

## **History, sacred history, and law at the intersection of law, religion, and history.**

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Lawyers, both practitioners and academics, engage with legal history in a variety of ways. Increasing attention is being paid to legal regulation of history and memory. I argue that the interaction of law and history is particularly problematic within the context of a dispute with a religious element. I will use three case-studies to illustrate these challenges: (1) The repeal of the Fraudulent Mediums Act 1951 by the Consumer Protection from Unfair Trading Regulations 2008; (2) The Babri Masjid/Ram Temple dispute in Ayodhya, India; and (3) The Hindmarsh Island bridge controversy in South Australia; These case studies show the difficulties legal actors face when confronted with incompatible secular and sacred histories and diverse ways of 'knowing history', and the importance, nonetheless, of understanding history to understand law and religion.

### **Introduction.**

I begin with a quotation from one of the judges in a case to which I shall return later, the Indian litigation concerning the Ayodhya dispute. Justice Khan noted that, 'having no pretence of knowledge of history, I did not want to be caught in the cross-fire of historians.' Such a separation between law and history is not possible, and indeed Justice Khan himself, as I show below, made a number of findings of historical fact which then shaped his legal reasoning.

In this paper I argue that the interaction between law and history, each with its own distinctive dynamics, is inevitable. Legal actors will face competing, often incompatible, arguments as to historical facts as parties in a dispute seek to advance their present interests. This will require legal actors to engage with historical materials in a way which may be uncomfortable and, in the case of sacred histories, involve some particularly difficult decisions around what type of historical evidence should be translated into legal evidence. The dynamics of the legal process can mean that determining these historical facts cannot simply be avoided by a state actor, particularly the judiciary. The complexity of historical processes may tempt a legal actor who cannot avoid this to seek to defer it, so that the dispute is resolved by an extra-legal process such as the political process, negotiation between the parties, or direct action. Such deferral may itself create significant difficulties.

In exploring these ideas, I draw upon three case studies. All are based in the common-law family of legal systems, which share a common emphasis on particular sources and modes of legal reasoning, and an emphasis on the court as adjudicator between competing arguments put by the different parties. My three case studies involve a change to consumer protection in England; the demolition of an ancient sacred site in India leading to national communal violence and at least 1200 deaths; and an Australian bridge building project that not only bankrupted the developers, but led to a national debate over the rights of indigenous communities.

### **Problems in lawyerly uses of history.**

The interaction between law and history is inevitable, at least from a legal perspective. As Cahillane puts it, 'lawyers sometimes feel that history comes naturally to them ... [but] it only comes naturally

in a certain way'.<sup>1</sup> While laws are occasionally presented as if their value depends upon their age, or rather lack of age, much of the corpus of materials that lawyers in the UK work with every day can equally be read as historical documents. A number of technical doctrines actively require lawyers to engage with the historical context of legal materials in order to state accurately their contemporary meaning. For instance, when interpreting an Act of Parliament, one of the common tools used by lawyers is the purposive approach, sometimes more narrowly stated as the 'mischief rule'. With this tool, in order to understand the meaning of a piece of legislation, the lawyer is required to determine what mischief it was intended to address – hardly possible without some grasp of the context around its passage.<sup>2</sup> As another example, since the landmark decision in *Pepper v Hart* the courts have recognised that the Parliamentary material from the passage of legislation can help to determine the meaning the legislation should be held to bear.<sup>3</sup>

Law, and legal materials, may also be seen as inevitable to the study of history. Legal documents can be mined by historians for many more uses than simply the study of the history of ideas in law.<sup>4</sup> Sugarman, for instance, has recently called for increasing dialogue between those working in history, legal history, and socio-legal studies.<sup>5</sup> The legal process may also be consciously intended to create a historic record. A recent example of this can be found in work of various bodies set up around the 1991-2002 civil war in Sierra Leone, which in the words of the Sierra Leone Truth and Reconciliation Commission Act 2000, included the goal of creating 'an impartial historical record of violations and abuses of human rights and international humanitarian law',<sup>6</sup> as well as resolving individual cases.<sup>7</sup> I will leave for elsewhere the extent to which legal processes are particularly suited for determining historical facts. That trials, especially criminal trials, carry some sort of cultural marker of authoritativeness can, perhaps, be illustrated by the recurrent use of mock trials to 'resolve' historical controversies, for instance the 2018 theatrical trial of Richard III for multiple murders, presided over

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1 L. Cahillane, 'The use of history in law – avoiding the pitfalls', in L. Cahillane and J. Schweppe, eds, *Legal research methods: Principles and practicalities* (Dublin, 2016), 57.

2 See e.g. *DPP v Bull* [1995] QB 88.

3 E. Laing, 'Pepper v Hart: where are we, how did we get here, and where are we going?', *Judicial Review* 11 (2006), 44-56.

4 Russell Sandberg and Norman Doe, 'Textual and contextual history', in Norman Doe and Russell Sandberg, eds, *Law and History – Critical Conceptions in Law*, (Abingdon, 2017).

5 David Sugarman, 'Promoting dialogue between history and socio-legal studies: The contribution of Christopher W. Brookes and the "legal turn" in Early Modern English History', *Journal of Law and Society* 44 (2017), 37-60.

6 Sierra Leone Truth and Reconciliation Act 2000 Part 3. See further <http://www.sierra-leone.org/TRCDocuments.html>, accessed 26 April 2018.

