INTERPLAY OF THE RIGHT TO RELIGIOUS FREEDOM WITH OTHER FUNDAMENTAL RIGHTS IN THE INDIAN CONSTITUTION: A CONSTRUCTIVIST COHERENCE ANALYSIS

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INTRODUCTION

The Indian Constitution recognises the right to religious freedom of both individuals and groups via Articles 25 and 26 respectively.[1] This right is not absolute and is subject to the limitations of public order, morality, and health.[2] However, a crucial textual difference lies between individual and group rights to religious freedom. Article 25, which guarantees the freedom of conscience and religion to individuals, has been expressly made subject to other fundamental rights enshrined in Part III of the Constitution.[3] Article 26 on the other hand contains no such restrictions and is only limited with respect to *public order*, *morality*, and *health*. The weight to be accorded to this difference has not been debated adequately over the years, leading to the vexed question of the interplay of the right to religious freedom and other fundamental rights. This question has gained importance because it is, presently, one of the questions pending before the Supreme Court in the reference made by the Court in the review petition against its judgement in *Young Lawyers Association v The State of Kerala*[4] ["Sabarimala case"].

This paper begins by setting the context of this interpretational conflict. **Section I** of the paper briefly explains the dispute as it arose in the context of the Sabarimala case and its pending reference before the Supreme Court. It further explains why the Supreme Court has rarely grappled with this conflict despite its vast jurisprudence in the matters of religion. It

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[1] The Constitution of India, art. 25(1) and art 26.

Article 25(1) reads as: "*(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.*"

Article 26 reads as: "*Subject to public order, morality and health, every religious denomination or any section thereof shall have the right*
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law."

[2] The Constitution of India, art. 25(1) and art 26.

[3] The Constitution of India, art. 25(1).

[4] *Indian Young Lawyers Association v The State of Kerala*, (2019) 11 SCC 1 ["Sabarimala Case"].

argues that the application of the essential religious practices test ["ERP Test"] has allowed the Court to determine claims based in religion at the definitional level, without having to balance competing interests of religious freedom and equality. **Section II** then delves into the constitutional interpretation of Articles 25 and 26 of the Indian Constitution to answer this question of interplay. It argues in favour of a holistic reading of Articles 25 and 26, in conjunction with other fundamental rights contained in Part III of the Constitution. Thus, it argues for the right to religious freedom for both individuals and groups to be limited not only by public order, morality and health but also to be read with other fundamental rights. In order to build this argument, the paper relies on the constructivist coherence theory of constitutional interpretation propounded by Richard H. Fallon Jr for it provides a holistic method of interpretation when different techniques lead to different answers.[5] Finally, **Section III,** briefly looks at the anti-exclusion test proposed by Justice Chandrachud in the *Sabarimala case* as the way forward in the jurisprudence relating to the right to religious freedom.

I. RELIGIOUS FREEDOM *VIS-A-VIS* OTHER FUNDAMENTAL RIGHTS- THE CONUNDRUM

The implications of the textual difference between Article 25 and 26 in terms of their interplay with other fundamental rights has received little attention from the Supreme Court. On a textualist reading, the absence of the phrase "subject to […] other provisions of Part III" in Article 26 could suggest its interpretation as a discrete, self-contained code unaffected by other fundamental rights.[6] This is one of the arguments that the respondents raised in the *Sabarimala Case*.

A. The Sabarimala Case

In the *Sabarimala Case*, the Supreme Court grappled with the interplay of a) the right to religious freedom with other fundamental rights. It sought to balance the right to *equality*, *dignity*, *non-discrimination*, and *religious freedom*, under Articles 14, 15, 17, 21, and 25, of women aged 10-50 years, who were barred from entering the Sabarimala Temple with b) the right of a religious denomination to manage its own affairs in matters of religion under Article 26 of the Constitution. The Petitioners and intervenors *inter alia* argued that even if the prohibition on their entry was protected as an essential practice under Article 26(b), it could not violate the basic concept of dignity and other fundamental rights enshrined in the

[5] Richard Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1987) 100(6) Harvard Law Review 1189.
[6] Sabarimala Case (n 4) [441.19] (Malhotra J).

Constitution.[7] They argued that Article 26 cannot be read in an isolated manner merely because it has not explicitly been subjected to the constraints of other fundamental rights.[8] They sought a harmonious reading of Articles 25 and 26 to argue that the respondents' rights to manage their own affairs is subject to women's right to worship in a public temple.[9] The respondents on the other hand insisted on the textual difference between Articles 25 and 26 to argue that the latter is not subject to other fundamental rights including equality.[10]

Justice Nariman in passing observed that a wide reading of the term "constitutional morality" in Article 26 would subject it to other fundamental rights, which it textually has not been subjected to.[11] At the same time, he noted that Article 26 will have to be harmoniously construed and balanced with other fundamental rights; however, this would be done on a case-to-case basis without subjecting Article 26 to other fundamental rights.[12] Justice D.Y. Chandrachud, on the other hand, propounded that Article 26, irrespective of the absence of a proviso subjecting it to other fundamental rights, must be read holistically with other rights enumerated in Part III of the Constitution.[13]

In a 4:1 opinion, the majority ruled the exclusion of women aged 10-50 years to be unconstitutional and violative of their fundamental rights, while also noting that the practice was not protected as "essential" under Article 26.[14] A review petition against this judgement referred the matter to a larger bench. One of the questions before the bench concerns the "interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III, particularly Article 14".[15] This question will be addressed in detail in Part II of the paper, where the authors argue in favour of reading Articles 25 and 26 holistically with other fundamental rights.

[7] Sabarimala Case (n 4) [21] & [60] (Misra CJ).
[8] Sabarimala Case (n 4) [39] & [59] (Misra CJ)
[9] Sabarimala Case (n 4) [37] (Misra CJ).
[10] Sabarimala Case (n 4) [441.19] (Malhotra J).
[11] Sabarimala Case (n 4) [176.7] Footnote 59 (Nariman J).
[12] ibid.
[13] Sabarimala Case (n 4) [216] (Chandrachud J).
[14] Sabarimala Case (n 4).
[15] *Kantaru Rajeevaru v Indian Young Lawyers Association*, (2020) 3 SCC 52.

B. Pitfalls of the ERP Test

Despite its vast jurisprudence in matters of religion, the Supreme Court has never grappled with this question in detail. This is in part due to the application of the ERP Test by the Court. In dealing with religion-based matters, the Supreme Court has evolved the ERP test, wherein only the religious practices that are determined to be *essential* to a religious denomination are given constitutional protection. The ERP test has enabled the Court to define religion in a manner that conforms to its reformist notions.[16] In doing so, the Court has rarely dealt with conflicts that may arise between the right to religious freedom and other rights. This leads to concerns that not only does the Court assume a theological mantle, but it also avoids grappling with intra-rights and inter-rights conflict by rejecting claims at the threshold level itself.[17] Definitional tests such as the ERP test preclude the courts from ascertaining the balance between competing rights and interests by allowing them to read the claim out of the purview of constitutional protection.[18]

Moreover, it militates against the religious community's constitutionally guaranteed autonomy to decide its essential practices.[19] The ERP test fails to account for the fact that religions and cultures are not homogenous, especially in cases as Sabarimala that involve highly localized temple rituals.[20] The Court still forces them into narrow categories of "essential/non-essential" and "exclusive/non-exclusive denominations" according to its own understanding of religion and discounts any differences before testing them against constitutional values.[21] This creates a gap between the judges' cultural understanding and the

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[16] Deepa Das Acevedo, 'Temples, Courts, and Dynamic Equilibrium' (2016) 64 The American Journal of Comparative Law 578; Rajeev Dhavan and Fali S. Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in B.N. Kirpal et al (eds) *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2000). 259; Sabarimala Case (n 4) [408] (Chandrachud J); Ronojoy Sen, 'Secularism and Religious Freedom' in Sujit Choudhry and Madhav Khosla (eds.) *The Oxford Handbook of the Indian Constitution* (OUP 2016) 914.

