

‘ESSENTIAL RELIGIOUS PRACTICES’
DOCTRINE AS A CAUTIONARY TALE:
ADOPTING EFFICIENT MODALITIES OF
SOCIO-CULTURAL FACT-FINDING

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In India, interactions between law and religion have often culminated in fractious, long-standing disputes. To reconcile this tension, a diluted form of legal pluralism was embraced in the post-Independence period. A delicate balance was struck between ‘universal’ state laws and ‘localized’ religious norms. In recent times, this balance has been upended by a judicial application of the ‘Essential Religious Practices’ (ERP) doctrine – a doctrine whereby protection is conferred on beliefs or practices judged ‘essential’ to a religion. In carving out the essential core of a religion, courts in India have retained only those religious norms that conform to the ‘globalizing uniformity’ of state laws. Surpassing a purely legal or constitutional perspective, this paper investigates the socio-cultural consequences emanating from this essentializing discourse. By employing the methodology of critical discourse analysis, it argues that one of the discursive implications of the ERP doctrine has been to undermine the internal autonomy and normative pluralism of religions. In doing so, it has also disregarded their dynamic nature and universalized dominant cultural norms. Perceiving this as a cautionary tale, this paper theorizes that any potential substitute for the ERP doctrine needs to steer clear of the same shortcomings and accord due weightage to the cultural particularities of religious groups. In this regard, the utility of anthropological expertise in enhancing modalities of socio-cultural fact-finding is discussed.

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I. INTRODUCTION

*"Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion."*¹

In an increasingly multicultural world, the coexistence of different bodies of norms within the same social space cannot be overlooked. Quite predictably, such normative pluralism begets aspirations for legal pluralism - typified by the cohabitation of polycentric laws of equal import.² These aspirations, however, are often at odds with the centralizing impulse of modern-day Westphalian states. A product of specific historical and political conditions,³ such legal centralism tends towards a top-down model⁴ wherein the state is perceived to be the sole repository of law.

To reconcile this tension and adopt a more pragmatic position, many states have embraced a diluted form of legal pluralism. Even while recognizing a unitary national legal system, they are receptive to plural sources of law, particularly in areas like personal or social relationships.⁵ Arguably, post-Independent India falls within this category. Along with an overarching system of codified state law, it recognizes the existence of localized or personal laws for members of different communities.⁶

¹ John Griffiths, 'What is Legal Pluralism' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1, 4.

² Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification' (2007) 1 *EJLS* 1.

³ See Georges Gurvitch, *Sociology of Law* (Routledge and Kegan Paul 1973).

⁴ EsinÖrücü, 'Diverse Cultures and Official Laws: Multiculturalism and Euroscepticism?' (2010) 6 *Utrecht Law Review* 75.

⁵ *ibid.*

⁶ Zoya Hasan, 'Diversity and Democracy in India' (India-EU Round table, London, December 2004) <<https://www.eesc.europa.eu/en/documents/discussion-paper-diversity-and-democracy-india-professor-zoya-hasan-rapporteur>> accessed 9 February 2020.

The reality of legal pluralism, however, has proven to be far more complex. In cases where there are contradictions between legally recognized normative orders,⁷ India is faced with a juristic dilemma.⁸ Does the ‘globalizing uniformity’ of state law trump the ‘localized exceptionalism’ of cultural norms? If so, how can dominant groups be prevented from universalizing their own practices? Alternately, if cultural relativism is to be afforded more space, how can the state keep a short leash on localized social problems like forced marriages, honour killings etc.?

In cases where religious norms appear to clash with the overarching constitutional structure, courts in India have chosen to side-step this Gordian knot. Rather than engaging in the politically fraught exercise of balancing religious norms vis-à-vis constitutional/state norms, they have developed a threshold criterion to determine which religious norms merit protection to begin with. This has been dubbed the Essential Religious Practices (‘ERP’) doctrine; a doctrine whereby legal protection is conferred on matters deemed ‘essential’ to a religion. Applying this threshold criterion has had the unstated advantage of dismissing certain beliefs or practices as unessential, thereby rendering a balancing exercise unnecessary.

Despite this apparently astute manoeuvring, an application of the ERP doctrine has proven to be controversial. Judicial pronouncements on the essential nature of religious beliefs and practices have raised significant concerns regarding constitutional/liberal values of religious autonomy as well as the competence of the court. The fulminations witnessed in the aftermath⁹ of the 2018 Sabarimala verdict¹⁰ stand testimony to this. At present, a nine-judge bench of the Apex Court¹¹ is readying itself to render an ‘authoritative pronouncement’ on the scope of judicial review under Article 25 of the Constitution.¹² In this

⁷ The relationship between ‘local law’ and ‘state law’ can be imagined as a continuum, ranging from rapprochement to distancing. See Keebet von Benda-Beckmann and Bertram Turner, ‘Legal Pluralism, Social Theory and the State’ (2018) 50 *The Journal of Legal Pluralism and Unofficial Law* 255.

⁸ Daniela Berti and Gilles Tarabout, ‘Criminal Proceedings in India and the Question of Culture: an Anthropological Perspective’ (*HAL*, 2013) <<https://halshs.archives-ouvertes.fr/halshs-00870593/document>> accessed 11 February 2020.

⁹ ‘Hundreds take part in Protests against Sabarimala Verdict’ *The Hindu* (Kochi, 20 October 2018).

¹⁰ *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1 : [2018] 8 SCJ 609.

¹¹ Harish V Nair, ‘Sabarimala row: Nine-judge Supreme Court Bench begins Hearing on ‘Essential Religious Practices’’ (*Times Now*, 3 February 2020) <<https://www.timesnownews.com/india/article/sabarimala-nine-judge-supreme-court-bench-begins-hearing-on-essential-religious-practices/548721>> accessed 9 February 2020.

¹² Krishnadas Rajagopal, ‘Sabarimala case: Supreme Court upholds referring religious questions to larger Bench, frames 7 questions of law’ *The Hindu* (10 February 2020) <<https://www.thehindu.com/news/national/sabarimala-case-supreme-court-upholds-referring-religious-questions-to-larger-bench-frames-7-questions-of-law/article30780943.ece>> accessed 12 February 2020.

regard, it is reasonable to presume that the bench will exhaustively consider the court's authority to probe ERPs.

While the legal and constitutional dimensions of the ERP doctrine deserve scrutiny, it is also imperative that we scrupulously examine the socio-cultural consequences flowing from its essentializing discourse. This helps to unravel the intricate web of power relationships and institutionally contingent knowledge that inform the application of this doctrine. Indeed, this forms the underlying objective of the instant paper.

By employing a critical discourse lens, this paper argues that the ERP doctrine has contributed to a discourse that a) disregards normative pluralism by invading the internal autonomy of religions, b) reifies religions as inert normative orders incapable of self-reformation, and c) foists dominant cultural norms on religious groups socialized within a different culture. The consequence of this discourse has been to unduly tip the scale against cultural exceptionalism. In order to avoid these fissures, the paper investigates alternative mechanisms to accord due weightage to localized religious norms in judicial proceedings. In this regard, the potential value of anthropological expertise as a modality for cultural/localized fact-finding is discussed.

Section II historically contextualizes the relationship between religions and the Indian state. Section III examines how the discourse of ERP has been sustained by an episteme that permits courts to control and discipline religions, thereby undermining normative pluralism. Section IV contends that the ERP doctrine has falsely constructed religious norms as static and invariable. Section V analyses how an application of the doctrine has reproduced dominant cultural norms with a particular focus on the Sabarimala example. Section VI investigates the value of anthropological resources in furthering an informed appreciation of cultural exceptionalism.

II. RELIGIONS AND THE INDIAN STATE

Before examining the evolution of the ERP doctrine, it is important to appreciate the unique historical legacy driving the relationship between religions and the Indian state.

India is home to an overwhelming diversity of religions, many of which are community-oriented¹³ and stipulate a disciplined ordering of social or political

¹³ Rajeev Bhargava, 'The Distinctiveness of Indian Secularism' in Aakash Rathore and Silika Mohapatra (eds), *Indian Political Thought: A Reader* (Routledge 2010).

life.¹⁴ A great deal of importance is ascribed not only to religious beliefs, but also to religious practices. Since practices are intrinsically social,¹⁵ religion inhabits an overtly public space in India.¹⁶

Furthermore, colonial history has had a lasting influence on the place of the 'sacred' in Indian public life.¹⁷ In pre-Independent India, the plural and de-centred religion of Hinduism was often evaluated against a Judeo-Christian metric, owing to the influx of Christian missionaries, colonial officials, and influential western philosophers.¹⁸ This, in turn, led to the emergence of numerous Hindu intellectuals who sought to engage in doctrinal debates on rationalist terms.¹⁹

As a result, India has bequeathed a public sphere where religion wields considerable influence.²⁰ Religious systems are not merely confined to 'private faith and worship'. This reality was recognized by the anti-colonial elite of India.²¹ Although modernists like Nehru and Ambedkar wished to establish institutional forms closely modelled on Western liberal democracies,²² they realized that an absolute devaluation of religion from politics would make little sense to the average Indian rooted in a religious worldview.²³

Accordingly, the Constitution departed from the Enlightenment notions of state neutrality or church-state separation.²⁴ An attempt by H.V. Kamath to introduce a clause inspired by American secularism was explicitly rejected.²⁵ Dictated by the practical exigency of reassuring minorities, the framers of the Constitution improvised and instituted rights that individuals could enjoy by virtue of their membership in religious communities.²⁶ This was primarily reflected in Articles 25 and 26 of the Constitution that guaranteed freedom of religion and autonomy of religious communities. At the same time, recognizing that a sacred-secular divide was not easily discernible, the drafters of the

¹⁴ Marc Galanter, 'Secularism, East and West' (1965) 7 *CSSH* 133, 159.

