



INDIAN JOURNAL OF
LEGAL REVIEW

VOLUME 6 AND ISSUE 2 OF 2026

INSTITUTE OF LEGAL EDUCATION



INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 6 and Issue 1 of 2026 (Access Full Issue on – <https://ijlr.iledu.in/volume-6-and-issue-1-of-2026/>)

Publisher

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RELIGION, RIGHTS, AND THE CONSTITUTION: THE CHANGING LANDSCAPE OF INDIAN SECULARISM

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BEST CITATION – AANCHAL PRASAD, RELIGION, RIGHTS, AND THE CONSTITUTION: THE CHANGING LANDSCAPE OF INDIAN SECULARISM, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 6 (2) OF 2026, PG. 836-842, APIS – 3920 – 0001 & ISSN – 2583-2344.

Abstract

The connection between the state and religion in the Indian Constitution is a unique form of secularism, and it is not similar to a stringent separationist model that exists in other jurisdictions. Indian secularism does not in any way uphold a strict separation of religion and government, but instead runs on a principle of principled equidistance, in which the state can interact with religious institutions without jeopardizing constitutional values. In this paper, the constitutional architecture of religious freedom in Articles 25 and 26 is discussed, and the development of judicial interpretation is analyzed in this area. Specific attention is paid to the Doctrine of Essential Religious Practices (ERP) formulated by the Supreme Court on the issue of the extent to which religious activities would be provided with constitutional protection. Although the doctrine has been the focus of the judicial determination of the conflict in religious liberty and legislation, it has equally been met with extensive criticism owing to the fact that the doctrine allows the judiciary to become the determiner of theological matters. The paper also examines the broadening understanding of the meaning of public order and the increasing significance of constitutional morality in modern jurisprudence. The analysis of the recent discussions on the possible implementation of an anti-exclusion strategy, as well as the use of proportionality in the limitation of religious practices, makes the study note the issues in balancing religious freedoms, equality and dignity. It ends by proposing reforms that would both reinforce the constitutional clarity and maintain the pluralistic and secular system in India.

Keywords: Religious Freedom, Constitutional Morality, Judicial Review of Religion, Indian Secularism

Introduction: The Secular Architecture of the Indian Constitution

The Indian Constitution is one of the most complicated concerning the relationship between religion and state. In contrast to the strictly orthodoxological concept of the wall of separation model that is linked to American secularism, Indian secularism is constructed based on the concept known as principled equidistance.²²⁹³ It is in this context that the state does not fully separate itself from religion

but rather interacts with religious organizations and practices to make sure that the practice of religion does not breach the constitutional values and does not interfere with the rights of other people. This is the Indian constitutional framework that has a more subtle strategy in which religious freedom is guaranteed, but at the same time, there are some restrictions to ensure that this does not jeopardize social harmony and constitutional governance²²⁹⁴.

The Indian Constitution provides the constitutional basis of religious freedom, and

²²⁹³ Rajeev Bhargava, What Is Indian Secularism?, in *The Future of Secularism* 42 (T.N. Srinivasan ed., 2007).

²²⁹⁴ M.P. Jain, *Indian Constitutional Law* 1207–1212 (8th ed. 2018).

this is mainly through Articles 25 and 26 of the Constitution of India. Article 25²²⁹⁵ provides every individual with the right to his/her conscience and the right to freely profess, practice, and spread religion. This is a provision that introduces the individual as the main carrier of religious rights and the constitutional promise of pluralism and diversity. Article 26²²⁹⁶ supplements the right by providing religious denominations with the freedom of running their affairs in religious matters, of forming and running religious institutions, and of administering property belonging to such institutions. All these provisions form a constitutional structure that acknowledges individual religious freedom and the independence of religious groups.

Article 25 and 26 expressly provide that the exercise of religious rights is subject to the aspects of the public order, morality, and health. The framers of the Constitution put these restrictions there to make sure that the freedom of religion would exist in the larger context of constitutional rule and social order. Practically, this implies that the state has the right to control religious activities that pose threats to the peace and security of the community, those that violate its security, or do not support the primary constitutional values. These restrictions have been the subject of debate over the decades and are now a major issue of Indian constitutional jurisprudence, especially as courts have tried to balance the competing claims of religious freedom, equality, and state power.