[17] Dhavan and Nariman (n 16) 261; Mary Kavita Dominic, ''Essential Religious Practices' Doctrine as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Fact-Finding' (2020) 16(1) Socio-Legal Review 48.

[18] Jaclyn L Neo, 'Definitional imbroglios: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication' (2018) 16 International Journal of Constitutional Law 574-595.

[19] Sabarimala Case (n 4) [408] (Chandrachud J); Gautam Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority, and Religious Freedom Under the Indian Constitution' in *The Transformative Constitution*: *A Radical Biography in Nine Acts* (HarperCollins India 2019); Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (2017) Brigham Young University Review 918.

[20] Keerthik Sasidharan, *The Churning of Tradition*, The Hindu (6 Feb. 2019) <https://www.thehindu.com/opinion/columns/the-churning-of-tradition/article25274079.ece>.

[21] Deepa Das Acevedo, 'Just Hindus' (2020) Law and Social Enquiry 1, 19.

religious devotees.[22] The test then also furthers a static conception of religion, which is incapable of self-reformation.[23] Finally, the Court's exposition that social reforms cannot obliterate essential religious practices[24] may allow for "essential" discriminatory religious practices that violate individual rights to continue. Thus, effectively, the ERP test renders the effect of Articles 25 and 26 nugatory in its failure of both recognising religious autonomy and allowing for social reform measures within a religion.

These pitfalls are exemplified in the *Sabarimala* case as well. Chief Justice Mishra's (as he was then) and Justice Khanwalikar's opinion proceeds on the assumption that religion is inherently non-discriminatory and that allowing women to enter temples is an "essential practice" of Hinduism.[25] In doing so, the judges relied on their own understanding of religion rather than perceiving the devotees' religious practices as they presented them.[26] More importantly, an opinion presuming religion to be non-discriminatory, presumes that there cannot be any conflict between religious practices and equality, which then obviates the possibility of the Court deciding the fate of discriminatory religious practices in terms of the Constitution.[27] The acknowledgement of the conflict between denominational rights to religious freedom and the right to equality and dignity came only in Justice Chandrachud's opinion.[28]

Moreover, the practice of not conducting actual fact-finding in matters involving the ERP test has allowed the Court to selectively rely on religious texts and affidavits that often reflect the majoritarian view within a religion, to fashion religion in the way it suits its opinions. A case in point is the *Sabarimala* case. The Court held that the record that was placed before the Kerala High Court in 1991 against which the appeal was filed, to be sufficient evidence.[29] However, the Kerala High Court had relied solely on the Thantri's (head of the temple) opinion which solidified and extended the ban on women's entry to the entire year,[30] despite contrary evidence to show that previously women had entered the temple outside the pilgrimage

[22] Dominic (n 17) 61.
[23] Dominic (n 17) 58.
[24] *Riju Prasad Sarma v State of Assam*, (2015) 9 SCC 461 [61].
[25] Sabarimala Case (n 4) [4] & [122] (Misra CJ).
[26] Acevedo (n 21).
[27] Deepa Das Acevedo, 'Pause for Thought: Supreme Court's Verdict on Sabarimala' (2018) 53(43) Economic & Political Weekly 12, 14.
[28] Sabarimala Case (n 4) [291] (Chandrachud J).
[29] Sabarimala Case (n 4) [199-200] (Nariman J).
[30] *S. Mahendran v Secretary, Travancore Devaswom Board, Thiruvananthapuram and Others*, AIR 1993 Ker 42 [25] and [36-37].

season.[31] Thus, it was the hegemonic religious view that found space in the Kerala High Court's judgment and women were absent for the most part.[32]

Similar folly is repeated in the Supreme Court's opinion in the *Sabarimala* case where the devotees' perception of their religion did not find adequate space in the judgement. More crucially, the Court did not delve into assessing factual claims of discrimination. Albeit on a conceptual level, the exclusion would end up being discriminatory and antithetical to women's dignity, but substantiating this on factual grounds would have strengthened the Court's decision and may have enhanced its acceptance among the devotees. This gains importance in light of the fact that there were female Ayyappan devotees who defended the exclusionary practice of the temple in furtherance of their religious beliefs and were "Ready to Wait".[33] Court's pronouncement has been perceived by the devotees to be an external imposition,[34] which is aggravated by the fact that a petition in this case was filed by a non-Ayyappan devotee.

This section discussed the interpretational conflict between Articles 25 and 26 and their interplay with other fundamental rights enumerated in Part III of the Constitution. This question arose recently in the context of the *Sabarimala* dispute, where Justice Chandrachud acknowledged this conflict and sought to resolve it. The question is currently pending before a larger bench of the Supreme Court. The authors argue that the application of the ERP test has allowed the Supreme Court to avoid dealing with this conflict by resolving religious matters at a definitional level. The next section will delve deeper into this conflict and argue in favour of limiting the right to religious freedom by other fundamental rights.

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[31] ibid [7].

[32] Acevedo (n 21) 7.

[33] Niranjana Jayakrishnan, 'I am a Woman from Kerala. Here's Why I am Against the Sabarimala Verdict', News18.Com (29 Sept. 2018) <https://www.news18.com/news/buzz/i-am-a-woman-from-kerala-heres-why-i-am-against-the-sabarimala-verdict-1893197.html>; '#ReadyToWait: These Kerala Women Devotees Campaign against Women Entering Sabarimala Shrine' Indian Express (29 Aug. 2016) <https://indianexpress.com/article/trending/trending-in-india/women-devotees-in-kerala-say-readytowait-to-enter-sabarimala-shrine-3002027/>.

[34] Rajeev Chandrasekhar, 'I oppose Sabarimala verdict because this is not about women's discrimination at all', The Print (18 Oct., 2018) <https://theprint.in/opinion/i-oppose-sabarimala-verdict-because-this-is-not-about-womens-discrimination-at-all/136444/>; 'Tens of thousands protest in India over Sabarimala temple', Al Jazeera (1 Jan. 2019) <https://www.aljazeera.com/news/2019/01/tens-thousands-protest-india-sabarimala-temple-190101140533525.html>; DNA Web Team, 'Ready to Wait: Women Explain Why They are Willing to Delay Their Entry into Sabarimala', Daily News Analysis (29 Aug. 2016) <https://www.dnaindia.com/india/report-women-devotees-of-lord-ayappa-say-they-are-readytowait-to-enter-sabarimala-2249993>.

