

BEYOND THE WALL: PRINCIPLED DISTANCE, CONSTITUTIONAL MORALITY, AND THE JURISPRUDENCE OF INDIAN SECULARISM

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Abstract

Indian secularism is often described as an imperfect copy of a Western ideal. This article argues the opposite: its departures from strict separation are the point. Through a doctrinal reading of the Constituent Assembly Debates, Articles 25 to 30 of the Constitution, and leading Supreme Court decisions, the article traces a relational model of secularism organized around principled distance. That model asks the state to guard against two kinds of power at once - majoritarian domination between religious communities and subordination within them. The constitutional architecture is therefore neither simply interventionist nor hands-off. It is context-sensitive, pluralist, and reformist. The article then examines the essential religious practices doctrine from Shirur Mutt through Durgah Committee, Shayara Bano, and the Sabarimala litigation. The doctrine's central weakness is institutional: it turns civil judges into arbiters of theological authenticity and can displace the more candid question of whether a practice causes discrimination, humiliation, or civil disability. A rights-based approach grounded in constitutional morality and anti-subordination better fits the Constitution's transformative commitments, provided that it remains alert to majoritarian interference with minority autonomy. The pending nine-judge reference in Kantaru Rajeevaru makes that choice immediate rather than theoretical.

Keywords: *Indian secularism, principled distance, essential religious practices, constitutional morality, anti-subordination, religious freedom*

INTRODUCTION

The constitutional puzzle is not whether India is secular. It is what kind of secularity a radically plural republic can plausibly sustain. The familiar image of a wall between church and state offers a clean answer, perhaps too clean. In India, religious institutions have historically touched family law, property, education, caste, public access, and political identity. A wall built around that terrain would not necessarily produce neutrality. It might simply preserve the power already inside it.

This article argues that Indian secularism is best understood as a relational and transformative constitutional practice. Its organizing idea is principled distance: the state may engage with or withdraw from religious institutions depending on what liberty, equality, dignity, and plural coexistence require in context (Bhargava, 2010). This is not ad hoc benevolence. It is a discipline of justification.

The claim has two parts. First, the Constitution protects communities against inter-religious domination, especially majoritarian assimilation and control. Second, it protects persons within communities against intra-religious domination, including caste exclusion, gender hierarchy, and civil disability. The hard cases arise because these safeguards can pull in different directions. Indian secularism lives in that friction.

The Supreme Court's essential religious practices doctrine was meant to police the boundary between protected religion and regulable activity. Over time, however, it encouraged judges to decide what a religion truly requires. The resulting judicial clericalism is both epistemically fragile and normatively evasive. A court can spend pages deciding whether a practice is old, textual, or essential and still avoid the more basic question: what does the practice do to the person before it?

The article proceeds from theory to constitutional design, then to doctrine. It reconstructs the Constituent Assembly's rejection of strict non-establishment, maps Articles 25 to 30, follows the ERP doctrine from Shirur Mutt to Sabarimala, and evaluates constitutional morality and anti-subordination as alternative standards. The conclusion defends a rights-based inquiry that takes religion seriously without allowing theology to decide the reach of fundamental rights.

METHOD AND SCOPE

This is a qualitative doctrinal study. It reads constitutional text, Constituent Assembly debates, statutes, and reported judgments alongside scholarship on secularism and transformative constitutionalism. The cases are selected because they mark changes in the Court's treatment of religious autonomy, social reform, essentiality, equality, and institutional competence. The method is interpretive rather than empirical: it asks how doctrines are structured, what values they privilege, and where their internal logic breaks down.

The analysis is limited in two ways. It does not offer a social-scientific measure of secular outcomes across India's states, and it does not attempt a complete history of every personal-law or minority-education dispute. Its narrower concern is jurisprudential architecture. The nine-judge proceedings in *Kantaru Rajeevaru* are treated as pending; official Supreme Court records show sustained hearings in April and May 2026, but this article does not anticipate the eventual judgment (Supreme Court of India, 2026a, 2026b).

From Separation to Principled Distance

The Limits of the Inherited Western Paradigm

The dominant account of secularism in political and legal theory is still anchored in the history of Western Europe and North America (Calhoun et al., 2011). It usually imagines secularity as an institutional boundary - a wall separating the state from ecclesiastical authority (Taylor, 2011).

That image emerged from a particular history: European wars of religion, the consolidation of sovereign states, and the effort to remove confessional conflict from the machinery of public power (Bhargava, 1998). It solved a real problem. It was never a universal blueprint.

