2022 LiveLaw (SC) 842

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE / ORIGINAL JURISDICTION
HEMANT GUPTA; J., SUDHANSHU DHULIA; J.
OCTOBER 13, 2022
AISHAT SHIFA *versus* **THE STATE OF KARNATAKA & ORS.**

Hijab Ban Case - Appeals against Karnataka High Court judgment which upheld Hijab Ban in some schools/pre-university colleges - In view of the divergent views expressed by the Bench, the matter placed before the Chief Justice of India for constitution of an appropriate Bench.

CIVIL APPEAL NO. 7095 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 5236 OF 2022) W I T H WRIT PETITION (CIVIL) NO. 120 OF 2022 CIVIL APPEAL NO. 7075 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15405 OF 2022) CIVIL APPEAL NO. 6957 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 9217 OF 2022) CIVIL APPEAL NOS. 7078-7083 OF 2022 (ARISING OUT OF SLP (CIVIL) NOS. 15407-15412 OF 2022) CIVIL APPEAL NO. 7077 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15419 OF 2022) CIVIL APPEAL NO. 7074 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15403 OF 2022) CIVIL APPEAL NO. 7076 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15418 OF 2022) CIVIL APPEAL NO. 7072 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 11396 OF 2022) CIVIL APPEAL NO. 6934 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 7794 OF 2022) CIVIL APPEAL NO. 7084 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15402 OF 2022) CIVIL APPEAL NO. 7085 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15416 OF 2022) CIVIL APPEAL NO. 7092 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15404 OF 2022) CIVIL APPEAL NO. 7088 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15414 OF 2022) WRIT PETITION (CIVIL) NO. 95 OF 2022 CIVIL APPEAL NO. 7087 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15413 OF 2022) CIVIL APPEAL NO. 7090 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15401 OF 2022) CIVIL APPEAL NO. 7096 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 5690 OF 2022) CIVIL APPEAL NO. 7091 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15399 OF 2022) CIVIL APPEAL NO. 7089 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15417 OF 2022) CIVIL APPEAL NO. 7086 OF 2022 (ARISING OUT OF SLP (CIVIL) NO. 15400 OF 2022) CIVIL APPEAL NO. 7069 OF 2022 ARISING OUT OF SLP (CIVIL) NO. 17648 OF 2022 (DIARY NO. 21273 OF 2022) CIVIL APPEAL NO. 7098 OF 2022 ARISING OUT OF SLP (CIVIL) NO. 17656 OF 2022 (DIARY NO. 9117 OF 2022) CIVIL APPEAL NO. 7093 OF 2022 ARISING OUT OF SLP (CIVIL) NO. 17653 OF 2022 (DIARY NO. 25867 OF 2022) CIVIL APPEAL NO. 7099 OF 2022 ARISING OUT OF SLP (CIVIL) NO. 17663 OF 2022 (DIARY NO. 11577 OF 2022) A N D CIVIL APPEAL NO. 7070 OF 2022 ARISING OUT OF SLP (CIVIL) NO. 17647 OF 2022 (DIARY NO. 21272 OF 2022)

(Arising out of impugned final judgment and order dated 15-03-2022 in WP No. 2880/2022 passed by the High Court Of Karnataka At Bengaluru)

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J U D G M E N T

HEMANT GUPTA, J.

1. The challenge in the present appeals is to an order passed by the Full Bench of the Karnataka High Court on 15.3.2022, dismissing the challenge to the Government Order dated 5.2.2022. Such Government Order directed the Government Schools in Karnataka to abide by the prescribed uniform, and the private schools were directed to mandate a uniform as decided by their Board of Management.

PREFACE

2. Before adverting to the submissions made by the counsels on both sides, it is imperative to give a background of the ethos and principles of secularism adopted in the Constitution of India. Though the term 'secular' has a wide amplitude and has been understood differently in different parts of the world, it is important to comprehend the same in context of the Indian Constitution.

3. The word "secular" is now part of the Preamble of the Constitution. What is meant by **"Secular"** (**पंथनरपे** in the Hindi version of the Constitution) needs to be discussed first. The

word 'Secular' was inserted in the Preamble of the Constitution by the 42nd Amendment w.e.f. 3.1.1977. It is commonly understood in contradistinction to the term 'religious'. The political philosophy of a secular government has been developed in the West in the historical context of the pre-eminence of the established Church and the exercise of power by it over the society and its institutions. The democratic State thereafter gradually replaced and marginalized the influence of the Church. The idea of secularism may have been borrowed in the Indian Constitution from the West; however, it has adopted its own unique brand based on its particular history and exigencies which are far distinct in many ways from secularism as defined and followed in European countries, the United States of America and Australia.[1]

4. The use of word '*panthnirpeksh*' in the Constitution brings out the difference in the terms *"Dharmanirpeksh"* and *"Panthnirpeksh"*. 'Panth', or sect, symbolizes devotion towards any specific belief, way of worship or form of God, but Dharma symbolizes absolute and eternal values which can never change, like the laws of nature. Dharma is what upholds, sustains and results in the well-being and upliftment of the Praja (citizens) and the society as a whole.

5. This Court in a judgment reported as ***A.S. Narayana Deekshitulu*** v. ***State of A.P. & Ors.***[2] quoted the concept of Dharma explained by Justice M. Rama Jois in his *Legal and Constitutional History of India* as *"it is most difficult to define Dharma. Dharma has been explained to be that which helps the upliftment of living beings. Therefore, that which ensures welfare (of living beings) is surely Dharma. The learned rishis have declared that which sustains is Dharma".* This Court held that *"when dharma is used in the context of duties of the individuals and powers of the King (the State), it means constitutional law (Rajadharma). Likewise, when it is said that Dharmarajya is necessary for the peace and prosperity of the people and for establishing an egalitarian society, the word dharma in the context of the word Rajya only means law, and Dharmarajya means rule of law and not rule of religion or a theocratic State".* Any action, big or small, that is free from selfishness, is part of dharma. Thus, having love for all human beings is dharma. This Court held as under:

"156. It is because of the above that if one were to ask "What are the signs and symptoms of dharma?", the answer is: that which has no room for narrowmindedness, sectarianism, blind faith, and dogma. The purity of dharma, therefore, cannot be compromised with sectarianism. A sectarian religion is open to a limited group of people whereas dharma embraces all and excludes none. This is the core of our dharma, our psyche.

157. Nothing further is required to bring home the distinction between religion and dharma; and so I say that the word 'religion' in Articles 25 and 26 has to be understood not in a narrow sectarian sense but encompassing our ethos of "सर्वे भवन्तु सुखिनः". Let us strive to achieve this; let us spread the message of our dharma by availing and taking advantage of the freedom guaranteed by Articles 25 and 26 of our Constitution."

6. This Court in ***Kesavananda Bharati*** v. ***State of Kerala & Anr.***[3], even prior to the addition of the word 'Secular' by the 42nd Amendment, held that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of individual would always subsist in the welfare State. Hon'ble Justice H.R. Khanna in his judgment referred to the statement of K. Santhanam, a prominent member of the Constituent Assembly and Editor of a newspaper. It was observed as under:

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[1] T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 (11 Judges Bench)
[2] (1996) 9 SCC 548
[3] (1973) 4 SCC 225

"1481. …K. Santhanam, a prominent southern member of the Assembly and editor of a major newspaper, described the situation in terms of three revolutions. The political revolution would end, he wrote, with independence. *The social revolution meant 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'.* The third revolution was an economic one: 'The transition from primitive rural economy to scientific and planned agriculture and industry'. Radhakrishnan (now President of India) believed India must have a 'socio-economic revolution' designed not only to bring about 'the real satisfaction of the fundamental needs of the common man', but to go much deeper and bring about 'a fundamental change in the structure of Indian society'…" *(Emphasis Supplied)*

7. The secular character of the State was reiterated in a later Constitution Bench judgment reported as ***Smt. Indira Nehru Gandhi*** v. ***Shri Raj Narain*** [4] wherein it was held as under:

"252. It has been stated by me on p. 685 (SCC p. 767) of the judgment (already reproduced above) that the secular character of the State, according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. The above observations show that the secular character of the Constitution and the rights guaranteed by Article 15 pertain to the basic structure of the Constitution…"

8. The word 'Secular' after being added in the Preamble was also considered by a three-Judge Bench judgment of this Court reported as ***Ziyauddin Burhanuddin Bukhari*** v. ***Brijmohan Ramdass Mehra & Ors.***[5]. This Court was considering an appeal against the setting aside of election of the appellant under the Representation of the People Act, 1951 to the Maharashtra State Assembly on the ground of speeches made by him in the course of election campaign. It was held that *"the Secular State, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices…"*

9. The term 'Secular' was also considered by a nine-Judges Bench of this Court reported as ***S.R. Bommai & Ors.*** v. ***Union of India & Ors.***[6]. It was held that our Constitution does not prohibit the practice of any religion either privately or publicly. The relevant extract of the judgment reads thus:

"146. These provisions by implication prohibit the establishment of a theocratic State and prevent the State either identifying itself with or favouring any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations.

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148. One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited…

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304. Both the expressions — 'socialist' and 'secular' — by themselves are not capable of precise definition. We are, however, not concerned with their general meaning or content. Our object is to ascertain the meaning of the expression "secular" in the context of our Constitution. As the discussion hereafter would demonstrate, the 42nd Amendment merely made explicit what was implicit in it…..... While the citizens of this country are free to profess, practice and

[4] 1975 (Supp.) SCC 1
[5] (1976) 2 SCC 17
[6] (1994) 3 SCC 1

propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable treatment of all other religions, races and castes. How are the constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements? *Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions*. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality…."

10. In the same year, in a judgment reported as ***Santosh Kumar & Ors.*** v. ***Secretary, Ministry of Human Resources Development & Anr.***[7], a question arose as to whether the inclusion of Sanskrit in the syllabus of Central Board of Secondary Education as an elective subject so far as teaching in secondary school is concerned is permissible. This Court quoted that *"It would be profitable to note that according to Justice H.R. Khanna secularism is neither anti-God nor pro-God; it treats alike the devout, the agnostic and the atheist. According to him, secularism is not antithesis of religious devoutness. He would like to dispel the impression that if a person is devout Hindu or devout Muslim, he ceases to be secular."*

11. The National Curriculum Framework for School Education published by National Council of Educational Research and Training was challenged before this Court in a judgment reported as ***Ms. Aruna Roy & Ors.*** v. ***Union of India & Ors.***[8]. This Court relied upon S.B. Chavan Committee Report, 1999 which strongly recommended education about religions as an instrument of social cohesion and social and religious harmony, when it said *"a word of caution is required here. Education about religions must be handled with extreme care. All steps must be taken in advance to ensure that no personal prejudice or narrow-minded perceptions are allowed to distort the real purpose of this venture and no rituals, dogmas and superstitions are propagated in the name of education about religions. All religions therefore have to be treated with equal respect (sarva dharma sambhav) and that there has to be no discrimination on the ground of any religion (panthnirapekshata)."* It was observed as under:

"29. At this stage, we would quote the relevant part of the S.B. Chavan Committee's Report as under:

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12. In view of the diverse character of our country, it is essential that certain national values are also imbibed by our young students. *They should be acquainted with the history of India's freedom struggle, cultural heritage, constitutional obligations and the features comprising our national identity*. The Committee feels that some of these national values can be imparted indirectly at the primary stage while at the middle and secondary levels, these can be included in the curriculum.

13. Another aspect that must be given some thought *is religion, which is the most misused and misunderstood concept*. The process of making the students acquainted *with the basics of all religions, the values inherent therein and also a comparative study of the philosophy of all religions should* begin at the middle *stage in schools* and continue up to the university level. Students have to be made aware that the basic concept behind every religion is common, only the practices differ. Even if there are differences of opinion in certain *areas, people have to learn to coexist and carry no hatred against any religion."*

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[7] (1994) 6 SCC 579
[8] (2002) 7 SCC 368

37. Therefore, in our view, the word "religion" should not be misunderstood nor contention could be raised that as it is used in the National Policy of Education, secularism would be at peril. On the contrary, let us have a secularistic democracy where even a very weak man hopes to prevail over a very strong man (having post, power or property) on the strength of rule of law by proper understanding of duties towards the society. Value-based education is likely to help the nation to fight against all kinds of prevailing fanaticism, ill will, violence, dishonesty, corruption, exploitation and drug abuse. ..... *Let knowledge, like the sun, shine for all and that there should not be any room for narrow-mindedness, blind faith and dogma*. For this purpose also, if the basic tenets of all religions over the world are learnt, it cannot be said that secularism would not survive."

12. In ***T.M.A. Pai Foundation***, it was held that the State is not prevented from making any law in relation to religious practice and the same is permissible under Article 25(2)(a) of the Constitution of India. The limited jurisdiction granted by Article 25(2) relates to the making of a law in relation to economic, financial, political or other secular activities associated with the religious practice. The Court held as under:

"83. Article 25(2) gives specific power to the State to make any law regulating or restricting any economic, financial, political or other secular activity, which may be associated with religious practice as provided by sub-clause (a) of Article 25(2). This is a further curtailment of the right to profess, practise and propagate religion conferred on the persons under Article 25(1). Article 25(2)(a) covers only a limited area associated with religious practice, in respect of which a law can be made. A careful reading of Article 25(2)(a) indicates that it does not prevent the State from making any law in relation to the religious practice as such. The limited jurisdiction granted by Article 25(2) relates to the making of a law in relation to economic, financial, political or other secular activities associated with the religious practice".

13. Thus, though the concept of secularism emerged in the west, it has taken a different colour over the period of time. In a democratic country like India, consisting of multiple religions, regions, faith, languages, food and clothing, the concept of secularism is to be understood differently. Secularism, as adopted under our Constitution, is that religion cannot be intertwined with any of the secular activities of the State. Any encroachment of religion in the secular activities is not permissible. Secularism thus means treating all religions equally, respecting all religions and protecting the practices of all religions. The positive meaning of secularism would be nondiscrimination by the State on the basis of religious faith and practices. Secularism can be practiced by adopting a completely neutral approach towards religion or by a positive approach wherein though the State believes and respects all religions, but does not favour any.

FACTUAL BACKGROUND

14. The challenge in the present appeals is to the Government Order dated 5.2.2022, the translated copy of which reads as under:

"**<u>Proceedings of the Government of Karnataka</u>**

Subject – Regarding a dress code for students of all schools and colleges of the state.

Refer – 1) Karnataka Education Act 1983

2) Government Circular:509 SHH 2013, Date:31-01-2014

Preamble:-

As mentioned in the above at reference No.1, the Karnataka Education Act 1983 passed by the Government of Karnataka (1-1995) Section [7(2)(g)(v)]* stipulates that all the school students studying in Karnataka should behave in a fraternal manner, transcend their group identity and develop an orientation towards social justice. Under the Section 133 of the above law, the government has the authority to issue directions to schools and colleges in this regard.

The above-mentioned circular at reference No.2 underlines how Pre-university education is an important phase in the lives of students. All the schools and colleges in the state have set up development committees in order to implement policies in line with the policies of the government, utilize budgetary allocations, improve basic amenities and maintain their academic standards. It is recommended that the schools and colleges abide by the directions of these development committees.

Any such supervisory committee in schools and colleges (SDMC in Government Institutions and ParentsTeachers' Associations and the management in private institutions) should strive to provide a conducive academic environment and enforce a suitable code of conduct in accordance with government regulations. Such a code of conduct would pertain to that particular school or college.

