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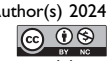
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'The Irregular' and the Unmaking of Minority Citizenship: The Rules of Law in Majoritarian India

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Abstract

This article focuses on the important aspect of India's democratic decline, the ascendance of the Hindu majoritarian state, and its relationship with the law. It argues that the law is central to the Hindu majoritarian project but often in obscurely informal ways. India's majoritarian state seeks to radically reconfigure the law in Indian social life by making the rule of law inapplicable to its minorities. Through a series of examples drawn from the everyday socio-legal life in contemporary India, the article shows how arbitrary and extralegal state violence is endorsed, affirmed, and acquiesced on grounds of serving ethnonationalist values and interests. It theoretically develops the novel interpretive framework of 'the irregular' to capture the practices of the ethnicization of the law, ethnonationalist legitimisation of extra-legality through intense political mobilisation, and the production of subordinated minority citizenship without the formal incorporation of graded citizenship.

Keywords

India, minorities, autocratic legalism, democratic decline, autocratization, rule of law, subordination, Muslims, Hindu Nationalism, Modi

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Introduction

We are today witnessing a global pattern of democratic "decline" and "recession" (Diamond, 2015; Lührmann and Rooney, 2021). Countries that until recently were considered relatively established and well-functioning democracies are sliding on several parameters of democratic rule. These include the drastic weakening of democratic accountability, the rule of law, free and fair elections, and liberal rights. The rise of populist and autocratic leaders has been one of the key drivers of this phenomenon. Authoritarian leaders and parties have emerged and entrenched themselves not through the traditional routes of displacing elections, but through slow but definite erosion (Levitsky and Ziblatt, 2018) of democratic constitutional mechanisms that "aggrandize" the executive (Bermeo, 2016). Countries undergoing this phenomenon now sit rather uneasily in the category of 'democracies' and are arguably better classified as hybrid polities that combine elements of electoral and autocratic rule.

India has increasingly become one of the central case studies of this trend. The election of Prime Minister Narendra Modi and the Bhartiya Janata Party (BJP) in 2014 and the return with a more robust mandate in 2019 has established them as the principal political force in India. India is now in a "dominant party system" (Chhibber and Verma, 2019) where the BJP commands an unparalleled influence over the national political discourse and policy agenda, and other parties have a considerably diminished opportunity of displacing Modi. The BJP's electoral consolidation is associated with several undesirable patterns in India's political and social life, most significantly the further weakening of accountability institutions, the undermining of independent civil society and media, the surging sectarian tensions and visibly rising anti-minority violence, and an overall sliding in democratic parameters. Reputed democracy indexes and surveys have started classifying India not as a "democracy" but as a "flawed democracy" and an "electoral autocracy" (EIU, 2024; V-Dem, 2023).

The law is important in these processes of democratic decline globally and in India. Like other instances of autocratic regimes abusing the law to politically entrench themselves (Scheppele, 2018; Landau, 2013), the Modi regime has undermined democratic rule through incremental, systematic, and subtle legal measures.

This article contributes to this conversation about the character of India's democratic decline and its relationship with the law. It focuses on one important facet of the country's democratic crisis: the consolidation of Hindu nationalism to "establish a majoritarian state in India" (Chatterji et al., 2021). The rise of authoritarian forms of rule in India is fundamentally linked with the longer historic Hindu nationalist ideological project of constituting a Hindu majoritarian state. The BJP is the electoral face of a large ecosystem of Hindu supremacist organisations, principally the Rashtriya Swayamsevak Sangh (RSS), committed to the Hindutva ideology that seeks socio-political domination of Hindu ethnonationalist interests and values. For this ideology, the minorities especially India's Muslims are considered outsiders at best and enemies at worst. The political dominance of Modi and the BJP thus marks the ascendance of India's majoritarian state. As I subsequently describe in detail, this has led many scholars to increasingly describe India as an ethnic state.

What is the relationship between this ascendant majoritarian state and the law? In the incipient conversation on this question, some have suggested that the majoritarian project

only seeks to reinterpret and rework existing constitutional norms in service of its political aims of deepening minority social and political marginalisation (Singh, 2019). This gives the impression that the law is marginal to the Hindu majoritarian project. This also suggests that there is no fundamental—or to the very least, irreconcilable—tension between the project and India's constitutional norms (Ahmed, 2021). Others have argued that India today is primarily a *de facto* ethnic democracy, but the enactment of certain discriminatory laws has started paving the way for a *de jure* ethnic democracy (Jaffrelot, 2021b, 155; Adeney, 2021). Formally legislated policies and their partisan legal enforcement indicate the incorporation of graded citizenship.

This article diverts from these approaches to understand the relationship between India's ascendant majoritarian state and the law. It proposes that the law is central to the majoritarian project in India today – and not always in recognisably formal ways. Majoritarian political strategies do not merely rework or instrumentalise the law, or rely only on formal legality. Rather, they seek to radically reconfigure the rule of law in India's socio-legal life. I argue that "Hindutva statecraft" (Hansen and Roy, 2022) profoundly relies on insidious practices of arbitrary violence against minorities that make democratic constitutional discourse of justification and accountability irrelevant to them. There is a growing pattern of the state exercising everyday violence against minorities, ostensibly under the cover of law, in arbitrary and authoritarian fashion. This arbitrary violence is legitimised through intense Hindutva politicisation, and affirmed and endorsed by state institutions—often including the courts—on grounds of preserving ethnonationalist interests and values. These practices of majoritarian violence and their ethnonationalist endorsement institutionalise autocratic and arbitrary power in relation to the minorities. Minority subordination produced by these strategies may often be obscure for many observers because it does not entail the formal incorporation of graded citizenship and is intricately entangled in legalese. Nevertheless, the experience of subordination is profound for minorities since it involves being perennially under the threat of arbitrary violence without any meaningful recourse to legal institutions.

This article offers a new theoretical perspective to understand how the law is implicated in the Hindu majoritarian project in this manner. It develops the interpretive framework of 'the irregular'. As I elaborate further, the irregular captures how the state's exercise of extralegal violence against minorities comes to be affirmed, endorsed, and acquiesced through the practices of ethnicization and ethnonationalist legitimisation. The irregular shows that India's majoritarian project not only uses and abuses the law. It seeks to fundamentally delimit the rule of law.

The article starts with situating the argument within the contemporary debates on India's democracy. It presents a pluralistic perspective to understand the different dimensions of India's democratic crisis, and how the electoral ascendance of the BJP is threatening fundamental values and norms of India's institutional, political, and social life. The next section introduces the framework of the irregular using the example of citizenship dispossession in the Indian state of Assam. The article proceeds to delineate the theoretical antecedents and promise of this framework. The article then provides two further illustrations of the irregular drawing from the recent controversies involving zonal regulations and control over religious monuments. Being outside the legal fields of terrorism and national security law that are often associated with state excesses, these illustrations

illuminate the everyday socio-legal life under India's ascendant majoritarian state. These illustrations also show how it is not only the political branches (the government machinery dominated by Modi and BJP), but also institutions like the courts that are implicated in ethnicised extra-legality under India's ascendant majoritarian state.

Hindutva and India's Ascendant Majoritarian State

There is now a sense that India's democracy is witnessing a crisis like many other democracies around the world. The first dimension of this crisis is institutional. Since coming to power, the BJP regime has used its discretionary governmental powers to undermine the institutional mechanisms of democratic and constitutional accountability "incrementally and systematically" (Khaitan, 2020). The regime has consistently used its executive powers to appoint party partisans and ideological sympathisers, especially belonging to the RSS, in key constitutional posts, including in the country's professional bureaucratic services, the central bank, central investigating agencies and the universities. These practices of entrenching influence have been targeted vertically across the spectrum of the government, allowing the regime's ideology to be "diffused widely through different kinds of governmental spaces" (Hansen and Roy, 2022).

The Modi government has also consistently undermined the role of Parliament through a series of tactical actions. The government refused to appoint the leader of the opposition for a prolonged period that compromised the participation of the opposition in governance. Since the BJP has not enjoyed support in many states, the central government has tried to undermine federalism's check on its power. For instance, it has misleadingly tabled politically consequential laws as 'money bills' that could be passed without the support of Parliament's upper house that is elected by state legislatures.

The regime has attempted to entrench itself in government through practices of "autocratic legalism" (Scheppele, 2018) that instrumentalise constitutional powers to undermine democratic control and accountability. While many of these actions have involved a formal exercise of constitutional powers, the regime has also resorted to informal tactics of undermining institutions, most significantly India's judiciary. The higher judiciary legally retains the power to nominate judges, but the government has used tactics like inordinate delays in processing and sanctioning appointments to filter out unwanted judges. In addition to the possibility that several judges are sympathetic to the government's agenda, these pressure tactics may already be serving the regime. There is now a systematic pattern of the Supreme Court delivering verdicts favourable to the government or benefitting the government by delays in deciding politically significant cases (see Prakash, 2023 in this special issue). For instance, the government changed India's campaign finance law by legislating the opaque 'electoral bonds' policy in 2017 that allowed large corporate donations to political parties without meaningful transparency. The Supreme Court, like in other instances, continued to delay adjudicating this policy—despite it being active and disproportionately benefitting the BJP—until finally holding it unconstitutional in February 2024 (see further Prakash, 2023 in this special issue on the problematic role of an overly 'credulous Court').