The Indian courts have therefore faced a fine balancing act to ensure that they prevent religious autonomy²²⁹⁷ and at the same time prevent a situation where religion becomes a means of defense against practices that are against the constitutional principles. Since independence, this balancing exercise has developed a lot; it has changed due to the

change in social values as well as constitutional interpretation and philosophy of the courts. The judiciary has come up with one of the most influential tools that are used in this respect, the Doctrine of Essential Religious Practices²²⁹⁸.

The Doctrine of Essential Religious Practices

Indian judiciary over the last few decades had been dependent on the Doctrine of Essential Religious Practices (ERP) as a tool to adjudicate on the degree of protection that religion activities had under the constitution. This doctrine can be dated back to the landmark case of the Supreme Court *Commissioner, Hindu religious Endowments v Lakshmindra Thirtha Swamiar*²²⁹⁹. The Court in this case declared that a term, religion in Article 25, does not solely contain issues of belief and faith, but it also encompasses rituals, ceremonies, and practices that were inherent in the religion. The Court also determined that the ruling on what is an essential religious practice should be based on the religious doctrines of that religion.

The Shirur Mutt decision was relevant as it gave precedence to the fact that religious practices considered necessities to that religion would be constitutionally protected and thus not interfered by any means, except based on the narrow reasons mentioned in the Constitution. Simultaneously, the ruling implicitly allowed courts to decide on the issue of whether or not a given practice is essential to a given religion. This judicial position slowly became a heart of Indian jurisprudence of religious freedom.

With the course of time, the Essential Religious Practices test became the main approach according to which courts resolved the tension between the religious practice and constitutional rights. In case a certain practice was questioned, the court would look into the religious texts, traditions and historical practices to ascertain whether the practice was critical to the religion. In case it was identified to be

²²⁹⁵ INDIA CONST. art. 25.

²²⁹⁶ INDIA CONST. art. 26.

²²⁹⁷ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 199–210 (2019).

²²⁹⁸ Comm’r, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar of Shirur Mutt, AIR 1954 SC 282.

²²⁹⁹ Comm’r, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar of Shirur Mutt, 1954 SCR 1005 (India).

necessary, it would be granted constitutional protection; otherwise it could be controlled or banned by the state²³⁰⁰.

But this method has also been subject to significant criticism. The criticism that the ERP doctrine is effectively turning judges into theological arbiters has been aired as one of the many criticisms. The religious texts must be interpreted by the courts, doctrinal relevance should be considered, and it has to determine the practices that are central and those that are peripheral to a religion. According to critics, the method can lead to the simplification of complicated religious traditions and a standardized understanding of religion that might not be representative of the religious diversity among religious groups²³⁰¹.

Regardless of such criticisms, the ERP doctrine has had a decisive role in various land out cases. In *Shayara Bano v. Union of India*²³⁰², the Supreme Court struck down the practice of instant triple talaq, declaring that it was not a mandatory practice of Islam and thus it could not be given constitutional safeguarding. Equally, in *Indian Young Lawyers Association v. State of Kerala*²³⁰³, the Court looked into the issue of women not being able to enter the Sabarimala temple and decided that the given practice could not be discussed as an important religious practice.

These rulings demonstrate how the judicial system has become quite ready to examine religious activities in the light of constitutional principles like equality and dignity²³⁰⁴. Simultaneously, their focus is on the strains of the ERP doctrine, especially when the courts have to interpret religious doctrine to find the solutions to constitutional conflicts.

Redefining Public Order and Constitutional Morality

²³⁰⁰ Rajeev Dhavan, Religious Freedom in India, 35 Am. J. Comp. L. 209, 221–24 (1987).

²³⁰¹ Ronojoy Sen, Articles of Faith: Religion, Secularism, and the Indian Supreme Court 33–40 (2010).

²³⁰² *Shayara Bano v. Union of India*, (2017) 9 SCC 1 (India).

²³⁰³ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1 (India).

²³⁰⁴ INDIA CONST. art. 14.

The other milestone that is significant to the Indian constitutional jurisprudence is associated with the changing understanding of the restrictions that are imposed on religious liberty, especially the idea of the public order. During the early years after independence, popularly, the understanding of the element of order in the society was limited to its narrow practical application that implied the suppression of communal violence, riots, and unrest. In this sense, the state was only allowed to interfere in any religious practice where it was seen to have a real danger to the social order or the security of the people²³⁰⁵.

