INDIA'S SECULARISM IDENTITY CRISIS THROUGH THE LENS OF THE *SABARIMALA* JUDGMENT

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INTRODUCTION

Secular judicial systems around the world are often forced to mediate between protecting religious diversity and preventing discrimination against protected classes of people.[1] In the United States, this tension is often demonstrated in claims that implicate the First

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[1] *See* RONOJOY SEN, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT xiii (Oxford Univ. Press, 2019). Sen notes that courts in most secular constitutional polities are confronted with the task of defining religion, and thus determining which elements of religion are protected by the constitution. *Id.* at xiii–xiv.

Amendment, which protects the free exercise of religion, and the Fifth and Fourteenth Amendments, which guarantee due process and equal protection under the law.[2] In India, the tension between religious freedom rights and equality rights is highlighted in claims that implicate Articles 14 through 18 of the Indian Constitution ("Constitution"),[3] which outline a number of secular equality rights, and Articles 25 and 26, which grant religious groups the freedom to adhere to their distinct traditions and practices.[4] While secularism in the United States is premised on governmental non-interference and a "wall of separation," Indian secularism actively encourages the state to intervene to protect religious diversity—a concept that scholars have termed "principled distance."[5]

In India, the dynamic between religion and the State has created unique problems for the country's judicial system, particularly when religious freedoms collide with other secular freedoms guaranteed by the Constitution.[6] The Indian judiciary has attempted to resolve constitutional conflicts by turning to a judicially-created doctrine known as the Essential Practices Doctrine (EPD).[7] EPD empowers judges to decide whether a religious practice is essential to a religion in order to determine whether the practice is constitutionally protected under Article 25(1),[8] or subject to state intervention under Article 25(2)(a).[9] Though EPD has been applied to religious freedom conflicts for decades, Indian courts have never developed a clear legal standard for determining the essentiality of a

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2 U.S. CONST. amends. I, V, XIV.

3 India Const. arts. 14–18.

4 *Id.* arts. 25–26.

5 RAJEEV BHARGAVA, INDIA'S LIVING CONSTITUTION 116 (Zaya Hassan, E. Sridharan & R. Sudarshan, eds. Anthem Press 2005). *See also* Deepa Das Acevedo, *God's Homes, Men's Courts, Women's Rights*, 16 INT'L J. CONST. LAW 552, 553 (2018) ("India's approach to religion-state relations has long drawn attention for the way in which it blends two seemingly contradictory elements: secular governance (formally part of the constitution since 1976), and an extensive governmental apparatus regulating religious life.").

6 *See* discussion *infra* Part II.

7 *See generally* Acevedo*, supra* note 5 (discussing the essential practices doctrine).

8 India Const. art. 25, cl. 1 ("Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.").

9 *See id.* at cl. 2 ("Nothing in this article shall affect the operation of any existing law or prevent the State from making any law— (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.").

practice, and the doctrine's application remains subject to wide judicial discretion.[10]

The 2016 Supreme Court decision *Indian Young Lawyers' Association v. State of Kerala* (*Sabarimala*) offers powerful insights into the complicated dynamics at play when Indian courts are forced to balance secular freedoms and religious freedoms within the unique context of constitutional rights.[11] In *Sabarimala,* the Indian Supreme Court found a temple entry ban unconstitutional where the ban prohibited menstruating women between the ages of ten and fifty from entering the Sabarimala temple.[12] Unsurprisingly, the judgment produced a passionate response from both sides of the debate. Leaders from India's ruling Hindu-fundamentalist Bharatiya Janata Party quickly framed the decision as an attack on Hindu values.[13] Many women attempted to enter the temple in light of their newly won access, but they were obstructed and attacked by protestors.[14] In response to this backlash, community organizers planned the infamous "women's wall" solidarity demonstrations in which close to five million women across Kerala formed a chain along the state's highways as a powerful show of support for the judgment.[15]

In *Sabarimala,* gender equality rights, found in Article 15,[16] were pitted against the rights of religious groups to freely worship and manage their own affairs, which are articulated in Articles 25 and 26.[17] The *Sabarimala* judgment provides interesting insights into the complex

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[10] *See* Ronojoy Sen, *Legalizing Religion: The Indian Supreme Court and Secularism*, POL'Y STUD. 30 (East-West Ctr., D.C.), Jan. 2007, at 14–15. The Indian judiciary's approach is quite different from the U.S. approach. United States courts refrain from assessing the logic or validity of a religious practice and instead focus on confirming the sincerity of the claimed religious practice. *See, e.g.*, Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981) ("Courts are not the arbiters of scriptural interpretation . . . ."). However, occasionally, even U.S. judges are tasked with determining whether a belief is indeed sincerely held, and in these circumstances, they are not immune from some level of theological interpretation. *See*, *e.g.*, Warner v. Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999) (a Florida district court relied on religious texts and testimony from theologians to determine whether grave memorial arrangements reflected a custom or tenet of the plaintiffs' religious traditions).

[11] *See* Indian Young Lawyers Ass'n v. State of Kerala (*ILYA*), (2019) 11 SCC 1 (2018) (India).

[12] *See id.* at para. 5.

[13] *Amit Shah in Kerala Highlights: Don't Misuse Sabarimala Verdict, BJP Chief Warns Left Government*, NDTV (Oct. 28, 2018), https://www.ndtv.com/kerala-news/ashram-of-kerala-religious-preacher-swami-sandeepananda-giri-who-backed-sabrimala-verdict-attacked-l-1938432 [https://perma.cc/UM2V-YEK3].

[14] *Sabarimala temple: Indian women form '620km human chain' for equality*, BBC (Jan. 1, 2019), https://www.bbc.com/news/world-asia-india-46728521 [https://perma.cc/ZGG6-GRV4].

[15] *Id.*

[16] India Const. art. 15.

[17] *Id.* arts. 25–26.

relationship between religious freedoms and secular freedoms precisely because the judgment involves gender equality rights—a sphere of rights that is an unquestioned status quo in most democratic societies. After all, the concept of prohibiting menstruating women from entering a temple due to "menstrual impurities" is outdated and unjust to modern sensibilities.[18] However, a behind-the-scenes look at the Court's reasoning, especially in the context of Indian secularism, renders this decision as something more than solely a gender rights victory.

The majority and dissenting opinions in the judgment put forward two conflicting visions of Indian secularism.[19] A panel of five justices reviewed the temple entry ban.[20] Surprisingly, the only woman to sit on the panel, Justice Indu Malhotra, wrote the sole dissenting opinion in this case.[21] In her dissent, she implies that the role of a secular judge in the Indian context is to exhibit judicial restraint and to respect religious freedom rights except in extreme cases of "pernicious, oppressive, or . . . social evil[s]."[22] By contrast, the four justices representing the majority decision to strike down the entry ban imply that the role of a secular judge is to uphold religious freedom rights only to the extent that they do not conflict with the other fundamental freedoms outlined in the Constitution.[23]

This Note will explore the Indian judiciary's difficulty in reconciling religious freedoms and secular freedoms by tracing the evolution and application of the EPD doctrine. EPD—the primary tool courts have used to balance constitutional conflicts between religious rights and secular rights—has evolved to embody a dysfunctional relationship between religion and the state. Given the ill-defined nature of the doctrine, its application is based on the personal ideologies of individual judges rather than a standardized legal doctrine. Additionally, EPD encourages judges to delve into the realm of theology and further inflame already delicate and emotionally charged issues. But the Indian

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[18] The associations between menstruation and impurity are not confined to Hinduism and are not uncommon throughout human history (and today). For example, according to ancient Zoroastrian religious practices, anything a woman touched after her period began was considered "unclean" and she was housed in separate quarters. *See* JIVANJI JAMSHEDJI MODI, THE RELIGIOUS CEREMONIES AND CUSTOMS OF THE PARSEES 136–37 (Jehangir B. Karani's Sons 2d ed. 1937) (1922).