The BJP regime has thus engaged in "practices of institutional capture, creation, and bypass" (Hansen and Roy, 2022). It is not the case that India's democratic institutional

health before Modi was significantly sound. But the BJP regime has politically weaponised its institutional weaknesses—without any meaningful political constraint—and hastened India's institutional decline resulting in what historian Ramchandra Guha calls "India's descent from a 50-50 to a 30–70 democracy" (Guha, 2020).

The second dimension of India's democratic decline relates to the impact of the BJP regime's illiberal policies on the country's civil society. Investigating agencies have systematically targeted human rights activists and dissidents under the laws related to terrorism, sedition, national security, and financial irregularities, which have severely limited rights of the accused. These laws allow the police to detain the accused for prolonged periods of time as undertrials without bail. The government, like in the case with democratic institutions, has not invented the tools of undermining civil society. It has systematically weaponized existing laws for political ends. The use of these extraordinary penal procedures has significantly increased since 2014 and investigating agencies have operated with considerable bias against the opposition and anti-BJP dissenters.[1] The government has also systematically hindered independent civil society organisations by revoking their international funding status. For many observers, the scale and quality of civil liberties violations since 2014 amounts to an "unofficial" or "undeclared" emergency (Sundar, 2020; Narrain, 2022).

Besides state capture through institutional changes and the enactment of illiberal laws that compromise civil liberties, there is a third overlapping dimension of India's democratic crisis. This emerges from the larger project of Hindutva to transform Indian society (Bhat et al., 2022) and which this article is most closely invested in. Hindutva as an extreme form of Hindu nationalist and Hindu supremacist ideology has historically sought to privilege Hindus and Hinduism in India's public life. Hindutva activists have advocated and mobilised for unifying all Hindus as the basis of the Hindu/Indian nation (Hindu *rashtra*), where Hindutva (literally, 'Hindu-ness') dominates politics and minorities are forced to either fully assimilate or accept a lower civic status.

The challenge for Hindutva activists has been the immense diversity among Hindus —owing to geography, culture, caste, and religious belief—that they have sought to overcome by using Hindu cultural tropes and anti-minority (especially anti-Muslim) violence. Hindutva activists have historically focused on flagship issues like minority rights, religious conversion, cow protection or the federal autonomy of India's only Muslim province Jammu and Kashmir. But more than any discrete issue, Hindutva politics is interested in acts of politicisation of social life that produce Hindu religious politization, unification, and dominance in public life. BJP's "majoritarianism politics" (Palshikar, 2019) has similarly been based on the vilification of minorities, the production of a unified (and permanent) majority by mobilising nationalism and majority victimhood, and the ascriptive majority's claim that its domination of public life is legitimate.

The contemporary moment of BJP's electoral dominance has ushered the next phase of Hindutva politics, varyingly called "new" or "neo" Hindutva (Hansen and Roy, 2022; Anderson and Longkumer, 2018; Narayan, 2021). This phase is based on a deeper penetration and "vernacularization" (Reddy, 2018) of Hindutva ideology, unprecedented popular acceptance of its ideas (Chhibber and Verma, 2019) and the BJP's successful capitalization of this acceptance.

Now that Hindutva is the official doctrine of the government, the projects of rebuilding the society and recrafting the state have become interlocked, where majoritarian ideology and the state legitimise and facilitate each other. The BJP's electoral victories are increasingly becoming the basis of popular authorization of majoritarian policies as "a new hegemony based on a new set of dominant ideas and sensibilities that would provide ideological sustenance to the dominant party system" (Palshikar, 2019). New Hindutva simultaneously seeks to "alter the character of the Indian State" into a Hindu *rajya*, a Hindu state, that can secure the Hindu *rashtra* (Mehta, 2022). This phenomenon is visible in policies enacted by the BJP at the central and state levels, including stringent and disproportionate 'cow protection' (Sarkar and Sarkar, 2016) and anti-religious conversion penal laws (Bhat, 2021; Selvaraj, 2023; Jenkins and Sharma, 2023) that discriminate against religious minorities. The BJP-led parliament enacted the Citizenship Amendment Act in 2019 that introduced an unprecedented 'religious test' facilitating non-Muslim immigrants from Pakistan, Bangladesh and Afghanistan for Indian citizenship. Since 2014, Hindutva activists have frequently targeted Muslims and Christians on the pretext of religious conversions and cow protection, and state agencies have overlooked and sometimes participated in this violence.

This systematic pattern of majoritarian law-making and anti-minority violence—the welding of ideology and state—indicates that India might be undergoing a "regime change" (Jaffrelot and Verniers, 2020) that hybridises seemingly contradictory features of autocratic governance, dominant majoritarian rule, and remnants of electoral politics. Scholars have suggested that India's ascendant majoritarian state is shaping into an "ethnic state", "ethnic democracy" or "ethnocracy" (Jaffrelot, 2021a; Khosla and Vaishnav, 2021; Roy, 2023) that entrenches minority subordination. The role of formal legality in constituting this hybrid ethnic state is now easily recognizable. Legislation enforcing majoritarian norms of religious faith and food, and most of all, a religious test for Indian citizenship are explicit examples of formally incorporating an ethnic state. But outside these formal routes, Hindutva statecraft profoundly relies on insidious practices of arbitrary violence to reconstitute India's socio-legal life and entrench subordinated minority citizenship.

Minority Citizenship and Irregular Status

To understand how Hindutva statecraft seeks to reconfigure the law in India's social life, I start with the case of the attrition and dispossession of citizenship status in India. Led by the BJP since 2014, the law of citizenship status has become incrementally "ethnicised" (Joppke, 2003; Winter and Previsic, 2017) by privileging ethnic and ascriptive (as against civic) ties as the basis of acquisition and loss of citizenship status. This section shows that the central mechanisms leading to this ethnicization are insidious state practices at the edge of legality, which nevertheless have been publicly affirmed and endorsed for serving ethnonationalist ends.

India after independence adopted a secular and non-discriminatory citizenship regime based on *jus soli* (birthright citizenship). But increasingly since 2014, Indian citizenship has undergone the process of ethnicization "in which the ties of soil and socialization are… downgraded, while the ties of blood and filiation are upgraded" (Joppke, 2008).

India's ethnicised citizenship law now grants citizenship by birth only to persons who are born to at least one Indian parent, and who do not have a parent that the state deems to be an 'illegal migrant' (The Citizenship Act, sec 3). The exercise of determining who is an 'illegal migrant' has historically been fraught with severe anti-migrant anxieties in which Muslims, particularly Bengali-origin Muslims (or *miya* Muslims), are assumed to be foreigners (Roy, 2010; Jayal, 2013). Alongside the diminution of *jus soli*, the most dramatic measure incorporating ethnicized citizenship is Citizenship Amendment Act in 2019 that exempts non-Muslim immigrants from Pakistan, Bangladesh and Afghanistan from the category of 'illegal migrants' and provides a faster route of naturalisation than ordinary immigrants. The Indian government has implemented immigration policies that facilitate Hindu and Sikh migration from Pakistan and Afghanistan (Bhat and Yadav, 2021). These measures, despite (at least formally) directly affecting non-citizens, have a wider symbolic effect of characterising India not as an inclusive and secular polity but a nation that primarily belongs to Hindus and on which Muslim citizens have an inferior claim (Ahmed, 2020). This unprecedented ethnicization endorses a majoritarian conception of citizenship (Jayal, 2022; Ahmed H, 2020) and incorporates features of an ethnic Hindu state.

But beyond these formal changes, citizenship status in India has been compellingly—and arguably, more consequentially—ethnicized through less formal and more insidious channels. The state has instituted exceedingly demanding and invidious documentary citizenship processes for status determination that engender enormous insecurity of minority citizenship status. The most profound examples of this are the Foreigners Tribunals ('tribunals') in the eastern state of Assam that have declared more than 100,000 persons as foreigners, a large proportion through *ex parte* proceedings (in the absence of litigants). These freewheeling bodies, which have exercised exclusive jurisdiction over the question of citizenship status in Assam since 2005, operate without meaningful institutional independence or regard for accepted normative standards.

The government appoints tribunal members contractually and grants extensions based on good performance, which in practice refers to the number of declared foreigners. Tribunal members are not bound by any legislated procedure and are free to follow their desired process and evidentiary practices. Documentation has established their disregard for standard procedural norms and discriminatory reliance on minor documentary inconsistencies to declare foreigners (Mohan, 2019; Amnesty International India, 2019; Bhat, 2024), making them lethal for litigants. The border police, which is tasked with identifying suspected foreigners for determination by the tribunals, have operated without meaningful safeguards and with impunity. These institutions are incentivised to identify 'foreigners', which invariably are minority citizens most likely to lack documents because of poverty and illiteracy.

