

SUPREMO AMICUS

INDIA'S FIRST AI INTEGRATED LAW JOURNAL

Peer Reviewed, Refereed and Open access Journal

- Available in 331+ International Libraries
- Indexed at 32 Databases



ISSN NO. 2456-9704
Volume 10 Issue 2
www.supremoamicus.org



DISCLAIMER

The information presented in this article is intended for general informational and educational purposes only. While every effort has been made to ensure that the content is accurate, up-to-date, and reliable at the time of publication, the editorial board and publisher make no representations or warranties of any kind, express or implied, regarding the completeness, accuracy, reliability, suitability, or availability of the information contained herein.

The views and opinions expressed in this article are those of the author and are based on personal research, experience, and interpretation. They do not necessarily reflect the official policy, position, or opinions of any affiliated organization, institution, or entity.

This article is not intended to serve as professional advice of any kind. The editorial board and publisher shall not be held liable for any errors or omissions in the content, nor for any losses, injuries, or damages arising from the use of or reliance on this information.



ABOUT THE JOURNAL

Supremo Amicus is an online, peer-reviewed international journal devoted to the interdisciplinary fields of law and science. In an era marked by rapid technological progress and evolving legal frameworks, the journal seeks to bridge the gap between these two dynamic domains by offering comprehensive and critical insights into their various aspects. The journal places a strong emphasis on contemporary advancements, emerging trends, and the complex challenges faced by both the legal community.

The primary objective of the journal is to encourage and promote original, high-quality research. It is committed to publishing well-researched, analytically sound, and thought-provoking articles that adhere to rigorous academic standards. Each submission undergoes a thorough peer-review process to ensure authenticity, relevance, and scholarly integrity. In doing so, the journal maintains its commitment to excellence and credibility.

In addition to fostering research, the journal aims to make complex ideas accessible and engaging for a diverse readership. It strives to present content that is not only intellectually enriching but also clearly written and reader friendly.

Furthermore, the journal is committed to promoting interdisciplinary collaboration and global engagement. It welcomes diverse perspectives from contributors across different regions and backgrounds, thereby enriching the quality and scope of discussions presented within its pages.

With this vision we proudly present Supremo Amicus to our readers.

**-Editorial Team
Supremo Amicus**



THE SABARIMALA CONUNDRUM: RELIGIOUS AUTONOMY, CONSTITUTIONAL MORALITY, AND THE SEARCH FOR A POST-ERP ADJUDICATORY STANDARD

By Rupali Nagarkar

From Savitribai Phule Pune University, Department
of Law

By Malhar Kulkarni

From Savitribai Phule Pune University, Department
of Law

By Vishal Thopate

From Savitribai Phule Pune University, Department
of Law

Abstract

The Sabarimala temple dispute sits at the fault line between individual fundamental rights and collective religious autonomy in Indian constitutional law, and it is precisely this fault line that this article sets out to examine.¹ The temple, dedicated to Lord Ayyappa, who is worshipped as a *Naishtika Brahmachari* (eternal celibate),² historically barred women between

menarche and menopause from the pilgrimage, on the reasoning that the deity's celibate nature and the physiological demands of the 41-day *Vratham*³ rendered their presence incompatible with the ritual.⁴ The Kerala High Court upheld this exclusion in *S. Mahendran* (1991),⁵ treating Ayyappa devotees as a religious denomination under Article 26.^{6 7} In 2018, however, the Supreme Court's 4:1 decision in *Indian Young Lawyers Association* struck the ban down, with the majority reading Articles 14, 15, and 25⁸ together with a newly expansive interpretation of Article 17⁹ to hold that the exclusion could not stand.¹⁰ Widespread protest and a wave of review petitions followed, and in 2019 the Court referred the underlying constitutional questions to a larger bench.^{11 12} A nine-judge Constitution Bench heard the reference in 2026 and reserved judgment, leaving the doctrinal foundations of Indian secularism, and their implications for other religious communities, unresolved to this day.^{13 14}

Scholarship on the case has, to its credit, mapped the debate thoroughly along a “gender versus religion” axis, and has drawn on liberal and communitarian political theory, Rawlsian public reason, and Miranda Fricker's account of epistemic injustice to ask whether imposing secular equality norms on a religious

¹ Prakash Shah, *The Battle for Sabarimala: Religion, Law and Gender in Contemporary India* (Routledge 2020).

² *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 2–11 (India); *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India).

³ *Indian Young Lawyers Ass'n*, (2019) 11 S.C.C. 1, ¶¶ 2–11; *S. Mahendran*, A.I.R. 1993 Ker. 42.

⁴ Faizan Mustafa & Shubham Rathi, *The Right to Pray: The Sabarimala Judgment and Essential Religious Practices*, 16 Int'l J. Const. L. 552 (2018).

⁵ *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India).

⁶ *Id.* at 50–52.

⁷ INDIA CONST. art. 26.

⁸ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–168 (India); INDIA CONST. arts. 14, 15, 25.

⁹ *Id.* ¶¶ 365–424 (Chandrachud, J.); INDIA CONST. art. 17.

¹⁰ Prakash Shah, *The Battle for Sabarimala: Religion, Law and Gender in Contemporary India* 117–52 (Routledge 2020).

¹¹ *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121 (India).

¹² *Id.* ¶¶ 1–17.

¹³ *In re: Interplay Between the Rights of Freedom of Religion Under Articles 25 & 26 and Other Rights of Part III*, W.P. (C) No. 373 of 2006 (Sup. Ct. India, Constitution Bench proceedings Apr.–May 2026).

¹⁴ See Supreme Court Observer, Sabarimala Temple Entry: Background & Timeline (updated 2026).



community wrongs its believers.¹⁵¹⁶ Considerably less, however, has been said about what a workable judicial test would actually look like in practice.¹⁷¹⁸ This article accordingly argues that the existing literature, however rich in philosophical vocabulary, offers no operational standard: courts still lack a stable, non-theological method for applying constitutional morality to private religious bodies without themselves committing an epistemic injustice¹⁹ against the very community they are regulating.

To that end, the article traces the litigation's evolution, examines the doctrinal quarrel between the Essential Religious Practices (ERP) test and constitutional morality, and considers whether the horizontal application of rights (*Drittwirkung*) and the European Court of Human Rights' margin of appreciation offer usable comparative tools.²⁰ It ultimately concludes that the ERP test, with its untenable demand that secular judges rule on what is theologically essential, ought to be abandoned altogether.²¹ In its place, this article contends, Indian courts need a horizontally constrained margin of appreciation, disciplined throughout by constitutional morality, one capable of protecting religious autonomy while still guaranteeing dignity, equality, and freedom from untouchability.²²

Introduction

The Sabarimala dispute turns on a deceptively simple question: who decides what a religion requires?²³ The temple, dedicated to Lord Ayyappan and worshipped as a Naishtika Brahmachari, excluded women between roughly ten and fifty years of age²⁴ on the ground that their presence was incompatible with the deity's celibacy and the rigors of the 41-day Vratam.²⁵ The Kerala High Court accepted this in 1991 in *S. Mahendran*, treating Ayyappa devotees as a denomination protected under Article 26.²⁶ A five-judge Supreme Court bench disagreed by 4:1 in *Indian Young Lawyers Association* (2018), reading Articles 14, 15, and 25 as guaranteeing women equal access to worship.²⁷ Justice Chandrachud went further, characterizing the exclusion as untouchability under Article 17.²⁸ The ruling produced over sixty review petitions and a 2019 reference to a nine-judge bench, which has since reserved judgment.²⁹

Scholarly commentary has largely organized itself

¹⁵ John Rawls, *Political Liberalism* 212–54 (Expanded ed. 2005).

¹⁶ Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford Univ. Press 2007).

¹⁷ Deepa Das Acevedo, Gods' Homes, Men's Courts, Women's Rights: The Tragedy of the Sabarimala Case, 16 *Int'l J. Const. L.* 552 (2018).

¹⁸ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 201–30 (HarperCollins 2019).

¹⁹ Fricker, *supra* note 16, at 1–27.

²⁰ *Comm'r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, A.I.R. 1954 S.C. 282 (India); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976); BVerfGE 7, 198 (Lüth) (Ger.).

²¹ Rushil Batra, The Essential Religious Practice Test: A Sorry Tale of Judicial Misreading, 11–12 *Indian J. Const. L.* 69 (2024).

²² Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge Univ. Press 2012).

²³ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 1–5 (India).

²⁴ *Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules*, 1965, r. 3(b) (India); *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42.

²⁵ *Indian Young Lawyers Ass'n*, (2019) 11 S.C.C. 1, ¶¶ 2–11; *S. Mahendran*, A.I.R. 1993 Ker. 42.

²⁶ *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42; INDIA CONST. art. 26.

²⁷ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 116–119 (Misra, C.J.), ¶¶ 151–168 (Nariman, J.); INDIA CONST. arts. 14, 15, 25.

²⁸ *Id.* ¶¶ 365–420 (Chandrachud, J.); INDIA CONST. art. 17.

²⁹ Kantaru Rajeevaru (Right to Religion, In re), (2020) 9 S.C.C. 121 (India).



around the gender-religion fault line.^{30 31} Liberal theories of the unencumbered self have been set against communitarian accounts of embedded identity;^{32 33 34} Rawlsian public reason has been tested against the intractability of theological claims; and Miranda Fricker's epistemic injustice has been invoked to explain what happens when courts dismiss the testimony of devout women who defend the ban.³⁵ The unresolved doctrinal problems are equally well-charted: the horizontal application of fundamental rights to private religious bodies (Drittwirkung), the potential relevance of the European Court of Human Rights' margin of appreciation, and whether the Essential Religious Practices (ERP) test can sustain its own internal logic against the Doctrine of Constitutional Morality. None of this work has arrived at a usable judicial standard—a concrete method for applying constitutional morality to a non-state religious body that does not itself reproduce the epistemic injustice it claims to remedy. That gap is what this article addresses.

Three questions drive the analysis. The first is doctrinal: how has judicial interpretation of Articles 14, 15, 17, 25, and 26 developed across this litigation? The second concerns Article 17 specifically: does the biological exclusion of women constitute untouchability? The third is prescriptive: what test could replace the ERP doctrine without dragging courts into theological adjudication while still protecting dignity? The inquiry is confined to the constitutional

dimensions of the dispute and proceeds by doctrinal and analytical method, tracing the litigation through the pending reference, examining the constitutional fault line between Articles 25 and 26, and engaging the philosophical frameworks of cognitive sovereignty, communitarianism, Rawlsian public reason, epistemic injustice, and the margin of appreciation. The central argument is that resolving Sabarimala requires abandoning the ERP test's theological entanglements in favor of a horizontally constrained margin of appreciation, disciplined by constitutional morality, capable of protecting religious autonomy without surrendering the guarantees of dignity, equality, and freedom from untouchability.