Nevertheless, over the last few decades, the judicial system has broadened the scope of the public order, attaching it to some wider constitutional principles. The cascading courts have started to view the provisions of Articles 25 and 26 as articulated by the constitutional morality. Constitutional morality is understood to be the general postulates of the Constitution, such as equality, liberty, dignity, and fraternity²³⁰⁶. This idea obliges all the social and legal institutions to act in accordance with these constitutional ideals.

This change in perspective on constitutional morality has changed greatly the relationship of the state and religion²³⁰⁷. Within the framework of this contemporary method, the concept of public order not only restricts itself to averting the physical upheavals, but also to upholding the constitutional values and democratic principles. On the same note, the definition of morality has changed to be based on the existing social or religious rules rather than constitutional morality.

The change has had significant implications for the regulation of religious practices. The state is no longer considered a bystander that just becomes involved when there is violence. Rather, it is gradually perceived to be an active constitutional force in providing that religious

²³⁰⁵ *Acharya Jagadishwarananda Avadhuta v. Comm'r of Police*, (1984) 4 SCC 522 (India).

²³⁰⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

²³⁰⁷ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1 (India).

practices do not work against the rights and dignity of people. The Constitution specifically grants the power to the state in Article 25(2) (b) to pass laws aimed at social reform, as well as the opening up of Hindu religious institutions to all classes and groups in society. This clause indicates the social change and equality promise in the Constitution.

The transformation of the traditional public order to constitutional morality has consequently broadened the area of judicial intervention in religion. Although the development has been commended for bringing social justice and equality, it has also attracted worries concerning the possibility of the judiciary taking too much action in religion.

This current development of Indian secularism is evident in several modern-day legal scandals on religious freedom and state control. These conflicts demonstrate the ongoing conflict of the rights of individuals, freedom of religion, and constitutional ideals.

The future of the Essential Religious Practices doctrine is one of the most important debates that is still ongoing. Relating to the case of Sabarimala litigation, the Supreme Court has sent some questions concerning the interpretation of Articles 25 and 26 to a larger bench²³⁰⁸. By 2026, the Supreme Court (nine-judge) bench is considering whether the ERP doctrine needs to remain relevant to judicial interpretation of the freedom of religion. The bench is also thinking of the fact that it can substitute the ERP test with another framework, called the Anti-Exclusion Test.

The Anti-Exclusion Test does not put emphasis on the theological significance of a practice but on its social outcomes. Under this approach, a religious practice is to be questioned to find out whether that practice also excludes or discriminates some groups in such a way that demeans their constitutional dignity²³⁰⁹. In the

event that a practice would lead to systematic exclusion on factors like gender, caste, or identity, it can be deemed as being incompatible with constitutional values, whether it is deemed as necessary to the religion or not²³¹⁰.

This is a drastic change in the constitutional thought. Courts would also inquire that the practice is damaging to the dignity and equality of individuals as opposed to the question of whether a practice is necessary in a religion. This was part of a larger trend in the Indian constitutional jurisprudence of shifting the emphasis towards individual rights over collective religious rights.

The other modern day problem that has received much judicial focus is the control of religious expression in educational institutions and other places of congregation. The religious dressing code, especially the use of the hijab in educational institutions has brought about some controversial issues concerning the level to which the state can enforce uniform requirements in the institutions²³¹¹. The courts have been faced with the dilemma of balancing the right of the individual to exercise their religious identity with the interest of the state in ensuring that there is secular discipline and uniformity in institutions.

These conflicts underscore the fact that qualified public spaces have come about. In these spaces, people still enjoy some constitutional rights but can be under institutionalized rules that would guarantee disinterestedness and discipline. The courts are faced with the difficulty of deciding on the right balance between individual freedom and the authority of institutions.

Critical Analysis: The Risks of Judicial Overreach

Although the court jurisprudence that has undergone transformation in India is indicative of a firm belief in the constitutional principles of

²³⁰⁸ Kantaru Rajeevaru v. Indian Young Lawyers Ass'n, (2020) 9 SCC 121 (India).

²³⁰⁹ Tarunabh Khaitan, The Supreme Court's Judgment in Sabarimala: A Triumph of Constitutional Morality?, 8 Indian L. Rev. 67 (2019).

²³¹⁰ Aishat Shifa v. State of Karnataka, (2023) 5 SCC 1 (India).