Other associated modalities have added further layers to these exclusionary processes. India's Election Commission has disenfranchised more than 350,000 voters in Assam—predominantly *miya* Muslims—after classifying them as 'doubtful citizens' without any hearing or transparent adjudication. The most expansive process is the recent National Register of Citizens ('NRC')—a Supreme Court-led documentary process in Assam that required all the state's residents to prove their Indian citizenship—that classified 1.9 million persons as suspected foreigners. Millions of these affected 'doubtful citizens' and 'suspected foreigners' await adjudication by the tribunals.

In addition to providing state actors unchecked discretion, these mechanisms have also allowed non-state actors to participate in targeting minority citizens. For instance, the NRC process "permitted anyone to file an objection against the inclusion of any person" without a provision against "frivolous objections" (Azad et al., 2020) resulting in thousands of politically motivated objections against *miya* Muslims in the state.

Ethnicization represented by these processes is not formal since these policies do not explicitly discriminate against minorities or revoke their citizenship status. These processes permit, facilitate and incentivise state and non-state actors to target minority citizens, who consequently are constantly under grave instability of status, the threat of detention, and the fear of being subjected to demanding and financially unbearable legal proceedings. For minority citizens, this experience of legal vulnerability reflects their inferior status in the polity. These invidious processes have thus produced a distinctive form of minority subordination: not through formal incorporation but by creating perennial and everyday insecurity.

Despite having the cover of law, these processes are normatively at the very edge of legality. The tribunals violate well-established principles of Indian jurisprudence requiring that only independent and competent judicial institutions can displace ordinary court jurisdiction (Rahman, 2020). In a remarkable irony, it is only citizenship status that has been assigned to such arbitrary institutions despite being the basis of the most significant constitutional rights, which raises serious concerns of constitutional due process violation (Bhatia, 2019). The Election Commission's disenfranchisement of 'doubtful citizens' patently violates Indian Supreme Court's precedents that require scrupulously adhering to due process and natural justice before excluding voters (Bhat, 2024). The Supreme Court's bench that piloted the NRC violated several recognised legal principles of procedural propriety related to transparency (Bhatia, 2018).

Notwithstanding these patent diversions from the normative demands of the law, Indian institutions have consistently affirmed, endorsed, and legitimised the extra-legality of these processes on the ground of preserving ethnonationalist interests and values. The most profound example of this is the *Sarbananda Sonowal* case in 2005, where the Indian Supreme Court endorsed ethnonationalist assumptions and anxieties about Muslim immigration to remove the existing judicious processes for citizenship status determination and install the tribunals system. The Court affirmed the long line of Hindu right-wing assertions about the extent and dangers of Muslim population growth or demographic threat in India (Bhatt, 2020, 197; Appadurai, 2006, 66) and held that immigration into India from Bangladesh was an "Islamic infiltration" seeking to strategically alter the religious demography of the region and the country. This, according to the Court, was a form of "international aggression" and a threat to national security, which warranted exceptionalist measures of creating effective executive bodies to identify and deport foreigners. In response to the argument that the unregulated tribunals system would violate the rights of life and non-arbitrariness that the Indian Constitution guarantees to all persons, the Court held that citizenship status determination fell outside the Indian Constitution's due process requirements. The Court thus installed and legitimised the invidious system of documentary citizenship outside ordinary legal norms through its "securitized" and "exceptionalist" logics (Bhat, 2024).

The courts since the *Sonowal* case have consistently accepted this reasoning in upholding the processes that violate constitutional due process, including the Supreme

Court in its *Assam Sanmilita Mahasangha* judgment (2015) initiating Assam's NRC. In cases where 'doubtful voters' have challenged their disenfranchisement, the courts have refused to hold the Election Commission accountable to procedural standards and directed the border police to refer the litigants to the tribunals. The courts have also regularly overlooked allegations of procedural impropriety in the tribunals. In each instance, the courts have held ordinary legal norms to be inapplicable considering that "large scale illegal migration of foreigners" is threatening "national security" and the "integrity of the nation", which govern "the overarching public policy governing a sovereign nation" (Bhat, 2019).

The court-led institutional legitimisation of these extra-legal processes has not occurred in isolation, but very much in the context of intense ethnonationalist mobilisation and consolidation (Chatterji et al., 2021). The sentiment against Bengali immigrants among Assam's dominant sections has a distinct local and historical context, and is independent of the migrants' religious affiliation. But since 2014, Hindu nationalism has "made significant inroads into Assam" and transformed this sentiment into a Hindu majoritarian anti-Muslim paranoia and "an unfinished piece of Partition business" (Baruah, 2020, 68–70). The BJP and the wider Hindu right have framed the 'problem' of immigration—successfully if election results are any indication—as the problem of Muslim migrants who should be deported. The most vicious example was in 2019, when Amit Shah, the BJP president at the time, called such immigrants "termites" and described the opposition political parties to be indulging in the "appeasement" of minorities (PTI, 2019). This complete public equivalence between 'illegal migrants' and *miya* Muslims—significantly constituted by the ethnonationalist mobilisation of Hindutva actors—is central to the continuing popular legitimisation of citizenship attrition policies.

This account carries important lessons about the relationship between citizenship dispossession and the rule of law. Elsewhere, following Peter Nyers (2010; 2018), I have described these state practices as "irregularizing" minority citizenship (Bhat, 2024). Status precariousness has enveloped not only the migrants and refugees but increasingly formal citizens (Jain, 2022), especially in cases where states in dubious circumstances have controversially revoked nationality of their citizens on grounds of terrorism (Macklin, 2018). But beyond such instances, Nyers perceptively notes that there are "more complex cases where citizenship has not been revoked per se, but where it has been rendered inoperable, or irregularized" (Nyers, 2018, 38). States in such instances do not formally revoke citizenship but "unmake" citizenship "performatively" (Nyers, 2010) through subtle and insidious exercise of governmental power, like by instituting and legitimising insidious administrative processes in Assam that dissolve all meaningful protection attached to citizenship status. These irregular processes irregularize minority citizenship, in that they engender citizenship attrition by subverting the stability, and hence the rights and guarantees that are tied to citizenship status. Irregularization is intimately connected with "the politics of exception" and "the racialization of citizenship" (Nyers, 2010), where states violate fundamental features of the rule of law in relation to marginalised and racialized groups, and justify them on grounds of national security. Through this distinct strategy of irregularization, states make fundamental rule of law protections unavailable and immaterial for stigmatised citizens without formally revoking them.

Mapping 'the Irregular' in India's Ascendant Majoritarian State

The strategy of irregularization has resonance beyond the attrition of citizenship status, and I propose, explains how Hindutva statecraft reconfigures India's socio-legal life. I propose the interpretive framework of 'the irregular' to capture this style of legal rule.

The irregular is a type of autocratic and authoritarian rule based on rendering the rule of law inoperable to minority citizens. Institutional and non-institutional actors endorse, affirm, or acquiesce the state's arbitrary exercise of violence against minorities on grounds of serving ethnonationalist values and interests. As in the case of citizenship attrition in Assam and the illustrations in the following two sections, arbitrary violence follows politicization of law through intense and highly visible Hindutva mobilisation—led by the state, non-state actors, or both in concert—around issues of ethnonationalist concern. This mobilisation leads in two directions. It results in the ethnicization of fields of legal practice, constituting laws to become sites of ethnonationalist consolidation. In this process, practices previously understood to be legally improper are institutionally affirmed or overlooked. Ethnonationalist mobilisation also drives outwards, so to say, to generate popular legitimacy for irregular state action. This results in a specific form of minority subordination, in the form of irregularization, where minority citizens are subjected to grave and constant vulnerability of rights violations without any meaningful recourse to institutional checks and the rule of law. In this manner, the irregular combines the practice of extra-legality, politics of ethnicization and minority subordination.

The framework of the irregular illuminates the role of semi-formal or informal practices in reconstituting India's socio-legal life. It also shows how the ethnicization of the law under Hindutva rule is not uniform. Hindutva's politicisation is sporadic, unpredictable, and episodic, since it is associated with which issue becomes the focus of ethnonationalist consolidation. The ethnicization of the law, by extension, may widen and contract, appear and recede. Thus, the irregular coexists with ordinary practices of legality. But minority subordination is progressively entrenched because minority citizenship can always be imperilled in practice by Hindutva politics. India's ascendant majoritarian state unmakes minority citizenship without necessarily incorporating graded citizenship formally or uniformly.

This bipodal or "dualist" (Hendley, 2022; Dyzenhaus, 2017) perspective on law—where the irregular coexists with ordinary practices of legality—draws from similar approaches of other scholars who have theorised that legal cultures in authoritarian settings often consist of multiple modes of regulating social and political life. Most notably, in his ethnography of law under the Nazi regime, Ernst Fraenkel noted that even with gravely compromised legal integrity, judges and other legal actors continued to address many banal disputes in ordinary legal ways. The law under Nazi authoritarianism was "Janus-faced or dual-natured" (Meierhenrich, 2017) where a "normative state"—abiding by normal legal rules and procedures—existed alongside a "prerogative state". The prerogative state was regulated by "arbitrary measures" and "discretionary prerogatives" of officials, and characterised by the "complete abolition of the inviolability of law" (Fraenkel, 2017, 107). In Fraenkel's theory, these dual states were not two separate spaces (separate institutions or geographies) but two "competing systems of government" (Suntrup, 2020) in the same legal system based on different legal principles. In legal fields

like property and contract law, and with respect to the racially dominant Germans, the Nazi courts maintained the normative state (and sometimes did not acquiesce to the prerogative state), reflecting features of liberal legality. The prerogative state dominated in cases that were politically significant to the Nazi Party or while dealing with Jewish litigants.