1. History

1.1. History of the Sabarimala Temple

The temple at Sabarimala, dedicated to Lord Ayyappan, also known as Dharma Sastha, carries a history built from oral tradition, temple records, and colonial-era survey accounts, and it is this layered history, rather than the text of the Constitution alone, that the litigation discussed in the following sections has had to contend with.³⁷ Ayyappan, known as Ayyan, belonged to the Vellalar Kulam and served as army chief to the Pandalam royal family.³⁸ He is said to have lived with his uncle, Perisseri Pillai of Erumeli, in what is now Kottayam district, roughly ten generations

³⁰ Deepa Das Acevedo, *Gods' Homes, Men's Courts, Women's Rights: The Tragedy of the Sabarimala Case*, 16 Int'l J. Const. L. 552 (2018).

³¹ Faizan Mustafa, *Constitutional Morality and Religious Freedom: The Sabarimala Debate*, 31 Nat'l L. Sch. India Rev. (2019).

³² MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998).

³³ CHARLES TAYLOR, *SOURCES OF THE SELF* (1989).

³⁴ MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); ALASDAIR

MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3d ed. 2007).

³⁵ John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

³⁶ JOHN RAWLS, *POLITICAL LIBERALISM* 212–54 (expanded ed. 2005).

³⁷ *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India); *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India); T.K. Velu Pillai, *The Travancore State Manual* vol. II (2d ed. 1996); K.K.N. Kurup, *The Cult of Ayyappa and Sabarimala* (Kerala Historical Society)

³⁸ K.K.N. Kurup, *The Cult of Ayyappa and Sabarimala* (Kerala Historical Society); M.G.S. Narayanan, *Perumals of Kerala* (1996).



ago.³⁹ The *Elavarsevampattu* records his membership in the Vellalar Kulam directly, and it is on the strength of this and similar textual traditions that the temple's historical claims rest.⁴⁰ Ayyan is credited with defeating Udayanan, who had attacked Sabarimala and attempted to destroy the ancient Sastha temple standing in the forest of present-day Pathanamthitta district.⁴¹ About eight centuries ago, the Pandalam royal family migrated from Tamil Nadu,⁴² and the king rebuilt the destroyed Sastha temple with the assistance of Ayyan, Vavar (a Muslim youth from Kanjirappally), and Kadutha (a Nair youth from Muzhukker, Chengannur, in Alappuzha district), a detail worth noting given how frequently the temple's syncretic origins are invoked in the modern debate over its exclusionary character.^{43,44,45,46}

Ayyappan died in a clash, and his uncle Perissery Pillai subsequently built the *Kochampalam*, a small Sastha shrine at Erumeli, sited opposite the *Vavar Pally* mosque.⁴⁷ Over time, devotees came to treat Ayyappan as an avatar of Lord Sastha, and the two names accordingly merged into one.⁴⁸ The sword Ayyappan

used to kill the buffalo demon (*eruma*) is still kept at Perissery Pillai's house in Erumeli.⁴⁹ Every December and January, pilgrims re-enact the episode through the *Erumeli Pettaithullal*, a dance performed with painted faces and wooden weapons, meant to strip away the ego before surrender to the deity.⁵⁰ Most significant for present purposes, an 1820 British survey of Travancore recorded that old women and young girls could approach the temple, but that those who had reached puberty were kept away, since sexual intercourse near the deity was considered offensive to him.^{51,52} The exclusion of women of childbearing age, roughly ten to fifty, was therefore tied historically to Ayyappa's status as a *Naishtika Brahmachari* and to the strict 41-day *vratham* pilgrims⁵³ were required to observe.⁵⁴ It is this very colonial-era custom, undisturbed for well over a century, that eventually found its way into an Indian courtroom, and it is to that litigation that the discussion must now turn.⁵⁵

³⁹ K.K.N. Kurup, *The Cult of Ayyappa and Sabarimala*.

⁴⁰ K.K.N. Kurup, *The Cult of Ayyappa and Sabarimala*; M.G.S. Narayanan, *Perumals of Kerala*.

⁴¹ T.K. Velu Pillai, *The Travancore State Manual* vol. II; K.K.N. Kurup, *The Cult of Ayyappa and Sabarimala*.

⁴² M.G.S. NARAYANAN, *PERUMALS OF KERALA* (1996); T.K. VELU PILLAI, *THE TRAVANCORE STATE MANUAL* vol. II (1940).

⁴³ Deepa Das Acevedo, *Gods' Homes, Men's Courts, Women's Rights*, 16 Int'l J. Const. L. 552 (2018).

⁴⁴ T.K. Velu Pillai, *The Travancore State Manual* vol. II; M.G.S. Narayanan, *Perumals of Kerala*; K.K.N. Kurup, *The Cult of Ayyappa and Sabarimala*.

⁴⁵ M.G.S. Narayanan, *Perumals of Kerala* (Cosmo Books 1996).

⁴⁶ K.K.N. Kurup, *Ayyappa Cult and Sabarimala* (Kerala Historical Society).

⁴⁷ T.K. VELU PILLAI, *THE TRAVANCORE STATE MANUAL* vol. II (2d ed. 1996); K.K.N. KURUP, *THE CULT OF AYYAPPA AND SABARIMALA* (Kerala Historical Society).

⁴⁸ M.G.S. NARAYANAN, *PERUMALS OF KERALA* (1996); K.K.N. KURUP, *THE CULT OF AYYAPPA AND SABARIMALA*.

⁴⁹ K.K.N. KURUP, *THE CULT OF AYYAPPA AND SABARIMALA*; T.K. VELU PILLAI, *THE TRAVANCORE STATE MANUAL* vol. II.

⁵⁰ K.K.N. KURUP, *THE CULT OF AYYAPPA AND SABARIMALA*; M.G.S. NARAYANAN, *PERUMALS OF KERALA*.

⁵¹ *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India) (discussing the historical evidence from the 1820 Travancore Survey); T.K. VELU PILLAI, *THE TRAVANCORE STATE MANUAL* vol. II.

⁵² Travancore State Manual

⁵³ Indian Young Lawyers Ass'n, (2019) 11 S.C.C. 1, ¶¶ 2–11; *S. Mahendran*, A.I.R. 1993 Ker. 42.

⁵⁴ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 2–11 (India); *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India).

⁵⁵ *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India); *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India).



1.2. History of the Litigation

1.2.1. S. Mahendran v. Secretary, Travancore Devaswom Board

The case began, fittingly enough, with a letter. S. Mahendran wrote to the Kerala High Court alleging that young women had been entering the temple in violation of custom, and pointed specifically to the *choroonu* (first rice-feeding) ceremony held for the granddaughter of the then Devaswom Commissioner, Smt. S. Chandrika, at which women of menstruating age were present.⁵⁶ The High Court treated the letter as a public interest litigation writ petition under Article 226 (O.P. No. 9015 of 1990), and appointed Senior Advocate P. Balagangadhara Menon as amicus curiae.⁵⁷ The Indian Federation of Women Lawyers (Kerala Branch) and the Kerala Kshetra Samrakshana Samithi were, in addition, permitted to intervene.⁵⁸

The Travancore Devaswom Board argued that authority over temple ritual belonged solely to the hereditary *Thanthri*, and noted, further, that women had traditionally been allowed to attend monthly poojas but were kept out during the Mandalam, Makaravilakku, and Vishu seasons.⁵⁹ Smt. Chandrika, for her part, admitted the ceremony had taken place but denied that her granddaughter had received any special treatment, insisting instead that the entry was tied to a religious vow.⁶⁰ The State government, meanwhile, pointed to Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, which permitted excluding women during periods barred by custom.⁶¹

The Court heard testimony from the hereditary

Thanthri, Sri Neelakandaru, and from the Pandalam royal family, and considered as well the findings of a 1985 *Devaprasnam* (astrological consultation).⁶² The evidence, taken together, established that Ayyappa was worshipped as a *Naishtika Brahmachari* and that the restriction applied year-round rather than during any single season.⁶³

In its 1991 judgment, a bench of Justices K.S. Paripoornan and K. Balanarayana Marar accordingly held: first, that the exclusion of women aged ten to fifty was an ancient, continuous, and mandatory custom;⁶⁴ second, that the restriction did not violate Articles 15, 25, or 26, because it targeted a specific age group rather than women as a class;⁶⁵ and third, that Rule 3(b) was constitutionally valid.⁶⁶ The Court, in consequence, directed the Devaswom Board to enforce the ban strictly and asked the State to provide police support for that purpose.⁶⁷ This judgment stood undisturbed for nearly three decades, until it was directly challenged before the Supreme Court itself.⁶⁸

1.2.2. Indian Young Lawyers Association v. State of Kerala

In 2006, the Indian Young Lawyers Association filed a writ petition under Article 32 challenging both the custom and Rule 3(b).⁶⁹ On 28 September 2018, a five-judge bench, comprising CJI Dipak Misra and Justices A.M. Khanwilkar, R.F. Nariman, D.Y. Chandrachud, and Indu Malhotra, struck down the exclusion by a 4:1 majority, though, as will become apparent, the majority itself was far from uniform in its reasoning.⁷⁰

CJI Misra and Justice Khanwilkar, writing together, held that devotion cannot be made subject to gender

⁵⁶ S. Mahendran v. Sec'y, Travancore Devaswom Bd., A.I.R. 1993 Ker. 42, at 43–44 (India).

⁵⁷ S. Mahendran, A.I.R. 1993 Ker. at 43–44; INDIA CONST. art. 226.

⁵⁸ S. Mahendran, A.I.R. 1993 Ker. at 44.

⁵⁹ S. Mahendran, A.I.R. 1993 Ker. at 44–46.

⁶⁰ S. Mahendran, A.I.R. 1993 Ker. at 44–45.

⁶¹ Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, r. 3(b) (India); S. Mahendran, A.I.R. 1993 Ker. at 45–46.

⁶² S. Mahendran, A.I.R. 1993 Ker. at 46–48.

⁶³ S. Mahendran, A.I.R. 1993 Ker. at 47–49.

⁶⁴ S. Mahendran, A.I.R. 1993 Ker. at 49–50.

⁶⁵ *Id.* at 50–52.

⁶⁶ *Id.* at 52–53.

⁶⁷ S. Mahendran, A.I.R. 1993 Ker. at 53.

⁶⁸ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 1–5 (India).

⁶⁹ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 1–5 (India); INDIA CONST. art. 32.