7 See J. F. Kamara, 'Preserving the legacy of the Special Court for Sierra Leone: Challenges and lessons learned in prosecuting grave crimes in Sierra Leone', *Leiden Journal of International Law* 22 (2009) 761-777; T. Mphepo, 'The Residual Special Court for Sierra Leone. Rationale and challenges', *International Criminal Law Review* 14/1 (2014) 177-199; W. A. Schabas, 'A synergistic relationship: the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', *Criminal Law Forum* 15 (2004), 3-54.

by Lady Justice Hallett, who adjudicated in the real dispute over that king's remains,<sup>8</sup> or the various trials of Socrates, Henry VIII and George III.<sup>9</sup>

The interaction between these two disciplines is increasingly subject to critical consideration.<sup>10</sup> Perhaps the highest profile area of controversy is in relation to Holocaust denial and, to bring in a less commonly discussed example, genocide assertion. The majority of European states now criminalise Holocaust denial, in some instances as part of a broader category of denial of particular historical facts which are treated as criminal.<sup>11</sup> In one case Holocaust denial was distinguished from the assessment of Petain's role in Vichy France on the basis that it belonged to 'the category of clearly established historical facts ... whose negation or revision would be removed from the protection of' the freedom of expression guarantee under the ECHR.<sup>12</sup> Complex although the legal, historical, and human rights issues are around Holocaust denial, these are exacerbated in relation to the mass killings of Armenians in 1915.<sup>13</sup> In 2005 Dogu Perincek was convicted in Switzerland of denying a genocide because of his description of Armenian genocide as 'a great international lie', although the European Court of Human Rights later found that in his particular case the necessary incitement of hatred or violence had not been demonstrated.<sup>14</sup> In 2007 Arat Dink and Serkis Seropyan were given suspended prison sentences under Article 301 of the Turkish Penal Code for printing Hrant Dink's assertion that the killing of Armenians in 1915 was a genocide.<sup>15</sup> So, to gloss over the complexities of criminal liability slightly, asserting the same historical fact may be compulsory in one European country, and prohibited in another. Throw in the strategically ill-thought out libel case brought by David Irving against Deborah Lipstadt and her publisher,<sup>16</sup> whose 32 days of trial are available as a complete transcript online,<sup>17</sup> and this area alone provides much food for thought, and has attracted considerable academic attention.

### **Special problems at the intersection of law, religion, and history.**

The focus of this paper, however, is on particular problems posed by the intersection of law and history around a specific nexus, that of religion. I will seek to bring out these problems through discussion of

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<sup>8</sup> See <https://www.shakespeareschools.org/support-us/trial>, accessed 26 April 2018.

<sup>9</sup> Gary Slapper, 'History on trial', *Journal of Criminal Law* 79 (2015), 375-377.

<sup>10</sup> See Doe and Sandberg, eds, *Law and History*; U. Belavuasu and A. Gliszczynska-Grabias, eds., *Law and Memory – Towards Legal Governance of History* (Cambridge, 2017).

<sup>11</sup> P. Lobba, 'Holocaust denial before the European Court of Human Rights: Evolution of an Exceptional Regime', *European Journal of International Law* 26 (2015), 237-253.

<sup>12</sup> *Lehideux and Isorni v France*, Grand Chamber, App. 24662/94 (1998), at para. 47.

<sup>13</sup> For an introduction to the legal issues, see V. Avedian, 'State identity, continuity, and responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide', *European Journal of International Law* 23 (2012), 797-820.

<sup>14</sup> See further his case in the European Court of Human Rights: *Perincek v Switzerland* GC, App. 27510/08 (2015).

<sup>15</sup> See <https://m.bianet.org/english/media/102745-arat-dink-and-seropyan-sentenced>, accessed 7 September 2018.

<sup>16</sup> *Irving v Penguin Books Limited and Deborah E Lipstadt* [2000] EWHC QB 115.

<sup>17</sup> See <https://www.hdot.org/trial-materials/trial-transcripts/>, accessed 26 April 2018.

three case studies, discussing each at some length, before concluding my paper by bringing out explicitly the challenges I think they illustrate.

*The Consumer Protection from Unfair Trade Regulations 2008.*

I will start with the surprisingly late demise of the Witchcraft Act 1735, s.4 of which punished specialist offences of pretending to exercise a range of supernatural powers. Although it was possible to bring criminal proceedings for frauds which seemed to fall within this provisions under general fraud law,<sup>18</sup> in the mid-twentieth century the specialist provision was seen as the most appropriate one to use in the historic case of *Duncan*,<sup>19</sup> discussed at length by Gaskill in his excellent monograph.<sup>20</sup>

Helen Duncan was a spirit medium operating in war-time Portsmouth. She was initially arrested under the Vagrancy Act 1824, for an offence under section 4, which prohibited, *inter alia*, 'pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive'. It was decided to proceed with the more serious offence under the Witchcraft Act 1735, s.4 of which punished those who 'pretend to exercise or use any kind of Witchcraft, Sorcery, Inchantment or Conjuraton, or undertake to tell Fortunes'.

Her conviction and imprisonment was a key part of the background to law reform. In 1951, following a campaign by the Spiritualist National Union, the Fraudulent Mediums Act 1951 replaced the Witchcraft and Vagrancy Act provisions in relation to '[acting] as a spiritualistic medium or [exercising] any powers of telepathy, clairvoyance, or other similar powers': similar powers covering all activities within the professed practice of the ability to see beyond what are the normal powers of the human being. The 1951 offence was committed only when the defendant acted for reward, excluded 'anything done solely for the purposes of entertainment', and (crucially) required an intention to deceive.

One of the key features of the Fraudulent Mediums Act was the emphasis it gave to the belief of the defendant in what they were doing. It contrasted rather sharply with the way providers of spiritual services had sometimes been dealt with by the courts. My favourite example is *Penny v Hanson*, where an astrologer prosecuted under general fraud laws received short-shrift from Justice Denman: 'It is nonsense to suppose that in these days of advanced knowledge the appellant really did believe he had the power to predict a man's future by knowing at what hour he was born, and the position of the stars at the particular moment of his birth. No person who was not a lunatic could believe he possessed such power.'<sup>21</sup>

The Fraudulent Mediums Act survived substantial changes in criminal law, including even a wide-ranging Fraud Act in 2006. It did not, however, survive the Consumer Protection Regulations 2008 which abolished the existing offence, aiming to regulate such activity under the consumer protection regime. Although obviously not a central issue in the CPR, before the regulations came into effect it was confirmed that an important change would be the removal of any intent to deceive requirement

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<sup>18</sup> See for instance, *Lawrence* (1876) 36 LTR 404; *Davis v Curry* [1918] 1 KB 109; *Stonehouse v Mason* [1921] 2 KB 819.

