proprietorial claim in the form of juristic personality in the disputed site is obscured by more general claims about the nature and continuity of Hindu law as much as Hindu belief and worship. It

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30 *Visharad* (n 6).

31 *Visharad* (n 6).

32 "During Muslim Rule, Governors were appointed but no material has been brought to our notice that in the matter of Hindu Laws, any interference was made by the Islamic Rulers". This was not to have changed during British rule. "Thus [during British rule] the personal Laws in the matter of religious usage of institution and also in the matter of minority etc. were to continue. Hindu idol or the deity was always treated as a person to be protected by the king like a minor or women and that legal position has not been shown to us having gone under change by any authority at any point of time". *Visharad* (n 6) [2572, 2575] (Justice Aggarwal).

has therefore been found necessary to question these claims and assumptions, while keeping in mind that, in themselves, such claims do not in any case provide any concrete evidence supporting the specific proprietorial claims and/or juristic personalities of the Plaintiffs of Suit 5.

Firstly, the idea of 'juristic personality' as a concept cannot be found in pre-colonial Hindu Law, notwithstanding the judge's claim in *Ganesh Tambekar v Lakhmiram Govindram* (1888).[33] It must be remembered that the idea of juristic personality, as it developed from Europe into colonial jurisprudence, involved a 'corporation'; 'worshippers' as the multiplicity of members that were unified in their intention to benefit the deity so as to exert proprietorial claims. This is what required the incorporation in the deity, which is therein considered as a 'juristic personality' for purposes of law and legal scrutiny. Only therein are worshippers enabled to seek the help of law in scrutinising the actions of the *shebait*/manager of the specific deity and question him (*shebait*) via law, on grounds of fraud and waste. This relationship between worshippers as an 'aggregate unity', unified by their intention to benefit the deity, and/as the formulation of the juristic personality of the deity as a fiction/figure and/or person of law cannot be found in the *Dharmasastras*, as Justice Aggarwal holds in his judgment. This is compounded by what appears to be another assumption about the uninterrupted continuity in the legal identity of a community of worshippers (Hindus at large as a 'corporation') of the deities *Ramlalla* and *Janmasthan* (conceived as juristic personalities). Finding the concept of juristic personality in Hindu Law appears to offer justification for the unity of worshippers and continuity of worship, even though there has been no evidence on record of the title/dedication and specific recognition of the juristic personality of *Ramalalla* at the disputed site continuing from pre-Mughal times. This lack of evidence of such a specific act of consecration/founding or legal recognition historically should have in itself have made it impossible to recognise the plaintiffs as juristic personalities. Moreover, the claim that the concept of juristic personality existed historically in 'Hindu law' prior to the colonial period requires further scrutiny.

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[33] While English Judges adjudicated in matters of Hindu law citing Hindu scriptures, it has been well established that their understanding of these scriptures were not only questionable, but also that they altered scriptures towards their own ends. Nandini Bhattacharyya Panda, in *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal*, has documented the fact that in the founding moments of the late 18th century, Hindu scriptures were altered and tailored to defend specific land revenue policies that the East India Company wished to implement. On the more general alteration of scriptures in every sense under colonial institutions, *see*, JDM Derrett, *Religion, Law and the State in India* (OUP 1968) and M Galanter, 'The Displacement of Traditional Law' in *Law and Society in Modern India* (OUP 1989). A separate investigation of the effects of taking the questionable judgments of the English — driven by imperial interests and compounded by a lack of requisite training in religion —as forming the body of case law continuing into the present through *stare decisis* is no doubt warranted.

Generations of rich and textured scholarship across philosophy, law, and legal history have established that according to the complex and subtle theories of *Mimamsa* — considered the most orthodox and juristically inclined of Hindu philosophical traditions and copiously invoked by the plaintiffs — the 'gods' were made of sound and not physical elements. They, therefore, could not own property.[34] There is also a whole *Mimamsa* critique of, largely *Nyaya* arguments regarding scripture as providing evidence for an omniscient God (*isvara*). In contrast, sacrifice and ritual action (through the *apurva* as concept-operator) according to *Mimamsa* are held as "responsible for creation and the destiny of each human being".[35] This framework and critique of a 'Supreme Being' in *Mimamsa* is important to underline, because the High Court and Supreme Court judgments on the contrary assume a unitary 'Hindu' notion of a supreme omniscient God, which lays the basis of a single identifiable community, implicitly and explicitly, existing from time immemorial.[36]

Citing a range of *Dharmasastra* literature, S.C. Bagchi argues that one could not find the concept of 'juristic personality' in this literature, not least because 'gods' were not conceived of as owning material property.[37] Such 'secular' property was thus traditionally vested in the *shebait*, and according to the scriptural texts, even while religious worshippers might claim *religious*

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[34] *See*, SC Bagchi, *Juristic Personalities on Hindu Deities* (University of Calcutta 1933) 51-78. Bagchi has also an important critique of the concept of 'juristic personality' as it develops in Europe. Interestingly Mimamsa also has the strongest philosophical arguments for the Brahmin, as JDM Derrett argues in 'The Reform of Hindu Religious Endowments' in DE Smith (eds), *South Asian Politics and Religion* (Princeton University Press 1966). Richard Davis, *Lives of Indian Images* (Princeton University Press 1999) and Ritu Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Duke University Press 2009), have also recently argued for colonial law as enunciating a shift. For a detailed exposition of the debate between the Buddhists and Kumarilla Bhatta on this question, *see* V Eltschinger, *Caste and the Buddhist Philosophy: Continuity of Some Buddhist Arguments against the Realist Interpretation of Social Denominations* (Motilal Banarsidass Publishers 2012).

[35] *See*, P Billimoria, 'Hindu-Mimamsa against Scriptural Evidence of God' 28 (1) Sophia: International Journal of Philosophy and Traditions 20. *See also*, Wilhelm Halbfass, 'Competing Causalities' in *Reflection and Tradition* (Motilal Banarisidass Publishers 1991); JN Mohanty, 'Dharma, Imperatives and Tradition: Towards an Indian Theory of Moral Action' in P Bilimoria, J Prabhu and R Sharma (eds), *Indian Ethics: Classical Traditions and Contemporary Challenges*, vol 1 (Routledge 2016).