²³¹¹ Resham v. State of Karnataka, 2022 SCC OnLine Kar 1441.

equality, dignity and liberty, there is also a major concern in relation to the growing judicial jurisdiction in faith related matters. Critics believe that the growing susceptibility of the courts to interpret religious beliefs poses a danger of turning a judiciary into a sort of super-theologian which is disturbing the delicate pluralistic balancing act that defines the Indian constitutional order. The Constitution is aimed at keeping a fine balance between freedom of religion on the one hand and compliance with the constitutional principles on the other hand. Nevertheless, by coming to consider theological issues, courts may be overstepping the mark and subjecting the constitutional adjudication to theological interpretation which may jeopardize the independence of religious communities and religious diversities.

Among the most incessant criticisms is associated with the paradox of the Essential Religious Practices doctrine (ERP). The ERP test, which was invented by the Supreme Court in *Commissioner, Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar*, was supposed to guard religious fundamental practices against interference by the state. Courts under this doctrine seek to hold a case whether a certain religious practices are a necessity to a religion and thus are entitled to constitutional protection under Articles 25 and 26 of the Constitution of India. Nevertheless, the task of determining what is considered to be essential is subjective. Judges usually use textual meanings of religious texts or historical teaching materials, which are not necessarily accurate reflections of the lived experiences and changing traditions of those who practice religions. Consequently, the ERP doctrine is able to generate results, which seem unconnected to the social phenomenon of religious communities.

The main flaw of the approach is what researchers call scriptural determinism²³¹². By

using ancient religious texts to sanction or disapprove modern practices to an extent that the religions are embarked on, the courts run the risk of encasing religions in time, while disregarding the dynamism of religious traditions. Religions cannot be said to be fixed entities; they change with the practice of the community, adaptation to cultural aspects, and altering social circumstances. In placing the authority of scripture above the practice, courts can accidentally limit this organic development. This issue is especially sharp in such a country as India, where the traditions of religion tend to be quite local and cannot be easily condensed into canons²³¹³.

Judicial theology is also a phenomenon that is depicted when courts have tried to determine the identity or extent of a religious group. One such case is the ruling of the Supreme Court in the case of *Sastri Yagnapurushadji v. In Muldas Bhudardas Vaishya*²³¹⁴, the Court carried out a comprehensive study of Hindu philosophy to decide whether some of the sects were a sub-group of the wider category of Hinduism. In the end, the Court embraced such an inclusive approach that took into consideration the differences in Hindu traditions. Although the ruling was generally welcomed as having a progressive implication, academics have suggested that the ruling is indicative of a form of legal centralism in which the legal system of the state has priority over the self-perception of the religious groups. Essentially, the judiciary takes over the mandate to regulate the actions of the religious identity, which reduces the independence of the religious organizations.

The other big issue is the application of the public order restriction of Articles 25 and 26²³¹⁵. In spite of the fact that the Constitution allows the state to govern religious activities, with the aim of preserving order in society, such a clause has been misused to cause concerns of executive overreach. Practically, the local

²³¹² Rajeev Dhavan, Religious Freedom in India, 35 Am. J. Comp. L. 209, 221–24 (1987).

²³¹³ Marc Galanter, Hinduism, Secularism, and the Indian Judiciary, 21 Phil. E. & W. 467 (1971).

²³¹⁴ *Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya*, AIR 1966 SC 1119.
²³¹⁵ INDIA CONST. arts. 25–26.

governments often refuse the right to hold religious processions, meetings, and even to use loudspeakers, justifying the refusal by the argument that such events can cause tension between the communities²³¹⁶. The concept of the role of religious festivals in creating public order can be seen as an instrument of preventive limitation instead of a response to real threats, as recent administrative regulations of religious festivals in a number of Indian states show.

This has given birth to what the constitutional experts call the heckler veto²³¹⁷. In this case, the religious practice might be limited not due to the inseparable nature of the said practice with the threat to the order, but due to the danger posed by another group. When the state does that and impedes the work of the law-abiding practitioner to stop the violence projected by others, it is then rewarding intolerance and punishing lawful behavior. This would be contrary to the principle that constitutional rights cannot be limited just because they raise opposition or discomfort among some quarters of society.

This is further complicated by the wide discretion that administrative authorities have. Without a well-defined system of proportionality²³¹⁸, the phenomenon of the common good will be transformed into a blanket justification for the limitation of religious activities. They may also be politically or socially influenced administrative decisions made under the pressure of prevailing politics or social forces, instead of being based on sound constitutional arguments. Such a dynamic can cause what critics fear may become known as majoritarian morality, whereby the desires of the majority are being sneakily repackaged as issues of social order or constitutional morality, critics caution. These are very disturbing, especially in a multi-racial society where

minority religious customs can be misinterpreted or unacceptable.