<sup>19</sup> This reached the Court of Appeal as *Duncan* [1944] 1 KB 773, CA.

<sup>20</sup> Malcolm Gaskill, *Hellish Nell: Last of Britain's Witches* (London, 2001). It is also discussed, with a focus purely on legal issues of proof, in Peter W. Edge, 'Naturalism and neutrality: Trying miraculous claims fairly in English Courts', *Journal of Church and State* 44 (2002), 521-537.

<sup>21</sup> *Penny v Hanson* (1887) 18 QBD 478 at 480.

in relation to suppliers of services covered by the Fraudulent Mediums Act.<sup>22</sup> Service providers within occulture in particular saw the change as a serious threat to their activities; or sometimes as a threat to their religious freedom. It led directly to the foundation of the Spiritual Workers Association.<sup>23</sup> Why did the founders of the SWA, and indeed others who lobbied against this change, have cause to be concerned?

The removal of the intent to deceive requirement means false claims are primarily assessed on their truth or otherwise, not the sincerity of the person making them. This could lead to statements of religious or non-scientific fact being treated as statements which can be resolved, as any other, by legal actors making findings of fact. To quote Justice Douglas in the US Supreme Court in *Ballard*, 'The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.'<sup>24</sup> In other words, therefore, when the CPR empowers a Trading Standards Officer to determine whether a 'fortune teller on Epsom Downs'<sup>25</sup> is acting lawfully, it raises profound issues of the authority of the state over individuals' religious beliefs. Concern about the intersection of fraud, spiritualism, and religious freedom had led directly to the Fraudulent Mediums Act 1951, but completely failed to be reflected in the CPR. A modest historical reflection on the background to the 1951 legislation should have informed the 2008 legislative change.

#### *The Babri Masjid/Ram Temple Dispute*<sup>26</sup>

My second case study concerns the Babri Masjid/Ram Temple Dispute, also referred to as the Ayodhya Dispute. Ayodhya is a North Indian town situated in the Faizabad district in the state of Uttar Pradesh. It has some connection with every major religion in India.<sup>27</sup> However, the important affiliations for our purposes are those that Hindus and Muslims have with the place.<sup>28</sup>

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<sup>22</sup> See [www.pm.gov.uk/output/page13563](http://www.pm.gov.uk/output/page13563), accessed 28 April 2018, as discussed in David V. Barrett, 'Unintended consequences', *Fortean Times* 237 (2008), 58-60.

<sup>23</sup> See <http://www.theswa.org.uk/Public/Law.aspx>, accessed 11 July 2011.

<sup>24</sup> *US v Ballard*, 322 US 78 (1944) US Supreme Court at 87.

<sup>25</sup> A phrase used by Theo Mathew, DPP in 1952, to indicate unimportant cases of this kind – see Gaskill, *Hellish Nell*, at 347.

<sup>26</sup> This section draws on joint work with Dr M. C. Rajan on the Ayodhya dispute, appearing as Peter W. Edge and M. C. Rajan, 'Sacred sites and state failures: A case study of the Babri Masjid/Ram Temple Dispute in Ayodhya', in M. J. H. Bhuiyan and D. Jensen, eds., *Law and Religion in the Liberal State* (Oxford, forthcoming).

<sup>27</sup> K. N. Panikkar, 'A Historical Overview' in S. Gopal, ed., *Anatomy of a Confrontation: The Babri Masjid-Ramjanmabhumi Issue* (New Delhi, 1991) 25-6; Hans Bakker, *Ayodhya* (Groningen, 1984) 38.

<sup>28</sup> For more information on Ayodhya, see S. Gopal, *Anatomy of a Confrontation*, and for a contrasting view, K. Elst, *Ram Janmabhoomi vs Babri Masjid* (New Delhi, 1990).

For Hindus, Ayodhya existed as a religious centre for many centuries.<sup>29</sup> In particular, Ayodhya is seen by Hindus as the birthplace of the Hindu god Ram, who went on to rule Ayodhya as his kingdom.<sup>30</sup> These events in the age of *Treta*<sup>31</sup> – the distant past – were followed by a period during which Ayodhya disappeared. In the present age, the site was located by king Vikramaditya.<sup>32</sup> In Hindu traditional accounts, although not necessarily archaeological or secular historical accounts, he constructed a huge temple on the birth site of Ram,<sup>33</sup> which was later destroyed by Muslims in order to construct Babri Masjid in 1528, thus giving Hindu claims over the site temporal priority.<sup>34</sup> From the eighteenth century, Ayodhya was established as a major Hindu pilgrim centre in North India,<sup>35</sup> and by 1991 Bawa estimated there were six thousand Hindu temples in the area, with most of the trade and employment opportunities serving pilgrims.<sup>36</sup>

The site was also a significant religious centre for Muslim pilgrims. As with the Hindu narrative, the Islamic narrative of the history of Ayodhya stresses the antiquity of the connection between religion and the site, long before conventional history might do so. Muslims argue that their attachment to Ayodhya dates back to the pre-Islamic period, with the burials of Seth and Noah at Ayodhya.<sup>37</sup> Both burial sites continue to attract a substantial number of religious visitors.<sup>38</sup> Ayodhya was ruled by Muslim kingdoms from, it is likely, the eleventh century. The first Mughal Emperor defeated the ruler of Ayodhya in battle, and his governor built a mosque in Ayodhya in 1528.<sup>39</sup> Ayodhya is considered a '*Khurd Mecca*' (small Mecca), because of the large number of Muslim holy persons, including sufi saints and other revered religious figures, who are believed to be buried there.