[36] Justice Aggarwal had held, "There is no essential jurisprudential or constitutional requirement that for every right/remedy a period of limitation must be enacted; more so in respect of Hindu Deity which is conceived of by Hindu Dharmashastra Law as Immortal, Indefeasible, Timeless, Omnipresent & Eternal'. *See*, *Visharad* (n 6) [2545] (Justice Aggarwal). Moreover, the Supreme Court held, "Hinduism understands the Supreme Being as existing in every aspect of the universe". Furthermore, "In Hinduism, physical manifestations of the Supreme Being exist in the form of idols to allow worshippers to experience a shapeless being". *See*, *M. Siddiq* (n 5) [144, 146]. All the same, the Supreme Court clarifies that the Supreme Being itself is not endowed with legal personality in this context. This argument of the continuity of an identifiable Hindu community from time immemorial characterised by tolerance also becomes the basis of other Supreme Court judgments cited and discussed below in note 68.

[37] Bagchi, *Juristic Personalities on Hindu Deities* (University of Calcutta 1933) 51-78.

merit in their gift-giving, they could not claim supervisory or proprietary rights over the *shebait* and/management of the temple.[38] It might be argued that such supervisory and proprietary right could not be claimed because the *Dharmasastras* were not responding to the challenge of legally conceptualising an entity (corporation) that has an identity of its own, which is all the same distinct from that of its members with certain proprietary claims. It is in only in such a context that a series of contesting figures from the *persona ficta* to the *corpus mysticum* to the *persona moralis* emerged in Europe and was applied, in considerably changed circumstances, in the colonial and post-colonial jurisprudence of India.

Notwithstanding such scholarly evidence, Justice Aggarwal concurs with the arguments made by the lawyers representing *Ramlalla* and *Janamasthan*, by citing the scriptures to suggest that a minor's property and temple property could not be alienated or be subjected to adverse possession.[39] This by itself cannot indicate the juristic personality of the deity as conceived in colonial and contemporary jurisprudence, because in the scriptural record, the deity is never compared to a minor in the context of the problem of (perpetual) ownership. Temple property merely referred to the proprietary rights of the Brahmins/*shebait* in the *Dharmasastric* context. In these scriptural texts, there is no mention or claim of the essential ingredient of the concept of juristic person i.e., a (worshipping) community as a corporation having as its purposive unity and identity in the juristic personality of the deity which enabled it to exert certain kinds of proprietary claims, including claims against the *shebait*. This notion of a corporation, as discussed earlier in Section 2, required a specific conceptualisation of the existence of a community-corporation and its rights in law and property beyond the birth and death of its member-constituents. It thereby involved notions of perpetuity and fiction, drawn from Aristotle, among other thinkers in Europe. In the *Dharmasastric* context, the Brahmin's/*Shebait's* right derived from his sacred status as a Brahmin and had no relationship with the proprietary or legal claims of a worshipping community. After all, it is to recognise the worshipping community — as a corporation — and its claims, that the 1887 Daktor case construed the deity as a juristic personality.

As J.D.M. Derrett has established, in the *Dharmasastras*, since 'gods' could not accept gifts, the endowment was under the virtual control of the Brahmins/*shebait*, and religious merit lay in gifting and it did not bestow a legal/proprietorial right to the worshipper or worshipping community as such.[40] In fact, in clear contradiction to Justice Aggarwal's judgment (in his concurrence with the arguments of plaintiff 5 which equate 'Hindu law' with the *Dharmasastras*, it has been clearly established that the mainstream *Dharmasastra* tradition along with the *Mimamsa* writers were critical of temple priests, the latter being

[38] Derrett (n 33).
[39] *Visharad* (n 6) [2575, 2580] (Justice Aggarwal).
[40] Derrett (n 33).

disparagingly termed as inferior profit seeking Brahmans.[41] This absence of the normative conception of a juristic personality in the *Dharmasastras* is in fact paralleled by the absence of any convincing evidence of the continuity of Hindu worship and belief in *Janmasthan* as/at the disputed site.

Thus, the very idea of continuous belief and a worshipping community with proprietary/supervisory rights in a temple from the early centuries of the common era, cannot but be seen as deeply anachronistic. Temples or the property of the Gods must be understood historically in a *Dharmasastric* framework that saw Brahmans as, to use the phraseology of the *Manusmriti*, 'Gods on earth'. The very texts cited as 'Hindu Law' by the lawyers of plaintiffs 1 and 2 operated with *varna* as the keystone of the normative framework, and thus, could not conceive of worshippers as a community/corporation requiring the 'fiction' of the deity as a legal person which enabled this community to exert certain kinds of proprietary claims, even against the *shebait*. While there is a scholarly consensus that it was birth and not action (in one's lifetime) that was the legal criteria for *varna* — the *Sudra's* duty was to serve his superior castes.[42] — What is germane to the present study is that such a framework did not conceive of the legal challenges that the category of the corporation (one and/in many) and its proprietorial claims posed. The focus on *varna* as a principle squarely contradicts the normative derivation of modern concepts from

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[41] P Olivelle, 'The Temple in Sanskrit Legal Literature' in HP Ray (ed), *Archaeology and Text: The Temple in South Asia* (OUP 2010); Richard Davis, 'Images and Temples' in P Olivelle and DR Davis (eds), *The Oxford History of Hinduism: Hindu Law: A New History of Dharmaśāstra* (OUP 2018); Heinrich von Stietencron, 'Orthodox Attitudes Towards Temple Services and Image Worship in Ancient India" (1977) 21 Central Asian Journal 126.

[42] Does it not jar the contemporary ear to have the *Manusmriti* and its verses (interpreted and commented upon by Medhatithi) cited as holy scripture by Shri Ravi Shankar Prasad (former Union Minister of Law and Justice), which speaks of the 'property of the gods' ['temple'] as the "name given to all that belongs to such men of the three higher castes as are disposed to perform sacrifices"? *Visharad* (n 6) [63] (Justice Aggarwal). Does not such holy scripture violate the Constitution and its values, apart from making clear that the 'temple' of the *Dharmasastras* cannot be identified with the 'temple' of today? Since the lawyers of plaintiffs 1 and 2 cite that extraordinary polymath Ganganath Jha's edition and translation of the *Manusmriti* to establish the relevance and importance of notions of Hindu Law, are we to also follow the dictates of other verses in the very same edition and translation such as verse 8.272? This verse states, "If through arrogance, he [the sudra] teaches brāhmaṇas their duty, the king shall pour heated oil into his mouth and ears"; and the scholarly apparatus allows us to see a range of subsequent authorities, also cited approvingly by the lawyers and the judgment, from Visnu, Narada Brihaspati (and Medhaditi the commentator) speaking in the same voice. It is difficult to conceive of a 'community' of worshippers as suggested by Justice Aggarwal in his reference to the *Dharmasastras* when Manu and the others had underlined *varna* as the basis of a polity; Medhaditi in a sense goes a step further arguing that in conquering a new land, the righteous King ought to settle the four *varnas* there and relegate the foreigners to the status of *candalas* [M Aktor, 'Varna' in P Olivelle and DR Davis (eds), *The Oxford History of Hinduism: Hindu Law: A New History of Dharmaśāstra* (OUP 2018)]. The scholarly literature on the *Dharmasastras* across various methodological orientations —from R Lingat and JDM Derrett to RS Sharma and Romila Thapar to P Olivelle and A Hiltebeitel to Ambedkar among others —find consensus on birth and/as *varna* as being crucial to the political authority and social schema envisioned in the *Dharmasastras*.

such traditions, as may be found in the reasoning of many judgements including that of Justice Aggarwal.[43] Many injunctions in the *Dharmasastras*, such as the above, would not survive either the tests of legality or constitutionality.