II. INTERPRETATION OF ARTICLES 25 AND 26: A CONSTRUCTIVIST COHERENCE APPROACH

Prof. Richard H. Fallon Jr., a renowned constitutional law scholar proposed the constructivist coherence theory of constitutional interpretation in response to what he calls the "commensurability problem" of constitutional law.[35] This is the problem of ascertaining how different types of constitutional arguments are "appropriately combined and weighed against each other within our constitutional practice."[36] He describes the five types of "modalities" [37] or arguments of constitutional interpretation, which are generally relied on by the courts to arrive at the meaning of a constitutional provision. These include: arguments from the text, arguments about the framers' intent, arguments of constitutional theory, arguments from the precedent, and value arguments.[38]

However, questions regarding, for instance, the interrelatedness between the theories and which theory should gain precedence over others in case of a conflict have not been adequately answered.[39] To answer this query, Fallon recommends the constructivist coherence theory. According to Fallon, various types of constitutional interpretation techniques, though distinct, are sufficiently interconnected.[40] Fallon posits that there are two strands to his theory. The first strand aims at achieving coherence since the different types of argument are interactive and not autonomous.[41] Even when there is a conflict in the result while assessing the various arguments, he argues that conflicting arguments could be reconsidered to achieve a common interpretation or result.[42] The second strand of his theory stipulates that when the various arguments point irreversibly to different results the arguments will have to be ranked hierarchically.[43] Thus, it is possible to achieve constructivist coherence, which he defines as a "reflective equilibrium in which arguments of all five types, following a process of reciprocal

[35] Fallon (n 5) 1189.
[36] Fallon (n 5) 1285.
[37] Philip Bobbitt, *Constitutional Interpretation* 11 (OUP 1991). Professor Philip Bobbitt, another constitutional law scholar, defines modalities of constitutional interpretation as "the way in which we characterize a form of expression as true."
[38] Fallon (n 5) 1238. For other typologies of constitutional arguments, *see* Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (OUP 1982).
[39] Fallon (n 5) 1238.
[40] Fallon (n 5) 1189.
[41] Fallon (n 5) 1286.
[42] Fallon (n 5) 1189.
[43] Fallon (n 5) 1189.

influence and occasional reassessment, point toward or at least are not inconsistent with a single result."[44]

In the Indian judicial landscape, Fallon's theory was most recently referred to by Justice Dipak Mishra in *Government of NCT of Delhi* v. *The Union of India and Ors*.[45] The authors rely on Fallon's theory in this paper since the textual interpretation of Article 26 in juxtaposition with Article 25 creates an anomalous situation in which Article 26 exists in isolation from other rights enumerated in Part III of the Constitution. However, as the authors show below, all other modalities of interpretation suggest a holistic reading of Article 26 with other fundamental rights. Using Fallon's theory, the authors seek to arrive at a coherent understanding of this issue by employing various modalities of constitutional interpretation to arrive at a common result.

This section builds on each of these typologies to argue for a holistic interpretation of Articles 25 and 26 with other fundamental rights.

A. Arguments about the Framers' Intent

Arguments about the framers' intent or historical arguments look at the meaning of constitutional provisions by inquiring into the original understanding of the constitutional drafters.[46] This section looks at the Constitutional Assembly Debates and its historical circumstances to argue for a harmonious reading of Articles 25 and 26 with other fundamental rights. It traces the background in which the Constituent Assembly's understanding of religion came about and reads the Constituent Assembly Debates in that light. It also addresses the difference in the phrasing of the two Articles to understand if the omission of the phrase "other provisions of Part III" was deliberate or not.

It has often been noted that Indian Constitution serves as a distinct break not only from the despotism of our colonial past, but also from the social hierarchies such as caste and patriarchy put in place by the 'private' realm of religion and customs.[47] In the 1920s and 30s, alongside the independence struggle, Dr. Ambedkar marshalled the cause of "untouchable"

[44] Fallon (n 5) 1189.
[45] *Government of NCT of Delhi v The Union of India and Ors*., (2018) 8 SCC 501.
[46] Fallon (n 5) 1198; Bobbitt (n 37) 9.
[47] Bhatia (n 19).

castes' right to enter Hindu temples.[48] These issues eventually found place in our Constitution in Articles 15, 17, and 25(2)(b).

It has been argued that religion plays a *thicker* role in the Indian society as compared to Western liberal jurisdictions.[49] Practices of religious communities are interlinked with individuals' access to basic goods. Discrimination employed within religion reflects and reinforces discrimination in the 'public' realm.[50] These ideas together underpin the Constituent Assembly's understanding of religion. The Constituent Assembly was acutely aware of the "thick" nature of religion in India and the hierarchies it created. It is precisely this thick nature of religion that prompted the Constituent Assembly to allow for State intervention in religion.[51] The clearest enunciation of this comes from Dr. B.R. Ambedkar's remarks in the debates wherein he observed that:

> I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State.[52]

A similar exposition was made by KM Munshi who observed that for the nation's unity and progress, religion had to be divorced from personal law and the role of religion was to be limited in the longer run.[53] Further, in the context of demands made for incorporation of a specific right guaranteeing the exercise of personal laws, some framers envisaged a role for legislature in making progressive changes to such personal laws. [54]

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[48] Anupama Rao, *The Caste Question* (University of California Press 2009) 81.

[49] Bhatia (n 19).

[50] Gautam Bhatia, 'The Sabarimala Judgement-III: Justice Chandrachud and Radical Equality' (*Indian Constitutional Law and Philosophy*, 29 Sept. 2018) <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/>; Bhatia (n 19).

[51] Bhatia (n 19).

[52] Constituent Assembly of India Debates, 2 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C02121948.html >.

[53] Constituent Assembly of India Debates, 23 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html>.

[54] M. Ananthasayanam Ayyangar remarked: "A time may come when members belonging to the particular community may feel that in the interests of the community progressive legislation has to be enacted." Constituent

For these reasons, the Fundamental Rights Sub-Committee's suggestion to subject religious freedom to other fundamental rights was accepted.[55] Further, the legislature was empowered to legislate social reforms even where the matter fell within the realm of religion. Munshi explained that the Drafting Committee did not want the practice of any religion to impede the legislature's power to make laws on social questions, for which reason, Article 25(2)(a) was added.[56] This was in pursuance of the concerns raised by some members. Alladi Krishanwami Ayyar had written to B.N. Rau expressing his concerns about the wide import of the term 'religion', which could prohibit all existing and future social reform legislation.[57] Rajakumari Amrit Kaur also wrote to B.N. Rau on her and Hansa Mehta's behalf, with similar apprehensions that the draft clause, as it then were, would not allow the legislature to eradicate religious customs such as child marriage, polygamy, discriminatory inheritance laws, and untouchability.[58] To allay these concerns the Drafting Committee added an explanation saving the power of the legislature to enact laws for social welfare and reform.[59] There was some opposition to this from the Asthika Sabha of Madras who saw this as an infringement of their religious freedom. However, B.N. Rau rejected their representations, noting that the explanation was essential to pursue social reform.[60]

They were equally concerned with ensuring access of all classes of Hindus to Hindu temples, which led to the addition of Article 25(2)(b) of the Constitution. Some framers even sought to widen the scope of this Article to include religious institutions of all religions.[61]

Crucially, several members of the Constituent Assembly were aware of the possible conflict between religious freedom and gender equality. Thus, in discussions surrounding the directive principle relating to a uniform civil code, a few members sought inclusion of a proviso

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Assembly of India Debates, 2 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C02121948.htm>.