Various initiatives have been undertaken to ensure that students in schools and colleges have a standardized learning experience. However, it has been brought to the education department's notice that students in a few institutions have been carrying out their religious observances, which has become an obstacle to unity and uniformity in the schools and colleges.

The question relating to a uniform dress code over individual dressing choices has come up in several cases before the Honourable Supreme Court and High Courts, which have ruled as below.

1) In para 9 of the Hon'ble High Court of Kerala's ruling in W.P. (C) No.35293/2018, date : 04-122018, it cites a ruling by the Hon'ble Supreme Court:

"9. The Apex Court in Asha Renjan and others v/s State of Bihar and others [(2017) 4 SCC 397] accepted the balance test when competing rights are involved and has taken a view that individual interest must yield to the larger public interest. Thus, conflict to competing rights can be resolved not by negating individual rights but by upholding larger right to remain, to hold such relationship between institution and students."

2) In the case of Fatima Hussain Syed v/s Bharat Education Society and Ors. (AIR 2003 Bom 75), in a similar incident regarding the dress code, when a controversy occurred at Kartik High School, Mumbai. The Bombay High Court appraised the matter, and ruled that it was not a violation of Article 25 of the Constitution for the principal to prohibit the wearing of head scarf or head covering in the school.

3) Subsequent to the Hon'ble Supreme Court's abovementioned ruling, the Hon'ble Madras High Court, in V. Kamalamma v/s Dr. MGR Medical University, Tamil Nadu and Ors. upheld the modified dress code mandated by the university. A similar issue has been considered by the Madras High Court in Shri. M Venkatasubbarao Matriculation Higher Secondary School Staff Association v/s Shri M. Venkatasubbarao Matriculation Higher Secondary School (2004) 2 MLJ 653 case.

As mentioned in the abovementioned rulings of the Hon'ble Supreme Court and various High Courts, since the prohibition of a headscarf or a garment covering the head is not a violation of Article 25 of the Constitution. Additionally, in terms of the [Karnataka Education Act, 1983 Article 133 Sub Rule (2) and Article 7(1)(i), 7(2)(g)(v) and Karnataka Education Act (Classification, Regulation, Curriculum Scheduling, Others) of Rules 1995 as per Rule 11]**, the government has decreed as below-

Government Order No: EP14 SHH 2022 Bengaluru Dated: 05.02.2022

In the backdrop of the issues highlighted in the proposal, using the powers granted by Karnataka Education Act, 1983 Sub-Rule 133 (2) [Section 7(1)(i), 7(2)(g)(v) and Karnataka Education Act (Classification, Regulation, Curriculum Scheduling, Others) of Rules 1995 as per Rule 11**, all the government schools in the state are mandated to abide by the official uniform. Private schools should mandate a uniform decided upon by their board of management.

In colleges that come under the pre-university education department's jurisdiction, the uniforms mandated by the College Development Committee, or the board of management, should be worn.

In the event that the management does mandate a uniform, students should wear clothes that are in the interests of unity, equality and public order.

By the Order of the Governor of Karnataka,
And in his name
Padmini SN
Joint Secretary to the Government
Education Department (Pre-University)

*Substituted by the Corrigendum/Addendum dated 5.2.2022
**Inserted by the Corrigendum/Addendum dated 5.2.2022"

15. The Karnataka Education Act, 1983[9], under which the above Government Order has been issued, was enacted with a view to foster the harmonious development of the mental and physical faculties of students and cultivate a scientific and secular outlook through education. The long title and some of the relevant provisions of the Act read thus:

"An Act to provide for better organisation, development, discipline and control of the educational institutions in the State.

Whereas it is considered necessary to provide for the planned development of educational institutions inculcation of healthy educational practice, maintenance and improvement in the standards of education and better organisation, discipline and control over educational institutions in the State with a view to fostering the harmonious development of the mental and physical faculties of students and cultivating a scientific and secular outlook through education;

Section-5. Promotion of education of the weaker sections and the handicapped. – The State Government shall endeavour to promote the education of the handicapped, backward classes and the weaker sections of the society including the economically weaker section thereof and in particular of the Scheduled Castes, Scheduled Tribes with special care by adopting towards that end such measure as may be appropriate.

xx xx xx

Section-7. Government to prescribe curricula, etc. – (1) Subject to such rules as may be prescribed, the State Government may, in respect of educational institutions, by order specify,-

xx xx xx

(h) the facilities to be provided, such as buildings, sanitary arrangements, playground, furniture, equipment, library, teaching aid, laboratory and workshops;

(i) such other matters as are considered necessary.

(2) The curricula under sub-section (1) may also include schemes in respect of,-

xx xx xx

(v) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities to renounce practices derogatory to the dignity of women;

(vi) to value and preserve the rich heritage of our composite culture;

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(viii) to develop the scientific temper, humanism and the spirit of inquiry and reform;

xx xx xx

(x) to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endevaour and achievement."

[9] For short, the 'Act'

16. The Act also contemplates withdrawal of recognition if any local authority or the Governing Council of any private educational institution denies admission to any citizen on the ground of religion, race, caste, language or any of them [Section 39 (1)(b)]; or directly or indirectly encourages in the educational institution any propaganda or practice wounding the religious feelings of any class of citizens of India or insulting religion or the religious belief of that class [Section 39 (1)(c)].

17. The impugned Government Order has been issued by exercising the powers conferred under Section 133 of the Act, which reads as thus:

"133. Powers of Government to give directions.- (1) The State Government may, subject to other provisions of this Act, by order, direct the Commissioner of Public Instruction or the Director or any other officer not below the rank of the District Educational Officer to make an enquiry or to take appropriate proceeding under this Act in respect of any matter specified in the said order and the Director or the other officer, as the case may be, shall report to the State Government in due course the result of the enquiry made or the proceeding taken by him.

(2) The State Government may give such directions to any educational institution or tutorial institution as in its opinion are necessary or expedient for carrying out the purposes of this Act or to give effect to any of the provisions contained therein or of any rules or orders made thereunder and the Governing Council or the owner, as the case may be, of such institution shall comply with every such direction.

(3) The State Government may also give such directions to the officers or authorities under its control as in its opinion are necessary or expedient for carrying out the purposes of this Act, and it shall be the duty of such officer or authority to comply with such directions."

18. The State Government is also empowered to make rules to carry out the purposes of this Act under Section 145 of the Act. Subsection (2) thereof provides that in particular and without prejudice to the generality of the foregoing power, the Rules may provide for the establishment or maintenance and administration of educational institutions [Section 145 (2)(xii)]; the purposes for which the premises of the educational institutions may be used and the restrictions and conditions subject to which such premises may be used for any other purpose [Section 145 (2)(xxix)]; and all matters expressly required by the Act to be prescribed or in respect of which the Act makes no provision or makes insufficient provision and a provision is, in the opinion of the State Government, necessary for the proper implementation of the Act [Section 145 (2)(xL)].

19. In pursuance of the above statutory provisions, the Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula etc.) Rules, 1995[10] were framed. Rule 11 of the said Rules provides for uniform, clothing, text books etc., which reads thus:

"11. Provision of Uniform, Clothing, Text Books etc., (1) Every recognised educational institution may specify its own set of Uniform. Such uniform once specified shall not be changed within the period of next five years.

(2) When an educational institution intends to change the uniform as specified in sub-rule (1) above, it shall issue notice to parents in this regard at least one year in advance.

(3) Purchase of uniform clothing and text books from the school or from a shop etc., suggested by school authorities and stitching of uniform clothing with the tailors suggested by the school authorities, shall be at the option of the student or his parent. The school authorities shall make no compulsion in this regard."

20. Rule 16 of the Rules provides for the constitution and functions of District Level Education Regulating Authority. An order was passed by the State on 31.1.2014 constituting

[10] For short, the 'Rules'

College Betterment Committee for the purpose of proper utilization of the grants sanctioned to it and for developing basic infrastructure and maintaining the quality of education. Such Committee is chaired by Member of Legislative Assembly as well as representatives of parents, one of whom is a woman, one SC/ST, another member with an interest in educational field, two student representatives out of which one shall be girl, Vice Principal/Senior Teacher of High School and Senior Lecturers of the college. The principal of the respective college is the Member Secretary. Such College Betterment Committee of the Government Pre-University College for Girls, Udupi, on 23.6.2018, passed the following resolution:

"RESOLUTION

xx xx xx

4. Further, it is resolved to maintain the same uniform in this year also as maintained in the last year like blue colored chudidar pant, white colored with blue color checks top and blue pant colored shawl on the shoulders, in all the six days of the week. Also, it is decided to handover the responsibility of providing the uniform to the poor girl students from the donors, to the VicePresident Yashpal Suvarna and powers were given to the Principal to take decision to after checking availability of the uniform in the shops."

21. The challenge to the Circular dated 5.2.2022 before the High Court remained unsuccessful on various grounds which are not necessary to be extracted herein.

22. Mr. Sanjay Hegde, Mr. Devadutt Kamat, Mr. Rajeev Dhawan, Ms. Meenakshi Arora, Ms. Jayna Kothari, Mr. Salman Khurshid, Mr. A.M. Dar, Mr. Kapil Sibal, Mr. Colin Gonsalves, Mr. Aditya Sondhi, Mr. Yusuf Muchhala, Mr. Huzefa Ahmadi, Mr. Dushyant Dave, learned Senior Advocates and Mr. Prashant Bhushan, Ms. Kirti Singh, Mr. Rishad Ahmed Chowdhury, Mr. Shoeb Alam, Mr. Rahmatullah Kotwal, Ms. Thulasi K. Raj, Mohd. Nizamuddin Pasha, learned counsels have assisted the Court in this matter on behalf of the appellants; whereas, Mr. Tushar Mehta, Solicitor General, Mr. K.M. Natraj, Additional Solicitor General, Mr. Prabhuling Navadgi, Advocate General for the State of Karnataka, Mr. R. Venkataramani, Ms. V. Mohana, Mr. D.S. Naidu, learned Senior Advocates, argued on behalf of the Respondents. The arguments covered various issues which will be dealt with hereinafter at appropriate stages.

23. We have heard learned counsels for the parties at length. I find that the following questions arise for consideration in the present appeals:

"(i) Whether the appeals should be heard along with ***Kantaru Rajeevaru (Right to Religion, In Re-9J)*** *and/*or should the present appeals be referred to the Constitution Bench in terms of Article 145(3) of the Constitution?

(ii) Whether the State Government could delegate its decision to implement the wearing of uniform by the College Development Committee or the Board of Management and whether the Government Order insofar as it empowers a College Development Committee to decide on the restriction/prohibition or otherwise on headscarves is ex facie violative of Section 143 of the Act?

(iii) What is ambit and scope of the right to **freedom of 'conscience' and 'religion'** under Article 25?

(iv) What is the ambit and scope of **essential religious practices** under Article 25 of the Constitution?

(v) Whether fundamental rights of **freedom of expression** under Article 19(1)(a) and **right of privacy** under Article 21 mutually exclusive or are they complementary to each other; and whether the Government Order does not meet the injunction of reasonableness for the purposes of Article 21 and Article 14?

(vi) Whether the Government Order impinges upon Constitutional promise of **fraternity** and **dignity** under the Preamble as well as fundamental duties enumerated under Article 51-A sub-clauses (e) and (f)?

(vii) Whether, if the wearing of hijab is considered as an essential religious practice, the student can seek right to wear headscarf to a secular school as a matter of right?

(viii) Whether a student-citizen in the constitutional scheme is expected to **surrender her fundamental rights** under Articles 19, 21 and 25 as a precondition for accessing education in a State institution?

(ix) Whether in the constitutional scheme, the State is obligated to ensure ***'reasonable accommodation'*** to its citizens?

(x) Whether the Government Order is contrary to the legitimate State interest of promoting literacy and education as mandated under Articles 21, 21A, 39(f), 41, 46 and 51A of the Constitution?

(xi) Whether the Government Order neither achieves any equitable access to education, nor serves the ethic of secularism, nor is true to the objective of the Karnataka Education Act?"

Question (i)- *Whether the appeals should be heard along with* ***Kantaru Rajeevaru (Right to Religion, In Re-9J)*** *and/or should the present appeals be referred to the Constitution Bench in terms of Article 145(3) of the Constitution?*

24. The preliminary submission of learned counsel for the appellants is that the present case ought to be referred to a larger bench in view of the order of this Court reported as ***Kantaru Rajeevaru (Sabarimala Temple Review-5J.)*** v. ***Indian Young Lawyers Association & Ors.***[11]. One of the arguments raised for such submission was that it has to be decided as to what is considered to be essentially religious, essential to religion and integral part of religion. The contention was that "religion" is a means to express one's "faith". The larger Bench of this Court framed the questions of law in an order[12]. However, the reasons[13] recorded for the reference state the ambit to be "the contours of judicial review in matters pertaining to essential religious practices". The questions referred to in the said case relate to the extent to which the Court can inquire into the issue as to whether a particular practice would be qualified as an integral, essential part of religion.

25. It was also argued that the present case involves a substantial question of law relating to interpretation of the Constitution, therefore, ought to be referred to a Constitution Bench in terms of Article 145(3) of the Constitution.

26. It is noted that the review in ***Kantaru Rajeevaru (Right to Religion, In Re-9J.)*** is to consider much wider questions. The argument that the matter should be referred to a larger Bench to be heard along with such referred cases does not warrant consideration. The questions referred to the larger Bench relate to power of judicial review in the matters of essential religious practices. But the said question need not be examined in the present matter as the issue herein is whether a religious practice, which may be an essential religious practice, can be regulated by the State in a secular institution. Therefore, I do not find it necessary to tag the present appeals along with ***Kantaru Rajeevaru***.

27. The argument that the present appeals involve a substantial question of law as to the interpretation of the Constitution, and thus should be referred to the Bench of Five Judges in terms of Article 145(3) of the Constitution is not tenable. Reliance is placed on a 9-Judges

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[11] (2020) 2 SCC 1

[12] (2020) 3 SCC 52

[13] (2020) 9 SCC 121

bench judgment reported as ***K.S. Puttaswamy and Anr. v. Union of India & Ors.***[14], wherein this Court held *"When a substantial question as to the interpretation of the Constitution arises, it is this Court and this Court alone under Article 145(3) that is to decide what the interpretation of the Constitution shall be, and for this purpose, the Constitution entrusts this task to a minimum of 5 Judges of this Court"*.

28. There is no dispute about the proposition canvassed. The issue in the present matter is however as to whether the students can enforce their religious beliefs in a secular institution. Thus, the issues raised do not become a substantial question of law as to the interpretation of the Constitution only for the reason that the right claimed by the appellants is provided under the Constitution. Hence, I do not find the need to refer the matter to a larger bench or that the same should be heard along with ***Kantaru Rajeevaru***.

Question (ii)- *Whether the State Government could delegate its decision to implement the wearing of uniform by the College Development Committee or the Board of Management and whether the Government Order insofar as it empowers a College Development Committee to decide on the restriction/prohibition or otherwise on headscarves is ex facie violative of Section 143 of the Act?*

29. The argument raised is with reference to Section 143 of the Act. It is contended that the State Government can delegate all or any of its powers exercisable by it, or to be exercised also by such office/authority subordinate to the State Government, as may be specified in the notification. It is the contention of the learned counsel for the appellants that the notification dated 31.1.2014 is to delegate the essential State functions in favour of a non-statutory authority. Therefore, such notification violates the mandate of Section 143 of the Act. Section 143 of the Act reads thus:

"143. Delegation. – The State Government may by notification in the official gazette, delegate all or any powers exercisable by it under this Act or rules made thereunder, in relation to such matter and subject to such conditions, if any as may be specified in the direction, to be exercised also by such officer or authority subordinate to the State Government as may be specified in the notification."