Even if one assumed that a temple did indeed exist at the site and it operated strictly within the framework of Hindu law as represented by the *Dharmasastras*, it could not be considered legal or constitutional because of the discrimination that lay as its fundament. Until postcolonial times, the temple as an institution did not uniformly allow all 'Hindus' the same status; it discriminated on grounds of caste and gender. As will be detailed below, there is, in any case, no convincing evidence of either worship or continuous worship from pre-Mughal times at the site. But constant references to "Hindu" in the judgment force us to reflect on the fact that historically, religion and worship functioned with radically different presuppositions; temples were often themselves historically the precise site of intense 'sectarian' conflict, such as between *Vaishnavas* and *Shaivaites*.[44] The rich work on South Indian temples such as Chidambaram has shown the King to be conceived of as God-like and therefore, claims of a worshipping community to temple property do not arise.[45]

One cannot therefore simply assume a category like a unitary monolithic Hindu worshipping 'since time immemorial' and use that assumption to elide the fact that no real evidence of a temple and continuous worship existed at the

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[43] This is not to suggest that the social schema envisioned in the *Dharmasastras* directly reflected or expressed social life; the precise relationship between the two is difficult to ascertain because of the paucity of sources.

[44] Richard Eaton has argued, echoing much of the scholarly literature that temples were often associated with the divinity of rulers and therefore political conflict entailed the looting and destruction of such temple complexes. *See*, his 'Temple Desecration in Pre-modern India' *Frontline* (9 December 2000). Both he and Richard Davis, in *Lives of Indian Images*, have documented the plundering, looting, and destruction of temples by 'Hindu' rulers. Gil Ben-Herut, in *Shiva's Saints: The Origins of Devotion in Kannada According to Harihara's Ragalegalu* (OUP 2018) 172-177, recounts Harihara's 13th century collection of texts to establish 'sectarian tension in the court'; for instance, in one story, Jommayya, the Shivabakta mortally wounds the Puranika who denigrates Shiva by telling tales about him from the Vaishnava Puranas. Elaine Fisher, in *Hindu Pluralism: Religion and the Public Sphere in Early Modern South India* (University of California Press 2017) 19, writes of an episode which took place in 1598 where a group of Vaishnava clergy expressed a wish to install an image of Vishnu for worship in Chidambaram in response to which the Shaiva priests at the temple threatened to "commit mass suicide to prevent the image of Vishnu from being installed, and twenty priests ended up jumping to their deaths from the temple tower". None of this is to deny that differences in doctrinal and institutional matters at one point in time could lead to rich syntheses later in time or that there all forms of temple destruction were the same; the limited point being that temples were sites of crucial differences and there existed no single over-arching label of Hindus for legal purposes as is the case today.

[45] The wide corpus of literature on this would have to include the works of Hermann Kulke, Padma Kaimal, Spencer W Georg, Kesavan Veluthat, and R Champalakshmi, and most recently Aleksandra Wenta.

disputed site.[46] Rather, only the political-social struggles of the colonial period democratised the temple site so as to thereby attempt to constitute a Hindu community without the essential divisions of caste. These movements are documented in a veritable catena of case law and legislation in the colonial and postcolonial periods.[47] It in only in independent India that legislation and court decisions have ensured that the temple becomes the site of worship for the entire Hindu community. *Venkataramana Devaru* v. *State of Mysore*[48] referred to Article 25 (b) of the Constitution — apart from specific legislative intervention — to make clear that the state ensures that Hindu temples be opened to all classes of the Hindu community. The judgement also further noted that the normative literature of the Hindus did indeed discriminate on the basis of *varna*; a form of discrimination that could no longer be allowed.[49]

There is no question of projecting this constitutional value and legal principle to the past or assuming a corporate continuity of belief and worship and proprietorial claims; particularly where the claim of juristic personality requires the concrete evidence of grant or proprietorial claim, neither of which exists. No amount of the science of archaeology can therefore help in the determination of whether a 'temple' existed, since the function, meaning, and nature of a temple changed over time, and it is this function and meaning that has a bearing on the dispute over title in Ayodhya. It is precisely the 'meaning'/function i.e., the questionable characterisation of the temple as a 'public' institution with a 'worshipping community', that allows Justice Aggarwal to argue that it would not fall under the Limitation Act. The specific legal burden of proving the precise legality of the juristic personality at the site and the historical continuity of worship are obscured by more general assumptions of such continuity merely through an invocation of terms such as 'Hindu' and 'temple'. It must be reiterated that even the empirical evidence of worship could not amount to the validity of juristic personality claimed by the plaintiffs, because

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[46] This is hardly confined to Hindus, and the history of Islam and Christianity have also enough evidence of antagonism and violence between sects and traditions each of whom considered themselves the true bearers of the faith; even Sanskrit sources often use several distinct terms for what we take to be 'Muslim' as B.D. Chattopadhyaya shows in *Representing the Other: Sanskrit Sources and the Muslims, Eighth to Fourteen Century* (Primus 2017). One of the weakness and problematic aspects of scholars of European history is their underestimation of the crucial role of religion and imperialism well into the period of modernity; this, for instance, mars the otherwise important work of M. Galanter when he comments on the relationship between modernity and law in India. In the context of this case however, it is important to note that Suit 4 bases its evidence not on any general understanding of Islam, but on concrete evidence, such as colonial sources regarding the existence and legality of the Mosque.

[47] *See*, Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (OUP 2012) for an overview.

[48] *Venkataramana Devaru v State of Mysore* AIR 1958 SC 255 : (1958) SCR 895.

