THE ESSENTIAL RELIGIOUS PRACTICE TEST: A SORRY TALE OF JUDICIAL MISREADING

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'Religion is too personal, too sacred, too holy to permit its "unhallowed perversion" by a civil magistrate'[1]

Abstract

The Essential Religious Practice Test has been consistently applied by the Supreme Court of India in almost all cases revolving around Article 25 and 26 of the Indian Constitution. It has been argued by scholars that the ERP test makes it impossible for any practice to be protected under the Constitution. This paper aims to prove this assertion by a doctrinal and statistical analysis by analyzing all cases decided by various High Courts post-2015 and Supreme Court post 2004. The conclusion obtained from an analysis of these cases supports the assertion that the ERP test reduces the scope of religious freedom without any textual or logical basis. This paper also attempts to highlight how the birth of the ERP test itself was a result of judicial misreading. In conclusion, it argues that as it stands, the ERP test must be withered down or done away with.

Introduction

The Constitution of India provides to all its citizens the freedom of religion as a fundamental right. The Constitution protects the freedom of religion under Articles 25 and 26[2] ('A-25' and 'A-26')

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1 *Engel v. Vitale* 370 U.S. 421, 432 (1962).

2 The author uses Article 25 and Article 26 synonymously in certain places. That is purely for the reason that the ERP inquiry remains the same in both.

subject to public order, morality, and health.[3] While it does not provide any limitation on the scope of the right *per se*, it does provide restrictions for the same. However, in the course of judicial interpretation, the Supreme Court ('SC') has held that what is protected under the freedom of religion is not all religious practice but only 'essential religious practices' ('ERP'). By doing so, the SC has restricted the scope of the right without any textual basis. Various scholars have criticized this approach by arguing that the Court has neither the expertise nor the right to determine what practices constitute the essential religious practices of a given religion.[4] As some put it 'with a power greater than that of a high priest, maulvi or dharmasastri, judges have virtually assumed theological authority'.[5]

The ERP framework requires a three-step inquiry. *First*, an inquiry is made to check if a claim is religious at all; *second*, if it is 'essential' to the faith; and *last*, even if essential, if it satisfies the restrictions placed in the Constitution.[6] This paper argues that the second step in the process, i.e., to evaluate if any given practice is essential to the religion is doctrinally unsustainable and practically impossible.[7] This paper aims to prove this assertion by doing a doctrinal and statistical analysis of *all* relevant SC judgments post-2004 and High Court judgments rendered post-2015.[8] However, such a claim cannot be comprehensively made without first providing the

[3] The Constitution of India 1950, arts 25-26.

[4] Rajeev Dhawan and Fali S Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in B.N. Kirpal, Ashok Desai, Rajeev Dhawan and Raju Ramachandran (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2004) 259.

[5] ibid.

[6] ibid 260.

[7] Akilesh Meneze and Priyanshi Vakharia, 'To Practice What is Preached: Constitutional Protection of Religious Practices vis-à-vis Reformative Secularism' (2020) 7(1) NULJ Law Review 211, 216.

[8] A detailed research methodology can be found in the Annexure.

relevant context and discourse in which debates on protecting religion in constitutional democracies take place.

Thus, this paper *first*, underscores the debates in the current literature on the vexed question of protecting religious freedom in the Indian Constitution and argues that the 'rationalization of religion' has long been understood and criticized by various scholars. *Second*, it highlights that the essential religious practice test came about due to a case of judicial misreading. *Third*, it looks at the standard of essentiality itself and how it has undergone a change over time especially post the case of *Acharya Jagadishwarananda*[9] ('*Acharya*') in 2004, and has now reached a point where practically no practice can be given protection. This is done by doing an empirical analysis of all relevant cases post a given time period. *Fourth*, it analyses the possible reasons behind the unflinching acceptance of the ERP test by the Courts and analyses the reasoning of Dhulia J. in *Aishat Shifa v State of Karnataka* that moves away from the ERP jurisprudence.[10] Lastly, it concludes by saying that the SC has the perfect opportunity now to reconsider the ERP test in the Sabarimala Review Petition and that the test should either be withered down or done away with.

CONSTITUTIONAL SECULARISM: THE DISCOURSE SO FAR

India is admittedly following an innovative model of secularism when compared to Europe or America.[11] It promises to protect religious freedom, while in the same breath trying to implement social welfare legislation to bring about reforms and implement the promise of equality.[12] Numerous such 'anomalies' have been

9 *Commissioner of Police v. Acharya Jagadishwarananda Avadhuta* (2004) 12 SCC 770 ('*Acharya*').
10 *Aishat Shifa v. State of Karnataka* (2022) SCC OnLine SC 1394.
11 Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (OUP 2019) 22.
12 Donald Eugene Smith, *India as a Secular State* (Princeton University Press 1963) 14.

documented by scholars since the framing of the Constitution and interpreted and rationalized in different ways.[13]

Various commentators writing in the early 1960s were hopeful that the forces of westernization and modernization would triumph over religious claims. For instance, Donald Eugene Smith concluded that "many of the constitutional anomalies regarding the secular State would have disappeared" in the early years of the Indian Constitution.[14] Smith was writing at a time when theories concerning the decline of religion were dominant and the implicit hope was that religious reform embedded in secular thought would triumph over religious freedom.[15] Marc Galanter went so far as to argue that the Indian State was primarily concerned with religious reform as opposed to being in the 'business' of religious freedom.[16] Similarly, Jacobsohn calls this the 'ameliorative model' of secularism which embraces the 'social reform impulse' of Indian nationalism.[17]

Unfortunately, the impact of religion on society has turned out to be much more complicated than imagined by Smith. Peter Berger, who once was the leading proponent of 'secularisation of society' has changed his view and admitted that the world is 'as furiously religious' as it has ever been.[18] In hindsight, it is fair to say that such hopes of religion fading away in the backdrop of ideas of secularism were

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13 In the early years after independence, social reform was prioritized over religious freedom even by scholars. See P.K Tripathi, 'Secularism: Constitutional Provisions and Judicial Review' (1966) 8(1) Indian Law Review 165, 192.

14 Donald Eugene Smith, *India as a Secular State* (n 13) 14.

15 Nikki R. Keddie, 'Secularism and Its Discontents' (2003) 132(3) Daedalus 14, 16.

16 Marc Galanter, 'Secularism: East and West' (1965) 7 Comparative Studies in Society and History 133, 136.

17 Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (OUP 2003).

18 Peter Berger, *The Desecularization of the World: Resurgent Religion and World Politics* (William B Eerdmans Publishing Co. 1999) 2. For a comprehensive analysis of the fall of secularism see: Dylan Reaves, 'Peter Berger and the Rise and Fall of the Theory of Secularization' (2012) 11 Denison Journal of Religion 11, 15.

unlikely to be true, given how 'religious and secular life is entangled' in India that the idea of the indifference of the State cannot be justified to either side politically.[19]

How then does one interpret the ideas of Indian secularism? Rajeev Bhargava in his work had rationalized the Indian model of secularism to be that of a 'principled distance', i.e., "the secular State neither mindlessly excludes all religions nor is it merely neutral towards them."[20] Such a 'principled distance' interpretative model which attempts to highlight the 'essential-secular' binary has however been criticized, especially in light of specific Articles in the Constitution concerning religious reform and prohibiting certain religious practices.[21] Bhargava would perhaps argue that the ERP test was a necessity given that the construction of the 'essential-secular' was both a pragmatic and counter-majoritarian choice to pave the way for social reform of religious institutions. When, however, one might be able to say 'thus far and no further' is a question that haunts us all even in this paradigm.

Motivated by such concerns, Ronojoy Sen highlights that a 'better description' of the Indian model of secularism is offered by Rajeev Dhavan wherein he highlights the three components of Indian secularism.[22] Dhavan argues that Indian secularism can be summed up in the three ideas of religious freedom, celebratory neutrality, and reformatory justice. In this paper, we are concerned with the two seemingly incompatible ideas of religious freedom and reformatory

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19 Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (n 18) 10.

20 Rajeev Bhargava, 'Reimagining Secularism: Respect, Domination and Principled Distance' (2013) 48 Economic and Political Weekly 79, 86.

21 Ronojoy Sen, 'Legalising Religion: The Indian Supreme Court and Secularism' (Policy Study 30, East-West Centre Washington 2007) 5.