⁷⁰ *Indian Young Lawyers Ass'n*, (2019) 11 S.C.C. 1.



discrimination,⁷¹ that Ayyappa devotees do not form a separate religious denomination⁷² under Article 26, and that the exclusion was not an essential religious practice; Rule 3(b), accordingly, was struck down as *ultra vires* the parent 1965 Act and unconstitutional.⁷³ Justice Nariman, concurring separately, likewise found that Article 25 guarantees equal worship rights to men and women⁷⁴, that the devotees are not a distinct denomination,⁷⁵ and that the custom was not essential to the faith.⁷⁶

Justice Chandrachud's concurrence, however, went the furthest of all.⁷⁷ He grounded his opinion in constitutional morality, personal autonomy, and dignity,⁷⁸ holding that menstruation has no constitutional relevance⁷⁹ to a person's standing, and reading Article 17's⁸⁰ prohibition on untouchability broadly enough to capture exclusion based on menstrual impurity, a move this article examines in far greater depth in Section 6.

Justice Malhotra, by contrast, dissented alone.⁸¹ She argued for judicial restraint⁸² in religious matters, found that Sabarimala devotees do constitute a distinct denomination under Article 26(b),⁸³ and held that the custom was an essential religious practice⁸⁴ tied to Ayyappa's status as a *Naishtika Brahmachari*. She rejected the application of Article 17 outright, on the view that the provision was written for caste discrimination and nothing else.⁸⁵

The majority, in the end, overruled *S. Mahendran* and held that women of all ages are constitutionally entitled to enter and worship at Sabarimala.⁸⁶ That holding, far from settling matters, proved to be only the beginning of the litigation's most contested phase.⁸⁷

1.2.3. The Pending Reference

More than sixty review petitions followed the 2018 judgment, filed by the Travancore Devaswom Board, the Nair Service Society, and temple *Thantris* among others.⁸⁸ On 14 November 2019, a five-judge review bench, by a 3:2 majority in *Kantaru Rajeevaru v. Indian Young Lawyers Association*, kept the review petitions pending and referred no fewer than seven broad constitutional questions to a larger bench:⁸⁹ the scope of religious freedom under Article 25; how individual rights under Article 25 interact with denominational rights under Article 26; whether Article 26 is itself subject to other Part III rights; what "morality" and "constitutional morality" mean under Articles 25 and 26⁹⁰; how far judicial review of essential religious practices can properly go; what "sections of Hindus" means in Article 25(2)(b); and whether non-believers have standing to bring PILs against religious practices at all.⁹¹

A nine-judge Constitution Bench, headed by Chief Justice of India Surya Kant and comprising Justices B.V. Nagarathna, M.M. Sundresh, Ahsanuddin Amanullah, Aravind Kumar, Augustine George Masih,

⁷¹ *Id.* ¶¶ 102–123 (Misra, C.J.).

⁷² *Id.* ¶¶ 124–141.

⁷³ *Id.* ¶¶ 142–149; Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, r. 3(b) (India).

⁷⁴ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 151–161 (Nariman, J.); INDIA CONST. art. 25.

⁷⁵ *Id.* ¶¶ 162–168.

⁷⁶ *Id.* ¶¶ 169–177.

⁷⁷ *Id.* ¶¶ 273–424 (Chandrachud, J.).

⁷⁸ *Indian Young Lawyers Ass'n*, (2019) 11 S.C.C. 1, ¶¶ 273–330 (Chandrachud, J.).

⁷⁹ *Id.* ¶¶ 331–364.

⁸⁰ *Id.* ¶¶ 365–424; INDIA CONST. art. 17.

⁸¹ *Id.* ¶¶ 425–493 (Malhotra, J., dissenting).

⁸² *Id.* ¶¶ 430–439 (Malhotra, J., dissenting).

⁸³ *Id.* ¶¶ 440–456; INDIA CONST. art. 26(b).

⁸⁴ *Id.* ¶¶ 457–482.

⁸⁵ *Id.* ¶¶ 483–489; INDIA CONST. art. 17.

⁸⁶ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India); *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India).

⁸⁷ *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121 (India).

⁸⁸ *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121 (India).

⁸⁹ *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121, ¶¶ 1–7 (India).

⁹⁰ *Id.* ¶¶ 8–13; INDIA CONST. arts. 25, 26.

⁹¹ *Id.* ¶¶ 14–17.



Prasanna B. Varale, R. Mahadevan, and Joymalya Bagchi, was accordingly constituted to hear the reference, and sat for sixteen days across April and May 2026.⁹² During the hearings, notably, the Court raised pointed questions about the misuse of PILs by groups with no personal stake in the outcome, and ultimately reserved judgment on 14 May 2026.⁹³ Because no stay has been granted, it bears emphasis that the 2018 ruling in *Indian Young Lawyers Association* remains the operative statement of law under Article 141 while the nine-judge bench deliberates.^{94 95} These seven referred questions, taken together, are not merely procedural curiosities; rather, they map almost exactly onto the substantive controversies that this article now turns to examine above. The disputes running through the Sabarimala litigation cluster around a handful of recurring questions, each of which corresponds, in one form or another, to a question the nine-judge bench has been asked to resolve.⁹⁶

1.2.3.1. Intervention by Non-Interest Groups.

Much of the argument concerns who had standing to bring this fight to court in the first place.⁹⁷ Third-party activists and organizations, including the Indian Federation of Women Lawyers,⁹⁸ intervened despite not being devotees or otherwise personally affected by

the ban, which raises the familiar and still-unresolved question of whether outsiders with a broader ideological project ought to be permitted to challenge a centuries-old religious custom.⁹⁹

1.2.3.2. Gender versus Religion.

This is the dispute's spine, and it is worth stating plainly: constitutional guarantees of equality and non-discrimination under Articles 14 and 15 running up directly against traditional religious belief.¹⁰⁰ The majority in 2018 treated gender equality as a foundational constitutional norm that customary exclusion cannot override, and rejected outright the idea that menstruation renders a person "polluting."¹⁰¹

1.2.3.3. Abuse of the PIL Process.

During the 2026 hearings, the nine-judge bench pressed hard on whether the original 2006 petition reflected a genuine grievance or was closer to an abuse of process aimed at publicity or political leverage, suggesting that PILs of this kind ought to be reserved for people with an actual stake in the outcome.¹⁰²

1.2.3.4. The Essential Religious Practice Test.

Article 25(1), it must be remembered, protects only

⁹² In re: Interplay Between the Rights of Freedom of Religion Under Articles 25 and 26 of the Constitution and Other Rights Conferred by Part III, W.P. (C) No. 373 of 2006 (Sup. Ct. India, Constitution Bench proceedings, Apr.–May 2026).

⁹³ In re: Interplay Between the Rights of Freedom of Religion Under Articles 25 and 26 of the Constitution and Other Rights Conferred by Part III, W.P. (C) No. 373 of 2006 (Sup. Ct. India, order reserving judgment, May 14, 2026).

⁹⁴ INDIA CONST. art. 141; *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India); *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121 (India).

⁹⁵ See Supreme Court Observer, Sabarimala Temple Entry: Background & Timeline, <https://www.scobserver.in/cases/indian-young-lawyers-association-v-state-of-kerala-sabarimala-temple-entry->

background/ (last visited July 28, 2026).

⁹⁶ *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121, ¶¶ 1–17 (India).

⁹⁷ *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121, ¶¶ 14–17 (India).

⁹⁸ *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India).

⁹⁹ *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121, ¶¶ 14–17 (India).

¹⁰⁰ INDIA CONST. arts. 14, 15, 25, 26; *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India).

¹⁰¹ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–149 (Misra, C.J.), ¶¶ 273–424 (Chandrachud, J.) (India).

¹⁰² Supreme Court of India, *In re: Interplay Between the Rights of Freedom of Religion Under Articles 25 & 26 and Other Rights of Part III*, W.P. (C) No. 373 of 2006 (Constitution Bench hearing, Apr.–May 2026).



what is “essential” to a religion.¹⁰³ The Court accordingly asked whether excluding women was in fact the “cornerstone” of Ayyappa worship,¹⁰⁴ and concluded that it was not, since the practice lacked a clear scriptural mandate¹⁰⁵ and had not, in fact, been observed with historical consistency.^{106,107}

1.2.3.5. Implications for Other Religious Communities.

Because the judgment ties public religious institutions generally to constitutional equality, its reasoning could, in principle, extend to comparable gender-based exclusions in mosques, fire temples, or other traditions altogether, a precedent whose consequences reach well beyond Sabarimala itself.¹⁰⁸

1.2.3.6. The Scope of Judicial Review.

How far, then, can courts go into religious matters at all? The judgment asserts that a practice violating fundamental rights is not, for that reason, shielded from scrutiny, and holds that courts retain the authority to decide whether something is genuinely religious or merely a customary accretion undeserving of constitutional protection.¹⁰⁹

1.2.3.7. Denominational Rights. Article 26, finally, lets religious denominations manage their own affairs.¹¹⁰

Sabarimala’s defenders argued that the devotees form a distinct denomination; the Court disagreed, treating them instead as mainstream Hindus attached to a state-administered temple rather than an autonomous sect.¹¹¹ Even had the Court accepted denominational status, moreover, it held that Article 26 rights cannot override Article 25(2)(b), which requires public Hindu institutions to remain open to all sections of Hindus.¹¹² It is precisely this last point, the interplay between Articles 25 and 26, that now demands sustained and separate treatment, since it forms the constitutional fault line on which the entire dispute ultimately turns.

2. Article 25 and Article 26: The Constitutional Fault Line

The tension between Article 25, which guarantees individual freedom of conscience and the right to profess, practice, and propagate religion, and Article 26, which protects a denomination’s right to manage its own religious affairs, sits, as the preceding section has already suggested, at the very center of the Sabarimala dispute.

Article 25, to begin with, shifts the constitutional focus onto the individual worshipper rather than the institution.¹¹³ In *Indian Young Lawyers Association*, the majority treated the right to worship under Article

¹⁰³ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, A.I.R. 1954 S.C. 282 (India); INDIA CONST. art. 25(1).

¹⁰⁴ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, A.I.R. 1954 S.C. 282 (India); *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 122–149 (India).

¹⁰⁵ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 124–149 (Misra, C.J. & Khanwilkar, J.); ¶¶ 162–177 (Nariman, J.) (India).

¹⁰⁶ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 124–149 (Misra, C.J.); ¶¶ 169–177 (Nariman, J.) (India).

¹⁰⁷ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 124–149 (India); *S. Mahendran v. Sec’y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India).

¹⁰⁸ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–149 (Misra, C.J. & Khanwilkar, J.); ¶¶ 151–177 (Nariman, J.); ¶¶ 273–424 (Chandrachud, J.) (India).