[19] *See infra* Part II.D.3.

[20] *See ILYA*, (2019) 11 SCC 1 (2018) (India).

[21] *See id.* at para. 17 (per Malhotra, J., dissenting).

[22] *Id.* at para. 8.2.

[23] *See* discussion *infra* Part II for more information on the plurality's approach.

judiciary should confine their role to constitutional analysis, not theological analysis. Particularly when it comes to the protection of secular fundamental rights, like gender equality, courts can and should leverage the limitations on religious freedom rights that are both explicitly and implicitly part of the Constitutional structure. The *Sabarimala* decision is significant because it so clearly captures India's "secularism identity crisis," and the Court's majority and dissenting opinions illustrate the tension between the nation's progressive impulses and deep-rooted tradition of legal pluralism.

Part I of this Note will provide background information on the development of Indian secularism and explore how colonial and post-colonial conflicts shaped religious freedom rights in India, including EPD. Part II will explore the problematic application of EPD throughout the years, expose the secularism identity crisis that has developed throughout India's history, and analyze how the identity crisis played out in the *Sabarimala* judgment. The Note will conclude by outlining considerations for the Indian judiciary to keep in mind as it reconsiders its religious freedom jurisprudence moving forward.

I. BACKGROUND

A. RELIGION IN POST-COLONIAL INDIA

India is a diverse nation composed of a multi-ethnic, multi-linguistic, and multi-religious society.[24] India's diversity is at the root of its rich and vibrant culture, but the country's diversity has also understandably produced significant obstacles in establishing a national identity. The Indian State has been faced with the heroic task of unifying vastly diverse religious and ethnic communities. India's approach towards secularism—an approach based on religious tolerance—was born from a need to unify a deeply divided post-colonial nation.[25]

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[24] *See More than 19,500 mother tongues spoken in India*, THE INDIAN EXPRESS (July 1, 2018, 2:13 PM), https://indianexpress.com/article/india/more-than-19500-mother-tongues-spoken-in-india-census-5241056/ [https://perma.cc/H3CX-EEWD] (noting that 121 languages are spoken in India); *India*, PEW-TEMPLETON GLOBAL RELIGIOUS FUTURES PROJECT, http://www.globalreligiousfutures.org/countries/india#/?affiliations_religion_id=0&affiliations_year=2020&region_name=All%20Countries&restrictions_year=2016 [https://perma.cc/7YG4-QYG6] (noting India's religious diversity).

[25] *See* NEERA CHANDOKE, BEYOND SECULARISM 47 (Oxford Univ. Press 1999) (noting that the State had to "assure the minorities that their future would be safe in a country that was marked by debilitating conflict between majority and minority religions").

Before India became an independent nation in 1947, the country was a colony of the British Empire for close to three hundred years.[26] British rulers fueled internal divisions within India, particularly along religious lines, in an attempt to consolidate power over a vast population.[27] These sectarian divisions certainly existed before British rule, but the rulers leveraged and deepened these divisions to gain political dominance.[28]

In the aftermath of WWII, Britain experienced economic ruin and could no longer afford to maintain its vast colonial holdings, including India.[29] Britain's departure from India was violent and divisive.[30] After Britain officially left India in August of 1947, the nation was divided into Hindu-majority India and Muslim-majority Pakistan.[31] The territorial split between India and Pakistan brought to the forefront long brewing tensions between India's Hindu and Muslim populations and led to one of the largest migrations in human history.[32] Millions of families throughout the country made the arduous trek to their new respective homelands. Migrants were met with brutal violence on their journeys.[33]

The forces that led to the India-Pakistan partition illustrate the role that religious identity played within the new Indian nation. India remained a religiously diverse nation in the aftermath of the partition.[34] Today, India's population is majority Hindu, but the country is also home to the world's second largest Muslim population as well as populations who identify as Buddhist, Sikh, Jain, Christian, Jewish, Zoroastrian, or a wide range of indigenous tribal religions.[35]

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[26] William Dalrymple, *The Great Divide*, THE NEW YORKER (June 22, 2015), https://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple [https://perma.cc/ZP7G-3QAX].

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Pakistan, once comprised of East Pakistan and West Pakistan, has now become Pakistan and Bangladesh. *Id.*

[32] *Id.*

[33] *Id.*

[34] *See* PEW-TEMPLETON GLOBAL RELIGIOUS FUTURES PROJECT, *supra* note 24.

[35] *Id.* Stephanie Kramer, *Key findings about the religious composition of India*, PEW RSCH. CTR. (Sept. 21, 2021), https://www.pewresearch.org/fact-tank/2021/09/21/key-findings-about-the-religious-composition-of-india/#:~:text=Hindus%20make%20up%2079.8%25%20of,declined%20by%20about%204%20points [https://perma.cc/65VX-VT6V]; Jesse Palsetia, *Zoroastrianism in India*, *in* RELIGIONS IN INDIA: A MICROCOSM OF WORLD RELIGIONS 225, 225 (Meenaz Kassam ed., 2017).

B. DEVELOPING THE INDIAN BRAND OF SECULARISM

The religious divisions that led to the formation of modern-day India and the religious diversity that continued to exist within post-colonial India inspired the need for a thoughtful and strategic relationship between the State and religion. Indian secularism emerged from the need to unite a multireligious society.[36] The framers of the Constitution understood that they could not ignore the deep-rooted religious beliefs that pervaded Indian society.[37] However, constitutional leaders like Jawaharlal Nehru, who would soon go on to become India's first Prime Minister, simultaneously believed that religion stood as an impediment to their progressive liberal democratic vision for the new Indian nation.[38] The Constituent Assembly, the forum that brought together some of India's leading political leaders to create the Constitution, provides interesting insights on these differing viewpoints. Within the Assembly, there was no clear consensus on how the new government should structure its relationship with religion, and the members of the Assembly differed greatly on the extent to which the Constitution should embrace religion.[39] On one end of the spectrum, leaders like B.R. Ambedkar[40] called for severe restrictions on the role of religion in the public sphere.[41] On the other end of the spectrum, a group of Hindu fundamentalists called for a Hindu state that would offset what they presumed would be an Islamic state in Pakistan.[42]

The framers eventually agreed on a brand of Indian secularism defined by the idea of "equal respect."[43] India was not designed to be an irreligious state; rather, it was designed to be a state that honored all

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[36] *See* CHANDOKE, *supra* note 25.

[37] *Id.*

[38] *Id.* at 46.

[39] *See* SEN, *supra* note 1, at xxii–iii.

[40] *See Bhimrao Ramji Ambedkar,* COLUMBIA GLOBAL CENTERS, https://globalcenters.columbia.edu/content/mumbai-bhimrao-ramji-ambedkar [https://perma.cc/3TD5-L5NG]. As a *Dalit* (formerly known as someone from the "untouchable" caste), Ambedkar understood the backwards and oppressive attitudes that could be perpetuated by Hinduism. *See* Julie McCarthy, *The Caste Formerly Known As 'Untouchables' Demands A New Role In India*, NPR (Aug. 13, 2016), https://www.npr.org/sections/goatsandsoda/2016/08/13/489883492/the-caste-formerly-known-as-untouchables-demands-a-new-role-in-india [https://perma.cc/P9EF-6H6U].

[41] SEN, *supra* note 1, at xxii.

[42] *See id.* at xxiii–iv.