22 Rajeev Dhavan, The Road to Xanadu: India's Quest for Secularism' in Gerald Larson (ed.,) in *Religion and Personal Law in Secular India: A Call to Judgement* (Indiana University Press 2001).

justice. Sen has concluded in his work that these two ideas are, more often than not, in conflict with each other and it is such conflict that has often led to 'homogenization' and 'rationalization' of religion by the Court.[23]

The ERP test is one manifestation of such rationalization and homogenization of religion which is inimical to internal variations in the practice of religion.[24] It is rationalization insofar as the Court believes its version of the religious practice to be forming the core (or essential part) of the religion, which deserves constitutional protection, and homogenization insofar as only one way (the Court's way) of practicing a religion is protected. Such unusual powers arrogated by the Court to itself have been a subject of criticism for a long time. For instance, J.D.M Derret has highlighted the paradoxical role of the Court in the following words:

> *"Courts can discard as non-essential anything which is not proved to their satisfaction – and they are not religious leaders or in any relevant fashion qualified in such matters –to be essential with the result that it (such practices) would have no constitutional protection".*[25]

Similarly, Galanter questions whether the Constitution gives the Court the power to 'actively participate in the internal re-interpretation of Hinduism' that eventually leads to the demise of religious pluralism and diversity.[26] More recently, Baxi has helpfully

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23 Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (n 12) 33. Similarly, Bhikhu Parekh argues that "the modern state is a 'deeply homogenizing institution' because it 'expects all its citizens to subscribe to an identical way of defining themselves and relating to each other and the state. See Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press, 2000) 8–9.

24 ibid.

25 Upendra Baxi, 'Commentary: Savarkar and the Supreme Court' in Ronojoy Sen, *Legalising Religion: The Indian Supreme Court and Secularism* (n 22) 48.

26 Marc Galanter, *Law and Society in Modern India* (OUP 1993) 251; 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 46.

distinguished the kinds of cases concerning religious freedom jurisprudence into rights-oriented secularism (ROS) and governance-oriented secularism (GOS).[27] In ROS, the principal concern remains how to best realise 'the normative proclamation of the right to freedom of conscience to religious belief and practice'. GOS is linked to ROS, but is more concerned with the 'integrity of the secular structure and reformatory justice'.[28] Thus, when religious reform is given precedence over religious freedom, it is actually a preference of GOS over ROS.

Some scholars like Robert Braid have highlighted that the primary (if not only) reason for utilizing the ERP test is to widen the reformatory powers of the State.[29] In other words, the preference of GOS over ROS is an *intentional* choice keeping in mind the promise of reformatory justice, even if it comes at the cost of religious freedom.

Others like Pratap Bhanu Mehta have also concurred with this and argued that the ERP test has been useful for the Court as it can minimize the conflict between the free exercise of religion and the secular purposes of the State by constructing an argument to the effect that the practices being regulated were not essential to that religion in any case.[30] Such reasoning, that the loss of religious freedom is attributable in some measure to concerns of religious reform, while intuitively correct, is questioned by the findings in this paper.

No doubt such arguments of attaining reformatory justice at the cost of religious freedom are valid to some extent. However, there are numerous cases where petitioners have claimed constitutional protection for religious practices, and the Court has denied protection

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27 Upendra Baxi, 'Commentary: Savarkar and the Supreme Court' (n 26) 50.

28 ibid.

29 Robert D. Baird, 'Religion and Law in India: Adjusting to the Sacred as Secular' in Robert D Baird (ed), in *Religion and Law in Independent India* (Manohar Publishers 2005).

30 Pratap Bhanu Mehta, 'Passion and Constraint: Courts and the Regulation of Religious Meaning' in Rajeev Bhargava (ed), *Politics and Ethics of the Indian Constitution* (OUP 2008).

even when there are no corresponding social reform measures being brought by the State.[31] The Supreme Court has also now recognized that applying the ERP test in *all* cases, even when no reformatory measure is being pushed by the State, is questionable in itself.[32] Thus, this paper, with an analysis of all cases over the past few years, argues that the Court is doing something more than just preferring GOS over ROS, or more broadly social reform over social freedom.

In short, there is almost a consensus that the restriction on religious freedom and usage of the ERP test is because of, and has a *causal* effect on religious reform.[33] Many commentators have already highlighted the problems with the ERP test from the lens of separation of powers, judicial propriety, and the reducing contours of religious freedom.[34] This paper goes one step forward in attempting to empirically prove whether such claims have been true by exhaustively looking at all HC and SC cases during a given period. Surprisingly, even with the vast literature on this subject, there has never been a critique of the *origins* of the test. This paper attempts to add to the current literature by questioning the dubious origins of the ERP test and arguing that such jurisprudence is a result of judicial misreading and

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31 *South Central India Union of SDA v. Government of Karnataka* (2016) SCC OnLine Kar 8342; *Riza Nahan v. State of Kerala* (2021) SCC OnLine Ker 9861. The Annexure has a detailed factual matrix of all cases.

32 *Aishat Shifa v. State of Karnataka* (n 11) [235]. Dhulia J. made a distinction between cases where the State intervenes to bring forth reformatory measures under Article 26 and cases where no reformatory measures are pushed by the State. He held, "The test of ERP has been laid down by this Court in the past to resolve disputes of a particular nature, which we shall discuss in a while. By and large, these were the cases where a challenge was made to State interference on what was claimed to be an " essential religious practice".

33 In the early years of the ERP jurisprudence, many scholars felt the approach of the Court was justified. See Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (n 12) 33.

34 Gautam Bhatia, 'Freedom From Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution' (2016) 5(3) Global Constitutionalism 351.

further providing an empirical analysis of the claims made regarding the final impact of the ERP test.

ERP – A Case of Judicial Misreading

There is nothing in the Constitution that can be used to limit the scope of the right envisioned in Article 25.[35] Yet, the scope of Article 25 has consistently been narrowed down over the years due to judicial misreading. The misreading here is two-fold, one has already been pointed out by Gautam Bhatia where Courts refer to Ambedkar's speech in the Constituent Assembly to infer the meaning of ERP. [36] However, as Bhatia points out, the speech was made in a particular context where *Ambedkar used the word 'essentially religious' to qualify the nature (whether a practice is religious or secular) of a given practice and not its importance (whether it is essential or not). This is the only reference to ERP in the Constitution or the Constituent Assembly Debates.* Since that has been analyzed by Bhatia in detail elsewhere, this paper is more concerned with pointing out the second misreading i.e., of interpreting *Shirur Mutt*[37] which has been curiously ignored by scholars.[38]

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35 Article 25: 'Freedom of conscience and free profession, practice and propagation of religion.—(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, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.'

36 Constituent Assembly Debates, December 2, 1948, Speech by Dr. B.R. Ambedkar, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02> accessed 20 August 2022.

37 *Commissioner, Hindu Religious Endowment Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt* 1954 SCR 1005 ('*Shirur Mutt*').

38 Gautam Bhatia, 'Essential Religious Practices" and the Rajasthan High Court's Santhara Judgment: Tracking the History of a Phrase' (*Indian Constitutional Law and Philosophy,*

The first major case on freedom of religion is that of Shirur Mutt[39] *where there was a challenge to the Madras* Hindu Religious and Charitable Endowment Act. During the arguments, the Attorney General ('AG') while defending the Act made the ERP argument as one of his submissions. He argued that all secular activities which may be associated with the religion, but do not constitute an 'essential' part of it, are amenable to State regulation. The Court responds to this by observing:

> "*The contention formulated in such broad terms cannot, we think, be supported. In the first place*, what constitutes the essential part of a religion is primarily to be *ascertained with reference to the doctrines of that religion itself*…"[40] (emphasis supplied)

A plain reading of this observation indicates that while the AG submitted that only essential religious practices are protected, the Court explicitly *rejected* that contention. Interestingly, the cases that were decided after *Shirur Mutt* interpret this case to mean that Article 25/26 only protects ERP.[41] The first few lines of the paragraph, where the Court expressly rejects the contention are simply, on purpose or otherwise, either ignored or left out in all future cases. Also, the use of the words 'in the first place' after the Court rejected the AG's contention indicates that the Court rejected employing the ERP test since what is essential would be determined by the religion itself and *not* by the Court.

August 2015) <https://indconlawphil.wordpress.com/2015/08/19/essential-religious-practices-and-the-rajasthan-high-courts-santhara-judgment-tracking-the-history-of-a-phrase/> accessed 28 August 2022.

39 ibid. Although *Mohammad Qureshi* was decided before *Shirur Mutt*, it did not elaborate on how the test evolved.

40 *Shirur Mutt* (n 38) [20].

41 For a comprehensive review of case law after *Shirur Mutt*, See M Mohsin Alam, 'Constructing Secularism: Separating 'Religion' and 'State' under the Indian Constitution' (2009) 11 Asian Law 30, 31-34.

