
VEILING JUSTICE: SABARIMALA REVIEW, THE HIJAB BAN AND THE 'ESSENTIAL' PROBLEM OF SECULARISM

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ABSTRACT

The recently concluded hearings in the Sabarimala Review Petition have reignited longstanding questions about the place of religion, gender, and agency within Indian constitutionalism. This paper intervenes in the ongoing discourse by examining the Doctrine of Essential Religious Practices (DoERP) through the perspective of Muslim women, whose voices have remained consistently marginalised in Indian constitutional discourse, including within existing critiques of the doctrine itself.

Through an intersectional feminist-constitutional critique, the paper traces the genealogy, flawed methodology, and inconsistent application of DoERP, showing how its logic entrenches both majoritarian and patriarchal hierarchies that are particularly harmful for women belonging to marginal identities. It further examines the anti-exclusion principle while arguing that even progressive doctrines risk reproducing paternalism if judicial reasoning remains detached from the realities of those at the margins.

Situating this critique within the broader politics of Indian secularism and majoritarianism, the paper contends that the nine-judge bench's reconsideration of religious freedom represents a radical opportunity to rethink the meaning of constitutional justice as one grounded in recognition, dignity, and the agency of subaltern citizens.

Keywords: Muslim women, Constitutionalism, Secularism, Doctrine of Essential Religious Practices, Intersectionality

INTRODUCTION

On 14 May 2026, the Supreme Court of India concluded hearings before a nine-judge Bench reviewing¹ its decision in *Indian Young Lawyers Association v. State of Kerala*, popularly known as the Sabarimala judgment². Although arising from the exclusion of women from the Sabarimala temple, the reference evolved into a broader constitutional reconsideration of the relationship between religious freedom, denominational autonomy, equality, and judicial review.

Similar questions had earlier emerged in the Karnataka Hijab Litigation³. The constitutional courts framed the issue in narrow doctrinal terms: whether wearing the hijab is an “essential religious practice” under Article 25 of the Indian Constitution⁴. This dominant legal framing or the Doctrine of Essential Religious Practice (*hereinafter referred to as DoERP*) does not just miss the point but obscures it completely, especially for Muslim women in India who are not asking the constitutional courts to protect a scriptural rule; they are asking to be seen as individuals capable of choice, belief, dissent, and agency.

This paper departs from the mainstream critiques of DoERP and seeks to indict it by treating the hijab debate as an entry point into a deeper crisis⁵: not only of the doctrine itself, but of how gender, secularism, multiculturalism and religious freedom are understood in India’s constitutional jurisprudence. Drawing on intersectional feminist-constitutional analysis, this paper seeks to explore DoERP within the broader discontent of Muslim women’s experiences with law in India.

I do so dialogically, engaging with two intersecting bodies of scholarship, *albeit* in an overlapping manner: first, the examination of origins and existing constitutional critique of DoERP, which exposes its conceptual and doctrinal flaws; and second, the wider discontent surrounding the recognition of Muslim women and their agency in India. Read together, these

¹ *Kantaru Rajeevaru v. Indian Young Lawyers Association Thr. Its General Secretary and Ors.* (2020) 2 SCC 1

² *Indian Young Lawyers Association v. State of Kerala* (2019) 11 SCC 1

³ In a reply to a question raised by MLA Sowmya Reddy in the Legislative Assembly of Karnataka on 22 September 2022, it was reported that a total of 1,010 hijab-wearing girls had dropped out of classes in Colleges, either due to the hijab ban or other related reasons. See also, People’s Union for Civil Liberties–Karnataka (PUCL-K), “Closing the Gates to Education: Violations of Rights of Muslim Women Students in Karnataka” (Jan. 9, 2023)

⁴ *Resham v. State of Karnataka* 2022 SCC OnLine Kar 1602

⁵ Simi K. Salim, “Hindutva with a ‘Feminist’ Tongue: Uniform Vigilantes, Hijab and the Crisis of Indian Secularism” in P.K. Yasser Arafath, G. Arunima (eds), *The Hijab: Islam, Women & The politics of Clothing* (Simon & Schuster 2022).

strands provide the analytical foundation through which the paper examines the proposed alternatives to DoERP.

This paper is structurally divided into five sections. *Section I* traces the origins of DoERP, while *Section II* focuses on its flawed methodology, its inconsistent application, and its inescapable tendency to erase the complex ways in which religion and gender are often negotiated by muslim women. I trace how the courts' fixation on "essentiality" has produced an especially distorted vision of religious freedom that is not only shaped by gendered assumptions, but also religious stereotypes and majoritarian impulses, ultimately proving to be especially harmful for women belonging to minority community(s). *Section III* turns to the politics of the doctrine, situating DoERP within the larger constitutional discourse on secularism, majoritarianism, and multiculturalism.

Section IV engages with the most prominent doctrinal alternative to DoERP, the anti-exclusion principle as an illustrative analysis to demonstrate how any doctrinal framework must be critically assessed in light of the intersectional nature of claims that come before constitutional courts. The anti-exclusion framework, which shifts the judicial focus from questions of essentiality to those of dignity and access, offers a potentially more inclusive approach to protecting religious freedom. However, as the section argues, the "transformative" promise of this principle ultimately depends on how courts interpret and operationalize it.

Section V turns to this question directly, examining how judicial structures, evidentiary methods, and representational biases continue to marginalize women's voices in constitutional adjudication. Without structural changes in how courts hear, represent and engage with marginalised voices, even progressive doctrines risk reproducing legal paternalism under the guise of "constitutional morality".

Ultimately, this is a call to reimagine the frameworks through which the judiciary engages with questions of religion and gender, and to confront the politics that underlie the adjudication of religious freedom for those at the margins, especially as the apex court prepares to revisit the scope of religious freedom in light of the pending review petition to examine the legality of DoERP. If the Constitutional vision of secularism⁶ is to mean anything for Muslim

⁶I rely on Rajeev Bhargava's idea of 'principled distance', which understands Indian secularism as context-sensitive engagement rather than a strict separation between state and religion; see Rajeev Bhargava, What is Indian Secularism and What is it for? 1 *Indian Review* 1 (2002), 1-32

women, it must begin by recognizing them not as homogenised community representatives, nor as rescue-cases, but as rights-bearing individuals navigating faith, power, and public life on their own terms.

