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Editorial Note

Applying Adverse Possession Rules To The Ayodhya Case

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I. Introduction

The infamous *Ayodhya* dispute is perhaps the single largest scar on India's secular fabric. In a nutshell, it is a dispute between Hindus and Muslims over a 1500 square yard plot of land as to who owns the land. The Muslims want the land since they had a mosque there and would like to continue worshipping there. Hindus want the land since it is regarded as the birthplace of Lord Ram and thus feel that this specific plot of land is in itself holy to the Hindu faith. Countless lives have been lost and thousands of families torn as under on account of these competing claims. Even the cruel 2002 Gujarat riots were sparked off on account of this dispute.[1]

From a legal perspective, I was deeply perturbed by the court in the *Ayodhya* case[2] treating the primary legal question here as one of Right to Practice

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1 Sheetal Parikh, "Enshrining a Secular Idol: A Judicial Response to the Violent Aftermath of Ayodhya", 37(1) Case Western Reserve Journal of International Law 85, 87 (2005).

2 Hereinafter, "Ayodhya HC Decision". It is very difficult to access a single file containing the case considering that the judgment is over 8000 pages. The Allahabad High Court website has the judgment broken down into more than 50 independent files. *See* decision of Hon'ble Full

One's Religion under Article 25 of the Constitution.[3] My understanding of the basic tenets of property law saw this dispute first and foremost as a property dispute. This decision is thus in many ways a demonstration of how law manifests abnormally often letting go of its most fundamental roots when dictated so by societal, political, and communal pressures. Such a realist critique of law lies at the heart of law and society analysis that JILS tries to promote. In addition to my criticisms of the High Court verdict, the results of my research on the Ayodhya fact matrix also diverge significantly from both the route taken as well as the final determination arrived at by the Honourable Supreme Court in its November 2019 verdict.[4]

First, the paper presents a comprehensive outline of facts in the *Ayodhya* dispute. I recognise that greater minds than mine have already addressed this question in great detail.[5] However, my paper will be incomplete and incoherent without laying down certain factual propositions which I can refer to throughout the paper to base my legal arguments on. Further, I also recognise that no position on the factual matrix that I take would be accepted universally as accurate or even proper considering the large amount of passions involved from both religions on this issue. Still, I will rely on original case records and accounts of historians to make my case as accurately as possible.

In the *Second* part, I make my case as to why the *Ayodhya* dispute should be analysed solely via applying rules of property law and why Article 25 is not applicable here. I envisaged this paper to majorly improve our understanding of civil laws, mainly the law of adverse possession. Therefore, there is no attempt at making an extensive Constitutional Law argument here. The only attempt is to show why Article 25 should not apply.

In the *Third* part, I analyse the law of adverse possession as we understand it today. I pay special attention to features of adverse possession that are relevant to the *Ayodhya* fact matrix. In the *Fourth* part, I apply the rules analysed in the previous part to the *Ayodhya* case and conclude that Hindus and Muslims have valid title over the outer and inner courtyard respectively via the operation of adverse possession.

Bench hearing Ayodhya Matters, available at <http://elegalix.allahabadhighcourt.in/elegalix/DisplayAyodhyaBenchLandingPage.do>, last seen on March 7, 2020. (The SCC Online database maintains the full text of the judgment split in 16 different files)

3 This same concern was raised by Shri Madhu Limaye in 1992. To jolt the judiciary into the correct course of action, he refers to the *Shahid Ganj* dispute in Pakistan which contained almost the same facts as the *Ayodhya* dispute. The Pakistani Supreme Court refused to rely on theology; they applied secular property laws to decide the case against Muslims. *See* Shri Madhu Limaye, "Ayodhya Row & the Lahore Case", (1992) 2 LW (JS) 13 (2), available in SCC Online.

4 *M. Siddiq v. Suresh Das*, (2020)1 SCC 1, available at <https://www.sci.gov.in/pdf/JUD_2.pdf>, last seen on March 7, 2020, hereinafter "Ayodhya SC Decision".

5 *See The Babri Masjid Question, 1528-2003 – "A Matter of National Honour"* (A.G. Noorani (ed.), Tulika Books 2014).