[49] ibid. It must however be noted that the Court allowed for public worship also argued that since the case concerned a denominational temple, the rights of the Gowda Saraswath Brahmins to particular ceremonies — to the exclusion of others — were granted and justified with reference to Article 26(b).

juristic personality required evidence of a concrete, legally validated deed or grant that laid the foundation of the temple

Finally, much historical work has shown that the belief in Rama as a deity — let alone the specific *Ramlalla* idol or the *Janamasthan* in Ayodhya — is by no means an essential feature of Hindu piety across time and subcontinental space. For instance, statements by Tieffenthaler that 'Hindus'[50] believed the place to be the *janmasthan*, cannot be taken to mean that there existed a community of Hindus at that time that clearly maps onto the population of Hindus today, enabling the latter to make proprietorial claims on the basis of the actions of the former. Detailed scholarship over generations has shown that in the 1760s, there is no evidence of a monolithic community with uniform beliefs, and there were many distinctions among those we take to be Hindus, in religious belief as much as practice. Research across disciplines has shown that one cannot make any assumption of a subcontinental homogenous category of 'Hindus' encapsulating an entire population from ancient times to the present.[51] In such a context it would not make historical sense to presuppose a historical continuity of belief and *worship* — particularly of Rama — and the correlative normative ideas of juristic personality. This is again particularly so in the face of lack of evidence in the concrete site in a case that is essentially one involving proprietary claims.

In the context of arguments regarding the coherence and continuity of Hindu faith and worship, Justice Aggarwal also invokes Article 25 to argue for such faith and worship to be part of essential practices of the Hindus and therefore not subject to statutory limitations.[52] Here, one sees the High Court takes upon itself the task of representing the (postulated) belief — through a questionable historical projection of both a worshipping community and the normative corporation — of a uniquely unitary Hindu people across time.[53] Not

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[50] For instance, as we discuss below, the Supreme Court holds that the travel logs of Tieffenthaler in the 18th century "record the presence of Hindu worship at the disputed site". *M Siddiq* (n 5) [907-8].

[51] Wilhelm Halbfass, *India and Europe: An Essay in Philosophical Understanding* (Motilal Banarsidass Publishers 2017) 192-3; BD Chattopadhyay, *The Concept of Bharatavarsha and Other Essays* (Permanent Black 2017); Romila Thapar, 'Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity' (1989) 23(2) Modern Asian Studies 209, *Reconsidering Untouchability: Chamars and Dalit History in North India* (Permanent Black 2011). While the term Hindu no doubt existed in pre-colonial times, it could be understood in a geographical, ethnological, and religious sense, often combining the three; analogously it cannot be seen outside of locality, caste, and sect. It certainly had no legal or administrative meaning as such, and could not map onto what today is meant by the term. It would also make little legal sense to in general allow legal actions today on the basis of any hypothetical and falsifiable claim of continuity, even if in a broader cultural sense no one can deny anyone the right to make use of the cultural and intellectual resources of such a past.

[52] *Visharad* (n 6) [2551] (Justice Aggarwal).

[53] And finally, when Judge Aggarwal goes so far as to see 'receiver' that is the Central Government itself taking the property after the destruction of the Masjid, as a *shebait* of the deity, a hopeless Pandora's box is opened.

for the sake of the Gods, but to declare and therein enforce a postulated religious belief of one community, against the proprietorial and religious claims of another, does not appear to fall within the ambit of the Court's jurisdiction as conventionally understood. One is struck by Vivekananda's story about Kali — retrieving Socrates's *aporia* — putting her servant (*shebait*? worshipping community?) in place by asking who is to protect whom i.e., does the God now require the servant to protect her against the (alleged) destruction of her temples?

Finally, in a seeming confirmation of Justice Aggarwal's reasoning, the Supreme Court too finds in the 18th century travelogue of Tieffenthaler, evidence of Hindu belief in the birth place of Rama at the disputed site, and worship in the broader area, even though the court itself holds that even evidence of mere belief or worship does not constitute juristic personality.[54] Moreover, the same record indicates the existence of the Mosque, even though the Supreme Court inexplicably states that no evidence has been provided to record worship at the Mosque.[55] Surely when Tieffenthaler speaks of 'Hindu' belief at the site where the Mosque stood, one may rightly infer that this is evidence of the Mosque. While no requirement is placed on the Hindu parties to prove that the belief on Rama's birth place was at the exact site of the dome, the Muslim parties could not take for granted that reference to a Mosque would also indicate that worship took place there. A similar tendentiousness is to be found in the reading of evidence regarding the 'inner courtyard'. While archival records speak of the eviction of Nihang Singh from the inner courtyard in his attempt to perform a *hawan* and *puja* for Guru Gobind Singh and raise a religious symbol,[56] the Supreme Court reads this as evidence of the 'continuity' of Hindu belief and worship of Rama, without taking into account that this was simultaneously the legal recognition of the Mosque. How do acts such as those of Nihang Singh's, which were characterised as a transgression by the legal order of the day, a legal order which had simultaneously confirmed the legal validity of the Mosque, come to constitute signs of 'possessory title'? It is unclear once again how nugatory evidence of worship and transgression can challenge the colonial legality of the Mosque, when the Supreme Court clearly stated that it did recognise legal continuity from the colonial into the postcolonial period in this specific case.

In fact, the Supreme Court explicitly held to be illegal the act of placing the idols under the central dome on the night of December 22, 1949. In recognising the illegality of the action of placing the idols (*Ramlalla*) under the central dome, the Court simultaneously recognised the legality of the Mosque. This act is called a "desecration", signalling the illegality of the placement and

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54 *M Siddiq* (n 5) [907-8].

55 *M Siddiq* (n 5) [899-900]. The judgment cites the relevant portions of the travel logs.

56 *M Siddiq* (n 5) [888-889].

the legality of the Mosque from the time of the colonial period.[57] It is recognised in the case record, as cited in Justice Khan's judgment and confirmed by the Supreme Court, that repair to the Mosque was officially undertaken in 1934 in the context of violence between the two communities in the area. From the moment the case entered the judicial record, attempts had been made by Hindus to construct a temple in the outer courtyard where they practiced worship. The religious worship in the Mosque by Muslims was recognised by the existing administration, as recorded in Justice Khan's judgment which was confirmed by the Supreme Court.[58] Attempts at constructing a temple at the disputed land had been rejected by the colonial administration which confirmed the legality of the Mosque, even while Hindu worship was allowed in the outer courtyard and Muslims were allowed to worship in the Mosque (inner courtyard); a grill existed partitioning the area.