The next major case on this point is that of *Durgah Committee*[42] where the Khadims of the Moinuddin Chistia order challenged the Dargah Khawaja Saheb Act of 1955. Here the Court interpreted *Shirur Mutt* to mean that only essential practices of the religion shall be protected. It was also held that it was the Court that was to make the distinction between what is superstitious and what is religious.[43] In *Durgah*, the Court simply assumes that *Shirur Mutt* stands for the ERP proposition by ignoring the part where the Court explicitly rejects the said contention. M.C. Setalvad, former Attorney General, also notes in his extra-curial writings that the position of law as laid down by Justice Mukherjea in *Shirur Mutt* was "sought to be modified" in *Durgah Committee* and how doing so would be "contrary" to the principle of deference laid down in the former.[44]

There are, therefore, two issues with the cases of *Shirur Mutt* and *Durgah Committee*. One is pointed out by the SC in the Sabrimala Review Petition,[45] i.e., even if one reads *Shirur Mutt* to argue that the ERP test was laid down in the case, it was held that the Court would have to defer to the views of the religious institutions. *Durgah Committee* on the other hand carves out a role for the Court to exclude the practices that might be superstitious or secular. This precise issue has been referred to a nine-judge bench to consider. Both these cases were in the context of State intervention in religion - this becomes relevant in the decision of *Aishat Shifa v State of Karnataka* which is discussed in the last section of this paper.[46]

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42 *Durgah Committee Ajmer v Syed Hussain Ali* (1962) 1 SCR 383 ('*Durgah*').

43 Rajeev Dhawan and Fali S Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' (n 5) 260.

44 M.C. Setalvad, *My Life: Law and Other Things* (Universal Book Traders, 2019) 218.

45 *Kantaru Rajeevaru (Sabrimala Temple Review) v Indian Young Lawyers Association* (2020) 2 SCC 1 (Ranjan Gogoi, J.) [7] ('*Sabrimala Review*').

46 *Aishat Shifa v. State of Karnataka* (n 11).

However, this paper points out a more fundamental contradiction, i.e., contrary to popular perception, a closer reading of *Shirur Mutt* highlights that it did *not* lay down the ERP test but rejected its application. It is important to note that *Shirur Mutt* was a 7-judge bench and it is argued that *Dargah Committee* and all other ERP cases[47] may be considered *per-incuriam*. The birth of the ERP test, is thus, due to judicial misreading and therefore is liable to be done away with.

Standard Employed to Determine ERP

As pointed out, the ERP test is a result of judicial misreading. However, now that the ERP test is in existence, it is important to inquire as to what standards Courts employ to determine if a practice is to be declared as an ERP. Therefore, this section of the paper assumes that the ERP test was laid down in *Shirur Mutt*, for that is what Courts have done. There have been different tests devised to determine if a practice is an ERP and therefore to be granted protection under Article 25-26 which is discussed in this section.

In *Mohd. Hanif Quareshi v State of Bihar,*[48] the question of whether Muslims had a fundamental right to slaughter cows on the religious festival of Bakra Eid was before the Court. A five-judge bench of the SC introduced the *optionality test* within the ERP framework. It was held that since Muslims had an option of slaughtering either cows *or* goats, the same could not be protected as an ERP. Hence the takeaway from this case, which has been used in many other cases,[49] is that if a practice is an optional one, i.e., not mandated/obligatory then it cannot qualify to be an ERP.[50]

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47 *Sardar Swarup Singh v. State of Punjab* 1959 AIR 860; *Tilkayat Shri Govindlalji v. State of Rajasthan* 1963 AIR 1638

48 *Mohd. Hanif Quareshi v. State of Bihar* 1959 SCR 629 (*'Qureshi'*).

49 *Hifzur Rahman Choudhury v. Union of India* MANU/GH/0575/2022 [8].

50 Post *Qureshi* High Courts often hold that cow slaughter laws are *per se* valid. See *Ramavath Hanuma v State of Telangana* MANU/AP/0276/2017 where it was also held that 'cow is a

The second major case on this point is *Durgah Committee*, which has been discussed above. Had the SC followed the *Shirur Mutt* reasoning, they should have given deference to the opinion of the religion for 'what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself'. Interestingly, the SC on the other hand observed that the practice in question in this case was superstitious and not essential to the religion, thereby going against the views of those practicing the religion. This essentially meant that the SC now acted as a clergy,[51] determining what was superstitious and what wasn't, even if that meant going against the views of the religious community. This has been argued to be antonymous to *Shirur Mutt* since it substitutes the view of the religious denomination with the view of the Court. This position was categorically affirmed in *Govindlalji Maharaj*[52] when the Court held that what constitutes essentiality is to be determined by the Court itself.

The next major case on this point was *Acharya*.[53] This test added another dimension to the ERP inquiry, i.e., the *recency test*. A case was filed before the SC to declare the *tandava* dance as an ERP but the Court refused to do so since it lacked a scriptural basis.[54] Interestingly, since the religion was new and the founder was alive, there was an explicit mention made in the scriptures to negate the basis of the verdict. Thus, the *tandava* dance was explicitly considered to be essential according to the religion's holy book. The case again reached the SC. Finally, in *Acharya-II*[55] the SC again held that the *tandava* dance

substitute to mother and god.'

51 Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (2017) 4 Brigham Young University Law Review 915.

52 *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan* (1964) 1 SCR 561 [57].

53 *Acharya* (n 10).

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

55 *Acharya* (n 10).

was not an ERP but due to different reasons. The Court employed the *recency test* to argue that if a practice is recent and not followed from the start of the religion then it cannot be categorized as an ERP. The SC also went on to hold that unless a practice is so important that there is a *fundamental change in the nature of the religion*[56] without that practice, only then can it be considered essential. The author refers to this as the '*but for test'* in this paper, i.e., but for a given practice, the character of the religion would change. It also ruled that once the Court declares a practice to be an ERP, that cannot be changed. This absurd logic implied that there can be no change in religious practices over time.[57]

Therefore, *Acharya* convoluted the field by introducing the recency test alongside holding that once a Court deems a practice not to be an ERP, it is set in stone. Hence the standard to determine ERP includes the optionality test, the recency test, the fact that once something is declared as not an ERP that is immutable, and whether the absence of a given practice would cause a fundamental change in the character of the religion. It is the Court that will determine all these questions.

It is now a mixture of all these tests that Courts employ to determine questions of ERP. For example, in the case of *Shayara Bano,*[58] Nariman J. adopted a two-step inquiry into determining what an ERP was. One was the 'but for test' in *Acharya*. He also adopted the test laid down in *Javed*[59] to hold that if a practice is merely permissible but not obligatory (similar to the optionality test) then it cannot be considered an ERP. Using these two tests it was held that the practice of triple talaq is not an ERP.

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56 *Acharya* (n 10) [9].

57 Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (n 52) 936.

58 *Shayara Bano v. Union of India* MANU/SC/1031/2017 (Nariman, J.) [252].

59 *Javed v. State of Haryana* (2003) 8 SCC 369.

Lastly, in the recent case of *Indian Young Lawyers Association*,[60] after holding that the practice which excluded women in the age group of 10-50 from entering the Ayappan temple at Sabarimala was not an ERP, the Court held that even if a religious group can perform the impossible task of proving that practice is an ERP that does not by itself imply constitutional protection. The ERP then has to satisfy the test for not violating Part III of the Constitution by arguing that morality implies constitutional morality in Articles 25 and 26.[61] This means that even if one somehow achieves the herculean task of showing that the practice in question is an ERP, it will then be tested on the anvil of constitutional morality, and other limitations laid down in Article 25/26.

Therefore, what emerges from these cases is as follows – *first*, to determine essentiality the Courts look at the optionality test to consider if the practice is obligatory; if it is not then it cannot be an ERP. *Second*, they look at the recency of the practice; if the practice started recently and not from the start of the religion it cannot be an ERP. *Thirdly* once the Court decides whether a practice is an ERP it is fixed in time and cannot be changed. *Fourthly*, even if a practice is obligatory and practiced from time immemorial, the 'but for test' is employed, i.e., if it does not change the 'fundamental character of the religion' it can still not be considered an ERP. Whether any one single practice can be so integral that without it the nature of the religion changes is open for debate.

Hence this paper argues that in practice there is a *very* high – almost impossible – burden on religious groups to prove that a practice is an ERP. This claim is empirically proved in the following section.

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60 *Indian Young Lawyers Association v. State of Kerala* MANU/SC/1094/2018 (Mishra, J.) [106] ('*Sabrimala*').

61 ibid.

Proving ERP – Mission Impossible?

The previous sections theoretically argue the standard to determine ERP is so high that it is nearly impossible to get protection under Articles 25-26. This section aims to empirically prove this claim. This paper analyses all Supreme Court judgments post-*Acharya* in 2004 and all High Court judgments post-2015 to see how Courts react to the ERP question. A summary of all these cases can be found in Annexure I.

First looking at the SC, there were eight relevant cases decided post-*Acharya* which involved the question of whether a practice is an ERP or not. In *none* of those eight cases did the Supreme Court declare that the practice in question was an ERP. In almost all cases, there seems to be a combination of the optionality and the 'but for test'.

In the case of *Mirzapur Moti,*[62] there was a 7-judge bench of the SC to decide whether the case of *Qureshi* was correct post the jurisprudential changes in how the Court views Directive Principles of State Policy vis-à-vis Fundamental Rights.[63] In deciding the case the Court categorically held that an optional religious practice is not covered by Article 25. Thus, this gives the optionality test an endorsement by a bench of no less than seven judges. While they rely on other cases[64] to hold the optionality test to be good law, being a 7-judge bench, the Court missed an opportunity to relook at whether previous cases like *Qureshi*, *Durgah*, and *Acharya* were actually correct in law. In the other cases too, the Court at times went against the view of the religious group to hold that a practice is not an ERP, a case in point being *Sabrimala*.