II. Part I: The Ayodhya Dispute – Facts

The Ayodhya dispute, in its historical sense, begins around 1528 when Babar is believed to have commissioned one of his officers, Mir Baqi Isfahani to convert a temple to mosque in Ayodhya. We receive this information from the 2003 Report of the Archaeological Survey of India ('ASI').[6] The very beginning of the tale itself is testament to the difficulty in judging the veracity of facts in this issue. Two archaeologists involved in the dig, Supriya Varma and Jaya Menon have written a detailed Article in Economic and Political Weekly alleging that this finding of the ASI Report is in fact false.[7] However, I shall go with the official word on this as was done by the Supreme Court of India as well.[8] In any case, whether a temple existed at the place of the mosque is of little relevance to the argument I make in this paper.

There can be no serious contestation that from 1528, there did exist a mosque in the disputed property which was under the possession of Muslims.[9] The first instances of violence in this site that I could find range back to 1857 where Hindus attempted to occupy the mosque and was held back by use of force by the Muslims.[10] Following this dispute, there was a compromise between the parties whereby the plot was divided into two – the inner courtyard was retained by Muslims and the outer courtyard was occupied by Hindus.[11]

The first intervention of a court of law in this suit was in 1885 when a Hindu priest, Raghubar Das sought permission from the court to build a temple in the outer courtyard that was allotted to Hindus as per the 1857 compromise. This suit was denied on public policy grounds since the court feared further riots

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6 The text of the report itself is not available online, *see* the Website of the Archaeological Survey of India, available at <https://asi.nic.in/>, last seen on March 8, 2020. The Allahabad High Court has referred extensively to the Report in its orders in *Gopal Singh Visharad*v. *Zahoor Ahmad*, 2010 SCC OnLine All 1922, p.292, available at <http://elegalix.allahabadhighcourt.in/elegalix/ayodhyafiles/hondvsj-ann-3.pdf>, last seen on March 8, 2020.

7 Supriya Varma and Jaya Menon, "Was There a Temple under the Babri Masjid? Reading the Archaeological 'Evidence'", 45(50) Economic & Political Weekly 61 (2010), available at <https://www.epw.in/system/files/pdf/2010_45/50/Was_There_a_Temple_under_the_Babri_Masjid_Reading_the_Archaeological_Evidence.pdf?0=ip_login_no_cache%3D57ecfa515d46f52a5197836d8f4d7f17>, last seen on March 08, 2020.

8 Ayodhya SC Decision, *supra* note 4, pp. 594-96.

9 *But see id.*, p. 243 – The Nirmohi Akhara makes a claim that a mosque never existed in the disputed area. However, this is so far removed from all historical accounts including the fact that a mosque was in fact demolished in 1992. Therefore, this stance is not worth any serious engagement.

10 Noorani, *supra* note 5, pp. 173-75.

11 Peter Van Der Veer "'God Must be Liberated' A Hindu Movement in Ayodhya",21(2) Modern Asian Studies 283, 289 (1987), available at <https://www.jstor.org/stable/312648>, last seen on March 8, 2020.

if this was allowed. Thus, there was a decree ordering maintenance of status quo in the two divisions.[12]

The next chapter in the Ayodhya dispute is the 1934 riots that damaged the mosque and cost countless lives. This was a result of certain Hindus retaliating to an alleged incident of a slaughter of a cow in the mosque.[13] Both Hindus and Muslims assert that they offered prayers inside the inner courtyard from 1934.[14] The earlier judicial mood of requiring parties to maintain status quo was reiterated by the courts in 1947 when Hindus were once again stopped from building a temple and Muslims were barred from repairing the damaged mosque.[15]

A central element in the entire dispute was December 22, 1949 when Hindu groups occupied the mosque by force, proclaimed the centre of the mosque to be the exact birthplace of Lord Ram, and installed idols here.[16] Following this, there was an order of the court attaching the entire property and vested possession with a government appointed receiver. Post this, the immediate decision was to stop both religions from worshipping on the site.[17]

It is against this order that the first suits that led to the Supreme Court decision in November, 2019 was filed before various district courts. In 1950, a suit was filed by Gopal Singh Visharad to worship at Ramjanmabhoomi which he claimed was in the inner courtyard of the disputed area.[18] Nine years later, Nirmohi Akhara filed a suit against the receiver stating that they had the traditional right to manage temples dedicated to Lord Ram.[19] In 1961, the Sunni Central Waqf Board filed a suit that the property under the receivers should be handed over to the Board so that Muslims could repair the mosque and resume their prayers there.[20] Finally, a fourth suit was filed in 1980 by Sri Deoki Nandan Agarwala on behalf of the idol placed in 1949 as well as Ramjanmabhoomi both of whom were claimed to be juristic persons.[21]

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[12] "Ayodhya Chronicle: Timeline of the Ram JanmabhoomiLand Title Dispute"(*BusinessLine*, dated November 9, 2019), available at <https://www.thehindubusinessline.com/news/national/ayodhya-chronicle-timeline-of-the-ram-janmabhoomi-land-title-dispute/article29929369.ece#>, last seen on March 8, 2020.