The surreptitious and illegal placement of the idols under the central dome on 22nd December has to be seen in the context of the prior colonial administrative and legal rejection of the request to establish a temple anywhere on the site (let alone the site of the interior Mosque/ 'inner courtyard'), as well as the refusal of the District Magistrate in December 1949, in independent India, to follow orders and to ensure that the idols were removed from the site in the Mosque where they had been placed.[59] It is an unfortunate comment on the history of India that the two crucial moments — the placement of the idols under the dome and the destruction of the Mosque, both of which the Supreme Court held to be illegal — reflect and express a sadly partisan role played by the executive and the judiciary. It is a matter of record that the District Magistrate refused to follow orders when the idols were placed under the dome without any legal basis. Subsequently, Hindus were allowed worship in the disputed area outside of the Mosque even while the Mosque itself was locked, thereby preventing Muslims from carrying out worship. In 1987, under the orders of the then District Magistrate, the locks were opened and Hindus were now allowed *darshan* and worship, while Muslims continued to be disallowed. And when the land was taken by the Central Government after the destruction of the Mosque in 1992, Hindus were once again allowed worship while Muslims were not. It was not since time immemorial that Hindus worshipped at the disputed site. Rather, it was only in independent India, since 1949, that there has been a continuous worship, sustained by blatant acts of illegality that nevertheless had government sanction.

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[57] *M Siddiq* (n 5) [755].

[58] *Visharad* (n 6).

[59] Justice Khan in his judgement takes note of the refusal by the DM to follow orders regarding the placing of idols under the central dome in 1949.

VI. JURISTIC PERSONALITY IN THE SUPREME COURT JUDGMENT

The initial discussions of juristic personality above had made it clear that it was a legal mechanism to render unity and continuity to a multiplicity of members so as to enable them to exercise certain claims, including claims against the *shebait*. The above arguments sought to show that far from *Ramlalla* existing as juristic personality it would be difficult to even speak of a unitary believing and worshipping Hindu community historically existing across time at the site. And so, if the plaintiffs of Suit 5 requested declaration of their very existence, it would have been in order for the Courts to first establish that *Ramlalla* and *Janmasthan* were both indeed valid juristic personalities. Particularly since the plaintiffs' claims to juristic personality were explicitly contested by the Sunni Waqf Central Board (Suit 4), which in turn claimed title to the disputed property.[60] The need to establish juristic personality in the first place would be clear from the Supreme Court's own discussion of the very category of juristic personality. It is to this elucidation that we now turn.

In section J of the judgment, the Supreme Court provided a lucid summary of the conceptualisation of juristic personality. It held juristic personality to be a creature of law. In being a creature of law, juristic personality, as applicable to the Hindu deity required two essential features: 1) the pious purpose of the individual making the endowment which takes the material form of the idol and in whom the property/endowment vests; and 2) the recognition and validation of this pious purpose (which takes the material form of the idol) as legal in the eyes of law, which gives a unity to the multiplicity of worshipers and ensures the perpetuity of the juristic personality beyond the mortality of specific worshippers. When recognised as a (legally valid) juristic person, it is protected by the law. The Supreme Court seems to have followed this reasoning in denying juristic personality to plaintiff 2 (*Janmasthan*). However, it seems to have contradicted its own reasoning on juristic personality when it affirmed the juristic personality of plaintiff 1 (*Ramlalla*). One might say, the reasoning for the denial of juristic personality to *Janmasthan* is equally applicable to *Ramlalla*, as we try and establish.

The plaintiffs in Suit 5 pleaded that faith and belief were alone sufficient for the establishment of juristic personality.[61] In countering this argument, the Supreme Court reiterated that the dispute was over title to property; and the conferral of juristic personality did not alter the nature of property as

[60] *M Siddiq* (n 5). On page 49 of the Supreme Court judgment it is written, "According to the written statement of the Sunni Central Waqf Board: (1) neither the first nor the second plaintiffs are juridical persons". However, on page 166 the Court held, "In the proceedings before us, the legal rights and properties of the first plaintiff in Suit 5 were in dispute. However, no submissions were made challenging the legal personality of the first plaintiff".

[61] *M Siddiq* (n 5) [204].

immovable property. Opposing the pleadings, the Judges explicitly held that faith and belief alone could not be taken as a legal title and conferring juristic personality on land merely on the basis of faith and belief would threaten to alter the very character of immovable property.[62] Such property was governed and secured by law and could not be decided with reference to a specific religious belief or practice. In its discussion of *Ram Jankijee Dieties*, the Court held that "once the faith and belief of the devotees had been established, *it was an express deed of dedication that resulted in the conferral of juridical personality on the idol*" (emphasis added).[63] In denying juristic personality to *Janmasthan,* the Court further explicated the nature of juristic personality by holding that juristic personality arose so as to "ensure the execution and protection of the pious purpose set out by a donor and the ultimate protection of the beneficial interest of the worshippers."[64]

However, contrary to the above reasoning, on the question of the applicability of limitation to Suit 5, the Supreme Court affirmed the juristic personality of *Ramlalla* despite there being no evidence of a specific 'pious purpose' of the donor whose recognition was held to be at the heart of the conferral of juristic personality. The court also confirmed certain strands of the reasoning which 'weighed' with Justice Aggarwal when he held the Suit to be within limitation, primary amongst which was the 'fact' that "the place in dispute [was] believed by Hindus to be the birth-place of Lord Ram and has been worshipped as such since time immemorial by the Hindu parties".[65] Even if this were accepted as true, from the Court's own explanation, none of this could amount to juristic personality.

From its own earlier discussion on juristic personality — and the conceptual and historical contextualisation of the category undertaken above — it is clear that juristic personality was a 'fiction of law' so as to recognise and then protect both the pious purpose (in the form of an idol) in which is vested an endowment (title to property) as well as the claims of a worshipping community. It was law which regulated the unity of the multiplicity which lived beyond — and was protected beyond — the mortality of members of the worshipping community. The judgment explicitly held that,

> the property endowed to the pious purpose [idol] is owned by the idol as a legal person in an ideal sense. The reason why the court created such legal fictions was to provide a comprehensible legal framework to protect the properties dedicated

[62] *M Siddiq* (n 5) [221]. "The purpose for which juristic personality is conferred cannot be evolved into a trojan horse that permits, on the basis of religious faith and belief, the extinguishing of all competing proprietary claims over property as well stripping the property itself of the essential characteristic of immoveable property".

[63] *M Siddiq* (n 5) [198].

[64] *M Siddiq* (n 5) [218].

[65] *M Siddiq* (n 5) [474].