Fraenkel's dualism has usefully offered scholars a legally pluralistic heuristic to interpret legality in other authoritarian or autocratic contexts, and more recently, racialized polities that we may otherwise consider democratic. Mark Tushnet calls the latter "quasi-dual states" in which "first-class citizens get full liberal constitutionalism" and "robust freedoms" and "second-class citizens get rule-of-law and thin constitutionalism" (Tushnet, 2017). Extending the dualist analysis to the United States, McCann and Kahraman (2021) argue that the deeply racialised elements in the American legal system are not deviations, violations or oversights of liberal legality, but constitute "hybrid legality". Under this hybrid legality, liberal law for some groups has coexisted with "authoritarian and illiberal legal rules, institutions, and practices" for the others. They argue that while American law has protected the dominant groups, it remains authoritarian ("unaccountable to many of its legal subjects") and illiberal ("denies basic rights protections, propertied independence, and justice") for "large swathes of the semi-free working class" and "racial minorities, immigrants, and the disposable poor" (McCann and Kahraman, 2021).

This article's framework of the irregular extends this dualist framework to illuminate several theoretical features of hybrid legality in India. First, it appreciates how the law is configured in plural and conflicting ways in the country's emerging Hindu majoritarian state. Legality under authoritarianism is often constrained by concerns of prudence. No modern polity can operate with an entirely arbitrary legal system based on brute force. Since a complete disregard for the rule of law "would risk their legitimacy", authoritarian regimes seek a "delicate balance between the extralegal and the legal" (Hendley, 2022), "fair arbitration and political prerogatives, repression and legitimacy" (Bækken, 2018, 3; see also Roy, 2023 in this special issue for a discussion of 'societal' restraints on absolute power in ethnocratic contexts). The "color of law" (Sharlet, 1977, 164) has to often be maintained. The law is not necessarily ignored but "abused", based on "vague or ambiguous legal norms [that deny] the principle of predictability, leaving open a large area of discretionary space" that permits and encourages arbitrariness (Sharlet, 1977, 164). The framework of the irregular shows that India's ascendant majoritarian state eschews (at least until now) formally graded citizenship and maintains the modality of legal form (if not substance), not least to keep an appearance of fidelity to constitutional and democratic norms.

Second, the framework of the irregular captures the political basis of divergence from normative legality. Authoritarian modalities are contextual, based on which interests and ideologies the regime seeks to secure. For instance, as scholars of judicial politics in Russia and China have shown, courts behave differently in "political" and "mundane" cases in these countries (Sharlet, 1977). In Singapore, the state violates political and civil rights even though "the economic arena is depoliticised" to preserve the regime's core interest in maintaining market trust (Jayasuriya, 1999; 2001). The apartheid system in South Africa reflected "a contradictory mix of despotic power and formal

constraints on its despotism" (Smith, 2017). There was a coexistence of formal and rule-bound institutional mechanisms and extensive use of arbitrary and extra-judicial violence. In the case of India, the framework of the irregular reveals how arbitrary violence is endorsed and affirmed, especially against minority citizens, in contexts that serve the crafting of an ethnonationalist majority and consolidating ethnonationalist values.

Third, this framework also illuminates the role of courts. Authoritarian regimes may co-opt and undermine the courts or share a tense relationship of negotiation and opposition. Kathryn Hendley (2022) notes that the "common pattern" among courts in authoritarian settings is that "the prerogative realm arises informally and often haphazardly". Legal actors may endorse or acquiesce to arbitrary state action because of legal and political common sense, political ideologies, and perceived inducements and risks. Judges may "adjust their rulings in response to external signals" or "blatant commands", behave according to "long-term conditioning that begins with legal education" or defer to the regime based on "institutional incentives for career advancement" (Hendley, 2022). Scholars applying the dualist framework to Russia and China show the existence of "telephone law", where party officials instruct the judges over the phone in cases relevant to them (Ledeneva, 2013). The judges in these setting may "have adapted themselves" without any need to be nudged by the political masters (Hendley, 2009). Scholars argue that the judges in China are "well versed in the politics of justice and ready to comply with political instructions in politically sensitive cases" (Fu and Dowdle, 2020, 69). Despite this, legal actors and institutions may also serve as spaces of resistance. Meierhenrich (2008) for instance shows how in the apartheid regime, elements of liberal legality sometimes provided resources to resist and reform the authoritarian system.

My discussion of citizenship status and other illustrations in the following two sections shows that the irregular in India is characterised by either forthrightly ignoring the courts, or the courts endorsing or acquiescing to arbitrary violence often by evading controversial questions. The judiciary's disregard and "withdrawal" (Khosla and Vaishnav, 2021, 116) has meant that the courts remain relevant as spaces of resistance, but drastically capricious and compromised.

The framework of the irregular also adds new dimensions to the dualist framework. It captures the role of the social. The very purpose of arbitrary violence for the BJP's Hindutva majoritarian politics is to craft a Hindu ethnic majority and consolidate ethnonationalist interests and values. The central tool for this is intense popular political performance in the public sphere that can redefine the understanding of the legitimate state. This makes political mobilisation for popular ethnonationalist legitimisation key to understand contemporary socio-legal life in India. Practices of ethnicization can be led by the executive and the courts. But unlike, say, Faenkel's notion of the prerogative state or its recent invocations in relation to India (Narrain, 2022), the exercise and legitimisation of arbitrary violence is not characterised only by executive decrees and judicial endorsements. A wider spectrum of state and non-state, political and social, and bureaucratic and judicial actors are key participants in leading and endorsing violence. Appreciating the role of institutional and non-institutional spaces is central for any meaningful theorising of the law in India's ascendant majoritarian state.

The irregular also illuminates the crucial role of extra-legality in India's ascendant majoritarian state. Arbitrary violence towards disempowered citizens is of course not new in India. But what we are witnessing today is a systematic pattern of politically weaponizing state illegality in service of the majoritarian project. This explains why, despite arbitrariness being commonplace in India, an increasing number of prominent legal professionals have expressed "disappointment", disillusionment, and bewilderment (see Lokur interviewed in Thapar, 2020a) with the current state of affairs.

The contemporary, ethnicised forms of illegality are not mere anomie or divergence from the acceptable legal norms that undermine state authority. These extralegal state practices represent a "new regime of constituent violence" (Hansen and Roy, 2022). Recent scholarship has not always adequately theorised this facet of the ascendant majoritarian state. For instance, Khosla and Vaishnav (2021) argue that "India's new constitutionalism" is marked by a shift towards an ethnic (a "Hindu nation"), absolute (increasingly centralised and unaccountable) and opaque state, but do not theorise the centrality of extra-legality. Others have underestimated the role of politicised illegality in the majoritarian project by suggesting that Hindu majoritarianism is "advanced through lawmaking rather than vigilante violence or state coercion" (Nilsen et al., 2022), or that it crafts "Hindutva constitutionalism" essentially by using the Constitution's "legal-technical ambiguities" as a language "to modify the existing legal-constitutional framework to expand the scope of Hindutva hegemony" (Ahmed, 2021). The framework of the irregular both challenges and complicates these approaches.

Finally, the irregular allows us to appreciate the problem of legal violence in India by rehabilitating the marginalised perspectives and experiences of the minorities. Dismissing the allegations of arbitrary violence against minorities, the Indian state today claims that its actions are either fully legal or at worse anomalies of no serious political consequence. But Muslims and other minorities are aware that the systematic public endorsement and acquiesce of state and non-state violence is entrenching their subordinate status in India's ascendant majoritarian state. Inordinate emphasis on legal formality overlooks how majoritarian authoritarianism systemically reconfigures and undermines the rule of law in the everyday lives in India, especially its minorities.

City Under Hindutva Rule

This and the following sections provide two further illustrations of how the irregular—combining the features of the practice of extra-legality, politics of ethnicization and entrenchment of minority subordination—configures India's everyday socio-legal life. I draw the first example from the recent demolitions of Muslim properties in several BJP-ruled states in India.

Through the summer of 2022, the BJP-dominated municipal authorities under the cover of city zonal regulations targeted hundreds of Muslim homes and shops in the context of Muslim protests or sectarian violence. The demolitions started in Delhi and Uttar Pradesh, and were soon adopted as state policy elsewhere including in Madhya Pradesh, Gujarat and Assam. The BJP and the wider cross-section of the Hindu right have mobilised for popular authorization and legitimisation of these demolitions, including successfully promoting these actions as flagship election issues. How

did urban zonal regulation become a site of ethnonationalist consolidation and what does it tell us about how Hindutva statecraft configures the law in contemporary Indian social life?