¹⁵ Bhargava (n 13).

¹⁶ Neera Chandhoke, 'Living Together: Secularism and the Making of an Indian Public Sphere' (21st Century Global Dynamics, 28 March 2017) <<https://www.21global.ucsb.edu/global-e/march-2017/living-together-secularism-and-making-indian-public-sphere>>accessed 9 February 2020.

¹⁷ Sugata Bose, 'Nation, Reason and Religion: India's Independence in International Perspective' (1998) 33 *EPW* 2090.

¹⁸ Chandhoke (n 16).

¹⁹ Sudipta Kaviraj, 'Modernity and Politics in India' (2000) 129 *Daedalus* 137.

²⁰ Chandhoke (n 16).

²¹ Ashish Nandy, 'The Politics of Secularism and the Recovery of Religious Tolerance' (1988) 13 *Alternatives* 177.

²² Kaviraj (n 19).

²³ Ashish Nandy, 'An Anti-Secularist Manifesto' (1995) 22 *IIC Quarterly* 35.

²⁴ Donald Eugene Smith, *India as a Secular State* (Princeton University Press 1967).

²⁵ Constituent Assembly Debates, 6 December 1948, vol 7 doc 67.

²⁶ Kaviraj (n 19).

Constitution qualified these provisions with a limitations clause. State interference was made permissible when religious beliefs and practices were contrary to public order, morality, health, or other provisions enumerated in Part III of the Constitution.²⁷ The state was also vested with the authority to make laws providing for social welfare and reform as well as the regulation of economic, financial, political, and secular activities associated with religion.²⁸

While some perceived this to be a dilution of secularism,²⁹ others like Nandy dismissed the very idea of secularism as a hegemonic language employed by 'Westernised intellectuals'.³⁰ On the other hand, Bhargava³¹ preferred to view the Indian model as the reimagining of secularism in India. He argued that Indian secularism was a product of transnational history; an ideal that drew inspiration from other polities but adapted itself to the cultural context of India. He termed it contextual secularism; one that maintained a 'principled distance' between religions and the Indian state.

In the post-secular³² world of today, contrary to the expectations of many a classical secularist,³³ religion has not been subsumed by forces of modernization. Many of the so-called liberal democracies are compelled to intervene in the private domain of modern subjects by reproducing their state apparatuses.³⁴ Thus, secularism has come to embody a new form of relationship between the private and public spheres that cannot be reduced to notions of state neutrality or church-state separation. It is against this backdrop that one must view the distinctive relationship³⁵ between religions and the Indian state. Appreciating this jurisprudential legacy is key to understanding the subsequent development of the ERP doctrine.

²⁷ Constitution of India 1950, art 25 and 26.

²⁸ Constitution of India 1950, art 25(2).

²⁹ Smith (n 24).

³⁰ Nandy (n 23).

³¹ Bhargava (n 13); Rajeev Bhargava, 'States, Religious Diversity, and the Crisis of Secularism' (*Open Democracy*, 22 March 2011) <<https://www.opendemocracy.net/en/states-religious-diversity-and-crisis-of-secularism-0/>> accessed 9 February 2020.

³² Jürgen Habermas, 'Secularism's Crisis of Faith: Notes on Post-Secular Society' (2008) 25 NPQ 17.

³³ See Thomas Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society* (MacMillan 1967); see also Peter Berger, *The Sacred Canopy* (Anchor 1990); Niklas Luhmann, *Religious Dogmatics and the Evolution of Societies* (Beyer tr, Mellen 1982).

³⁴ Talal Asad, 'Religion, Nation-State, and Secularism' in Peter van der Veer and Hartmut Lehmann (eds), *Nation and Religion: Perspectives on Europe and Asia* (Princeton University Press 1999).

³⁵ Bhargava (n 13).

III. PLURALISM AND THE ERP DOCTRINE

The previous section highlighted how the distinctive model of Indian secularism permitted the state to intervene in religious matters that were clearly delineated in the Constitution.

However, this carefully circumscribed power to intervene was subsequently expanded by the Supreme Court. Through a series of cases, it imposed a threshold requirement for enjoying religious freedom, namely the ERP doctrine. Under this doctrine, religious freedom was restricted to matters deemed ‘essential’ to a religion and state intervention was permitted in all extraneous matters. In other words, the court bifurcated religion into ‘essential’ and ‘non-essential’ practices and accorded protection to essential religious practices alone.³⁶

There have been multiple speculations as to why the court imposed this additional restriction on religious freedom, thereby re-defining the scope of state intervention. Khaitan³⁷ posits that the ERP doctrine was envisioned as performing a gatekeeping function: “given the fact that religious freedom is often used to advance some rather bizarre claims, by asking whether the practice is essential...the courts can basically keep the crazies out”. Alternately, former Justice Alam contends that in a country like India, it is easier to argue that something is not essentially religious as opposed to saying that religion is against public order or morality.³⁸ Offering a third perspective, Bhatia³⁹ notes that the standards of public order, morality, and health place a heavy burden on the state for justifying intervention – a burden that many regulatory laws find challenging to meet.

While accepting the force of these claims, this section focuses on another function that the ERP doctrine sought to perform. It is contended that the discourse of ERP was employed to further the centralizing impulse of the Indian

³⁶ Amit Raj Agrawal ‘Constitutional Sentiments and Judiciary: A Study on Freedom of Religion in India with special reference to Triple Talaq (Talaq-E-Biddat) Ruling’ (2018) *ILI Law Review* 71, 76 <<http://www.ili.ac.in/pdf/ara.pdf>> accessed 11 February 2020.

³⁷ Tarunabh Khaitan, ‘The Essential Practices Test and Freedom of Religion – Notes on Sabarimala’ (*Indian Constitutional Law and Philosophy*, 29 July 2018) <<https://indconlawphil.wordpress.com/2018/07/29/guest-post-the-essential-practices-test-and-freedom-of-religion-notes-on-sabarimala/>> accessed 11 February 2020.

³⁸ Aftab Alam, ‘The Idea of Secularism and the Supreme Court of India’ (2010) *Pluralism Working Paper Series No. 5*, 21-22 <<https://knowledge.hivos.org/sites/default/files/publications/pwpno5theideaofsecularism.pdf>> accessed 11 February 2020.

³⁹ Gautam Bhatia, ‘Essential Religious Practices and the Rajasthan High Court’s Santhara Judgment: Tracking the History of a Phrase’ (*Indian Constitutional Law and Philosophy*, 19 August 2015) <<https://indconlawphil.wordpress.com/tag/essential-practices/>> accessed 10 February 2020.

legal system. In carving out the essential core of a religion, the court has included only those norms that align with the overarching norms of the state. Religious norms inconsistent with official state norms have been strategically dismissed as 'unessential' beliefs and practices. To clarify this further, the *first* sub-section explores the manner in which the ERP doctrine evolved so as to create this epistemic reality. The *second* sub-section analyses the consequences flowing from the centralizing discourse of this doctrine.

A. Evolution of the ERP Doctrine

It has already been established that the Supreme Court propounded the ERP doctrine as a tool to restrict religious freedom to essential matters. However, on a bare perusal of the Constitution, it becomes apparent that the term 'essential' does not find a place in it. The right to profess, practice, and propagate is extended to all religious matters on a general basis.⁴⁰ How then, did the concept of ERP come about?

The Constituent Assembly Debates furnish a clue in this regard. A speech delivered by Ambedkar is particularly illuminating:

The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill...There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals...which are *essentially religious*. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion...⁴¹

Thus, Ambedkar's use of the term 'essentially religious' was in response to a very specific concern. He was well aware that unlike certain countries with their seemingly clear demarcation between the church and the state, there was no aspect of Indian life untouched by religion. Therefore, if the Constitution was to protect every religious aspect, there was a real risk that the state's power to pass social legislation would be constrained. Bearing this in mind, he insisted that there ought to be a delineation between religious activities and secular activities tinged with religion, so that the latter could be subject to state

⁴⁰ Constitution of India 1950, art 25.