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29 S. Gopal et al., 'The Political Abuse of History: Babri Masjid-Ramjanmabhumi Dispute – An Analysis by Twenty-Five Historians', in A. G. Noorani, ed., *The Babri Masjid Question 1528-2003: 'A matter of National Honour'* (New Delhi, 2003), vol 1, 30.

30 Peter van der Veer, 'Riots and Rituals: The Construction of Violence and Public Space in Hindu Nationalism', in P. R. Brass, ed., *Riots and Pogroms* (London, 1996), 160.

31 In Hindu cosmology, cosmos passes through cycles within cycles for eternity. The basic cycle is the *Kalpa*, formed by a thousand *Mahayugas*. Each *Mahayuga* is divided into four *yugas* or ages called *Krta*, *Treta*, *Dvapara* and *Kali*. Their lengths are respectively 4,800, 3,600, 2,400 and 1,200 'years of the Gods', and each year equals 360 human years. According to Hindu mythology, Rama spent his youth in Ayodhya and was king during the *Treta-yuga*, thousands of years before our present age, the *Kali-yuga*.

32 A. Copley, 'Indian Secularism Reconsidered: From Gandhi to Ayodhya', *Contemporary South Asia* 47 (1993), 57.

33 R. Friedland and R. Hecht, 'The Bodies of Nations: A Comparative Study of Religious Violence in Jerusalem and Ayodhya', *History of Religions* 38 (1998), 101 at 106.

34 P. van der Veer, 'God Must be Liberated!: A Hindu Liberation Movement in Ayodhya' *Modern Asian Studies* 21 (1987) 285-6.

35 P. van der Veer, *Gods on Earth: The Management of Religious Experience and Identity in a North Indian Pilgrimage Centre* (London 1988), 36.

36 M. Bawa, 'Scenes From Ayodhya' *The Sunday Times of India* (New Delhi 3 November 1991), 18.

37 M. J. Akhtar, *Babri Masjid: A Tale Untold* (New Delhi, 1997), 10.

38 T. Mahmood, 'Ayodhya, Ram and Islam' in VN Mishra, ed., *Ramjanambhoomi Babri Masjid: Historical documents, Legal opinions and Judgements* (New Delhi, 1991), PAGE EXTENT, at 24-25.

39 Akhtar, *Babri Masjid*, 11.

The pre-1528 history of the site, then, differs considerably between the two communities. This is reflected in how they see 1528. Hindu groups, particularly *Sangh Parivar*,<sup>40</sup> allege that *Babar*, the first Mughal Emperor, destroyed a magnificent and ancient Ram temple in order to build his Babri Masjid. The Muslim view is that the mosque was built on an empty space, and that there is no evidence of the demolition of a Hindu temple.<sup>41</sup> With the beginning of the direct rule of the area by the British Crown in 1856 the stage was set for these and other community differences to begin to be worked out by litigation.<sup>42</sup>

In 1857, a Hindu priest took a part of the Babri Masjid compound and constructed a *chabutra*, a raised platform for idols. This was opposed by local Muslims, and the dispute was initially resolved by agreeing to raise a wall between the mosque and the *chabutra*, which was later called *Janmasthan Temple*. The compromise did not suit either party, with Muslims and Hindus litigating over development of the Temple.<sup>43</sup> The dispute reached the District Court in 1886. The judge rejected proposals to develop the Temple on three grounds. Firstly, that while it was unfortunate that a Masjid had been built on land specially held sacred by the Hindus, as the event had occurred 356 years earlier and it was too late to remedy the grievance. Secondly, that any change could cause more harm and derangement of order than benefit. Thirdly, there were no documents to support the claim of the Hindu priest to be the land-owner.<sup>44</sup> Both parties were requested to maintain the status quo.<sup>45</sup>

In 1949, the controversy took an important new turn. During the final months of 1949 a group of Hindu monks occupied a Muslim cemetery near the mosque, and ignited sacred fires to emphasize their claim that the area was originally a Hindu religious site.<sup>46</sup> Some days later, idols of Hindu Gods including Ram were discovered inside the mosque. Although there is evidence that these had been placed by human hands,<sup>47</sup> this was promoted as a miracle. As Gould observes, 'this miracle story created a local sensation. Hindus and Muslims flocked to the *Janmasthan*, the former to bear witness to the miracle, the latter to defend the Babri Masjid against desecration and seizure by the Hindus.'<sup>48</sup>

As the dispute exacerbated local tensions, the local authorities ordered the gates of Babri Masjid to be locked and prohibited both communities from its use, on the basis that the dispute was likely to lead to a breach of the peace. A Receiver was appointed to arrange for the care of the property in

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<sup>40</sup> *Sangh Parivar* translates as 'Family of Hindu Nationalist Organizations' which is an umbrella organization of Hindu nationalist groups.

<sup>41</sup> R. S. Sharma and others, *Ramjanmabhumi-Babari Masjid: A Historians Report to the Nation* (New Delhi, 1991), 6-7.

<sup>42</sup> K. N. Panikkar, 'A Historical Overview' in Gopal, ed., *Anatomy of a Confrontation*, 31-3.

<sup>43</sup> *Mahant Raghubar Das, Mahant of Janmasthan, Ayodhya v The Secretary of State for India in Council*, Plaint dated 29 January 1885 (no 61/280 of 1885). See Akhtar, *Babri Masjid*, 181.

<sup>44</sup> Judgement by F. E. A. Chamier, District Judge, Faizabad dated 26 March 1886.

<sup>45</sup> Judgement by Judicial Commissioner W. Young, Oudh, dated 1 November 1886 in no 1221 K/1886 cited in A. G. Noorani, ed., *The Babri Masjid Question 1528-2003: A Matter of National Honour* (New Delhi, 2003) Vol 1, 188.