The anti-Muslim demolitions in the summer of 2022 should be understood in relation to Hindu nationalism's imagination of the country's space and its profound anxieties about Muslim presence in it. Hindutva at the broadest level seeks to 'sacralise' the territory of India as the basis of nationalism where religious association with the national space—rather than secular and civic connections—is the true source of Hindu/Indian-ness. Vinayak Savarkar, the originator of the term 'Hindutva', had famously proposed that only those who were Hindu by birth and 'blood', and whose spiritual practice was rooted within the Indian territory were real Indians. Hindutva's spatial strategy includes constructing majoritarian "heterotopias" (Deshpande, 1998) by remaking sites into politically charged spaces of majoritarian fantasies, consolidation, and violence.

The most intense example of this is the Hindutva mobilisation around the construction of temples on Muslim religious sites, which I take up in detail in the next section. Everyday spatial strategies have been equally significant for Hindutva, like redefining public spaces as 'Hindu' by sustained community pedagogies and engagement in neighbourhoods (Oza, 2013; Bacchetta, 2010), religious processions, and most disturbingly, riots and violence. Religious processions as "rituals of provocation" (van der Veer, 1996) through Muslim neighbourhoods have been the most common contexts of sectarian violence and a key strategy for Hindutva consolidation. Widespread communal violence especially since the 1960s and everyday forms of residential discrimination have redrawn the urban landscape by entrenching segregation, leading to Muslim ghettoization, and impeding inter-community social encounters (see generally in Jaffrelot and Gayer, 2012). Muslim 'ghettos' are frequently characterised as 'mini-Pakistan', suggesting that concentrated Muslim pockets in the city symbolise national borders and stigmatised alien spaces in the very heart of the Indian nation (Mehta, 2006). Unsurprisingly, Hindutva politics shares a profound anxiety in which "the visibility of Muslim bodies and buildings is…threatening" (Grant, 2005) and a "visual affront" (Deshpande, 1998).

There has been a recent proliferation of intense reaction against Muslim visibility in public spaces. Hindutva activists have mobilised to stop Muslims from offering namaz (Islamic religious worship) in public places despite conventions and government permissions. In contexts of intense politicisation, BJP governments have prohibited Muslim female students from wearing the hijab in public schools. There has also been tremendous Hindutva anxiety about Muslim protests and expressions in the public that stake claim to the shared civic spaces of citizenship claim making.

The intense Hindutva backlash that led to the demolitions in the summer of 2022 emerged out of these spatial anxieties and strategies. Their immediate context was punishing Muslims for their recalcitrance in participating in protests and for being singularly blameworthy in sectarian violence. The usual pattern involved protests or violence; followed by claims by the police that they had identified the conspirators, invariably Muslims; municipal administrations immediately stepping in to demolish houses of the alleged conspirators or in Muslim neighbourhoods on the ground of violating zonal

regulations, suggesting that government departments had coordinated action; and an intense period of politicisation where Hindutva politicians and activists mobilised public opinion in favour of the demolitions.

To understand how this intense politicisation became the basis of ethnicizing zonal regulations and paved the way for irregular state action, I give detailed accounts of two instances of demolitions. The first prominent instance occurred in April 2022, in Delhi's Jehangirpuri in the aftermath of sectarian clashes during Hanuman Jayanti processions (the birthday of the Hindu god Hanuman) as they passed through the Muslim-concentrated neighbourhood. Hindu processions had reportedly peacefully passed through the neighbourhood throughout the day of 16 April, but violence broke out when a third procession—which the police itself claimed during the subsequent lower court proceedings was without legal permission—allegedly raised provocative and humiliating anti-Muslim slogans and tried to put a Hindu religious flag on a mosque, resulting in mobs of Muslims and Hindus pelting stones at each other.

The incident soon triggered intense politicisation, with prominent BJP leaders claiming that the violence was a Muslim 'conspiracy' against Hindus and perpetrated by 'illegal migrants' from Bangladesh and Rohingya refugees, a claim that was completely baseless. The BJP's Delhi chief wrote to the city's BJP-run municipal authorities that considering 'anti-social elements and rioters [had] pelted stones' on the Hindu procession, they must identify and demolish 'illegal constructions of rioters' in the neighbourhood. The municipal authorities responded by initiating a two-day 'anti-encroachment drive'. On the morning of 20 April, bulldozers under the watch of over thousand security forces started demolishing properties without notifying owners as required under the law and despite the owners claiming to possess legal documents.

As national media was dramatically covering the demolitions live on television—with fanfare or horror depending on their political inclinations—public interest lawyers hurriedly approached the Supreme Court for an urgent intervention to halt what they called the "completely unauthorised, unconstitutional" demolitions. The Court for its part ordered the authorities to "maintain status quo" but the authorities continued the demolitions claiming to not have received any written orders. Scurrying back to the Court, the lawyers pleaded for an intervention again. "Despite the world knowing that this court passed orders, they are not stopping", the lawyer bewailed before the judges. "This is not right. We are a rule of law society", the lawyer continued. By the time the authorities stopped the demolitions one hour after the court order, many more homes and shops had been demolished.

Take the second instance of Uttar Pradesh's Prayagraj (Allahabad). In June 2022, violence broke out during protests in the city. Muslims were demanding legal action against two BJP spokespersons who had made statements against Prophet Mohammad that they perceived as derogatory and humiliating. The BJP chief minister Ajay Singh Bisht, a Hindu priest also known as Yogi Adityanath, instructed officials to "demolish any illegal buildings and homes of people accused of involvement in unrest" (Reuters, 2022). The authorities detained the city's prominent Muslim social activist Javed Mohammad, subsequently formally arrested him for being the 'mastermind' of the riots, threatened his family with 'bulldozer action' and went ahead to demolish his home. The demolished house did not belong to Mohammad but to his wife, the notice

for demolition was "backdated" (Pal, 2022) and hence was legally dubious (Hasan, 2022). The demolitions were televised live, and widely greeted by BJP politicians and sympathisers. The chief minister's media advisor tweeted that "every Friday is followed by a Saturday" (Ghosh, 2022) alluding to the BJP's resolve to punish Muslim protests, and another prominent BJP legislator tweeted the demolition video with the caption, "return gift to the rioters" (Pal, 2022).

This politics of demolitions has since spread to other locations. Under the cover of zonal regulations, municipal authorities have demolished Muslim properties in Madhya Pradesh and Gujarat (CSSS, 2022) in the context of sectarian violence like Delhi's Jehangirpuri. Authorities in Assam have demolished madrasas (Islamic religious seminaries) claiming to be built by 'illegal migrants' from Bangladesh or by persons involved in terrorism (Apoorvanand and Gogoi, 2022). In May 2022, Delhi's municipal authorities sent demolition bulldozers into Shaheen Bagh—the most prominent site of Muslim protests against the Citizenship Amendment Act in 2020—amidst heightened politicisation and media coverage. A crowd of residents surrounded the bulldozers, eventually leading to the authorities cancelling the scheduled demolitions. "The MCD [Municipal Council of Delhi] was here to scare us", one resident was reported to have told the newspapers. Another added, "we see bulldozers being used freely by this government… Is this country run by the Constitution, or by bulldozers?" (quoted in Harigovind and Mishra, 2022).

These instances of the state exercising arbitrary violence reflect the configurations of the irregular that I have outlined in the previous section. Take the first feature of systematic extra-legality. Notwithstanding municipal authorities claiming before the courts and the media that their actions were directed against unauthorised constructions, these demolitions clearly violated the law. Statutory law under which the authorities purported to have acted requires the serving of notice and a 'reasonable opportunity of showing cause', including an adequate period to remove any permanent constructions. Indian constitutional law has an established requirement that the administration must give fair and adequate notice, hearing, and meaningful engagement if it seeks to remove unauthorised constructions (Sahgal, 2022). The authorities violated each of these legal requirements by providing no notice, hearing, and meaningful time to respond before the demolitions. In fact, the illegality of these actions has not even been a controversial matter, with a consensus among civil society actors and legal commentators that they violated the constitutional right to property, the rule of law (Rajagopal quoted in Thapar, 2020b), the right to residence and the fundamental right to life (Lokur, 2022).

Rather than being sporadic or incidental, the demolitions were a systematic and conscious exercise of arbitrary state violence against Muslims. Retired Supreme Court justices described the demolition policy as "clearly…arbitrary" that "smacks of vendetta, legal and factual mala fides" (Lokur, 2022) and "absolutely illegal and an act of a police state" (Gupta quoted in Vishwanath, 2022). A public letter written by legal experts, including six retired Supreme Court and High Court justices, while pleading that the courts take up this matter, called the demolitions a "brutal clampdown by a ruling administration' that is "an unacceptable subversion of the rule of law and a violation of the rights of citizens, and makes a mockery of the Constitution and fundamental rights guaranteed by the State".[2] Opposition leaders have claimed that the government

authorities had "turned into lawless mobsters", engaged in "a brazen demolition of our constitutional order",[3] and "exempted itself from the Constitution of India".[4] While the administration has spoken in multiple tongues, political and institutional actors have acknowledged—under their breath, if not publicly—the true nature of these demolitions. As a former Supreme Court justice accepted, the claim of demolishing unauthorised buildings was just a garb for "teaching a lesson" to the protestors and their collective punishment (Lokur, 2022).