⁴¹ Constituent Assembly Debates, 2 December 1948, vol 7 doc 65 (emphasis added).

intervention. In other words, the term ‘essential’ was employed to separate the religious from the secular.⁴²

This interpretation of ERP was initially followed by the Supreme Court. In one of its earliest cases⁴³ pertaining to the validity of state intervention in religious endowments, the Court specifically noted that secular activities (economic, commercial, or political in character) which might be associated with religion but did not constitute an essential part of it, would be amenable to state regulation. At the same time, it imposed the caveat that due respect had to be accorded to the internal doctrines of a religion when determining whether a matter was essentially religious or secular.

For example, if the tenets of a sect prescribed that periodical ceremonies were to be performed in a certain way at certain periods of the year, this would constitute an essentially religious matter, even if it involved secular activities like expenditure of money or employment of priests.⁴⁴

When viewed through a Foucauldian lens, it is apparent that this discourse was structurally related to the broader episteme of the historical period in which it had arisen.⁴⁵ It was sustained by systems of knowledge that acknowledged the distinctive model of Indian secularism; a model wherein the relative autonomy of religious communities was respected,⁴⁶ even while the state’s authority to legislate on religious endowments was not contested.⁴⁷

However, this understanding was gradually eroded in subsequent judgments. Contrary to Ambedkar’s postulation, the connotation of the term ‘essential’ underwent a significant transformation. This was most evident in the cow slaughter case⁴⁸ decided by the Supreme Court. This was a case where the Court had to determine the validity of legislations banning cow slaughter. It was contended before the Court that sacrificing cows for the festival of Bakrid was required by the tenets of Islam. However, based on an interpretation of Islamic religious texts, the Court ruled that the practice of sacrificing cows was optional for Muslims and therefore not an ERP.⁴⁹

⁴² Bhatia (n 39).

⁴³ *Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [1954] AIR 282.

⁴⁴ *ibid.*

⁴⁵ Michel Foucault, *The Order of Things* (Tavistock Publications 1970).

⁴⁶ Hasan (n 6).

⁴⁷ *Shirur Mutt* (n 43).

⁴⁸ *Hanif Quareshi v State of Bihar* AIR 1958 SC 731 : [1959] SCR 629.

⁴⁹ *ibid.*

Here it is evident that the Court has interpreted the term 'essential' quite differently. From qualifying the *nature* of the practice (i.e. whether it is religious or secular), it has evolved into qualifying its *importance* within the religion. In other words, instead of analysing whether something is essentially religious, the Court has scrutinized whether something is essential to the religion.⁵⁰

Such an investigation into the 'essentiality' of religious practices entails substantive interpretation and analysis of religious doctrines by the Court. In other words, it requires it to don the role of a 'theologian'.⁵¹ This is precisely what the Court did in the above case by interpreting the verses of the Holy Quran and consulting translations of the *Hidaya* (a classic book of Islamic jurisprudence from the Hanafi school of thought).⁵²

Having established this precedent, there was no turning back. This new understanding of ERP was extensively applied to a series of cases. It was consolidated as a vehicle for initiating religious reform, compatible with overarching state laws. A recent example is the *Shayara Bano* case,⁵³ where the Court assessed the constitutionality of the practice of triple talaq. This was a practice which had permitted a Muslim man to divorce his wife instantaneously by pronouncing the word 'talaq' three times. In his judgment, Justice Kurian Joseph held the practice to be not essential for Muslims based on an analysis of Islamic jurisprudence. By re-interpreting what is or is not essential to Islam, he sought to further gender-based reforms within the religion.

Apart from advancing such a significant step forward in its role as interpreter of religions, there have also been occasions where the Court extended its authority to 'rationalize' religion and 'purge' it from superstitions.⁵⁴ In the *Durgah Committee* case,⁵⁵ the Court denied validity to practices that had "sprung from merely superstitious beliefs" and therefore could be considered as "extraneous and unessential accretions to religion". This expanded power was employed in a subsequent case to declare the practice of excluding Dalits as 'superstitious' and 'ignorant'.⁵⁶

⁵⁰ Bhatia (n 39).

⁵¹ Elizabeth Seshadri, 'The Sabarimala Judgment: Reformative and Disruptive' (*The Hindu Centre for Politics and Public Policy*, 5 October 2018) <<https://www.thehinducentre.com/the-arena/current-issues/article25120778.ece>> accessed 10 February 2020.

⁵² *Quareshi* (n 48).

⁵³ *Shayara Bano v Union of India* (2017) 9 SCC 1.

⁵⁴ Valentina Rita Scotti, 'The "Essential Practice of Religion" Doctrine in India and its application in Pakistan and Malaysia' (*Rivista telematica*, 8 February 2016) <<https://riviste.unimi.it/index.php/statoechiase/article/view/6783>> accessed 10 February 2020.

⁵⁵ *Durgah Committee, Ajmer v Syed Hussain Ali* [1961] AIR 1402.

⁵⁶ *Sastri Yagnapurushadji v Muldas Brudardas Vaishya* [1966] AIR 1119.

Indeed, there have been several cases where the courts have displayed this reformative impulse. Other prominent decisions include the banning of animal sacrifice in temples,⁵⁷ facilitating the appointment of non-Brahmins as temple priests,⁵⁸ and most recently, overturning a legalized religious injunction against the entry of women in Sabarimala.⁵⁹ In all these cases, the courts had conferred on themselves extensive powers to dismiss practices as ‘unessential’ or ‘superstitious’. The following sub-section explores the consequences flowing from these discursive practices.

B. Judicial Control of Religions and Normative Pluralism

The judicial discourse of ERP has been portrayed as a rational and objective method allowing the court to determine the ‘truth’ of what constitutes the core of a religion. In reality however, it has facilitated a contrived ‘reform’ of religion that brings it in conformity with overarching state norms. In Foucauldian terms,⁶⁰ it has created an episteme that permits the disciplinary control of religions by normalizing the standards implicit in official state laws. This disciplinary power has been exercised in conjunction with the juridical authority⁶¹ of the court.

It might appear that such a discourse has produced desirable outcomes in certain cases (for instance, by addressing caste or gender discrimination). However, by embroiling itself in substantive issues of religious doctrine and stipulating what religions ought to look like, the court has undermined normative pluralism.

Although India’s ‘distinctive’ secular traditions permit a limited degree of state intervention in religious matters, this needs to be balanced against the autonomy of religions. Regulating religions through the selective valuation of certain aspects, rather than taming their power, can transform them, making them more significant to the identity of majority and minority populations. This, in turn, can lead to an exacerbation of inter-religious conflicts⁶² as well as intra-religious rivalries.

Therefore, in a context where the religious and the secular are indelibly intertwined, it is important to account for the power and productivity of

⁵⁷ *Ramesh Sharma v State of H.P.* 2014 SCC OnLine HP 4679.

⁵⁸ *N. Adithayan v Travancore Devaswom Board* 1995 SCC OnLine Ker 254 : AIR 1996 Ker 169.

⁵⁹ *Young Lawyers Association* (n 10).

⁶⁰ Michel Foucault, *Discipline and Punish – The Birth of Prison* (2nd vintage edn, Random House 1995) 170-194.

⁶¹ See Ben Golder and Peter Fitzpatrick, *Foucault’s Law* (Routledge 2009).

⁶² Saba Mahmood, *Religious Difference in a Secular Age – A Minority Report* (Princeton University Press 2016) 15.

religions in material and discursive terms.⁶³ In this regard, the next section sheds light on the dynamic capacity of religious systems and the ways in which this can be exploited to effectively supplement the constitutional reform of religions.

IV. DYNAMIC NATURE OF RELIGIOUS SYSTEMS

The previous section indicated that the court used the ERP doctrine as a vehicle to further the centralizing impulse of the Indian legal system. In doing so, it has inaccurately constructed religions as static or invariable systems, ill-equipped to undergo internal reform. This is discussed in the current section.

It is pertinent to begin with the implications flowing from the court's self-bestowed authority, whereby certain 'regressive' practices are dismissed as unessential or superstitious. Such an approach is premised on the belief that the normative orders embedded within religions and state law are frozen in a perpetual state of conflict, resolvable only through judicial intervention. However, this assumption belies the dynamic capacity of religious systems. Religions do not constitute a fixed system of meanings but are constantly undergoing transvaluation by interacting with various factors.

This is precisely what transpired in Hinduism nearly two centuries back when the practice of *sati* (widow burning) was outlawed. India's colonial encounter had laid the ground for a complex and competing set of struggles over Hindu society and Hindu traditions.⁶⁴ Although traditional Hindu orthodoxy had bestowed the practice of *sati* with a normative ideality, Raja Ram Mohan Roy (who was a Brahmin himself) was aware that many Hindus practised large-scale abstention from this ritual.⁶⁵ Combining this knowledge with his formidable grasp of Hindu scriptures⁶⁶ and European ideas of rationality, Roy argued that it was the incumbent duty of widows to live as ascetics under Hindu law.⁶⁷ Although stemming from a colonialist discourse that presumed the hegemony of Brahminical texts⁶⁸ and located women as passive beneficiaries,⁶⁹ this paved the way for subsequent radical debates within Hinduism. Far from being an inert normative order, Hinduism dynamically interacted with

⁶³ *ibid.*

⁶⁴ Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (OUP 1998).