[43] *Id.*

religions and gave them the space to operate in the public sphere.[44] This relationship between the state and religion has been characterized as one of "principled distance." "Principled distance" is an approach to secularism that balances non-establishment with a limited space for the State to intervene to promote the equal treatment of all religious groups.[45] This approach stands in contrast to the "wall of separation" theory of secularism that exists in the United States.[46]

C. RELIGIOUS FREEDOM IN THE INDIAN CONSTITUTION

Religious rights show up in the Indian legal system in a few different spheres. One sphere is India's personal law system in which certain legal matters, like family law matters, are dictated by religious law rather than state law.[47] Another sphere in which religion and the law interact is the Constitution, which will be the focus of this Note. The chapter on Fundamental Rights, Part III of the Constitution, includes the rights to "Equality" (Articles 14 to 18), and "Freedom of Religion" (Articles 25 to 28).[48] In terms of the religious freedom rights, this paper will focus on Article 25 (freedom of conscience, free profession, practice, and propagation of religion) and Article 26 (freedom to manage religious affairs).[49]

The Constitution grants affirmative rights to religious groups.[50] Though the framers ultimately included affirmative protections for religious groups in the Constitution, these freedoms were not without limits.[51] Articles 25 and 26 begin with a series of limitations on religious freedom rights on the grounds of "public order, morality, and health."[52] The rights enshrined in Article 25 are additionally subject to all other provisions included in the "Fundamental Rights" section of the

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[44] *Id.*

[45] BHARGAVA, *supra* note 5, at 116.

[46] *Id.*

[47] For example, under the Muslim Personal (Shariat) Application Act of 1937, the Act claimed to apply Sharia law to marriage, divorce, guardianship, and trusts. *See* FARRAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM 25–27 (Oxford Univ. Press, 1st ed. 2016) (providing introductory material regarding the personal law system).

[48] *See* India Const. part III.

[49] *Id.* arts. 25–26.

[50] *Id.* arts. 25–28.

[51] *Id.* arts. 25–26.

[52] *Id.*

Constitution.[53] Article 25(a) also highlights a distinction between secular activities that can be regulated by the state related to economic, political, or financial matters, and religious activities that cannot be regulated by the state.[54] Article 26 establishes the "freedom to manage religious affairs."[55] This broad freedom allows individuals and groups to engage in practices that are prescribed by the legal or ethical codes of their respective religions. Unlike Article 25, the text of Article 26 does not explicitly state that the freedom to manage religious affairs is limited by the other rights enshrined in the "Fundamental Rights" section of the Constitution.[56]

Additionally, the Constitution has been deemed a "charter for the reform of Hinduism."[57] As a result, the religious freedom rights include provisions that subject Hinduism to a more intrusive degree of state intervention as compared to other religions.[58] For example, the text of Article 25(b) makes clear that Hindu religious practices can be subject to reform based on general social welfare considerations.[59] Hinduism was likely an easy target for state intervention because the religion is so vast and decentralized.[60] Additionally, the Indian government has typically been dominated by Hindu politicians.[61]

D. ESSENTIAL PRACTICES DOCTRINE (EPD)

As described above, religion has played an important and deep-rooted role in Indian society. Given this context, leading political thinkers sought to rein in religion and distinguish essential religious practices that were constitutionally protected from practices that were only incidentally religious in nature.[62] During the Constituent Assembly debates, Ambedkar

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[53] *Id.* art. 25.

[54] *Id.*

[55] *Id.* art. 26.

[56] *Id.*

[57] Ronojoy Sen, *The Indian Supreme Court and the Quest for a 'Rational' Hinduism*, 1 S. ASIAN HIST. & CULTURE 86, 87 (2010), https://www.tandfonline.com/doi/pdf/10.1080/19472490903387258?needAccess=true [https://perma.cc/62FS-PUTA].

[58] India Const. art. 25.

[59] *Id.*

[60] The term "Hinduism" was largely introduced by the British to characterize all beliefs that were not rooted in Islam, Christianity, or Judaism. Therefore, an extremely diverse set of beliefs, practices, and doctrines were characterized as "Hindu." SEN, *supra* note 1, at 2.

[61] Though it's important to note that the State's interventionist approach has not been confined to Hinduism. *See infra* Part II for examples of State intervention in Islam.

[62] *See* Sen, *supra* note 10, at 9–11.

powerfully articulated the need for the state to identify essential religious practices:

> 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. I do not think it is possible to accept a position of that sort. 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 as may be connected with ceremonials which are *essentially religious*.[63]

The concerns underlying Ambedkar's words—that religion has too strong of a hold on society and should thus be parsed into that which is essentially religious and that which is extraneous to religion—is embodied in Article 25 of the Constitution.[64] Article 25 grants the State the ability to make laws regulating economic, financial, political, or other secular activity associated with religious practice, thereby limiting which activities can constitute religion.[65] EPD emerged as a tool for the Indian judicial system to manage the distinction between the secular and the religious.[66] This doctrine has no clear standard and has been applied inconsistently throughout its history, but it is fundamentally designed to distinguish between elements of religious practice that are to be protected by the religious freedom rights in the Constitution and elements of religion that are subject to State reform and regulation.[67]

EPD was first articulated by the Indian courts in the 1954 case *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshimindra Thirtha Swaminar of Sri Shirur Mutt* (*Shirur Mutt*).[68] In *Shirur Mutt,* the Supreme Court adopted a broad definition of religion, which included not just the doctrines of a religion, but also the "rituals and observances, ceremonies and modes of worship which are regarded as

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[63] *See* Gautham Bhatia, *Essential Practices Doctrine and the Rajasthan High Court's Santhara Judgment: Tracking the History of a Phrase,* INDIAN CONST. L. & PHIL. (Aug. 19, 2015), https://indconlawphil.wordpress.com/2015/08/19/essential-religious-practices-and-the-rajasthan-high-courts-santhara-judgment-tracking-the-history-of-a-phrase/ [https://perma.cc/AQ5V-BH9U].

[64] India Const. art. 25.

[65] *Id.*

[66] *See* Sen, *supra* note 10, at 9–10.

[67] *Id.* at 1, 3.

[68] *Id.* at 11.

integral parts of a religion."[69] Another notable element of the *Shirur Mutt* decision was the Court's embrace of the idea that religious denominations had the authority to define which religious practices were essential to their faith.[70]

However, as EPD case law continued to develop, the Supreme Court adopted a narrower definition of religion which gave religious denominations less autonomy to define "essentiality" on their own terms.[71] In *Sri Venkatrama Devaru v. State of Mysore* (*Devaru*), the Court was confronted with the issue of whether a Hindu temple could impose a blanket ban on *dalits*.[72] The Court turned to the Hindu scriptures to determine whether the exclusion of certain castes from Hindu temples was an essential element of the Hindu religion.[73] In particular, the Court analyzed the twenty-eight Agamas, a text that specifies practices around temple worship.[74] After consulting a number of Hindu texts, the Court held that matters pertaining to the manner of worship were religious in nature.[75] This finding implied that the exclusion of *dalits* was an essentially religious practice.[76] Though the Court struck down the blanket exclusion of *dalits* on the social reform grounds articulated in Article 25(2)(b),[77] the *Devaru* case marked an important turning point in the application of EPD.[78] Rather than deferring to religious groups to define the essentiality of a given religious practice, the Court would play an active role in deciphering essential religious practices from secular practices.[79]

EPD would continue to evolve in a way that transferred the power to define religion from religious communities to the courts.[80] In *Duragh Committee v. Hussain Ali*, a Sufi Muslim attendant of a shrine challenged the Duragh Khawaja Saheb Act of 1955.[81] The Act prohibited the shrine's attendants from managing religious properties.[82] The court invoked EPD