30. It is contended by the learned counsel for the appellants that the power to maintain public order is the responsibility of the State Government and, therefore, the State Government could not delegate its authority to College Development Committee which is not State within the meaning of Article 12 as it is a mechanism created by the State. The Circular issued by the Government of Karnataka dated 31.1.2014, published in the official Gazette, reads thus:

"Government of Karnataka
No. ED 580 SHH 2013 Department of Education Multistore Building Bangalore dated 31-01-2014
CIRCULAR

Education department is providing 1st and 2nd PUC education in the state. PUC education is the main stage in the student's life. In accordance with the government and department direction and in order to utilise the grants as well as in maintaining academic standards and development of infrastructure, we are hereby directed to form a college development committee and to follow the guidelines as under:

1.	President	MLA of the respective constitution
2.	Vice President	Local representative nominated by the MLA

[14] (2017) 10 SCC 1

3.	Members	1) 4 members from the students parents and among them 1 parent should be a female and 1 parent should belong to schedule caste/schedule tribe. 2) The person who is interested in the education field. 3) 2 members from the students representative, among them 1 should be a girl student (this is not applicable for boys college) 4) Vice Principal/Senior Teacher from respective composite P.U. college. 5) Senior Lecturer of PU College.
4.	Secretary member	Principal of the respective PU College.

SD/ 31-01-2014
(S.H. Curiyavar)
Under Secretary to the Govt
Dept of Education (P.U Education)."

31. Furthermore, learned counsels for the appellants have also vehemently argued that the Government Order dated 5.2.2022 refers to some of the judgments which do not deal with the issue of wearing hijab, but still it is concluded that use of headscarf or a garment covering the head is not in violation of Article 25. It is averred that though the operative part of the order seems to be facially religious-neutral, it targets a particular community in effect. It is also contended that the High Court has supplanted the reasons to uphold the said Government Order even though the reasons recorded therein are not sufficient to prohibit the use of headscarf. Hence, at the outset, the State ought to prove the jurisdiction to issue such a circular.

32. The alternate argument is that the College Development Committee, a non-statutory authority, cannot exercise power of the State Government under Part III of the Constitution. It was contended that the law which can restrict the right of an individual under Article 19(1)(a), Article 25(2), or any other right falling within part III of the Constitution, can only be by way of a law made by the competent legislature. Mr. Shoeb Alam referred to judgments of this Court reported as ***State of Madhya Pradesh & Anr.*** v. ***Thakur Bharat Singh***[15], ***State of West Bengal*** v. ***Anwar Ali Sarkar***[16], ***Bishambhar Dayal Chandra Mohan & Ors.*** v. ***State of Uttar Pradesh & Ors.***[17] and a recent order passed by this Court reported as ***Pharmacy Council of India*** v. ***Rajeev College of Pharmacy & Ors.***[18] to support such contention. However, Mr. Dushyant Dave argued that the rights in Part III of the Constitution can be restricted or regulated by a statute made by competent legislature and also includes any law as defined under Article 13(2) & (3) of the Constitution. Articles 13(2) and (3) of the Constitution are relevant for the purposes of the present proposition, which reads thus:

"**13. Laws inconsistent with or in derogation of the fundamental rights**.—

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(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

[15] AIR 1967 SC 1170
[16] AIR 1952 SC 75
[17] (1982) 1 SCC 39
[18] 2022 SCC OnLine SC 1224

(*a*) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;"

33. I do not find any merit in the said argument raised by the appellants. The College Development Committee is envisaged to be an in-house mechanism to ensure better utilization of grants as well as maintaining academic standards and development of infrastructure. Such directions are relatable to sub-section (3) of Sections 133 and 145 of the Act. In any case, the constitution of the College Development Committee is not in conflict with any of the provisions of the Act. The said circular was published in the Karnataka Gazette, issued in exercise of the executive powers of the State, supplementing the provisions of the Act and not supplanting all or any of the provisions thereof.

34. The Government Order is in two parts. The first part is the Preamble which gives the background leading to the order impugned before the High Court. The second part, i.e., the operative part of the order alone bears the Government Order number and date. The order mandates that the uniform prescribed by the College Development Committee or the Board of Management should be worn. The appellants have though understood the order to be interfering with their essential religious practices.

35. The executive power under Article 73 extends to all matters in respect of which the Parliament has power to make laws or under Article 162 in respect of the matters where legislature of the State has power to make laws.[19] The question is whether restrictions can be imposed by the executive in respect of the rights specified under Part III such as Articles 19, 21, 25 and 31A.

36. There is no dispute about the proposition that in the absence of any statute or the statutory rule, but in exercise of the executive power, the State can issue an executive order. However, the argument raised is that restrictions under Part III of the Constitution can only be imposed by way of a statutory law and not by way of an executive power.

37. Now, coming to the judgments referred to by the learned counsel for the appellant for the abovementioned contention; in ***Anwar Ali Sarkar***, this Court was considering the conviction of the respondent by the Special Court established under Section 3 of the West Bengal Special Courts Ordinance, 1949, which was replaced by the West Bengal Special Courts Act, 1950. It was the provision of the Act which was set aside being discriminatory. This Court, in fact, inter-alia held that *"this is further made clear by defining "law" in Article 13 (which renders void any law which takes away or abridges the rights conferred by part III) as including, among other things, any "order" or "notification", so that even executive orders or notifications must not infringe Article 14. The trilogy of articles thus ensures non-discrimination in State action both in the legislative and the administrative spheres in the democratic republic of India".* Thus, the said judgment is thus not helpful to the argument raised.

38. In ***Thakur Bharat Singh***, this Court dismissed an appeal filed by the State against the judgment of the High Court reported as ***Thakur Bharat Singh*** v. ***State of M.P. & Anr.***[20]. The High Court struck down Section 3(1)(b) of the Madhya Pradesh Public Security Act, 1959 when the writ petitioner before the High Court was prohibited to be in Raipur District and was directed to remain within the municipal limits of Jhabua District and was also ordered to report daily to the Police Station Officer, Jhabua. The High Court held as under:

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[19] Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549

[20] AIR 1964 MP 175

"For the foregoing reasons, our conclusion is that clauses (a) and (c) of section 3(1) of the Act are valid, but clause (b) being violative of article 19(1)(d) of the Constitution is invalid. As clause (b) is invalid, the direction made against the appellant Bharatsingh under that clause asking him to reside in Jhabua was clearly illegal and was rightly quashed by the learned Single Judge. On quashing that direction, the further direction that Bharatsingh should notify his movements by reporting himself daily to the Police Station Officer, Jhabua, cannot survive. The learned Single Judge, therefore, rightly quashed the order made against Bharatsingh directing him to notify his movements and report himself daily to the Police Station Officer, Jhabua, though he did so on the erroneous view that clause (c) of section 3(1) was inextricably woven with clause (b) thereof and was invalid. The result is that both these appeals are dismissed. In the circumstances of the case, we leave the parties to bear their own costs of the two appeals."

39. An appeal against the said judgment was dismissed by this Court wherein this Court held as under:

"7. We are therefore of the view that the order made by the State in exercise of the authority conferred by Section 3(1)(*b*) of the Madhya Pradesh Public Security Act 25 of 1959 was invalid and for the acts done to the prejudice of the respondent after the declaration of emergency under Article 352 no immunity from the process of the Court could be claimed under Article 358, of the Constitution, since the order was not supported by any valid legislation."

40. The aforementioned judgment is in respect of the statute enacted by a State Legislature, the provision of which was found to be invalid. The issue raised in the aforesaid case has no parity with the facts of the present case.

41. In ***Bishambhar Dayal Chandra Mohan***, the State Government contended that the impugned teleprinter message dated March 31, 1981 was in the nature of an executive instruction issued by the State Government under its powers under Article 162 of the Constitution for the due observance of the provisions of the U.P. Foodgrains Dealers (Licensing and Restriction on Hoarding) Order, 1976 and the Uttar Pradesh Foodgrains (Procurement and Regulation of Trade) Order, 1978. It was the stand of the State that no person can carry on business in foodgrains as a dealer or as a commission agent, except under and in accordance with the terms and conditions of a valid licence issued in that behalf under the two orders. In these circumstances, this Court held as under:

"33. Under Article 19(1)(*g*) of the Constitution, a citizen has the right to carry on any occupation, trade or business and the only restriction on this unfettered right is the authority of the State to make a law imposing reasonable restrictions under clause (6).....

41. There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A. The word "law" in the context of Article 300-A must mean an Act of Parliament or of a State legislature, a rule, or a statutory order, having the force of law, that is positive or State made law…"

42. The writ petitions filed by the dealers were dismissed. In the aforesaid case, the restriction was put by an executive order, which was found to be a reasonable restriction in terms of Article 19(6) of the Constitution. Even the said judgment does not aid the appellants and has no applicability to the facts of the present case.

43. Furthermore, reliance on a recent judgment of this Court reported as ***Pharmacy Council of India*** is unfound as it has no parity with the facts of the present case. The Pharmacy Council of India, an authority created under the Pharmacy Act, 1948, resolved on

17.7.2019 to put a moratorium on the opening of new pharmacy colleges for running Diploma as well as Degree courses in pharmacy for a period of five years. The argument raised by the appellant was that Sections 3, 10 and 12 of the Pharmacy Act confer the power to regulate, therefore, such power would include the power to prohibit also. This Court negated such an argument and held as under:

"55. Since we have held that the Resolutions/communications dated 17th July 2019 and 9th September 2019 of the Central Council of the appellant-PCI, which are in the nature of executive instructions, could not impose restrictions on the fundamental right to establish educational institutions under Article 19(1)(g) of the Constitution of India, we do not find it necessary to consider the submissions advanced on other issues. We find that the Resolutions/communications dated 17th July 2019 and 9th September 2019 of the Central Council of the appellant-PCI are liable to be struck down on this short ground."

44. A perusal of the above judgment shows that an authority under the Act had put a moratorium on the opening of new pharmacy colleges, thus, prohibiting the right conferred on an individual under Article 19(1)(g) of the Constitution. The same however was by virtue of a resolution not supported by any statute. Therefore, the said judgment of this Court has no applicability to the facts of the present case.

45. Furthermore, this Court in a judgment reported as ***Shri Dwarka Nath Tewari*** v. ***State of Bihar***[21] was considering Article 182 of the Bihar Education Code. The Court found that Article 182 of the Code is not in exercise of any power granted under the statute and thus cannot deprive the petitioners of their rights in the properties which were the subject matter of the writ petition. This Court held as under:

"13. It is clear, therefore, from the portion of the preface extracted above, that Article 182 of the Code has no greater sanction than an administrative order or rule, and is not based on any statutory authority or other authority which could give it the force of law. Naturally, therefore, the learned Solicitor-General, with his usual fairness, conceded that the article relied upon by the respondents as having the force of law, has no such force, and could not, therefore, deprive the petitioners of their rights in the properties aforesaid."

46. "Law", as contemplated under Articles 19(2) and 25(2), falls within Part III of the Constitution. Therefore, law, as defined under Article 13(3), would include any ordinance, order, bye-law, rule, regulation, notification, custom or usage in the territory of India to have the force of law. The order issued by the State Government would thus be a law within the meaning of Article 13(2) read with Article 13(3)(a), which is a valid exercise of power under Article 19(1)(a) read with Article 19(2), and Article 25(1) read with Article 25(2) of the Constitution.

47. The Government Order relates to the powers conferred on the executive under Section 133 of the Act and rule-making power of the State under Article 162 of the Constitution. The said Government Order does not run contrary to any of the provisions of the Act and the rules framed thereunder. Therefore, the executive was well within its jurisdiction to ensure that the students come in the uniform prescribed by the College Development Committee.

48. The College Development Committee so constituted consists of Member of the Legislative Assembly, representatives of the students, faculty members etc. Therefore, such authority is a representative body of the students and teachers including the Member of the Legislative Assembly and Principal of the College as Member Secretary. Such Committee cannot be said to be beyond the scope of Section 143 of the Act. Such authority established

[21] AIR 1959 SC 249

in exercise of the powers vested with the State Government is not in contravention of any of the provisions of the statute. In terms of Article 162 of the Constitution, the State Government in exercise of its executive power could create the College Development Committee as such Committee does not contravene any of the provisions of the statute or the rules framed thereunder.

49. In view of the above, I find that the State Government has the power to constitute a College Development Committee by notification dated 31.1.2014 in terms of Section 143 of the Act. The State Government could confer its power to be exercised by such office/authority subordinate to the State Government. It is noted that the word 'authority' has not been defined under the Act. The authority contemplated by the Act could be a nonstatutory authority such as of a person or a group of persons who may be authorized to exercise powers under Section 143 of the Act.

50. Further, it is well settled that executive powers can be used to supplement the statutory rules. This Court in a judgment reported as ***Sant Ram Sharma*** v. ***State of Rajasthan & Ors.***[22] held that it is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed thereunder. This Court in a judgment reported as ***Union of India & Anr.*** v. ***Ashok Kumar Aggarwal***[23] held as under:

"59. The law laid down above has consistently been followed and it is a settled proposition of law that an authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide *Union of India* v. *Majji Jangamayya* [(1977) 1 SCC 606 : 1977 SCC (L&S) 191] , *P.D. Aggarwal* v. *State of U.P.* [(1987) 3 SCC 622 : 1987 SCC (L&S) 310 : (1987) 4 ATC 272] , *Paluru Ramkrishnaiah* v. *Union of India* [(1989) 2 SCC 541 : 1989 SCC (L&S) 375 : (1989) 10 ATC 378 : AIR 1990 SC 166], *C. Rangaswamaiah* v. *Karnataka Lokayukta* [(1998) 6 SCC 66 : 1998 SCC (L&S) 1448] and *Joint Action Committee of Air Line Pilots' Assn. of India* v. *DG of Civil Aviation* [(2011) 5 SCC 435 : AIR 2011 SC 2220] .)"

51. The Preamble of the Act aims towards fostering harmonious development of the mental and physical faculties of students and cultivating a scientific and secular outlook through education.

52. The curricula under Section 7(2) of the Act is to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women, to value and preserve the rich heritage of our composite culture, to develop scientific temper, humanism and the spirit of inquiry and reform and to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavor and achievement. The said provision is substantially *pari materia* with the fundamental duties enumerated in Part IV-A of the Constitution inserted by 42nd Amendment, required to be followed by the institutions covered under the Act.

53. The said provisions show that the mandate of the statute is to renounce sectional diversities, to develop humanism and to cultivate scientific and secular outlook. The sectarian approach that certain students will carry their religious beliefs to secular schools run by the State would be antithesis of the mandate of the statute. All students need to act

[22] AIR 1967 SC 1910
[23] (2013) 16 SCC 147

and follow the discipline of the school. Out of the many steps required to ensure uniformity while imparting education, one of them is to wear the uniform dress without any addition or subtraction to the same. Any modification to the uniform would cease to be the uniform, defeating the very purpose of prescribing under Rule 11 and as mandated by the College Development Committee.