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62 *State of Gujrat v. Mirzapur Moti Kureshi Kassab Jamat* MANU/SC/1352/2005.

63 Vikramaditya S Khanna, 'Profession, Occupation, Trade or Business' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 875.

64 *State of West Bengal v. Ashutosh Lahiri* (1995) 1 SCC 189.

Coming to the decisions rendered by various High Courts, the same trend is seen, i.e., only three cases out of twenty-three held that the given practice is an ERP. In all three cases, protection was accorded to religious activities because the *Acharya* standard was *not* used. Apart from the three almost all HC judgments cite *Acharya* and employ the 'but for test'. At times *Shirur Mutt* is not even cited thus implying that the core case on the point of ERP as of today is *Acharya*.

Interestingly, one of the judgments that held that a given practice was an ERP was a single judge bench of the Kerala HC which held that wearing the Hijab is an ERP for Muslim women.[65] The Court here ignores the 'but for test'. This, of course, being a single-judge bench has little to zero binding value as was evident in the case of *Resham*[66] and *Zainab Abdul Qayyum Choudhary*[67] where the question was identical, i.e., the Court was to determine whether the practice of wearing a Hijab was an ERP. In *Resham* the Karnataka High Court simply held that since the facts were different, the *ratio* of the case does not apply, while in *Zainab*, the Bombay High Court chose to prioritize discipline and uniform over religious freedom.

In the second case of *Qualified Private Medical Practitioners Association v Union of India*[68] decided by a division bench of the Kerala HC, it was held that the practice of the Eucharist is an ERP. The Kerala High Court ignored *Acharya* and held the practice to be an ERP even though they specifically pointed out how it is *not* an obligatory practice.

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65 *Amnah Bint Basheer v. Central Board of Secondary Education* MANU/KE/0470/2016.

66 *Resham v. State of Karnataka* 2022 LiveLaw (Kar) 75.

67 *Zainab Abdul Qayyum Choudhary v. Chembur Trombay Education Society* (2024) SCC OnLine Bom 1925.

68 *Qualified Private Medical Practitioners Association v. Union of India* (2020) SCC OnLine Ker 295 [18].

In the third case decided by the Karnataka HC, it was held that the appointment of the chief pontiff of the Shirur Mutt is an ERP.[69] Even in this case the Court again *ignores Acharya* and does *not* employ the 'but for test'. Hence, the only way to declare a religious practice as an ERP is to either ignore the 'but for test' laid down in *Acharya* or distinguish it on facts.

Interestingly, another view seen in some of the cases is that of *reasonable accommodation*. The author believes that this is perhaps something the Courts have not looked at enough and other jurisdictions have shown the usefulness of the doctrine in the context of religious freedoms.[70] For example, in the case of *DSGMC v. Union of India*,[71] Ravindra Bhat J., speaking for the Delhi HC, held that wearing Kara/Kirpans in NEET would be permitted during examinations. However, in case there are concerns regarding cheating, the students may be called earlier for inspection. In cases where an individual challenges State action to argue for religious freedom (as opposed to with a religious denomination), the principle of reasonable accommodation may be an option worth exploring. By incorporating reasonable accommodation as a principle, the scope of the right shall not be limited as is the case with the ERP test.[72]

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69 *P. Lathavya Acharya v. State of Karnataka* MANU/KA/4599/2021 [64].

70 *MEC for Education, Kwazulu-Natal v. Pillay* (CCT 51/06) [2007] ZACC 21.

71 *DSGMC v. Union of India* MANU/DE/1651/2018 [9].

72 While mostly invoked in the context of disability rights, there is a growing consensus on the usefulness and validity of RA in other spheres as well. See Aart Hendriks and Lisa Waddington, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' (2002) International Journal of Comparative Labour Law and Industrial Relations 404. Most recently, the Indian Supreme Court has shown its willingness to extend its application to religious freedom in *Aishat Shifa v. State of Karnataka* (2023) 2 SCC 1. Similar arguments are made in other jurisdictions as well. See Joshua Malidzo Nyawa, 'Reasonable Accommodation of Religious Beliefs at the Workplace – An Account from Kenya' (*Indian Constitutional Law and Philosophy*, 23 July 2023) <https://indconlawphil.wordpress.com/2023/07/23/guest-post-reasonable-accommodation-of-religious-beliefs-at-the-workplace-an-account-from-kenya/> accessed 26 April 2024.

As is seen in *DSGMC*, reasonable accommodation would allow Courts to be deferential to the views of the religion and at the same time incorporate the reformatory concerns of the State. Recall that in *Acharya*, the people following the Ananda Margi faith were willing to follow any reasonable conditions being imposed upon the conduct of the *tandava* dance. If this principle was followed, chances are the decision in *Acharya* would have been different.[73] Thus, reasonable accommodation seems to be a meeting point where claims by both parties may be satisfied.

Another surprising factor noted during the analysis was that many of these cases are PILs. This points towards an increasing trend of PILs being used to challenge the rights of religious groups. This takes us back to the question of the floodgate theory that Indu Malhotra J. raised in *Sabrimala*.[74] It is a debatable point as to whether her prediction is already a reality.

Therefore, to conclude, it is each Court to its own, for there is no single standard employed and it is, to put it bluntly, judicial interpretation gone nuts. However, in most cases, the *Acharya* standard was seen to be the prominent one. The author believes that practically, it is *impossible* to prove in unequivocal terms that the absence of any one religious practice can change the nature of a religion. Hence, simply put, it is close to impossible to prove that a given practice qualifies as an ERP.

Thus, the ERP test, as conceived of in *Shirur Mutt,* is not principally incoherent. However, the reasoning in nearly every case following *Shirur Mutt* has led to an anomalous situation that effectively renders Article 25-26 redundant. In that light, the Court may choose

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73 *Acharya* (n 10) (Lakshmanan, J.) [66].
74 *Sabrimala* (n 61) (Malhotra, J.) [303.7].

to discard the 'judicial misreading' in the Sabrimala Review, or alternatively, discard the ERP test *in toto* – which is discussed in the next section.

Aishat Shifa v. State of Karnataka **– The Beginning of the End?**

Is there any justifiable reason for the continuance of the ERP test given the blatant judicial misreading of *Shirur Mutt*? One possible reason is the internal politics of the Court and the role played by one particular judge, Gajendragadkar J., in the entrenchment of the ERP jurisprudence.[75] As the key architect of the doctrine, in his extra-curial writing, Gajendragadkar J. has expressed how he conceives religion to be based on logic and a spirit of scientific inquiry.[76] His approach in his book, titled *Secularism and Constitution of India*, is mirrored in his judgments and can be succinctly summarized as follows:

> "Religion, it is also argued, tends to be scholastic and deductive, and does not accept the validity of a rational and scientific approach…These points no doubt have a certain amount of validity; but they seem to overlook the fact that in its best and highest sense, *religion should and must recognize the validity of reason and the relevance of the spirit of inquiry, unhampered by the letter of scripture.*"[77] (emphasis mine)

Thus, the rationalization and homogenization of religion is not an unintended impact of the ERP test, but its primary cause and reason. In his other extra-curial writings, he has highlighted how the role of a judge is that of 'social engineering' and his judgments on religious freedom underscore a 'predominantly reformist role' to be

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75 Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (n 12) 175.

76 P.B. Gajendragadkar, *Secularism and the Constitution of India* (Bombay University Press 1971).

77 ibid 43.

played by the judge.[78] Matthew John concludes by highlighting that it was only after following Gajendragadkar's lead, that the Supreme Court, acting almost as theologians, entrenched the ERP test. Mohsin Alam Bhatt has also concluded that Gajendragadkar's personal beliefs were an important factor in the shaping of the ERP jurisprudence.[79]

In any event, the more pertinent question now is how the Court can move away from the ERP test. While writing this paper, the SC gave its much-awaited decision in *Aishat Shifa v State of Karnataka.*[80] This decision was the result of an appeal of *Resham v State of Karnataka* which had held that the wearing of the Hijab is not an ERP relying on the *Acharya* standard. While the division bench gave a split verdict and the case is now likely to be referred to a three-judge bench, the reasonings of both judges gain importance. Interestingly, this case deviates from the usual practice of Courts using the ERP test to deny the protection of religious rights.

In this regard, Dhulia J.'s reasoning is of particular importance and allows us to look at one possible way forward to get away from the ERP test by restricting the application of the test in certain specific circumstances. Dhulia J. points out how the ERP test was developed in a particular context, i.e. when there is a question of State intervention and both a question of A-25 and A-26. This proposition had been suggested by Farrah Ahmed and others even before the Karnataka HC started hearing the petitions but went unnoticed.[81] The context in which the ERP test was developed was when the State

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78 P.K Tripathi, 'Mr. Gajendragadkar and Constitutional Interpretation' (1966) 8 Journal of Indian Law Institute 479, 480.