[13] Sushil Srivastava, "The Abuse of History: A Study on the White Papers on Ayodhya",22(5/6) Social Scientist 39, 47 (1994), available at <https://www.jstor.org/stable/3517901>, last seen on March 8, 2020.

[14] Ratna Kapur, "The Ayodhya Case: Hindu Majoritarianism and the Right to Religious Liberty",29 Maryland Journal of International Law 305, 335 (2014).

[15] Noorani, *supra* note 5, p.202.

[16] Ved Mehta, "The Mosque and the Temple – The Rise of Fundamentalism", 72(2) Foreign Affairs 16, 16-18 (1993).

[17] Noorani, *supra* note 5, p. 218.

[18] Ayodhya SC Decision, *supra* note 4, p.29.

[19] *Id*., p.34.

[20] *Id*., p.38.

[21] *Id*., p.44.

Despite the continuation of the proceedings under these 4 suits, in 1986, a separate district court ordered for the locks to be removed and that Hindus should be allowed to worship the idol that is placed inside. The order records that Hindus were in any case worshipping in the outer courtyard and that "heavens are not going to fall" if they be now permitted to directly worship the idol in the inner courtyard.[22] Thus, from 1986, Hindus resumed worship in the inner courtyard after a pause of slightly more than 35 years.

In 1989, the Allahabad High Court took over the four suits that were filed in various district courts under Chapter VIII, Rule 4 of the Allahabad High Court rules that give the High Court the extra-ordinary power to take over cases from subordinate courts.[23] During the pendency of these proceedings, in October 1991, the Uttar Pradesh Government passed notifications under the Land Acquisition Act acquiring the entire property that was sub-judice. However, as the result of a writ proceeding, this notification was made interim and subject to the determination in the suits that were being decided by the High Court.[24]

A little more than a year later, on December 06, 1992, the mosque was finally demolished in yet another violent attack by Hindu mobs. Following this, a prayer ceremony was conducted and a make shift structure was erected as a temple.[25] In response to the wide scale riots as a result of the destruction of the mosque and in order to have a final determination of the matter, the Parliament passed the Acquisition of Certain Area at Ayodhya Act, 1993.[26] *Inter alia*, this Act provided that all suits before any court of law on these matters would abate following the Act.[27] However, this provision was struck down by the Supreme Court for violating the Right of the Muslim community to judicial remedy and the matter was remanded to the High Court for it to be heard on merits and disposed of.[28]

Having reached the echelons of the higher judiciary, we stop the analysis of facts in this part of the paper. The subsequent parts of the paper will refer to the High Court and the Supreme Court decision copiously while seeing whether the issue can be seen under Article 25 and how adverse possession applies in these facts. The goal in this part was to understand the contextual facts that shape the *Ayodhya* dispute.

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[22] Gerald James Larson, *India's Agony Over Religion*269-70 (State University of New York Press 1995).

[23] Kalyani Ramnath, "Of Limited Suits and Limitless Legalities: Interpreting Legal Procedure in the Ayodhya Judgment", 5 NUALS Law Journal 1, 9 (2011).

[24] Kapur, *supra* note 14, p.340.

[25] Noorani, *supra* note 5, p.254.

[26] Acquisition of Certain Area at Ayodhya Act, 1993 (Act No. 33 of 1993, dated April 3, 1993), available at <https://indiacode.nic.in/bitstream/123456789/1915/3/A1993-33.pdf>, last seen on March 8, 2020.

[27] *Id*., S. 4(3).

[28] *M. Ismail Faruqui* v.*Union of India*, (1994) 6 SCC 360, ¶¶ 61-62, hereinafter "Ismail Faruqui Decision".

III. Part II: Right To Religion In The Ayodhya Issue

As mentioned in the Introduction section, I do not wish to extend extensive Constitutional law arguments in this paper. Therefore, this section will be relatively short. To provide context, two out of the three judges who decided the *Ayodhya* dispute in the Allahabad High Court referred extensively to the Right to Religion given primarily through Articles 25 and 26 of the Constitution.[29]

Article 25 gives a general right to practice, propagate, and profess one's religion. Article 26 provides the right to a religion to manage its own affairs; notably, this includes the right to set up places of worship.[30] The stated restrictions on these rights are public order, morality, health, and other Fundamental Rights.[31] Admittedly, a private Right to Property is not included in these restrictions. Thus, solely by looking at the content of restrictions, one may make an argument that civil laws on determination of title can in fact be seen on a lower pedestal than Right to Religion which is a Fundamental Right. This could perhaps be the reason why this case was decided by the courts more on the basis of Right to Religion rather than Right to Property. In the remaining part of this section, I will now proceed to explain my disagreement with this kind of argumentation that places Right to Religion above the Right to Property.