> to the pious purpose from external threats as well as internal maladministration (emphasis added).[66]

In the light of this clear elucidation of the context and concept of juristic personality, it is once again clear that to establish *Ramlalla* as a juristic personality one would need evidence of the 'pious purpose of the individual making the endowment' as well as its legal recognition. The fact that neither of these conditions was satisfied makes it impossible to apply to the plaintiffs the category of legal personality *ab initio*. There is thus, an inconsistency between the Supreme Court's exposition of the concept of juristic personality and its application of the same in this particular case, since rather than testing the legality of the juristic personality of the plaintiff in its claims to the disputed territory, it accepts such a claim from the very beginning. To return to the beginning of this paper, there is a clear distinction to be made in law between the faith in and worship of Rama, and the juristic personality of *Ramlalla* in its strict legal sense.

At this point it is important to emphasise that the Supreme Court held that the entire Ayodhya dispute was a hearing on "immovable property", tacitly negating Justice Aggarwal's contention in line with the demands of the plaintiffs that Article 25 was relevant and applicable. If there was no record of a prior legal recognition of *Ramlalla* (and *Janmasthan*), there was ample record of the legality of the Mosque in the colonial period, as confirmed by the Supreme Court in its judgment. In this confirmation and on this specific aspect, it also confirms Justice Khan's findings on the legality of the Mosque in the colonial period. The Supreme Court had itself made clear — by citing and explaining Article 296 of the Constitution — that there was a legal continuity between the British sovereign and the Republic of India with respect to property, except in those cases/titles which were specifically modified or revoked by the express acts of the Government of India. This certainly did not happen with the disputed land. Since a Mosque is not a juristic personality there is no absolute requirement — as is the case with the plaintiffs of Suit 5 — to provide evidence of a title deed. Thus, even if Suit 4 could not provide such a title deed, it could establish its property through title by virtue of the Mosque's legal recognition by the colonial regime which was not explicitly reversed by the Indian government after Independence. Moreover, in the light of the explicit recognition of British law and legal continuity into the postcolonial period by the Court, it is unclear why the Court frames the dispute between Suit 4 and 5 as merely a contest between the 'possessory claims'

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[66] *M Siddiq* (n 5) [163]; And yet, despite the lucid discussions on the intrinsic connection between juristic personality and religious endowment, the Court holds, contrary to this, without providing any explicit justification, on page 201, "In the present case, there exists no act of dedication and therefore the question of whom the property was dedicated to does not arise and consequently the need to recognise the pious purpose behind the dedication itself as a legal person also does not arise".

of the two sides. The Court rightly states that neither side was able to provide a title deed. However, there was a (colonial) legal recognition of the Mosque in the 'inner courtyard' and no such colonial legal recognition or legal recognition of any sort of *Ramlalla* (or a temple) anywhere in the historical record. Taking into account this crucial dimension, accepted by the Supreme Court, would in fact, contrary to the said Court's finding, confirm the legal existence of the Mosque and the claims of Suit 4, which unlike the High Court, did not bar it by limitation.

By recognising the legal continuity from colonial times and discussing the category of juristic personality that depended on a title deed and endowment at a particular time and place and claimed by the plaintiffs of Suit 5, the Supreme Court renders redundant the entire range of questions regarding the historical origins of the Mosque and the question as to whether a temple existed prior to the Mosque or whether Hindu worship and belief regarding the site existed historically. And yet, on the contrary, in its findings it appears to confirm Justice Aggarwal's fundamental contention about the faith, belief, and worship at the disputed site 'since time immemorial' being sufficient to establish title. While no convincing evidence establishes this as a fact, even if such proofs existed, this would not amount to rendering the legal applicability of juristic personality claimed by the plaintiffs.

VII. CONSTITUTIONALITY AND SECULARISM, FAITH AND WORSHIP

The Supreme Court in its discussion of the denial of juristic personality to *Janmasthan* reiterates its "constitutional commitment to secularism".[67] It emphasises the fact that the adjudication of civil claims over property must remain within the secular domain. In this context it also reiterates that, "the conferral of legal personality on idols stemming from religious endowments is a legal development applicable only to a practice of the Hindu community",[68] and that the pleading of the plaintiffs with regard to *Janmasthan* was "a novel extension of the law applicable to Hindu religious endowments".[69] And yet one cannot but ask if this very understanding of juristic personality does not equally deny its application to *Ramlalla*?

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[67] *M Siddiq* (n 5) [222]. Unfortunately, the scholarly discussion on secularism today seems still hostage to the debate about its allegedly foreign or indigenous origins rather than focusing on the concrete entanglements of religion and law in cases regarding endowments, conversion, and reservation. Analogously, while Courts may be rightly accused of exceeding their mandate of judging the legality and constitutionality of actions by 'defining' religions in terms of 'essential practices', there seems no constitutional ground but secularity, and the Courts which can, in principle, adjudicate on issues that involve the entanglement of religion and (secular) rights. Critics of secularism often do not appear to appreciate this.

[68] *M Siddiq* (n 5) [222].

[69] *M Siddiq* (n 5) [222].

It is not beyond the realm of possibility that the 'next friend' in Suit 5 was aware of the problem that there was no evidence of a religious endowment in the context of the idol/deity *Ramlalla*, which would render defective the very possibility of applying the category of juristic personality. And so, the 'next friend' argued that the disputed land was not *debdutter* property (a religious endowment) but *itself* a juristic personality i.e., *Janmasthan*.[70] There being no evidence of a religious endowment, and therein no property title, the plaintiff spoke of the land itself as being the deity. Therefore, we have the unusual case of the demand for declaration of a deity/idol *Ramlalla* with no religious endowment. But the claim to the disputed site is not made as a property title but as the right to worship the land itself as a deity (*Janmasthan*) which was claiming juristic personality. Thus, the plaintiffs ultimately appear to claim title as right to religion and right to worship. The extraordinary legal situation is one of *Ramlalla* requesting declaration as juristic personality with no religious endowment, and *Janmasthan* requesting declaration as juristic personality not as an idol.