Two institutional forms dominate the familiar story. The American model emphasizes non-establishment and free exercise; French *laïcité* more aggressively protects a republican public sphere from visible religious authority. Table 1 places both beside the Indian model.

Table 1
Three Constitutional Models of Secularism

Model	Core logic	Public religion	State intervention	Characteristic risk
United States	Mutual non-establishment and free exercise	Generally protected, subject to neutral law	Limited where action would establish or burden religion	Treating formal separation as sufficient neutrality
French <i>laïcité</i>	Republican citizenship insulated from clerical authority	More readily restricted in state institutions	Used to preserve a religion-neutral civic sphere	Assimilation through enforced privatization
India	Principled distance and equal respect	Recognized as a durable part of public life	Permitted for regulation, reform, and protection	Selective engagement becoming partisan or majoritarian

Note. The categories are ideal types; actual doctrine in each jurisdiction is more internally varied. Synthesized from Bhargava (2010), Calhoun et al. (2011), Jacobsohn (2003), and Taylor (2011).

Different as they are, the American and French models share a basic premise: religion and the state occupy domains that

can be cleanly separated. The premise works most comfortably where religious practice can be pushed into private life without unravelling the social order (Jacobsohn, 2003).

That clean division travels badly. In postcolonial societies, religion is often braided into family law, property, community authority, and everyday social rank (Bhargava, 2010). A constitutional wall cannot simply wish those entanglements away.

Principled Distance and the Two Axes of Domination

Rajeev Bhargava's idea of principled distance begins from this difficulty (Bhargava, 2010). The state is not required to keep the same distance from every practice at every moment. Its distance must instead be justified by constitutional commitments to liberty, equality, dignity, and fraternity.

The framework responds to two distinct vulnerabilities:

- Inter-religious domination: the marginalization of a minority by a politically or demographically dominant religious group.

- Intra-religious domination: the oppression of women, lower-caste members, dissidents, or other vulnerable persons within a religious community (Bhargava, 2010).

A rigid separation rule is particularly weak against intra-religious domination. Non-intervention can protect dissent, but it can also shelter caste exclusion, gender hierarchy, and coercive custom from reform (Jacobsohn, 2003). Principled distance therefore permits two movements at once: protection against majoritarian capture and intervention against internal subordination. The tension is deliberate.

Twin Tolerations and Constitutional Transformation

Alfred Stepan's 'twin tolerations' makes a related point. Democratic institutions must remain free to legislate without theological permission, while religious citizens and organizations must remain free to worship, organize, and argue in public life (Stepan, 2000). Neither side disappears. Both accept limits.

In the Indian constitutional scheme, the twin tolerations are operationalized through a delicate equilibrium: the state guarantees wide religious freedom under Articles 25 and 26, while explicitly retaining the sovereign prerogative under Article 25(2) to regulate secular activities and enact social welfare legislation.