[55] Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (OUP 2015) 60.

[56] Constituent Assembly of India Debates, 1 May 1947, vol III <164.100.47.194/Loksabha/Debates/cadebatefiles/C01051947.html>.

[57] B. Shiva Rao, *The Framing of India's Constitution* (Universal Law Publications 2006) 259.

[58] ibid 260.

[59] Rao (n 48) 261.

[60] Rao (n 48) 266.

[61] Prof. K.T. Shah said: "Sir, I do not see why this right or obligation should be restricted only to Hindu Religious institutions to be thrown open to the public. I think the intention of this clause would be served if it is more generalised, and made accessible or made applicable to all the leading religions of this country, whose religious institutions are more or less cognate, and who therefore may not see any violation of their religious freedom, or their religious exclusiveness, by having this clause about throwing open their places of worship to the public.", Constituent Assembly of India Debates, 6 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C06121948.html>.

guaranteeing protection of personal laws.[62] In this context, KM Munshi noted that if any religious practice that is discriminatory to women is given unbridled protection under personal law, the ideals of non-discrimination would not be achieved.[63] He noted that a fundamental right guaranteeing equality to women had already been passed and therefore any protection of discriminatory religious practices would run afoul of it.[64] Eventually the Constituent Assembly rejected the motion to add such a proviso.[65] Similarly, albeit in a different context, Lakshminarayan Sahu noted that religious freedom was not absolute and that religious freedom to practice sati, for instance, was abolished in the country.[66] The fact that the personal reforms undertaken often forewent religious beliefs for gender equality further show that the dominant view of the Constituent Assembly was to protect equality as a constitutional value and limit religious freedom to that extent.[67]

Further, some members of the Constituent Assembly itself read the right to freedom of religion with other rights. Thus, K. Santhanam remarked that the right to freedom of speech and expression and to form associations and unions under Article 19 includes the right of religious expression and forming religious associations.[68] Reading this way he emphasised that Article 25 was more about religious toleration limited by public order, morality, health and other rights.[69] Beyond the Constituent Assembly, other leaders of the time also echoed the view that the right to religious beliefs and freedom of both individual and community had to be

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[62] Constituent Assembly of India Debates, 23 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html>.

[63] KM Munshi noted: "I know there are many among Hindus who do not like a uniform Civil Code, because they take the same view as the Honourable Muslim Members who spoke last. They feel that the personal law of inheritance, succession etc. is really a part of their religion. If that were so, you can never give, for instance, equality to women. But you have already passed a Fundamental Right to that effect and you have an article here which lays down that there should be no discrimination against sex. Look at Hindu Law; you get any amount of discrimination against women; and if that is part of Hindu religion or Hindu religious practice, you cannot pass a single law which would elevate the position of Hindu women to that of men." Constituent Assembly of India Debates, 23 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html>

[64] ibid.

[65] Constituent Assembly of India Debates, 23 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html>.

[66] Constituent Assembly of India Debates, 24 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html>.

[67] Ananya Mukherjee Reed, 'Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can and Cannot Do' (2001) 25(2) Atlantis 45.

[68] Constituent Assembly of India Debates, 6 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C06121948.html>.

[69] ibid.

limited by other rights. For instance, Lala Lajpat Rai believed that religious rights had to be "adjusted and correlated that they might be exercised without doing injury to each other."[70]

From this discussion, it emerges that the framers conceptualised religious freedom to be limited and for it to not impede any social reform measures. The Constituent Assembly sought to uphold the principles of equality, non-discrimination, human dignity, and liberty, which underpin other provisions of Part III. The Constituent Assembly did not qualify this concern when it came to group rights under Article 26. It sought to limit the right to religious beliefs and freedom in principle, irrespective of the right being held by individuals or by a community.

The draft of Article 25 initially did not contain any proviso, which, as Dr. B.R. Ambedkar explained, was a mere omission. Thus, the phrase "subject to public order, morality, and health" was added to the draft in line with the principle that rights in the matter of religion cannot be absolute.[71] This underlying reasoning of ensuring that religion does not become absolute would apply equally in case of a group's right to religious freedom.

It has been argued that the textual difference between Articles 25 and 26 i.e., the omission of the phrase "other provisions of Part III" from Article 26 indicates that the group rights under Article 26 are not subject to other fundamental rights. However, based on the discussion in the Constituent Assembly debates, it emerges that there was no discussion and deliberation in the Constituent Assembly on the omission of the phrase "other provisions of Part III". There is nothing in the debates to suggest that Article 26 was intentionally not subjected to other rights enumerated in Part III. Given that the Constituent Assembly's underlying concerns about limiting religious freedom to eliminate pernicious religious practices applies to both rights of individuals and groups, from a historical perspective, this textual difference ought not to be considered critical.

This is also substantiated by the fact that it was individual liberation that was given primacy to by the Constituent Assembly over group rights.[72] In both caste and religious

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[70] Madhav Khosla, *India's Founding Moment* (Harvard University Press 2020) 129.

[71] Constituent Assembly of India Debates, 7 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C07121948.html>.

[72] Rochana Bajpai, 'Multiculturalism in India: An Exception' in *Multiculturalism in the British Commonwealth: Comparative Perspectives on Theory and Practice* (University of California Press 2019) 137; *See also* Pandit GB Pant observed: "There is the unwholesome and to some extent a degrading habit of thinking always in terms of communities and never in terms of citizens. But it is after all citizens who form communities and the individual as such is essentially the core of all mechanisms…that are adopted for securing progress and advancement. So, let us remember that it is the citizen that must count…It is the citizen that forms the base as well as the summit of

questions, the Constituent Assembly sought, through the Constitution, to limit the hierarchies created by groups and to liberate individuals.[73] Social reform movements that preceded the framing of the Constitution focused on individual choice within communities and were often framed in the language of individual rights against these communities.[74] Ambedkar in the above quoted Constituent Assembly speech also recognised the inequalities created by the social system and noted that the basic unit of the Constitution was indeed the individual.[75] The Constituent Assembly's rejection of explicitly saving personal law, which would have strengthened group rights, also shows that it was the individual that was the normative unit of the Constitution whose right to equality was to be protected.[76] This indicates that while the Constituent Assembly recognised group rights to religious freedom, they were to be read with the right to equality of individuals.[77] Thus, the framers envisaged the State to both exercise restraint to protect religious freedom and to undertake reforms at the same time,[78] for, left to its own, they were concerned that oppressive religious practices could limit the transformative impact of independence.[79]

Drawing on the understanding that the Constituent Assembly was cognisant of the "thick" nature of the religion which often threatened the exercise of individual rights, and the primacy it gave to individual liberation, it is clear that the framers had sought to limit religious freedom of both individuals and groups. These limitations are informed by other rights enumerated in Part III which guarantee equality and dignity to individuals. That Article 25 specifically subjects religious freedom to other fundamental rights and that the omission of such a proviso in Article 26 was not deliberate, leads one to conclude that Articles 25 and 26 must be read harmoniously with other fundamental rights. The framers envisaged discriminatory religious practices to be foregone for gender equality, thus, should any group

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the social pyramid…." Constituent Assembly of India Debates 24 January 1947, vol II <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C24011947.html>.