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[69] *Id.* at 12.
[70] *Id.* at 13.
[71] *Id.* at 14–15.
[72] *Id.* at 15–16. *See* Chandoke, *supra* note 25, at 45.
[73] *See* Sen, *supra* note 10, at 15–16.
[74] *Id.* at 17.
[75] *Id.*
[76] *Id.* at 17–18.
[77] *Id.*
[78] *Id.* at 18.
[79] *Id.*
[80] *See id.* at 18–22.
[81] *Id.* at 18–19.
[82] *Id.* at 19.

but declined to consult the relevant religious texts.[83] Rather, it reviewed the history of the shrine and concluded that the shrine had always been managed by the State rather than by a religious entity, and eventually upheld the Act.[84] In addition to the Court's decision to bypass religious texts in its EPD analysis, the Court also articulated a more narrow definition of religion than had been previously established.[85] The Court asserted that religious practices must be "essential and integral" to a religion in order to be protected under the Constitution.[86] Furthermore, the Court concluded that rituals or practices rooted in superstitious belief are extraneous and not essential to a religion.[87]

In *Shirur Mutt*, the Court defined religion broadly, deferring to the religious community to determine "essentiality."[88] In *Duragh Committee*, the Court asserted its role in defining the essentiality of a religious practice.[89] The judiciary's criteria for EPD were markedly different from the standard articulated in *Shirur Mutt*. The evolution of EPD highlights the ways in which the Court has (a) restricted the definition of religion and (b) applied an inconsistent approach in determining "essentiality"—turning to religious texts on some occasions and turning to history on other occasions.[90] Over the years, the test that post-colonial courts have used to determine "essentiality" has changed, but the shift in power from religious communities to courts to define religion has remained consistent. As courts have taken on a more active role in defining religion, the state's tolerance for religious diversity and the state's protection of religious freedom rights has eroded. This has produced a sort of secularist identity crisis as the nation embraces progressive values while trying to retain its legal pluralist traditions.

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* ("Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself.").

[88] *Id.* at 13–14.

[89] *Id.* at 19.

[90] *See* Bhatia*, supra* note 63 ("[T]he word 'essential' has gone from qualifying the *nature of the practice* (i.e., whether it is religious or secular), to qualifying its *importance* (within the religion) – i.e., from whether something is *essentially religious* to whether it is *essential to the religion.* It is a minor grammatical shift, but with significant consequences, because it allows the Court to define questions that are internal to religion in a judicial enquiry, and thereby define the nature of the religion itself.").

II. ANALYSIS

Progressive judgments, like the *Sabarimala* decision, are caught in the web of India's secularism identity crisis. The current iteration of EPD is not a viable long-term solution for balancing secular freedoms and religious freedoms. EPD originally emerged as a tool for Indian courts to genuinely reconcile conflicts between the religious freedom rights of Articles 25 and 26 and the numerous other fundamental rights outlined in Part III of the Constitution.[91] EPD has evolved, however, into a tool for judges to accommodate only those elements of religion that align with progressive values. But even where progressive values should triumph, the integrity of the process that upholds those values matters.

The current iteration of EPD is an extremely problematic tool to manage conflicts between secular rights and religious freedom rights. First, EPD is ill-defined and gives judges a large amount of discretion to determine when and how to apply the test. A judicial doctrine with no proper legal standard means that the values and personal belief systems of individual judges trump consistent or sound legal reasoning. Second, EPD allows judges to erroneously act as theologians and make determinations on issues that remain unresolved within the religious community itself. Often, judges with no affiliation to a given religion are tasked with interpreting scripture or applying the fundamental tenets of that religious philosophy (e.g., a Hindu judge interprets verses from the Quran).[92] They are thus bound to adopt simplistic, narrow, or incorrect interpretations of religious principles. Such activity can have the effect of shaping public norms and perceptions of a religion.

As EPD has been whittled down over the years, it has transformed from a tool to genuinely protect religious practice into a doctrine that can very easily be leveraged or manipulated by judges to reach a desired result. In *Sabarimala,* the Court's desired result was to strike down a temple entry ban rooted in outdated and patriarchal notions. In reaching this result, however, the Court applied many of the problematic frameworks that have come to define modern day religious freedom jurisprudence in India. Courts have an important role to play in upholding fundamental rights, and

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[91] *See* discussion *supra* Parts I.C, I.D.

[92] *See* Jeffrey Gettleman, Hari Kumar & Kai Schultz, *Hundreds of Cases a Day and a Flair for Drama: India's Crusading Supreme Court*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/world/asia/india-supreme-court-modi.html [https://perma.cc/57KN-DGRD] ("Today, there are only two Christians and one Muslim on the Court. Twenty-two of the twenty-five judges are men.").

they are not without recourse when religious practices violate rights deemed fundamental to society, like the right to equality before the law. The *Sabarimala* judgment, unlike many prior religious freedom judgments,[93] includes a robust discussion of the doctrine of "constitutional morality"—a doctrine that could present the way forward for determining the constitutionality of religious practices that violate fundamental rights guaranteed by the constitution.[94]

A. THE JUDICIARY'S EXPANSIVE ROLE IN INDIAN SOCIETY

The Indian judiciary plays an expansive role in Indian society,[95] and this is partly why India's secularism identity crisis has played out so prominently in the courts. Due to a number of structural and circumstantial factors, India's judiciary has been tasked with managing and balancing the competing visions of Indian secularism.

The Indian Supreme Court has earned the reputation of being a progressive institution in India, and the judiciary in general has taken on a significant interventionist role in Indian society.[96] The framers intended the judiciary to be an accessible forum for all people, particularly when it came to questions of constitutional significance.[97] In fact, the Constitution allows litigants to directly petition the Supreme Court when fundamental rights are at stake.[98] But the Court's role can be explained by circumstance as much as it can be explained by intentional design. Courts have naturally stepped in to tackle issues that other branches of government have failed to address, so institutional failures are also responsible for shaping the judiciary's role in Indian society.[99]

Indian courts adhere to lenient doctrines of justiciability and courts are accordingly granted broad jurisdiction.[100] For example, a

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[93] *See* Indian Young Lawyers Ass'n v. State of Kerala (*ILYA*), (2019) 11 SCC 1, para. 16 (2018) (per Chandrachud, J., concurring) (noting that much of the religious rights jurisprudence has evolved around what constitutes an essential religious practice).

[94] *See* discussion *infra* Part II.D.2.

[95] *See* Deepa Das Acevedo, *Just Hindus*, 45 L. & SOC. INQUIRY 965, 965–66 (2020).

[96] *See id.* at 965.

[97] Nick Robinson, *Judicial Architecture & Capacity*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 330, 331 (Oxford Univ. Press 2016).

[98] *Id.* at 332.

[99] Sujit Choudry, Madhav Khosla & Pratap Bhanu Mehta, *Locating Indian Constitutionalism*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 1, 8–9 (Oxford Univ. Press 2016).

[100] *See* Shyam Divan, *Public Interest Litigation*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 662, 675 (Oxford Univ. Press 2016) ("[T]he growth of PIL has shattered traditional notions of justiciability.").

relaxed *locus standi* requirement, enabling public interest litigation (PIL), allows entities that have not been directly harmed by a constitutional violation to bring claims on behalf of others who have been harmed.[101] It is a doctrine rooted in the noble intent of extending access to the courts to those who would otherwise be excluded from the court system.[102] PIL has proven to be particularly useful for human rights activists.[103] However, the PIL doctrine also increases the judiciary's caseload.[104] Because of the relaxed standing requirement, Indian courts hear cases that are not "controversies" involving concrete disputes between parties, as was the case in *Sabarimala*.[105] In addition to the judiciary's relaxed standing requirements, the court does not have a well-defined political question doctrine to dismiss claims that may be better suited for another branch of government.[106] An analysis of the Supreme Court's jurisprudence suggests that justices have commonly considered the stakes and interests underlying a political question doctrine, but no concrete set of rules has ever been expressly asserted.[107] Ultimately, the Indian judiciary has broad jurisdiction, and while this makes courts more accessible to all factions of Indian society, it also leaves courts with the task of considering issues that other political branches may be better equipped to handle.