54. Mr. Dushyant Dave referred to an extract which appears to be from a booklet published by the Department of Pre-University Education containing guidelines for the year 2021-2022. It is contended that such guidelines have contemplated that uniform is not mandatory and that some College Principals and Management Committee have imposed uniforms as mandatory, which is illegal. The relevant clause reads as under:

"Uniform is not mandatory for students studying in Pre University college under Government / Pre University Education Department / Education Act. But some college principals and management committee members have imposed uniforms as mandatory which is illegal. Any violation of the foregoing instructions will be taken seriously."

55. In respect of the said contention, I find that the students were following uniform prescribed by the College Development Committee. It is not the case of any of the students that they were not wearing uniform for the academic session 2021-22. The only claim raised was in relation to right to wear the headscarf during the academic year 2021-22, the year in controversy, and to which the guidelines relate. The recognized educational institution in terms of Section 2(30) of the Act means an educational institution recognized under the Act and includes one deemed to be recognized thereunder. The recognition of educational institutions is contemplated by Section 36 of the Act whereas the educational institutions established and run by the State Government or by the authority sponsored by the Central or the State Government or by a local authority and approved by the competent authority shall be deemed to be the educational institution recognized under the Act. The students are not disputing the mandate to wear uniform. It appears that the guidelines have been made part of the brochure without taking into consideration Rule 11 of the Rules which contemplates that every recognised educational institution may specify its own set of uniform. Therefore, the guidelines run counter to the statutory Rule 11 framed in exercise of the powers conferred under Section 145 of the Act. Thus, the uniform, having been prescribed in terms of the Act and the rules framed thereunder, the guidelines to the contrary are *non-est and* in any case had not been followed during the academic year in question.

56. The Government Order dated 5.2.2022 contemplates that the prescribed uniform should be followed. It necessarily excludes all religious symbols visible to naked eye. The argument that the students wear Rudraksha or a Cross is mentioned only to deal with an argument so raised. Anything worn by the students under his/her shirt cannot be said to be objectionable in terms of the Government Order issued.

57. In view of the above enunciation of law, I do not find that the constitution of the College Development Committee contravenes any of the provisions of the Act or the Rules made thereunder or that the regulation of uniform by such Committee is beyond its scope.

***Question (iii)**- What is the ambit and scope of right to **freedom of** '**conscience**' and '**religion**' under Article 25?*

58. At the outset, it is pertinent to mention that the Constitution does not define the term 'Religion', though it is used in Articles 15, 16, 25, 26, 27, 28 and 30. The Articles which are under consideration for the purpose of present appeals read thus:

"14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of brith.—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) xx xx xx

19. Protection of certain rights regarding freedom of speech, etc.—(1) All citizens shall have the right—

(*a*) to freedom of speech and expression;

xx xx xx

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

xx xx xx

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, practise 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."

59. Mr. Huzefa Ahmadi and Mr. Dushyant Dave have quoted from the proceedings of the Constituent Assembly Debates, to bring about the thought process which had gone into to present the Constitution to the people of India. Mr. Ahmadi relies upon the speech of Dr. Ambedkar to the Constituent Assembly on 25.11.1949 (Constituent Assembly Debates, Volume XI, Page 979) to the following effect:

"The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. *What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity.* They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. *Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.* Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. *Without fraternity, liberty and equality could not become a natural course of things."*

60. Mr. Dave referred to the report dated 25.5.1949 of the Advisory Committee on Minorities by the Constituent Assembly, presided by Hon'ble Sardar Vallabhbhai J. Patel, wherein it was stated as under:

"It is not our intention to commit the minorities to a particular position in a hurry. If they really have come honestly to the conclusion that in the changed conditions of this country, it is in the interest of all to lay down real and genuine foundations of a secular State, then nothing is better for the minorities than to trust the good-sense and sense of fairness of the majority, and to place confidence in them. So also it is for us who happen to be in a majority to think about what the minorities feel, and how we in their position."

61. In Constituent Assembly Debates, Volume V, dated 27.8.1947, it was opined as under:

"The Draft Constitution is also criticised because of the safeguards it provides for minorities. In this, the Drafting Committee has no responsibility. It follows the decisions of the Constituent Assembly. Speaking for myself, I have no doubt that the Constituent Assembly has done wisely in providing such safeguards for minorities as it has done. In this country both the minorities and the majorities have followed a wrong path. It is wrong for the majority to deny the existence of minorities. It is equally wrong for the minorities to perpetuate themselves. A solution must be found which will serve a double purpose. It must recognize the existence of the minorities to start with*. It must also be such that it will enable majorities and minorities to merge someday into one.* ....."

62. In the Constituent Assembly Debate dated 6.12.1948, while considering the draft Article 19, which is now Article 25, Pandit Lakshmi Kanta Maitra expressed his views as follows:

"By secular State, as I understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever. The State is not going to establish, patronize or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be discriminated against simply on the ground that he professed a particular form of religion. In other words in the affairs of the State the professing of any particular religion will not be taken into consideration at all. This I consider to be the essence of a secular state."

63. Mr. Kamat also referred to the proposed amendment moved by Mr. Tajamul Husain on 3rd December, 1948 proposing an amendment to the following effect:

"No person shall have any visible sign or mark or name, and no person shall wear any dress whereby his religion may be recognised."

64. The argument raised is that since the amendment was not accepted, therefore, the citizens have a right to have visible sign mark or name or dress so that their religion may be recognized. Though the amendment was not moved, but the fact that such discussion had taken place in the Constituent Assembly shows that the Constituent Assembly was aware of wearing of different clothing by the people of India which the member was suggesting to be not carried out. Since the Constitution is silent about the clothes to be worn by the citizens, therefore, the concern shown by a member of the Constituent Assembly should not be put under the carpet. In fact, Mr. Tajamul Husain further raised an argument as under:

"**Mr. Tajamul Husain**: I wish to point out that religion is a private affair between man and his God. It has no concern with anyone else in the world. What is the religion of others is also no concern of mine. Then why have visible signs by which one's religion may be recognised? You will find, Sir, that in all civilized countries—and civilized countries now-a-days are the countries in Europe and America—there is no visible sign or mark by which a man can be recognised as to what religion he professes.

xx xx xx

So I do not want these things. I know I am 100 years ahead of the present times. But still, I shall have my say.

In civilized countries in England there was a time when there was no uniformity of dress. In this country you find all sorts of dresses.

You find dhoties, you find pyjamas, you find kurtas, you find shirts, —and again, no shirts, no dhoties, nakedness, all sorts of things. That was the same thing in England at one time.

xx xx xx

Mr. Tajamul Husain: I am sorry for the interruption of the Maulana. My name I will change when the whole country adopts my resolution. Then, he will not be able to find out what I am and who I am.

Now, Sir, I was talking about dress. There was a England when there was no uniformity, but the Honourable the Law Minister will agree with me that an Act was actually passed in Parliament by which there was uniformity of dress and now in England and in the whole of Europe and in America there is uniformity of dress. We are one nation. Let us all have one kind of dress; one kind of name; and no visible signs. In conclusion, I say we are going to be a secular State. We should not, being a secular State, be recognised by our dress. If you have a particular kind of dress, you know at once that so and so is a Hindu or a Muslim. This thing should be done away with. With these words, I move my amendment.

(Amendment 589 and 583 were not moved.)"

65. On the other hand, learned Solicitor General referred to the speech of Dr. B.R. Ambedkar in the Constituent Assembly Vol. VII, p. 781, which reads as under:

"The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious."

66. In respect of the Constituent Assembly Debates, this Court in ***A.K. Gopalan*** v. ***State of Madras***[24] held that the Court could only search for the objective intent of the legislature primarily in the words used in the enactment, aided by such historical material such as reports of statutory committees. The Court did not put any importance on the speeches made by some of the members of the Constituent Assembly in the course of the debate on Article 15 (now Article 21). The result appears to be that while it is not proper to take into consideration the individual opinions of Members of Assembly to construe the meaning of a particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted.

67. In ***State of Travancore-Cochin & Ors.*** v. ***Bombay Company Ltd., Alleppey***[25], this Court held that the speeches made by the members of the Constituent Assembly in the course of debates on the draft Constitution is unwarranted. It was noted that this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes as well — see *Administrator-General of Bengal* v. *Prem Nath Mallick* [22 IA 107, 118].

68. In a nine-Judges Bench judgment in ***Indra Sawhney & Ors.*** v. ***Union of India & Ors.***[26], this Court held that what is said during the debates is not conclusive or binding upon the Court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. Therefore, views of the members of the

[24] AIR 1950 SC 27
[25] AIR 1952 SC 366
[26] 1992 Supp (3) SCC 217

Constituent Assembly are not really to be relied upon after this Court in a number of judgments have expressed about the rights under Article 25 of the Constitution.

69. Thus, the debates show the in-depth knowledge of the members of the Constituent Assembly at that relevant point of time, but more than 70 years later, with the interpretation of various provisions by the Constitutional Courts, it is not advisable to rely solely upon views of the individual members in such debates.

70. Further, the argument of Mr. Dave is that Article 25 protects religious practices and that the expression 'essential religious practice' has been wrongly used by this Court in ***Shayara Bano*** v. ***Union of India & Ors.***[27]. It was contended that the judgment in ***Commissioner, Hindu Religious Endowments, Madras*** v. ***Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt***[28] has not used the expression 'essential religious practice'. Therefore, wearing of a headscarf may not be essential, but is a religious practice, thus, protected by Article 25.

71. Dr. Dhawan, in support of his arguments, argued that the rights available to the students are the right to dress, free speech and expression not affecting public order or morality and the right of privacy, relying upon judgments in ***National Legal Services Authority*** v. ***Union of India & Ors.***[29] and ***K.S. Puttaswamy***. It is contended that wearing of hijab is an essential religious practice, and that the action of the State is discriminatory on the grounds of religion and sex.

72. Mr. Tushar Mehta, learned Solicitor General appearing for the State rebutted the arguments raised on behalf of the appellants and gave the background of issuance of the Government Order dated 5.2.2022. He submitted that on 29.3.2013, the College Development Committee, Udupi, prescribed the uniform for the girl students and since then the same was being followed by them. On 31.1.2014, a circular was issued by the Government regarding formation of a College Development Committee comprising *inter alia* the local member of the Legislative Assembly, representatives of parents, student representatives and teachers and Principal of the Pre-University College.

73. It was on 23.6.2018, that the College Development Committee, Udupi, prescribed a dress code for the students. On 31.12.2019, the College Development Committee of another College i.e., Kundapura Pre-University College, Udupi, unanimously resolved that the uniform of the students for the academic year would continue to be same as one prescribed in the previous years.

74. The students at the time of admission to the pre-university course undertook to comply with all the rules and regulations of the Pre-University College. It was pointed out that suddenly in the middle of the academic term, the issue of hijab was generated in the social media by the activists of Popular Front of India. The police papers in this respect were handed over to the High Court in a sealed cover as mentioned on page 126 of the order of the High Court. It is stated that the chargesheet has since been filed. Thereafter, some representations were made by the parents of the students and/or students requesting hijab to be worn in classrooms.

75. The College Development Committee directed to maintain status quo. Five students thereafter filed Writ Petition No. 2146 of 2022 on 29.1.2022 seeking an interim prayer that they be allowed to continue to attend school wearing headscarves. On 31.1.2022, the

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[27] (2017) 9 SCC 1
[28] AIR 1954 SC 282 (1954 SCR 1005)
[29] (2014) 5 SCC 438

College Development Committee, Udupi, decided that students must not wear hijab in classrooms whereas the Kundapura Pre-University College resolved it on 2.2.2022. There was a counter-reaction for the demands raised. It is in these circumstances that the Government issued the impugned order.

76. It is contended that such directions were issued to the colleges/institutions and not to the individual students as per the mandate of the Act. The Preamble of the Act is to provide for the planned development of educational institutions, inculcating healthy educational practice, maintenance and improvement in the standards of education, better organization, discipline and control over educational institutions so as to cultivate a scientific and secular outlook through education. Section 133(2) of the Act empowers the State Government to give directions to any educational institution as in its opinion are necessary or expedient for carrying out the purposes of the Act. Therefore, the Government Order was issued to direct the colleges/institutions to ensure that wherever uniform is mandated by the College Development Committee or the Board of Management, it should be worn. But if such uniform is not mandated, the students should wear clothes which are in the interest of unity, equality and public order. Therefore, the circular was issued to the colleges to ensure compliance of norm of uniform in a non-discriminatory manner, irrespective of any religious faith of the students.

77. The legality of Rule 11 of the Rules is not under challenge. In terms of the said Rule, the educational institutions have a right to prescribe a uniform to the students attending the said school. The scope of judicial review of the decisions of the educational institutions *vis-a-vis* its pupil is narrower than a purely administrative action. Reference was made to ***T.M.A Pai Foundation*** wherein it was held as under:

"64. An educational institution is established only for the purpose of imparting education to the students. In such an institution, it is necessary for all to maintain discipline and abide by the rules and regulations that have been lawfully framed. The teachers are like foster parents who are required to look after, cultivate and guide the students in their pursuit of education. The teachers and the institution exist for the students and not vice versa. Once this principle is kept in mind, it must follow that it becomes imperative for the teaching and other staff of an educational institution to perform their duties properly, and for the benefit of the students....."

78. In the matters of campus discipline of the educational institutions, the Court does not substitute its own views in place of the school authority except in a case of manifest injustice or to interfere with a decision which does not pass the test of *Wednesbury reasonableness*. This Court in a judgment reported as ***Chairman, J & K State Board of Education*** v. ***Feyaz Ahmed Malik***[30]***,*** held as under:

"20. ..... From the discussions in the impugned judgment, it is clear that the High Court has taken upon itself the task of finding out a scheme to tackle the problem of mass malpractice in examination. In our considered view the approach of the High Court in the matter is erroneous and this has vitiated the judgment. In matters concerning campus discipline of educational institutions and conduct of examinations the duty is primarily vested in the authorities in charge of the institutions. In such matters the court should not try to substitute its own views in place of the authorities concerned nor thrust its views on them. That is not to say that the court cannot at all interfere with the decisions of the authorities in such matters. The court has undoubtedly the power to intervene to correct any error in complying with the provisions of the rules, regulations or notifications and to remedy any manifest injustice being perpetrated on the candidates. ....."

30 (2000) 3 SCC 59

79. In ***Ahmedabad St. Xavier's College Society & Anr.*** v. ***State of Gujarat & Anr.***[31], it was held that the educational institutions are temples of learning and thus discipline is required to be maintained between the teacher and the taught.

"30. Educational institutions are temples of learning. The virtues of human intelligence are mastered and harmonised by education. Where there is complete harmony between the teacher and the taught, where the teacher imparts and the student receives, where there is complete dedication of the teacher and the taught in learning, where there is discipline between the teacher and the taught, where both are worshippers of learning, no discord or challenge will arise. An educational institution runs smoothly when the teacher and the taught are engaged in the common ideal of pursuit of knowledge. ..... The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclectism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character.

31. Regulations which will serve the interests of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions."

80. In respect of minority institutions, this Court in a judgment reported as ***Bihar State Madarasa Education Board*** v. ***Madarasa Hanfia Arabic College***[32] held that the State has power to regulate the educational needs and discipline of a minority institution.

"6. ..... This Court has all along held that though the minorities have right to establish and administer educational institution of their own choice but they have no right to maladminister and the State has power to regulate management and administration of such institutions in the interest of educational need and discipline of the institution. Such regulation may have indirect effect on the absolute right of minorities but that would not violate Article 30(1) of the Constitution as it is the duty of the State to ensure efficiency in educational institutions. The State has, however, no power to completely take over the management of a minority institution. ..... Minority institutions cannot be allowed to fall below the standard of excellence on the pretext of their exclusive right of management but at the same time their constitutional right to administer their institutions cannot be completely taken away by superseding or dissolving Managing Committee or by appointing ad hoc committees in place thereof. ....."