79 M Mohsin Alam, 'Constructing Secularism: Separating 'Religion' and 'State' under the Indian Constitution' (n 42).

80 *Aishat Shifa v. State of Karnataka* (n 11).

81 Farrah Ahmed, Aparna Chandra and Others, 'Prohibiting Hijab in Educational Institutions: A Constitutional Assessment' (*LiveLaw,* 17 March 2022) <https://www.livelaw.in/prohibiting-hijab-in-educational-institutions-a-constitutional-assessment> accessed 1 September 2022.

sought to defend its policies on the ground that the legislation was bringing either social reform or regulating secular or financial aspects of religious institutions. Justice Dhulia held that the ERP test was *never* meant for situations where individuals claim their Article 25 rights. Instead, the ERP test was meant for situations *only* when there is an element of social reform on the part of the State.

This finding is significant – for this leaves space for a deferential approach to be taken by the Court at least in cases where reformatory measures are not imposed by the State. While the normativity of the sincerely held belief test is outside the scope of its paper, *Aishta Shifa* points out one possible way forward wherein the scope of the ERP test is restricted and the sincerely held belief test might be adopted.

Conclusion

This paper has attempted to analyse how the genesis of the ERP test itself is flawed and is a result of judicial misreading. It then highlighted how the standard to determine ERP has gone from bad to worse over the years with the SC donning the role of a clergy, determining what practices are to be protected – even if it means going against the views religious group itself. From the last section, via an empirical analysis, it has been proved that it is almost impossible for a religious group or an individual to seek protection under Article 25 if the 'but for test' laid down in *Acharya* is followed.

The Supreme Court now has the perfect opportunity to reconsider the ERP test in the *Sarbimala Review Petition*. But if not ERP, then what? There can be two possible answers to this question based on two possible situations. The first is when the State intervenes in the matters of a religious group (*Durgah Committee*) and the other is when an individual claims his right against the religious denomination

(*Sabrimala*). The former can be easily dealt with by the proportionality analysis with the four-pronged test.[82] Doing so would not restrict the scope of the right but shall still allow for the State to intervene where necessary.[83] The latter is where the scenario gets complex. One possible answer to that could be the sincerely held belief test[84] which puts the individual at the center of the debate.[85] Other alternatives might involve either going to the initial idea of ERP where the Courts defer to the religious views or bringing in the idea of reasonable accommodation.

This paper does not argue that these alternatives are flawless but simply wishes to highlight that these are alternatives that could be considered by the Supreme Court in the *Sabrimala Review*. The 'essentiality test' strikes at the very foundation of religious freedom in India by restricting the *scope* of a right without any basis.[86] There might be a difference of opinion about what to replace the ERP test with, but one thing is certain, it is time to give the ERP test a well-deserved burial.

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82 Jaclyn L. Neo, 'Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication' (2018) 16(2) International Journal of Constitutional Law 574, 580.

83 Farrah Ahmed, Aparna Chandra and Others, 'Prohibiting Hijab in Educational Institutions: A Constitutional Assessment'(n 86).

84 Anup Surendranath, 'Essential Practices Doctrine: Toward an Inevitable Constitutional Burial' (2016) Journal of the National Human Rights Commission 173. This is similar to the sincerely held belief test employed in *Bijoe Emmanuel v. State of Kerala* (1986) 3 SCC 615.

85 This aligns with what the judges held in *Sabrimala* while recognising that 'all persons' are 'equally' entitled to their freedom of religion.

86 Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (n 52) 938.

Annexure I

RESEARCH METHODOLOGY

All SC Cases post-2004 and all HC cases post-2015 (13 and 51 cases respectively) were analyzed as of 2022. This was done by using the SCC Boolean Seach Operator. The search was done by using the 10-word cap with the following – '*Essential NEAR Religious NEAR Practice*'. The focus was on cases where a given practice was sought protection under A-25/26. The author after reading all cases during the given period picked only those where there was a serious reliance on Article 25 by either party which came down to 31 cases. In cases where there was a passing reference to ERP or cases simply affirming an old judgment have not been taken into account. Color coding has been used where *red* indicates that the Court has rejected the ERP claim being made, *grey* indicates that the Court did not respond to the ERP claim and *green* indicates that the Court declared the practice as ERP.

The Supreme Court (2004-2022) and High Courts (2015-2022)

Name	Facts	Standard Employed	ERP/Not ERP	Other Comments
State of Gujrat v Mirzapur Moti Kureshi Kassab Jammat (2005) 8 SCC 534 [7 J]	This case involved a challenge to a Prevention of Cow Slaughter Act. Earlier bulls and bullocks over the age of 16 could be slaughtered. By an amendment, i.e., the Bombay Animal Preservation (Gujarat Amendment) Act, the age restriction was taken away. This meant that no bull and bullock, irrespective of age could be slaughtered. But the Court also goes on to address the argument	Does not cite *Shirur Mutt* or *Acharya* – no detailed inquiry on the issue of ERP.	Not ERP - The Court held that it is settled law post-*Ashutosh Lahiri* that since it is an optional practice, it cannot be ERP. Interestingly, that *Ashutosh Lahiri* a 3J bench and this being a 7J bench could have reconsidered that question. Rather this was a lost opportunity to reconsider the	The case depended on whether *Qureshi* is good law. This challenge was due to a change in how the Court viewed the role of DPSPs. *Quareshi* saw Directive Principles of State Policy to be unenforceable and subservient to the Fundamental Rights and, therefore, refused to assign any weight to the Directive Principle contained in Article 48 of the Constitution. This logic stands discarded by a series of subsequent decisions of the SC. Also, Article 48A and Article 51A(g) were not noticed as they were introduced later.

	of cow slaughter being an ERP for Muslims.		ERP test as a whole.	
Advi Saiva Nalasangam v State of Tamil Nadu (2016) 2 SCC 725 [2 J]	In 1970, an amendment to the Tamil Nadu Hindu Religious and Charitable Endowments abolished the practice of appointing religious office holders on hereditary basis. The Court upheld the amendment's constitutionality in 1972, in the *Seshammal* Case. However, in 2006, a government order was issued directing that the Archakas of the temples were to be appointed without any discrimination stemming from customs on the basis of caste or creed. The question was whether the following of the Agamas was an ERP in the appointment of Archakas.	Cites *Shirur Mutt* and *Acharya.*	Upheld *Seeshmal* to say that while the State is exercising a secular power in making appointments, the Court (In *Seeshmal*) found that the criteria prescribed under the Agamas was essential to the practice of the religion, and was therefore inviolable. But the Agamas must be within the constitutional mandate (Similar to Chandrahud J. in Sabrimala)	In *Seeshmal,* the Court held that while the appointment of Archakas on the principle of "next in line" is a secular practice, the particular denomination from which Archakas are required to be appointed as per the Agamas embody a long-standing belief and such belief/practice constitutes an essential part of the religious practice. The Court is not an 'outside authority' to determine ERP. The Court reiterated that though the appointment was a secular function, the denomination of the Archakas must be in accordance with the Agamas. The Agamas restricted the appointment of Archakas to particular religious denominations. However, the Court held that the Agamas must conform to the constitutional mandate and not practice exclusion on the basis of constitutionally prohibited criterion like caste. Gogoi J. suggested checking appointments on a case-to-case basis for Article 14 violations. Hence, any selection made in the future would have to be in consonance with the Agamas. However, in cases of appointments on the basis of any constitutionally unacceptable parameter, it would be open to challenge under Article 14. There is no finding in the judgment on whether the criteria fixed in the Agamas constitutes "law" within the meaning of Article 13(3). If the Agamas fall within what are generally regarded as "personal laws", they would fall outside the scope of Article 13(3), and therefore not be amenable to an Article 14 challenge.[87]

[87] Suhrith Parthasarathy, 'Religious Freedom and Archaka Appointments in the Supreme Court's Recent Decision' (*Indian Constitutional Law and Philosophy*, December 2015) <https://indconlawphil.wordpress.com/?s=Adi+Saiva> accessed 12 August 2022.