I. ORIGINS OF DOERP: FROM PROTECTION TO POLICING

Part III of the Indian Constitution⁷ has been a site of deep contestation and negotiation of competing values, prompting the apex court to adopt *ad hoc* interventions and court made doctrines, lacking in any uniformity and structure in its approach⁸. Nowhere is this tension more apparent than in the adjudication of religious freedom. The difficulty for the Indian Judiciary in defining the scope of religious freedom has been particularly acute, since the dominant Western model of secularism, built on a strict separation between the church and the state, was neither adopted by the framers nor reflected in clear terms in the constitutional text. In fact, the term “secularism” itself entered the Constitution only with the 42nd Amendment⁹. The Constituent Assembly debates around religious freedom clauses reveal that there was never a single idea of secularism, but multiple and sometimes conflicting ones¹⁰, a theme that will be revisited while discussing the hijab ban. These competing visions continue to shape judicial reasoning today, with outcomes varying depending on which model of secularism a judge implicitly adopts. It is within this interpretative uncertainty and the resulting doctrinal vacuum that the DoERP emerged, particularly to navigate the apparent tensions between religious freedom and other fundamental rights.

Article 25 of the Indian Constitution¹¹, like most global freedom of religion clauses, guarantees individuals the freedom to profess and practice religion, qualified by or *subject to*

⁷ Part III of the Constitution of India, 1950 enumerates the Fundamental Rights *viz.* civil, political, and socio-economic guarantees, available to all citizens and, in some cases, to all persons in India. These rights, *inter alia* include equality (Arts 14–18), freedoms & protection of life and liberty (Arts 19–22), and freedom of religion (Arts 25–28), together form the constitutional framework for safeguarding individual autonomy and limiting state power.

⁸ Nikhil Pratap, ‘Conflicting Fundamental Rights under the Indian Constitution: Analysing the Supreme Court’s Doctrinal Gap’ *Columbia Law School Scholarship Archive* (2022) ; see also Chintan Chandrachud, ‘Constitutional Interpretation’ in Sujit Choudhry, Madhav Khosla, et al. (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016)

⁹ The term “secular” was formally inserted into the Preamble by the Constitution (Forty-Second Amendment) Act, 1976 (India). In *SR Bommai v Union of India* (1994) 3 SCC 1, the Supreme Court observed that the Forty-Second Amendment merely made explicit what was already implicit in the constitutional scheme, affirming secularism as a basic feature of the Constitution.

¹⁰ Madhav Khosla, *India’s Founding Moment: The Constitution of a Most Surprising Democracy* 111 (Harvard University Press, 2020); See also Bhargava, *Supra* note 6); Gary J Jacobsohn, *The Wheel of Law: India’s Secularism in Comparative Constitutional Context* (Princeton University Press, 2009)

¹¹ The Constitution of India 1950, art. 25

public order, morality, and health and to other fundamental rights. Article 26¹² grants religious denominations/groups the right to manage their own affairs in matters of religion, with no express qualification/limitation tying it to the rest of Part III. This difference gave rise to a fundamental question: which aspects of religion are open to state regulation, and which must remain beyond the reach of legal intervention i.e. what is the scope of religious freedom in India?

In its early efforts to interpret Articles 25 and 26, the Court introduced a foundational distinction between religious and secular practices, holding that while religious practices were protected, secular ones, even if performed in a religious setting, could be subject to state regulation. Over time, a second layer of distinction emerged within religious practices themselves: only those deemed “essential” to a religion would receive constitutional protection, while non-essential or incidental practices could be regulated or restricted. Thus, the Court evolved the Doctrine of Essential Religious Practices (DoERP), which functions as a threshold test to determine which practices fall within the protective ambit of religious freedom offered by Article 25, and which do not.

The tests, as laid down in *Shirur Mutt's case*¹³, proposed a broad definition of religion and acknowledged the autonomy of the religious community in defining what is essential to that religion. Over time, particularly in decisions authored by Justice Gajendragadkar, this interpretive framework transformed into a completely different and a narrower form of analysis. The Supreme Court began taking theological authority into its own hands, diligently studying scriptures after scriptures, deciding by itself which practices were “essential” to the concerned religion, acting as a clergy¹⁴ and cleansing the religion¹⁵ of practices it deemed as ‘irrational’, ‘superstitious’, ‘backward’ or unworthy of protection. In *Mohd. Hanif Qureshi v State of Bihar*¹⁶, *The Durgah Committee, Ajmer v Syed Hussain Ali*¹⁷, *Tilkayat Shri Govindlalji*

¹² The Constitution of India 1950, art. 26

¹³ *The Commissioner Hindu Religious Endowment Madras v. Sri Lakshmindar Tirtha Swamiyar of Shirur Mutt* (1954) 1 SCC 412

¹⁴ Faizan Mustafa and Jagteshwar Singh Sohi, “Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy” 2017 *Brigham Young University Law Review* 915 (2018)

¹⁵ Ronojoy Sen, “The Indian Supreme Court and the Quest for a “Rational” Hinduism” 1 *South Asian History and Culture* 1 (2009); See also Ronojoy Sen, “Legalising Religion: The Indian Supreme Court and Secularism” 30 *Policy Studies (East-West Center, Washington)* (2007)

¹⁶ *Mohd. Hanif Qureshi vs State of Bihar* 1957 SCC OnLine SC 17

¹⁷ *Durgah Committee, Ajmer and others vs Syed Hussain Ali and others* 1961 SCC OnLine SC 121

*v State of Rajasthan*¹⁸, *Sastri Yagnapurushadji v Muldas Bhudardas Vaishya*¹⁹, *Acharya Jagadishwarananda Avadhuta v. Commissioner of Police, Calcutta*²⁰, and *Commissioner of Police v. Acharya Jagadishwarananda Avadhuta*²¹ the Court engaged directly with religious texts and traditions, often sidelining the perspectives of the religious communities themselves.