<sup>46</sup> C. Jaffrelot, *The Hindu Nationalist Movement and Politics 1925 to the 1990s* (London, 1996) 93.

<sup>47</sup> A. G. Noorani, 'Legal Aspects to the Issue' in S. Gopal, ed., *Anatomy of a Confrontation*, 70-1.

<sup>48</sup> H. A. Gould, *Grass Roots Politics in India: A Century of Political Evolution in Faizabad District* (Oxford, 1994), 181-96.

dispute, and took charge of the disputed property in January 1950.<sup>49</sup> The dispute was then tied up in suits and counter-suits, with decades passing without a hearing of the substantive case.

In the interim, Ayodhya had begun the process of transformation into a national controversy.<sup>50</sup> In 1984 a Hindu nationalist organisation initiated a movement to 'liberate' the *Ram Janmabhumi* and rebuild a magnificent Ram temple at Ayodhya. In 1986 a Hindu intervener who was not a party in any of the main suits secured an order allowing him free entry into the building for prayer, which as noted above had not been permitted since the interim order of 1950. In his order, Judge Pandey stated:

After having heard the parties it is clear that the members of the other community, namely Muslims, are not going to be affected by any stretch of imagination if the locks of the gates are opened and the idols inside the premises are allowed to be seen and worshipped by pilgrims and devotees. It is an undisputed fact that the premises are presently in the Court's possession and for the last 35 years Hindus have an unrestricted right of worship as a result of the Court orders of 1950 and 1951 (19.1.50 and 3.3.51). The District Magistrate has stated before me today that members of the Muslim community are not allowed to offer any prayer at the disputed site. If this is the state of affairs, then there is no occasion for law and order problem arising as a result of the removal of locks. It is absolutely an affair inside the premises.<sup>51</sup>

In consequence, there was a significant change in the site from one that neither community was able to use as a place of worship, to one that could be used by Hindus, but not Muslims. This trajectory reached a violent apogee in 1992.

In October 1992 an organisation of Hindu priests announced the resumption of religious voluntary work to rebuild Ram Temple from 6 December 1992.<sup>52</sup> Although there was some official effort to protect the mosque, this did not translate into security on the ground, despite a request by the Supreme Court. The Babri Mosque was demolished by 150,000 volunteers, who proceeded to build an ad hoc Ram temple on the site. After the demolition, the courts ordered the relaxation of restrictions of Hindu worship on the site,<sup>53</sup> in part because Ram was a 'figure constitutionally accepted as the Lord by the builders of this nation and culture'.<sup>54</sup> The order was challenged before the Supreme Court, who directed maintenance of the 'status quo', that is to say, the former balance between Muslims and Hindus, with the site open to Hindu worship but not Muslim worship.<sup>55</sup>

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49 S. K. Tripathi 'One Hundred Years of Litigation' in A. A. Engineer, ed., *Babri Masjid/Ramjanmabhoomi Controversy* (New Delhi, 1990) 20-1.

50 D. S. Burlet, 'Challenging Ethnic Conflict: Hindu-Muslims Relations in India 1977-1993' (unpublished PhD Thesis, Department of Peace Studies, University of Bradford 1997), 191.

51 *Umesh Chandra Pandey v State of UP and Others* (1986) Civil Appeal no 66/1986.

52 'Nothing Can Stop Kar Seva', *The Hindu* (New Delhi, 1 November 1992).

53 Judgement delivered on 1 January 1993 by Justices H. N. Tilhari and A. N. Gupta in *Vishwa Hindu Parishad v Union of India* case cited in A. G. Noorani, ed., *The Babri Masjid Question 1528-2003: 'A matter of National Honour'* (New Delhi, 2003) Vol 2, 247-48.

54 Akhtar, *Babri Masjid*, 173.

55 S. Ahmad, 'Judicial Complicity with Communal Violence in India', *Northwest Journal of International Law & Business* 17 (1996), 320 at 334.



Although Babri Mosque had now been demolished, proceedings in the High Court were re-started in January 1996, and continued until judgment by the Allahabad High Court in September 2010. The protracted hearing resulted in three judgments totalling more than 8000 pages.<sup>56</sup>

All three judges noted the undesirability of the very long period which had passed before the unlocking order of 1986 could be resolved. Justice Sharma was perhaps most blunt: 'the disputed structure is not in existence, it has already been demolished'. There was a notable willingness to make findings of fact as to the history of the site: Justice Khan for instance found that the constructed portion of the premises under dispute had been built as a mosque under orders of Babar,<sup>57</sup> and that no temple had demolished for its construction.<sup>58</sup> Justice Sharma, on the other hand, found that such a temple had existed, that it had been destroyed in order to build a mosque and that, under Islamic law, 'the disputed structure could not be a mosque as it was raised by force of arms on land belonging to the plaintiff deities.'<sup>59</sup>

The majority of the Court (that is, two of the three judges) ruled that the site should be partitioned into three parts, roughly two-thirds Hindu, one-third Muslim. Justice Khan stressed the sharing of the site between Hindu and Muslim worshippers since pre-1855, and from this found that both communities were in joint possession of the entire premises in dispute, although for convenience, they were using and occupying different portions. The three parties (Muslims, Hindus and a named Hindu sect) were declared joint holders until formal partition. Proposals for partition were required within three months, but some areas were set aside for the non-Muslim parties. Justice Khan was joined by Justice Argawal, who endorsed the tripartite division, but was more specific about areas set aside for the Hindus. He also stressed the role of the Government of India in making their land available to allow 'separate entry ... of the people without disturbing each other's rights'. The dissenting justice, Sharma, found that the building was not, under Shariah, a mosque, and that the land remained owned by the Hindu deities in the (pre-existing) Temple. Government attempts to extinguish the sacredness of the place were beyond its competence.