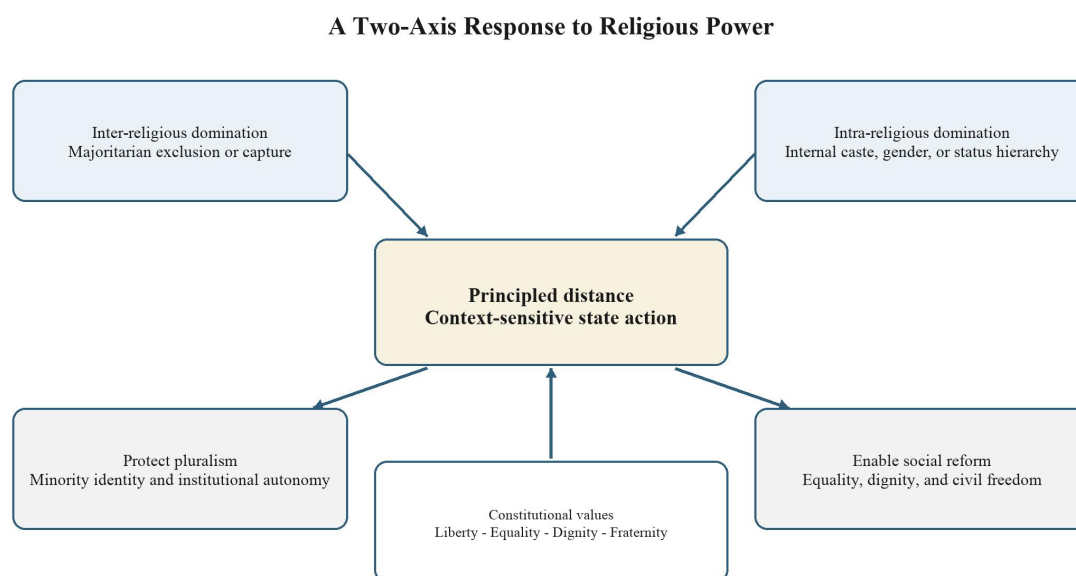


Figure 1
Principled Distance as a Two-Axis Constitutional Response

Note. The diagram is an original synthesis of Bhargava's principled-distance framework and Stepan's twin tolerations (Bhargava, 2010; Stepan, 2000).

The Constituent Assembly met in the immediate shadow of Partition. Communal violence made majoritarian religious politics an existential danger; caste exclusion, untouchability, and gender hierarchy made state passivity equally untenable. The framers were therefore dealing with two emergencies, not one.

Religious practice in India was intertwined with civil status, inheritance, access to institutions, and social rank. A strict rule of non-intervention would have immobilized the new republic and left inherited hierarchies substantially untouched (Austin, 1966).

The Constitution was designed to distribute power, but also to change the terms on which people lived together. Article 17 abolished untouchability; Article 15 prohibited discrimination on specified grounds; Article 21 came to anchor dignity and personal liberty. Neutrality could not mean indifference to those promises.

Indian secularism thus took an interventionist, value-laden form. The state could reform oppressive practices while maintaining structural guarantees for minority identity and institutional life (Baxi, 2013). That combination - engagement without establishment - is the constitutional experiment examined here.

The Constituent Assembly and a Pluralist Constitutional Order

Partition and the Rejection of Formal Non-Establishment

The religious-liberty clauses were drafted amid profound communal rupture. Partition exposed the danger of sectarian

power, while entrenched caste and gender hierarchies made a purely defensive constitution inadequate (Austin, 1966). During the deliberations on Draft Article 19 (which subsequently became Article 25 of the Constitution of India), several members proposed the incorporation of a classical non-establishment clause modeled explicitly on the First Amendment of the United States Constitution. Prof. K.T. Shah moved an amendment proposing that: K. T. Shah proposed that a secular Indian state should have 'no concern with any religion, creed or faith' and should observe 'absolute neutrality' in religious matters (Constituent Assembly Debates, 1948, vol. 7, p. 815). The formulation was clear. Its implications were not.

The Assembly rejected Shah's formula. Total disengagement, members understood, could freeze social hierarchy in place and disable legislation opening temples, regulating endowments, or reforming discriminatory personal-law rules (Baxi, 2013). The refusal of a wall was therefore not a refusal of secularism; it was a refusal of passivity.

Propagation, Conscience, and the Social-Reform Power

The wording of Draft Article 19 generated intense debate regarding the scope of individual liberty, specifically concerning the inclusion of the word "propagate." Several members expressed apprehension that guaranteeing the right to propagate religion would facilitate coercive religious conversions, potentially undermining social harmony in the vulnerable post-partition era.

Lokanath Misra argued that making propagation a fundamental right would turn India into a proselytizing ground rather than a stable democratic republic (Constituent Assembly Debates, 1948, Vol. VII, p. 822).

K. M. Munshi answered that propagation was bound up with both free speech and the integrity of minority faiths. The Drafting Committee retained the word partly to secure the confidence of Christian representatives who regarded propagation as an article of faith (Constituent Assembly Debates, 1948, vol. 7, p. 837).

The final text kept the right freely to profess, practice, and propagate religion in Article 25(1), but made it subject to public order, morality, health, and the other rights in Part III. Article 25(2) then preserved legislative authority over secular activities associated with religion and over social welfare and reform. The compromise is compact, but far from timid.

Crucially, Dr. B.R. Ambedkar ensured the incorporation of Article 25(2), which explicitly bifurcated religious practice into spiritual tenets and secular activities:

Religious conceptions in this country are so vast that they cover every aspect of life, from birth to death.... If we do not restrict the definition of religion, the State will be completely disabled from enacting social reform legislation. We must claim that the secular activities associated with religion fall outside the ambit of fundamental religious rights. (Constituent Assembly Debates, 1948, vol. 7, p. 781)

Group Autonomy, Minority Security, and the Unstated Secular Premise

The drafting of Articles 26, 29, and 30 revealed a fundamental tension in Indian constitutional design: balancing collective denominational autonomy with the protection of minority identity and individual rights.