As Chandrachud J. in *Sabarimala*²² rightly noted, this approach lead the Court to don a “religious mantle,” venturing into doctrinal determinations that lie outside its competence²³. As noted by Rajeev Dhavan and Fali Nariman, DoERP empowered judges to conduct a three-step inquiry: whether a practice is religious, whether it is essential, and whether it passes the test of constitutional morality or public interest.²⁴ Thus, far from remaining a neutral constitutional mechanism, DoERP effectively allowed courts to police religious identities.

II. AN INTERSECTIONAL FEMINIST CRITIQUE OF DoERP

The interpretative exercise under DoERP does not merely require the court to interpret constitution, it inadvertently requires the court to define the acceptable boundaries of religiosity²⁵, often in ways that can disproportionately affect minority communities. The implications of this shift are not confined to jurisprudence. They have significant political implications, particularly in the current context where religious identity is deeply entangled with questions of power and majoritarianism²⁶. The issue becomes especially stark when this sword hangs not just on a community, but on women belonging to that community- who already carry a double burden: facing scrutiny and control both from the patriarchal state and majoritarian discourse on one hand (inter-community forces), and from patriarchal structures within their own communities on the other (intra-community forces).²⁷

¹⁸ *Tilkayat Shri Govindlalji Maharaj vs State of Rajasthan* 1963 SCC OnLine SC 52

¹⁹ *Sastri Yagnapurushadji vs Muldas Bhudardas Vaishya* 1966 SCC OnLine SC 198

²⁰ *Acharya Jagadishwarananda Avadhuta v. Commissioner of Police, Calcutta* (1983) 4 SCC 522

²¹ *Commissioner of Police v. Acharya Jagadishwarananda Avadhuta* (2004) 12 SCC 770

²² *Indian Young Lawyers Association, Supra note 2*

²³ Chandrachud J [102] *ibid.*; see also Suhrith Parthasarathy, “An Equal Right to Freedom of Religion: A Reading of the Supreme Court’s Judgment in the Sabarimala Case” *Oxford Human Rights Hub Journal* (Feb. 26, 2020) (forthcoming), available at: <https://ssrn.com/abstract=3544657> (last visited on Oct. 13 2025)

²⁴ Rajeev Dhavan and Fali S. Nariman, “The Supreme Court and Group Life”, in B.N. Kirpal, et.al. (eds.), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* 256–287 (Oxford University Press, 2000)

²⁵ Pratap Bhanu Mehta, “Passion and Constraint: Courts and the Regulation of Religious Meaning”, in Rajeev Bhargava (ed) *Politics and Ethics of the Indian Constitution* 319 (Oxford University Press, 2008).

²⁶ Barbara Cossman and Ratna Kapur, “Secularism’s Last Sigh? Hindutva & the (Mis)Rule of Law”, in Rajeev Bhargava (ed.), *Secularism and Its Critics* (Oxford University Press, 1999)

²⁷ Vrinda Narain, “Gender and Community: Muslim Women’s Rights in India” (University of Toronto Press 2002); See also Flavia Agnes, “The Politics behind Criminalising Triple Talaq” 12-14 *Economic and Political Weekly* 53 (2018)

It is in this context that the Hijab case serves not just as a constitutional dispute, but as a site where the layered tensions and faultlines of DoERP are laid bare. It offers a moment of examination and reveals how this doctrine collapses under the weight of claims made by those at the intersection of multiple margins and discourses.

A. Constitutional Legitimacy & Obscuring Agency

At its very core, DoERP is structured in a way that denies and negates individual agency, which is fundamental to the exercise of religious freedom²⁸. The judicial tendency to determine what constitutes an "essential" religious practice frequently flattens the voices of marginalized groups, especially women, who negotiate complex intersections of faith, rights, and identity²⁹.

In *Resham v. State of Karnataka*³⁰, the High Court of Karnataka approached the matter entirely through the lens of religious compulsion. A case that was fundamentally about access, identity, and dignity was transformed into a question of theological prescription. The Court failed to engage with the multiple meanings and motivations behind wearing the hijab, reducing the women's claims to a single, rigid claim of religious obligation. Of the five judges who had the opportunity to examine the issue at hand, it was only Justice Dhulia who explicitly recognised the hijab as an expression of agency and choice for young Muslim women in his written opinion³¹.

As argued by Megha Mehta, both the hijab controversy and the anti-polygamy/nikah halala petitions stem from the Supreme Court's prior jurisprudence in *Shayara Bano v. Union of India*³² (Triple-Talaq case) and *Indian Young Lawyers Association v. State of Kerala (Sabarimala)*³³. In both cases, the shadow of DoERP was casted to resolve a perceived conflict

²⁸Gautam Bhatia, "The Essential Religious Practices Test and the Inversion of Agency: Notes from the Hijab Hearing", *Constitutional Law and Philosophy Blog*, Feb. 9, 2022, available at: <https://indconlawphil.wordpress.com/2022/02/09/the-essential-religious-practices-test-and-the-inversion-of-agency-notes-from-the-hijab-hearing/> (last visited on July 22, 2025)

²⁹Nisha Susan, "Every Girl's Hijab Has a Unique Story, Hindutva Supporters Have Only One Reason to Ban It", *The News Minute*, Feb. 6, 2022, available at: <https://www.thenewsminute.com/karnataka/every-girl-s-hijab-has-unique-story-hindutva-supporters-have-only-one-reason-ban-it-160656> (last visited on July 22, 2025) ; See also Irene Zempi, "It's a Part of Me, I Feel Naked without It": Choice, Agency and Identity for Muslim Women Who Wear the Niqab" 39 *Ethnic and Racial Studies* 1738 (2016).

³⁰ *Resham*, *Supra* note 4

³¹ *Aishat Shifa v. State of Karnataka* (2023) 2 SCC 1

³² *Shayara Bano v. Union of India* (2017) 9 SCC 1

³³ *Indian Young Lawyers Association*, *Supra* note 2

between gender equality and religious freedom³⁴. The result is a body of jurisprudence that approaches women not as autonomous constitutional subjects, but as passive beneficiaries of judicial reform. This pattern is particularly concerning for muslim women who have historically been spectators, and seldom actors in shaping socio-legal discourse concerning their own rights and have been what Vrinda Narain characterises as “half citizens” in independent India³⁵.