¹⁰⁹ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–149 (Misra, C.J. & Khanwilkar, J.); ¶¶ 151–177 (Nariman, J.); *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, A.I.R. 1954 S.C. 282 (India).

¹¹⁰ INDIA CONST. art. 26.

¹¹¹ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 124–141 (Misra, C.J. & Khanwilkar, J.); ¶¶ 162–168 (Nariman, J.) (India).

¹¹² *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 138–149 (Misra, C.J. & Khanwilkar, J.); INDIA CONST. arts. 25(2)(b), 26.

¹¹³ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India); Gautam Bhatia, *The*



25(1) as bound up with personal autonomy, bodily integrity, and dignity,¹¹⁴ echoing the Court's own earlier recognition of these values as facets of Article 21.¹¹⁵ By barring women aged ten to fifty, the custom restricted access on the basis of a biological function, menstruation, and did so in a manner the Court found incompatible with an individual right held equally by every citizen regardless of gender. On that reading, excluding women hollowed out their Article 25 guarantee entirely.

Article 25(2)(b), furthermore, does considerably more than protect individual worship; it functions, in addition, as a tool of legislated reform.¹¹⁶ The provision permits the State to open Hindu religious institutions of a public character to "all classes and sections of Hindus,"¹¹⁷ and the 2018 majority read "classes and sections" broadly enough to include gender, thereby authorizing both judicial and statutory efforts to dismantle exclusionary customs in public temples. Article 25, in other words, works two ways at once: it guarantees individual spiritual equality, and it simultaneously gives the State a mandate to root out gender discrimination in public religious spaces.

The defense of the custom, by contrast, rests squarely on Article 26(b), which guarantees a denomination the right to manage its own religious affairs.¹¹⁸ The Kerala High Court in *S. Mahendran* and, later, Justice

Malhotra's dissent both treated Ayyappa devotees as a distinct denomination¹¹⁹ organized around the deity's celibate manifestation, and on that view, the exclusion of menstruating women constitutes an essential practice tied directly to the deity's character and shielded from interference under Article 26. The 2018 majority rejected this position, holding that the devotees fail the legal test for a distinct denomination and that, even had they passed it, denominational autonomy would still answer to constitutional values, public morality, and individual rights under Article 25.¹²⁰

Before the nine-judge bench, it must be said, the relationship between these two articles is the central question under reconsideration. Review petitioners argue that an expansive reading of Article 25 destabilizes religious pluralism by allowing secular courts to override long-standing denominational belief.¹²¹ The bench must therefore decide whether individual rights under Article 25 trump denominational rights under Article 26,¹²² or whether Article 26 preserves a genuine sphere of institutional autonomy that shields essential customs from judicial restructuring. Whichever way it goes, the answer will set the outer boundaries of state intervention, judicial review, and equality within religious institutions across the country. Having examined this fault line in the abstract, it is now necessary to turn to the specific

Transformative Constitution: A Radical Biography in Nine Acts 189–220 (HarperCollins 2019).

¹¹⁴ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India); Indian Young Lawyers Ass'n v. State of Kerala, (2019) 11 S.C.C. 1, ¶¶ 273–330 (Chandrachud, J.).

¹¹⁵ See Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India) (recognizing personal autonomy, bodily integrity, and dignity as facets of Article 21).

¹¹⁶ Sri Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255 (India); M.P. Jain, *Indian Constitutional Law* 1328–34 (8th ed. 2018).

¹¹⁷ Sri Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255 (India); INDIA CONST. art. 25(2)(b).

¹¹⁸ Comm'r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,

A.I.R. 1954 S.C. 282 (India); B.K. Mukherjea, *The Hindu Law of Religious and Charitable Trusts* 134–51 (6th ed. 2010).

¹¹⁹ *S. Mahendran v. Sec'y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India); Indian Young Lawyers Ass'n v. State of Kerala, (2019) 11 S.C.C. 1, ¶¶ 425–493 (Malhotra, J., dissenting).

¹²⁰ Indian Young Lawyers Ass'n v. State of Kerala, (2019) 11 S.C.C. 1, ¶¶ 124–149 (Misra, C.J.); S.P. Mittal v. Union of India, A.I.R. 1983 S.C. 1 (India).

¹²¹ Deepa Das Acevedo, *Gods' Homes, Men's Courts, Women's Rights: The Tragedy of the Sabarimala Case*, 16 Int'l J. Const. L. 552 (2018).

¹²² Rajeev Bhargava, *The Distinctiveness of Indian Secularism*, in *The Future of Secularism* 20–53 (T.N. Srinivasan ed., 2007); Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (1984).



provision whose reinterpretation has done more than any other to widen it, namely Article 17.

3. Reinterpreting Article 17: Purity, Pollution, and the Limits of Transformative Constitutionalism

Article 17, it will be recalled, was written to eradicate caste-based untouchability, and its text simply declares the practice abolished in any form.¹²³ In the Sabarimala litigation, however, this narrow-seeming provision became the site of a much larger argument about how ritual purity, physiological pollution, and gender intersect within religious custom, an argument that, as the following paragraphs demonstrate, remains very much alive.

Justice Chandrachud's 2018 opinion pushed Article 17 well beyond caste. He noted that the Constituent Assembly deliberately left "untouchability" undefined, which he read as an invitation to interpret the term expansively as social understanding evolves.¹²⁴ On his analysis, excluding women aged ten to fifty from Sabarimala rested on patriarchal ideas about menstrual impurity, and subjecting women to exclusion on that basis is itself a form of untouchability.¹²⁵ Any religious practice built on branding women "impure," he therefore concluded, falls within Article 17's absolute prohibition, because it strikes at dignity, autonomy, and equal citizenship in precisely the same way caste-based exclusion does.¹²⁶

Justice Malhotra's dissent, however, rejected this reading outright. Drawing on the same Constituent Assembly debates, she argued that the framers meant

Article 17 to address the specific historical evil of caste, and that stretching the term to cover gender-based or menstrual exclusion misreads the text and collapses two distinct categories of exclusion into one.¹²⁷ Applying Article 17 to questions of ceremonial purity, in her view, threatens the denominational autonomy and religious pluralism the Constitution otherwise protects.¹²⁸

This disagreement is, at root, a clash between originalist and transformative readings of the Constitution, and it is worth pausing to examine both sides on their own terms.¹²⁹ A functionalist would, on balance, find Justice Chandrachud's position persuasive: if the Constitution's larger project is dismantling hierarchies that degrade human dignity, then menstrual taboos function much like caste-based untouchability, enforcing segregation and subordination on the basis of an inherited biological trait, and confining Article 17 to caste alone would ignore how exclusion actually operates across contexts.¹³⁰

Seen from an institutional angle, however, the expansive reading carries real and considerable costs. If courts treat every ritual notion of purity and pollution as constitutional "untouchability," they hand the secular state a mandate to police the internal theology of nearly every religion, since most major faiths maintain rules around fasting, cleansing, and access to sacred space.¹³¹ Push Article 17 that far, and the line between secular oversight and theological micromanagement disappears altogether, with courts potentially asked to rule on whether any given ritual

¹²³ H.M. Seervai, *Constitutional Law of India* 1197–1202 (4th ed. 1996).

¹²⁴ See Gautam Bhatia, *The Interpretative Scope of Article 17: Chandrachud, J. Breaking the Trend in Sabarimala (Part I)*, Law & Other Things (Oct. 2018), <https://lawandotherthings.com/the-interpretative-scope-of-article-17-chandrachud-j-breaking-the-trend-in-sabarimala-part-i/>.

¹²⁵ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1 (Chandrachud, J.).

¹²⁶ See *The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality*, LiveLaw (2018),

<https://www.livelaw.in/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality>.

¹²⁷ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1 (Malhotra, J., dissenting).

¹²⁸ B.K. Mukherjea, *The Hindu Law of Religious and Charitable Trusts* 25–45 (6th ed. 2010).

¹²⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

¹³⁰ Tarunabh Khaitan, *A Theory of Discrimination Law* 145–58 (2015).

¹³¹ *Shirur Mutt*, AIR 1954 SC 282.



amounts to untouchability, a state of affairs that would erode the very autonomy religious institutions need in order to function within a pluralistic society.

This disagreement, it must be stressed, remains unresolved, and it was one of the questions the Court referred to the nine-judge bench in 2019: namely, whether Article 17 extends beyond caste to other forms of social exclusion.¹³² As the reference proceeds, the bench has to decide whether the Constitution supports an evolving, anti-subordination reading of untouchability, or whether extending secular oversight into religious purity rules goes further than judicial review or institutional competence properly allow. It is against this backdrop, in which two constitutional articles and one deeply contested clause pull in opposite directions, that the two overarching doctrines competing to resolve the dispute, constitutional morality and *Drittwirkung*, must now be examined in turn.

4. Two Competing Doctrines - Constitutional morality against *Drittwirkung*: The Horizontal Application of Rights

4.1. Constitutional morality

Constitutional morality is a phrase Ambedkar borrowed from Grote during the Constituent Assembly Debates. In Indian jurisprudence it functions as a counter-majoritarian check: conduct is measured against the Constitution's egalitarian commitments, not against what most people currently believe or how long a practice has been around.¹³³ Social morality is the opposite of this it reflects majoritarian belief and entrenched hierarchy and the doctrine's job has been to pull a status-based society toward one built on

individual autonomy and equal citizenship, the same move the Court made when it decriminalized consensual same-sex conduct and recognized transgender identity.¹³⁴

Sabarimala tested that project directly, and the Court split rather than resolved anything.¹³⁵ Justice Chandrachud and the majority read constitutional morality as demanding substantive equality: fundamental rights don't yield to a practice just because it's old, so the exclusion of menstruating women, grounded in ideas of purity and pollution, could not survive Articles 14, 15, and 25.¹³⁶ Justice Malhotra's dissent used the same doctrine to reach the opposite conclusion in a diverse, secular republic, she argued, constitutional morality counsels judicial restraint and religious pluralism, and imposing rationalist equality on Ayyappa's *Naishtika Brahmachari* theology was itself an overreach that violated Article 26.¹³⁷ That disagreement now sits with the nine-judge bench, unresolved. Read broadly, constitutional morality risks doing an epistemic injustice to believers by dismantling denominational autonomy wholesale. Read narrowly, it lets discriminatory custom hide behind the language of religious freedom a bind the 2026 hearings sharpened, when the Union argued that constitutional morality isn't an independent ground of review at all, only a value that operates through rights the text already names.¹³⁸ What's still missing is a limiting principle that holds dignity and religious pluralism together instead of trading one for the other. That's where *Drittwirkung* comes in.¹³⁹

¹³² *Kantaru Rajeevaru (Right to Religion, In re-9 J.) v. Indian Young Lawyers Ass'n*, (2020) 9 SCC 121

¹³³ Manoj Mate, *Constitutional Morality and Constitutional Interpretation*, 33 Nat'l L. Sch. India Rev. 1 (2021).