In denying juristic personality to *Janmasthan*, the Supreme Court made clear that juristic personality does not change the character of immovable property. And the Supreme Court held the dispute to be one over immovable property and therefore having no place for any claim on the basis of a purely religious right. But that would leave the strange situation of *Ramlalla* as idol/deity with no religious endowment at all i.e., proprietary claim or title. This in itself ought to make it impossible to affirm *Ramlalla* as a juristic person, since the latter as a concept is intrinsically tied with religious endowments, as the Court itself holds throughout the judgment. To claim that the *Janmasthan* was a religious endowment would mean denying it juristic personality which Suit 5 could not admit, which was why the claim was worded as a religious right. In such a context, even while denying the role of religious right in the determining of a case over immovable property, the Supreme Court appears to have *suo motu*, against the pleading, treated the land as a religious endowment *of Ramlalla*, and even without any record of this *endowment*, recognised *Ramlalla* to have juristic personality, holding that this land as endowment belonged to *Ramlalla*. This entire chain of reasoning of the Court appears as incomprehensible as its results unjustifiable.

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[70] *M Siddiq* (n 5) [192-3]. The argument which has been urged on behalf of the plaintiff in Suit 5 is materially different from the case for conferment legal personality on a Hindu endowment. In the case of an endowment, courts have recognised the charitable or religious purpose situated in the institution as a basis for conferring juristic personality on the institution. In doing so, the court recognises the pious purpose of the founder or testator to protect the properties so endowed. However, it is not the case of the plaintiffs in Suit 5 that the property styled as the second plaintiff is debutter property. Rather, by invoking the argument of a — juristic person, the plaintiffs have urged this Court to create an additional ground for the conferral of legal personality — the faith and belief of the devotees. Amongst the ensemble of arguments advanced before this Court, this innovative legal claim is at the heart of the present dispute.

Ironically, in the course of its judgment, the Supreme Court held that historically, the disputed site had "witnessed a medley of faiths and the co-existence of Hindu and Muslim practices, beliefs and customs".[71] And yet it refused the reasoning and decision of the majority opinion of the High Court in holding the site to be joint-property based on its findings of the co-existence of communities worshiping at the site. Rather, it held Suit 5 — inexplicably affirming *Ramlalla* and denying *Janmasthan* — to be maintainable in view of what it saw as the *Ramlalla*'s claim to "possessory title" to the disputed site be "on a better footing" than Suit 4 (Sunni Central Waqf Board). That is, it gave *Ramlalla* exclusive property right (which as argued above was not demanded by the plaintiffs for *Ramlalla* since the land itself was held to be divine as *Janmasthan* and a juristic person and not property) and gave Suit 4 acres of land outside of the disputed site (which was also not demanded since the pleading was that the inner courtyard was a legal Mosque, which the Court accepted). If the High Court was accused of going beyond its brief in giving all Suits some part of the disputed land, the Supreme Court which was empowered by Article 142, declined to give Suit 4 any sort of title to the disputed land and gave it 5 acres elsewhere and therefore in its wisdom, transformed a question of right into a gratuitous act of charity. Given all the above arguments in the paper, Suit 4's claim to the 'inner courtyard' of the Mosque — even bracketing the question of the legality and continuity of Hindu worship in the outer courtyard in the colonial and pre-colonial period — appears unassailable.

Notwithstanding the unambiguous commitment to secularism stated in the judgment, this commitment does not seem to be reflected in the Supreme Court's findings and directions. In accepting and affirming the juristic personality of *Ramlalla,* the Court has gone against its own definition and requirements of a juristic person. The only explanation for this seems to be that the Court assumed and accepted, with scarce evidence, the continuity of the belief and worship of the Hindus from time immemorial, deciding property title on this basis rather than the secular and legal criteria of juristic personality which it had itself explicated so fully. The intellectual context of the formation of juristic personality lay in the distinction between eternity and perpetuity where the latter — whether city, angel or crown — unlike God, was believed to have an origin in time even though it was meant to live perpetually in the protection of law. This origin as a historical legal act, essential for the constitution of juristic personality, was not to be found or placed on record.

Ultimately, while the Supreme Court has clarified in its reading, as much as in its explicit statements that the dispute rested on secular law and proprietary claims and could only be resolved as such, the operative affirmation of *Ramlalla* as juristic personality, on the contrary, was not merely an affirmation of any unalloyed religious faith. Rather one may interpret this affirmation

[71] *M Siddiq* (n 5) [881].

as the inability to resist the 'myth' of a religious identity that was smuggled in as — politically as much as jurisprudentially so affirmed — national identity. After all, in its discussion of juristic personality, the Supreme Court did not derive this from Hindu law nor did it treat the case as one of the right to (Hindu) worship; by treating it as such, Justice Aggarwal seemed more consistent, even if his reasoning was questionable. And yet, the Supreme Court not only tacitly accepted the history and unity of the community of Hindus sans any record of a legal or administrative recognition of a community as such in pre-colonial times, but also thereby allowed Hindus today to make legal-proprietarily claims on and from the past, merely by virtue of being Hindu. This again reversed the Court's own rendering of the dispute as one over property and juristic personality requiring certain forms of concrete evidence, and opens the doors for a range of proprietary-legal actions merely on all too uncertain grounds such as religious identity.

Endowing the Hindu community with such an immaculate conception — to which only the national lays claim — was already paved by the conflation between the national way of life and Hindu practice, in previous Supreme Court judgments. Hinduism is therein characterised as a 'way of life' of the 'Indian people'[72] on the one hand, but jealously retains its particular religious identity in Constitutional provisions, legislative acts, and (other) Supreme Court judgments, when it is deemed that only a Hindu, as distinct from Christians and Muslims, may get the benefits of caste-based reservation; presumably because caste discrimination is a characteristically Hindu practice.[73] Ironically, at the same time**,** recent Supreme Court judgments have stated that all the values of the Constitution, whether it be tolerance or liberty, are to be in any case derived from Hinduism historically.[74] If Hinduism is indeed defined by the Supreme Court as a way of life of the 'Indian people', how

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[72] *Ramesh Yeshwant Prabhoo v Prabhakar Kashinath Kunte* (1996) 1 SCC 130 : AIR 1996 SC 1113.

[73] M Galanter, 'The Religious Aspects of Caste: A Legal View' in DE Smith (ed), *South Asian Politics and Religion* (Princeton University Press 1966); P Samarendra, 'Religion, Caste and Conversion: Membership of a Scheduled Caste and Judicial Deliberations' (2016) 51(4) Economic and Political Weekly 38; P Samarendra, 'Religion and Scheduled Caste Status' (2016) 51(31) Economic and Political Weekly 13. The legal category 'Hindu' has been expanded in this context to include Sikhs and Buddhists in the context of reservations. Legislation too, such as on personal law, defines 'Hindu' as a religion to include Buddhists and Sikhs, and not Christians and Muslims, giving no rationale for this distinction.