Shayara Bano v Union of India. MANU/SC/1031/2017 [5 J]	A challenge to the practice of triple talaq. The contention is whether triple talaq is an ERP and is as such protected by A-25.	*Shirur Mutt* and *Acharya*	Triple talaq was not an ERP. The 'but for' test in *Acharya* alongside the optionality test (re-iterated in *Javed*) was employed.	Khehar and Nazeer JJ. (Dissent) held that none of the forms of 'talaqs' have their origin in the Quran. On the question of determining if triple talaq is approved by Hadiths, the Court explicitly states that it will not go into that question and held, "We truly do not find ourselves, upto the task. We have chosen this course, because we are satisfied, that the controversy can be finally adjudicated, even in the absence of an answer to the proposition posed in the instant part of the consideration…The practice originated 1400 years ago and was widespread. It was therefore clear that practice of 'talaq-e-biddat' was very much prevalent, since time immemorial." It is considered integral to the religious denomination in question, i.e., Sunnis belonging to the Hanafi school and forms part of their personal law. They hold that the Act neither lays down nor declares the Muslim personal law- 'Shariat'. Therefore it cannot be tested for Part III violations. Thus, the two-judges did not decide on the practice being an ERP, but instead stated that the practice is 'integral' to the faith. The Court used use A-142 to direct the legislature to make a law on this subject and till then Muslim husbands are 'injuncted' from practicing triple talaq for 6 months. Joseph J (Concurring) –Agrees with Khehar J. to say the Act does not regulate talaq and, hence cannot be tested on Part III grounds. Disagrees with him to say that triple talaq is not an integral part of Islam. Also disagrees with injuncting a fundamental right on A-142. Relies heavily on the case of *Shamim Ara* to say that what is bad in the Holy Quran cannot be good in law and upholds *Shamim Ara* to say the practice of triple talaq lacks the approval of Shariat and is opposed to the Quran.

				Nariman J and U.U Lalit JJ (Concurring) – All forms of talaq are recognized and enforced by the Shariat Act therefore it is necessary to check for Part III violations. Holds it **not** to be an ERP. *Acharya* test (alongside the optionality test) was employed. The Court held, "Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it" and "the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice" (i.e., te *Acharya test*). Also held that since triple talaq is instant and irrevocable it shall be hit by manifest arbitrariness under Article 14.
Indian Young Lawyers Association v State of Kerala (2017) 10 SCC 689 [5 J]	Whether the practice of excluding women in the age group of 10-50 from entering the Ayyappa temple in Sabarimala constitutes an ERP.	Both *Shirur Mutt* and *Acharya.*	Not ERP	Mishra J and Khanwilkar J held that Ayyappan's do not constitute a religious denomination under A-26. There is no identifiable group called Ayyappan's and they are categorised as Hindus. Under Article 25, the right is not just for inter-faith parity but also intra-faith parity. It cannot be restricted under religious sects' morality, since morality means constitutional morality. The test is the *Acharya* test -- "if nature of Hindu religion is altered". The Court held the practice to not be an ERP in the absence of scriptural evidence. Also relies on *Acharya* to say practices that come about recently cannot be ERP since women were earlier allowed (recency test). Also, "all persons" in A-25 means women and men have equal rights under A-25. Nariman J (Concurring) –Held that the Ayappans were not a religious denomination, and consequently A-26 does not get attracted. Does not discuss the ERP test but points out how A-25 says everyone is "equally entitled" which includes women. Chandrachud J. (Concurring) held that morality is not social morality but constitutional morality - which is based on justice, equality, fraternity,

				etc. There is a multiplicity of constitutional values that should be used to determine the essentiality of a practice. Held that the practice was not an ERP. Documents show the celibate nature of the deity but no connection is shown as to how women should not be allowed to maintain celibacy. Relies on *Acharya* to say it is not obligatory since women used to go earlier so it will not result in a fundamental change in the character of the religion. Also relies on the A-17. Indu Malhotra J (Dissent) –Held the practice is an ERP simply because the community says so (i.e., the original *Shirur Mutt* deference standard). Also holds that Ayappans are a religious denomination under A-26. Holds that one cannot apply rationality to religious practices. Also points out the role of PILs in such cases.
M Siddiq v Mahant Suresh Das (2019) 18 SCC 631 [3 J]	As a response to *Ismail Faruqui* which held that the "mosque is not an essential part of Islam and Namaz can be offered, even in the open."	No ERP inquiry was conducted. But *Shirur Mutt* cited.	Did not disagree with the observation made by the Court in *Ismail*. Two out of the three judges said it was to be read contextually and Nazeer J. dissented to say that Courts have relied on it so it requires reconsideration.	Not a case of ERP *per se* but the Court could have gone into the question of mosques being essential to the Muslim religion. In effect, it upheld the observation of mosques not being an ERP.
Arjun Gopal v Union of India (2019) 13 SCC 523 [2 J]	Can the Court ban/restrict the use of firecrackers during Diwali? A contention was raised that it is a religious practice that continues from time immemorial and therefore cannot be banned.	Neither cited.	Do not comment on ERP. Goes directly to the restrictions to say there is a serious health hazard.	The Court holds that Article 25 is subject to Article 21. If a particular practice, even if religious, threatens the health of the people, it cannot be permitted. Using the principle of 'balancing of rights', A-21 was given primacy.

Chief Secretary to the government Chennai v Animal Welfare Board (2017) 2 SCC 144 [2 J]	Whether Jalikattu is an ERP.	Cites *Shirur Mutt* but not *Acharya.*	Not ERP	The petitioner argued that every festival has religious roots and since this one is followed after harvest, one cannot ignore 'religious ethos'. The Court held that Jalikattu is not an ERP so not liable to be protected under A-25(1). It rejected the ERP contention as no proof was adduced for the same since Jalikattu was considered to be more of a cultural activity as opposed to a religious one.
Kantaru Rajeevaru (SabrimalaTemple Review) v Indian Young Lawyers Association (2020) 2 SCC 1 [5 J] 3-2 Split	The Court agrees to examine the ERP doctrine as a whole alongside the seeming contradiction in *Shirur Mutt* and *Durgah Committee.*	None cited, not required.	Not mentioned - sent it to nine-judge bench for review.	This could be a great opportunity for the Court to examine all relevant issues and as this paper argues, do away with the ERP test in its present form. Interestingly Khanwilkar J. changed his stance i.e., while he was in the majority in *Sabrimala,* he also agreed to the review of the same judgment.
Aishat Shifa v State of Karnataka. (2022) SCC OnLine SC 1394	The Court examined the correctness of the decision of the Karnataka High Court in *Resham v State of Karnataka.*	Cited *Shirur Mutt* and *Acharya*	Split Decision – The ERP test was not employed.	This decision comes against the backdrop of growing criticism of the ERP test. This allows Courts to differentiate *Shirur Mutt* and *Acharya* based on facts and hold the ERP test inapplicable in instances where there is no element of social reform and only individual rights are being claimed. It allows the nine-judge bench an opportunity to look at this as an alternative to wither down the ERP test.

The High Courts (2015-2022)

Cases	Facts	Standard of Reasoning	ERP or Not Protected	Other Comments/Evidence examined
Allahabad HC				
Afsal Ansari v Union of India MANU/UP/0995/2020 [2 J] (PIL)	Whether the recital of the Azan over loudspeakers is protected as an essential/integral practice under A-25.	Some cases are cited to put forward the point of loudspeakers and noise pollution. *Shirur Mutt* or *Acharya* is not cited. The recency test is employed to argue that the usage of loudspeakers during Azan is a recent practice and hence cannot be essential.	Not ERP. The Court held that the recital of the Azan is a fundamental right but recital on loudspeakers is not.	The Court constantly talks about a "rights versus rights" framework since loudspeakers will impact the rights of minors and elderly persons. The entire focus remains on noise pollution. Interestingly, if the concern is noise pollution and the adverse impact it has, ideally the Court could restrict the right under 'health'. Instead, we see the scope of the right itself being diminished.
Gauhati HC				
Hifzur Rahman Choudhury v Union of India MANU/GH/0575/2022. [2 J] (PIL)	The Animal Welfare Board is asking the State to prevent cow slaughter. The State passes a communication under the Assam Cattle Prevention Act to disallow slaughter on Bakra Eid. Petitioners contend that the Act under S.12 allows for exemptions based on religious grounds. Hence the order restraining cow-slaughter on Bakra-Eid is invalid.	Relied heavily on *Qureshi* and *Mirzapur Moti* to say it is well-settled that cow slaughter is not ERP. Approves of the optionality test. Either sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. Hence to claim an exemption under section 12, the religious practice must be an ERP.	Not ERP - Agrees with the view of *Qureshi* that the slaughtering of healthy cows on Bakra Eid is not essential or obligatory.	The Court held that for lifting the ban it should be shown that it is essential for a Muslim to sacrifice a healthy cow on Bakra Eid and only then can an exemption under Section 12 be claimed. Additionally, they hold that it is a settled legal position that there is no fundamental right to insist on the slaughter of a healthy cow on Bakra Eid.