Tajamul Husain urged a private conception of religion and uniform citizenship. Minority representatives, including Jerome D'Souza and Begum Aizaz Rasul, countered that formal equality could not by itself cure the vulnerability of smaller communities in a majoritarian democracy (Austin, 1966).

The Assembly resolved this debate through a dual structure:

- Denominational autonomy: Article 26 protects institutional self-government in matters of religion, subject to public order, morality, and health.

- Minority safeguards: Articles 29 and 30 protect cultural conservation and minority educational institutions, limiting forced assimilation while permitting legitimate regulation.

A notable feature of the original 1950 Constitution of India was the omission of the word "Secular" from the Preamble. This omission was not accidental; the Constituent Assembly engaged in deliberate discussions regarding its inclusion.

The original Preamble did not use the word 'secular.' Yet the principle was already distributed across equality, non-discrimination, religious liberty, minority rights, electoral citizenship, and the ban on religious taxation and instruction in specified state institutions. The Forty-second Amendment made the label express in 1976; *S. R. Bommai v. Union of India* (1994) later treated secularism as part of the Constitution's basic structure.

The Constitutional Architecture of Religious Liberty

Part III does not treat religious freedom as one undifferentiated negative liberty. It separates individual conscience and practice under Article 25 from collective denominational autonomy under Article 26, then places both beside minority cultural and educational guarantees in Articles 29 and 30.

Article 25(1) belongs to every person. It protects conscience and the freedom to profess, practice, and propagate religion, yet expressly subjects those freedoms to public order, morality, health, and the other provisions of Part III.

Article 26 is framed differently. It is subject to public order, morality, and health, but it does not repeat Article 25's express reference to the other rights in Part III. That omission has fuelled the recurring argument over whether denominational autonomy can resist claims grounded in equality, non-discrimination, and dignity.

Article 25(2) is the constitutional hinge. It keeps religious liberty from becoming an immunity for economic exploitation, financial opacity, or caste exclusion, and it gives social reform an explicit textual home.

Table 2

Articles 25 to 30: Rights, Powers, and Constitutional Limits

Provision	Rights holder	Primary function	Express limits or qualifications
Article 25(1)	Every person	Conscience; profession, practice, and propagation	Public order, morality, health, and other Part III rights

Provision	Rights holder	Primary function	Express limits or qualifications
Article 25(2)(a)	State regulatory power	Regulation of economic, financial, political, or secular activity linked to religion	Action must remain constitutionally valid
Article 25(2)(b)	State reform power	Social welfare, reform, and opening public Hindu institutions	Targets public character and reform objectives
Article 26	Religious denominations	Institutional creation, religious affairs, property, and lawful administration	Public order, morality, and health
Articles 29-30	Cultural sections and religious or linguistic minorities	Cultural conservation and minority educational autonomy	Permits regulation that does not erase minority character

Note. The table summarizes the constitutional text and leading doctrinal qualifications; it does not imply that any listed right is absolute. See Constitution of India, arts. 25-30 (1950).

Article 25(2), Temple Entry, and Harmonious Construction

Under Article 25(2)(a), the state retains the power to regulate or restrict any economic, financial, political, or other secular activities associated with religious practices. Under Article 25(2)(b), the state is empowered to enact measures providing for social welfare and reform, specifically the throwing open of Hindu religious institutions of a public character to all classes and sections of society.

The reform power under Article 25(2) supported a wider statutory project, including civil-rights legislation against untouchability, temple-entry laws, and post-independence reforms of Hindu marriage and succession.

In *Sri Venkataramana Devaru v. State of Mysore* (1958), the Supreme Court addressed a direct clash between statutory social reform under Article 25(2)(b) and denominational autonomy under Article 26(b). The trustees of the Sri Venkataramana temple in Mulki, belonging to the Gowda Saraswath Brahmin denomination, challenged the Madras Temple Entry Authorization Act, claiming that excluding other communities was an integral denominational right under Article 26(b).

Justice T.L. Venkatarama Ayyar, writing for the Constitution Bench, applied the doctrine of harmonious construction:

There are two provisions in the Constitution, both in Part III... one of which, Article 26(b), confers on a denomination the right to manage its own affairs in matters of religion, and the other, Article 25(2)(b), reserves to the State the power to enact a law for throwing open public Hindu temples to all classes and sections of Hindus. Both... must be read together and harmonized. (*Sri Venkataramana Devaru v. State of Mysore*, 1958, p. 918)

The Court treated Article 25(2)(b) as an overriding constitutional qualification in this setting. Denominational autonomy did not vanish, but it yielded to a law opening a public Hindu temple to excluded sections of the community.