B. EPD HAS NO JUDICIALLY MANAGEABLE STANDARD

EPD is an ill-defined doctrine, and its application is largely left to the discretion of individual judges. A judicial framework that forces judges to grapple with theology, rather than the text and principles of the Constitution, is bound to produce problematic and inconsistent results. Part I of this Note explores how EPD evolved from a doctrine that once deferred to the practices and beliefs of religious communities to a doctrine

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[101] *See id.* at 668–69.

[102] *Id.* at 666–67.

[103] *Id.* at 675.

[104] *See id.* at 678. However, it is also important to note that PIL cases only make up 1 percent of the judiciary's standard.

[105] *See* Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 INT'L J. CONST. L. 739, 743 (2010). *Sabarimala* was filed as a public interest litigation lawsuit. *See* Manveena Suri, *Sabarimala Temple: India's Supreme Court lifts ban on women entering shrine*, CNN, https://www.cnn.com/2018/09/28/asia/india-temple-women-banned-intl/index.html [https://perma.cc/E4TQ-PZA7] (last updated Sep. 28, 2018, 5:18 AM).

[106] NL Rajah, *The Conundrum of a 'Political Question'*, BAR & BENCH (Apr. 25, 2020, 7:04 AM), https://www.barandbench.com/columns/litigation-columns/the-conundrum-of-a-political-question [https://perma.cc/R67N-CURK].

[107] *Id.*

that vested broad discretion in the Indian judiciary to define the essential elements of a religion. Indian case law offers no clear guidance on how and when the test is applied,[108] therefore EPD lacks a clear judicially manageable standard. Given such broad judicial discretion, courts have applied EPD in a variety of ways to determine whether a practice is essential or not.[109] The following cases from both the Indian Supreme Court and the Indian High Courts offer some insight into the different ways the judiciary has applied EPD.

In some cases, courts look to the length of time a practice has been part of a religion. In *Commissioner of Police & Ors. vs. Acharya Jagadishara*nanda *Avadhuta & Anr.,* the Indian Supreme Court looked to the length of time that the Ananda Marga community had engaged with a particular ritual to determine whether the ritual was essential to their faith.[110] The Ananda Marga faith was founded in 1955, and one particular ritual, the *tandava* dance, was introduced to the religion in 1966.[111] The *tandava* dance was controversial because dancers traditionally carried a skull and trident while performing the dance in public venues.[112] In *Commissioner of Police*, the court had to determine whether the *tandava* dance was an essential part of the Ananda Marga faith.[113] The court held that the dance was not essential to the faith, because the faith had existed for over a decade before the dance was introduced to adherents.[114] As a result, the dance was not a "core upon which the Ananda Marga order was founded."[115] Even though the dance was eventually added to a seminal text of the Ananda Marga order, known as the *Carya Carya*, the court did not find this sufficient to classify the dance as an essential practice of their faith.[116]

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[108] *See* Comm'r of Police v. Avadhuta, [2004] 2 SCR 1019 (India) ("[The] [e]ssential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion."). This standard provides no standard at all and is further complicated by the fact that religion is ultimately individual practice.

[109] *See id.*; Mohammed Fasi v. Superintendent of Police, MANU/KE/0114/1985 (India); Gramsabha of Vill. Battis Shirala v. Union of India, MANU/MH/1091/2014.

[110] *Comm'r of Police*, 2 SCR at para. 10.

[111] *Id.*

[112] *See id.* at para. 50.

[113] *Id.* at para. 5.

[114] *Id.* at para. 10.

[115] *Id.*

[116] *Id.* at para. 11.

In other cases, courts have looked to the prevalence of a given religious practice among adherents to determine whether the practice is essential to the religion.[117] In *Mohammed Fasi v. Superintendent of Police & Ors.*, the Kerala High Court looked to community practice to determine whether the contested issue was essential to Islam.[118] The petitioner was a head police constable in the State of Kerala. He grew a beard to comply with the code of conduct prescribed by his Islamic faith.[119] However, a provision of the Kerala Police Drill Manual required police personnel to have their "face and neck clean and shaven," and another manual prohibited police personnel from growing a beard without the permission of their Commander.[120] The petitioner's request to maintain his beard was rejected by his managing authority, and he filed a petition challenging the validity of the beard ban based on his right to freely practice his religion under Article 25 of the Constitution.[121] The high court held that maintaining a beard was not essential to practicing the Islamic faith.[122] Even though the petitioner provided a clear textual basis for his religious claim, the court's decision was based on the observation that a large number of Muslim dignitaries did not maintain a beard, including high ranking religious leaders.[123] Therefore, the high court concluded that growing a beard could not be an obligation that was essential to the Islamic faith because so many prominent religious leaders were able to maintain

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[117] *See* Mohammed Fasi v. Superintendent of Police, MANU/KE/0114/1985 (India).

[118] *See id.*

[119] *Id.* at paras. 2–3. Petitioner cited a number of *hadiths* (statements and stories of the Prophet Muhammed which serve as another persuasive source of authority for Muslims in addition to the Qu'ran) that supported his obligation to maintain a beard, including:

> Narrated Nafi: Ibn 'Umar said, "The Prophet said, 'Do the opposite of what the pagans do. Keep the beards and cut the moustaches short". Whenever Ibn 'Umar performed the Hajj or 'Umra, he used to hold his beard with his hand and cut whatever remained outside his hold.
>
> . . . Narrated Ibn "Umar: Allah's Apostle said, "Cut the moustaches short and leave the beard (as it is).
>
> . . . .
>
> . . . Narrated Abu Huraira; The Prophet said, "Jews and Christians do not dye their hair so you should do the opposite what they do.

Id.

[120] *Id.* at paras. 11–12.

[121] *Id.* at paras. 1–2.

[122] *Id.* at para. 12.

[123] *See id.* at para. 4 ("The President of a neighbouring Theocratic Islamic Republic does not wear a beard. Similarly high dignitaries like President, Vice President, Judges of the Supreme Court and High Court and Ministers have not been wearing beards.") (quoting respondent's counter affidavit).

their piety without a beard.[124] *Mohammed Fasi* is a clear illustration of the vast power that judges have to craft their own versions of EPD. Because the doctrine is open to judicial discretion, the *Mohammed Fasi* court was free to prioritize their own observations of religious customs over the textual prescriptions of a practice in a seminal religious text.

Even when courts engage in a textual analysis of religious practices, judges cherry-pick which texts to use as the basis for their analysis.[125] In *Gramsabha of Village Battis Shirala v. Union of India & Ors.*, the Bombay High Court based its essentiality determination on a religious text that was distinct from the text the petitioners had relied on to make their religious freedom claim.[126] In *Gramsabha*, members of a Hindu sect claimed that a ritual involving the capture and worship of a live cobra was essential to their religion.[127] Members of the sect claimed that the ritual was prescribed in their foundational religious text, *Shrinath Lilamrut*.[128] However, the high court analyzed the ritual in the context of a different foundational Hindu text, the *Dharma Shastras*.[129] Given that the ritual was not included in the *Dharma Shastras*, the high court held that the ritual was not essential to the sect's faith.[130] In order to understand the implications of the court's decision to prioritize one text over another, it is important to recall that Hinduism is more aptly viewed as a collection of sects than as one unified philosophy.[131] As a result, the high court's decision to confine the essentiality analysis to one particular text is not necessarily aligned with the ideological diversity that exists within the Hindu faith. Ultimately, the courts are not suited to determine which texts are the legitimate texts of a given religion.