81. In ***Modern Dental College & Research Centre*** v. ***State of Madhya Pradesh***[33], it was held that the right under Article 19(1)(g) is not absolute but is subject to reasonable restrictions under clause (6) in the larger interest and welfare of student community and to promote merit, achieve excellence and curb malpractices, fee and admissions could certainly be regulated. This Court held as under:

"57. It is well settled that the right under Article 19(1)(g) is not absolute in terms but is subject to reasonable restrictions under clause (6). Reasonableness has to be determined having regard to the nature of right alleged to be infringed, purpose of the restriction, extent of restriction and other relevant factors. In applying these factors, one cannot lose sight of the directive principles of State policy. The Court has to try to strike a just balance between the fundamental rights and the larger interest of the society. The Court interferes with a statute if it clearly violates the fundamental rights. The Court proceeds on the footing that the legislature understands the needs of the people. The Constitution is primarily for the common man. Larger interest and welfare of student community to

[31] (1974) 1 SCC 717
[32] (1990) 1 SCC 428
[33] (2016) 7 SCC 353

promote merit, achieve excellence and curb malpractices, fee and admissions can certainly be regulated."

82. It has been argued that Article 25 of the Constitution must be given a conjunctive meaning. In Article 25(1), the term 'conscience' needs to be given not only the widest connotation but also an interconnected meaning. It is contended to be wide enough to cover the use of hijab, which reflects an expression of conscience. It is argued that the terms 'conscience', 'profess' and 'practice', as occurring in Article 25(1), are distinct and at the same time, interconnected. Practice would necessarily include conscience, and therefore both are inseparable.

83. It is further submitted that the right to dress inheres in the right to freedom of speech and expression, right to identity, and the right to dignity under Article 21 of the Constitution of India. Restriction on dress, even in the context of uniform, must have a rational nexus with the object sought to be achieved. Dress has been referred also in the context of expression of self. It is submitted that Muslim women wearing hijab is a symbolic expression of their identity to the public as a woman who follows Islam. The wearing of hijab does not cause any issue of public disorder or disturbance. Moreover, an arbitrary, unsubstantiated and illogical constraint imposed on the appearance of Muslim women and their choice of self-presentment is constitutionally impermissible and an explicit violation of Article 19 guaranteed in the Constitution. It was submitted that the purpose of uniform is not to erase the markers of individuality. Simply by wearing the prescribed dress code, diverse distinctions which exist amongst the students would not evaporate. In multi-cultural societies, students should be taught to acknowledge, accept and respect diversities in the society. It is further submitted that the impugned Government Order is exclusionary and destructive of tolerance and diversity in the classroom. The classroom is expected to be uniform but not homogenous.

84. This Court in ***S.P. Mittal*** v. ***Union of India***[34] held that, it is *"obvious that religion, undefined by the Constitution, is incapable of precise judicial definition either. In the background of the provisions of the Constitution and the light shed by judicial precedent, we may say religion is a matter of faith. It is a matter of belief and doctrine. It concerns the conscience i.e. the spirit of man. It must be capable of overt expression in word and deed, such as, worship or ritual. So, religion is a matter of belief and doctrine, concerning the human spirit, expressed overtly in the form of ritual and worship. Some religions are easily identifiable as religions; some are easily identifiable as not religions. There are many in the penumbral region which instinctively appear to some as religions and to others as not religions".*

85. Further, in ***A.S. Narayana Deekshitulu,*** this Court held that *"A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. ...Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity.*

[34] (1983) 1 SCC 51

86. In ***Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of U.P***.[35], this Court held that the religious freedoms guaranteed by Articles 25 and 26 is intended to be a guide to a community life and ordains every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance between the rigidity of right of religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and guaranteed freedom of conscience to commune with his Cosmos/Creator and realize his spiritual self.

87. Thus, religion believes in conscience and ethical and moral precepts. The freedom of conscience is what binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men. There is a fine distinction between freedom of conscience and religion. The scope of protection under Article 25 goes beyond religious beliefs. This provision affords to all persons freedom to beliefs which may not necessarily be religious but which may spring from one's conscience. Freedom of religion, on the other hand, grants one the right to follow one's faith, the established form of which gives a set of ethical norms to its followers and defines the rituals, observances, ceremonies and modes of worship.

88. I need to examine the right to freedom of conscience and religion in light of the restrictions provided under Article 25(1) of the Constitution. Such right is not just subject to public order, morality and health but also 'other provisions of Part III'. This would also include Article 14 which provides for equality before law. In ***T.M.A. Pai Foundation,*** this Court reiterated that Article 25(1) is not only subject to public order, morality and health, but also to other provisions of Part III of the Constitution. It was observed as under:

"82. Article 25 gives to all persons the freedom of conscience and the right to freely profess, practise and propagate religion. This right, however, is not absolute. The opening words of Article 25(1) make this right subject to public order, morality and health, and also to the other provisions of Part III of the Constitution. This would mean that the right given to a person under Article 25(1) can be curtailed or regulated if the exercise of that right would violate other provisions of Part III of the Constitution, or if the exercise thereof is not in consonance with public order, morality and health. The general law made by the Government contains provisions relating to public order, morality and health; these would have to be complied with, and cannot be violated by any person in exercise of his freedom of conscience or his freedom to profess, practise and propagate religion. For example, a person cannot propagate his religion in such a manner as to denigrate another religion or bring about dissatisfaction amongst people."

89. The object of the Government Order was to ensure that there is parity amongst the students in terms of uniform. It was only to promote uniformity and encourage a secular environment in the schools. This is in tune with the right guaranteed under Article 14 of the Constitution. Hence, restrictions on freedom of religion and conscience have to be read conjointly along with other provisions of Part III as laid down under the restrictions of Article 25(1).

Question (iv) *- What is the ambit and scope of* ***essential religious practices*** *under Article 25 of the Constitution?*

90. The appellants have contended that wearing of a headscarf is an essential religious practice followed by the women following Islam since time immemorial. It is averred that the same has been provided for in their religious scriptures and thus is essential to the religion. The argument is that the impugned Government Order impinges upon their right of wearing

[35] (1997) 4 SCC 606

headscarf as an essential religious practice, and is thus violative of the right guaranteed under Article 25 of the Constitution.

91. To rebut the said argument of essential religious practice, Mr. Tushar Mehta relied upon a judgment of this Court reported as ***Commissioner of Police & Ors.*** v. ***Acharya Jagadishwarananda Avadhuta & Anr.***[36] wherein, this Court held that essential part of a religion means the core beliefs upon which a religion is founded. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. The test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion would be changed without that part or practice. If taking away of that part or practice results in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part of the religion.

92. The argument of the learned Solicitor General is that in the Writ Petition filed titled ***Aishat Shifa v. State of Karnataka & Ors.***, there is a reference to Verse 31 Chapter 24 and Verse 31 Chapter 34 of the Holy Quran. In ***Shaheena & Anr.*** v. ***State of Karnataka & Ors.*** (Writ Petition No. 3038 of 2022), the petitioners have quoted Verse 26 Chapter 7, Verse 31 Chapter 24 and Verse 59 Chapter 33 of the Holy Quran indicating that wearing of headscarf is part of the religious identity and essential in Islamic faith. The reliance was also placed upon the judgment of the Kerala High Court reported as ***Amnah Bint Basheer & Anr.*** v. ***Central Board of Secondary Education (CBSE), New Delhi & Anr.***[37]

93. It is contended by the learned Solicitor General that wearing of hijab may be a practice, it may be an ideal or a permissible practice, but to raise it to the level of an essential religious practice, something more is required to be pleaded and proved and it has to be shown that if the headscarf is not worn, the identity of the person as a believer in the faith itself would be jeopardized as explained by this Court in ***A.S. Narayana Deekshitulu*** and ***Acharya Jagadishwarananda Avadhuta-II***, referred to above.

94. Mr. Prabhuling K. Navadgi, learned Advocate General referred to Verse 31 of Surah 24 of the Holy Quran to assert that wearing of a headscarf is not an essential feature of the Islamic practice. It is argued that wearing of a headscarf may be a religious practice but is not essential to the religion as non-following of such practice would not lead a believer to be non-Muslim. The essential religious practices are those practices, if not followed, would render the person religion less. Learned Advocate General of the State of Karnataka argued that the protection under Article 25 is only to the essential religious practices and not to every religious belief. What constitutes the essential part of religion is primarily to be ascertained with reference to the doctrine of that religion itself. Article 25(2)(a) contemplates not the regulation by the State of all religious practices as such, but regulation of essential religious practices which are economic, commercial or political, though they are associated with religious practice.

95. To appreciate the argument raised, I firstly need to examine the tenets of Muslim Law. In the Mulla's Mohammedan Law, 5th edition, 2019, it was stated that the Prophet Muhammad himself declared that the Holy Quran was revealed to him by the angel "Gabriel" in various portions and at different times. The texts are held by Mohammedans to be decisive as being the words of God transmitted to man through the Prophet. It is explained that there are four sources of Mohammedan Law, namely, (1) the Quran; (2) *Hadis*, i.e., precepts, actions and sayings of the Prophet Muhammad, not written down during his lifetime, but

[36] (2004) 12 SCC 770 (Acharya Jagadishwarananda Avadhuta-II)
[37] AIR 2016 Ker 115

preserved by tradition and handed down by authorized persons; (3) *Ijmaa*, i.e., a concurrence of opinion of the companions of Muhammad and his disciples; and (4) *Qiyas*, being analogical deductions derived from a comparison of the first three sources when they do not apply to the particular case.

96. Still further, five duties[38] have been laid down for the Muslims by the Prophet, the same are reproduced as under:

"(i) Kalma :- It is the duty of every Muslim to recite kalma. Kalma implies certain Hymns proclaiming the unity of God accepting Mohammed as the Prophet.

(ii) Namaz :- Every Muslim must say prayers (Namaz) five times a day and on every Friday he must offer his afternoon prayer at the Mosque.

(iii) Zakat :- It is the duty of every Muslim to offer Zakat or charity to the poor and needy.

(iv) Ramzan :- The most pious duty of every Muslim is to observe fasts in the holy month of 'Ramzan'.

(v) Haj :- Every Muslim, should go for Haj or pilgrimage to Mecca at least once in his lifetime."

97. In same Chapter[39], according to the 'Shariat', religious commandment (Hukum) of Allah are of five types, which reads thus:

"(i) Farz – Five daily prayers (namaz) – One must do strictly.

(ii) Haram – Drinking wine – One must forbade strictly. (iii) Mandub/Additional Prayers on the id – One may do.

(iv) Makrum – Eating certain kinds of fish prohibited – One may refrain from.

(v) Jaiz or Mubah – Thousands of Jaiz things, such as travelling by air – Shariat is indifferent towards it."

98. The Chapter 7[40] also gives the description of laws which have modified the Mohammedan Law. Such statutes are as under:

"(i) The Indian Contract Act, 1872.

(ii) The Usuary Law Repeal Act.

(iii) Usurious Loans Act.

(iv) The Religious Toleration Act.

(v) The Freedom of Religion Act, 1850.

(vi) The Waqf Validating Act.

(vii) The Shariat Act, 1937.

(viii) The Dissolution of Muslim Marriage Act, 1939.

(ix) The Special Marriages Act, 1954. (When a Muslim solemnizes or registers his marriage under this Act, such marriage and the liability for *Mahr*, the dissolution of such marriage and succession to the property of such Muslim and of the issue of such marriage is not governed by Muslim Law).

(x) Constitution of India : The Muslim Law of Preemption stands subject to Act 19(1)(f) of the Constitution.

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[38] Page 14 Mulla's Mohammedan Law, 5th edition, 2019
[39] Page 19 Mulla's Mohammedan Law, 5th edition, 2019
[40] Page 106 Mulla's Mohammedan Law, 5th edition, 2019

(xi) Muslim Law relating to crimes, procedure and slavery stand abrogated by laws enacted in this regard by the Legislature."

99. There are various text books interpreting the verses of the Holy Quran. However, reference is made to the interpretation given by Abdullah Yusuf Ali, translation in English published alongside the original Arabic text, completed in Lahore on 4.4.1937. The interpretation by Yusuf Ali has been referred to by this Court in a number of judgments[41]. Mr. Aditya Sondhi and Mohd. Nizamuddin Pasha have also referred to the Holy Quran by Abdullah Yusuf Ali in their written submissions. The English translation and meaning ascribed to such translation available online "The Glorious Quran" read thus:

"Surah 24 Verse 31

31. And say to the believing women that they should lower their gaze and guard(2984) their modesty; that they should not display their beauty and ornaments(2985) except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments.(2986) And O ye Believers! turn ye all together towards Allah, that ye may attain Bliss.(2987)

2984 The need for modesty is the same in both men and women. But on account of the differentiation of the sexes in nature, temperaments, and social life, a greater amount of privacy is required for women than for men, especially in the matter of dress and the uncovering of the bosom.

2985 *Zinah* means both natural beauty and artificial ornaments. I think both are implied here, but chiefly the former. The woman is asked not to make a display of her figure or appear in undress except to the following classes of people: (1) her husband, (2) her near relatives who would be living in the same house, and with whom a certain amount of *neglige* is permissible; (3) her women, i.e., her maid-servants, who would be constantly in attendance on her: some Commentators include all believing women; it is not good form in a Muslim household for women to meet other women, except when they are properly dressed; (4) slaves, male and female, as they would be in constant attendance (but with the abolition of slavery this no longer applies); (5) old or infirm men-servants; and (6) infants or small children before they get a sense of sex. Cf. also 33:59.

2986 It is one of the tricks of showy or unchaste women to tinkle their ankle ornaments, to draw attention to themselves.

2987 While all these details of the purity and good form of domestic life are being brought to our attention, we are clearly reminded that the chief object we should hold in view is our spiritual welfare. All our brief life on this earth is a probation, and we must take our individual, domestic, and social life all contribute to our holiness, so that we can get the real success and bliss which is the aim of our spiritual endeavor.(R)."

Surah 33 Verse 36

36. It is not fitting for a Believer, man or woman, when a matter has been decided by Allah and His Messenger to have any option about their decision:(3721) if any one disobeys Allah and His Messenger, he is indeed on a clearly wrong Path.

3721 We must not put our own wisdom in competition with Allah's wisdom. Allah's decree is often known to us by the logic of facts. We must accept it loyally, and do the best we can to help in our own way to carry it out. We must make our will consonant to Allah's Will. (R)."

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41 Mohd. Ahmed Khan v. Shah Bano Begum & Ors., (1985) 2 SCC 556; Danial Latifi & Anr. v. Union of India, (2001) 7 SCC 740; Iqbal Bano v. State of U.P. & Anr., (2007) 6 SCC 785; and, Shayara Bano v. Union of India & Ors., (2017) 9 SCC 1

100. The students in one of the writ petitions before the High Court referred to the following verses from the Holy Quran. Such verses from the Book "The Glorious Quran" by Yusuf Ali read as under:

"**Surah 34 Verse 31**

31. The Unbelievers say: "We shall neither believe in this scripture nor in (any) that (came) before it." (3834) Couldst thou but see when the wrong-doers will be made to stand before their Lord, throwing back the word (of blame)(3835) on one another! Those who had been despised will say to the arrogant ones: (3836) "Had it not been for you, we should certainly have been believers!"