Rajasthan HC				
Nikhil Soni v Union of India MANU/RH/1345/ 2015. [2 J] (PIL)	Whether the practice of Santhara/Sallekhana is an essential religious practice in Jainism and therefore entitled to protection under Article 25. This decision was stayed by SC.[88]	Relies on *Acharya* and *Hamid Qureshi*. The standard utilised is that of *Acharya*.	Held not to be an ERP using the optionality test.	The Court itself highlights how religious books and scriptures approve of the practice of Santhara. Multiple scriptures cited by petitioners. Yet the Court held that while there is a scriptural basis to prove the religious aspect of the practice, the obligatory aspect has not been proved. The Court came down heavily on PILs and how petitioners had no locus (similar to the criticism of Malhotra J. in *Sabrimala*).
Andhra Pradesh HC				
Yellanti Renuka v State of Andhra Pradesh (2022) SCC OnLine AP 688 [1 J]	Whether relocation of the deity in Mahakali Ammavari Temple at the time of the reconstruction of the temple violates ERP.	Relies on *Shirur Mutt* and *Durgah Committee*	Not ERP.	The deity was installed by the Petitioner in 1976 keeping the procedure of Agamashastras in mind. Reconstruction of the temple is due to highway expansion. The temple is in a dilapidated state. Petitioners argued that the State cannot remove the deity. It was held not to be ERP. The Court held that the petitioners have failed to prove ERP using the authoritative text of Agama Shastra which prohibits the relocation of idols or other material. It was also an admitted fact that the

88 Dhananjay Mahapatra, 'Supreme Court permits Jain community to practice Santhara' (*The Times of India*, 1 September 2015) <https://timesofindia.indiatimes.com/india/supreme-court-permits-jain-community-to-practice-santhara/articleshow/48751751.cms> accessed 2 September 2022.

				deity was taken out of the temple and traveled through various parts of India.
Delhi HC				
DSGMC v. Union of India MANU/DE/1651/ 2018. [2 J]	Whether the wearing of Kara/Kirpan by students practicing the Sikh religion in the NEET examination conducted by CBSE can be prohibited.	Relies on *Shirur Mutt* and *Acharya*.	Does not comment on ERP at all. It impliedly uses the principle of reasonable accommodation.	The Court highlights how there is a special mention for Kirpans in A-25. CBSE says that the rule is to maintain uniformity and prevent malpractices. Petitioners argued that these articles are allowed elsewhere in public spaces (flights etc). It was held that it is incumbent on CBSE to make special arrangements for the petitioners if they want to prevent malpractice. They further held that every practicing Sikh is enjoined to wear the Kara/Kirpan without commenting on ERP. (Reasoning is similar to *Amnah Bint Basheer*).
Manisha Sharma v Commissioner of Delhi 2015 SCC OnLine Del 13254. [1 J]	The police rejected the petitioner's request to assign him a temporary firework license for the occasion of Diwali, which is being challenged. One of the grounds is that firecrackers are related to Diwali and the use of firecrackers during a religious festival should be protected under A-25.	Relies of *Ismail Faruqui and Javed* but not *Acharya* or *Shirur Mutt*.	The bursting of crackers during Diwali is not an ERP. The Court rejects the argument by holding that the bursting of firecrackers have no sanctity in religious texts and there is nothing to suggest that the bursting of firecrackers is even a religious practice.	The Court hints towards the fact that even if it were to recognise the practice as ERP, it would be willing to restrict the practice on the ground of health. It was held that Diwali is historically a festival of lights and is mainly associated with the pooja that is done, and not with the bursting of firecrackers.

Tripura HC				
Subhas Bhattacharjee v State of Tripura (2019) SCC OnLine Tri 441 [2 J] (PIL)	The Court frames the following question, "Whether the age-long practice of 500 years of sacrificing animals, after the stoppage of the practice of human sacrifice, in Tripureswari Devi Temple, Udaipur, Gomati District, Tripura can be construed as an essential and integral part of religion, as protected under Article 25(1) of the Constitution of India?"	Relies on *Shirur Mutt* and *Acharya*. Uses the 'but for' test in *Acharya* and optionality in *Qureshi*.	Animal sacrifice in temples is not an ERP. While the religious text mentions the practice, it is not obligatory. Moreover, it does not change the essential character of the religion. Hence the *Acharya* standard is used.	At the outset, the locus of the petitioner was challenged since he did not make a representation to the government and directly came to the Court. However, the Court approved it by saying that the social practice would have continued if not for this PIL (contrast with Malhotra J in Sabrimala). Apart from ERP, the Court holds that animals have the right to life after *Animal Welfare Board* Also, even if this is an ERP, post *Sabarimala,* the Court recognises that this would violate constitutional morality. The Court also attempted to restrict the practice on the grounds of health, and observed that, "one cannot deny the fact that sacrifice of animal in temple does affect mental and physical health of an individual" and "the blood of the animals is allowed to flow in the open drains, as a result, causing foul smells".
Madhya Pradesh HC				
Aarsh Marg Seva Trust v State of Madhya Pradesh MANU/MP/1626/ 2019 [2 J]	The petitioners were women who claimed they had a right to perform Abhishek for God Bawangajaji in Jainism and the Trust is restricting them from doing	Cites *Shirur Mutt* and *Sabrimala* but not *Acharya.*	The Court held that celibacy of the idol is an ERP and, therefore, the restriction on women to perform Jal Abhishek is an ERP. But the very practice of Jalabhishek is not ERP (so women	The Court distinguishes this from *Sabrimala* by arguing that *Sabrimala* was regarding the entry of women into the temples. Here, women are allowed entry and only those practices which go against the

	so. They claim that women performing the Jal Abhishek is an ERP. They also challenge it on A-14 and A-15 grounds (this is post-*Sabrimala*). Interestingly, the Trust also claimed the restriction of Abhishek for women on the grounds of ERP. They argued that the restriction on women was to maintain the celibacy of the naked idol.		cannot claim an ERP for Jal Abhishek).	celibacy of deity/idol are restricted, so *Sabrimala* was distinguished on facts.
Kerala HC				
Muraledharan T v State of Kerala (2020) SCC OnLine Ker 2313 [2 J] (PIL)	There was a challenge to the Kerala Animals and Bird Sacrifices Prohibition Act, 1968. Similar to *Subhas Bhattacharjee* in Tripura HC.	Cites *Shirur Mutt* and *Acharya*	Not ERP. The Court explicitly holds this based on the *Acharya* standard basis the fact that the evidence is lacking (But for test).	There was no material to establish that sacrificing animals and birds was essential to the religion. It was shown that the scriptures permitted sacrifice, but it could not be proved that it was obligatory.
Kannan KG v State of Kerala (2019) SCC OnLine Ker 6208) [1 J].	A decision was taken in an all-party meeting that persons who are accused in criminal cases shall not be engaged as volunteers for temple festivals. Petitioner has challenged this on grounds of Article 25.	No inquiry on ERP. *Bijoe Emmanuel* cited.	Not ERP - Participation in a temple festival cannot be an ERP.	It is also said that this decision was taken so public order is maintained (which is one of the limitations under A-25). But no connection is shown on how an accused volunteering in temple festivals might lead to the deterioration of public order.
Riza Nahan v State of Kerala (2021) SCC OnLine Ker 9861 [1 J]	The petitioner is an 8th-standard student who was selected for the Student Police Cadet (SPC). SPC	None cited.	Does not say anything on ERP. Held that there is no compulsion on the student to join SPC and if you are not ready to	There is no inquiry on the ERP doctrine. Moreover, the reasoning is simply absurd. If taken to its logical conclusion, any

	had a uniform that prohibited the wearing of a Hijab and full-sleeved dress. It was contended that this violated A-25 and the wearing of the Hijab was an ERP.		follow the dress code you need not join.	group can restrict the religious rights as long as membership of that group is voluntary – a slippery slope argument.
Qualified Private Medical Practitioners Association v Union of India (2020) SCC OnLine Ker 295)]2 J] (PIL)	This case was a result of a PIL by a few doctors against a practice in the Church. Priests used to serve wine from a single spoon to the mouth of every communicant. This practice is referred to as the 'Eucharist'. It was argued that there was no cleaning of the spoon which gave rise to a very high possibility of saliva contamination. The Church says the practice of the Eucharist is protected under A-25.	None. *Acharya* Standard not followed. If the 'but for test' was to be applied, the Court could not hold this as an ERP.	It is an ERP. It was held that receiving the holy sacrament is a matter of expressing your faith, no authority can interfere except according to the restrictions laid down in A-25 and A-26. It was further held that if at all any changes are required then they must come from within the Church itself.	The Court held that the Food Safety Act has no role to play here and the government using the FSA cannot interfere in matters of the Church. The doctors have no instances of how the practice has impacted health adversely. Additionally, even though not obligatory the practice was still held to be an ERP.
Amnah Bint Basheer v CBSE MANU/KE/0470/ 2016 [1 J]	Challenge to the prescription of dress code in All India Premedical Entrance Test in 2016 conducted by CBSE. It argued that people hide electronic devices so long sleeves are not permitted. Petitioners cannot wear a headscarf and full-sleeved dress as mandated by Islam. Hence the question is of	Cites *Shirur Mutt* and *Acharya.*	The Court held that wearing the headscarf is an ERP. The Quran indicates that the Islamic dress code for women not only consists of a scarf that covers the head, the neck, and the bosom but also includes the overall dress that should be long and loose. The Court does not use the 'but for test'.	The Court does not (rightly so) limit the scope of the right. The Court holds that the restrictions under A-25 are not satisfied. To answer the question of transparency and credibility of the examination, the approach of the Court is always to 'harmoniously accommodate'. Held that the invigilator can be asked to frisk such candidates including by removing the scarf.