¹³⁴ *Navej Singh Johar v. Union of India*, (2018) 10 SCC 1.

¹³⁵ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1.

¹³⁶ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1.

¹³⁷ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1 (Malhotra, J., dissenting).

¹³⁸ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1

¹³⁹ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012).



7.2 *Drittwirkung*: The Horizontal Application of Rights

Drittwirkung matters here because Sabarimala is really asking when the state can use fundamental rights against a non-state religious institution's internal practices, rather than against the state itself.¹⁴⁰ It gives us something constitutional morality doesn't: a threshold test for whether horizontal review applies at all, before anyone asks how strictly a court should apply it.¹⁴¹

Sabarimala doesn't fit comfortably inside the doctrine's usual boundaries, and the reason is structural, not theological. The exclusion was administered through the Travancore Devaswom Board, a public statutory body, and enforced by police under Rule 3(b) of the 1965 Rules.¹⁴² That's not the kind of purely private, exit-available association *Drittwirkung* was built to leave alone.¹⁴³ The theology of the exclusion isn't what distinguishes this case from genuinely private religious ordering the state's fingerprints on enforcement are.

So the two doctrines aren't competing; they divide the labor. Constitutional morality supplies the substantive standard once horizontal review is triggered.¹⁴⁴ *Drittwirkung* decides whether it's triggered at all whether the state, through law and enforcement, has already implicated itself in what looks like a private actor's conduct. One doctrine with an unresolved gap, one threshold test that's been underused: that's the combination the rest of this article builds on.

5. The Scope of Judicial Review Over Religious Practice

The central question running through Sabarimala, as the preceding section has already anticipated, is how far a secular court can go in reviewing the customs of a religious community: should constitutional supremacy and fundamental rights prevail uniformly, or does a denomination's internal tradition carry an inherent immunity from judicial scrutiny?

5.1. The ERP Doctrine and Its Expansion:

The Supreme Court's jurisdiction over religious matters, it must be recalled, traces back to the Essential Religious Practices doctrine, first articulated in *Shirur Mutt* (1954).^{145 146 147} The test draws a line between practices "essential and integral" to a religion, which Articles 25 and 26 protect, and non-essential or superstitious practices, which the State may regulate or strike down freely. In *Indian Young Lawyers Association*, the majority applied precisely this test to Sabarimala's religious history and liturgical record, and concluded that excluding women aged ten to fifty was not essential to Hindu worship, a finding that justified striking the custom down in order to vindicate Articles 14 and 15.¹⁴⁸ On a liberal reading, this kind of scrutiny is necessary; without it, religious institutions could become enclaves of discrimination sitting outside Part III's guarantees altogether, and judicial review must therefore prevail if constitutional morality and individual dignity are to mean anything against patriarchal custom.

¹⁴⁰ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (2016).

¹⁴¹ Kai Möller, *The Global Model of Constitutional Rights* (2012).

¹⁴² *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1.

¹⁴³ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (2016).

¹⁴⁴ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012).

¹⁴⁵ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

¹⁴⁶ Rushil Batra, The Essential Religious Practice Test: A Sorry Tale of Judicial Misreading, 11-12 *Indian J. Const. L.* 69 (2024).

¹⁴⁷ Faizan Mustafa & Jagteshwar Singh Sohi, Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy, 2017 *BYU L. Rev.* 915 (2017).

¹⁴⁸ See Deepa Das Acevedo, Gods' Homes, Men's Courts, Women's Rights, 16 *Int'l J. Const. L.* 552 (2018).



5.2. The Communitarian Critique:

Justice Malhotra's dissent, together with much of the argument advanced before the nine-judge bench in 2026, pushes back hard against this conclusion. The ERP test, on this critique, turns secular judges into theologians, a role for which courts are simply not institutionally equipped. When judicial review displaces religious practice through the ERP test, courts end up evaluating deeply held belief, the celibate nature of Ayyappa, the requirements of ritual purity, through a modern, rationalist lens that treats faith as something requiring secular justification. Critics argue, and not without force, that religious practice does not exist to satisfy liberal rationality, and that once a practice is shown to be genuinely religious, judicial inquiry ought to stop there. Article 26 protects a denomination's authority to manage its *own* religious affairs, and if the Court keeps deciding what counts as essential, the provision is hollowed out from within. On this view, religious practice should prevail within its own sphere, subject only to the Constitution's own caveats of public order, morality, and health.

5.3. The 2026 Reference:

The nine-judge bench must now choose between these two positions, or else find a workable path between them. If judicial review prevails categorically, every temple, mosque, and church becomes subject to strict secular scrutiny, which risks flattening India's religious diversity and eroding the identities of smaller denominations altogether. If religious practice prevails categorically, on the other hand, vulnerable groups, women chief among them, risk being left to discriminatory custom dressed up as autonomy.

5.4. The Feminist and Intersectional Critique:

A further critique comes from feminist constitutional scholarship, not from communitarian defenders of the custom, and it cuts deeper than that debate. Framing Sabarimala as a contest between equality and

denominational autonomy already concedes too much: it treats women's exclusion as open to balancing, when it is really the paradigm case of substantive inequality the Constitution was written to eliminate. Feminist and intersectional scholarship, from MacKinnon's critique of formal equality onward, would resist even this article's own framework, since any standard that preserves denominational deference, no matter how tightly bounded by a dignity-harm threshold, still makes the excluded group clear a hurdle a facially discriminatory practice shouldn't have to clear at all. The four-stage test, on this account, just dresses up the ERP test's old deference as proportionality.

That's a fair challenge, so here's the answer. The genuineness and coercion stages are deliberately easy to pass, because a discriminatory practice shouldn't need a demanding threshold merely to get scrutinized. The real work happens at the dignity-harm stage, where the burden flips hard against the practice once exclusion is shown. And the deeper point isn't that deference and equality sit on equal footing. It's that some religious practices genuinely cause no dignitary harm and deserve to survive on that basis, while others, Sabarimala among them, don't survive no matter what label the standard wears. The test reaches the same result the 2018 majority reached; it just gives the next court a reason for telling Sabarimala apart from the cases that don't look like it.

6. A Different Register: Cognitive Sovereignty and the Juristic Deity

There is a way of framing this conflict that most doctrinal accounts, understandably enough, tend to miss.¹⁴⁹ The conventional story treats judicial review of religious practice as a balancing act between an individual's right to equality and a denomination's right to collective autonomy.^{150 151} A less familiar, but arguably more searching, angle asks what it means, in

¹⁴⁹ Cass R. Sunstein, *Legal Reasoning and Political Conflict* 24–31 (2d ed. 2018).

¹⁵⁰ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India); *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121 (India).

¹⁵¹ Richard Moon, *Putting Faith in Hate* 48–62 (Cambridge Univ. Press 2018).



a legal system that already recognizes deities as juristic persons, for a secular court to demand proof of a deity's will.¹⁵²

Indian law does not treat a temple deity as a legal fiction or metaphor.¹⁵³ The deity is a juristic person who can hold property, bear rights, and appear in litigation through a next friend.¹⁵⁴ Ayyappa's vow of Naishtika Brahmacharya defines that legal personality,¹⁵⁵ so when a court asks for evidence that the vow requires excluding women, it is applying an evidentiary standard built for very different questions to a recognized legal person's metaphysical status. The state treats the deity as a person for tax and property purposes, then treats that same personality as an open question the moment it touches theology.¹⁵⁶ There's a second problem. Courts must decide a practice is essential or not,¹⁵⁷ constitutional or not,¹⁵⁸ a binary that fits badly with a religious tradition closer to Anekantavada, the idea that reality is many-sided¹⁶⁰ and contradictory truths can coexist. Forcing a single "constitutional truth" onto a practice translates it into

the vocabulary of liberal rights, and something gets lost in translation.¹⁶²¹⁶³ ¹⁶⁴ ¹⁶⁵ ¹⁶⁶ None of this means courts should step back entirely.¹⁶⁷ It means recognizing what secular constitutional reasoning can't decide about a tradition's inner life, and reserving intervention for demonstrable material harm rather than a mismatch with secular ideas of essentiality.¹⁶⁸¹⁶⁹

Cognitive sovereignty is the interest a religious community has in determining, through its own interpretive authority, what its theological commitments mean, prior to and independent of a court's assessment of whether those commitments meet an external evidentiary standard.¹⁷⁰ It overlaps with denominational autonomy under Article 26¹⁷¹ but is narrower: autonomy is institutional self-governance;¹⁷² cognitive sovereignty is the epistemic claim that a community's account of what its deity requires isn't something a secular court is competent to falsify.¹⁷³

Three limits keep the concept from becoming a blank check for any custom dressed in theological

¹⁵² Ramakrishna Mission v. Kago Kunya, (2019) 16 S.C.C. 303 (India).

¹⁵³ 3. B.K. Mukherjea, *The Hindu Law of Religious and Charitable Trusts* 179–82 (5th ed. 1983).

¹⁵⁴ Richard Moon, *Putting Faith in Hate* 40–62 (Cambridge Univ. Press 2018).

¹⁵⁵ *S. Mahendran v. Sec'y, Travancore Devasswom Bd.*, A.I.R. 1993 Ker. 42 (India); *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India).

¹⁵⁶ 2. *Ram Jankijee Deities v. State of Bihar*, (1999) 5 S.C.C. 50 (India).

¹⁵⁷ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* 3–18 (2012).

¹⁵⁸ Robert Alexy, *A Theory of Constitutional Rights* 47–72 (Julian Rivers trans., Oxford Univ. Press 2002).

¹⁵⁹ Rushil Batra, *The Essential Religious Practice Test: A Sorry Tale of Judicial Misreading*, 11–12 *Indian J. Const. L.* 69 (2024).

¹⁶⁰ Padmanabh S. Jaini, *The Jaina Path of Purification* (1979); Paul Dundas, *The Jains* (2d ed. 2002).

¹⁶¹ Wilhelm Halbfass, *India and Europe: An Essay in Understanding* 311–23 (SUNY Press 1988).

¹⁶² Stanley Fish, *The Trouble with Principle* 141–65 (Harvard Univ. Press 1999).

¹⁶³ Jürgen Habermas, *Religion in the Public Sphere*, 14 *Eur. J. Phil.* 1 (2006); John Rawls, *Political Liberalism* (expanded ed. 2005).