More importantly, the genealogical function of DoERP was to *limit* state and judicial intervention in religious matters, not to serve as an *enabler* of agency for individuals much less the minorities, to seek constitutional protection for their practices³⁶. This nuance is only highlighted by Justice Dhulia wherein he adopted a different approach and articulated that DoERP was irrelevant to the case at hand³⁷. He noted that DoERP had evolved primarily in cases concerning community claims against the state under Articles 25 and 26. By contrast, the right to wear the hijab represented an individual assertion of religious freedom under Article 25(1), read together with the right to freedom of expression under Article 19(1)(a) of the Indian Constitution³⁸. In this context, he argues that applying DoERP was misplaced.

This conceptual confusion has led to a narrowing of complex rights-based claims of agency, such as those concerning freedom of speech, association, access, or pluralism into vague and reductive theological disputes. For muslim identity, in addition to their subaltern struggle to occupy the public sphere, this has translated into an additional burden of proving before courts whether hijab is essential, whether keeping a beard is essential³⁹, whether triple talaq is essential⁴⁰, whether offering namaz in a mosque is essential⁴¹, whether azaan is

³⁴ Megha Mehta, “Centering Women’s Voices – A Feminist Analysis of Religious Freedom and the Hijab Case”, *Constitutional Law and Philosophy Blog*, Sept. 21, 2022, available at: <https://indconlawphil.wordpress.com/2022/09/21/guest-post-centering-womens-voices-a-feminist-analysis-of-religious-freedom-and-the-hijab-case/> (last visited on July 15, 2025)

³⁵ Narain, *Supra* note 27

³⁶ Gautam Bhatia, “Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution” 5 *Global Constitutionalism* 351 (2016)

³⁷ Dhulia J. [32-33] *Supra* 31

³⁸ The Constitution of India 1950, art. 19(1)(a)

³⁹ *Mohammed Fasi v Superintendent of Police, Alleppey*, (1985) SCC OnLine Ker 26.

⁴⁰ *Shayara Bano*, *Supra* 32

⁴¹ *Ismail Faruqi v. Union of India*, 1994 (6) SCC 360, The Supreme Court justified the State of Uttar Pradesh’s acquisition of the disputed Babri Masjid–Ram Janmabhoomi site by invoking the Doctrine of Essential Religious Practices. Departing from a straightforward application of the doctrine of *eminent domain*, the Court instead examined whether offering namaz in a mosque was an “essential practice” of Islam. It concluded that a mosque was not an indispensable part of Islamic worship, reasoning that namaz could be offered anywhere, and therefore the State’s acquisition of the site did not violate the constitutional guarantee of religious freedom.

essential⁴², whether waqf is essential⁴³, etc. In the process, the space for alternative constitutional strategies or agency, especially for subalterns straining to claim space, has been significantly diminished.

This critique echoes the wider scholarly view that the Doctrine of Essential Religious Practices (DoERP) lacks constitutional legitimacy, having been crafted by the judiciary without any textual basis in the Constitution. Scholars have further argued that it is inappropriate for secular courts, armed only with conventional tools of legal interpretation, to undertake the task of interpreting religious doctrine. As many have argued, in most of the landmark cases where this doctrine has been applied, the same outcomes could have been reached through alternative constitutional mechanisms which are already available⁴⁴. The persistence of DoERP, therefore, reflects not constitutional necessity but a certain judicial tardiness in developing more nuanced approaches to understanding discrimination, particularly those claims of agency that emerge at the intersection of multiple identities and axes of marginalization.

A broader critique of court-made doctrines is also relevant here. Unlike statutory law, a judicially created doctrine has no explicit constitutional backing. Its validity cannot be directly challenged, since the judiciary is not considered a “State” under Article 13⁴⁵. For a woman approaching the court with a claim, there is no scope to pre-emptively ask the court not to apply the DoERP to adjudicate it. While the outcome of a judgment may be challenged, the very methodology employed by the Court to arrive at a decision remains outside the reach of the litigant.

In effect, it was within Justice Dhulia’s discretion to employ or discard DoERP, and within the lawyers’ strategy. But the women themselves, despite being the petitioners, had no voice in determining how their claims would be adjudicated. In this manner, DoERP has

⁴² *Afzal Ansari v. State of U.P.*, 2020 SCC OnLine All 592, See also *N Shaw Nawaz Khan v The Home Secretary, Government of Tamil Nadu WP No 21744 of 2017, Order dt. Aug 28, 2019*

⁴³ Gursimran Kaur Bakshi, “Waqf Not An Essential Practice Of Islam”: Centre Tells Supreme Court, Opposes Stay Of Waqf Amendment Act 2025’, *LiveLaw*, May 21, 2025, available at: <https://www.livelaw.in/top-stories/waqf-not-an-essential-practice-of-islam-centre-tells-supreme-court-opposes-stay-of-waqf-amendment-act-2025-292914> (last visited on accessed July 20, 2025)

⁴⁴ *Bhatia*, *Supra* note 36 ; See also Dushyant Kishan Kaul, “The “Essential Practices” Doctrine: Examining the Constitutional Impact of Inordinate Judicial Intervention on Religious Freedoms” 350-393 *International Journal on Minority and Group Rights* 29 (2022)

⁴⁵ *Ratilal Panachand Gandhi v. State of Bombay* 1952 SCC OnLine Bom 86; For a broader discussion see *Rupa Ashok Hurra v. Ashok Hurra and Anr.* (2002) 4 SCC 388

become as elusive as the Doctrine of Basic Structure⁴⁶: just as the judiciary “knows” what constitutes the basic structure when it sees it, so too does it “know” what is essential when it sees it⁴⁷.