Immediately after the judgement, the Indian Prime Minister appealed for peace, and suggested that the status quo would be maintained until the Supreme Court took up the case. In May 2011 the Supreme Court stayed the verdict, describing it as 'strange and surprising'. It noted in particular that the High Court had granted a relief – partition – which had not been sought by any of the parties. Instead, all parties had sought exclusive rights over the entire precinct. The Supreme Court ordered the status quo, until the case was resolved by the Supreme Court. Supreme Court hearings began in February 2018, and at the time of writing are ongoing.

*The Hindmarsh Island bridge controversy.*<sup>60</sup>

My final case study takes us to Australia. A development company purchased land on Hindmarsh Island, in the Murray River estuary, and sought permission to replace the existing ferry with a bridge. Planning approval was granted subject to an environmental impact study. That study was completed

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<sup>56</sup> For a fuller analysis of the decision, see G. Arcot Srikantan, 'Re-examining secularism: The Ayodhya Dispute and the equal treatment of religions', *Journal of Law Religion and State* 5 (2017), 117.

<sup>57</sup> *Ibid.*, 227.

<sup>58</sup> *Ibid.*, 242.

<sup>59</sup> *Ibid.*, 14.

<sup>60</sup> See Margaret Simons, *The meeting of the Waters: The Hindmarsh Island Affair* (Sydney, 2003).

quickly, and identified the need for an anthropological study. This was carried out by Rod Lucas, who in 1990 reported that existing records did not record mythological sites, but cautioned that consultation with indigenous groups, particularly of the Ngarrindjeri, was needed. Planning permission was granted, but subject to the condition that there be consultation with 'relevant Aboriginal representative bodies', which did not take place. As the project developed, a complex relationship arose between the development company, a state-owned bank, and the state government. In 1994 a government appointed archaeologist, Dr Neil Draper, completed his survey of Hindmarsh Island and the mainland foreshore, identifying a number of significant sites which should be protected under existing legislation.

In 1994, at the request of the Ngarrindjeri, the Federal government intervened, with an emergency declaration stopping work until Professor Cheryl Saunders, a lawyer, reported on these sites. One group that Saunders consulted with was a group of Ngarrindjeri women, who claimed the Island was sacred to them as a fertility site, and for other reasons that could not be publicly revealed. An anthropologist, Dr Dean Fergie, prepared an assessment of these women's claims which was submitted to Saunders. In the process, some of these cultural secrets were written down and sealed in envelopes marked 'Confidential: to be read by women only'. The male Minister for Aboriginal Affairs received these with the assessment, and placed a twenty-five year ban on the project.

In February 1995 this decision was successfully challenged in the Federal Court by the development company. In the following month the Shadow Minister for the Environment resigned following his tabling some of the secret documents in Parliament, having misrepresented how he had obtained them, and having not followed the instruction to keep them confidential and read by women only. In May 1995 a number of dissident Aboriginal women stated that the 'secret women's business' must have been fabricated, as they either had no knowledge of it, or did not believe it. In June 1995 a Royal Commission was appointed, and reported in December 1995. The Commission did not make use of the contents of the envelopes, but found that the secret women's business was not authentic. The Royal Commission emphasised that the way the secrets were revealed gradually was suspicious; that the secrets were not documented in the anthropological record; that testimony given by two dissidents supported fabrication; that the secret women's business would have been irrational as inconsistent with existing barrages, which had not been objected to on that ground; and that one ground for the objection was based on a sacred story around the Seven Sisters constellation which was not part of Ngarrindjeri, as opposed to western Aboriginal, beliefs.

The Ngarrindjeri brought another application for federal heritage protection, and a female Senator appointed Jane Matthews, a female judge, as reporter, so that the proponent women would be able to refer to knowledge limited to women. In 1996 there was a change of government, and the new government refused to appoint a woman to receive the report; it also became clear that Australian law would not allow the women to rely on material that was not open to disclosure to other parties. Rather than disclose it, the women withdrew their restricted material from consideration by Matthews. The Federal government proceeded to pass specific legislation to ensure the bridge could proceed,<sup>61</sup> legislation which survived constitutional challenge on the basis of racial discrimination.<sup>62</sup>

This was still not the end of the story. In the 2001 case of *Chapman v Luminis Pty Ltd (no.5)*,<sup>63</sup> the developers, who had entered liquidation, sued a range of parties for financial loss suffered as a result

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<sup>61</sup> Hindmarsh Island Bridge Act 1997.

<sup>62</sup> *Kartinyeri v Commonwealth* [1988] HCA 22.

<sup>63</sup> *Chapman v Luminis Pty Ltd (no.5)* [2001] FCA 1106.

of the delay in the building of the bridge from 1994 to 1999. The judge found against the developers, and in doing made findings critical of the Royal Commission decision. In particular he considered that late and gradual emergence of sacred knowledge was not indicative of fabrication, that the lack of recording in the anthropological literature was not inconsistent with the material, and that the Seven Sisters story was plausible. The court dismissed claims of fabrication, and found against the developers.