Individual Liberty and Denominational Discipline

The tension between individual equality and denominational insularity returned to the Supreme Court in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay* (1962). This case concerned a challenge to the Bombay Prevention of Excommunication Act, 1949, which prohibited the practice of excommunicating members from religious communities. The Dai-ul-Mutlaq, as the religious head of the Dawoodi Bohra community, challenged the statute on the ground that the power of excommunication was essential to managing denominational affairs under Article 26(b).

By a 4:1 majority, the Supreme Court struck down the Bombay Prevention of Excommunication Act. The majority held that the power to excommunicate was an integral facet of religious administration aimed at preserving denominational discipline, and therefore fell squarely within the protected domain of Article 26(b).

In a notable dissent, Chief Justice B.P. Sinha argued that excommunication produced devastating civil consequences, reducing individuals to social outcasts and depriving them of basic human rights. He asserted that the state's power under Article 25(2)(b) to enact social reform should prevail over exclusionary customary assertions.

The controversy did not end in 1962. In *Central Board of Dawoodi Bohra Community v. State of Maharashtra* (2023), a five-judge Constitution Bench directed that the surviving constitutional questions be placed with the larger nine-judge religious-freedom reference. The old dispute over group discipline and individual civil status had become part of a much wider reckoning.

Minority Cultural and Educational Protections

Articles 29 and 30 complement the religious liberty clauses by providing specialized guarantees to religious and linguistic minorities, ensuring that formal equality does not result in involuntary assimilation.

Article 29(1) grants any section of citizens residing in India having a distinct language, script, or culture of its own the right to conserve the same. Article 29(2) guarantees that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, or language.

Article 30(1) confers upon all minorities, whether based on religion or language, the fundamental right to establish and administer educational institutions of their choice.

In *T.M.A. Pai Foundation v. State of Karnataka* (2002), an eleven-judge Constitution Bench addressed the extent of state regulatory authority over minority educational institutions. Chief Justice B.N. Kirpal clarified that the right under Article 30(1) is not absolute to the extent of permitting maladministration:

The Court's often-repeated formula is that a right to administer is not a right to maladminister. Standards concerning educational quality, financial transparency, and employee welfare may be legitimate, but regulation cannot extinguish the institution's minority character (*T.M.A. Pai Foundation v. State of Karnataka*, 2002).

In *P.A. Inamdar v. State of Maharashtra* (2005) and *Society for Unaided Private Schools of Rajasthan v. Union of India* (2012), the Court reaffirmed that while the state can enforce standards of academic excellence, financial transparency, and employee welfare, it cannot enforce quota reservations in unaided minority institutions, as doing so would erode their institutional autonomy protected under Article 30(1).

The structure therefore resists a simple ranking of individual and group rights. Its harder task is contextual: prevent collective autonomy from swallowing internal dissent, but also prevent equality review from becoming a pretext for majoritarian control of minority institutions.

The Essential Religious Practices Doctrine

From Community Deference to Judicial Screening

The essential religious practices (ERP) doctrine became the Supreme Court's principal technique for separating protected religious conduct from regulable activity. Its modern origin lies in *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954), usually shortened to *Shirur Mutt*.

In this foundational matter, a seven-judge Constitution Bench was tasked with determining the constitutional validity of the Madras Hindu Religious and Charitable Endowments Act, 1951, which sought to regulate the administration and financial governance of religious maths.

A religion may not only lay down a code of ethical rules... it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion.... What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. (*Shirur Mutt*, 1954, p. 1028)

Justice B.K. Mukherjea, writing for the unanimous Bench, rejected the narrow, belief-centric definition of religion prevalent in American First Amendment jurisprudence (such as *Davis v. Beason*, 1890), which had defined religion purely in terms of a personal relationship with a Creator. Instead, the Court recognized that in Indian traditions, religion encompasses both ritual conduct and doctrinal belief:

- Broad protection: Article 25 extends beyond belief to conduct undertaken in pursuance of religion, including rituals, observances, ceremonies, and modes of worship.

- Internal reference point: essentiality was initially assessed with reference to the religion's own doctrines rather than an external test of rationality.

The early formulation was comparatively deferential. Courts looked to the faith's own doctrines to identify what counted as integral religious practice. That deference did not last.