The cases outlined above illustrate that EPD is subject to vast judicial discretion. There are no clear guidelines on how courts should apply the doctrine to different circumstances. Courts can turn to custom, religious texts, or even the length of time which a ritual has been practiced by the community. In *Commisioner of Police*, a practice that had developed in recent time, but was soon codified, could not withstand the EPD analysis; however, in *Mohammed Fasi*, a practice that had its origins

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[124] *Id.*

[125] *See, e.g.*, Gramsabha of Vill. Battis Shirala v. Union of India, MANU/MH/1091/2014.

[126] *See id.*

[127] *Id.* at para. 5.

[128] *Id.*

[129] *Id.* at para. 14.

[130] *Id.*

[131] *See* India Const. art. 25, cl. 2(b).

in a long-standing seminal text of Islam could not withstand EPD scrutiny. Ultimately, such vastly different approaches indicate that courts may merely be manipulating EPD in a way that allows them to reach a desired outcome.

C. EPD ERRONEOUSLY FORCES JUDGES TO SERVE AS THEOLOGIANS

Judges are not well-equipped to serve as theologians. Religious study and legal study are two distinct realms, yet the EPD doctrine blurs this divide and forces judges to make value judgments about religious practices. As the examples from the previous section illustrate,[132] judges determine the essentiality of religious practices by looking to the details of a practice to determine whether the absence of the practice fundamentally alters the religion. The natural result of the mandate is this: judges engage in some degree of scriptural interpretation and grapple with issues that have not been settled by religious scholars and theologians. To complicate matters more, the panel of twenty-five judges on the Indian Supreme Court are predominantly Hindu men,[133] so their ability to engage with scriptural interpretation or to fully understand the customs, traditions, and history of any religion—even Hinduism—is limited.

An illustrative example of the "judge as theologian" danger is *Ismail Faruqui v. Union of India*. In *Ismail Faruqui*, the Indian Supreme Court was faced with the question of whether conducting prayer in a mosque was an essential element of the Islamic faith.[134] The Barbri-Masjid mosque was built in 1528 CE on land that has long been claimed as a place of significance for the Hindu community.[135] In December 1992, the mosque was destroyed in a violent attack initiated by a Hindu nationalist group.[136] The destruction of the mosque led to widespread communal violence.[137] As a result, the President of India passed the Acquisition of Certain Area Act in 1993 which allowed the government to acquire the contested area and subsequently implement a development scheme that

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[132] *See supra* Part II.B.

[133] Gettleman et al., *supra* note 92.

[134] *See* Ismail Faruqui v. Union of India, AIR 1995 SC 605A.

[135] *Id.* at para. 6(1.1) (noting that the land on which the mosque was situated was also believed to be the birthplace of the Hindu God, Shri Ram).

[136] *Id.* at paras. 7–8(1.35).

[137] *Id.* at para. 13.

included a mosque and a temple.[138] The Court weighed the constitutionality of the ordinance authorizing the government takeover.[139] Within its analysis, the Court assessed whether the mosque was an essential and integral part of the Islamic faith, and thus immune from government takeover under the religious freedom rights in Articles 25 and 26 of the constitution.[140] Ultimately, the court's decision to uphold the ordinance rested on the sovereign's land acquisition powers, but the court also addressed the EPD question and found that "a mosque is not an essential part of the practice of the religion of Islam and Namaz" because prayer can be offered anywhere.[141] Even if Islam does not require Muslims to pray in a mosque, mosques have undoubtedly evolved into a very important component of the Islamic faith and are an important element of religious community-building.[142] The Court is overstepping its judicial role in making these sorts of religious pronouncements. EPD analysis produced a charged statement on the importance of mosques in a context that was already fraught with tension and animosity.[143] The court could have simply upheld the statute under the State's sovereign authority to acquire land rather than grapple with the question of whether a mosque is an essential and integral part of the Islamic faith.

The Indian judiciary should proceed with caution when it plays the role of a theologian. Religions are not monoliths. Religions are composed of different sects and different interpretations.[144] Most importantly, religion is deeply personal. The essentiality of a given practice is often defined at the individual level. A group of judges with limited knowledge of the history, texts, and customs of a given religion simply do not have the background to make pronouncements on religious principles and religious scripture. When judges engage in this sort of

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[138] *Id.* at para. 15 (The plan included "a Ram temple, a mosque, amenities for pilgrims, a library, museum, and other suitable facilities. . . .").

[139] *Id.* at paras. 80–81.

[140] *Id.*

[141] *Id.* at para. 85.

[142] *See* Adrija Roychowdhury, *What is the role of the mosque in Islam?*, INDIAN EXPRESS (Sept. 29, 2018, 11:58 AM), https://indianexpress.com/article/research/ayodhya-verdict-babri-masjid-what-is-the-role-of-the-mosque-in-islam-5376988/ [https://perma.cc/ZFM2-CBET].

[143] *See* Ismail Faruqui, AIR 1995 at paras. 3–8 (noting the charged history of the land).

[144] *See generally* India Const. art. 25, cl. 2(b) (noting that "Hinduism" was used to reference a vast array of doctrines, beliefs, and practices); Asifa Quraishi-Landes, *Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible*, 16 RUTGERS J.L. & RELIGION 553, 554–57 (2015) (discussing the multitude of interpretations within Islamic jurisprudence).

analysis, the language they use in their decisions has the power to shape and define religious norms and religious perceptions.

EPD is more of a pretext for broad judicial discretion than a coherent doctrine. Because the doctrine has no judicially manageable standard and judges are given the ability to interpret religious doctrine, they can pick and choose which elements of a religion to label essential or unessential. The current iteration of EPD clearly instills the wrong kind of discretion in a set of secular judges. As a result, courts engage in the EPD analysis in a manner that undermines the integrity of the judicial decision-making process.

D. SABARIMALA AND THE SECULARISM IDENTITY CRISIS

The *Sabarimala* decision has brought to the forefront the competing views of secularism in India. *Sabarimala* addressed the constitutionality of the Sabarimala temple's practice of banning menstruating women between the ages of ten and fifty from entering the premises.[145] The temple at the heart of the controversy is located in a remote mountain range in the southern Indian state of Kerala.[146] The temple is devoted to Lord Ayyappa, whose manifestation is known as *Naisthik Brahmachari* and is believed to be celibate.[147] Every year, thousands of male devotees embark on a pilgrimage to reach the temple that involves a thirteen kilometer trek on a steep mountain.[148] During the forty-one days preceding the pilgrimage, they must work to attain ritual purity by abstaining from smoking, alcohol, meat, and sex.[149] Menstruating women are thought to be inherently incapable of achieving this purity.[150]

In 1955, the Travancore Devaswom Board, the entity that manages the Sabarimala temple, imposed a restriction on the entry of menstruating women between the ages of ten and fifty-five.[151] The

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[145] Indian Young Lawyers Ass'n v. Kerala (*ILYA*), (2019) 11 SCC 1, paras. 5, 23, 27 (2018).

[146] Acevedo, *supra* note 95, at 969.

[147] *Id.*

[148] *Sabarimala: The Indian god who bars women from his temple*, BBC (Oct. 19, 2018), https://www.bbc.com/news/world-asia-india-45901014 [https://perma.cc/9JBH-YZVG].