Recommendations and the Way Forward

Considering these issues, scholars and policymakers are increasingly agreeing that the constitutional balancing act needs to be approached more systematically and more clearly. Several reforms have been suggested so as to enhance the uniformity and validity of court judgments in this region.

A major reform would be the gradual substitution of the doctrine of Essential Religious Practices with the Anti-Exclusion. Courts can do this without interfering with religious dogma by considering the social implications of religion and not their theological importance, and thus safeguard constitutional values. This line at least puts more value on the dignity and equality of people and puts religious freedom jurisprudence in line with the more general purposes of the Constitution²³¹⁹.

The other reform that is of significance is the exposition of the meaning of constitutional morality²³²⁰. The morality restrictive clause of Articles 25 and 26 should be clearly construed by courts to mean constitutional morality and not the existing societal or religious morality. This explanation would help in avoiding the abuse of the morality exception in order to stop minority culture practices just because they are not popular or controversial.

Another suggestion is the systematic use of the proportionality test in narrowing religious practices. The state must also prove that any restriction of religious freedom serves a legitimate purpose, that the restriction is appropriate to include such a purpose, that there is no means available of restricting freedom of religion less restrictively, and that the benefits of the restriction do not exceed the harm to religious liberty²³²¹. Competing rights

²³¹⁶ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 199–210 (2019).

²³¹⁷ *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574 (India).

²³¹⁸ *Modern Dental Coll. & Research Ctr. v. State of Madhya Pradesh*, (2016) 7 SCC 353 (India).

²³¹⁹ Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* 162–68 (2020).

²³²⁰ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1 (India) (Chandrachud, J., concurring).

²³²¹ Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *Yale L.J.* 3094 (2015).

and interests can be balanced in a systematic way through the proportionality framework, which has already been used in a few constitutional cases.

Along with the judicial reforms, there is also the necessity to promote the reform among religious communities themselves²³²². Sometimes, outside intervention of states may be seen as paternalistic or intrusive, especially when it is applied to very strong religious beliefs. Enabling an in-house discourse and empowering progressive opinions among religious groups can provide a more sustainable channel for pursuing change.

Lastly, those in charge of administration who are supposed to regulate religious institutions ought to undergo specialized training on the principles of the constitution. Most of the controversies do not occur when there are intentional breaches of the constitution but due to misinterpretations of the policies regarding the freedom of religion and the power of states. Constitutional literacy among administrative officials may help ensure that decisions regarding religious practices are made in a way compatible with constitutional values.

Conclusion

The Indian constitutional experiment proves that religious freedom and secular government are not mutually exclusive but they should exist within a well-balanced structure. The judiciary has been at the center stage of negotiating this balance over the decades and formulating doctrines and principles of interpretation to balance conflicting constitutional values.

The shift in the constitutional philosophy is also manifested in the evolution of jurisprudence between the Essential Religious Practices doctrine to a more rights-based one. Constitutional protection has increasingly shifted the emphasis of protection not of religion as an abstract institution but of the

dignity and autonomy of individuals in religious communities.

On this aspect, the notion of public order has also experienced a radical change. Public order is no longer restricted to the prevention of physical violence or social unrest, but it has come to include the maintenance of constitutional values and democratic norms. The dilemma that courts and policy makers should address is to make sure that this broad meaning does not result in the state interfering too much with the issue of faith.

Finally, religious freedom in India can only be secured in the future through the constitutional system in terms of a fine balance between faith and constitutionalism. Religions should be honored since they are a part of the Indian cultural and social fabric, but they also need to change in a certain way, which should be in accordance with the rules of equality, dignity, and freedom that are stipulated in the Constitution.

This constitutional dialogue is dynamic as the arguments that have been before the Supreme Court continue. With the judiciary still trying to define the extent of protection of religious freedom, the key question is whether the Constitution could manage to strike the balance between the sacred and the secular. The solution will be the future of Indian secularism and how the constitutional edict of liberty and equality is fulfilled in a radically pluralistic society.

²³²² Flavia Agnes, Law, Justice and Gender: Family Law and Constitutional Provisions in India 95–104 (2011).