	whether Hijab is an ERP.			However, this must be done by honouring the religious sentiments of the candidates. Finally, the board claims practical difficulties in implementing this. However, the Court held that practical difficulty cannot be an excuse to honour fundamental rights.
Karnataka HC				
South Central India Union of SDA v Government of Karnataka (2016) SCC OnLine Kar 8342 [1 J].	The 'Seventh Day Adventist' group is a denomination of Christians. They are arguing on behalf of a student whose exams are scheduled on Saturday. The faith is that members of the group do not take part in any activity on all Saturdays (Sabbath Day) from 6 AM to 6 PM for doing so would be an act of sin. The question is whether following the Sabbath day is an ERP.	Cites *Shirur Mutt* and *Acharya.*	Not ERP. The Court recognised that as per the religion, the god created the universe in six days and rested on the seventh day, which is celebrated as the Sabbath Day. But the Bible does not say the week commences from Sunday and ends on Saturday - Sabbath Day can be Saturday or Sunday or any other day for that matter.	The judgment begs the question as to whether *any* scriptural documents can provide all the answers. There was also disagreement within the denomination itself on the question of when the Sabbath Day was to be celebrated.
Resham v State of Karnataka (2022) LiveLaw (Kar) 75 [3 J]	If wearing of Hijab by Muslim women constitutes an ERP and if the prescription of a school uniform is a violation of A-25.	Cites *Shirur Mutt* and *Acharya.*	Not ERP. The Court uses the 'but for' test in *Acharya* to hold that wearing the hijab was only recommendatory. Held that, "it is not that if the alleged practice of wearing hijab is not adhered to, those not wearing hijab become the sinners, Islam loses its glory and it ceases to be a religion".	They distinguish this case from *Basheer* by saying the exam was a one-time affair and this case concerns a regular everyday practice. However, logically, even if the facts are different, the practice being essential to Islam cannot change. It can't be that wearing the Hijab in an examination is an ERP but not in a school.

P. Lathavya Acharya v State of Karnataka MANU/KA/4599/2021 [2 J] (PIL)	The question is whether the appointment of the pontiff of *Shirur Mutt* is an ERP. There was a 16-year-old minor as the Matadhipathi (chief pontiff) of the Udupi Shiroor Mutt. The Court held that *Shirur Mutt* is a religious denomination and has A-26 rights. The contention was that a 16-year-old cannot become the chief pontiff. The Court held that the ERP of appointing heads was being practiced for 800 years in consonance with the teachings of Shriman Madhwacharya.	Cites *Shirur Mutt* but not *Acharya*.	Held that the appointment of the pontiff was an ERP. The practice has been performed for 800 years. Also, Hindu religion allows one to be a sanyasi before eighteen years of age.	The system of Dwandwa Mutts (eight mutts are paired with each other. If one mutts head dies without nominating the successor the head of the paired mutt appoints the successor) is an ERP. One of the key challenges were due to the fact that he was a minor. The 'but for' test was not employed here. It was held that, "Courts are certainly not meant to write religious text, however, they are under an obligation to follow religious text in the matter of cases dealing with religious dispute and to follow old practices which are prevalent in the religion so long as they do not violate constitutional rights of an individual".
Bombay HC				
Campaign against Manual Scavenging v State of Maharashtra (2015) SCC OnLine Bom 3834 [2 J] (PIL)	By previous interim directions, the Court held that the river bed of Chandrabhagha River shall not be used for any activity like temporary pandals, booths, shelters, or any prohibited activity. The Warkari Sahitya Parishad contends that there is a long custom/tradition which exists for 700 years of holding Bhajans, Kirtans, and Gajar on the river bed.	Cites *Acharya*.	The practice of having bhajans/kirtan on the river bed specifically cannot be an ERP. The standard used is of *Acharya* - "by no stretch of imagination, it can be said that act of imposing ban on erecting temporary structures on the river bed will amount to the change in the character of the religion or its beliefs".	The Court recognises that even if the practice were to be an ERP, it would nevertheless be restricted on the ground of health.

Zahid Mukhtar v State of Maharashtra MANU/MH/0670/2016 [2 J] (PIL)	The Maharashtra Animal Preservation (Amendment) Act, 1995 which got presidential assent in 2015 is challenged. By the Amendment Act, in addition to the existing prohibition on the slaughter of cows, a complete prohibition was imposed on the slaughter of bulls and bullocks in the State. A ban was imposed on possessing the flesh of cow, bull, or bullock slaughtered within and outside the State.	*Acharya* was not cited. The Court relies on *Shirur Mutt*	Not ERP – Held that for lifting the ban it should be shown that it is essential for a person practicing Islam to sacrifice a healthy cow on Bakra Eid.	Heavy reliance was placed on Articles 48 and 48A. The Court relied on the case of *Ashutosh Lahiri* to hold that it is, not obligatory for a person practicing Islam to sacrifice a cow or progeny of a cow.
Noorjehan Safia Niaz and Another v State of Maharashtra (2016) SCC OnLine Bom 5394 [2 J] (PIL) (Reaffirmed by SC in *Haji Ali Dargah Trust* case)	Earlier the petitioners could visit the sanctum sanctorum where the saint was buried although through a different entry for men. In 2012, a barricade was put and women were not allowed to enter the sanctum sanctorum. The Trust claimed that stopping women from entering the sanctum sanctorum was an essential part of Islam and therefore protected by A-25.	Both *Shirur Mutt* and *Acharya*	The prohibition of women from entering the sanctum sanctorum was not an ERP. The standard used is whether the nature of Islam would change if women were allowed i.e., the 'but for test' in *Acharya* was employed.	The Court also held that Part III had to be satisfied in any case and even if it was an ERP, the Court would not permit such practice. Since people from all over visited the place there was no right to discriminate under the guise of religion. What weighed heavily with the Court was the fact that women were permitted to enter the sanctum sanctorum before 2012 (thereby employing the recency test).

Mahesh Vijay Badekar v State of Maharashtra (2016) SCC OnLine Bom 9422 [2 J] (PIL)	Two issues were raised. First regarding the construction of pandals or temporary booths for religious festivals and second, regarding noise pollution caused due to the use of loudspeakers at religious festivals. The question was whether either of these two was an ERP.	*Ismail Faruqui* (not *Shirur Mutt* of *Acharya*).	Neither of the two was held to be an ERP. The Court held that the State must ensure roads are not blocked and remain accessible to the public. Further, it was held that the right to worship does not extend to the right of worship at every place.	It was held that "no one has fundamental right of offering prayers or worshiping on a street or footway by obstructing free flow of traffic as it is not an essential part of any religion".
Elmas Fernandes v State of Goa MANU/MH/2912 /2019 [2 J]	The challenge is to Article 19 of Decree Number 35461. This related to the annulment of marriage, the bishop appointed a judge in the patriarchal tribunal to hear the case. The contention is that the judge was biased. The judge decided to annul the marriage.	None cited.	Not ERP. The ourt held that the power of the Ecclesiastical Courts may have civil consequences. Hence it cannot be considered as an ERP.	Under Article 19 of the Decree, the procedure is that Catholics who want to annul their marriage appeal to the Bishop in Panaji. Once the appeal is decided by the Tribunal, the same order is sent to the HC for enforcement. The same was challenged by the woman and the church claimed it is an ERP and hence protected under A-25. Thus, Catholics will now have to file separate petitions in civil Courts for annulment of marriage.[89]

89 Lisa Monteiro, 'Church tribunal decisions will not have any civil effect henceforth' (The Times of India, October 2019) <https://timesofindia.indiatimes.com/city/goa/church-tribunal-decisions-will-not-have-any-civil-effect-henceforth/articleshow/71640129.cms> accessed 1 September 2022.

Madras HC				
T Wilson v DC Kanyakumari (2021) SCC OnLine Mad 1739 [1J]	The petitioner is a devout Christian who used to conduct prayer meetings in his residential house. Prayers were conducted on loudspeakers. This was restricted by the District Collector since people complained of a possible law and order situation. The Petitioner claimed that this violated Article 25.	Only *Acharya* but not *Shirur Mutt.*	The Court held that congregational prayers are indeed an ERP. But no protection was given to the petitioner.	The Court held that, "Bible does not profess a prayer to be done or conducted in a manner that would warrant gathering of people and usage of amplifiers of any sort in the process".
Ramaswamy Udayar v District Collector (2021) SCC OnLine Mad 1779 [2 J]	Religious procession of Hindus was to be carried through the streets/roads of a Muslim-majority area. The claim is that such permission must be granted.	*Acharya* but not *Shirur Mutt*	No mention of ERP - but allowed procession on A-25 grounds. They do not go into any inquiry about ERP.	With no inquiry into ERP, the Court instead chooses to observe how a secular country necessarily has to be a tolerant one. This seems like a judgment given on gut and intuition and not the law.