[149] *Id.*

[150] *See id.*

[151] *ILYA*, (2019) 11 SCC 1, para. 26 (2018) (per Chandrahud, J., concurring) ("It is hereby notified that Ayyappans who do not observe the usual Vrithams are prohibited from entering the temple by stepping the Pathinettampadi and women between the ages of ten and fifty-five are forbidden from entering the temple.").

restriction was enforceable due to Rule 3(b) of the Kerala Hindu Places of Public Worship Rules (Kerala Act), which allowed for the exclusion of women from a public place of worship if based on "custom and usage."[152] The Kerala Act was eventually accompanied by a set of corresponding rules which explicitly authorized entry bans against women.[153] In 1991, the entry ban was challenged in the Kerala High Court.[154] The court ruled that the entry ban was essential to the Ayyappan devotees' faith, and thus constitutional, and the restriction was not in violation of Article 15 (gender equality), Article 25 (freedom to practice religion), or Article 26 (freedom to manage religious affairs) of the Constitution.[155]

In 2006, Indian Young Lawyer's Association, a public interest group, filed a public interest litigation petition challenging the Kerala Act's authorization of the entry ban on the grounds that the exclusionary practice violated equality rights under Article 14 and religious worship rights under Article 25 of the Constitution.[156] The petitioners argued that the entry ban not only violated prohibitions on gender discrimination outlined in Article 14, but also violated the rights of female worshippers to freely practice their faith under Article 25.[157] Twelve years later, the Supreme Court held in a 4-to-1 majority that the entry ban was unconstitutional.[158] Each of the five Justices wrote separate lengthy opinions.[159] In the *Sabarimala* judgment, the majority and dissent are particularly interesting because both the majority and dissent relied not just on EPD but also on another tool—the "constitutional morality" doctrine. Below is an analysis of two of the doctrines the Court invoked to determine the constitutionality of the entry ban: (1) EPD and (2) the "constitutional morality" doctrine.[160]

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[152] Kerala Hindu Places of Public Worship Rules, 1965, Rule 3(b) ("Women at such time during which they are not by custom and usage allowed to enter a place of public worship.").

[153] *Id.* at Rule 3 ("The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship. . . (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.").

[154] *See* S. Mahendran v. Sec'y, Travancore, AIR 1993 Ker 42.

[155] *Id.* at para. 44 ("[W]orship at Sabarimala shrine is in accordance with the usage prevalent from time immemorial.").

[156] *ILYA*, 11 SCC at paras. 5–6.

[157] *See id.*

[158] *See id.*

[159] *Id.*

[160] *Id.* at para. 111; *id.* at para. 12 (per Chandrachud, J., concurring); *id.* at para. 11.6 (per Malthorta, J., dissenting).

1. EPD in the Sabarimala *Judgment*

The justices writing for the plurality invoked an application of EPD that was reminiscent of how the court applied EPD in the *Commissioner of Police* case.[161] After the plurality concluded that the Ayyapans belonged to a sect of Hinduism, the Court was then tasked with determining whether the practice of banning women between the ages of ten and fifty was an essential practice of the Hindu religion.[162] The court looked to the length of time that the contested practice had been part of a religion.[163] Justice Misra's analysis focused heavily on the fact that women of all ages had been allowed to enter the temple in the mid-1900's.[164] In fact, prior to 1950, women of all age groups used to visit the Sabarimala temple for their children's rice feeding ceremonies.[165] Because the temple ban was not consistently applied throughout the temple's existence, Justice Misra concluded that the practice could not be deemed essential to the Hindu religion and "could only be treated as mere embellishments to the non-essential part or practices."[166] According to Justice Misra's reasoning, if a religious community existed without a given practice, the practice could not be so essential to the religion as to warrant constitutional protection.

Justice Malhotra, the lone dissenting judge—and sole woman on the five-bench panel for the case—called for an application of EPD that resembled the deferential approach taken in *Shirur Mutt*, a standard rooted in broad deference to religious communities to define the parameters of religious practice.[167] She concluded that the EPD analysis should be reserved only for "pernicious, oppressive, or . . . social evil[s], like *Sati*."[168] She further asserted: "In a secular polity, issues which are matters of deep religious faith and sentiment must not ordinarily be interfered with by the courts."[169] According to Justice Malhotra, the entry ban was not

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[161] *See* discussion *supra* Part II.B.

[162] *IYLA*, 11 SCC at para. 112.

[163] *Id.* at paras. 121–25.

[164] *Id.*

[165] *Id.*

[166] *Id.* at para. 124.

[167] *See id.* at paras. 8.1–8.6 (per Malhotra, J., dissenting).

[168] *Id.* at para. 8.2.

[169] *Id.* at paras. 6.1, 10.13 ("Judicial review of religious practices ought not to be undertaken, as the Court cannot impose its morality or rationality with respect to the form of worship of a deity. Doing so would negate the freedom to practise one's religion according to one's faith and beliefs. It would amount to rationalising religion, faith, and beliefs, which is outside the ken of Courts.").

pernicious enough to justify judicial intervention, and the court should have simply deferred to the Ayyappan's practice.[170]

2. *"Constitutional Morality" in the* Sabarimala *Judgment*

In addition to EPD, both the plurality and the dissent leveraged a textual tool—the "constitutional morality" doctrine—to support their respective contentions. Article 25 of the Constitution explicitly subjects the freedom of conscience to "morality, health, and public order, and to the other provisions of this Part."[171] The term "morality" is not formally defined in the Constitution, but courts have increasingly interpreted this term to refer to the concept of "constitutional morality."[172]

The majority concludes that the entry ban violates the "constitutional morality" limitation included in the Constitution.[173] Justice Chandrachud writes most extensively about the "constitutional morality" doctrine, and he defines "constitutional morality" as the notion that religious practices must be aligned with the values of individual dignity and substantive equality that inspired the Constitution and appear in the preamble of the Constitution.[174] Essentially, under this view, secular fundamental freedoms reign supreme over customary laws, rituals, and traditions:

> So, liberty in matters of belief, faith and worship, must produce a compassionate and humane society marked by the equality of status among all its citizens. The freedom to believe, to be a person of faith and to be a human being in prayer has to be fulfilled in the context of a society which does not discriminate between its citizens.[175]

Justice Malhotra also addresses "constitutional morality" in her dissent but invokes a completely different definition of the concept.[176] Justice Malhotra asserts that harmony between religious and secular freedoms is the underlying value that should guide the court's interpretation of "constitutional morality." Justice Malhorta provides that

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[170] *See id.* at para. 8.5 (noting that women who are prohibited from entering the Sabarimala temple are permitted to enter other temples devoted to different manifestations of Lord Ayyappa).

[171] India Const. art. 25. Note that "this Part" refers to Part III of the Constitution, which guarantees a right against discrimination on the basis of sex.

[172] *See id. See also IYLA*, 11 SCC at paras. 11–12 (per Chandrachud, J., concurring).

[173] *See id.* at para. 111 (per Misra, J.).

[174] *See id.* at para. 12 (per Chandrachud, J., concurring).

[175] *Id.* at para. 3.

[176] *See id.* at paras. 11.1–11.8 (per Malhorta, J., dissenting).

"Constitutional Morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is irrelevant whether the practise is rational or logical."[177] Given that "constitutional morality" has never been clearly defined, both the plurality and the dissent anchor their definitions of "constitutional morality" in different constitutional values.