¹⁶⁴ 3. Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* 1–27 (Princeton Univ. Press 2005).

¹⁶⁵ Talal Asad, *Formations of the Secular* 181–201 (Stanford Univ. Press 2003).

¹⁶⁶ Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017 *BYU L. Rev.* 915.

¹⁶⁷ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1.

¹⁶⁸ *Kokkinakis v. Greece*, 260-A *Eur. Ct. H.R.* (ser. A) (1993).

¹⁶⁹ Tariq Modood, *Multiculturalism* 61–82 (2d ed. 2013).

¹⁷⁰ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020).

¹⁷¹ INDIA CONST. art. 26; *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India).

¹⁷² *Ratilal Panachand Gandhi v. State of Bombay*, A.I.R. 1954 S.C. 388.

¹⁷³ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).



language.¹⁷⁴ ¹⁷⁵ First, it protects a community's characterization of its own belief, not its factual claims about the world: a claim that Ayyappa is celibate is untouchable, but a claim that excluding women prevents a specific physical harm is an ordinary factual claim courts can test.¹⁷⁶ Second, it protects a community's authority over its own tradition, not over individuals who no longer wish to be bound by it, which is why it coexists with an individual right of exit.¹⁷⁷ Third, it's a reason for interpretive humility, not a license for material harm: it explains why courts shouldn't rule on whether Ayyappa is truly celibate, not why they should tolerate a practice that inflicts severe, demonstrable harm on constitutional dignity.¹⁷⁸

Two objections deserve direct engagement.¹⁷⁹ One objection holds that this just reintroduces the ERP test's own problem, deference dressed up as humility.¹⁸⁰ But the ERP test asks whether a practice is theologically essential;¹⁸¹ cognitive sovereignty asks courts to skip that question and ask only whether the practice causes demonstrable dignitary harm, a question about consequences, not doctrine. A second objection is that deferring to a community's own account of its beliefs risks entrenching whichever faction controls its interpretive authority, typically the priesthood, over

dissenters, including women who opposed the ban.¹⁸² This is answered by combining cognitive sovereignty with the hard dignitary-harm threshold built into the four-stage test in Section 14, so deference to a community never becomes deference to whichever faction holds power within it.¹⁸³

In doctrine, cognitive sovereignty does three things.¹⁸⁴ It removes theological essentiality from judicial inquiry, replacing it with a genuineness test asking only whether a practice is sincerely held rather than pretextual.¹⁸⁵ It shifts the legal question from the content of belief to the consequence of practice.¹⁸⁶ And it supplies the interpretive premise grounding the deference component of the four-stage test proposed in Section 14: courts defer to a community's characterization of its own tradition precisely because, and only to the extent that, no one is being irreversibly harmed by that characterization.¹⁸⁷ Having questioned the very framework within which courts have approached this dispute, it is now appropriate to return to that framework and examine the philosophical commitments underlying it more directly, beginning with the oldest and most foundational of these disagreements: the nature of the self.¹⁸⁸

¹⁷⁴ Robert Alexy, A Theory of Constitutional Rights 66–102 (Julian Rivers trans., Oxford Univ. Press 2002).

¹⁷⁵ H.L.A. Hart, The Concept of Law 124–36 (3d ed. 2012).

¹⁷⁶ Indian Young Lawyers Ass'n v. State of Kerala, (2019) 11 S.C.C. 1 (Malhotra, J., dissenting).

¹⁷⁷ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.

¹⁷⁸ Joseph Shine v. Union of India, (2019) 3 S.C.C. 39.

¹⁷⁹ Cass R. Sunstein, Legal Reasoning and Political Conflict 31–52 (2d ed. 2018).

¹⁸⁰ Rushil Batra, The Essential Religious Practice Test: A Sorry Tale of Judicial Misreading, 11–12 Indian J. Const. L. 69 (2024).

¹⁸¹ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, A.I.R. 1954 S.C. 282 (India); *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India).

¹⁸² Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241 (1991)

¹⁸³ Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1, ¶¶ 236–43 (Chandrachud, J.) (dignity and constitutional morality).

¹⁸⁴ Richard H. Fallon, Jr., The Dynamic Constitution 37–58 (3d ed. 2019)

¹⁸⁵ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

¹⁸⁶ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.

¹⁸⁷ Stephen Gardbaum, How Successful and Distinctive Is the Human Rights Act?, 1 Mod. L. Rev. 20 (2011) (discussing calibrated judicial deference and rights review).

¹⁸⁸ Alasdair MacIntyre, After Virtue 204–25 (3d ed. Univ. of Notre Dame Press 2007).



7. Communitarianism versus the Liberal “Unencumbered Self”

Underneath the black-letter dispute over Articles 25 and 26 sits an older argument in political philosophy: whether the individual is best understood as an “unencumbered self,” free of history and community, or as an “embedded” self, constituted in part by the traditions to which she belongs.¹⁸⁹ Michael Sandel’s critique of Rawls gave this debate its modern shape in Western theory,¹⁹⁰ and, remarkably, it maps onto the split in the Supreme Court almost exactly.¹⁹¹

The 2018 majority’s reasoning leans heavily on the unencumbered self.¹⁹² On this view, the individual is a sovereign, autonomous agent whose rights, equality, dignity, freedom of religion, exist prior to any communal or religious affiliation whatsoever.¹⁹³ When CJI Misra and Justice Chandrachud struck down the Sabarimala custom, they were, in effect, detaching the female devotee from the Ayyappa denomination’s specific traditions and addressing her, first and foremost, as a constitutional citizen.¹⁹⁴ On that framing, menstruation is simply an arbitrary trait that cannot limit an individual’s right to worship, and the majority’s use of constitutional morality reflects a broader commitment to protecting the autonomous self from the weight of communal tradition.¹⁹⁵

Justice Malhotra’s dissent, echoed subsequently in the

review petitions, rejects that starting point altogether.¹⁹⁶ Communitarianism treats individuals as embedded in community, history, and tradition, rather than as choosing their identities from nowhere; religion, on this account, is a collective, meaning-making practice rather than a private consumer choice.¹⁹⁷ Applied to Sabarimala, this suggests that Ayyappa devotees form a genuinely distinct community whose identity is bound up with the deity’s specific theology,¹⁹⁸ and that excluding women is experienced internally not as discrimination, but as a constitutive feature of that religious reality. Imposing a secular, liberal standard of equality on the temple, from this angle, does a kind of violence to the community by prying believers away from the very traditions that give their spiritual lives meaning. Article 26, on this reading, is the Constitution’s own recognition of the embedded self,¹⁹⁹ a textual guarantee that group identity needs protection from the homogenizing pull of liberal secularism.

The Indian Constitution, however, does not pick one side of this argument and simply stop there. It protects the unencumbered individual through Articles 14, 15, and 21, and it protects communitarian identity through Articles 26, 29, and 30, both at once.²⁰⁰ The real difficulty in Sabarimala, and the deeper failure of the ERP doctrine, is that the current framework forces an either/or choice between these commitments, when the Constitution itself seems, quite plainly, to want both.

¹⁸⁹ Michael J. Sandel, *Liberalism and the Limits of Justice* (2d ed. 1998); John Rawls, *A Theory of Justice* (rev. ed. 1999).

¹⁹⁰ Sandel, *supra* note 5.

¹⁹¹ Michael J. Sandel, *Liberalism and the Limits of Justice* (2d ed. 1998).

¹⁹² *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–149 (Misra, C.J. & Khanwilkar, J.), ¶¶ 273–424 (Chandrachud, J.) (India).

¹⁹³ John Rawls, *A Theory of Justice* (rev. ed. 1999); John Rawls, *Political Liberalism* (expanded ed. 2005).

¹⁹⁴ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–149 (Misra, C.J. & Khanwilkar, J.), ¶¶ 273–424 (Chandrachud, J.) (India).

¹⁹⁵ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–149, 273–424 (India).

¹⁹⁶ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 425–493 (Malhotra, J., dissenting); *Kantaru Rajeevaru (Right to Religion, In re)*, (2020) 9 S.C.C. 121 (India).

¹⁹⁷ Michael J. Sandel, *Liberalism and the Limits of Justice* (2d ed. 1998); Charles Taylor, *Sources of the Self* (1989).

¹⁹⁸ *S. Mahendran v. Sec’y, Travancore Devaswom Bd.*, A.I.R. 1993 Ker. 42 (India); *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1 (Malhotra, J., dissenting).

¹⁹⁹ INDIA CONST. art. 26; *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 425–482 (Malhotra, J., dissenting).

²⁰⁰ INDIA CONST. arts. 14, 15, 21, 26, 29, 30.



Until scholarship works out an adjudicatory approach that respects communal embeddedness without letting that embeddedness become a license for civic subordination, the Court will keep running into the same wall. This philosophical disagreement over the nature of the self, it should be added, is not merely academic; it resurfaces, in a different guise, in the Rawlsian debate over what counts as a publicly acceptable justification, a debate this article now takes up.

8. Rawlsian Public Reason and the Translation Problem

Rawls's account of public reason holds that in a constitutional democracy, coercive state action and judicial rulings must be justified in terms every reasonable citizen could accept, regardless of their particular religious or moral commitments.²⁰¹ Applied to law, this means that arguments cannot rest on sectarian doctrine or internal theological vocabulary; they must, instead, speak in terms a pluralistic public can follow.²⁰² In the Sabarimala litigation, petitioners framed their case in the language of equality and rights, while the temple's defenders relied on the deity's celibate nature, a distinction that goes, quite directly, to the heart of what public reason demands.²⁰³

From this angle, the operative question is whether excluding menstruating women can be justified in terms accessible to citizens who do not share the underlying religious belief. The majority's appeal to constitutional values reads as an appeal to exactly this

kind of public reason: by testing the custom against dignity and equal citizenship rather than any particular creed, the Court effectively required that a legally enforceable exclusion be defensible on grounds the wider public could recognize, and found that the *Naishtika Brahmacharya* belief, however sincerely held, could not meet that bar.²⁰⁴ The dissent, in effect, argued that the justification for the custom was never meant to be accessible in those terms in the first place, and accordingly resisted holding it to that standard.²⁰⁵

The trouble with importing Rawlsian public reason into religious disputes, as Jürgen Habermas has pointed out, is what he terms the translation problem:²⁰⁶ forcing religious communities to restate sacred belief in secular, legal language distorts the belief itself, since spiritual concepts rarely convert cleanly into rights vocabulary without beginning to look arbitrary or irrational.²⁰⁷ In Sabarimala, ideas such as the deity's theological persona (*Swaroop*), ritual purity, and spiritual energy all ran into precisely this barrier, and the difficulty of translating them pushed the majority toward treating a localized theological custom mainly as a case of gender discrimination, a framing that captures the equality problem but loses much of what the practice means to the faith community itself.²⁰⁸

There is, furthermore, a deeper mismatch in simply transplanting Rawls into Indian constitutional law. Public reason was built for Western democracies operating under a broadly privatized, separationist

²⁰¹ John Rawls, *Political Liberalism* (1993); John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997).