The subjective standard articulated in *Shirur Mutt* underwent a significant shift in *Durgah Committee, Ajmer v. Syed Hussain Ali* (1961). In this case, the Khadims of the shrine of Khwaja Moinuddin Chishti challenged the *Durgah Khawaja Saheb Act*, 1955, contending that the statutory takeover of shrine administration violated their denominational autonomy under Article 26.

Justice P.B. Gajendragadkar, writing for the Constitution Bench, introduced an objective filter that narrowed the scope of constitutional protection:

Practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. (*Durgah Committee, Ajmer v. Syed Hussain Ali*, 1961, p. 412)

The shift was consequential. Judges were no longer merely asking whether a community regarded a practice as religious; they were screening doctrine for what counted as authentic, central, rational, or merely accretive. Here the doctrine starts to wobble.

Plural Reasoning in Shayara Bano

The doctrinal complexities of the ERP test became central in *Shayara Bano v. Union of India* (2017), where a five-judge Constitution Bench evaluated the validity of *Talaq-e-Biddat* (instant and irrevocable triple talaq).

The Court invalidated *talaq-e-biddat* through different routes. Justice Kurian Joseph examined Islamic sources and concluded that instant triple talaq lacked the required theological foundation. Justice R. F. Nariman, joined by Justice U. U. Lalit, relied on Article 14 and held the statutory recognition of an unilateral, irrevocable divorce power manifestly arbitrary (*Shayara Bano v. Union of India*, 2017).

Shayara Bano exposes the choice with unusual clarity: should a discriminatory personal-law practice fall because judges find it theologically inessential, or because constitutional equality has been violated? The second route is institutionally cleaner. It is also more candid about what a constitutional court is for.

Sabarimala and the Conflict with Constitutional Morality

The ERP doctrine faced its most direct institutional test in *Indian Young Lawyers Association v. State of Kerala* (2018), known as the Sabarimala case. The litigation challenged Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, which permitted the customary exclusion of women aged 10 to 50 from entering the Sabarimala temple dedicated to Lord Ayyappa.

The Majority Ruling

The four-judge majority rejected denominational status for Ayyappa devotees, found the exclusion non-essential, and treated equality, dignity, and bodily autonomy as controlling constitutional considerations. Justice D. Y. Chandrachud's opinion was especially direct: a practice tied to menstrual status could not be insulated from Part III merely by being presented as custom (*Indian Young Lawyers Association v. State of Kerala*, 2018).

The Dissent of Justice Indu Malhotra

Justice Indu Malhotra dissented. She argued that essentiality should be evaluated from the believer's standpoint and warned that importing secular rationality into matters of faith could destabilize protection for India's many localized religious traditions. The dissent captures the strongest objection to aggressive rights review: a court that is insufficiently

attentive to pluralism can make equality sound suspiciously like assimilation.

Table 3

The Jurisprudential Evolution of Religious-Freedom Review

Decision	Doctrinal move	Constitutional significance
Shirur Mutt (1954)	Looks primarily to a religion's own doctrines to identify essential practice	Broad, community-referential protection
Sri Venkataramana Devaru (1958)	Harmonizes Article 26 autonomy with Article 25(2)(b) reform	Temple-entry reform may override exclusion
Durgah Committee (1961)	Screens out superstition and unessential accretions	Judges assume a more evaluative theological role
Sardar Syedna (1962)	Majority protects excommunication as denominational discipline	Collective autonomy prevails over asserted civil consequences
Shayara Bano (2017)	Uses both theological non-essentiality and manifest arbitrariness	Exposes competing ERP and equality routes
Sabarimala (2018)	Combines ERP analysis with equality, dignity, and constitutional morality	Deepens the conflict between autonomy and anti-subordination
Central Board (2023) / Kantaru Rajeevaru	Places recurring Article 25-26 questions before a nine-judge bench	Offers an opportunity to clarify ERP, morality, standing, and rights review

Note. Case years refer to decision dates used in the discussion. Reporter years may differ.

Why the ERP Framework Misfires

The evolution of the Essential Religious Practices doctrine illustrates two core structural dilemmas in Indian secular jurisprudence:

- Judicial clericalism: the doctrine requires civil courts to perform scriptural exegesis and tends to privilege textual, centralized accounts over lived, regional, or heterodox traditions (Sen, 2010).

- Doctrinal inversion: it makes the availability of constitutional protection turn on theological authenticity rather than on the existence of discrimination, civil disability, or bodily harm (Baxi, 2013).