The applicable question in a case like *Ayodhya* for understanding the Right to Religion is not the breadth of the restrictions but the breadth of the rights itself. I argue that the content of the Right to Religion presupposes that one is practicing religion over a property that he has some rights over; this can be title, possession, lease, or license. While I do not wish to enter into the larger Constitutional Law arguments in this paper, the strength of this argument can be shown by a simple illustration. Considering our existing jurisprudence on Article 25, a religion can exist as long as there is (1) a common faith, (2) common organisation, and (3) a distinctive name.[32] Thus, there is nothing stopping me from starting a religion with me as the Avatar of God provided that a sufficient number of people agree to join my religion. Following the logic used by the two judges of the High Court in the *Ayodhya* dispute, the followers of my religion will be able to lay valid title to the Hospital where I was born provided it can be proved on a balance of probabilities that I was in fact born in that hospital. This seems a ridiculous proposition but follows directly from the principle of holding civil property laws as subservient to religious dictates. The ridiculousness of the outcome in my

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[29] Kapur, *supra* note 14,pp.345, 349.

[30] Art. 26(a), Constitution of India.

[31] Other Fundamental Rights is given as a restriction under Art. 25, but not under Art. 26. This distinction has not been mentioned in the main text because my argument in this section is not based on the scope of the restrictive clauses.

[32] Durga Das Basu, *Indian Constitutional Law*, Vol. 1 622 (S.K. Mukherjee (ed.), 5th edn., Kamal Law House 2019).

scenario is testamentary to the irrationality of giving right to practice religion a scope so large than it can upset settled property laws.

While the Supreme Court did not lay down the above argument in so many words, it did state that:

> "*The court does not decide title on the basis of faith or belief but on the basis of evidence. The law provides us with parameters as clear but as profound as ownership and possession. In deciding title to the disputed property, the court applies settled principles of evidence to adjudicate upon which party has established a claim to the immovable property.*"[33]

For all the criticisms drawn by the Supreme Court judgment[34] and my own personal disagreement with how the court arrived at its decision on title, it is a matter of great relief that the Supreme Court did steer away from the legal blunder of giving religious rights greater legitimacy than property rights.

Having dealt with both the factual matrix surrounding the *Ayodhya* dispute and the argument of viewing the dispute through the lens of religious rights, I now proceed to how the dispute should be solved on applying settled rules of adverse possession.

IV. Part Iii: A Brief Understanding Of The Rule Of Adverse Possession

Before we apply adverse possession to the *Ayodhya* fact matrix, it is useful to clarify what adverse possession is and what the specific rules applicable in this regard are.

The modern Indian law regarding adverse possession is codified in §27 of the Limitation Act.[35] This is *in pari materia* with §28 of the Limitation Act of 1908[36] which applies to the *Ayodhya* decision. As per §27, if someone fails to institute a suit for possession of a property within the applicable limitation period, his right to such property shall be extinguished. Adverse possession is an example of an acquisitive effect of passage of time, rather than a restrictive effect.[37] This means that adverse possession includes within it the creation of a new right and

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[33] Ayodhya SC Decision, *supra* note 4, p.921, ¶796.

[34] *See for example* A.G. Noorani, "Supreme Court Denies Justice", *Frontline* datedDecember 6, 2019, available at <https://frontline.thehindu.com/cover-story/article30014667.ece>, last seen on March 8, 2020.

[35] Limitation Act, 1963 (Act No. 36 of 1963, dated October 5, 1963), available at <https://indiacode.nic.in/bitstream/123456789/1565/1/196336.pdf>, last seen on March 8, 2020.

[36] Limitation Act, 1908 (Act No. 9 of 1908 dated August 7, 1908).