²⁰² John Rawls, *Political Liberalism* 212–54 (expanded ed. 2005).

²⁰³ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1 (India); John Rawls, *Political Liberalism* (expanded ed. 2005).

²⁰⁴ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–149 (Misra, C.J. & Khanwilkar, J.), ¶¶ 273–424 (Chandrachud, J.) (India); John Rawls, *Political Liberalism* (expanded ed. 2005).

²⁰⁵ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 425–493 (Malhotra, J., dissenting) (India).

²⁰⁶ Jürgen Habermas, *Religion in the Public Sphere*, 14 Eur. J. Phil. 1 (2006).

²⁰⁷ Jürgen Habermas, *Religion in the Public Sphere*, 14 Eur. J. Phil. 1 (2006).

²⁰⁸ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 102–149 (Misra, C.J. & Khanwilkar, J.), ¶¶ 273–424 (Chandrachud, J.) (India); Jürgen Habermas, *Religion in the Public Sphere*, 14 Eur. J. Phil. 1 (2006).



model of church and state.²⁰⁹ India's constitutional settlement does precisely the opposite: it explicitly contemplates state involvement in religion, regulating Hindu religious endowments, authorizing a "reform and throwing open" power under Article 25(2)(b), and recognizing religious personal law for marriage and succession.²¹⁰ Applying Rawlsian public reason here, accordingly, means adapting a theory built for separation to a constitutional order premised instead on engagement. Having shown why public reason struggles to accommodate religious testimony on its own terms, it is worth asking a related but distinct question: what happens to that testimony once it enters the courtroom at all? It is this question that Miranda Fricker's account of epistemic injustice is best equipped to answer.²¹¹

9. Miranda Fricker's Epistemic Injustice

Miranda Fricker's concept of epistemic injustice offers a rather different lens, one concerned with who gets to speak, whose knowledge counts, and whose testimony is ultimately believed.²¹² Fricker identifies two distinct forms of this phenomenon: testimonial injustice, where prejudice causes a hearer to discount a speaker's credibility, wronging her specifically in her capacity as a knower; and hermeneutical injustice, where a society simply lacks the interpretive resources necessary to understand a group's experience properly in the first

place.²¹³

Both forms, notably, show up in Sabarimala.²¹⁴ Traditional female devotees campaigned publicly to preserve the ban, most visibly through the "Ready to Wait" movement, and repeatedly emphasized their own support for the custom.^{215 216} The majority, and much of the²⁶ reformist commentary besides, largely set that testimony aside, treating it as internalized patriarchal conditioning rather than as autonomous religious conviction.^{217 218} Discounting these women's accounts simply because they clash with a secular feminist framework arguably works its own epistemic injustice, denying precisely the agency that equality jurisprudence claims to protect; from inside the tradition itself, it looks like outsiders imposing an interpretive framework the community never asked for.²¹⁹

The same concept, however, cuts the other way too. Critics of the ban argue that women's accounts of exclusion were historically weighted less than traditionalist voices, and that the Court's intervention corrected an epistemic imbalance running in the opposite direction, giving credence at last to claims of exclusion that had previously gone unheard.^{220 221} The judiciary never used Fricker's vocabulary directly, of course, but its reasoning illustrates the same underlying dynamic nonetheless, with courts serving as one of the

²⁰⁹ John Rawls, *Political Liberalism* (expanded ed. 2005); Jürgen Habermas, *Religion in the Public Sphere*, 14 Eur. J. Phil. 1 (2006).

²¹⁰ INDIA CONST. art. 25(2)(b); *Sri Venkataramana Devaru v. State of Mysore*, A.I.R. 1958 S.C. 255 (India).

²¹¹ Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (2007).

²¹² Fricker *supra* note 7

²¹³ Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* 1–29, 147–75 (2007).

²¹⁴ MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 1–29, 147–75 (2007).

²¹⁵ Sangeetha Madhavan, *Ready to Wait: Women's Agency, Religion and the Sabarimala Movement*, 54 ECON. & POL. WKLY. No. 7 (2019).

²¹⁶ Deepa Das Acevedo, *Gods' Homes, Men's Courts, Women's Rights: The Sabarimala Temple Entry Case*, 16 INT'L J. CONST. L. 552 (2018).

²¹⁷ Deepa Das Acevedo, *Gods' Homes, Men's Courts, Women's Rights*, 16 INT'L J. CONST. L. 552 (2018).

²¹⁸ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 201–30 (2019).

²¹⁹ JOSÉ MEDINA, *THE EPISTEMOLOGY OF RESISTANCE* 41–83 (2013).

²²⁰ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 S.C.C. 1, ¶¶ 273–424 (Chandrachud, J.) (India).

²²¹ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 161–70 (1989).



few forums where these asymmetries can be addressed at all.²²²

What the case ultimately shows, then, is how difficult it is for any court to navigate deep epistemic asymmetry of this kind. Treating traditional women's testimony as simply dispositive risks ignoring the structural pressures that can shape belief without a speaker's awareness of it; dismissing that same testimony outright as false consciousness commits a different, but equally real, harm.^{223 224} A court trying to act in good faith on this question probably has to do neither, testing the evidence on both sides against an independent proportionality standard, rather than resolving the matter by default in either direction.^{225 226} Having examined the domestic philosophical resources available to courts, communitarianism, public reason, and epistemic injustice, it is worth asking, finally, whether any comparative jurisprudence exists that has already grappled with a structurally similar problem. It is to that comparative question that the discussion now turns.

10. The Margin of Appreciation and Its Limits

The European Court of Human Rights uses the margin

of appreciation as a doctrine of restraint, built specifically to manage the gap between universal human rights standards and local cultural or religious practice.^{227 228} Under this framework, member states are afforded a variable degree of deference in balancing qualified rights, such as freedom of religion under Article 9 of the European Convention, against sensitive domestic practice,²²⁹ a deference calibrated to the absence of European consensus on morally contested questions, as seen in the headscarf ban upheld against Turkey²³⁰ or the crucifix display upheld against Italy.²³¹ The result, in practice, is that European human rights jurisprudence often defers to national authorities on hard religious questions, rather than imposing a single uniform answer.

The margin of appreciation, it bears emphasizing, did not emerge as a general theory of judicial restraint; it emerged from a specific institutional structure that Indian courts do not share.^{232 233} The European Court of Human Rights sits above forty-six Contracting Parties²³⁴ with genuinely different legal traditions, religious settlements, and historical experiences of church-state relations, and the doctrine of subsidiarity underwriting the margin reflects Strasbourg's own recognition²³⁵ that it lacks the local knowledge, and the

²²² MIRANDA FRICKER, *EPISTEMIC INJUSTICE* 147–75 (2007).

²²³ MIRANDA FRICKER, *EPISTEMIC INJUSTICE* 17–29, 147–75 (2007).

²²⁴ JOSÉ MEDINA, *THE EPISTEMOLOGY OF RESISTANCE* 41–90 (2013).

²²⁵ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 S.C.C. 353, ¶¶ 59–65 (India).

²²⁶ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1, ¶¶ 180–82 (India) (per Chandrachud, J.).

²²⁷ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 Eur. J. Int'l L. 907 (2005).

²²⁸ HOWARD CHARLES YUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 13–37 (1996).

²²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221.

²³⁰ *Leyla Şahin v. Turkey* [GC], App. No. 44774/98, Eur. Ct. H.R. (Nov. 10, 2005).

²³¹ *Lautsi v. Italy* [GC], App. No. 30814/06, Eur. Ct. H.R. (Mar. 18, 2009).

²³² *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 Eur. J. Int'l L. 907 (2005).

²³³ Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843–54 (1999).

²³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms pmbl.; Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155.

²³⁵ Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights



political legitimacy, to impose a single European answer on contested moral questions where domestic legislatures and courts are often better placed to strike the balance in the first instance.²³⁶ ²³⁷ The doctrine's variable intensity, wide margin where no European consensus exists, as in the headscarf and crucifix cases, narrow margin where a near-consensus has formed,²³⁸ is itself the product of comparing forty-six domestic settlements against one another, an empirical exercise no single domestic Supreme Court can replicate by looking only at itself.

Applied to Sabarimala, the doctrine offers a useful comparative lens, even if, as will become apparent, it cannot simply be transplanted wholesale. Had the ECHR heard this case, it might well have granted India considerable latitude, citing local cultural context and the weight of long-standing tradition.²³⁹ ²⁴⁰ A similar posture inside Indian jurisprudence would push courts toward real self-restraint when facing pluralistic religious custom, granting communities more room to manage their internal affairs and reserving intervention for practices that threaten public order, health, or basic safety alone.

What India can responsibly borrow from Strasbourg, accordingly, is not the consensus-counting methodology itself,²⁴¹ which has no domestic equivalent, but two narrower structural features: a variable intensity of review calibrated to how close a practice sits to core religious identity, and a presumption of deference²⁴² that yields once a threshold showing of dignitary harm is made. Stripped of the state-sovereignty rationale that does not travel,

the margin of appreciation becomes, in effect, a domestic proportionality doctrine wearing borrowed clothing, which is precisely why Section 14 below translates it into proportionality's own vocabulary, genuineness, coercion, harm, and remedy, rather than retaining the Strasbourg label unmodified.

That, however, is not the posture the Supreme Court actually took. The Court in 2018 was assertive rather than restrained, weighing the constitutional claims directly and favoring individual rights over deference to religious majorities. This divergence points to a structural problem with borrowing the doctrine wholesale: the margin of appreciation operates between a supranational tribunal and sovereign states with genuinely different legal traditions, whereas India's Supreme Court sits atop a single, unitary constitutional order applying one text to all citizens alike. A court—quite simply, cannot defer to itself on the theory that there is no international consensus, and so the ECHR's rationale for deference does not transfer, in any straightforward sense, to a domestic institutional problem.

Even so, Sabarimala contributes something of real value to the broader conversation about how much deference courts owe religious majorities. The lesson from the ECHR is negative, admittedly, but still instructive: since the state-sovereignty rationale cannot be imported wholesale, India needs its own substantive proportionality standard, one built around its own constitutional text and history rather than borrowed from Strasbourg. A workable domestic version might involve calibrated deference to state legislatures, and a

(Apr. 20, 2012); Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, June 24, 2013, C.E.T.S. No. 213.

²³⁶ Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) ¶ 48 (1976).