[73] Khosla (n 70) 111, 142 & 152; Satya Prasoon & Ashwini Tallur, 'Rescuing Individual Rights from the Chokehold of Groups Rights' The Wire (3 Dec. 2017) <https://thewire.in/law/constitution-individual-group-rights-religion>.

[74] Bhatia (n 19).

[75] Constituent Assembly Debates, 4 November, 1948, Vol. VII <http://164.100.47.132/LssNew/constituent/vol7p1.html>.

[76] Gautam Bhatia, 'How Courts Decide on Matters of Religion' LiveMint (5 Mar. 2019), <https://www.livemint.com/news/india/how-courts-decide-on-matters-of-religion-1551715822881.html>.

[77] Bajpai (n 72) 137.

[78] Deepa Das Acevedo, 'Temples, Courts, and Dynamic Equilibrium' (2016) 64 The American Journal of Comparative Law 579.

[79] PN Bhagwati, 'Religion and Secularism Under the Indian Constitution' in Robert Baird (ed) *Religion and Law in Independent India* (2nd edn., 2005) 35, 43.

practice its religion in a manner that is discriminatory on grounds of sex or excludes an individual from accessing public goods,[80] such a practice is not likely to stand the test of the law.

B. Arguments from Constitutional Theory

Arguments from constitutional theory are concerned with interpreting the Constitution as a whole and assessing the purpose and values it espouses.[81] This is similar to the structural argument typology proposed by the constitutional law scholar Professor Philip Bobbitt, which draws inferences from structures of and relationships between constitutional provisions.[82] This argument also builds on and borrows from the argument about the framers' intent discussed above.

Articles 25 and 26 form part of the fundamental rights chapter of the Constitution contained in Part III. Article 14 is the primary source of the principle of equal protection of law which then is manifested in protection against horizontal discrimination based on religion, race, caste, sex or place of birth in Article 15; equality in matters of public employment (Article 16); abolition of untouchability (Article 17); and abolition of titles (Article 18). This extends to other provisions guaranteeing freedoms and personal liberty inasmuch as they apply to *all* individuals. It can even be found in Articles 25 and 26 inasmuch as they guarantee equal right to religious freedom to *all* individuals and groups. The Constitution guarantees formal equality and endorses substantive equality by empowering the State to enact laws that may impinge upon religious autonomy, in order to eradicate discriminatory religious practices.[83] It is within this constitutional scheme that the right to freedom of religion finds space and it must be interpreted within such a scheme.

The freedom of conscience and religion has been enlisted with other freedoms that together form various facets of liberties to be realised by an individual and by the society. These freedoms are exercised together and not in disjunction from each other, meaning that all freedoms exist in harmony.[84] The underlying values of each provision informs others and

[80] Sabarimala Case (n 4) [217] (Chandrachud J). On anti-exclusion test, see Bhatia (n 19).
[81] Fallon (n 5) 1200.
[82] Bobbitt (n 37) 74.
[83] Ananya Mukherjee Reed 'Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can And Cannot Do' (2001) 25(2) Atlantis 42, 44.
[84] Sabarimala case (n 4) [217] (Chandrachud J)

together they contribute to the human personality.[85] Thus, Articles 25 and 26 cannot be read as self-contained code but must be read in conjunction with other fundamental rights enlisted in Part III of the Constitution.[86]

Article 25 is the only provision in this chapter that has been explicitly made subject to other fundamental rights. This is in line with the framers' intention of limiting the role of religion to ensure that religion does not become a site for perpetration of pernicious, oppressive practices that undermine the principles of equality, liberty, and dignity.[87] At the same time, Article 26 also forms part of this constitutional scheme along with other freedoms given in Part III. Given their coexistence in Part III, the freedom enumerated in Article 26 will also be read in harmony with the principles of equality, liberty, and dignity espoused by other Articles including Article 25. Further, Part III is predominantly characterised with rights for individuals. This indicates that the individual is at the heart of Part III and group rights are a platform for the self-fulfilment of individuals.[88] Thus, group rights to practices and customs cannot be absolute to an extent that they impinge upon individual freedoms and dignity.[89]

This argument is best encapsulated in Justice Chandrachud's exposition in the *Sabarimala* case:

> Fundamental human freedoms in Part III are not disjunctive or isolated. They exist together. It is only in cohesion that they bring a realistic sense to the life of the individual as the focus of human freedoms. The right of a denomination must then be balanced with the individual rights to which each of its members has a protected entitlement in Part III.[90]

C. Arguments from Precedent

Arguments from judicial precedents or doctrinal arguments are those that derive principles and law laid down in previous decisions of the judiciary and apply it to the problem at hand.[91]Indian jurisprudence, over time, has moved towards the constitutional interpretation

[85] *Justice KS Puttaswamy v Union of India*, (2017) 10 SCC 1 [260].
[86] Bhatia (n 19); Suhrith Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala' (2020) 3(2) University of Oxford Human Rights Hub Journal 124.
[87] See Part (II)(A) above.
[88] Sabarimala Case (n 4) [410] (Chandrachud J).
[89] Sabarimala Case (n 4) [410] (Chandrachud J).
[90] Sabarimala Case (n 4) [409] (Chandrachud J).
[91] Fallon (n 5) 1202; Bobbitt (n 37) 7.

that interprets fundamental rights harmoniously. Today, there is consensus on reading constitutional provisions holistically as opposed to a disintegrated approach of interpreting each provision as a separate self-contained code.[92] Albeit initially, Indian judiciary had adopted a disjunctive interpretation of fundamental rights. In *AK Gopalan v State of Madras*,[93] The majority opinion of the Court held that Article 21 cannot be read with Article 19 and thus a preventive detention law cannot be challenged for violation of Article 19. This approach was reversed later in *RC Cooper v Union of India*,[94] where the court held that fundamental rights are not water-tight silos but indeed have fluid content overlapping with other rights of Part III. This was further expounded in *Maneka Gandhi v Union of India*,[95] where the Court held that a law needs to meet the requirements of Articles 14, 19, and 21, and the procedure established by law under Article 21 must also be "just, fair, and reasonable". Similarly, in *Special Courts Bill Reference*,[96] the Court held that an overlap in a Constitution as detailed as India's is inevitable and thus, different provisions must not be construed in a manner that nullifies the effect of another.

In the context of the interplay between Articles 25 and 26, one of the earliest decisions was that of *Sri Venkataramana Devaru v State of Mysore* ["Devaru"].[97] The Court grappled with the conflict between a law passed under Article 25(2)(b) to open access to Hindu temples and the denomination's right to manage its own affairs in matters of religion under Article 26(b). The Court held that Article 25(2)(b) was an exception to religious freedom under both Articles 25 and 26 and applied equally to denominational temples.[98] Thus, Article 26(b) could not be read in a manner that rendered Article 25(2)(b) superfluous.[99] It was held that: "If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art 25(2)(b), then of course, on our conclusion that Art 25(2)(b) prevails as against Art 26(b), the denominational rights must vanish."[100] This decision falls in line with the framers' objective of limiting the right to religious freedom to create leeway for reform.