These tensions produced the nine-judge reference in Kantaru Rajeevaru v. Indian Young Lawyers Association (2020). The reference asks the Court to clarify the relationship among Articles 25 and 26, the limits of the ERP inquiry, the meaning of 'morality,' and the place of rights-based review in religious disputes.

Constitutional Morality and Anti-Subordination

The Institutional Problem of Judicial Clericalism

The ERP doctrine creates an institutional and epistemological problem. Judges trained in public law must decide which scriptures, sects, experts, and historical practices count as authoritative. Secular adjudication begins to resemble clerical gatekeeping - the phenomenon often described as judicial clericalism (Jacobsohn, 2003).

Synthetic Canonical Standardization: Indian religious traditions - particularly within Hinduism and decentralized Islamic or indigenous practices - are historically polycentric, non-codified, and region-specific. When the Supreme Court searches for a single "essential" scriptural command, it routinely relies upon orthodox, textualized sources. This marginalizes living, syncretic, or localized heterodox traditions in favor of an artificially standardized canon (Sen, 2010). The second hazard is normative displacement. A case about dignity or civil disability can turn into a contest over ancient texts. If scriptural proof becomes the price of constitutional review, the rights-bearing citizen recedes from view (Baxi, 2013).

A Rights-Based Alternative

To resolve the dilemmas generated by the ERP doctrine, contemporary constitutional jurisprudence has increasingly relied upon the concept of constitutional morality. Popularized in modern Indian legal theory by scholars and judicial pronouncements, the concept draws directly from Dr. B.R. Ambedkar's interventions in the Constituent Assembly.

In Navtej Singh Johar v. Union of India (2018), Joseph Shine v. Union of India (2018), and Indian Young Lawyers Association v. State of Kerala (2018), the Court distinguished constitutional morality from public, sectarian, or majoritarian morality. The phrase is not a licence for judicial taste. Properly used, it points to fidelity to the Constitution's commitments to liberty, equality, dignity, and fraternity.

A rights-based approach changes the judicial question. Instead of asking only whether a practice is essential to a faith, the court asks whether the practice produces subordination, humiliation, exclusion, or material civil disability. Theology may remain relevant to understanding the claim. It should not decide the constitutional outcome.

The Jurisprudential Pivot

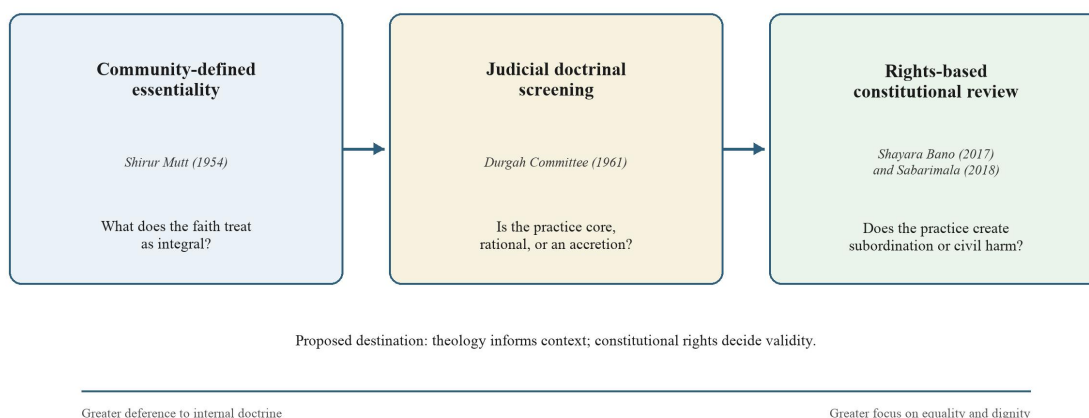


Figure 2
From Theological Essentiality to Rights-Based Constitutional Review

Note. The figure presents the article's analytical reconstruction of the case law; it is not a claim that the later cases have formally displaced ERP.

Anti-Subordination and Personal-Law Reform

The theoretical core of constitutional morality in matters of religion is the anti-subordination principle. Under this framework, religious liberty under Article 25(1) cannot be converted into an instrument for enforcing the secondary status of marginalized groups, notably women and lower-caste individuals.