3. Competing Visions of Secularism

The *Sabarimala* judgment provides interesting insights into two competing visions of Indian secularism. On one hand, Indian secularism serves to protect the rights of religious groups to practice their faith and live a life that is rooted in the tenets of their respective religions. The Constitution explicitly outlines such rights, and Article 26 in particular, excludes language that subjects the right to manage one's religious affairs to fundamental rights scrutiny.[178] This version of secularism—one that shows deference to religious communities—was adopted by the dissenting judge in *Sabarimala*.[179] On the other hand, the history and context of the Constitution illustrates the framers' intent to create a society based on progressive and modern values.[180] Under this version of secularism, religious freedom rights are upheld to the extent that such rights do not conflict with the principles of justice, equality, and human dignity that serve as the foundation for the Constitution. This notion of secularism was adopted by the justices in the majority in *Sabarimala*.

Ultimately, the *Sabarimala* judgment poses more questions than answers, and the 2018 judgment was not the end of this saga. Since the decision was issued, various parties have filed review petitions with the court—as allowed under the Indian judicial infrastructure—and the temple entry issue has been referred on appeal to a larger seven judge constitutional bench.[181] The nine-judge bench is slated to consider the

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[177] *Id.* at para. 11.6.

[178] *See* India Const. art. 26.

[179] *See IYLA*, 11 SCC at para. 11.2 (per Malhorta, J., dissenting).

[180] *See* discussion *supra* Part I.B.

[181] *See* Shrutanjaya Bhardwaj, *Constituting Constitution Benches of the Supreme Court: An analysis,* BAR & BENCH (Sept. 28, 2019, 2:08 AM), https://www.barandbench.com/columns/constituting-constitution-benches-of-the-supreme-court-an-analysis [https://perma.cc/F6XG-C8TG] (explaining the unique structure of the Indian Supreme Court). Most cases before the Supreme Court are heard before one or two judges, known as a "Division Bench." However, constitutional

unresolved legal questions from the judgment on the scope of religious freedom rights and to rule on more coherent standards to resolve disputes between religious and secular freedoms.[182]

The *Sabarimala* outcome is undoubtedly an important step forward for women's rights, particularly in a country like India where outdated and oppressive notions of women continue to shape the ways in which women are treated by both institutions and general society. However, the judgment itself presents a more complicated picture of the issues and interests at stake. Justice Malhotra's concerns with the majority's approach to religious freedom issues are not without merit,[183] particularly given the strong protections that the Constitution affords to religious rights.

The two competing versions of secularism result in different visions for society. A society that adheres to a rigid legal pluralism may occasionally be required to accommodate practices or disfavored views that are misaligned with progressive values. If the judiciary formally adopts the plurality's constitutional morality and EPD arguments, this will ensure that only those elements of religious practice that comport with the values of a progressive society would be protected by the Constitution. While it is not necessarily the role of the courts to impose a particular societal vision on the populace, violations of fundamental equality rights are breaches that should not be categorized as mere disfavored views. The broad deference to religious communities that Justice Malhotra espouses would prohibit courts from upholding the fundamental rights guaranteed by the Constitution.

4. The Future of Religious Rights Jurisprudence

Moving forward, the judiciary should reconsider its existing approach to religious freedom rights. Given the role that religion plays in both Indian society and the Constitution, a modified version of EPD is still

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issues are generally heard by a larger bench of Judges. Constitutional issues are first heard by a bench of five judges. Appeals are generally heard by a bench of seven or more judges.

[182] Krishnadas Rajagopal, *Sabarimala case: Supreme Court upholds referring religious questions to larger bench, frames 7 questions of law,* HINDU (Feb. 10, 2020, 12:57 PM), https://www.thehindu.com/news/national/sabarimala-case-supreme-court-upholds-referring-religious-questions-to-larger-bench-frames-7-questions-of-law/article30780943.ece [https://perma.cc/AM6W-EWXD]. Additionally, the Court's docket includes a number of temple entry cases involving other religious denominations. A more definitive response to these legal questions will shape the outcome of these pending cases.

[183] *See* discussion *supra* Part II.D.1–2 for analysis of Justice Malhotra's dissent.

useful for courts to analyze conflicts between religious practices and interests that do not rise to the level of constitutional rights. However, the judiciary might consider applying EPD in a more intentional and thoughtful manner. In this sphere of conflicts, a version of EPD that is more deferential to a given religion's conception of their own belief—as suggested by Justice Malhotra—does make sense. For example, in cases like *Mohammed Fasi* or *Commissioner of Police*, which involve the balancing of a state interest in uniformity or public order with the rights of religious communities,[184] courts might be better off showing more deference to religious conceptions of how a religion is defined and avoiding standards that allow secular judges to define the contours of religion. Further, some minimal amount of discretion within the EPD framework is not necessarily a bad thing, especially given the diversity of religions and religious sects that exist within India. Bright line delineations of what constitutes an essential religious practice or a secular element of the religion simply might not be compatible with India's religious diversity. But deference to religious communities has its limits. Deference often requires judges to defer to philosophies that are rooted in patriarchal, male-dominated interpretations of the religion. The voices fighting for more equal and progressive interpretations of scriptures and ideologies within a given religious community are often the voices in the minority, and their perspective may be steamrolled in the process of applying a deferential approach.[185]

Nevertheless, secular constitutional rights should be granted heightened protections. These rights clearly play a profound and foundational role in the constitutional framework, and when courts analyze conflicts between religious practices and secular constitutional freedoms, they should consider applying to these conflicts the "constitutional morality" framework outlined by Justice Chandrachud and

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[184] *See* discussion *supra* Part II.B.

[185] *See* Siobhan Mullaly, *Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case*, 24 OXFORD J. LEGAL STUD. 671, 689 (2004). Mullaly discusses the *Shah Bano* case, in which the Supreme Court applied EPD and concluded that Muslim women are entitled to "maintenance" payments under § 125 of the Code of Criminal Procedure for a period longer than the *iddat* period. In discussing the Court's reasoning, Mullaly writes:

> In the *Shah Bano* case, we see the Supreme Court appealing to an egalitarian Islam, recognizing the diversity within Islam and rejecting the dominant voices of the Islamic Shariat and All-India Muslim Personal Law Boards. Instead, the Supreme Court chose to listen to sub-altern voices, voices that were seeking equality within and between religious communities.

Id.

the other justices in the *Sabarimala* majority. In this sphere of conflicts, Justice Malhotra's proposal is that courts should defer to religious communities except in extreme cases of oppressive practices.[186] This means that there would be no recourse for so many fundamental rights violations. The "constitutional morality" doctrine provides a reasonable and just bright line rule that would protect those who are the subject to fundamental rights violations—a rule that is aligned with the Constitution.

III. CONCLUSION

Secular judiciaries across the world are confronted with a complicated balancing act—balancing a commitment to religious tolerance and respect for religious diversity with broader guarantees of equality. In India, the Constitution commits the State to more than mere respect for religious diversity; the State is tasked with actively protecting religious diversity.[187] While India's tradition of legal pluralism may be chaotic at times, its deep societal roots render it an important and fundamental tenet of the Indian legal system. In a country with a deep-rooted tradition of legal pluralism, a one-size-fits-all approach simply may not be appropriate for dealing with conflicts between religious practice and secular rights. The judiciary will likely need to apply different analyses based on the interests and rights at stake in each conflict. The *Sabarimala* outcome is undoubtedly a positive step forward in dismantling gender taboos, but the decision also reveals India's secularism identity crisis—a crisis that will only be resolved if Indian courts remain intentional, thoughtful, and respectful about how they engage with conflicts between secular and religious interests.

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[186] *ILYA*, (2019) 11 SCC 1 (2018) (per Malhotra, J., dissenting).

[187] India Const. arts. 25–26.