⁶⁵ Tanika Sarkar, 'How to think Universalism from Colonial and Post-Colonial Locations: Some Indian Efforts' in Peter Korkman and Virpi Mäkinen (eds), *Universalism in International Law and Political Philosophy* (Helsinki Collegium for Advanced Studies 2008).

⁶⁶ *ibid.*

⁶⁷ Mani (n 64).

⁶⁸ Partha Chatterjee, *The Nation and its Fragments* (Princeton University Press 1993).

⁶⁹ Gayathri Chakravorty Spivak, 'Can the Subaltern Speak' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan 1988) 297-308.

evolving standards of morality. Arguably, it has evolved today to accommodate the subjectivities of women and critiques of Brahminical scriptures in a way that was inconceivable during Roy's time.

To take a more general example, religious systems in contemporary times have often redefined their version of reality so as to better accommodate the growing influence of biology or evolutionary epistemology. As is common knowledge, religious and biological conceptions of life often differ. However, the challenges put to theology by natural sciences have forced it to interact with these sciences and re-describe its interpretation of reality in this light.⁷⁰

For instance, the Vatican has re-imagined Catholicism and the Genesis account of creation in such a manner as to be compatible with the theory of evolution.⁷¹ The emergence of the concept of 'theistic evolution'⁷² stands testimony to this. Indeed, it is not uncommon to come across evolutionary biologists who also profess to be 'devout Christians'.⁷³ This is nothing but a reflection of the dynamic nature of religious systems. Rather than being static and invariable, religions have been compelled by evolutionary biology to reinvent themselves.

If one were to take lessons from history, it would appear that courts in present-day India also need to acknowledge the capacity of religions to create a reformed version of their moral-political universe. The religious believer does not change her faith or views merely because the court assumes a theological function and re-interprets the religious doctrines she subscribes to. As Bordieu argues, the shaping of practices through juridical formalization can succeed only to the extent that legal organization gives explicit form to a tendency immanent within those practices.⁷⁴ In the present case, this tendency develops when religious systems are allowed to evolve organically through internal reflections and debates.⁷⁵ By acting as a quasi-religious authority, the court

⁷⁰ CW du Toit, 'Evolutionary Biology as a link between Abstract Religion and Knowledge' (2000) 56 HTS 506, 519-21.

⁷¹ John H Brooke, 'Christianity and Darwinism: Can There Be No Common Ground?' (*Interdisciplinary Encyclopedia of Religion and Science*, 2008) <<http://inters.org/Brooke-Christianity-Darwinism>> accessed 26 February 2020.

⁷² The idea that God used the process of evolution to create living beings. See Darrell R Faulk, *Coming to Peace with Science: Bridging the Worlds Between Faith and Biology* (IVP Academic 2004); Keith B Miller, *Perspectives on an Evolving Creation* (Eerdmans 2003).

⁷³ See Thomas Burnett, 'David Lack: Evolutionary Biologist and Devout Christian' (*BioLogos*, 7 August 2012) <<https://biologos.org/articles/david-lack-evolutionary-biologist-and-devout-christian>> accessed 26 February 2020; Sally Lehrman, 'The Christian Man's Evolution: How Darwinism and Faith Can Coexist' (*Scientific American*, 1 November 2008) <<https://www.scientificamerican.com/article/the-christian-mans-evolution/>> accessed 26 February 2020.

⁷⁴ Pierre Bordieu, 'The Force of Law: Towards a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805.

⁷⁵ See Nandy (n 23).

obfuscates the space for religious groups to reimagine their theological conceptions in line with constitutional values or evolving standards of morality.

Therefore, rather than engineering religious doctrines to fit modern consciousness, it would be more appropriate for courts to pronounce on the constitutionality/legality of these doctrines. This would enable them to strike down unconstitutional religious norms without substantively encroaching upon the internal autonomy of religions. Determining the essentiality of beliefs and practices is a matter best left to the ruminations of a religion. This ensures that religious systems and their conceptions of 'essential doctrines' can gradually evolve through a self-reflective process, while being spurred on by constitutional ideals and modern world views. It also helps the subjectivities of the historically marginalized (women, Dalits, theistic rationalists etc.) to transcend the sphere of legal recognition and reclaim doctrinal legitimacy.

For instance, in the case of Triple Talaq, it would have been more fitting for the Court to restrict itself to evaluating the impugned practice against constitutional standards of equality and dignity of women. This would facilitate a better adjudication of competing interests, in their own right. Choosing to interpret the essential nature of this practice, on the other hand, impinges on the internal autonomy of religions to define and interpret their own doctrines and beliefs. There are existing religious interpretations that already deem the practice of Triple Talaq to be 'sinful' and 'alien' to Islam,⁷⁶ rendering an external adjudication of its 'essentiality' unnecessary. Allowing these interpretations to evolve organically would facilitate a reclamation of doctrinal spaces imbued with patriarchal values or traditions, as opposed to confining the rights of Muslim women to the legal sphere alone. Besides respecting the dynamic capacity of religious systems, it is also important for Courts to recognize and protect varying conceptions of religion that do not abide by dominant cultural conventions. However, this has been hindered by an application of the ERP doctrine, as is explained in the following section.

V. ERP DOCTRINE AND UNIVERSALIZATION OF DOMINANT CULTURAL NORMS

The importance of preserving the internal autonomy and dynamic nature of religions has already been discussed. Following from this, the current section problematizes the manner in which Courts have perceived the broad contours of a religion. It is argued that the ERP doctrine has universalized certain

⁷⁶ See Anees Ul Islam Asmi and Shaheela Khurshid, 'The Position of Triple Talaq in Islam: A Critical Analysis of the Triple Talaq Bill' (2018) 4 *Journal of Legal Studies and Research* 37; see also Moin Qazi 'Tracing the History of the Triple Talaq to look to the Future' (*Qrius*, 8 January 2018) <<https://qrius.com/history-triple-talaq-future/>> accessed 17 April 2020.

dominant cultural assumptions about religions. These ‘universal’ understandings have hindered state law and its machinations from appreciating the cultural particularities of religious communities.

In this regard, the *first* sub-section contends that the Court is a complete outsider, incapable of appreciating the internal processes and cultural frameworks underpinning a religion. Consequently, when it defines the essentiality of religious beliefs and practices, it creates a friction between the cultural sensibilities of judges and religious participants.

The *second* sub-section illustrates this with the particular example of the Sabarimala case - as one of the more recent, politically explosive judgments to have applied the ERP doctrine. By undertaking critical discourse analysis, it is contended that the judgment has reproduced dominant cultural assumptions at the cost of smaller and more culturally specific religious groups.

A. ‘Outsider’ Status of the Court

This sub-section argues that the ‘outsider’ status of the Court renders it incompetent to appreciate the cultural frameworks underlying a religion.

In this regard, it would be instructive to refer to Moody-Adams⁷⁷ notion of an insider-outsider. The insider-outsider is a figure who can initiate moral change more effectively than a fully immersed insider or a total outsider. According to Sarkar,⁷⁸ in the example of *sati* abolition, Roy represented such a figure. As a Brahmin, he was well-versed with Hindu scriptures and had neither disavowed his faith nor his community. At the same time, he was also a cultural exile and social critic that enabled him to critically reflect on the practice of *sati*. To link this to our previous analysis, an insider-outsider is an agent who actualizes the dynamic capacity of religions.

In contradistinction to this, the Court is a complete outsider. More often than not, judges have been socialized within a community different from the litigating religious denominations and therefore, have little or no appreciation of their values, perspectives, and knowledge.⁷⁹ This can manifest in an inability of the judges to accord due weightage to beliefs or practices not corresponding with their own cultural sensibilities.

⁷⁷ Michele Moody-Adams, *Fieldwork in Familiar Places: Morality, Culture, and Philosophy* (HUP 1997).

⁷⁸ Sarkar (n 65).

⁷⁹ James A Banks, ‘The Lives and Values of Researchers: Implications for Educating Citizens in a Multicultural Society’ (1998) 27 *Educational Researcher* 4.

For instance, consider the *Tandava* dance case, which pertained to members of the *Ananda Margi* faith (socio-spiritual movement founded by Prabhat Sarkar). These members had claimed that their religious rites involved carrying out processions in public places, accompanied by the *tandava* dance (tantric dance performed with a skull, a small knife, a trident, and a pellet drum). In the instant case, they had appealed against the decision of the police to prevent such processions. The Supreme Court ruled in favour of the police by holding that the impugned dance was not an essential religious rite of the Ananda Margis. According to its judgment, although the Ananda Margi faith had come into existence in 1955, the *tandava* dance had been adopted only in 1966. Since the faith had existed without the practice at one point, the Court claimed that the dance was not an essential feature of the faith.⁸⁰

Here the Court appears to identify a religious practice as an integral practice, only if it existed when the religion was founded.⁸¹ This is premised on the perception that religious faiths remain static over time. It fails to take into account those beliefs or practices that need not have temporal continuity, but still occupy a central place in the minds of believers. In other words, the Court has failed to acknowledge the dynamic nature of the Ananda Margi faith; something that an insider-outsider would have been privy to.