[92] LH Tribe and MC Dorf, *On Reading the Constitution* (Harvard University Press 1991) 21-23.
[93] *AK Gopalan v State of Madras*, AIR 1950 SC 27.
[94] *RC Cooper v Union of India*, 1970 AIR 564.
[95] *Maneka Gandhi v Union of India*, (1978) 1 SCC 248.
[96] *In Re Special Courts Bill Reference*, (1979) 1 SCC 380.
[97] *Sri Venkataramana Devaru v State of Mysore*, 1958 SCR 895 ["Devaru"].
[98] ibid [24-25].
[99] *Devaru* (n 97) [32].
[100] *Devaru* (n 97) [32].

Crucially, by extending Article 25(2)(b), which contains the limitation of other rights in Part III, to Article 26(b), the decision effectively resulted in endorsing a reading of Article 26 with other fundamental rights.

In *Sardar Syedna Tahir Saifuddin v State of Bombay*,[101] the majority opinion followed *Devaru*. However, it read the limitation on Article 26(b) narrowly, noting that it is not subjected to the preservation of civil rights. It further construed Article 25(2)(b) narrowly to hold that a law prohibiting excommunication by a religious community is not a measure of "social welfare and reform".[102] This strict approach was also seen in *Subramanian Swamy v State of Tamil Nadu*,[103] where the Court held that Article 26 has not been made subject to other fundamental rights, and thus the right under Article 26 cannot be waived. This approach was a setback from the previous position of Court in *Devaru*. Reading Article 26 in isolation from other fundamental rights created a sharp distinction between religious freedom and other fundamental rights, which failed to account for the inextricable connection between religion and society. Such an approach also aligned with the reliance on definitional tests such as the ERP test, which allowed the court to avoid grappling with inter-rights conflicts.

Similarly, in *Narendra Prasadji Anand Prasad Ji Maharaj & Ors. v State of Gujarat*,[104] the Court observed that Article 25 was subjected to other fundamental rights given that it coincided with Article 19(1)(a) and conferred rights on all persons. It held that the same was not needed for Article 26 which refers to religious denominations and not citizens as Article 19 does.[105] However, despite holding this difference to be critical, the Court held that Article 26 did not limit state's power to compulsorily acquire property under erstwhile Article 31(2). Crucially, it went on to hold that a fundamental right does not exist in isolated compartments but must harmoniously co-exist with other fundamental rights as well as with the reasonable power of the state to effectuate social welfare measures such as agrarian reforms.[106] Thus, there is a tacit acceptance in this case on balancing Article 26 with other fundamental rights despite the Court's acknowledgement of the difference between Articles 25 and 26.

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[101] *Sardar Syedna Tahir Saifuddin v State of Bombay*, 1962 SCR Supl (2) 496.
[102] ibid [40].
[103] *Subramanian Swamy v State of Tamil Nadu*, (2014) 5 SCC 75.
[104] *Narendra Prasadji Anand Prasadji Maharaj & Ors. v State of Gujarat*, (1975) 1 SCC 11 ["*Narendra Prasadji"*]
[105] ibid [26].
[106] *Narendra Prasadji* (n 104) [30-31].

This position was reiterated in *Riju Prasad Sarma v State of Assam*,[107] with the Court holding that Article 25(2)(b) exception applies to Article 26(b) as well. A more nuanced approach was adopted in *N Adithayan v Travancore Devaswom Board*,[108] wherein the Court held that religious practices did not enjoy absolute freedom but were limited by human rights, dignity and social equality mandated under the Constitution.[109] This approach indicated a turn towards a more harmonious approach, correcting course from hitherto textualist approach of reading the right to religious freedom as a self-contained code.

Most recently, in the *Sabarimala case*, Justice Chandrachud endorsed the approach of holistically reading Article 26 with other rights. He held that the fact that Article 26 is not explicitly subject to other provisions of Part III only means that it is not subordinate to other rights.[110] However, this does not result in discrete, overriding religious freedom for groups. It must still be read harmoniously with other fundamental rights for it is one of the facets of other freedoms that co-exist in the Constitution.[111] He thus held that Ayyapan's devotees' right to religious autonomy under Article 26 had to be balanced with the right of women petitioners to equality, dignity, non-discrimination, and liberty to worship under Articles 15, 17, 21, and 25.[112]

A survey of the judgements discussed above suggests that over time, the Supreme Court has shifted its position on the interpretation of Articles 25 and 26. It has moved from reading them as watertight compartments separate from other fundamental rights to reading them holistically within the framework of Part III of the Constitution, in conjunction with other fundamental rights. Thus, the current position of law based on these judgments favours a holistic reading of right to religious freedom with other rights. However, curiously, despite such holistic reading which paves way for the Court to engage with cases involving competing rights, it continued relying on the ERP test that allowed it to evade such engagement by rejecting claims at a threshold level.

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[107] *Riju Prasad Sarma v State of Assam*, (2015) 9 SCC 461.
[108] *N Adithayan v Travancore Devaswom Board*, (2002) 8 SCC 106.
[109] ibid [18].
[110] Sabarimala Case (n 4) [216] (Chandrachud J).
[111] Sabarimala Case (n 4) [217] & [410] (Chandrachud J).
[112] Sabarimala Case (n 4) (Chandrachud J).

D. Value Arguments

Arguments that appeal to moral, political or social values or concern the normative outcomes are often used by courts to give meaning to constitutional provisions.[113] In other words, it looks at the ethos of the Constitution and polity as a source.[114] The Indian Constitution espouses the values of equality, fraternity, liberty, and justice in its Preamble. As K.G. Kannabiran posits, post-independence India relieved itself from the shackles of oppression via a new Constitution, which stipulates fundamental rights for its citizens to bring a social transformation.[115] Thus, the Indian State bears the onus to promote moral and material welfare of the people as envisaged by the Constitution.[116] This transformation that gives centrality to dignity of individuals and equality, is envisaged not only in terms of State and individual but also amongst individuals.[117] The Constitution sought to socially transform Indian society by eliminating structures of oppression to ensure liberty, equality and fraternity.[118] It recognises religious freedom of both individuals and groups and envisages this in a society that is marked with equality amongst citizens, which assures fraternity in the society and realises dignity of individuals.[119]

In other words, constitutional morality of the Indian Constitution, as inferred from the Preamble and Part III seeks to realise the dignity of the individual.[120] Thus, the protection of religious freedom must be balanced with dignity of individuals to realise the values of equality, fraternity, and liberty. For this balancing to take place to fulfil the overarching value of individual dignity, the freedom of religion granted under both Articles 25 and 26 will have to be read in conjunction with other fundamental rights. Thus, religious practices of any religious denomination that impinge upon individual liberty, threaten equality, and harm individual dignity will not withstand the test of law.[121]

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[113] Fallon (n 5) 1204; Bobbitt (n 37) 9.
[114] Bobbitt (n 37) 94.
[115] KG Kannabiran, *The Wages of Impunity: Power, Justice and Human Rights* (Orient Longman 2014) 64.
[116] J. Patrocinio de Souza, 'The Freedom of Religion Under the Indian Constitution' (1952) 13 The Indian Journal of Political Science 62,73.
[117] *Navtej Singh Johar & Ors. v Union of India & Ors*., AIR 2018 SC 4321 [52].
[118] Dhavan and Nariman (n 16) 270.
[119] Sabarimala Case (n 4) [202-204] (Chandrachud J).
[120] *Navtej Singh Johar & Ors. v Union of India & Ors*., AIR 2018 SC 4321 [78].
[121] Sabarimala Case (n 4) [221] (Chandrachud J); Parthasarthy (n 86) 25.