The reform of personal laws has remained one of the most contested arenas of Indian secularism. The historical compromise embodied in the personal law system - wherein civil matters such as marriage, divorce, maintenance, and succession are governed by faith-specific codes - often created an institutional shield for gender inequality:

The Narasu Appa Mali Precedent: In *State of Bombay v. Narasu Appa Mali* (1952), the Bombay High Court held that uncodified personal laws do not fall within the definition of "laws in force" under Article 13 of the Constitution, thereby immunizing them from judicial review under fundamental rights provisions.

The Transformative Turn: Contemporary scholarship and judicial trends have challenged the immunity conferred by *Narasu Appa Mali*. In *Shayara Bano v. Union of India* (2017), the Supreme Court demonstrated that personal law rules and statutory applications that are manifestly arbitrary or perpetuate systemic subjugation can be struck down directly under Article 14.

An anti-subordination approach holds both sides of principled distance together: minority identity must be protected against majoritarian assimilation, and individuals within minority communities must be protected against internal domination (Bhargava, 2010). Neither protection is expendable.

The Nine-Judge Reference

The conceptual struggle between the Essential Religious Practices doctrine, denominational autonomy under Article 26, and the overarching framework of constitutional morality culminated in the reference order in *Kantaru Rajeevaru v. Indian Young Lawyers Association* (2020).

The reference places at least four questions at the center of the next doctrinal phase:

1. How should the individual freedom in Article 25 relate to denominational autonomy under Article 26?
2. How far may a constitutional court inquire into doctrine when applying the ERP test?
3. Does 'morality' in Articles 25 and 26 mean constitutional morality, denominational morality, or some more limited public-law standard?
4. Who has standing to challenge exclusionary religious practices through public-interest litigation?

The reference was actively heard by a nine-judge bench in April and May 2026. That timing matters: the dispute is no longer a distant doctrinal possibility, but neither should an unfinished hearing be written as a judgment. The responsible position is analytical restraint. The Court may retain ERP, narrow it, or place it inside a more explicit fundamental-rights framework (Supreme Court of India, 2026a, 2026b).

The preferable route is a structured sequence. Courts should first identify the claimant and the material burden on religious exercise; second, distinguish theological belief from associated secular administration without pretending that the line is always obvious; third, test state action for neutrality, necessity, and proportionality; and finally, examine whether the practice itself imposes status-based subordination or civil disability. This sequence leaves room for religious self-understanding but refuses to make scriptural necessity the final constitutional fact.

CONCLUSION

Indian secularism is not a diluted version of an Atlantic original. It is a response to a different constitutional landscape: public religion, deep pluralism, the memory of Partition, and social hierarchies that often claimed religious shelter. Its central innovation is relational. The state may not establish a faith or become the manager of religious truth, but it also

cannot treat inherited domination as private and therefore untouchable.

Principled distance names that difficult middle position. It protects minority institutions when majoritarian power presses inward, and it authorizes reform when caste, gender, or community discipline presses downward on vulnerable persons. Sometimes the state must step back. Sometimes it must step in. The justification, not the geometry, is what makes the action secular.

Articles 25 to 30 give this model legal form. Individual conscience, denominational autonomy, social reform, cultural conservation, and minority education are not arranged in a neat hierarchy. They are constitutional commitments that must be read together. Sri Venkataramana Devaru showed how reform and autonomy can be harmonized; Sardar Syedna showed the cost of allowing group discipline to eclipse civil consequences; the minority-education cases show that regulation can be valid without becoming assimilation.

The ERP doctrine is the weakest part of the architecture. Its original deference in Shirur Mutt gradually became judicial screening in Durgah Committee. That shift invited courts to standardize fluid traditions and to decide rights cases in the language of authenticity. The problem is not that judges know too little theology, though often they will. The deeper problem is that theological truth is not the constitutional question.

Constitutional morality and anti-subordination offer a better center of gravity. They direct attention to equal citizenship, dignity, and concrete civil harm while retaining the need to protect minority autonomy from majoritarian control. The approach must remain disciplined: constitutional morality cannot become a label for whatever a judge finds progressive. It must be tied to text, precedent, institutional competence, and reasoned analysis of burdens on both communities and individuals.

The nine-judge reference in Kantaru Rajeevaru therefore presents a genuine choice. The Court can continue asking civil judges to certify authentic religion, or it can make the inquiry more constitutionally candid. Religious traditions deserve protection because persons and communities are free, not because judges approve their theology. And practices should be limited when they produce legally cognizable subordination, not because a bench has found them spiritually unpersuasive. That is the emancipatory promise of Indian secularism - pluralism without abandonment, reform without establishment.

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