This systematic and widely acknowledged exercise of arbitrary violence against Muslims was facilitated by intense Hindutva mobilisation. This mobilisation led to the ethnicization of zonal regulations. Informality is pervasive in Indian cities (Roy, 2009) and far from limited to one community, 'unauthorised' housing dominates the fabric of the urban landscape. Indian law and legal institutions have had a consistently poor record of protecting the most marginalised—who occupy these 'informal' and 'unauthorised' spaces—from arbitrary displacement and demolitions (Bhan, 2016; Bhuwania, 2017). But even for scholars who have documented the frequent urban exclusion in India, the demolitions in the summer of 2022 marked something distinctive. Urban sociologist Sanjay Srivastava (2022) noted that these demolitions, which arose out of the increasing "association between Muslims and illegality and illegitimacy", had turned the state into "an informal and ad hoc instrument of governance" to "cleanse" Indian cities of its Muslims. Scholars identified in these developments the "dangerous" new development where the Indian state had "openly abandoned" religious neutrality among communities and was "combining state power above with street power below" against Muslims (Varshney, 2022). Zonal regulation thus became a site of ethnonationalist consolidation and an instrument of minority subordination.

Illegality in the case of demolitions was not an ordinary form of anomie that undermined state's authority. It did the opposite. These intense activities of Hindutva politicisation of extra-legal violence constituted a new ethnonationalist understanding of state legitimacy by affirming and endorsing extra-legality. Beyond the celebration of brazen illegality through media communication, 'bulldozer justice' has been consistently framed as an electoral issue. Yogi Adityanath made the demolitions an election plank during the state's elections in 2022, revelling under his popular epithet 'bulldozer baba' – the 'bulldozer priest'. He won the election by a landslide. Madhya Pradesh's BJP chief minister Shivraj Singh Chouhan, in turn, appealed to his voter base by touting himself as 'bulldozer mama'— 'bulldozer uncle'—and instructed the police to demolish houses of "rioters" and "rapists" (Mateen, 2022; Sarkar, 2022). The government was both an agent facilitating public consent around the legitimacy of arbitrary violence against minorities, and a majoritarian state that enforced the majoritarian will notwithstanding the law. The public violation of the rule of law was not incidental to state violence. It was what made violence politically constitutive of the majoritarian state. The fusion of systematic exercise of arbitrary violence against the minorities and ethnonationalist legitimisation reflects the contours of the irregular in India's ascendant majoritarian state.

The irregular is captured by the limitations of normative legality in responding to arbitrary violence. In the initial phase of demolitions, for instance in Delhi, state actors simply ignored court orders. During the subsequent hearings on petitions filed in the Supreme Court against the demolitions, the lawyers representing Muslims pointed out the

context and specificities of illegality. A senior lawyer told the judges: "We haven't seen this in this country, not during emergency not in pre-independence India… This can't be countenanced in a Republic and in a country with [the] rule of law". The lawyers argued for completely halting "any criminal proceedings as an extra-legal punitive measure" since such "extra-legal measures" violate "the principles of natural justice" (Ojha, 2022), and demanded contempt proceedings against officials who violated the Court's directions.

Despite the overwhelming evidence of irregularity, the most generous assessment of the Supreme Court's response would be to call it cautious. The Court expressed reservations about passing an 'omnibus order' against all the demolitions or constituting a judicial commission to systematically inquire into illegalities.[5] Rather placidly, it directed the administration to conduct the demolitions only "in accordance with law" and not in "retaliation". The Court's order—arguably appropriate in the context of ordinary due process violations—clearly overlooked that the government had adopted demolitions as an ideologically driven state policy. This amounted to an "unconstitutional state of affairs" (Bhatia, 2022) in terms of the scale of rights violations and the systematic emasculation of the rule of law in relation to the minorities. It is difficult to be say whether this was because of the Court's lack of imagination—its inability to legally craft a more responsive relief—or plain reluctance to confront the state's assertive political agenda. Irrespective, the Court's inability or disinclination maintained the irregular by rendering normative legality meaningless to counter arbitrary violence.

The bulldozing of Muslim homes reflects the irregularization of minority citizenship that is reminiscent of Assam's citizenship dispossession. Members of the minority communities have articulated the nature of these irregular practices and their resulting experience of minority subordination in singularly articulate terms. This minority experience is that of erasure and immateriality of citizenship. An old Muslim woman in Delhi's Jehangirpuri, whose son was detained by the police while her neighbourhood faced demolitions told journalists in anguish that "they"—the police and government authorities— "have closed the gates. Shout as much as you want. No one is listening" (Ahmad, 2022). Social activist Afreen Fatima, the daughter of Javed Muhammad whose home was demolished by the Prayagraj municipal authorities, wrote after the demolitions that "there's no legal provision for such demolition of private property… But it doesn't matter; the whole idea is to demonstrate that Muslims have no legal protection in a Hindu state. We are not equal citizens" (Fatima, 2022). The experience of subordination is vulnerability writ large, legality notwithstanding. In absolute candour, Fatima told a journalist that all this was "to make the process the punishment… More than 200 million Muslims are being forced to live in a constant state of insecurity, fear that anytime a bulldozer might come and bring down out house" (Fatima, 2022). This is the condition this article has called irregular minority citizenship—grave insecurity produced by extra-legal practices justified on the ground of ethnonationalist values—that encodes minority subordination without its formal incorporation.

Religious Monuments Under Hindutva Rule

My next example is the recent legal politics around the seventeenth century Gyanvapi mosque in the north Indian city of Varanasi. The mosque built by the Mughal emperor

Aurangzeb supposedly after demolishing a Hindu Shiva temple (Desai, 2003) stands next to the iconic Kashi Vishwanath temple. Hindus at least since the early nineteenth century have legally claimed the mosque's precincts as an extension of the temple. Indian Parliament in early 1990s dissolved the legal dispute through legislation. The dispute subsided until 2018, when Varanasi's lower courts dramatically revived it, feeding an intense and ongoing Hindutva mobilisation.

This section shows how the revival of the Gyanvapi legal dispute reflects the ethnicization of statutory law of religious monuments and the norms of judicial process, resulting in the broader patterns of irregularization that entrench minority subordination. In the previous two examples, the political branches were the primary actors driving the process of ethnicization, even as the courts followed by acquiescing and endorsing irregularization. The case of religious monuments shows that judicial actors may, and in fact have also led this process.

The rebuilding of temples—claimed to have been destroyed by Muslim rulers—has been central to the Hindu nationalist thought as an instrument of remedying past Hindu humiliation and reviving Hindu pride (van der Veer, 1987). Beyond these goals, Hindutva activists have also sought ethnonationalist consolidation and domination by politically mobilising around temple claims over existing Muslim religious sites. The most significant example of this is the mobilisation for the destruction of the sixteenth century mosque Babri Masjid in the town of Ayodhya and building a Hindu temple in its place. Hindu nationalists claimed that the site was originally a Hindu temple marking the precise birthplace—janm bhoomi—of the Hindu god Lord Rama that was destroyed by the first Mughal emperor Babar. The Rama janm bhoomi agitation in the 1980s galvanised Hindu popular sentiment, led to Hindutva mobs destroying the mosque in 1992, and eventually paved the way for BJP's electoral consolidation (Jaffrelot, 1998). Hindutva activists see the presence of such mosques on claimed Hindu sacred sites as an affront to Hindu/national pride— "a sign of [a] traumatic wound in the nation and in Hindu civilization" (Hansen, 1999, 173)—making their retrieval and 'liberation' a central ongoing nationalist project. The success of the Rama janm bhoomi agitation also proved the ethnonationalist virtues of such mobilisations, including consolidating Hindus around a shared imagination of victimisation particularly against Muslims as outsiders and invaders, crafting the "homogenization of a national Hinduism" (van der Veer, 1994) and entrenching Hindu religious symbolism as the basis of Hindu/Indian nationalism (Hansen, 1999). Alongside Ayodhya, Hindutva activists in the early 1980s politicised many other temple/mosque demands, sometimes claiming that as many as 30,000 mosques were built on destroyed temples and must be returned to Hindus. The Gyanvapi mosque was one of their key demands, though the Ayodhya agitation came to increasingly eclipse it.

The law has been implicated in this religious politics in a variety of contradictory ways as the instrument to satiate, aggravate or prevent religious animosity. The Indian state and the wider cross-section of Muslim claimants have historically appealed to formal legality. They have been optimistic that normative law and its institutions can deliver legitimate routes to resolve deeply politicised conflicts. Hindutva activists in contrast have often insisted that "matters of faith" cannot be determined in a court of law (Varshney, 1993). The long slew of property legal claims in the Ayodhya dispute, originating in

civil suits as early as 1885 (Mehta, 2018) turned Indian courts into the principal site of religious conflict. During the more than century long litigation that this article cannot offer a comprehensive critique of, the courts have had a mixed record of keeping secular reason sanitised from religious faith (Dhavan, 1994; Mehta, 2015; Mehta, 2018) often deciding controversial legal questions based on the "inner voices" of conscience (Gupta, 2010) and "Hindu faith" (Kapur, 2014). In 2019, the Indian Supreme Court in the *M. Siddiq* (Ayodhya) case heard the appeals from the Ayodhya civil suits and ruled in favour of constructing the temple in a controversial judgment that stretched ordinary understandings of property rights.