E. Arguments from the Text

Textual arguments rely directly on the text of the Constitution and its plain meaning.[122] As pointed out earlier, in contradistinction to Article 25, Article 26 is not subject to other fundamental rights. The only restrictions that can be placed on the rights of the religious denomination under Article 26 are public order, morality and health.[123] On a textualist interpretation, given that this right has not been made subject to other fundamental rights unlike Article 25, it could be argued that Article 26 exists in isolation to other rights mentioned in the Constitution. In other words, a strict textualist approach would suggest that the three grounds of public order, health, and morality would be the exhaustive list of restrictions. This argument could be bolstered by the fact that framers explicitly restricted Article 25 by other fundamental rights but did not do so for Article 26, indicating that it is not limited by other fundamental rights.

As discussed earlier, this reasoning has been adopted by the Supreme Court in some cases.[124] Most recently, Justice Malhotra in her dissenting opinion in *Sabarimala case* observed that given the pluralist history of Indian society, the framers of the Constitution did not subject Article 26 to Part III of the Constitution.[125] State interference in religious matters has been limited to making laws for social welfare as provided under Article 25(2)(b). Thus, she noted that constitutional scrutiny of religious practices based on Article 14 and other provisions of Part III would be outside the ken of the courts, unless the practices are "social evil".[126]

However, the discussion above,[127] suggests that the framers sought a limited role for religion in order to do away with oppressive religious practices and that the omission of the phrase "other provisions of Part III" was in fact, not deliberate. Moreover, Article 26's merely not being subject to other fundamental rights does not prevent it from being harmoniously read with other fundamental rights. The phrase 'subject to' only indicates that a provision is controlled by other. Thus, whilst Article 26 is not subordinate to other fundamental rights it can still be read synchronously with other rights.[128] Further, given the "thick" role played by religion in India, religion often becomes the site of social discrimination and exclusion

[122] Fallon (n 5) 1195; Bobbitt (n 37) 7.
[123] The Constitution of India, art. 26.
[124] *Sardar Syedna Tahir Saifuddin v State of Bombay*, 1962 SCR Supl (2) 496; *Subramanian Swamy v State of Tamil Nadu*, (2014) 5 SCC 75.
[125] Sabarimala Case (n 4) [479-480] (Malhotra J).
[126] Sabarimala Case (n 4) [453] & [476] (Malhotra J).
[127] See Part (II)(A) of the paper.
[128] Sabarimala Case (n 4) [221] (Chandrachud J).

practiced at a broader level in the society.[129] It reflects and reinforces the injustices carried out in other spheres. As discussed earlier, the framers were acutely aware of this fact and sought to balance religious freedom with the values of dignity and equality. Thus, the constitutional commitment to religious autonomy of groups and pluralism in the text of Article 26 must be understood within the framework of individual dignity and equality enshrined in Part III of the Constitution.[130]

Finally, it could be argued that the term "morality" in Article 26 refers to "constitutional morality" which would import restrictions from other fundamental rights and the Constitution as a whole. However, such an approach necessarily relies on reading the constitutional provisions holistically, which is a deviation from the textualist approach and also questions the exhaustive nature of restrictions enlisted in Article 26.[131]

Moreover, such a strict approach does not contemplate conflicts between the group's right to religious freedom and other fundamental rights. On the other hand, a conjunctive approach where rights of Part III are viewed as overlapping provisions securing principal constitutional values, balancing of competing provisions to secure constitutional values could be envisaged.[132]

Fallon stipulates that even though the five arguments exist independently, there exist numerous interconnections amongst them. Where one argument points in a different direction than those given by all other arguments, then such arguments could be re-examined to adjust results and arrive at a uniform conclusion.[133] Thus, when a textual reading leads to a vexed interpretation, the text has to be read with other arguments that lend other meanings to the text.[134] This could be informed by precedents, constitutional theory, values, or the framer's intent. In this case, whilst the text of Article 26 suggests that it is not subject to other fundamental rights, arguments about framers' intent, precedents, values, and the structure of the Constitution suggest that it is to be read holistically with other fundamental rights enumerated in Part III. Thus, the textual difference between Articles 25 and 26 will ultimately be rendered irrelevant.

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[129] Bhatia (n 50).
[130] Bhatia (n 19).
[131] Raghav Kohli, 'The Sound of Constitutional Silences: Interpretive Holism and Free Speech under Article 19 of the Indian Constitution' (2020) 20 Statute Law Review 11.
[132] ibid. 9.
[133] Fallon (n 5) 1240.
[134] Fallon (n 5) 1241.

Therefore, based on a discussion of the arguments about framers' intent, precedents, values, and the structure of the Constitution and construing the text of Articles 25 and 26 in this light, the authors conclude that the two provisions must be read in consonance with other fundamental rights enshrined in Part III of the Constitution. Thus, the right to freedom of religion will be limited to the extent it interferes with and leads to the violation of other fundamental rights, and particularly the right to equality.

III. ANTI-EXCLUSION TEST: THE WAY FORWARD?

Section I of this paper discussed the pitfalls of the ERP test. The ERP Test has allowed the Court to determine claims based in religion at the definitional level, without having to balance competing interests of religious freedom and equality. Moreover, it militates against a religious community's autonomy to ascertain its essential practices. At the same time, by designating certain practices as "essential" could protect them from constitutional scrutiny and allow for discriminatory essential religious practices to continue.

Justice Chandrachud acknowledged these limitations of the ERP test in his concurring opinion in the *Sabarimala case*. He proposed an alternative in the form of the anti-exclusion test. The test prescribes respect for religious group's autonomy to decide its practices except where the practices lead to exclusion of individuals, impairing their dignity, and hindering access to public goods.[135] This test avoids the pitfalls of the ERP test and protects the autonomy of religious groups that they have been granted under the Constitution. At the same time, it aims to protect the rights of the members of the groups from pernicious religious practices of their groups. In doing so, it also allows the courts to redress historical disadvantage of groups that have been socially excluded.[136] It is also in line with the constructivist coherent interpretation of Articles 25 and 26 discussed above in as much as it reads and balances the right to religious freedom with other rights including the rights to equality, liberty, and dignity.

Thus, the anti-exclusion test will mark a remarkable shift in the jurisprudence and enable the courts to undo the harms caused by the ERP test. It will affirm the religious freedom of groups in determining their own religious practices, as opposed to the current perilous approach of the court undertaking a theological exercise and ascertaining 'essential' practices of a religion. At the same time, it will protect individual dignity and right to equality. Crucially,

[135] Sabarimala Case (n 4) [414-145] (Chandrachud J); Bhatia (n 19).
[136] Lucy Vickers, 'A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases' (2020) 3(2) University of Oxford Human Rights Hub Journal 157.

the principle allows the courts to engage with and balance the often-competing rights of religious freedom and equality, by harmoniously reading all fundamental rights together, which this paper has argued in favor of.