[74] *See*, for instance, the Supreme Court judgments of *Ramesh Yashwant Prabhoo* (n 72) and *M. Ismail Faruqui v Union of India* (1994) 6 SCC 360 : AIR 1995 SC 605. Both these verdicts repeat strands of the argument as presented in *Yagnapurushadji v Muldas Bhudardas Vaishya* AIR 1966 SC 1119 on the tolerance of Hinduism, but do not point out to the contrary strain where the latter speaks of the Constitution as being necessary for bringing out a 'fundamental change' in the social and religious outlook of the Hindus; the context being temple entry. The honourable Judges remain content with citing Monier Williams and Radhakrishnan among others and not Ambedkar and all the other rich and relevant scholarship being produced around the world on the issue that convincingly points to a very different understanding of the issue.

could it uphold anti-conversion laws,[75] since by such a conception, if assumed to be true, no Indian could either convert into or from Hinduism, it being a 'way of life' and not a religion? Deep legal and normative anomalies such as these allow for the strategic vacillation between Hinduism as 'national' and Hinduism as a particular religion defined by its distinction from religions like Islam and Christianity, thereby giving scope to colour the latter as, by their very nature, a betrayal of so-imagined indigenous culture and identity. Routine and extraordinary violence may be traced to such a provenance. In fact, the denial of *Janmasthan* was easier to do since this involved an overtly religious idea that had no basis in jurisprudence i.e., a 'self-created'/*svayambu* juristic personality.

To ultimately succumb to the claim of the faith and worship of the Hindus since time immemorial as itself constituting legal-proprietorial entitlement — notwithstanding the dubious 'evidence' for such continuity and the utter inapplicability of the legal category of juristic personality as the Court itself understands it — is to accede to the claims that Hindus are a self-constituting monolithic community scarred only by the attacks of Muslim-outsiders. The Court therein — contrary to scholarship — resonates and responds to decades of popular and political discourse and mobilisation on the real authenticity of Hindus, the essential foreignness of and compulsive violence of Islam and (yet), the denied but undeniable Hinduness of all Indian Muslims. Such is the narrative exemplified by Savarkar's argument that Hindus existed as a single definable community across history and arrived at a particular consciousness of itself in its wars against Muslim-outsiders.[76] However, this argument about the entire 'medieval' period as one a war between two interlocking monolithic communities has long been convincingly demolished by the scholarly literature on the rich and complex interactions and syntheses between various communities in pre-colonial history[77]. Moreover, Ambedkar, scholar, jurist, and chair-

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[75] *Stainislaus v State of MP* AIR 1977 SC 908. As many have argued that it is difficult to square this with the Preamble of our Constitution which guarantees 'liberty of thought, expression, belief, faith, and worship', from which flows Art 25 (the right to profess practice and *propagate* one's religion) as well as Art 19 (freedom of speech and expression).

[76] VD Savarkar, *Essentials of Hindutva* (Veer Savarkar Prakashan 1969) 44.

[77] There is a vast literature on this which straddles several historiographical and disciplinary divides, Marxist and non-Marxist, literary and historical, philological and religious, among others; a sample would include, Romila Thapar, Harbans Mukhia, and Bipan Chandra, *Communalism and the Writing of Indian History* (People's Publishing House 1969); Romila Thapar, *Somnatha: The Many Voices of History* (Penguin India 2008); Richard Davis, *Lives of Indian Images* (Princeton University Press 1999); Sunil Kumar, *The Present in Delhi's Pasts* (Three Essays Collective 2011); Audrey Truschke, *Culture of Encounters: Sanskrit at the Mughal Court* (CUP 2016); Carl W Ernst *Refractions of Islam in India: Situating Sufism and Yoga* (Yoda Press 2016); BD Chattopadhyaya, *Representing the Other? Sanskrit Sources and the Muslims* (Primus 2017); JS Hawley, *A Storm of Songs* (Harvard University Press 2017). Most recently, Audrey Truscke's important work *The Language of History: Sanskrit Narratives of a Muslim Past* (Penguin India 2021) xxiii, has analysed Sanskrit texts from the 11th to the 18th century, on Muslims and Indo-Muslim rule, establishing that these texts do not frame their narratives in terms of a 'Hindu'-'Muslim' conflict, focusing on issues such

man of the drafting committee of our Constitution, reflected, expressed, and anticipated a wide scholarly consensus in his irrefutable critique of such a conceptualisation of the Hindu community as one existing since time immemorial.[78] Notwithstanding which, the jurisprudence of the highest courts of the land appear unable to distinguish themselves from a popular prejudice in erasing the story of Rama and Sambuka, that Ambedkar reminds us of in his critique of a self-subsisting eternal Hindu tradition of tolerance.[79] For ultimately, it is not *Ramlalla*, but the Hindu-nation which seeks declaration in this case, in the wake the violent history that it imagines in the shape of the Mosque as septic scar. Which court in the land could dare refuse?[80]

National history vengefully awakes from its imaginary entombment. And at the risk of mauling Adorno on Benjamin,[81] one might wager that it is here that the nation emerges: at the crossroads of positivism (historical claim-making) and magic (its immaculate origins). The spot is indeed bewitched.[82]

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as 'place of origin, caste, class and style of rulership'. All of this goes well beyond common place facts of Rajputs being generals in Mughal armies and conflicts between communities which no doubt existed would have to be seen in the light of these contexts.

78 BR Ambedkar, *Annihilation of Caste* (1936) <http://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/aoc_print_2004.pdf> accessed 8 June 2021; R Govind, 'Ambedkar's Lessons, Ambedkar's Challenges: Hinduism, Hindutva and the Indian Nation' (2018) 53(4) Economic and Political Weekly 80.

79 BR Ambedkar (n 78).

80 And yet the destructive scope of this assertion of continuous Hindu history as the core of national identity surviving violence from outsider-Muslims may be found in the re-naming of places and cities, markers of memory. This may well ineluctably extend its will more spectacularly to other places of worship, where claims to an immemorially authentic past are insisted upon. Any faith in the Places of Worship (Special Provisions) Act 1991 would appear rather optimistic at a time when the Government of the day has passed the Citizenship Amendment Act which has introduced religion as a criterion in the granting of citizenship, thereby hitting, once again, at the secular foundations of the polity.

81 H Lonitz and others *The Complete Correspondence, 1928-1940* (Harvard University Press 1999) 283.

82 Of course, this is not a comment on Adorno's critique of Benjamin's study of Charles Baudelaire, but merely a crassly opportunistic appropriation of Adorno's prose. However, this appropriation is propelled by the belief that something on the nature of national self-constitution is captured in Adorno's 'crossroads.'