3834 To the Pagans all scriptures are taboo, whether it be the Qur'an or any Revelation that came before it. The people of the Book despised the Pagans, but in their arrogant assumption of superiority, prevented them, by their example, from accepting the latest and most universal Scripture when it came in the form of the Qur'an. This relative position of men who fancy themselves on their knowledge, and men whom they despise but exploit and mislead, always exists on this earth. I have mentioned the people of the Book and the Pagan Arabs merely by way of illustration.

3835 One disbelief is as bad as another. There is little to choose between them. But when the final account will be taken, there will be mutual recriminations between the one and the other.

3836 The Pagans will naturally say to the people of the Book; 'You misled us; you had previous Revelations, and you should have known how Allah sent His Messengers; had it not been for your bad example, we should have received Allah's Revelation and become Believers'. Or the humble followers will say this to their leaders, or those less gifted will say to those by whom they were misled and exploited. The dichotomy is between such as pretentiously held their heads high in the world and such as they profited by but held in contempt.

Surah 33 Verse 59

59. O Prophet! Tell thy wives and daughters, and the believing women, (3764) that they should cast their outer garments over (3765) their persons (when abroad): that is most convenient, that they should be known (3766) (as such) and not molested. And Allah is Oft-Forgiving, (3767) Most Merciful.

3764 This is for all Muslim women, those of the Prophet's household, as well as the others. They were asked to cover themselves with outer garments when walking around. (R).

3765 *J ilbab*, plural *Jalabib*: an outer garment: a long gown covering the whole body, or a cloak covering the neck and bosom.

3766 The object was not to restrict the liberty of women but to protect them from harm and molestation. In the East and the West a distinctive public dress of some sort or another has always been a badge of honour or distinction, both among men and women. This can be traced back to the earliest civilisations. Assyrian Law in its palmiest days (say, 7th Century B.C.), enjoined the veiling of married women and forbade the veiling of slaves and women of ill fame: see *Cambridge Ancient History*, III, 107.

3767 That is, if a Muslim woman sincerely tries to observe this rule, but owing to human weakness falls short of the ideal, then "Allah is Oft-Forgiving, Most Merciful" (*Cf.*24:30-31). (R).

Surah 7 Verse 26

26. O ye Children of Adam! We have bestowed raiment (1008) upon you to cover your shame, as well as to be an adornment to you. But the raiment of righteousness, - that is the best. Such are among the Signs of Allah, that they may receive admonition!

1008 There is a double philosophy of clothes here, to correspond with the double signification of verse 20 above, as explained in n. 1006. Spiritually, Allah created man "bare and alone" (6:94): the soul in its naked purity and beauty knew no shame because it knew no guilt: after it was touched by

guilt and soiled by evil, its thoughts and deeds became its clothing and adornments, good or bad, honest or meretricious, according to the inner motives which gave them colour. So in the case of the body: it is pure and beautiful, as long as it is not defiled by misuse; its clothing and ornaments may be good or meretricious, according to the motives in the mind and character; if good, they are the symbols of purity and beauty; but the best clothing and ornament we could have comes from righteousness, which covers the nakedness of sin, and adorns us with virtues. (R)."

101. The Hedaya, commentary on Islamic Laws, 2nd edition was published in April, 1870. The same is available online. The reprint of such publication, word-to-word, line-to-line and pageto-page was published in the year 1979 by Kitab Bhavan, New Delhi. The interpretation of the Holy Quran in the Hedaya had been quoted by this Court in a number of judgments[42]. Volume I, Book VI of Vows is now regulated by the Penal Code (Note at the end of Volume I); Volume II Book VIII relating to Larceny stands omitted as now regulated by Penal Code, Act No. XLV of 1860; Book V and XII dealing Ittak, or the Manumission of Slaves stands deleted in consequence of the abolition of slavery by Act No. V of 1843.

102. It is noted that the issue of essential religious practices in the context of Islamic law has been raised at earlier instances also before this Court, though for other practices. In a judgment reported as ***Mohd. Hanif Quareshi and others*** v. ***State of Bihar***[43], this Court found the sacrifice of a cow to be not obligatory and essential to the religion of Islam. The Court negated the argument of the appellants when it was held that there is *"no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day in an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners"*. This Court held as under:

"13. Coming now to the arguments as to the violation of the petitioners' fundamental rights, it will be convenient to take up first the complaint founded on Article 25(1)…

What then, we inquire, are the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? …

..... All that was placed before us during the argument were Surah XXII, Verses 28 and 33, and Surah CVIII. What the Holy book enjoins is that people should pray unto the Lord and make sacrifice. We have no affidavit before us by any Maulana explaining the implications of those verses or throwing any light on this problem. We, however, find it laid down in Hamilton's translation of Hedaya Book XLIII at p. 592 that it is the duty of every free Mussulman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice, provided he be then possessed of Nisab and be not a traveller. The sacrifice established for one person is a goat and that for seven a cow or a camel. It is therefore, optional for a Muslim to 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. The very fact of an option seems to run counter to the notion of an obligatory duty. It is, however, pointed out that a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats…We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners."

103. In ***Mohd. Ahmed Khan*** v. ***Shah Bano Begum & Ors.***[44], this Court held that the provisions of Muslim Personal Law do not countenance cases in which the wife is unable to

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[42] Mohd. Hanif Quareshi & Ors. v. State of Bihar, AIR 1958 SC 731; Valia Peedikakkandi Katheessa Umma & Ors. v. Pathakkalan Narayanath Kunhamu & Ors., AIR 1964 SC 275; N.K. Mohd. Sulaiman Sahib v. N.C. Mohd. Ismail Saheb & Ors., AIR 1966 SC 792; and, Shayara Bano v. Union of India & Ors., (2017) 9 SCC 1

[43] AIR 1958 SC 731

[44] (1985) 2 SCC 556

maintain herself after the divorce. Though the effect of the said judgment was nullified by a Statute, but the fact remains that the personal law was not approved by this Court. It was held as under:

"14. These statements in the text books are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, *who is unable to maintain herself*. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent, both in quantum and in duration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dirhams, which is equivalent to three or four rupees (*Mulla's Mahomedan Law,* Eighteenth Edn., para 286, p. 308). But, one must have regard to the realities of life. Mahr is a mark of respect to the wife. The sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife…"

104. The Constitution Bench in a judgment reported as ***Dr. M. Ismail Faruqui & Ors.*** v. ***Union of India & Ors.***[45] held that offering of prayer or worship is a religious practice, but its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice. It was held as under:

"77. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property. Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.

78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.

xx xx xx

82. … A mosque is not an essential part of the practice of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere, even in open…"

105. Later, a three-Judges Bench judgment of this Court reported as ***Javed & Ors.*** v. ***State of Haryana & Ors.***[46] negated the argument that no religious scripture or authority has been brought to the notice of the Court which provides that marrying less than four women or abstaining from procreating a child from each and every wife would be irreligious or offensive to the dictates of the religion. It was held as under:

[45] (1994) 6 SCC 360
[46] (2003) 8 SCC 369

"44. The Muslim law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of the Haryana Act being violative of Article 25 does not arise..."

106. In ***Shayara Bano***, Justice Nariman, speaking for himself and Justice Lalit, noted that *"a practice does not acquire the sanction of religion simply because it is permitted"* and applied the essential religious practices test. It was held as under:

"*54*. … it is clear that triple talaq is only a form of talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it. According to *Javed* [*Javed* v. *State of Haryana*, (2003) 8 SCC 369 : 2004 SCC (L&S) 561] , therefore, this would not form part of any essential religious practice. Applying the test stated in *Acharya Jagadishwarananda* [*Commr. of Police* v. *Acharya Jagadishwarananda Avadhuta*, (2004) 12 SCC 770], it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice.

107. Justice Kurian Joseph, concurring with Justices Nariman and Lalit, held that on an examination of the Holy *Quran* and Islamic legal scholarship, the practice of triple talaq could not be considered an essential religious practice. He opined that *"merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible".*

108. The judgments referred to above had the direct or indirect effect on modifying the understanding of the verses of the Holy Quran, apart from the statutes mentioned by Mulla in his book referred to above. But I would examine the question that if the believers of the faith hold an opinion that wearing of hijab is an essential religious practice, the question is whether the students can seek to carry their religious beliefs and symbols to a secular school.

109. A reading of the judgment in ***Sri Shirur Mutt*** shows an argument that secular activities which may be associated with religion but do not really constitute an essential part of it are amenable to State regulation. The power to legislate in respect of all secular activities was not accepted. The question examined was the scope of clause (b) of Article 26 which speaks of management of its own "affairs in matters of religion." The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply. The question is, *where is the line to be drawn between what are matters of religion and what are not*. It was held that what constitutes an essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. This Court held as under:

"*17*. … A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief… *The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Article 25*."

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19. … *What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself*. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day … all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or

employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(*b*)."

110. In ***Ratilal Panachand Gandhi*** v. ***State of Bombay***[47], it has been held that *"religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines and the distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. But in cases of doubt, the court should take a common sense view and be actuated by considerations of practical necessity."*

111. In a judgment reported as ***Durgah Committee, Ajmer*** v. ***Syed Hussain Ali***[48], the challenge was to the Durgah Khwaja Saheb Act 36 of 1955. The challenge was in respect of freedom guaranteed under Article 26I and (d) of the Constitution. The property in respect of which claim had been made consisted of offerings made either in or outside the shrine. This Court quoted from ***Sri Shirur Mutt*** to say that the word "religion" has not been defined in the Constitution and is a term which is hardly susceptible of any rigid definition. It was held that the practices, though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself, cannot be accepted unless such practices are found to constitute an essential and integral part of a religion and their claim for the protection under Article 26 may have to be carefully scrutinized. It was held that protection must be confined to such religious practices as are an essential and an integral part of it and no other. This Court held that Articles 25 and 26 together safeguard the citizen's right to freedom of religion. It was observed as under:

"33. … …Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself*. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other*." *(Emphasis Supplied)*

112. In ***Sri Venkataramana Devaru & Ors.*** v. ***State of Mysore & Ors.***[49], the question examined was whether the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Article 26(b) is subject to, and can be controlled by, a law protected by Article 25(2)(b). This Court held that Article 25 deals with the rights of individuals and Article 26 protects the rights of denominations. It was observed as follows:

"29. The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Article 25(2)(*b*) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect

[47] AIR 1954 SC 388
[48] AIR 1961 SC 1402
[49] AIR 1958 SC 255

can be given to Article 26(*b*) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Article 25(2)(*b*) will prevail. While, in the former case, Article 25(2)(*b*) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 26(*b*). We must accordingly hold that Article 26(*b*) must be read subject to Article 25(2)(*b*)."

113. In a later judgment reported as ***Tilkayat Shri Govindlalji Maharaj Etc.*** v. ***State of Rajasthan & Ors.***[50], the validity of Nathdwara Temple Act, 1959 was the subject matter of consideration. It was held that the protection under Article 25 is not absolute and the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion. It was held as under:

"55. Articles 25 and 26 constitute the fundamental rights to freedom of religion guaranteed to the citizens of this country. Article 25(1) protects the citizen's fundamental right to freedom of conscience and his right freely to profess, practice and propagate religion. *The protection given to this right is, however, not absolute*. It is subject to public order, morality and health as Article 25(1) itself denotes. It is also subject to the laws, existing or future, which are specified in Article 25(2)….

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57. In deciding the question as to *whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not*. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress…... This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question *is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion*. It is in the light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of *Durgah Committee Ajmer* v. *Syed Hussain Ali* [(1962) 1 SCR 383 at p. 411] and observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26."

114. In ***Acharya Jagdishwaranand Avadhuta & Ors.*** v. ***Commissioner of Police, Calcutta & Anr.***[51], the question was whether performance of *Tandava* dance is a religious rite or practice essential to the tenets of the religious faith of the followers of Ananda Marga. Such argument was not accepted, when this Court held that *"even conceding that Tandava dance has been prescribed as a religious rite for every follower of the Ananda Marga it does not follow as a necessary corollary that Tandava dance to be performed in the public is a matter of religious rite".* Later, in a judgment reported as ***Acharya Jagadishwarananda Avadhuta-II***, it was held that the protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background of the given religion. This Court held as under:

"9. … What is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential

[50] AIR 1963 SC 1638

[51] (1983) 4 SCC 522

practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (*sic* essential) part or practices."

115. In the Constitution Bench judgment reported as ***Young Lawyers Association & Ors. (Sabarimala Temple, In Re)*** v. ***State of Kerala & Ors.***[52]***,*** it was held as under:

"208. *In clause (1), Article 25 protects the equal entitlement of all persons to a freedom of conscience and to freely profess, protect and propagate religion. By conferring this right on all persons, the Constitution emphasises the universal nature of the right. By all persons, the Constitution means exactly what it says : every individual in society without distinction of any kind whatsoever is entitled to the right. By speaking of an equal entitlement, the Constitution places every individual on an even platform*. Having guaranteed equality before the law and the equal protection of laws in Article 14, the draftspersons specifically continued the theme of an equal entitlement as an intrinsic element of the freedom of conscience and of the right to profess, practise and propagate religion. There are three defining features of clause (1) of Article 25 : *first*, the entitlement of *all* persons without exception, *second*, the recognition of an *equal* entitlement; and *third*, the recognition both of the freedom of conscience and the right freely to profess, practise and propagate religion. The right under Article 25(1) is evidently an individual right for, it is in the individual that a conscience inheres. Moreover, it is the individual who professes, practises and propagates religion. Freedom of religion in Article 25(1) is a right which the Constitution recognises as dwelling in each individual or natural person.

209. Yet, the right to the freedom of religion is not absolute. For the Constitution has expressly made it subject to public order, morality and health on one hand and to the other provisions of Part III, on the other. The subjection of the individual right to the freedom of religion to the other provisions of the Part is a nuanced departure from the position occupied by the other rights to freedom recognised in Articles 14, 15, 19 and 21. While guaranteeing equality and the equal protection of laws in Article 14 and its emanation, in Article 15, which prohibits discrimination on grounds of religion, race, caste, sex or place of birth, the Constitution does not condition these basic norms of equality to the other provisions of Part III. Similar is the case with the freedoms guaranteed by Article 19(1) or the right to life under Article 21. The subjection of the individual right to the freedom of religion under Article 25(1) to the other provisions of Part III was not a matter without substantive content. Evidently, in the constitutional order of priorities, the individual right to the freedom of religion was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty and personal freedoms recognised in the other provisions of Part III.

210. Clause (2) of Article 25 protects laws which existed at the adoption of the Constitution and the power of the State to enact laws in future, dealing with two categories. The first of those categories consists of laws regulating or restricting economic, financial, political or other secular activities which may be associated with religious practices. Thus, in sub-clause (*a*) of Article 25(2), the Constitution has segregated matters of religious practice from secular activities, including those of an economic, financial or political nature. The expression "other secular activity" which follows upon the expression "economic, financial, political" indicates that matters of a secular nature may be regulated or restricted by law. The fact that these secular activities are associated with or, in

[52] (2019) 11 SCC 1

other words, carried out in conjunction with religious practice, would not put them beyond the pale of legislative regulation. The second category consists of laws providing for (*i*) social welfare and reform; or (*ii*) throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The expression "social welfare and reform" is not confined to matters only of the Hindu religion. ....."