B. Methodology: Marginal voices & Dominant Discourses

The methodology behind the DoERP doctrine is equally suspect and arbitrary. Firstly, because it operates as a definitional exercise, one that presumes the Court can fix the boundaries of “religion” with precision. As Jocelyn Neo argues, definitions are inherently acts of inclusion and exclusion; they determine who and what counts. By adopting a narrow understanding of what constitutes “essential” religion, courts risk excluding entire belief systems or practices from constitutional protection. In this way, the ERP test becomes a mechanism of control rather than of protection, allowing the judiciary to decide whose faith practices are worthy of recognition. As Neo, drawing on Gunn, points out, such legal definitions are never neutral; they regulate social and legal relations among communities with fundamentally different understandings of religion and belief⁴⁸.

Secondly, the entire exercise of judicially determining what constitutes an “essential” practice often involves a highly selective inquiry into religious texts, sources and traditions. This exercise is shaped by dominant, often male, scholarly interpretations, with courts routinely relying on English-language sources, colonial-era conceptions of religion, and commentaries⁴⁹.

Even more troubling is the fact that Indian courts have resolved such questions without taking any testimony from the experiences of individuals themselves. The Karnataka High Court, in its 129-page judgment, drew on an array of sources, including contemporary student research, 19th-century European thinkers, and the writings of Dr. B.R. Ambedkar to justify the ban on hijab in state educational institutions. Over 90 pages were devoted to tracing the origins,

⁴⁶The Basic Structure Doctrine, emerging from *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, establishes that certain core features of the Indian Constitution cannot be amended, yet the judiciary has not definitively outlined what constitutes this “basic structure”, identifying elements like democracy, secularism, and separation of powers on a case-by-case basis.

⁴⁷ Pratap Bhanu Mehta, “The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure” in Zoya Hasan, Eswaran Sridharan et al. (eds), *India’s Living Constitution* (Permanent Black, 2002)

⁴⁸ Jaclyn L Neo, “Definitional Imbroglios: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication”, 16 *International Journal of Constitutional Law* 574 (2018); See also T J Gunn, “The Complexity of Religion and the Definition of “Religion” in International Law’ 16 *Harvard Human Rights Journal* 189 (2003)

⁴⁹Ronojoy Sen, “Articles of Faith: Religion, Secularism, and the Indian Supreme Court”, (Oxford University Press, 2010)

etymology, and cultural function of the hijab. Yet, despite citing more than twenty academic sources, the Court did not reference a single Muslim woman scholar. Its historical inquiry began with a paper by Sara Slining, then an undergraduate student, published in a journal exclusively for student work. Her paper, cited twice in the judgment, provides illustrations and comparative descriptions of headscarves across cultures, ultimately arguing that regional variations in usage suggest the hijab is a socio-cultural rather than a religious practice. This framing laid the groundwork for the Court's final conclusion: that the hijab is not essential to Islam, and thus does not merit constitutional protection under Article 25⁵⁰.

This methodology often privileges a narrow and often sanitized set of sources, produces a uniform and homogenized version of religion that erases dissent or minority expressions of faith. As Dominic notes, implicit in this meta-narrative are unspoken qualifications about what is deemed culturally valuable, a question deeply embedded in dominant stereotypes, often posed as neutral or universal constructs of knowledge. These practices, reinforced through specific institutional settings like the court, reproduces dominant cultural frameworks. Ultimately, the judicial discourse ends up placing a disproportionate burden of cultural assimilation on those at the margins⁵¹. In Foucauldian terms, this reflects how legal discourse may function as a *regime of truth*, where judicial reasoning naturalises particular cultural assumptions under the guise of neutrality. DoERP thus concerningly exemplifies how power operates through knowledge, defining which religious expressions are deemed legitimate within the constitutional framework⁵².

This concern about methodology is not merely theoretical, it also has real and far-reaching implications for questions of representation and *Locus standi*. In *Sabarimala*, Justice Indu Malhotra J., in her dissenting opinion, warned against the dangers of allowing constitutional challenges to religious practices through public interest litigation by individuals who are not adherents of the faith. She observed that entertaining such petitions opens the door to ideological challenges unmoored from the lived experiences of believers, particularly threatening for religious minorities whose traditions are already vulnerable to misinterpretation

⁵⁰Malavika Parthasarathy, "The Texts That Made the Hijab Judgment", Supreme Court Observer, Mar. 23, 2022, available at: <https://www.scobserver.in/journal/the-texts-that-made-the-hijab-judgment/> (last visited on July 22, 2025)

⁵¹Mary Kavita Dominic, "Essential Religious Practices" Doctrine as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Fact-Finding" 16 *Socio-Legal Review* 46 (2020)

⁵² Michel Foucault, *The Archaeology of Knowledge* (A M Sheridan tr, Routledge, 2002)

or erasure⁵³.

This concern must also be situated within the broader institutional context of India's judiciary, which continues to suffer from a deep representational deficit⁵⁴. The near-total absence of Muslim women from judicial spaces, from the Supreme Court to the High Courts, reveals how narrow the spectrum of voices that shape constitutional meaning truly is. Since independence, India has had only one Muslim woman Supreme Court judge, Justice Fathima Beevi, and as of 2025, there are no female Muslim judges currently serving in India's High Courts⁵⁵. This chronic underrepresentation is not merely a question of diversity, it speaks to the epistemic limits of a judicial system that claims neutrality while being structurally unrepresentative. The absence of these voices in judiciary mirrors their historical exclusion from the Constituent Assembly too, where only one Muslim woman was present and had little influence in shaping debates on secularism or personal law.

The consequence is a constitutional discourse where doctrines speak for, rather than with, women, reinforcing the very silences the Constitution promises to break.

III. THE POLITICS OF DoERP: MAJORITARIANISM & MULTICULTURALISM

Apart from the abovementioned critiques of DoERP which laments the theological credential of the judiciary in religious matters, there is a case to be made for its inadvertent political effects.⁵⁶ Not only is the DoERP in itself problematic but there is a sharp distinction between how the judiciary has potentially applied this doctrine to perpetuate religious stereotyping informed by majoritarian frameworks, having particularly damaging implications for the muslim identity in India⁵⁷, and more acutely for muslim women.