[37] Henry F. Buswell, *The Statute of Limitations and Adverse Possession: With an Appendix Containing the English Acts of Limitation*2 (Fred B. Rothman & Co. 1991), available in the HeinOnline database.

not just a bar against someone enforcing their rights. While the provision in itself talks of barring the right and not just the remedy, admittedly there is nothing directly from the provision that confers a new right on someone. However, if the title of the original owner is extinguished, it is inconceivable that a property exists with no owner; therefore, the title goes to the erstwhile trespasser.[38]

The specific policy consideration behind adverse possession is that it does more harm than good to disturb possession which has become settled for long even if the possession was obtained in an illegal manner.[39] Unless the law recognises certain amount of passage of time itself being an indicator of good title, there will be avoidable uncertainty and therefore blockages in the real-estate market.[40] Further, there is also the under-pining sentiment that an owner who fails to raise his claim within a prescribed period time is a negligent owner who would not be using the property in an effective manner in any case.[41]

Though not specifically required in §27, there are certain essential ingredients for adverse possession which have been recognised by courts over time. This is codified generally in the Latin phrase, *nec vi, nec clam, nec precario* which means that the possession should be by neither force, nor stealth, nor license.[42] The first two requirements are simple –the possession should be open[43] and peaceful.[44] The final requirement is slightly more complicated; it means that the possession should actually be adverse.[45] In other words, the trespasser should set up possession in denial of the true owner's title and enjoyment of the property.[46] The trespasser's *animus* should be that he has rights to the property in exclusion of the erstwhile owner.[47]

In addition to these, there are certain finer points on adverse possession which are of special relevance to the *Ayodhya* dispute. *First*, an erstwhile owner who has lost his rights on account of adverse possession for 12 years cannot regain ownership by dispossessing the new owner.[48] *Second*, the burden of proof

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38 B.B. Mitra, *The Limitation Act* 422-23 (M.R. Mallick (ed.), 20th edn., Eastern Law House 1998).

39 D.L. Carey Miller, "Three of a Kind: Positive Prescription in Sri Lanka, South Africa, and Scotland", 19(2) Stellenbosch Law Review 209, 213 (2008).

40 Henry W. Ballantine, "Title by Adverse Possession",32(2) Harvard Law Review 135, 136-37 (1918), available at <https://www.jstor.org/stable/1327641>, last seen on March 8, 2020.

41 Axel Teisen, "Adverse Possession – Prescription",3(2) American Bar Association Journal126, 127 (1917), available at<https://www.jstor.org/stable/25699854>, last seen on March 8, 2020.

42 *P. Lakshmi Reddy* v.*L. Lakshmi Reddy*, AIR 1957 SC 314 : 1957 SCR 195.

43 *Pilla Akkayyamma* v.*Channappa*,2015 SCC OnLine Kar 8226 : ILR 2015 Kar 3841.

44 *Lal Singh* v.*Mathru*, 2018 SCC OnLine HP 2511.

45 T.R. Desai, *The Limitation Act: An Exhaustive Sectionwise Commentary on the Limitation Act, 1963*,550 (Dr. Medha Kolhatkar (ed.), 12th edn., LexisNexis 2019).

46 *T. Anjanappa* v.*Somalingappa*, (2006) 7 SCC 570.

47 *Danappa Revappa Kolli* v.Gurupadappa Mallappa *Pattanashetti*,1989 SCC OnLine Kar 338 : ILR 1990Kar 610; *Venkatachalaiah v. Nanjundaiah*, 1991 SCC OnLine Kar 449 :AIR 1992 Kar 270; *Jahurul Islam v. Abul Kalam*,1990 SCC OnLine Cal 246:AIR 1991 Cal 132; *Achal Reddy v. Ramakrishna Reddiar*,(1990) 4 SCC 706 : AIR 1990 SC 553.

48 *Ram Murti v. Puran Singh*, 1962 SCC OnLine P&H278 :AIR 1963 P&H 393.

is with the person claiming title by way of adverse possession. Thus, this person has to prove that the erstwhile owner was dispossessed for a period of 12 years.[49] The burden of proof is rather high; there shall be no considerations of equity taken in favour of a person who denies the title of a person by claiming adverse possession.[50]

The *third* point regarding adverse possession of specific applicability to the *Ayodhya* case is the application of adverse passion by an owner against a co-owner. The Supreme Court of India in *Vidya Devi v. Prem Prakash* held that adverse possession can be claimed against a co-owner if the following 3 conditions are satisfied:[51]

- Declaration of hostile *animus*.
- Long and uninterrupted position of the person pleading ouster.
- Exclusive possession by the person pleasing ouster is with the knowledge of the co-owner against whom ouster is pled.

The third point here contains two requirements – 1) the possession of the person claiming ouster must have been exercised in exclusion of the other co-owner,[52] and 2) such exclusive possession should be with the knowledge of the co-owner.