This decision was widely seen as a vindication of the claims to secret women's business. In 2010 a government minister endorsed the 2001 finding that the secret women's business was genuine in a ceremony at the foot of the bridge; and Ngarrindjeri elders then led a symbolic walk across the bridge.<sup>64</sup>

### Some lessons

The first lesson, which I would draw from the Consumer Protection regulations, is that a lack of interest in history can result in an impoverishment of current law. Russell Sandberg, in his recent consideration of legal history through the lens of the employment status of ministers of religion,<sup>65</sup> argues that the modern law school culture suffers from 'presentism' – a privileging of the present – and notes the decline of legal history in law schools over the last century. Legal history, however, has a powerful subversive potential, showing 'that every line drawn in the law and everything the law holds as sacred is arbitrary and that the environment that students are socialised into is a historical construct'.<sup>66</sup> Stewart and Kiyani have made a similar point in their recent critique of the ahistorical nature of analysis of international criminal law, seeing understanding of the legal history of international criminal law as providing an important resource to reduce partiality.<sup>67</sup> The difficulties for lawyers seeking to engage historically with issues of law and religion do not justify their failure to do so. In particular, there are legal structures which may make it crucial to adjudicate between different conceptions of continuity, as well as tactically useful.<sup>68</sup> We see this in particular in the Ayodhya case study, where the question of whether or not a Ram Temple had been destroyed in the sixteenth century was returned to throughout the protracted litigation. As Mehta puts it, 'Each of the contending parties, and there are at least four, evokes the status quo to establish the legitimacy of its claims'.<sup>69</sup>

Secondly, the complexity of engaging with issues at the nexus of law, religion, and history may tempt a state actor to seek to avoid doing so, in the hope that the dispute will be resolved by extra-legal

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<sup>64</sup> See <https://www.theaustralian.com.au/news/nation/pain-eases-with-apology-over-ngarrindjeri-secret-womens-business/news-story/14c6b440265844bda517322686d18925>, accessed 22 May 2018.

<sup>65</sup> Russell Sandberg, 'The Employment status of ministers: A judicial retcon?', *Religion and Human Rights* 13 (2018), 27-48.

<sup>66</sup> *Ibid*, 46.

<sup>67</sup> J. G. Stewart and A. Kiyani, 'The Ahistoricism of legal pluralism in International Criminal Law', *American Journal of Comparative Law* 65, (2017), 393-449.

<sup>68</sup> Sandberg, 'The Employment status of ministers', 47.

<sup>69</sup> D. Mehta, 'The Ayodhya Dispute: Law's Imagination and the Functions of the Status Quo', in D. Mehta and R. Roy, eds., *Violence and the quest for justice in South Asia* (New Delhi, 2018), 291-321, at 293. See also D. Mehta, 'The Ayodhya Dispute: The absent mosque, state of emergency, and the jural deity', *Journal of Material Culture* 20 (2015), 397-414.

mechanisms. The Ayodhya dispute shows the drawbacks of deferring engagement. For thirty-five years, from 1950 to 1985, the Ayodhya dispute remained a local dispute between a few members of two religious communities. There was no final legal resolution of the dispute before the 1992 demolition, and indeed the Supreme Court did not begin substantive hearings on the case until 2018. Delay has been described as the 'pathology of the Indian legal system',<sup>70</sup> and has been a longstanding cause of concern. Chodosh has suggested that the adversarial model is poorly designed to meet the needs of a rural population with widespread poverty, illiteracy and unfamiliarity with formal legal procedure, not least since most of it is conducted in the English language,<sup>71</sup> while Deshpande suggests that the legal system creates the opportunity for parties with a weak case to delay resolution against them.<sup>72</sup> Average delays in the civil process have been calculated at between ten and fifteen years,<sup>73</sup> and a similar level of delay can be found in cases before the higher judiciary.<sup>74</sup> However, in the Ayodhya dispute the delay was extended to forty-two years, from 1950 to 1992, without even a preliminary hearing.

These issues of continuity and deferring judgement come together in the seemingly technical issue of interim relief. Interim relief is an order granted by the court intended to protect the rights of a party until there has been a final determination of the substantive dispute. The practical importance of interim relief is considerable, with Bean suggesting that the English courts grant far more interim injunctions than permanent ones.<sup>75</sup> In the Ayodhya dispute, interim relief, literally, spanned generations. The 1950-51 interim relief barred Muslims and Hindus from Babri Masjid; the 1986 opening of the locks, a variation of that interim relief, turned the space into place of Hindu public worship. The fate of the site has, for generations, been dealt with as interim relief. Given that the purpose of interim relief is to protect the rights of a party, identifying the status quo that is in danger of being damaged if there is no interim relief has been an important part of the work of the courts. One of the significant constitutional issues raised by the 1992 demolition is the flouting of the authority of the courts in seeking to maintain some form of status quo before the full hearing.

Thirdly, once a legal actor commits to engaging with history, the nexus of law, religion and history may raise particular problems around sacred history. Writing on the Ayodhya dispute in 1990, Gopal found that the historical claims by the Muslim and Hindu communities 'can find no sanction from history', and stressed that while appropriation of history is a continual process in any society, 'in a multi-religious society like ours, appropriations which draw exclusively on communal identities engender

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<sup>70</sup> O. Mendelsohn, 'The Pathology of the Indian Legal System', *Modern Asian Studies* 15 (1981), PAGE EXTENT, at 824.

<sup>71</sup> H. E. Chodosh and et al., 'Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process', *New York University Journal of International Law & Politics* 30 (1997-1998), 25 at 29; see also R. Moog, 'Delays in the Indian Courts: Why the Judges Don't Take Control', *Justice System Journal* 16 (1992), 19, 22.

<sup>72</sup> V. S. Deshpande, 'Civil Procedure' in J. Minattur, ed., *The Indian Legal System* (Bombay, 1978), 201.

<sup>73</sup> Chodosh et al., 'Indian Civil Justice System Reform', 29.

<sup>74</sup> M. Kachwaha, *The Judiciary in India: Determinants of its Independence and Impartiality* (Leiden, 1998), 38.