Ratna Kapur explicitly critiques how DoERP has been applied inconsistently, in ways

⁵³ Indu Malhotra J. [7.3], *Indian Young Lawyers Association*, *Supra* note 2

⁵⁴ Kartik Kalra, 'Behind the mask, outside the bench: India's higher judiciary speaks of equality while women, after a century in law, remain a micro-minority' *Frontline* (17 October 2022) <<https://frontline.thehindu.com/social-issues/gender/women-judiciary-supreme-court-gap-judicial-appointments-reform/article69946658.ece>> accessed on 10 Oct 2025

⁵⁵ There is no official government data on judges' religion or gender composition; the Ministry of Law and Justice of India and the courts do not maintain a public diversity audit, making this conclusion based on publicly available records rather than official statistics.

⁵⁶ Cossman & Kapur, *Supra* note 26

⁵⁷ Pranav Verma, "The Fate of 'Essential Religious Practices' in India's Constitutional Courts" 83 *Journal of Asian Studies* 701 (2024)

that privilege Hinduism while delegitimizing Islamic practices, bordering on intolerance.⁵⁸ She argues that in cases involving Muslim women, such as the *triple talaq* case, the judiciary used DoERP to invalidate Muslim personal laws, claiming practices like *talaq-e-biddat* were not “essential” to Islam and were therefore not constitutionally protected. In contrast, in the *Sabarimala* case, where Hindu women challenged their exclusion from a temple, the Court was more cautious and deferential towards Hinduism, even though the practice similarly conflicted with gender equality. The Court's framing and reasoning for why entry to temple to menstruating women is non-essential to the faith of the followers in *sabarimala* aligned with a majoritarian Hindu nationalist discourse that casts Hinduism as progressive, reformable, and inherently egalitarian, especially when compared to Islam, which is often judicially treated as regressive and in need of external correction.

Thus, while the Court invalidated discriminatory practices in both religious contexts, the interpretive lens remained uneven. Hinduism was portrayed as inherently capable of internal reform and consistent with constitutional morality, whereas Islam was cast as oppositional to those same values. Kapur critiques this asymmetry as part of a broader judicial tendency to conflate Hindutva with Hinduism and then relying on Hindu theological frameworks in defining “secularism”. In doing so, the Court has often invoked Hindu scriptures to illustrate ideals of tolerance and pluralism, thereby entrenching a jurisprudential narrative that positions the Hindu majority as uniquely capable of embodying secularism.

In his opinion upholding the hijab ban in *Aishat Shifa*⁵⁹, Gupta J. opens with a reflection on Indian secularism but locates its essence not in the constitutional text, but in the moral idea of *dharma*. He equates *dharma* with constitutional morality, asserting that “any action, big or small, that is free from selfishness, is part of dharma.”⁶⁰ In his view, *dharma* becomes synonymous with the rule of law, recast as a secular and universal ethos:

“The use of word ‘panthnirpeksh’ in the Constitution brings out the difference in the terms “Dharmanirpeksh” and “Panthnirpeksh”. ‘Panth’, or sect, symbolizes devotion towards any specific belief, way of worship or form of God, but Dharma symbolizes absolute and eternal values which can never change, like the laws of nature. Dharma

⁵⁸Ratna Kapur, “Gender and the ‘Faith’ in Law: Equality, Secularism and the Rise of the Hindu Nation” 35 *Journal of Law and Religion* 407 (2020)

⁵⁹*Aishat Shifa*, *Supra* note 31

⁶⁰ Gupta J. [3-4], *Aishat Shifa*, *Supra* note 31

is what upholds, sustains and results in the well-being and upliftment of the Praja (citizens) and the society as a whole. (para 4)

“... used in the context of duties of the individuals and powers of the King (the State), it means constitutional law (Rajadharma). Likewise, when it is said that Dharmarajya is necessary for the peace and prosperity of the people and for establishing an egalitarian society, the word dharma in the context of the word Rajya only means law, and Dharmarajya means rule of law and not rule of religion or a theocratic State.” (para. 5)”

This interpretive move carries deeper implications, especially considering the rise in the number of theocratic judges in the judiciary who derive authority from religious texts⁶¹. By translating constitutional principles through the idiom of *dharma*, the judgment embeds secularism within a civilizational moral framework rooted in Hindu textual traditions. Such conflation carries the risk of *constitutional appropriation*: it aligns secularism with a particular civilizational narrative rooted in Hindu textual orthodoxy, thereby undermining the pluralist and multicultural foundations of Indian Secularism⁶².

As Galanter notes, early temple-entry decisions concerning access for marginalised castes similarly relied on the “true teachings” of Hinduism to portray the religion as inherently progressive and capable of internal reform⁶³. He argues that these developments invite a deeper reflection on the mode through which secularism, as embodied in Indian law, seeks to transform religion. As comparative experience illustrates, secularism cannot be equated simply with a formal standard of neutrality. Every secular state defines the boundaries within which neutrality operates and, in doing so, privileges certain understandings of religion over others. The United States, for instance, through its First Amendment, ostensibly mandates state neutrality, yet it structurally favors religions that value voluntary, private worship over those that seek collective or institutional enforcement of belief. Similarly, the understanding of secularism by the Indian Judiciary has evolved not as a passive standard of impartiality but as an active normative project. It has shaped the discourse on religion by endorsing certain

⁶¹Mohan Gopal, “Theocratic Judges Who Find Source of Law in Religion than Constitution Increased”, *LiveLaw* (YouTube), 2023, available at: <https://youtu.be/5Eduw62pyJI> (last visited on Oct. 29, 2025)

⁶²Keertana Kannabiran Tella, “Challenging the Hijab Ban in India: Plural Embodiment and Secular Constitutionalism” 21 *International Journal of Law in Context* 139 (2025).

⁶³ Marc Galanter, “Hinduism, Secularism and the Indian Judiciary” 10 *Philosophy East and West* 467 (1971)

practices as compatible with constitutional values and marginalizing others as regressive or exclusionary.