Yet another example is embodied by the *Gram Sabha* case decided by the Bombay High Court. Here the members of a particular sect had claimed that capturing and worshipping a live cobra during *Nagpanchami* (a festival in which snakes are worshipped and offered milk) was an essential part of their religion. They had relied on a local religious text, namely the text of Shrinath Lilamrut, to advance their claim. However, the Court chose to rely on a scholarly history of the *Dharma Shastras* (Hindu Codes of Conduct) and held the practice to be not essential.⁸²

In the particular circumstances of this case, the Court presumes that Hindus are a homogenous community⁸³ with an exhaustive list of essential practices. It has completely ignored the possibility of cultural variations within Hinduism. As Ramadan⁸⁴ would argue, the core of a religion is clothed in the forms of the various cultures in whose midst it exists. Therefore, even though the practice of cobra worship may not have been important according to mainstream Hindu scriptures like the *Dharma Shastras*, the same could not be said for the

⁸⁰ *Commissioner of Police v Acharya Jagadishwarananda Avadhuta* (2004) 12 SCC 770.

⁸¹ Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (2017) *BYU Law Review* 914.

⁸² *Gram Sabha of Village Battis Shirala v Union of India* 2014 SCC OnLine Bom 1395.

⁸³ Mustafa and Sohi (n 81).

⁸⁴ Tariq Ramadan, *What I Believe* (OUP 2010); Jaco Beyers, 'Religion and Culture: Revisiting a Close Relative' (2017) 73 *Theological Studies* 1.

cultural variants of Hinduism. The outsider status of the Court has rendered it oblivious to ‘inculturation processes’ i.e. the emergence of cultural variations within a religion.⁸⁵

Clearly, while applying the ERP doctrine, courts have made certain erroneous cultural assumptions about religion that discount the significance of beliefs or practices having varied underpinnings. This has generated a friction between the cultural sensibilities of judges and the religious public. The next section analyses this in further detail by citing the particular example of Sabarimala.

B. The Sabarimala Example

The Sabarimala judgment was delivered by the Supreme Court of India in September 2018. The case pertained to the validity of a religious injunction that barred women between the ages of 10 and 50 from entering the Sabarimala temple located in Kerala. The injunction was premised on the belief that the deity installed in the temple, namely Lord Ayyapan, was a *Naisthik Bramchari* (someone who has undertaken a vow to remain an eternal celibate). It was argued that the celibate nature of this deity entailed an exclusion of women whose ‘age was conducive to procreation’.⁸⁶

1. Analysing the Judgment

In keeping with an established line of precedents, one of the primary issues considered by the Court was whether the practice of excluding women constituted an ERP. Before interrogating this however, there was one crucial point that had to be settled. The Court needed to ascertain the broad contours of the religious group whose practice was being assessed. In other words, it had to ask itself – “Essential for whom? The general denomination of Hindus or the specific group of Ayyappa devotees?”

In resolving this question, the majority judgment held that Ayyappa devotees did not constitute a separate religious denomination. It was observed that they did not satisfy the three-pronged test laid down in previous judgments i.e., they lacked a) a collective common faith, b) a common organization, and c) a distinct name. Based on this reasoning, the Court proceeded to examine whether the exclusionary practice was essential for the general denomination of ‘Hindus’.⁸⁷

⁸⁵ Richard Bonney, ‘Reflections on the Differences between Religion and Culture’ (2004) 6 *Clinical Cornerstone* 25.

⁸⁶ *Young Lawyers Association* (n 10) [53] (CJI Misra), [5] (Justice Malhotra).

⁸⁷ *ibid* [88] – [98] (CJI Misra), [26] – [27] (Justice Nariman), [58] – [69] (Justice Chandrachud).

This approach of assessing the import of the practice as against a monolithic understanding of 'Hindus' is contentious. The conglomeration of religious traditions that are sheltered under the umbrella term 'Hinduism' incorporates a sizeable array of texts, beliefs and sects.⁸⁸ Indeed, Shattuck⁸⁹ illustrates how the distinctive South Asian geography has produced cultural pluralities within Hinduism. They are so disparate a collection that some scholars have questioned the legitimacy of artificially unifying them under the singular notion of Hinduism.⁹⁰

With regard to the specifics of the Ayyappa cult, Srinivas⁹¹ postulates that Ayyappa worship is a cultural variant restricted mostly to South India. Moreover, it is said that it is difficult to categorize the cult as strictly belonging to a Hindu *tantric* (esoteric doctrines regarding rituals, disciplines, and meditation) modality, owing to the significant absence of Lord Ayyappan in the conventional *Ithihasa-Purana* (universal history as perceived by Hindus) texts.⁹²

In light of such cultural variations within Hinduism, is it appropriate for the Court to assess the essentiality of the exclusionary practice against a homogenous and singular understanding of 'Hindus'? While Ayyappa devotees may not have satisfied the judicial test for constituting a separate religious denomination, the cultural specificity of their beliefs required that the significance of their practice was evaluated against their own cultural frameworks. At this point, it is pertinent to note that the three-pronged test is not the object of criticism here. Rather, what is highlighted is the deleterious consequences flowing from a combined application of the ERP doctrine with the 'religious denomination' test.

It would now be useful to scrutinize the manner in which the Court assessed the essentiality of the practice for 'Hindus'.

Firstly, Justices Mishra and Khanwilkar noted that there was no scriptural evidence according an essential status to the exclusionary practice.⁹³ Here they

⁸⁸ See Julius Lipner, *Hindus: their Religious Beliefs and Practices* (Routledge 2010).

⁸⁹ Cybelle Shattuck, *Hinduism* (Routledge 2003) 16.

⁹⁰ See Robert Eric Frykenberg, 'The Emergence of Modern 'Hinduism' as a concept and as an institution: A Reappraisal with special reference to South India' in Gunther-Dietz Sontheimer and Hermann Kulke (eds), *Hinduism Reconsidered* (Manohar 1989); Heinrich von Stietencron, 'Religious Configurations in Pre-Muslim India and the Modern Concept of Hinduism' in Vasudha Dalmia and Heinrich von Stietencron (eds), *Representing Hinduism: The Construction of Religious Traditions and National Identity* (SAGE 1995).

⁹¹ Mysore Narasimhachar Srinivas, *Religion and Society among the Coorgs of South India* (Asia Publishing House 1965).

⁹² See Radhika Sekar, *The Sabarimala Pilgrimage and Ayyappan Cultus* (Motilal Banarsidass 1992).

⁹³ *Young Lawyers Association* (n 10) [122] (CJI Misra).

proceeded on a predominantly textual vision of religion, whereby religious practices outside of foundational scriptures seemed to have no value.

However, a ‘sacred text’ as conventionally understood, is the attribute of dominant religious faiths like Christianity, Islam, Judaism,⁹⁴ Brahmanical Hinduism⁹⁵ etc. Not all faiths have a sacred book. For instance, when the emancipated adherents of Jainism rejected the *Vedas* (ancient Indian scriptures) for a ‘purer faith’ in the 6th century B.C., their sacred oracles were handed down orally. It was only around the 5th century that the canon of their scriptures was edited.⁹⁶ Similarly, religious groups that identify as animists mostly keep their faiths alive through story-telling or other oral traditions.⁹⁷ Therefore, requiring scriptural evidence tends to marginalize the oral traditions of smaller or culturally-specific groups.

Secondly, the majority judgment held that a practice could be considered to be ‘essential’ only if the nature of the religion would be changed without it. Any alterable parts or practices which did not affect the ‘core’ of the religion were considered to be mere ‘embellishments’.⁹⁸

This logic was then applied to the facts of Sabarimala. It was observed that prior to 1950, women of all age groups used to visit the temple for the first rice-feeding ceremony of their children. Furthermore, the injunction against entry of women had been historically restricted to particular religious festivals, as opposed to all year around.⁹⁹ Since there had been no continuity in the exclusionary practice followed at the Sabarimala temple, it was held that the practice was an alterable one and therefore not essential.¹⁰⁰

Here, by insisting on the inalterable and continuous nature of a practice, the Court has presumed that religious beliefs and practices are frozen in time. However, anthropology reminds us that cultural systems like religions are dynamic¹⁰¹ and therefore variations in time and space need to be accounted for.¹⁰² The previously mentioned Ananda Margi faith is a case in point.

⁹⁴ See James Moffatt, ‘The Sacred Book in Religion’ (1934) 53 JBL 1.

⁹⁵ See Friedrich Max Müller, *The Sacred Books of the East* (Clarendon 1895).

⁹⁶ Moffatt (n 94).

⁹⁷ See Virginius Xaxa, ‘Politics of Language, Religion and Identity: Tribes in India’ (2005) 40(13) Economic & Political Weekly 1363.