116. In ***Bijoe Emmanuel*** v. ***State of Kerala***[53], it was held that *"Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to be borne in mind in interpreting Article 25".* This Court upheld the right of the students belonging to Jehovah's Witnesses not to sing National Anthem in the school prayer though the students stood at the time of singing of the National Anthem. In the said case, the circular of the State Government dated 18.2.1970 was in question mandating that all schools in the State shall have morning assembly and that the whole school shall sing National Anthem in the assembly. The circular was not restricted to secular schools only but to all schools. The said judgment is of no help to the arguments raised as it does not deal with secular schools only.

117. Thus, to sum up, the essential religious practice doctrine was developed when the State interfered with certain practices qua religious places or religious festivities or performance of religious rituals in public or where such practices curtailed fundamental rights such as:

(i) In ***Sri Shirur Mutt***, the statute interfered with the management of the Mutt.

(ii) In ***Ratilal Panachand Gandhi***, a notification issued under the Bombay Public Trusts Act was under challenged which covered the temples and Mutt entitling the Government to control them through the Charity Commissioner.

(iii) In ***Durgah Committee***, the challenge was to the constitutional validity of the Dargah Khwaja Saheb Act, 1955 on the ground that it interferes with the right of management of the Durgah.

(iv) In ***Tilkayat Shri Govindlalji Maharaj***, the validity of Nathdwara Temple Act, 1959 was challenged on the ground that all the properties of the Nathdwara Temple are the private properties of the appellant and that the State legislature was not competent to enact the Act. It was the argument that even if Nathdwara Temple was held to be a public temple, the appellant as a Mahant or a Shebiat had a beneficial interest in the office of the high priest as well as the properties of the temple as the rights of the appellant under Articles 14, 19(1)(f) and 31(2) of the Constitution of India have been contravened.

(v) In ***Dawoodi Bohra***, the religious faith and tenets of Dawoodi Bohra community conferring power of excommunication from the community on its religious head as part of the management of the religious affairs under Article 26(b) of the Constitution was upheld.

(vi) The ***Shayara Bano*** case relating to triple talaq was in respect of gender equality granted under Articles 14 and 15 of the Constitution of India.

118. The essential religious practice in the abovementioned cases related to (i) right of management of places of worship, (ii) right of individual qua places of worship and (iii) curtailment of fundamental rights of individuals through religious practices. The claim of the appellants is not to perform a religious activity in a religious institution but to wear headscarf in public place as a matter of social conduct expected from the believers of the faith. But in the present, the students want to subjugate their freedom of choice of dress to be regulated

[53] (1986) 3 SCC 615

by religion than by the State while they are in fact students of a state school. The equality before law is to treat all citizens equally, irrespective of caste, creed, sex or place of birth. Such equality cannot be breached by the State on the basis of religious faith.

119. The Constitution has negatively worded Article 25(2). Article 25(2)(a) gives primacy to laws made by competent legislature for regulation of secular aspects and Article 25(2)(b) gives primacy to "social welfare" and "reform". In other words, if the State seeks to regulate the economic, political, financial or other secular aspects connected with religion, the State law is to have primacy over the proposed right. Similarly, if a particular practice/belief/part of any religion is in existence and is found to be subjected to either "social welfare" and "reform", such right will have to give way to "social welfare" and "reform".

120. It is reiterated that Article 25(2) being negatively couched is clearly an enabling provision which provides the power to the State in the matters mentioned therein. The said provision does not curtail or restrict the otherwise positive right under Article 25(1) in the absence of any intervention by the State in the nature of legislative or executive power.

121. Justice H.R. Khanna had quoted the statement of K. Santhanam in ***Kesavananda Bharati*** in respect of social revolution to get India out of the medievalism based on factors like birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education. I find that religion is not to be understood in a narrow sectarian sense but by encompassing our ethos that all should be treated alike. Secular State means rising above all differences of religions, and attempting to secure the good of all its citizens irrespective of their religious beliefs and practices. The faith or belief of a person is immaterial from the point of view of the State. For the State, all are equal and all are entitled to be treated equally. The Constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity cannot be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him. Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. Therefore, the object of the State is to bridge the gap between different sections of the society and to harmonize the relationship between the citizens to ensure growth of community in all spheres i.e., social, economic and political.

122. The appellants have also made a comparison with the rights of the followers of the Sikh faith by arguing that since Kirpan is allowed in terms of Explanation I to Article 25, therefore, the students who want to wear headscarf should be equally protected as in the case of the followers of the Sikh students. The Full Bench of the Punjab & Haryana High Court in ***Gurleen Kaur & Ors.*** v. ***State of Punjab & Ors.***[54] held that the essential religious practice of the followers of Sikh faith includes retaining hair unshorn, which is one of the most important and fundamental tenets of the Sikh religion. The Full Bench of the High Court held as under:

"128.....A perusal of explanation I under Article 25 of the Constitution of India reveals, that wearing and carrying a "kirpan" by Sikhs is deemed to be included in the profession of the Sikh religion. During the course of examining historical facts, legislation on the 'Sikh religion', the "Sikh rehatmaryada". the "Sikh ardas" and the views of authors and scholars of the Sikh religion, we arrived at the conclusion that wearing and carrying of "kirpans" though an important and significant aspect of the Sikh religion, is nowhere close to the importance and significance of maintaining hair unshorn. If the Constitution of India itself recognizes wearing and carrying of "kirpans" as a part of the profession of the Sikh religion, we have no hesitation, whatsoever, to conclude that wearing hair

[54] 2009 SCC OnLine P& H 6132

unshorn must essentially be accepted as a fundamental requirement in the profession of the Sikh religion. For the present controversy, we hereby, accordingly, hold that retaining hair unshorn is one of the most important and fundamental tenets of the Sikh religion. In fact, it is undoubtedly a part of the religious consciousness of the Sikh faith."

123. It appears that no appeal has been filed against the judgment of the Full Bench. Thus, the said judgment is final as on today. The issue in the present appeals is not the essential religious practices of the people following Sikh faith. It would not be proper to discuss the essential religious practices of the followers of the said faith without hearing them. The practices of each of the faith have to be examined on the basis of the tenets of that religion alone. The essential religious practices of the followers of Sikh faith cannot be made basis of wearing of hijab/headscarf by the believers of Islamic faith.

124. Mr. Mohd. Nizamuddin Pasha relied upon a Constitution Bench judgment of this Court reported as ***M. Siddiq (Dead) through LRs. (Ram Janmabhumi Temple Case)*** v. ***Mahant Suresh Das & Ors.***[55] wherein this Court held that Courts should not enter into an area of theology and attempt to interpret religious scriptures. This Court held as under:

"90. During the course of the submissions, it has emerged that the extreme and even absolute view of Islam sought to be portrayed by Mr P.N. Mishra does not emerge as the only available interpretation of Islamic law on a matter of theology. Hence, in the given set of facts and circumstances, it is inappropriate for this Court to enter upon an area of theology and to assume the role of an interpreter of the Hadees. The true test is whether those who believe and worship have faith in the religious efficacy of the place where they pray. The belief and faith of the worshipper in offering namaz at a place which is for the worshipper a mosque cannot be challenged. It would be preposterous for this Court to question it on the ground that a true Muslim would not offer prayer in a place which does not meet an extreme interpretation of doctrine selectively advanced by Mr Mishra. This Court, as a secular institution, set up under a constitutional regime must steer clear from choosing one among many possible interpretations of theological doctrine and must defer to the safer course of accepting the faith and belief of the worshipper.

91. Above all, the practise of religion, Islam being no exception, varies according to the culture and social context. That indeed is the strength of our plural society. Cultural assimilation is a significant factor which shapes the manner in which religion is practised. In the plural diversity of religious beliefs as they are practised in India, cultural assimilation cannot be construed as a feature destructive of religious doctrine. On the contrary, this process strengthens and reinforces the true character of a country which has been able to preserve its unity by accommodating, tolerating and respecting a diversity of religious faiths and ideas. There can be no hesitation in rejecting the submission made by Mr Mishra. Our Court is founded on and owes its existence to a constitutional order. We must firmly reject any attempt to lead the Court to interpret religious doctrine in an absolute and extreme form and question the faith of worshippers. Nothing would be as destructive of the values underlying Article 25 of the Constitution."

125. There is no dispute about the proposition canvassed. The practice of wearing of hijab may be a 'religious practice' or an 'essential religious practice' or it may be social conduct for the women of Islamic faith. The interpretations by the believers of the faith about wearing of headscarf is the belief or faith of an individual. The religious belief cannot be carried to a secular school maintained out of State funds. It is open to the students to carry their faith in a school which permits them to wear Hijab or any other mark, may be tilak, which can be identified to a person holding a particular religious belief but the State is within its jurisdiction to direct that the apparent symbols of religious beliefs cannot be carried to school maintained

[55] (2020) 1 SCC 1

by the State from the State funds. Thus, the practice of wearing hijab could be restricted by the State in terms of the Government Order.

Question (v)- *Whether fundamental rights of* ***freedom of expression*** *under Article 19(1)(a) and* ***right of privacy*** *under Article 21 mutually exclusive or are they complementary to each other; and whether the Government Order does not meet the injunction of reasonableness for the purposes of Article 21 and Article 14?*

126. It is argued that a citizen is entitled to express oneself by not just wearing a dress of her choice, but also in the context of her cultural traditions, and that such dress which allows others to identify that she belongs to a particular community, embraces a particular culture, and represents the values of that culture.

127. It is submitted that there cannot be any law which prohibits such expression as long as it does not disturb the public order or violates the accepted norms of decency and morality as prescribed by law. It is contended that it is the responsibility of the State to protect the composite culture of India, but the same has been intervened through the Government Order, contrary to the rights enshrined in the Constitution. The argument is also as to whether, this right to express herself by wearing a hijab, stops at the school gate and that beyond the school gate, she has no right to express herself to convey to others that she embraces a certain culture and she wishes to identify herself with that culture. Such expression, at the time when the notification was issued, neither had the tendency to, nor was there any evidence to show that it, in any way, disturbed public order, or was violative of decency or morality. The rights and duties conferred under the aforementioned provisions transcends the boundaries of the school gate. A citizen or student does not forego her fundamental rights and protections guaranteed under the Constitution, which includes the freedom to express her culture, the moment she steps into the school premises. It is also submitted that wearing an article of clothing, reflecting the distinct culture of a citizen, is consistent with the fundamental right of a citizen to conserve her culture under Article 29(1) and it is the fundamental duty of citizens to preserve and protect that culture which is part of the rich heritage of India.

128. The argument of the appellants is based upon the Preamble of the Government Order dated 5.2.2022 wherein it was recited that prohibition of a headscarf or a garment covering the head is not violative of Article 25 of the Constitution, apart from the fact that it is in terms of the Act and the rules framed thereunder. It is also argued that the State Government has not mentioned the role of Popular Front of India in the order passed, therefore, the State Government is not justified to refer to Popular Front of India during the course of arguments. In other words, the State cannot supplement the reasons than what is mentioned in the order.

129. It is averred that the Preamble refers to the three judgments of the High Courts as discussed above and a judgment of this Court reported as ***Asha Ranjan*** v. ***State of Bihar & Ors.***[56]. The contention is that the judgment in ***Fathima Thasneem (Minor) & Anr.*** v. ***The State of Kerala & Ors.***[57] of the Kerala High Court does not support the stand of the State Government, whereas, the judgment in ***Asha Ranjan*** is not in respect of wearing of a headscarf, therefore, to rely upon the said judgment to convey that wearing of headscarf is not in violation of Article 25 shows complete non-application of mind. The State cannot thus supplement the reasons in support of the prohibition to use headscarf before the High Court or before this Court.

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[56] (2017) 4 SCC 397

[57] 2018 SCC OnLine Ker 5267

130. Reliance has been placed upon ***Mohinder Singh Gill & Anr.*** v. ***Chief Election Commissioner, New Delhi & Ors***[58]***,*** wherein it was held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and it cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning, may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

131. In ***Maneka Gandhi*** v. ***Union of India & Anr.***[59], this Court held that even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that article, if it is an integral part of a named fundamental right. It was observed that *"….be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached."*

132. In ***National Legal Services Authority***, this Court held that Article 19(1)(*a*) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. It was held as under:

"69. Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from (*sic* on) exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognised and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(*a*) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. The self-identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution."

133. In ***Devidas Ramachandra Tuljapurkar*** v. ***State of Maharashtra & Ors.***[60], this Court held as under:

"93. Having stated about the test that is applicable to determine obscenity we are required to dwell upon the right to freedom of speech and expression. The words, "freedom of speech and expression" find place in the association words "liberty of thought, expression, belief, faith and worship", which form a part of the Preamble of the Constitution. The Preamble has its own sanctity and the said concepts have been enshrined in the Preamble.

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99. Interpreting Article 19(1)(*a*) of the Constitution, the test is always to see the said article in aid of the Preambular objectives which form a part of the basic structure of the Constitution. Article 19(1)(*a*) is intrinsically linked with the Preambular objectives and it is the duty of the Court to progressively realise the values of the Constitution. In *Maneka Gandhi* v. *Union of India* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] , it has been held : (SCC p. 280, para 5)

"*5*. … It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of

[58] (1978) 1 SCC 405
[59] (1978) 1 SCC 248
[60] (2015) 6 SCC 1

the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in *R.C. Cooper case* [*Rustom Cawasjee Cooper* v. *Union of India*, (1970) 2 SCC 298] and ....that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have…."

134. In ***St. Stephen's College*** v. ***University of Delhi***[61], this Court held that it is essential that there should be proper mix of students of different communities in all educational institutions. It has been held as under:

"81. Even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to have a relatively homogeneous society. It may lead to religious bigotry which is the bane of mankind. In the nation building with secular character sectarian schools or colleges, segregated faculties or universities for imparting general secular education are undesirable and they may undermine secular democracy. They would be inconsistent with the central concept of secularism and equality embedded in the Constitution. Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life. The students and teachers are the critical ingredients. It is there they develop respect for, and tolerance of, the cultures and beliefs of others. It is essential therefore, that there should be proper mix of students of different communities in all educational institutions."

135. In ***Navtej Singh Johar & Ors.*** v. ***Union of India***[62], the freedom of expression was referred to observe that the transgender persons have a right to express their self-identified gender by way of speech, mannerism, behavior, presentation and clothing, etc. The said judgment was relied upon to submit that the right to wear a particular clothing emerges from the right of dignity enshrined under Article 21 of the Constitution. It was held as under:

"641.2. In *National Legal Services Authority* v. *Union of India* [*National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438], this Court noted that gender identity is an important aspect of personal identity and is inherent to a person. It was held that transgender persons have the right to express their self-identified gender by way of speech, mannerism, behaviour, presentation and clothing, etc. [Ibid, paras 69-72.] The Court also noted that like gender identity, sexual orientation is integral to one's personality, and is a basic aspect of selfdetermination, dignity and freedom. [Ibid, para 22.] The proposition that sexual orientation is integral to one's personality and identity was affirmed by the Constitution Bench in *K.S. Puttaswamy* v. *Union of India* [*K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1, paras 144, 145 and 647.]."

136. The object of the Act is to maintain discipline and control over the educational institutions in the State with a view to foster the harmonious development of the mental and physical faculties of the students. Therefore, discipline and control are with regard to educational institutions, and not with regard to students. In terms of Section 5 of the Act, the State Government's endeavor is to promote the education of the handicap, backward classes and the weaker sections of the society including the economically weaker sections, whereas curricula under Section 7 includes promotion of national integration and inculcation of the sense of the duties of the citizens, enshrined under Article 51 of the Constitution. It is also pointed out that the State provides uniform to all the students from Class I to Class X as a part of its social obligations and to maintain parity with all students studying in the Government Schools without any distinction of caste, creed, sex or religion.