In carrying out such harmonious construction of rights, the anti-exclusion test strikes the correct balance between religious autonomy and dignity and equality. It aligns with the Benhabib's three principles for negotiating equality for reasonable pluralism – egalitarian reciprocity, voluntary self-ascription, and freedom of exit.[137] The anti-exclusion principle ensures that members in minority of a group are not granted lesser rights than those of the majority;[138] allows for self- determination rather than groups controlling the membership at the expense of individuals;[139] and allows freedom of exit to individuals.[140] This allows the religion to evolve to accommodate internal dissent and become more egalitarian, thus achieving the constitutional vision of our framers.

The anti-exclusion principle must replace the ERP test and must be applied in all cases involving religious practices and customs that conflict with the rights of the individuals within that religion. It will however not be of use in cases involving State's role in the management of religious institutional property, which will be determined based on the distinction between secular and religious practices as drawn in the Constitution.[141] Further, the principle would apply to both cases concerning validity of reformatory laws and those involving challenge to religious practices. The courts could evaluate if the impugned laws aimed at reforming religion achieve the anti-exclusion principle or if the impugned religious practices exclude individuals and violate their rights[142] Some commentators have even argued for the application of the anti-exclusion test to all cases involving competing rights as it enables the courts to consider each right equally and carve a balance between them.[143]

At the same time, it is important to note that the standard of claim of exclusion and impingement of dignity is high and would require rigorous evaluation of factual claims. This is important to protect the freedom of religion, which is essential to the social fabric of India

[137] S Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* 92 (Princeton University Press 2002).
[138] Siobhán Mullally, 'Debating Gender Equality in India: Feminism and Multicultural Dilemmas' in *Gender, Culture and Human Rights: Reclaiming Universalism* 193 & 210 (Hart Publishing 2006).
[139] ibid.
[140] Mullally (n 138).
[141] Bhatia (n 19).
[142] Bhatia (n 19).
[143] Vickers (n 136).

given its pluralistic and secular milieu and people often derive their identity and freedoms from such communitarian existence. All religious practices cannot be easily tested against the anvil of rationality and must warrant judicial interference *only* when they exclude individuals socio-economic sphere such that it impairs their dignity or denies them access to basic public goods. Similarly, it is important that the challenge to religious practices based on anti-exclusion claims originate from the affected persons themselves unless there are significant barriers that prevent them from raising such claims.[144] This is because the claims of equality and dignity are adjudged in relation to the other worshippers of the same religion.[145] Moreover, claims at the behest of non-devotees could open floodgates of litigation, which could be perilous, especially for religious minorities.[146]

Thus, the party claiming to have been discriminated against by its religious community would need to show that the impugned religious practices lead to its exclusion or hinder its access from accessing basic goods or treat it as inherently inferior than other members of the community.[147] This would require the Court to assess the claims made by both parties on facts and verify their credibility. Hitherto, the Supreme Court and High Courts have avoided conducting a comprehensive factual analysis especially in writ petitions.[148] However, testing the claims of exclusion and impingement of dignity due to religious practices would require the courts to call for witnesses, permit cross-examination and take evidence on record. Aid of anthropologists with significant experience and expertise in practices of a religion could also be sought for the court to understand the underpinnings of the impugned practice.[149] A rigorous fact-finding would enable the courts to hear both sides and efficiently adjudicate competing values, which would enhance the legitimacy of their decisions.

Thus, the Supreme Court's adoption of the ERP test, which is grounded in theological concerns, turns the focus of the Court on the interpretation of religious texts. As a result, rarely have the courts dealt with discriminatory underpinnings of a vexed religious practice, which

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[144] Sabarimala Case (n 4) [446-448] (Malhotra J); Gautam Bhatia, 'The Sabarimala Judgment – II: Justice Malhotra, Group Autonomy, and Cultural Dissent' (*Indian Constitutional Law and Philosophy*, 29 September 2018) <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/>.

[145] Sabarimala Case (n 4) [447] (Malhotra J).

[146] Sabarimala Case (n 4) [448] (Malhotra J); Mukul Rohatgi, 'An Axis Shift: A Critique of the Sabarimala Case' in Saurabh Kirpal (ed) *Sex and the Supreme Court* 285-286 (Hachette India 2020).

[147] Parthasarathy (n 86) 148.

[148] Suhrith Parthasarathy, 'The Search for Truth in the Republic of Writs' (Indian Constitutional Law and Philosophy, 3 January 2019) <https://indconlawphil.wordpress.com/2019/01/03/iclp-book-discussion-rohit-des-a-peoples-constitution-ii-the-search-for-truth-in-the-republic-of-writs/>.

[149] Dominic (n 17) 69.

would balance religious freedom with equality and dignity. In this context, the anti-exclusion test proposed by Justice Chandrachud is indeed a welcome step in resolving conflicts between religious freedom and other rights. This would also help in tackling the religious hegemonic view which the court otherwise ascribes to in determining the essential religious practices. Marginal voices which are being discriminated against within their religion would find space in the anti-exclusion test, requiring the courts to balance the religious practice with other fundamental rights. At the same time, for a meaningful resolution, the Court must be prepared to delve into disputed questions of facts concerning discrimination or exclusion or violation of dignity.[150]

CONCLUSION

Indian jurisprudence on the right to freedom of religion contained in Articles 25 and 26 of the Indian Constitution has witnessed a puzzling growth of jurisprudence since the inception of the Indian Constitution. On one hand the court has espoused a deferential status to practices of religious denomination even in derogation of other fundamental rights. On the other hand, it has struck down religious practices which did not conform to the reformist notions of the judges and thus were deemed not "essential". This growth of a paradoxical jurisprudence has been the result of the essential religious practices test. Sufficient literature has been devoted to the critique of this test that seeks to endorse the role of judges as religious scholars. This paper argued that given the rejection of religious claims on definitional threshold, the Court has not grappled with the issue of the interplay of fundamental rights with Articles 25 and 26. Only Justice Chandrachud's opinion in the *Sabarimala* case has tackled this question adeptly. Today, this matter stands before a nine-judge bench of the Supreme Court.

In light of the pending reference, this paper sought to resolve this interpretational conflict. It argued in favour of reading Articles 25 and 26 holistically with other fundamental rights. The paper, relying on Fallon's constructive coherence theory, has advanced this proposition based on all five typologies of constitutional interpretation. All arguments sans the textual argument lead to the uniform outcome of reading Articles 25 and 26 in conjunction with other rights contained Part III of the Constitution. In light of other four arguments, it is appropriate to interpret the text of the Constitution in this holistic manner to achieve the constitutional vision of protection of individual dignity, equality, liberty and fraternity.

[150] Parthasarathy (n 86) 150.

The holistic reading of fundamental rights as proposed in this paper would also support the anti-exclusion test proposed by Justice Chandrachud. The test balances the right to religious freedom with the principles of equality and individual dignity. However, for the test to be meaningfully applied, Courts must be open to undertake factual inquiries into discrimination or exclusion claims, wherever necessary.