⁹⁸ *Young Lawyers Association* (n 10) [122] – [126] (CJI Misra), [44] (Justice Chadrachud).

⁹⁹ *ibid* [125] (CJI Misra).

¹⁰⁰ *ibid* [122] – [126] (CJI Misra).

¹⁰¹ See Ilenia Ruggiu, ‘The ‘Cultural Test’ as Cultural Expertise: Evolution of a Legal–Anthropological Tool for Judges’ (2019) 8 *Laws* 1.

¹⁰² See Jarich Oosten, ‘Cultural Anthropological Approaches’ in Frank Whaling (ed), *Theory and Method in Religious Studies: Contemporary Approaches to the Study of Religion* (Mouton de Gruyter 1995).

Furthermore, requiring the prolonged continuity of a belief or practice threatens to marginalize religious faiths that are relatively new. In light of this reality, it is inappropriate for the Court to deride the significance of practices that are alterable and have not had a protracted life.

2. Comments

From the above analysis, it becomes clear that the judicial doctrine of ERP has contributed to a hackneyed representation of religion whereby singularity, homogeneity, literate traditions, inalterability, or temporal continuity are perceived to be its enduring hallmarks. In the Durkheimian tradition, courts have presumed themselves to be an authority on the 'essence' of religion.¹⁰³ In doing so, they have imposed the conventions of dominant cultural groups.¹⁰⁴ This was foreseen by Rosen¹⁰⁵ when he posited that the articulation of broad standards in any legal system are likely to be infused with cultural content.

This cultural content needs to be problematized. It is worth inquiring whether it is a product of subconscious biases inhering in judges. The acquisition of cultural categories is largely an unconscious process and therefore judges need not be aware that they have internalized them.¹⁰⁶

Mautner¹⁰⁷ terms the sources of knowledge that underpin the thinking of a jurist as 'common sense'. This common sense represents an intangible cultural system that embodies empirical and normative information about the world and equips people to function normally within their every-day social interactions. It is not merely a matter-of-fact apprehension of reality, but involves colloquial wisdom, judgments, or assessments,¹⁰⁸ depending on one's social environment,¹⁰⁹ and varying dramatically from one person to the next.¹¹⁰ When understood in this manner, a judicial application of common sense in cases where the parties belong to a different cultural group than that of the judges, can amount to cultural coercion.¹¹¹

¹⁰³ See Emile Durkheim, *The Elementary Forms of the Religious Life* (Free Press 1995).

¹⁰⁴ See Robert Alun Jones, *Emile Durkheim: An Introduction to Four Major Works* (Sage Publications 1986) 115-155.

¹⁰⁵ Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press 2008).

¹⁰⁶ Alison Dundes Renteln, 'The Use and Abuse of the Cultural Defence' (2005) 20 CJLS 47.

¹⁰⁷ Menachem Mautner, 'Common Sense, Legitimacy, Coercion: Judges as Narrators' (1998) 7 Israel Journal of Criminal Justice 11; see also Masua Sagiv, 'Cultural Bias in Judicial Decision Making' (2015) 35 JLSJ 229.

¹⁰⁸ Clifford Geertz, 'Common Sense as a Cultural System' (1975) 33 The Antioch Review 5.

¹⁰⁹ Mary Douglas, *Implicit Meanings: Essays in Anthropology* (Routledge & Kegan Paul, 1975) xx.

¹¹⁰ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books 1983).

¹¹¹ Sagiv (n 107).

The aforementioned conceptions of religion discernible in the Sabarimala verdict are nothing but an embodiment of the intangible cultural systems within which the judges are operating. It has contributed to a discourse that marginalizes the beliefs and practices of denominations that do not fit within their 'common sense' perception of religions.

Implicit in this meta-narrative are unspoken qualifications about what really is worth valuing in a culture¹¹² – qualifications steeped in dominant cultural stereotypes. Masked as scientific, universal, or ahistorical constructs of knowledge,¹¹³ they have been put to work in the specific institutional setting¹¹⁴ of the court. These discursive practices have contributed to a structuring of power relations¹¹⁵ that prioritize dominant cultural frameworks, over and above those underlying smaller or more culturally specific religious groups. By modifying religious subjectivities to be compliant with dominant cultures,¹¹⁶ they have engendered a disproportionate burden of cultural assimilation¹¹⁷ on minority communities.

Critical discourse analysis has enabled us to attend to these cultural norms of intelligibility (i.e. the 'rule-bound discourse') as well as their effects.¹¹⁸ It helps us to fathom the powerful ways in which dominant cultural norms or assumptions are reproduced in judicial settings. Understanding this order of discourse as characterized by dominance¹¹⁹ compels a rethinking of judicial strategy to better include hitherto marginalized groups. Such reorientation of research goals and methods is precisely what critical studies encourage us to undertake.¹²⁰

Staying true to this tradition, the following section probes how the court can acquire a more informed appreciation of localized cultural sensibilities.

¹¹² Robert Fullinwider, 'The Cosmopolitan Community' (1996) 27 *J. Soc. Philos.* 32.

¹¹³ See Michel Foucault, *The Archaeology of Knowledge* (Routledge 2002).

¹¹⁴ See Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (Harvester 1980).

¹¹⁵ Siegfried Jäger, 'Discourse and Knowledge: Theoretical and Methodological Aspects of Critical Discourse and Dispositive Analysis' in Ruth Wodak and Michael Meyer (eds), *Methods of Critical Discourse Analysis* (SAGE 2001) 1.

¹¹⁶ Mahmood (n 62) 15.

¹¹⁷ Fullinwider (n 112).

¹¹⁸ Susan Ehrlich, 'Legal Discourse and the Cultural Intelligibility of Gendered Meanings' (2007) 11 *Journal of Sociolinguistics* 452.

¹¹⁹ Norman Fairclough, 'A Reply to Henry Widdowson's Discourse Analysis: A Critical View' (1996) 5 *Language and Literature* 49.

¹²⁰ See Teun Adrianus van Dijk, *Handbook of Discourse Analysis* (Academic Press 1985).

VI. ANTHROPOLOGICAL EXPERTISE AS A MODALITY FOR SOCIO-CULTURAL FACT-FINDING

We have observed how the ERP doctrine invades the internal autonomy of religions and reproduces dominant cultural norms. As a result, the balance has swung heavily in favour of 'universal' state norms at the cost of cultural exceptionalism. In order to restore a more harmonious balance between the two, the court needs to adopt efficient ways of appreciating the cultural particularities of religious groups.

A good starting point would be a method of judicial review that departs from the ERP doctrine in its current form. This could possibly imply reverting to the standards of public order, health, morality etc., as enshrined in the limitations clause of Article 25. Conversely, the solution could lie in the enunciation of a new doctrine like the anti-exclusion principle advocated by Bhatia,¹²¹ whereby the rights and integrity of religious groups are protected to the extent that they do not block an individual's access to basic public goods for a dignified life. Either of these options would appear to have the advantage of preserving the internal autonomy of religions without universalizing the practices of dominant communities.

However, it would be perfectly reasonable to question whether any of these alternate methods of judicial review can wholly desist from making their own cultural assumptions. Is it possible to adjudge whether a religious practice violates public order, morality, or individual rights without first ascertaining the theological substance of the impugned practice? Is it feasible to determine the ecclesiastical underpinnings of a religious practice without exercising some form of inherent value judgments or cultural assumptions?

This paper does not purport to offer a comprehensive or infallible solution to this dilemma. However, it does seek to underscore the enormous potential of applied anthropology in allaying at least part of this predicament. The use of anthropological resources in judicial proceedings remains a largely untapped source of study in India. In particular, this paper is concerned with the expertise of social or cultural anthropologists who have studied religions across different cultures and in relation to other social institutions. The utility of such experts in assisting Indian courts to appreciate socio-cultural particularities and mitigate cultural bias is an idea worth exploring.

¹²¹ Gautam Bhatia, 'How Courts decide on matters of Religion' (*LiveMint*, 5 March 2019) <<https://www.livemint.com/news/india/how-courts-decide-on-matters-of-religion-1551715822881.html>> accessed 12 February 2020.

In this regard, the *first* sub-section explores the potential value-addition of anthropological expertise in judicial proceedings concerning religious matters. The *second* sub-section investigates the challenges inherent in this approach.

A. Value Addition made by Cultural Experts

This section situates itself within the traditions of Geertz,¹²² Douglas,¹²³ and Turner,¹²⁴ all of whom consider religion to be key to culture. Since religions reside within social systems¹²⁵ and constitute cultural expressions,¹²⁶ they are well within the scope of inquiry of social and cultural anthropologists. By conducting rigorous research, fieldwork, or participant observation,¹²⁷ anthropologists study a religious subject's distinctive conception of the world and the mental dispositions accompanying it.¹²⁸ They seek to understand beliefs and practices that appear to be 'foreign' or 'strange', until their supposed inexplicability is absorbed into the enlarged experiences of society.¹²⁹

Since the world makes sense to religious denominations in terms of the standards of their own culture,¹³⁰ anthropological expertise can be useful in acquainting the court with these cultural conventions. Facilitating such a dialogue between anthropology and law offsets the dominant cultural norms imbued in existing judicial discourse. By building a bridge between the sensibilities of dominant and minority cultures, it furthers the pluralistic values entrenched within the Constitution. More generally, it revives attention to the link between law and culture¹³¹ by illustrating how the former can develop in an interactive manner¹³² through its sensitivity to the particular contexts of people.