<sup>75</sup> See A. Keay, 'Whither American Cyanamid? Interim injunctions in the 21<sup>st</sup> Century', *Civil Justice Quarterly* 23 (2004), 133-151.

endless communal conflicts'.<sup>76</sup> History and archaeology have played a central role in the framing of the legal dispute over ownership and use of the site.<sup>77</sup> However, the sort of history which the different religious communities are asserting is particularly challenging. While the claims as to the burial place of Noah are not easily susceptible to probing by secular historians, the Muslim arguments are, predominantly, based on a time frame with which such historians may find comparatively easy to discover common ground. The 'Old Earth Creationism' of the Hindu arguments, with Ram having been born 9 million years ago, and Ayodhya Temple having been built 100 BC,<sup>78</sup> is more challenging for a court which does not share that religious frame. As Mehta puts it, 'two temporal registers, asymmetric and incommensurate, are entangled with each other – historic time and mythic time. The first is based on rules of evidence drawn from empirical detail, while the second provides a kind of habit within which belief and faith are mobilised'.<sup>79</sup> These different types of history may co-exist not only in a case, but in the arguments put forward by a single party. In their discussion of the use of architecture in Ayodhya, Bernbeck and Pollock put it this way:

Why, in a case such as Ayodhya, in which many Hindu partisans are firmly convinced that a temple did exist under the mosque regardless of any "proof" and/or that the place is a holy one for Hindus, is archaeological evidence necessary? We suggest that archaeological testimony is primarily a tool to be used to try to convince other, more skeptical audiences (for example, the Indian Supreme Court) because it provides tangible evidence such as the physical remains of a building interpretable as a temple.<sup>80</sup>

The Hindmarsh Island Bridge case shows that, even within a secular frame, different ways of conveying historical knowledge which arise from their religious context can pose real challenges to lawyers who seek to engage with historical information in a particular way.<sup>81</sup> The proponents of the secret women's business, and those who opposed them, all framed the debate in historical terms. The key legislation described its purpose as 'the preservation and protection from injury or desecration of ... areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition'.<sup>82</sup> The sociological question of whether an area was of particular significance to Aboriginals was not sufficient: that importance had to be in accordance with Aboriginal tradition.<sup>83</sup> Accordingly, the key question was whether the secret women's business was a traditional part of the culture of the

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<sup>76</sup> S. Gopal et al., 'The political abuse of history: Babri Masjid-Rama Janmabhumi Dispute', *Social Scientist* 18 (1990), 76-81, at 80-1.

<sup>77</sup> See S. Ratnagar, 'Archaeology at the heart of a political confrontation: The case of Ayodhya', *Current Anthropology* 45/2, (2004) 239.

<sup>78</sup> See the summary in G. Pandey, 'Modes of history writing: New Hindu history of Ayodhya', *Economic and Political Weekly* 29 (1994), 1523-8.

<sup>79</sup> Mehta, 'The Ayodhya Dispute: The absent mosque', 398.

<sup>80</sup> R. Bernbeck and S. Pollock, 'Ayodhya, Archaeology, and Identity', *Current Archaeology* 37 (1996) 138-142, at 141.

<sup>81</sup> See Michael F. Brown, *Who owns native culture?* (Cambridge, 2005).

<sup>82</sup> Aboriginal and Torres Strait Islander Heritage Protection Act 1984 s.4.

<sup>83</sup> See further J. F. Weiner, 'Culture in a sealed envelope; The concealment of Australian Aboriginal Heritage and Tradition in the Hindmarsh Island Bridge Affair', *Journal of the Royal Anthropological Institute* 5 (1999), 193.

Ngarrindjeri. The proponents ran straight into two expectations as to how historical knowledge should be accessed.

The Royal Commission was strongly influenced by the absence of any record of the practice in the report by a male anthropologist who had carried out an in-depth study of the group in the 1940s; the rather reasonable comments by Dr Jane Jacobs that a male anthropologist walking into the tribe in the 1940s might not have directed his attention towards women's secrets, and that even if he had would not have got very far, were not taken on board by the Royal Commission. The issue of gender specific knowledge was hotly contested by anthropologists on both sides in the 2001 court case, and evaluating the anthropological evidence was an important part of the judgment.<sup>84</sup> To state it at its simplest, the problem here is that esoteric religious traditions may well be less well documented by outsiders than exoteric ones.

Additionally, women who claimed to have key evidence to resolve this important factual issue would only permit it to be shared with other women. A strong constitutional norm in Australia is that parties should have access to the evidence supporting another party's case; another norm, less historically entrenched, is that decision making should not depend upon the gender of the decision maker. The claims to secret knowledge of the proponent women could not be reconciled with these norms, and attempts to accommodate the women led to significant political, and indeed legal, problems. The decision not to accommodate them, while it can be seen as 'a denial of natural justice',<sup>85</sup> can also be seen as compliant with a broader norm. As Harris puts it, the case shows 'the essential incompatibility of the two systems of law – the emphasis upon disclosure and the law's need to know against the essential secret nature of some of the beliefs of Aboriginal peoples.'<sup>86</sup>

To conclude, the nexus of law, religion and history poses some unique challenges for legal actors. These legal actors need to resist the temptation not to engage with historical issues: not least because it is sometimes essential in the light of the internal dynamics of the legal process. A failure to confront the historical dimension also impoverishes the formulation of legal answers to legal problems. For scholars, the existing movement to reinvigorate the understanding of the interaction between law and history needs to take account of the particular challenges of sacred history. Such sacred histories may be mythical, esoteric, and gendered in ways which are particularly difficult to slot into lawyerly understandings of history and evidence.

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<sup>84</sup> See G. Edmond, 'Thick decisions: Expertise, Advocacy and Reasonableness in the Federal Court of Australia', *Oceania* 74/3 (2004), 190-230; and more broadly L. Veters and M.-C. Foblets, 'Culture all around? Contextualising anthropological expertise in European courtroom settings', *International Journal of Law in Context* VOLUME (2016), 272-292.

<sup>85</sup> M. Langton, 'The Hindmarsh Island Bridge Affair: How Aboriginal Women's Religion Became an Administerable Affair', *Australian Feminist Studies* 11 (1996), 211-217, at 211.

<sup>86</sup> M. Harris, 'The narrative of Law in the Hindmarsh Island Royal Commission', *Law Context: A Socio-Legal Journal* 14 (1996), 115, at 115.