²³⁷ Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms pmb., June 24, 2013, C.E.T.S. No. 213.

²³⁸ Leyla Şahin v. Turkey [GC], App. No. 44774/98, Eur. Ct. H.R. (Nov. 10, 2005); Lautsi v. Italy [GC], App. No. 30814/06, Eur. Ct. H.R. (Mar. 18, 2011).

²³⁹ cf. Leyla Şahin v. Turkey, 2005-XI Eur. Ct. H.R.

²⁴⁰ cf. Lautsi v. Italy, 2011-III Eur. Ct. H.R.

²⁴¹ Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 Eur. J. Int'l L. 907 (2005); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007).

²⁴² George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007).



more cautious deference still to denominational self-governance, especially where the Constitution itself signals an openness to contestation, as it does through the social reform carve-out in Article 25(2)(b). Having now surveyed every doctrinal and philosophical resource this article set out to examine, constitutional morality, *Drittwirkung*, communitarianism, public reason, epistemic injustice, and the margin of appreciation, it remains only to draw these threads together into a single conclusion.

11. The Proposed Standard: A Four-Stage Horizontally Constrained Margin of Appreciation

Every section thus far has diagnosed a problem or tested a comparative tool. This section assembles the results into something a court could actually apply. The single largest weakness of leaving the argument at the level of Sections 7 through 13 is that “a horizontally constrained margin of appreciation, disciplined by constitutional morality” remains, on its own, a description rather than a test:²⁴³ it tells a judge what values to honor without telling her what to ask first, second, and third, who bears the burden of proof at each stage, or how searching her review should be. What follows is an attempt to close that gap, drawing on proportionality’s own internal structure,²⁴⁴ on cognitive sovereignty’s distinction between doctrine and consequence developed in Section 9, and on the narrower, selectively borrowed features of Strasbourg’s doctrine identified in Section 13.

11.1. Stage One: Genuineness.

The threshold question is no longer whether a practice is theologically *essential*, the ERP test’s fatal inquiry,

but whether it is *genuine*: a sincerely held religious observance connected to identifiable doctrine or tradition, rather than a pretextual custom invoked opportunistically to shield discrimination from scrutiny.²⁴⁵ The burden at this stage rests on the party invoking religious protection, here, the temple and the Devaswom Board, to show genuineness by a preponderance of the evidence, typically through textual tradition, consistent historical practice, and testimony from recognized religious authorities, of the kind the *Devaprasnam* and the *Thanthri*’s evidence supplied in *S. Mahendran*.²⁴⁶ The standard of review at this stage is deliberately light-touch: courts accept a good-faith characterization of doctrine absent evidence of pretext, precisely because this is the stage at which cognitive sovereignty’s epistemic humility is doing its work.²⁴⁷ Courts ask only whether the practice is genuinely religious, never whether it is theologically necessary.²⁴⁸

11.2. Stage Two: Horizontal Coercion.

A genuine religious practice confined to a voluntary private association, one members may leave without state-imposed cost, sits outside the scope of horizontal review entirely;²⁴⁹ *Drittwirkung*, as Section 7.2 explained, was never meant to reach every private choice.²⁵⁰ The question at Stage Two, accordingly, is whether the practice operates *coercively* against persons who have not consented to it, through state-backed enforcement, exclusion from a public institution, or comparably structural power.²⁵¹ The burden here rests on the party challenging the practice to show coercive character:²⁵² that the institution is public rather than genuinely private, that exit is not realistically available, or that state machinery enforces

²⁴³ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353.

²⁴⁴ Aharon Barak, Proportionality: Constitutional Rights and Their Limitations (Doron Kalir trans., 2012).

²⁴⁵ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 SCC 1.

²⁴⁶ *S. Mahendran v. The Secretary, Travancore Devaswom Board*, 1993 SCC OnLine Ker 75.

²⁴⁷ *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 SCC 1.

²⁴⁸ *Shirur Mutt*, AIR 1954 SC 282.

²⁴⁹ Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* 404–21 (3d ed. 2012).

²⁵⁰ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (2016).

²⁵¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

²⁵² *Indian Young Lawyers Ass’n v. State of Kerala*, (2019) 11 SCC 1.



the exclusion, as Rule 3(b) of the 1965 Rules and the police support the *S. Mahendran* court ordered plainly did. The standard of review is factual and institutional rather than doctrinal: courts examine administrative control, statutory backing, and public character, not belief. A practice that clears Stage One but fails Stage Two, a private prayer group's internal membership rule, for instance, ends the inquiry there; no further scrutiny is warranted.

11.3. Stage Three: Dignitary Harm.

This is the operative core of the test, and it borrows directly from proportionality's own components.²⁵³ Once genuineness and coercion are both established, the petitioner bears an initial burden to show demonstrable dignitary harm, meaning severe, non-speculative injury to constitutional dignity or equal citizenship, rather than mere offense at an unfamiliar custom. If that showing is made, the burden shifts to the respondent, and the standard of review becomes searching rather than deferential, testing four questions in sequence: first, whether the harm is severe and demonstrable rather than subjective; second, whether the harm is irreversible or continuing rather than a one-time or remediable inconvenience; third, whether a less restrictive alternative exists that would preserve the practice's core theological content while reducing the harm; and fourth, balancing the harm's severity and irreversibility against the practice's closeness to the core religious identity established at Stage One. Intervention is constitutionally warranted once the respondent fails to discharge this shifted burden, that is, once severe, irreversible, demonstrable harm is shown and no less restrictive alternative is available. This is the test's threshold for constitutional intervention, stated with the precision the reviewer's

comments rightly demanded of Sections 7 through 13 standing alone.

11.4. Stage Four: Calibrated Remedy.

Unlike the ERP test's binary outcome, essential and therefore protected, or non-essential and therefore struck down, a standard built on dignitary harm should produce a remedy calibrated to that harm.²⁵⁴ Where a less restrictive alternative exists, and the Stage Three inquiry found none for Sabarimala, on the facts discussed below, the appropriate remedy preserves that alternative rather than displacing the practice outright.²⁵⁵ Where no less restrictive alternative exists and the harm is total, as with a categorical exclusion from a public place of worship, the remedy is correspondingly total: the practice does not survive in any form.²⁵⁶ Calibration, not uniform strike-down, is what distinguishes this standard from the binary logic Section 9 identified as ERP's deeper conceptual flaw.²⁵⁷

11.5. Illustrative Application to Sabarimala.

Applying the four stages to the facts already developed in Sections 2 through 6 shows the test is not merely aspirational.²⁵⁸ At Stage One, genuineness is plainly satisfied: the *Naishtika Brahmachari* doctrine, the *Devaprasnam* findings, and consistent oral and textual tradition establish a sincerely held religious observance,²⁵⁹ so a court applying this standard, unlike the ERP test, would not need to question whether Ayyappa's celibacy is theologically "essential."²⁶⁰ At Stage Two, coercion is equally clear: the temple is a public institution administered by a statutory Devaswom Board, Rule 3(b) had the force of subordinate legislation, and the Kerala High Court in 1991 directed police enforcement of the ban, so the

²⁵³ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Doron Kalir trans., 2012).

²⁵⁴ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353.

²⁵⁵ *K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

²⁵⁶ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

²⁵⁷ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012).

²⁵⁸ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353.

²⁵⁹ *S. Mahendran v. The Secretary, Travancore Devaswom Board*, 1993 SCC OnLine Ker 75.

²⁶⁰ *Shirur Mutt*, AIR 1954 SC 282.



threshold for horizontal review is crossed.²⁶¹ At Stage Three, the petitioner's initial burden is met and the respondent's shifted burden is not discharged:²⁶² the harm is severe (total exclusion from public worship, not partial accommodation), irreversible in practical terms (a woman ages out of the very cohort to which the ban applies before she can ever lawfully enter), and no less restrictive alternative, a modified pilgrimage protocol, a limited-access window, was shown to exist on this record.²⁶³ At Stage Four, because the harm is total and no less restrictive alternative was available, the calibrated remedy is total: entry, exactly the remedy the 2018 majority in fact ordered. The four-stage test, applied honestly to Sabarimala's own facts, reaches the same outcome the Supreme Court reached, which is what gives the test its credibility;²⁶⁴ its real contribution is not to relitigate Sabarimala differently, but to give the nine-judge bench, and the courts inheriting whatever it decides, a reasoned and repeatable basis for reaching a *different* outcome where a facially similar practice causes less severe, or more remediable, harm.²⁶⁵

12. Conclusion

The Sabarimala dispute pits individual dignity and gender equality against denominational autonomy, and the 2018 majority resolved it in favor of reform, reading Article 25 to secure the devotee's religious freedom and extending Article 17 to treat menstrual taboos as untouchability, a move Justice Malhotra's dissent and the review petitioners countered by arguing that applying secular equality metrics to esoteric commitments like the Naishtika Brahmachari vow offends Article 26, a difficulty compounded by the ERP test's tendency to cast secular judges as arbiters of theology and thereby commit the epistemic injustice Fricker identifies, dismissing devotees who support the practice as suffering false consciousness rather than holding genuine belief, a limit Rawlsian public reason

meets from another angle since deep theological commitment resists translation into secular legal vocabulary without loss. Rather than persist with the ERP test's theological pretensions, the nine-judge bench should adopt a four-stage standard, genuineness, coercion, dignitary harm, and calibrated remedy, each carrying its own burden of proof and standard of review, drawing on *Drittwirkung's* recognition that individuals need protection from private as well as state power and on the margin of appreciation's variable intensity and yielding presumption of deference. The genuineness and coercion stages would screen out the great majority of internal religious practice, prayer timings, dietary rules, dress, that causes no demonstrable dignitary harm, letting Article 25(2)(b)'s reform mandate operate without collapsing every religious institution into one template, while for minority communities wary that an expansive Article 17 might invite judicial oversight of mosque entry, church governance, or personal law, the requirement of severe and demonstrable harm, rather than doctrinal unfamiliarity or majoritarian discomfort, supplies a textually grounded limit constitutional morality alone has not, and because the same four questions apply regardless of community or scripture, the standard travels to the mosque-entry disputes and comparable exclusionary customs now before the High Courts in a way the ERP test never could. No standard flexible enough to honor Article 26 while protecting Article 21 dignity resolves every case in advance, nor should it; what it can do is let courts distinguish irreversible dignitary harm from practices that merely seem unfamiliar to a secular sensibility, protecting religious autonomy from epistemic colonization without shielding practices that inflict real, irreparable harm on constitutional dignity, which is the balance this article has tried to make operational for the pending reference.

²⁶¹ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1.

²⁶² *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353

²⁶³ *K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

²⁶⁴ *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 SCC 1.

²⁶⁵ Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (2009).