¹²² See Clifford Geertz, 'Religion as a Cultural System' in Clifford Geertz (ed), *The Interpretation of Cultures: Selected Essays* (Fontana Press 1993).

¹²³ See Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (Routledge 1966).

¹²⁴ See Victor Turner, *The Drums of Affliction: A Study of Religious Processes among the Ndembu of Zambia* (Clarendon 1968). Turner studies the religious beliefs and rituals of Ndembu villagers in Northern Rhodesia as constituting a cultural field.

¹²⁵ Matt Waggoner, 'Culture and Religion' in Peter B Clark (ed), *The Oxford Handbook of Sociology of Religion* (OUP 2011); Henri Hubert and Marcel Mauss, *Sacrifice: Its Nature and Function* (WD Halls tr, University of Chicago Press 1981).

¹²⁶ Beyers (n 84).

¹²⁷ Caroline Edwards, Louise Anderson and Siobhan McKeering, 'Anthropologists, Lawyers and Native Title Cases in Australia' (2006) 16 *Anthropological Forum* 153.

¹²⁸ Geertz (n 122); See Emile Durkheim, *The Elementary Forms of the Religious Life* (Free Press 1995).

¹²⁹ Douglas (n 109).

¹³⁰ Rosen (n 105).

¹³¹ Livia Holden, 'Cultural Expertise and Socio-Legal Studies: Introduction' (2019) 78 *SLPS* 1.

¹³² Seyla Benhabib, *Situating the Self: Gender, Community and Post Modernism in Contemporary Ethics* (Polity Press 1992).

Discounting the role of anthropologists in religious litigation could increase the risk of courts committing what Ruggiu¹³³ terms as 'anthropological mistakes'. In the Sabarimala judgment,¹³⁴ conceiving religions as static or homogenous was one such mistake. It is in mitigating the same that anthropological expertise assumes considerable significance.

Even while suggesting the use of anthropological expertise in judicial proceedings, it is not disputed that there are other sources capable of apprising the court about the cultural particularities of different communities. For instance, members of a cultural group themselves can testify about the intricacies of their beliefs and practices as well as the cultural frameworks underpinning them. However, depending on them as experts bears the risk of misinterpretation of cultures.¹³⁵ Cultures are fluid entities riddled with internal divergences, contradictions, asymmetries, and power lines.¹³⁶ Due to their own underlying biases, it is possible that members of a cultural group fail to draw the court's attention to divergent or conflicting views about the material constituents of their culture.¹³⁷ The court, as a matter of principle, needs access to representations of culture that move beyond the singular accounts of insiders.

Anthropologists, on the other hand, occupy the insider-outsider sphere.¹³⁸ When commencing their research on a particular community, they may be perceived as complete outsiders by members of that community. However, by engaging in years of field work or participant observation, some of them are able to acquire the trust of these communities and build enduring relationships with them. Banks¹³⁹ cites the example of anthropologist Franz Boas, who although not a member of the African American community, pioneered a project to discredit scientific racism in the United States. According to him, Boas represented an 'external-insider' figure who endorsed the values, beliefs, and knowledge claims of the studied community, despite having been socialized within another culture. Thus, depending on situations and contexts, it is possible for anthropological researchers to occupy the insider-outsider sphere.¹⁴⁰

¹³³ Ruggiu (n 101) 4.

¹³⁴ *Young Lawyers Association* (n 10).

¹³⁵ Irena Madella, 'Cultural Defence: An Odyssey for English Courts' (2017) 3 *Kent Student Law Review* 1.

¹³⁶ Sarkar (n 65).

¹³⁷ Madella (n 135).

¹³⁸ Moody-Adams (n 77).

¹³⁹ Banks (n 79).

¹⁴⁰ See Susan Matoba Adler, 'Multiple Layers of a Researcher's Identity: Uncovering Asian American voices' in Kagendo Mutua and Beth Blue Swadener (eds), *Decolonizing Research in Cross-Cultural Contexts: Critical Personal Narratives* (SUNY Press 2004); Dusanee Suwankhong and Pranee Liamputtong, 'Cultural Insiders and Research Fieldwork: Case Examples from Cross-Cultural Research with Thai People' (2015) 14(5) *International Journal of Qualitative Methods* 1.

In religious matters, as much as they would like to see themselves as objective observers, anthropologists are constantly pulled between “explanation and interpretation, demystification and appreciation or transcendent reason and immanent experience”.¹⁴¹ Their insider-outsider status ensures that they not only appreciate the cultural sensibilities of religious groups, but also maintain a sufficient distance to reflect on alternate moral traditions, theological interpretations, or contestations within the group’s culture.¹⁴² They function as formidable social commentators who bear witness to the complexities of localized religious communities.

Indeed, the use of anthropological expertise in judicial proceedings is not unheard of. It was famously relied upon by jurisdictions like the USA and Canada to resolve cases involving aboriginal land claims,¹⁴³ school segregation policies,¹⁴⁴ and the like. In the context of religious cases, *Wisconsin v Yoder*¹⁴⁵ is particularly note-worthy. In 1972, the US Supreme Court had to examine whether the state had violated the rights of Amish parents by requiring them to send their children to school. In reaching its decision, the Court had made frequent references to the testimony of anthropologist John Hostetler. Hostetler had testified that, as part of their way to salvation, the Amish required a church-community separate from the world. He had asserted that requiring Amish youth to attend high school would destroy the church community and cause great psychological harm to Amish children, owing to the alienation resulting from a clash of values. Ultimately, the Court went on to decide in favour of the Amish community by relying on Hostetler’s reasoning (Rosen 2007).

While not advocating a direct transplantation of this approach in India, it would be useful to investigate the possibility of integrating such interdisciplinary approaches within the Indian legal system.

1. Value Addition in the Indian Context

Having contemplated about the utility of anthropological expertise in judicial decision-making, it would be useful to examine how this might add value to religious cases within the Indian context. In this regard, one can deliberate on the Sabarimala example, where the Court has to review the constitutionality of the practice of excluding women (of a particular age group) from the Sabarimala temple.

¹⁴¹ Michael Lambek, ‘Facing Religion, from Anthropology’ (2012) 4 AOTC 1.

¹⁴² Sarkar (n 65).

¹⁴³ See *Delgamuukw v R* 1997 SCC OnLine Can SC 103 : (1997) 3 SCR 1010.

¹⁴⁴ See *Brown v Board of Education of Topeka* 1954 SCC OnLine US SC 44 : 98 L Ed 873 : 347 U.S. 483.

¹⁴⁵ *Wisconsin v Yoder* 1972 SCC OnLine US SC 92 : 32 L Ed 2d 15 : 406 U.S. 205 (1972).

Presumably, the ERP doctrine has been discarded in this hypothetical scenario. It could have been replaced by the original tests of public order, morality, health etc. Alternately, it could have been substituted with another method of judicial review like the anti-exclusion principle. Irrespective of the method of judicial review adopted, one thing is absolutely certain. Before the Court applies its chosen standard of review to the impugned practice, it needs to be apprised of the contents of this practice, the rationale underpinning it, and any alternate theological interpretations. More crucially, it needs to do so by keeping dominant cultural assumptions or value judgments at bay.

In this regard, the Court could choose to undertake its own investigation by relying on its own expertise. Conversely, it could take the assistance of anthropologists who have authoritatively studied the history of the Sabarimala temple, the celibate nature of the deity, the traditions of the Ayyappa community, and the rationale behind the exclusionary practice.

For all the reasons discussed before, the latter option would seem more preferable. If aided by anthropological expertise, the Court would have a more comprehensive understanding of the cultural sensibilities driving the Ayyappa community - an understanding untainted by cultural assumptions or biases. This would facilitate a more informed balancing of religious interests and other constitutional values.

On applying its preferred standard of review, if the Court still concludes that religious interests have been outweighed by overarching constitutional values, the same would have been achieved without substantively violating the internal autonomy of religions. Reliance on anthropological expertise would have minimised the perpetuation of inaccurate or dominant cultural representations of religion. It might have even drawn attention to alternate moral traditions or theological interpretations within the Ayyappa community that lie closer to constitutional values. By respecting and engaging with faiths in this manner, courts can retain the radical thrust of critical social consciousness.

Of course, it is not necessary that such a reformulated verdict would appease devotees who are hostile to any form of intervention in religious matters. Relying on anthropological expertise, however, has the utility of not reifying discourses that marginalize certain denominations by an institution as powerful as the judiciary. It facilitates a more efficient adjudication of competing interests. It also addresses some of the specific criticisms levelled against the 'competence' of the Court.