The Supreme Court in the Ayodhya case, nevertheless, retained the optimistic view of normative legality's potential in containing religious conflict through two primary strategies, both of which appear to have failed. The Supreme Court's judgment offered the law as reckoning, by recognising that the "desecration of the mosque" in 1992 was a "calculated act" and that Muslims had been "wrongly deprived" of the mosque. The judges may have expected that this acknowledgment would reassure Muslims about the promise of the rule of law in India and underscore the importance of the criminal cases against the conspirators of the demolition. This was not to be when in 2020, a special criminal court acquitted all the 32 accused in the demolition case, and contrary to the Supreme Court's views on the matter, held that the mosque's demolition was "not pre-planned".[6]

The second strategy, which is the focus of this section, centres on the Places of Worship (Special Provisions) Act, 1991 (the PW Act). Anxious that mobilisations like the Rama janm bhoomi agitation would unleash uncontrollable violence, Parliament under this statute prohibited anyone to "convert any place of worship of any religious denomination" into a place of worship of a "different religious denomination". The PW Act also laid down that the "religious character of a place of worship" shall remain the same as it was at the time of India's independence (15 August 1947) and made any legal attempt seeking its "conversion" as non-maintainable. This was a broad prohibition that extended to "any suit, appeal or other proceeding" before "any court, tribunal or other authority". The only exception to this was the Ayodhya dispute.

The PW Act was the most ambitious attempt of the normative state to satiate deeply divisive religious disputes in the country. The law's advocates argued that changing the religious complexion of any historic site would be a lethal threat to the country's social harmony. Muslims would see it as domination, not historic justice; and Hindus would see it as legitimising their larger claims, founded or otherwise, and encourage them to further violently mobilise. Indian history, the advocates of the law argued, was contested, layered, and most of all, messy. Historical accounts suggested that many Muslim rulers had destroyed non-Muslim places of worship, just as many Hindu rulers had destroyed Buddhist temples before. The PW Act sought to freeze these conflicts—that could fundamentally undermine political stability—in constitutional time. There was also the crucial —though often under-articulated—rationale of legal legitimacy: claims of historic and archaeological fact can often be impossible to arbitrate, and if sought to be conducted by the courts are bound to undermine their reputation as judicious and fair institutions.

The Supreme Court's judgment in the Ayodhya case framed these concerns in the catch-all phrase of 'secularism'. It noted that the law "cannot be used as a device to reach back in time and provide a legal remedy to every person who disagrees with the

course which history has taken". It observed that the PW Act provided "a constitutional basis for healing the injustices of the past". It was, according to the Court, "designed to protect the secular features of the Indian polity" and "enforced a constitutional commitment and operationalized its constitutional obligations to uphold the equality of all religions". It finally held the Act to be part of the unamendable and basic features of the Constitution and elevated it to one of the central tenets of the Indian normative state.[7]

To understand how these proclaimed values of the normative state have started to unravel against the irregular, most immediately in the context of the Gyanvapi mosque controversy, I give a detailed account of the dispute's recent case history. This account shows how intensely growing Hindutva political and legal mobilisation against the constraints of the PW Act, inside and outside the courts, is leading to a creeping ethnicization of the law of religious monuments and the judicial process.

During the Ayodhya agitation in 1991, several Hindu groups filed a property title suit against the Gyanvapi mosque administration before a Varanasi city civil court.[8] They demanded the legal recognition of their right to use the mosque precincts "as place of worship", to "renovate and reconstruct their temple" and integrate it with the Vishwanath temple. The mosque administration contested the suit and argued that it was not maintainable under the recently passed PW Act. In 1998 the Varanasi district court decided to admit the suit to be tried on evidence. The mosque administration challenged this order in Uttar Pradesh's state High Court. Considering that the district court's decision had raised a legal question about the interpretation and application of the PW Act, the High Court accepted that the legal challenge to the district court's order should be decided on merits and stayed the trial.

The matter remained undecided in the High Court when in 2019, Hindu groups approached the Varanasi civil court and revived the case. This time they demanded that the Archaeological Survey of India (the country's premier archaeological agency, ASI) conduct an inquiry inside the mosque precincts to collect evidence of temple ruins. Despite the High Court's stay, the civil court granted the relief. As expected, the mosque administration immediately challenged the civil court's order in the High Court. The mosque administration argued that since the High Court was yet to decide the preliminary question of maintainability under the PW Act, it was improper for the trial to proceed. Like the previous occasion, the High Court agreed and once again stayed the trial.

Remarkably within a few months in April 2021, the Varanasi civil court commenced the trial. The Varanasi court ordered a five-member ASI committee to survey the mosque. The civil court authorised the ASI "to enter into every portion" of the mosque and conduct "excavation or extraction", with the "prime purpose" of finding out if the mosque was "a superimposition, alteration or addition…over any other religious structure". For the third time, the mosque administration challenged the trial in the High Court arguing that the civil court's order had been passed "in the most arbitrary manner" and "against the spirit of judicial discipline". The High Court agreed. In a strongly worded judgment, the High Court noted that the civil court for some "unfathomable reasons" had diverted from the discipline "warranted" by "judicial courtesy and decorum". "Judicial enthusiasm", the High Court noted, "should not obliterate the profound responsibility that is expected" from the civil court.[9]

These intra-institutional tensions between the lower courts and the higher judiciary indicate the contours of the law's ethnicization. The "judicial enthusiasm" in the lower courts appears to have been produced, cultivated and/or legitimised by intensely growing Hindutva mobilisation, reinforced by the BJP's victory in the 2019 national elections. The lower courts are legally bound to respect the directions of the higher judiciary. But a "coordinated strategy" (Poddar, 2022) of Hindutva groups—filing several similar petitions in the context of heightened political mobilisation—had started to push the lower courts to overlook the legal constraints of judicial process and statutory law.

The strategy finally paid off the fourth time, when within months of the High Court's rebuke, five Hindu women devotees filed a new petition demanding the "restoration of performance of [Hindu] rituals" in the mosque's precincts. Unlike the previous petitions, this petition did not directly challenge the mosque administration's title over property but demanded the right to offer Hindu worship inside the mosque without interference. The civil court ordered a videographic inspection of the mosque premises in April 2022, immediately triggering a national spectacle and further politicising the issue. The mosque administration challenged the civil court's order in the High Court and argued that the fresh petitions were an "abuse of legal process" and the court-ordered administrative actions sought "to circle around" legal requirements and were an "attempt to disturb the communal peace and harmony" (Ojha, 2022). But this time, the appellate courts did not interfere. Under the watch of a heightening Hindutva mobilisation and divisive media reportage, the Supreme Court directed the Varanasi district court to first rule on the applicability of the PW Act.

The district court order that followed in September 2022 was a culmination of these intense acts of ethnicization led in concert by the lower courts, lawyers, and Hindutva activists. The Varanasi district court held that the PW Act did not place a bar on the claim of the Hindu devotees to offer worship in the mosque precincts. The district court held that the case did not involve 'converting a place of worship'—prohibited under the PW Act—since the Hindu devotees were not seeking "declaration or injunction over the property" but only "demanding [the] right to worship…visible and invisible deities" within the mosque precincts. The suit according to the district court was "limited and confined to the right of worship as a civil right and fundamental right as well as customary and religious right".

But in the court judgment's interstices, there were several unsubstantiated premises that altogether hollowed out the PW Act. The claim of the Hindu devotees—while framed as the right to access the mosque precincts as a matter of customary practice—was based on an assertion of the religious status of the mosque. The devotees argued that the Hindu deities had been "continuously existing within the property in the suit since before" India's independence. Despite Mughal emperor Aurangzeb's (alleged) demolition of the temple structure, "the deities continued to be [the] *de jure* owner of the property". Thus, they asserted, "the entire property…vests in the deity from the time immemorial" and the Muslim religious practices in the mosque precincts was "without any authority of law". The claim of religious customary practice that Hindus had been "continuously performing pooja" (Hindu religious worship) in the mosque precinct was based on this assertion of the Hindu sacred character of the space. The Hindu devotees may not have explicitly questioned the mosque administration's title over the

mosque precinct, but they had questioned its very character as an Islamic space. By accepting that the PW Act only prohibited suits that questioned the title of religious property, the district court opened a different and equally pernicious route of 'converting the religious character' of places of worship – by asserting the existence of religious beliefs and customs that can fundamentally alter the sacred character of sites.