This is not an isolated critique. Lila Abu-Lughod, working in a global context, also warns of the violence embedded in secular legal paternalism. Her work reveals how Islamophobic narratives and the *War on Terror* have been legitimised through the language of liberation, often under the guise of saving Muslim women⁶⁴. The hijab discourse, in particular, is deeply shaped by Orientalist narratives that frame Muslim women as uniquely oppressed and the hijab as a symbol of subjugation⁶⁵. Such framings serve both Western Islamophobic interests and the Islamic Right, producing what she calls a “flipped Orientalism” that strips Muslim women of their own interpretive agency and displaces their lived experiences.⁶⁶

In Iran, the state’s imposition of both veiling and unveiling has politicised a deeply personal choice, producing a coercive religiosity. In France, the state is purporting to liberate Muslim women by policing their clothing in the name of secularism. In both cases, the outcome is similar: women are denied interpretive agency and forced to navigate a patriarchal public and political discourse that refuses to trust their autonomy⁶⁷. The judiciary must steer clear of creating such political landscapes that often instrumentalizes women’s bodies for ideological ends. Judicial frameworks must guard against reproducing these same exclusionary logics and must seek to conduct a genuine enquiry that moves beyond the binaries⁶⁸. Any alternative to DoERP must allow nuance and fluidity of identity, dissent, and assertion in myriad forms it appears in, instead of succumbing to a positivist tendency to cabin a complex claim into neat boundaries and formulaic analysis.

IV. NEED FOR ALTERNATIVES: THE ANTI-EXCLUSION PRINCIPLE

Determining the essentiality of beliefs and practices is a matter best left to the

⁶⁴ Lila Abu-Lughod, *Do Muslim Women Need Saving?* (Harvard University Press, 2013)

⁶⁵ Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton University Press, 2005)

⁶⁶ Tasneem Alsayyed Ahmad, “Why We Can’t Stop Talking about the Veil”, *Injustices in the Hijab Debates: Orientalist, Ideological, and Epistemic Injustices in Dominant Hijab Discourse* (2025) (Ph.D. thesis, University of Waterloo)

⁶⁷ Darina Al Aroud, “That’s a Wrap: Unveiling the Politicization and Sexualization of the Hijab”, 7 *ResPublica* (2025); See also Vrinda Narain, “Law, Gender, and Nation: Muslim Women and the Discontents of Legal Pluralism in India”, in Jocelyne Cesari and José Casanova (eds), *Islam, Gender, and Democracy in Comparative Perspective* 188-210 (Oxford University Press 2017)

⁶⁸ Sirma Bilge, “Beyond Subordination vs Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women”, 31 *Journal of Intercultural Studies* 9 (2010)

ruminations of a religion itself. This allows religious systems and their doctrines to evolve gradually through internal contestation⁶⁹. It creates space for historically marginalised subjectivities of women, Dalits, queers, to not only seek recognition from the legal system, but to reclaim doctrinal legitimacy beyond the confines of legal domain⁷⁰. As Gayatri Spivak argues, *strategic essentialism* can serve as a deliberate and temporary mode of self-identification adopted by subaltern groups to mobilise collectively in pursuit of rights and visibility, even while recognising the internal diversity of those identities⁷¹. Denying this space to define identity on one's own terms forecloses precisely this strategic potential and any *misrecognition* may even amount to a form of oppression⁷². For Muslim women, in particular, the freedom to articulate their faith and its meanings becomes central to reclaiming constitutional agency within and beyond the law.

The growing dissatisfaction with DoERP has led judges and scholars alike to search for alternatives. In *Sabarimala*, while the majority (4:1) permitted women's entry, Chandrachud J. declared DoERP unsustainable, and Indu Malhotra J. also rejected DoERP but did not propose an alternative. In *Aishat Shifa*, Sudhanshu Dhulia J., despite being bound by earlier decisions of larger benches, effectively sidestepped DoERP, underscoring the need for a more robust doctrinal framework.

While some have argued for either discarding⁷³ or retaining the DoERP⁷⁴, others have proposed alternatives to DoERP such as the sincerely held belief test⁷⁵, the deference approach⁷⁶, principle of reasonable accommodation⁷⁷, harmonious interpretation⁷⁸, holistic

⁶⁹ Ashis Nandy, "An Anti-Secularist Manifesto" 22 *India International Centre Quarterly* 35 (1995)

⁷⁰ Dominic, *Supra* note 51

⁷¹ Gayatri Spivak, "Can the Subaltern Speak?" in Larry Grossberg and Cary Nelson (eds), *Marxism and the Interpretation of Culture* 66–111 (Macmillan, 1988); see also Spivak, "Subaltern Studies: Deconstructing Historiography?" in Donna Landry and Gerald MacLean (eds), *The Spivak Reader* 203–37 (Routledge 1996)

⁷² Charles Taylor, "The Politics of Recognition", in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* 25–73 (Princeton University Press, 1994)

⁷³ Rushil Batra, "The Essential Religious Practice Test: A Sorry Tale of Judicial Misreading" 11 *Indian Journal of Constitutional Law* 71 (2025)

⁷⁴ Sayan Mukherjee, "Discarding or Limiting the Essential Religious Practices Test: Why the Supreme Court Must Be Cautious?" 58 *Economic & Political Weekly* 58 (2023)

⁷⁵ Anup Surendranath, "Essential Practices Doctrine: Towards an Inevitable Constitutional Burial" *Journal of the National Human Rights Commission* 173 (2017)

⁷⁶ Neo, *Supra* note 48

⁷⁷ Kartik Kalra, "Guest Post: Ends over Means – On Dhulia J.'s Circumvention of the Essential Religious Practices Test in the Hijab Case", *Constitutional Law and Philosophy Blog*, Oct. 17, 2022, available at: <https://indconlawphil.wordpress.com/2022/10/17/guest-post-ends-over-means-on-dhulia-j-s-circumvention-of-the-essential-religious-practices-test-in-the-hijab-case/> (last visited on Sept. 30, 2025)

⁷⁸ Niharika Maurya, "Essential Religious Practices Test: A Critical Analysis" 6 *Supremo Amicus* 382 (2020)

interpretation⁷⁹, among others. A full evaluation of each of these frameworks lies beyond the scope of this paper. The present discussion therefore offers an illustrative analysis of one alternative—the anti-exclusion principle—aiming to serve as a broader reminder as to how any alternative doctrinal framework must ultimately be assessed.