To conclude, anthropological expertise can operate as a very effective supplement to judicial standards of review in religious matters. While advocating

such a dialogic relationship between law and anthropology, it is acknowledged that this approach is not without its challenges.

B. Challenges

The assertions made above justifiably raise some concerns. The most prominent among them is the apparent epistemological incommensurability between the disciplines of law and anthropology.¹⁴⁶ Previous expert witnesses like Feldman¹⁴⁷ have observed that “ethnohistorical data is not likely to meet professional standards when it is gathered in the context of a legal dispute”.

Good¹⁴⁸ gives an illuminating example in this regard. He explains how the notion of ‘fact’ is approached differently by the two disciplines. In the legal field, the term ‘fact’ is used to distinguish it from law. Any matter that has been established to a required standard of proof is treated as a fact in jurisdictions like India. Anthropologists, on the other hand, are cognizant of the challenges in securing and ordering their fieldwork data. They are well aware that facts can be products of particular theoretical perspectives and subject to contestation.¹⁴⁹ Indeed, they are disinclined to speak of facts without hedging qualifications.¹⁵⁰ Therefore, while anthropology treats ambiguity and complexity as immanent aspects of real-life situations,¹⁵¹ law is institutionally committed to notions of unambiguous facticity.¹⁵²

Such an inherent tension can translate into role conflicts when anthropologists enter the field of applied research.¹⁵³ In adversarial legal proceedings, they might come under pressure to attest to facts or provide definite answers, as opposed to the equivocations they normally prefer.¹⁵⁴

¹⁴⁶ Randy Frances Kandel, ‘Six Differences in Assumptions and Outlook between Anthropologists and Attorneys’ in Randy Frances (ed), *Double Vision: Anthropologists at Law* (American Anthropological Association 1992) 1-4.

¹⁴⁷ Kerry D Feldman, ‘Ethnohistory and the Anthropologist as Expert Witness in Legal Disputes: A Southwestern Alaska Case’ (1980) 36 *Journal of Anthropological Research* 245, 253.

¹⁴⁸ Anthony Good, ‘Cultural Evidence and the Law’ (*Allegra Lab*, 7 November 2016) <<https://allegralaboratory.net/cultural-evidence-and-the-law/>> accessed 11 February 2020.

¹⁴⁹ Anthony Good, ‘Undoubtedly an Expert? Anthropologists in British Asylum Courts’ (2004) 10 *The Journal of the Royal Anthropological Institute* 113.

¹⁵⁰ Good (n 148).

¹⁵¹ Anthony Good, ‘Cultural Evidence in Courts of Law’ (2008) 14 *The Journal of the Royal Anthropological Institute* 47.

¹⁵² Sheila Jasanoff, ‘Research Subpoenas and the Sociology of Knowledge’ (1996) 59 *Law and Contemporary Problems* 95.

¹⁵³ Lewis M Killian, ‘The Social Scientist’s role in the preparation of the Florida Desegregation Brief’ (1956) 3(4) *Social Problems* 211.

¹⁵⁴ Good (n 149).

While accepting the legitimacy of these concerns, it is important to recognize that the empiricist or positivistic nature of law is partly driven by pragmatic considerations. The credibility of judicial process is largely contingent on reaching a decisive outcome within a reasonable timespan. Therefore, rather than dismissing anthropology and law as wholly incommensurable, it might be a more valuable exercise to develop guidelines that bring these disciplines in conversation with each other. While not within the scope of this paper, such a proposal lays the groundwork for interesting research in the future.

At this point, it would be encouraging to note that there have been scholars like Bens¹⁵⁵ who rationalize that the so-called irreconcilable differences between law and anthropology are overstated. In fact, there is research which indicates that experts report few difficulties, despite having had preconceived notions of the differences between the legal and academic spheres.¹⁵⁶

Another concern raised by this project is the presumption that professional anthropological experts appointed by the court are devoid of any cultural or theoretical biases themselves. On the contrary, the frequent involvement of anthropologists in advocacy efforts which are oriented towards the protection of subaltern or vulnerable groups, raises considerable ethical and deontological issues.¹⁵⁷ Furthermore, as has already been indicated, the 'facts' ascertained by anthropologists can be a product of their own theoretical perspectives and subject to contestation.¹⁵⁸

Given this reality, it is not disputed that anthropological experts are susceptible to their own biases.¹⁵⁹ However, since part of their training involves problematizing such biases, they might be more qualified than judges to ascertain socio-cultural 'facts' pertaining to religious beliefs and practices. In the words of Lambek, "If there is a compass to the anthropological direction, perhaps it lies in unmasking or decentring hegemonic assumptions, undue power, unfairness and dogmatic or absolutist thinking..."¹⁶⁰

Moreover, there is considerable scholarship that explores innovative mechanisms to counteract such biases. For instance, Renteln¹⁶¹ recommends prescribing a code of ethics for professional associations of anthropologists as an

¹⁵⁵ Jonas Bens, 'Anthropology and the Law: Historicising the Epistemological Divide' (2016) 12 *International Journal of Law in Context* 235.

¹⁵⁶ Debra Kalmuss, 'Scholars in the Courtroom: Two Models of Applied Social Science' (1981) 16 *The American Sociologist* 212.

¹⁵⁷ Aurelien Bouyad, 'The Cactus and the Anthropologist: The Evolution of Cultural Expertise on the Entheogenic Use of Peyote in the United State' (2019) 8 *Laws* 1.

¹⁵⁸ Good (n 149).

¹⁵⁹ Douglas (n 109) xii.

¹⁶⁰ Lambek (n 141).

¹⁶¹ Renteln (n 106).

accountability measure to ensure the credibility of information presented to the court. Another solution termed the 'hot tub' has been employed in a number of Australian cases pertaining to the land claims of Aboriginal groups. This method involves convening a conference of experts wherein areas of agreement or disagreement are deliberated upon. Subsequently, these expert opinions are discussed in court under oath.¹⁶² It is believed that this approach not only allows judges to acquire a holistic view of the evidence, but also reduces the risk of bias¹⁶³ or partisanship. This is because experts are less likely to be partisan in the presence of colleagues who are qualified to challenge their assertions.¹⁶⁴

While the aforementioned mechanisms might have been tailored for particular societies or contexts, such a comparative exercise helps to contemplate about methodologies that can be emulated in India. Of course, there would be a need to supplement this with adequate logistical, financial, and infrastructural support. From setting up professional rolls of anthropologists for deployment in judicial proceedings to drawing on existing expertise within organizations like the Anthropological Survey of India or the Indian Anthropological Association, there are a number of strategies worth exploring.

In this regard, it is reassuring to note the larger judicial move towards imparting maximum efficacy to modalities of 'fact-finding'. With the advent of public interest litigation in India, courts have often sought to marshal facts through extensive investigation processes.¹⁶⁵ Judges appear to be more predisposed towards appointing enquiry commissions¹⁶⁶ or conferring extensive powers on committees of experts.¹⁶⁷ For instance, in a case that dealt with issues of child labour,¹⁶⁸ the Supreme Court had engaged an expert to carry out socio-legal investigations regarding the conditions of labour.

In a similar vein, the progressive deployment of anthropological knowledge to ascertain socio-cultural facts in religious cases is an idea worth probing.

¹⁶² Edwards, Anderson and McKeering (n 127).

¹⁶³ Hans Eriksson, 'Experts in the Australian Hot Tub' (Masters' Thesis, University of Lund 2008).

¹⁶⁴ Edwards, Anderson and McKeering (n 127).

¹⁶⁵ Monika Sangeeta Ahuja, 'Public Interest Litigation in India: A Socio-Legal Study' (PhD Thesis, University of London 1996).

¹⁶⁶ Amber Sinha, 'Questions of Fact: India's Aadhaar matter and the Limits of the Supreme Court' (*Centre for Asian Studies*, October 2018) <https://www.ifri.org/sites/default/files/atoms/files/sinha_india_aadhaar_matter_2018_.pdf> accessed 11 February 2020.

¹⁶⁷ GL Peiris, 'Public Interest Litigation in the Indian Subcontinent' (1991) 40 ICLQ 66.

¹⁶⁸ *Bandhua Mukti Morcha v Union of India* (1997) 10 SCC 549.

VII. CONCLUSION

In this paper, we have critically examined the application of the ERP doctrine. It was argued that the discourse of ERP was sustained by an episteme that authorized courts to control and discipline religions, thereby undermining normative pluralism. Religions were projected as inert normative orders, incapable of adapting to critical public consciousness without judicial intervention. The need to preserve a religion's internal autonomy and prevent universalization of dominant cultural conventions was also discussed. In this regard, the paper advanced the idea of anthropological expertise as facilitating an informed judicial appreciation of cultural particularities.

By bringing anthropology and law in conversation with each other, this paper seeks to complement other efforts that have problematized cultural biases in powerful institutions like the judiciary. It investigates how the trappings of these institutions can be sequestered from majoritarian cultural norms that marginalize certain communities. More broadly, it adds to the modicum of literature that advocates the adoption of interdisciplinary approaches within legal institutions.