The district court's order is a pathway of creating "facts on the ground" (Imseis, 1999; El-Haj, 2001), a strategy commonly associated with settler colonial states surreptitiously acquiring colonised territories. In the context of Israel, Nomi Maya Stolzenberg (2009) argues that the "concept of facts on the ground" involves the state adopting "extra-legal" policies of colonial settlement that create a new "practical reality" by altering territorial demography and land possession. The aim of this strategy is to eventually facilitate "the conversion of a *de facto* reality into a *de jure* reality, either a newly and fully legalized state of affairs, or if not that, then a state of affairs that nevertheless cannot be undone" (Stolzenberg, 2009, 115). As Stolzenberg argues, despite being legally "deviant practices", the reason why "*de facto* possession" (and hence, the strategy of creating facts on the ground) succeeds is because it "has a strong tendency to ripen into *de jure* possession". "Practical reality" has "normative power or force that affects the outcomes of disputes, biasing the outcome in favor of the established status quo and, hence, against a restoration of the status quo ante" (Stolzenberg, 2009). The district court's order has paved the way for constructing a new "practical reality" under the cover of the law by providing Hindu religious claims legal recognition as *already existing* customary practice, which can legitimately claim state protection and state sanctioned dispossession of competing claims.[10]

The evolution of the Gyanvapi case reflects the irregular. The district court's judgment was a culmination and an expression of ethnicization. Intense Hindutva ethnonationalist mobilisation—in this case involving state (the lower courts) and non-state (Hindutva activists, lawyers, and sympathetic media) actors—led to the ethnicization of the law. This first involved lower courts practically disregarding ordinary legal conventions and norms of judicial process, and then making the PW Act immaterial in precisely the religious conflicts the legislation was meant to forestall.

The systemic consequence is now the increasing insecurity of Muslims. In the wake of the revival of the Gyanvapi legal dispute and the diminution of the PW Act, several other petitions against other mosques have been filed (Ahmed, 2022). These include new petitions, including unprecedented claims regarding the iconic Taj Mahal, which are incrementally making Muslim control over religious monuments precarious. Religious worship is perhaps a smaller concern compared to the premonition of sectarian violence that such ethnonationalist mobilisation has historically accompanied.

Conclusion

This article highlighted the overlooked features of lawfare under India's ascendant Hindu majoritarian state. The first implication of the analysis is for the nature of this lawfare. The law is both the tool and the site for ethnonationalist domination. Authoritarianism in India operates not only in self-evidently formal or informal ways, but also through compellingly extralegal routes. The state is not only reworking existing law in service

of the majoritarian project. It is increasingly rendering the rule of law immaterial in Indian social life. Hindutva's legal constitution, thus, is to reconfigure India's socio-legal life by delimiting the rule of law.

This has lessons for contexts outside India, and our understanding of the law's role in contemporary processes of democratic decline and the rise of electoral authoritarianism globally. The article reveals that, just as authoritarian practices are complex, variegated, targeted and diverse, so is their relationship with the law. Authoritarian practices characterising democratic decline may often operate under the cover of the law to fundamentally make the rule of law inconsequential. Lawfare engendering democratic decline not only includes the subtle and incremental use of the law, or its formal or informal instrumentalization to undermine the democratic process. It also includes the arguably much more insidious exercise of extra-legality that maintains the appearance of a rule-bound democratic system while hollowing it out over time.

The second implication of this article's argument is for our understanding of how the law constitutes new forms of authoritarian politics. The practices of authoritarian politics, as the framework of the irregular illuminates, are populist and authoritarian, as also popular and public. They promote the centralisation of political power, as also the politicization and polarisation of the public sphere. The framework reveals the implication of the social dimension in democratic decline: how the public sphere becomes the space for ethnonationalist mobilisation through the ethnicization of the law. As the case studies in the article show, this politicization happens through concerted yet disparate acts of legal/extralegal spectacle and violence. From this perspective, paradoxically, the persistence of elections in contexts witnessing democratic decline is not (necessarily) evidence of democracy. Elections are shorn of their democratic role of constituting accountability and shared political communities. Rather, ostensibly democratic elections become moments for enacting these violent ethnonationalist spectacles and provide opportunities for gaining popular legitimisation of extra-legality and subordination.

The third implication of the article is to show how legal politics engenders state transformation. The article theoretically bridged the role of formal/informal and legal/extralegal in constituting India's ascendant majoritarian state. Public performances, popular authorization and institutional endorsement of extra-legality reshape the understanding of state legitimacy. Institutional and non-institutional actors, as the case studies showed, often work in concert to produce this new understanding of legitimacy. Institutional actors may include politicians or ethnonationalist activists, but also officials and judges. Moreover, authoritarian politics in context of democratic decline introduces fundamental cleavages in the exercises of state power based on who is being subjected to it. This hybrid legality constitutes hybrid polities because democratic politics becomes reserved only for full citizens. The rule of law becomes the dividing line between those who are subjected to accountable state power and others who may be violated without it.

Finally, the fourth implication is for the relationship of national minorities with the contemporary processes of democratic decline, which has not been systematically studied. There are several questions to consider. What are the ways in which democratic decline is constituted by, and in turn constitutes anti-minority politics? How does legal politics under conditions of democratic decline engender new and sometimes legally

obscure forms of minority subordination? How do these dynamics create a new form of legal rule? The article answered these questions by arguing that it is not only the formal incorporation of graded citizenship, but a wide and arguably more complex array of state practices of violence and legitimation that can legally constitute group domination and subordination. Minority subordination is produced, outside formal incorporation of graded citizenship, by fostering perineal vulnerability to arbitrary violence. This resonates with recent scholarship in other hybrid-electoral contexts arguing that despite the existence of formal equality among citizens, the state enforces the rule of law in "situational" ways depending on whether minorities are involved (Jabareen, 2020).

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Court Cases

Ashwini Kumar Upadhyay v Union of India, Writ Petition (Civil) 1216/2020
Assam Sanmilita Mahasangha v Union of India 2015 (3) SCC 1
M. Siddiq v Mahant Suresh Das (2019) SCC OnLine 1440
Sarbananda Sonowal v Union of India (2005) 5 SCC 665
Swayambhu Lord Vishweshwar v Anjuman Intezamiya Masjid Varanasi, Original Suit No. 610 of 1991 (15 October 1991), Court of Civil Judge (Junior Division).
U.P. Sunni Central Waqf Board v Ancient Idol of Swayambhu Lord Vishweshwar, Matters Under Article 227 No. 3562 of 2021 (9 September 2021), High Court of Judicature at Allahabad.

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Notes

1. For the documentation of sedition law, see 'A Decade of Darkness: The Story of Sedition in India', *Article 14*, https://sedition.article-14.com. For the documentation of the misuse of anti-corruption law against the political opposition, see 'Under BJP Government, Cases Against Political Rivals Explode: NDTV Analysis', *NDTV*, 22 December 2021, https://www.ndtv.com/india-news/under-bjp-government-cases-against-bjp-rivals-explode-ndtv-analysis-2665911.

2. The signed letter can be found at https://im.rediff.com/news/2022/jun/14petition.pdf (accessed 15 January 2024).
3. 'Demolition in Jahangirpuri: After communal flare up, bulldozer politics', *The Indian Express*, 21 April 2022, https://indianexpress.com/article/cities/delhi/demolition-in-jahangirpuri-after-communal-flare-up-bulldozer-politics-shobha-yatra-hanuman-jayanti-violence-delhi-7879373.
4. 'UP bulldozer drive: Shashi Tharoor asks '…under what law?'', *Mint*, 12 June 2022, https://www.livemint.com/news/india/up-bulldozer-drive-shashi-tharoor-asks-under-what-law-11655037351867.html.
5. 'Ram Navami violence: SC dismisses plea seeking judicial panel', *The Indian Express*, 27 April 2022, https://indianexpress.com/article/cities/delhi/ram-navami-violence-sc-dismisses-plea-seeking-judicial-panel-7888903.
6. 'All acquitted in Babri Masjid demolition case', *The Hindu*, 30 September 2020, https://www.thehindu.com/news/national/ayodhya-babri-masjid-demolition-case-verdict/article62125062.ece.
7. The PW Act is currently under constitutional challenge in the case of Ashwini Kumar Upadhyay v Union of India, Writ Petition (Civil) 1216/2020.
8. Swayambhu Lord Vishweshwar v Anjuman Intezamiya Masjid Varanasi, Original Suit No. 610 of 1991 (15 October 1991), Court of Civil Judge (Junior Division).
9. U.P. Sunni Central Waqf Board v Ancient Idol of Swayambhu Lord Vishweshwar, Matters Under Article 227 No. 3562 of 2021 (9 September 2021), High Court of Judicature at Allahabad.
10. This is not an unprecedented strategy and in fact had been adopted in the Ayodhya case. Deepak Mehta (2015) has shown how the state and courts addressing Hindu legal claims over the course of a century shifted the concrete realities in favour of Hindu claimants by constantly redefining what constituted as the 'status quo', which eventually made factual claims of historically existing Hindu customs in the contested sites plausible and irrefutable. The difference in the case of Gyanvapi is that unlike Ayodhya, the PW Act prohibits precisely such practices that may alter the 'character' of a religious place.

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