V. Part IV: Applying Adverse Possession

As seen from the previous part, adverse possession is primarily a defence available to the trespasser when the owner sues for possession. In other words, adverse possession is applied against the previous owner. The first thing to note while applying adverse possession to the Ayodhya factual matrix is that none of the parties to the four initial suits could produce any title document to claim ownership over the property. In fact, the title of the property as admitted by various parties rested with the government as a *Nazul*. This follows from the British classification of the property post annexation in 1858.[53]

Before proceeding any further, it is essential to clarify why I have started the application of law from 1858 and not from either the construction of the initial temple in Ayodhya or from 1528 when Babri Masjid was constructed. In 1856, the British East India Company annexed the Kingdom of Oudh where

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[49] *Jagamohan Garnaik v. Sankar Samal*,1989 SCC OnLine Ori 36 :AIR 1990 Ori 124.
[50] *SeeGauran Devi v. Durga Dass*, 1996 SCC OnLine HP 11 : AIR 1996 HP 112.
[51] *Vidya Devi v. Prem Prakash*,(1995) 4 SCC 496 : AIR 1995 SC 1789.
[52] *Sangappa v. Gorava*, AIR 1993 Kant 1.
[53] Ayodhya SC Decision, *supra* note 4, p.768, ¶650.

the disputed area was located.[54] Thus, it is from 1856 that the common law that we are all used to and from where our modern legal system is developed first applied in India. We do not even know whether the legal systems that existed in Oudh/Awadh before 1856 recognised possession as a valid property law concept. However, it is fair to start our calculation from 1857 and not 1947 since our Constitution recognises the validity of the laws that governed the sub-continent right before the Constitution came into force.[55] This was recognized by the Supreme Court as well in the *Ayodhya* decision.[56]

At this point, a short point used extensively by the High Court can be dismissed once and for all. The High Court applied S.110 of the Evidence Act and each individual judge's understanding of whether Hindus or Muslims or both of them jointly had possession to determine title.[57] S. 110 of the Evidence Act reads as follows:

> *S.110: Burden of proof as to ownership - When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.*[58]

From reading the bare text of this provision, it is clear that this is only a presumption. In the face of proof of title, S.110 has no application. Since the *Nazrul* is an admitted fact by the parties,[59] any analysis premised on S.110 is doomed to fail. Till this point, I am in agreement with the decision of the Supreme Court.[60]

My disagreement with the Honourable Supreme Court starts with the fact that the decree made by the court on title for Hindus is simply unintelligible from a logical plain. The court holds that Muslims cannot have title by adverse possession,[61] waqf,[62] or the doctrine of lost grant[63] (S.110 of the Evidence Act encapsulates the doctrine of lost grant which grants a presumption of ownership towards the one who is shown to be in possession of a property; this presumption

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54 Subrata Roy, "Tragedy of the Nawab Wajid Ali Shah of Lucknow in Calcutta (1856-78)", 72(2) Proceedings of the Indian History Congress 1561 (2011), available at <https://www.jstor.org/stable/44145783>, last seen on March 8, 2020.

55 Art. 372(1), Constitution of India.

56 Ayodhya SC Decision, *supra* note 4, pp. 770-71, ¶652.

57 *See for example* Ayodhya HC Decision per S.U. Khan, J. in *Gopal Singh Visharad v. Zahoor Ahmad*, 2010 SCC OnLine All 1935, pp. 252-55, available at <http://elegalix.allahabadhighcourt.in/elegalix/ayodhyafiles/honsukj.pdf>, last seen on March 8, 2020.

58 Indian Evidence Act, 1872 (Act No. 1 of 1872, dated March 15, 1872), available at <https://indiacode.nic.in/bitstream/123456789/6819/1/indian_evidence_act_1872.pdf>, last seen on March 8, 2020.

59 Ayodhya SC Decision, *supra* note 4, p.838, ¶723.

60 *Id*., p.881, ¶768, p.897, ¶785.

61 *Id*., 866, ¶755.

62 *Id*., p.856, ¶745.