The anti-exclusion principle, articulated most forcefully by Chandrachud J. in his concurring opinion in *Sabarimala* acknowledges the doctrinal confusion and normative pitfalls of the DoERP test, and instead grounded his reasoning in the transformative vision of the Constitution. This principle builds upon earlier scholarly critiques, most notably by Gautam Bhatia, who has argued that group rights under Articles 25 and 26 must be limited to the extent that they do not exclude individuals from access to basic goods necessary for a dignified life⁸⁰. In this sense, the anti-exclusion principle seeks to restore a balance between group autonomy and individual rights, while steering clear of theological inquiries that courts are ill-suited to conduct.

The test works in two steps:

1. **Autonomy of the community:** Courts begin with the presumption that communities can decide what their religious practices are.
2. **Check for exclusion:** That autonomy ends where the practice *excludes, stigmatizes, or degrades* individuals, especially historically disadvantaged groups. At that point, constitutional rights override religious claims.

The anti-exclusion principle thus shifts the focus away from judicial theology and directs the focus towards whether a practice results in the exclusion of individuals from full and equal participation in civic life. The test, therefore, is not one of doctrinal centrality but of constitutional harm i.e. if a practice stigmatizes, excludes, or reduces individuals to second-class citizens, it must give way to constitutional guarantees of dignity and equality.

V. THE WAY FORWARD: SCOPE, LIMITATIONS AND EXPECTATIONS FROM THE ALTERNATIVES

While the anti-exclusion principle offers a promising correction, for muslim women- it raises the same feminist and intersectional concerns. As we will see, the hijab debate equally

⁷⁹Shubhangi Maheshwari and Shrey Nautiyal, “Interplay of the Right to Religious Freedom with Other Fundamental Rights in the Indian Constitution: A Constructivist Coherence Analysis” 10 *Indian Journal of Constitutional Law* (2021)

⁸⁰Bhatia, *Supra* note 36

exposes the epistemic limits of the anti-exclusion principle and by extension, the limitations inherent in other proposed alternatives to DoERP.

The first complication arises in the context of power: Who defines “dignity” and “exclusion”? Dignity is not a self-evident value but a contested one⁸¹. Intersectionality complicates matters further. Women are not a monolithic group; experiences of exclusion differ sharply along lines of caste, class, sect, and region. A one-size-fits-all judicial determination of dignity or exclusion risks silencing internal plurality and privileging elite voices within communities. Thus, unless courts foreground the lived experiences of the affected women themselves, the anti-exclusion principle risks becoming yet another top-down imposition of constitutional morality. The challenge, therefore, lies in ensuring that the definition of exclusion and dignity is shaped by women themselves, reflecting *complex equality*⁸². This tension between religious freedom and gender justice in India is not inherent but produced through a politics that oscillates between state paternalism and community control. Both frameworks ultimately marginalise women’s voices by deciding on their behalf what liberation ought to mean⁸³.

The proposed alternatives fail to account for the fact that discrimination therefore operates across multiple, intersecting axes. Any single-axis understanding of concepts such as secularism, equality, dignity, or access is inadequate. While the Court may extend protection to Muslim women as women facing exclusion within their communities, it rarely pauses to interrogate how its own modes of adjudication and embedded biases contribute to the exclusion and stereotyping of identities.

Megha Mehta observes, in both *Shayara Bano* and *Sabarimala*, the Supreme Court failed to engage with the lived experiences or testimonies of the women directly affected by the impugned practices. Instead, the judgments reflect the moral convictions of the judges themselves, rather than the perspectives of the excluded women to bring ‘formal equality’ amongst religions. Thus, there is little assurance that the anti-exclusion framework articulated in *Sabarimala* would be consistently applied to similar cases, such as *Resham*, where questions

⁸¹ Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” 19 *European Journal of International Law* 655 (2008)

⁸² Maleiha Malik, “Complex Equality: Muslim Women and the ‘Headscarf’” 68 *Droit et Société* 127 (2008)

⁸³ Ananya Mukherjee Reed, “Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can and Cannot Do” 25 *Atlantis* 45 (2001)

of women's agency intersect with broader political contestations⁸⁴.

Courts are required to develop methodologies that engage with the voices of affected groups through affidavits, testimonies, sociological evidence, and perhaps even interdisciplinary inputs from anthropologists and feminist scholars⁸⁵. As Lucy Vickers argues, the anti-exclusion principle can serve as a "common denominator" for reconciling conflicts between equality and religious freedom by shifting the focus from theology to exclusion and harm. Yet, its success depends on whether courts are willing to engage with lived realities and undertake a genuine inquiry into how exclusion operates in practice⁸⁶.

Therefore, rather than circling around abstract invocations of secularism, liberal constitutionalism, or doctrines, the judiciary must turn its attention toward reimagining its alternative frameworks in ways that are responsive to the lived realities of those most affected through self-reflection and refining its tools of enquiry. The crucial question is not merely which doctrine to apply, but which institutions are best placed to address questions of gender justice within religious communities, how and on whose terms. How can voices of those affected be centred in adjudication, rather than spoken for through the paternalism of courts or legislatures that presume to know what is "dignifying" or "liberating"? Equally, how can constitutional discourse move beyond treating "women" as a homogenous category, to account for the layered and intersectional nature of their identities? Unless courts begin to adopt a consciously intersectional, feminist and truly plural constitutional lens, judicial reasoning on such questions will continue to reproduce the very hierarchies it claims to dismantle.

This moment presents not merely a transformative, but a radical opportunity for the forthcoming Nine-Judge Bench to rethink what justice means for subaltern citizens in India. When hegemony is at its strongest, the constitutional promise of difference, dignity, and mutual respect, especially in the realm of minority rights, must form the foundation of any meaningful vision of justice⁸⁷.

*Perhaps the question is not whether such recognition can be claimed by them as a right, but whether it reflects the way in which we ought to approach one another in a plural society*⁸⁸.

⁸⁴ Mehta, *Supra* note 34

⁸⁵ Dominic, *Supra* note 51

⁸⁶ Lucy Vickers, "A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases", 3 *University of Oxford Human Rights Hub Journal* 157 (2020)

⁸⁷ Kannabiran, *Supra* note 62

⁸⁸ Taylor, *Supra* note 72