63 *Id*., p.881, ¶768.

exists because law recognises that original title deeds, grants may get lost over time). The court makes an independent finding that on a balance of probability there was a temple that existed beneath the mosque.[64] Then, there is huge leap of both logic and legal backing to hold that the suit filed by the deities isallowed subject to alternate land being given to Muslims.[65] Curiously enough, while Article 142 is used as the means to give alternate land to Muslims as redressal for destroying the mosque in 1992,[66] there is absolutely no legal doctrine at all cited to decide the title of the land in the deity's favour.[67]

In fact the only conceivable way to support the finding on title would be to regard the land itself as a separate deity as argued by the plaintiffs in the suit filed by the deities,[68] and then argue that once a land is regarded as a deity, then no laws of property apply to the same. However, such a finding would be contradictory to the rationale used by the court to dismiss the Waqf board's claim to regard the property as part of a Waqf. Despite noting historical evidence to treat the property as a Waqf,[69] the court held that treating a property used by another religion for worship as a Waqf would be inconceivable.[70] Following this, treating property used by Muslims for prayer as a deity would also be inconceivable. Thus, there is no way to justify how the court ended up deciding title in favour of Hindus.

To solve this, let us go back to the point till which we were in fact in agreement with the court; namely that at 1858, there was a valid *Nazul* that left the property in the hands of the government. The language used by the court to describe the relationship between the government and the worshippers of both faiths is that the British *permitted* the people of the land to perform their rituals in the disputed area.[71] Admittedly, understanding the relationship in terms of a permission being granted by the government bars the application of adverse possession by either faith against the government.

However, a nuanced understanding of the fact scenario suggests that the relation was not one of permission at all. As argued by Hindus in the final suit, they believed that the land itself is a deity and therefore could not be owned by anybody. The Muslims have maintained that the land they worship in is a Waqf. The waqf is by definition dedicated to *Allah* and cannot be owned by anybody

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64 *Id*., p.921, ¶798.
65 *Id*., pp.925-927, ¶805.
66 *Id*., p.923, ¶800.
67 *Id*., p.925.
68 *Id*., p.45 shows that "*Asthan Sri Rama Janambhumi*" is itself regarded as a deity in the plaint to Suit 5.
69 *Id*., pp. 791-98.
70 *See Id*., p.856, ¶745.
71 *Id*., p.770, ¶652.

including the state.[72] Thus, both parties were maintaining their possession openly from the time of the compromise of 1857, with an *adverse* animus denying the title of the government over the property. Thus, both the Hindus and Muslims have in effect satisfied all the conditions for acquiring title by adverse possession over the outer and inner courtyard respectively by 1917 when the 60-year Limitation period prescribed under Article 149[73] for filing a suit for possession ran out.[74]

Through this result of having separate titles over the inner and outer courtyard, I also signal my disagreement with the higher court decisions in the *Ayodhya* dispute over the number of divisions in the 1500 square yard property. The High Court divided the property into three parts in a standard partition by metes and bounds between the three petitioners in the suit who had claimed title to the property.[75] The Supreme Court said that the property cannot be divided at all and the entirety of the property must be seen as a composite whole.[76] Neither of these decisions are in tune with the actual fact scenario wherein the parties themselves had viewed the property as two parts for 77 years between 1857 and 1934.

There is no credible claim that can be made by the Waqf board for defeating the exclusive possession of the Hindus to the outer courtyard. Therefore, let us now see whether Hindus can successfully claim adverse possession between 1934 and 1961 for acquiring title of the inner courtyard from the Muslims. Fortunately, the Supreme Court already dealt with this question while analysing Limitation.[77] The suit by the Board was filed in 1961. As per Article 142 of the Limitation Act of 1908, the limitation period for filing a claim for possession when the plaintiff has been dispossessed is twelve years. This means that the Board should not have been dispossessed before 1949. As per the historical accounts stated above, the dispossession of Muslims happened via the riots that took place on the intervening nights of December 22-23, 1949.[78] The suit was filed on December 18, 1961.[79] This is clearly within Limitation period and therefore questions of adverse possession cannot arise.

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72 Muhammad Zubair Abbasi, "The Classical Islamic Law of Waqf: A Concise Introduction", 26(2) Arab Law Quarterly 121, 126 (2012).

73 Limitation Act, 1908 (Act No. 9 of 1908 dated August 7, 1908).

74 Art. 146-A prescribes a 30-year limitation period for the government when it is dispossessed from public streets or roads. Since, it is not accurate to regard the Ayodhya property as a public road or street, I applied Art. 149 which is the miscellaneous provision for suits by the government. In any case, even if Art. 146-A were to be applied, the limitation period would be in fact shorter than Art. 149 and the government would still fall prey to adverse possession claims.

75 Ramnath, *supra* note 23.

76 Ayodhya SC Decision, *supra* note 4, p.922, ¶799.

77 *Id*., p.755, ¶631.

78 Nivedita Menon, "The Ayodhya Judgment: What Next?", 46(31) Economic & Political Weekly 81, 87 (2011), available at <https://www.jstor.org/stable/23017880>, last seen on March 8, 2020.

79 Ayodhya SC Decision, *supra* note 4, p.38.

To arrive at the same result from a slightly different route, neither Hindus nor Muslims have been able to satisfy the high evidentiary threshold required for claiming exclusive possession between 1934 and December 22, 1949.Thus, for the fateful four-day time period between December 18, 1949 and December 22, 1949, Hindus cannot prove exclusive possession to the threshold required for claiming adverse possession. Consequently, Hindus can show adverse possession for a maximum of 11 years and 361 days, but not 12 years as required by Section 28 of the Limitation Act, 1908.

The remainder of facts regarding destruction of mosque, construction of temple etcetera is irrelevant to decide adverse possession since the time duration in calculating adverse possession is arrested from the time the owner claims a suit for possession.[80] Thus, the question of title can only be that the outer courtyard belongs to Hindus and that the inner courtyard belongs to Muslims.

The Supreme Court had reiterated time and again that the Ayodhya Act, 1993 would not be relevant in deciding title.[81] The Act was interpreted to mean that title rests with the government till a final determination of the suits.[82] Since a proper application of the law should have led to a bifurcated title between Hindus and Muslims, the same should have been ordered to be enforced by the Supreme Court through Sections 6 and 7 of the Act.

VI. Conclusion

In this paper, I have done the following things:

- Traced the history of the *Ayodhya* dispute from 1528 to November 09, 2019.
- Argued, albeit from a largely intuitive plain, as to why property disputes should be settled by the application of secular civil laws and not the Fundamental Right to Religion.
- Analysed the basic features of adverse possession as a concept.
- Analysed the court's argument for giving title to the deity and pointed out the internal contradictions and lack of logical backing in arriving at this conclusion.

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[80] *Sultan Jehan Begum* v.*Gul Mohammad*, 1972 SCC OnLine MP 57 :AIR 1973 MP 72; *Achhiman Bibi* v.*Abdur Rahim Naskar*, 1958 SCC OnLine Cal 19 : AIR 1958 Cal 437; *Fatima Bibi* v.*A. HajeeMuhammad Usman Sahib*, 1942 SCC OnLine Mad 390 : AIR 1943 Mad 425.

[81] Ismail Faruqui Decision, *supra* note 28, ¶84; *Mohd. Aslam*v. *Union of India*, (2003) 2 SCC 576.

[82] Ismail Faruqui Decision, *id.*, ¶56.

- Envisaged an argument of adverse possession of both Hindus and Muslims against the government so as to result in a valid title to Hindus and Muslims over the outer and the inner courtyard respectively.

Before moving on to my fears with how the court has addressed the 4th element in the list, a quick note on the last point I mentioned in the above list. Since the Muslims had argued both adverse possession[83] as well as a Waqf by user,[84] the court could have inferred this argument from the pleadings of the Board if it so pleased. However, admittedly, the burden to plead once case is on oneself[85] and the court has no obligation to join the dots. Therefore, there is no cause to imply a conspiracy or *mala fide* in the court not considering these in coming to their decisions.

However, the way the Supreme Court decided that the deity possesses title is totally without any backing of law or logic. If my finding in this regard is actually true, then it casts serious aspersions on whether the court was influenced by the prevailing political mood while delivering the verdict. There are various procedural aspects in the judgment that as it is bring out this fear. The judgment was not authored by a named judge. Further, there is a 116-page addendum in the end of the judgment which with no explanation whatsoever contains a monologue of Hindu beliefs on *Ramjanma Bhoomi*.[86]

The *Ayodhya* decisions spread over 9000 pages[87] by themselves contain more data than a researcher reads on an average for writing a paper. To add to this, any meaningful engagement with the court would require testing the veracity of each fact stated by the court which is another large amount of research. As a result, my finding could be flawed when I affirm that there was no cause whatsoever for the entire property to be awarded to the deity. In fact, I hope it is flawed since I would like to continue to believe in the sanctity of the guardians of our Constitution. As such, I invite interested scholars to critically review the arguments made in my paper and the verdict of the Honourable Supreme Court of India.

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83 Ayodhya SC Decision, *supra* note 4, p.856, ¶746.
84 *Id*., p.841, ¶729.
85 *Karimullah Khan* v.*Bhanu PratapSingh*, AIR 1949 Nag 265.
86 Ayodhya SC Decision, *supra* note 4, pp. 930-1045.
87 High Court judgment is over 8000 pages and the Supreme Court judgment is over 1000 pages.