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[61] (1992) 1 SCC 558

[62] (2018) 10 SCC 1

137. Sections 15(b) and 39 (b) & (c) of the Act delineate the circumstances for the reasonable excuse for non-attendance of the child at an approved school. One of the accepted excuses is when religious instructions not approved by his parents are made compulsory. Sections 39 (1)(b) and (c) deals with withdrawal of recognition to such schools which deny admission to any citizen on grounds of religion, race, caste, language or where there is direct or indirect encouragement in the educational institution of any propaganda or practice wounding the religious feelings of any class of citizens of India.

138. Rule 11 of the Rules has mandated the recognized educational institutions including private institutions to prescribe uniforms. Once the uniform is fixed, it is provided that it shall not be changed for the period of next five years and when it is intended to be changed, notice for the same shall be given to the parents at least one year in advance. It is thus argued that specifications regarding disallowance of hijab was applied abruptly at the end of the academic section and also applied retrospectively when the girls had been stopped from entering school on or about 31.12.2021, though the Government Order was notified on 5.2.2022.

139. I do not find any merit in the above arguments raised by the appellants. The Government order is in exercise of the executive powers of the State. The reasons for an enactment of a Statute, Rules and statutory order are not required to be part of it. It is only when the issue of constitutionality is raised, the executive is required to satisfy the Court about the legality of action taken. The right under Article 19(1)(a) as a right of expression to dress as per one's own will, however, is also subject to reasonable restrictions under sub-clause (2) of Article 19. The State has not put a restriction on the exercise of right conferred under Article 19(1)(a) but has regulated the same in a manner that during the school hours on working days and in the class, the students shall wear the uniform as prescribed. Since it is a regulatory provision for wearing of uniform, hence, the decision of the State Government mandating the College Development Committee to ensure the students wear the uniform as prescribed does not violate the freedom guaranteed under Article 19(1)(a), rather reinforces the right to equality under Article 14. The College Development Committee is constituted in terms of the statutory provisions and, therefore, the direction of the State that the College Development Committee shall ensure that the students wear the dress as prescribed cannot be said to be violative of Part III of the Constitution.

140. The test of invasion of Article 19(1)(a) is required to be examined by the test of doctrine of Pith and Substance in view of the judgment of this Court reported as ***Bachan Singh*** v. ***State of Punjab***[63] wherein this Court held as under:

"60. From a survey of the cases noticed above, a comprehensive test which can be formulated, may be restated as under:

"Does the impugned law, in its pith and substance, whatever may be its form and object, deal with any of the fundamental rights conferred by Article 19(1)? If it does, does it abridge or abrogate any of those rights? And even if it does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), is the direct and inevitable effect of the impugned law such as to abridge or abrogate any of those rights?"

The mere fact that the impugned law incidentally, remotely or collaterally has the effect of abridging or abrogating those rights, will not satisfy the test. If the answer to the above queries be in the affirmative, the impugned law in order to be valid, must pass the test of reasonableness under Article 19. But if the impact of the law on any of the rights under clause (1) of Article 19 is merely incidental,

[63] (1980) 2 SCC 684

indirect, remote or collateral and is dependent upon factors which may or may not come into play, the anvil of Article 19 will not be available for judging its validity." *(Emphasis Supplied*)

141. It is to be observed that the Act, Rules and the orders issued under the said Act were enacted to provide for better organization, development, discipline and control of the educational institutions in the State. The primary object was encouraging holistic development through education and its various facets. The prescribing of uniform is only an incidental action in furtherance of the core object of the Act. Therefore, keeping in view ***Bachan Singh***, some incidental effect on the right under Article 19(1)(a) cannot be said to be an unreasonable restriction, also being mindful of the fact that it is not an absolute right.

142. The freedom of expression under Article 19(1)(a) of the Constitution means right to express one's opinions by word of mouth, printing, picture, or in any other manner. It includes the freedom of communication and the right to propagate or publish one's opinion. The communication of ideas could be made through any medium, newspaper, magazine or movie. Such right is though subject to reasonable restrictions on grounds set out under Article 19(2) of the Constitution[64].

143. Further, the right to privacy as crystallized in the Constitution Bench judgment of ***K.S. Puttaswamy*** has to be read in the context of other provisions of the Constitution in the present appeals. This Court laid down as under:

"298. ……The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matter on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

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377. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right to privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

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526. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously

[64] *S. Rangarajan* v. *P. Jagjivan Ram & Ors.*, (1989) 2 SCC 547

followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1)(a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

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639. The right to privacy as already observed is not absolute. The right to privacy as falling in Part III of the Constitution may, depending on its variable facts, vest in one part or the other, and would thus be subject to the restrictions of exercise of that particular fundamental right. National security would thus be an obvious restriction, so would the provisos to different fundamental rights, dependent on where the right to privacy would arise. The public interest element would be another aspect."

144. In a Constitution Bench judgment reported as ***I.R. Coelho*** v. ***State of Tamil Nadu***[65], this Court held that it can no longer be stated that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by State authorities. This Court held as under:

"60. It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by state authorities. Thus post-Maneka Gandhi's case it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of state power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened."

145. Thus, the rights of citizens of this country cannot be compartmentalized into one right or the other. The rights of citizens have to be read together so as to provide a purposeful meaning to Part III of the Constitution. Thus, all the Fundamental Rights under Part III of the Constitution are to be read in aid of each other. They constitute a bouquet of rights which can't be read in isolation and have to be read together as a whole.

146. However, it is to be noted that none of the fundamental rights is absolute. The curtailment of the right is permissible by following due procedure which can withstand the test of reasonableness. The intent and object of the Government Order is only to maintain uniformity amongst the students by adherence to the prescribed uniform. It is reasonable as the same has the effect of regulation of the right guaranteed under Article 19(1)(a). Thus, the right of freedom of expression under Article 19(1)(a) and of privacy under Article 21 are complementary to each other and not mutually exclusive and does meet the injunction of reasonableness for the purposes of Article 21 and Article 14.

Question (vi)- *Whether the Government Order impinges upon Constitutional promise of* ***fraternity*** *and* ***dignity*** *under the Preamble as well as fundamental duties enumerated under Article 51-A subclauses (e) and (f)?*

147. Mr. Ahmadi has argued that the impugned Government Order dated 5.2.2002 impinges upon the constitutional promise of "Fraternity" as mentioned in the Preamble as well as in the fundamental duties enumerated in Article 51A (e) and (f). It is argued that the

[65] (1999) 7 SCC 580

liberty, equality and fraternity is the trinity of the constitutional values to invoke horizontal and social sensitivity towards inequalities. It is contended that liberty is of thought, expression, belief, faith and worship; equality is of status and opportunity; and fraternity assures dignity of the individual.

148. In ***Indra Sawhney***, Hon. Justice P.B. Sawant in his order said that *"inequality ill-favours fraternity, and unity remains a dream without fraternity. The goal enumerated in the Preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all." (para 412).*

149. This Court in a judgment reported as ***Subramanian Swamy*** v. ***Union of India, Ministry of Law & Ors.***[66] had the occasion to interpret the term "fraternity" (बंधता ु) as the constitutional value which is to be cultivated by the people themselves as part of their social behavior. It is to be understood in the breed of homogeneity in a positive sense and not to trample dissent and diversity. This Court observed as under:

"153. The term "fraternity" has a significant place in the history of constitutional law. It has, in fact, come into prominence after the French Revolution. The motto of Republican France echoes:"Liberté, égalité, fraternité", or "Liberty, equality, fraternity". The term "fraternity" has an animating effect in the constitutional spectrum. The Preamble states that it is a constitutional duty to promote fraternity assuring the dignity of the individual. Be it stated that fraternity is a Preambulatory promise….

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156. Fraternity as a concept is characteristically different from the other constitutional goals. It, as a constitutional concept, has a keen bond of sorority with other concepts. And hence, it must be understood in the breed of homogeneity in a positive sense and not to trample dissent and diversity. It is neither isolated nor lonely. The idea of fraternity is recognised as a constitutional norm and a precept. It is a constitutional virtue that is required to be sustained and nourished.

157. It is a constitutional value which is to be cultivated by the people themselves as a part of their social behaviour. There are two Schools of Thought; one canvassing individual liberalisation and the other advocating for protection of an individual as a member of the collective. The individual should have all the rights under the Constitution but simultaneously he has the responsibility to live up to the constitutional values like essential brotherhood—the fraternity—that strengthens the societal interest. Fraternity means brotherhood and common interest. Right to censure and criticise does not conflict with the constitutional objective to promote fraternity. Brotherliness does not abrogate and rescind the concept of criticism. In fact, brothers can and should be critical. Fault-finding and disagreement is required even when it leads to an individual disquiet or group disquietude. Enemies Enigmas Oneginese on the part of some does not create a dent in the idea of fraternity but, a significant one, liberty to have a discordant note does not confer a right to defame the others. The dignity of an individual is extremely important.

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161. The concept of fraternity under the Constitution expects every citizen to respect the dignity of the other. Mutual respect is the fulcrum of fraternity that assures dignity. It does not mean that there cannot be dissent or difference or discordance or a different voice. It does not convey that all should join the chorus or sing the same song. Indubitably not. One has a right to freedom of speech and expression. One is also required to maintain the constitutional value which is embedded in the idea of fraternity that assures the dignity of the individual. One is obliged under the Constitution to promote the idea of fraternity. It is a constitutional obligation."

[66] (2016) 7 SCC 221

150. Reference is also made to another three-Judges Bench judgment of this Court in ***Prathvi Raj Chauhan*** v. ***Union of India & Ors.***[67] wherein it is observed that there is a preambular assurance that the republic would be one which guarantees to its people liberty, dignity, equality of status and opportunity and fraternity. It is fraternity, poignantly embedded through the provisions of Part III, which assures true equality, where the State treats all alike, assures the benefits of growth and prosperity to all, with equal liberties to all, and what is more, which guarantees that every citizen treats every other citizen alike. This Court held as under:

"15. ..... That is why the preambular assurance that the republic would be one which guarantees to its people liberties, dignity, equality of *status and opportunity* and *fraternity*.

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17. The making of this provision—and others, in my view, is impelled by the trinity of the preambular vision that the Constitution Makers gave to this country. ..... In my opinion, all the three—Liberty, Equality and Fraternity, are intimately linked. The right to equality, *sans* liberty or fraternity, would be chimerical—as the concept presently known would be reduced to equality among equals, in every manner—a mere husk of the grand vision of the Constitution. Likewise, liberty without equality or fraternity, can well result in the perpetuation of existing inequalities and worse, result in licence to indulge in society's basest practices. It is fraternity, poignantly embedded through the provisions of Part III, which assures true equality, where the State treats all alike, assures the benefits of growth and prosperity to all, with equal liberties to all, and what is more, which guarantees that every citizen treats every other citizen alike.

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34. ..... It is to address problems of a segmented society, that express provisions of the Constitution which give effect to the idea of fraternity, or *bandhutva (*बंधुत्व) referred to in the Preamble, and statutes like the Act, have been framed. These underline the social — rather collective resolve — of ensuring that all humans are treated as humans, that their innate genius is allowed outlets through equal opportunities and each of them is fearless in the pursuit of her or his dreams. The question which each of us has to address, in everyday life, is can the prevailing situation of exclusion based on caste identity be allowed to persist in a democracy which is committed to equality and the rule of law? If so, till when? And, most importantly, what each one of us can do to foster this feeling of fraternity amongst all sections of the community without reducing the concept (of fraternity) to a ritualistic formality, a tacit acknowledgment, of the "otherness" of each one's identity."

151. The impugned Government Order was said to be an anti-thesis of diversity, though based upon misunderstood fraternal behavior when it is asserted that all the school students studying in the State of Karnataka should behave in a fraternal manner, transcend their group identity and develop an orientation towards social justice. It is argued that the Government Order suggests that the ethic of fraternity is best served by complete erasure of all differences. It does not mean 'flattening out of differences', or forced assimilation. Reference was made to a judgment of this Court reported as ***Tehseen S. Poonawalla*** v. ***Union of India & Ors.,***[68] wherein it was held that the aim of our Constitution is unity in diversity and to impede any fissiparous tendencies for enriching the unity amongst Indians by assimilating the diversities. It was also argued that the Government Order uses the words 'unity' and 'uniformity' interchangeably and that uniformity is not a constitutional or statutory mandate, and has no nexus with unity. It is argued that plurality of voices celebrates the

[67] (2020) 4 SCC 727
[68] (2018) 9 SCC 501

constitutionalist idea of a liberal democracy and the same ought not to be suppressed. This Court held as under:

"21. Freedom of speech and expression in different forms is the élan vital of sustenance of all other rights and is the very seed for germinating the growth of democratic views. Plurality of voices celebrates the constitutionalist idea of a liberal democracy and ought not to be suppressed. That is the idea and essence of our nation which cannot be, to borrow a line from Rabindranath Tagore, "broken up into fragments by narrow domestic walls" of caste, creed, race, class or religion. Pluralism and tolerance are essential virtues and constitute the building blocks of a truly free and democratic society. It must be emphatically stated that a dynamic contemporary constitutional democracy imbibes the essential feature of accommodating pluralism in thought and approach so as to preserve cohesiveness and unity. Intolerance arising out of a dogmatic mindset sows the seeds of upheaval and has a chilling effect on freedom of thought and expression. Hence, tolerance has to be fostered and practised and not allowed to be diluted in any manner.

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26. In the obtaining situation, the need to preserve and maintain unity amongst the fellow citizens of our country, who represent different castes, creed and races, follow different religions and use multiple languages, ought to be discussed and accentuated. It is requisite to state that our country must sustain, exalt and celebrate the feeling of solidarity and harmony so that the spirit of oneness is entrenched in the collective character. Sans such harmony and understanding, we may unwittingly pave the path of disaster.

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28. "Unity" in the context of a nation means unity amongst the fellow citizens. It implies integration of the citizens whereby the citizens embrace a feeling of "We" with a sense of bonding with fellow citizens which would definitely go a long way in holding the Indian society together. Emile Durkheim, French sociologist, has said that when unity is based on heterogeneity and diversity, it can very well be described as organic solidarity. Durkheim's view would be acceptable in the context of the Indian society as it exhibits a completely organic social solidarity.

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31. Unity in Diversity must be recognized as the most potent weapon in India's armoury which binds different and varied kinds of people in the solemn thread of humanity. This diversity is the strength of our nation and for realising this strength, it is sine qua non that we sustain it and shun schismatic tendencies. It has to be remembered that the unique feature of "Unity in Diversity" inculcates in the citizens the virtue of respecting the opinions and choices of others. Such respect imbibes the feeling of acceptance of plurality and elevates the idea of tolerance by promoting social cohesion and infusing a sense of fraternity and comity."

152. Reliance is also placed upon the judgments of this Court reported as ***St. Stephen's College***, ***Sri Adi Visheshwara of Kashi Vishwanath Temple,*** and ***State of Karnataka & Anr.*** v. ***Dr. Praveen Bhai Thogadia***[69] wherein the concept of unity in diversity was held to be the Constitutional aim. It was submitted that unity in diversity is the most potent weapon in India's armoury which binds different and varied kinds of people in the solemn thread of humanity. Unity in diversity inculcates in the citizens the virtue of respecting the opinions and choices of others. Such respect imbibes the feeling of acceptance of plurality and elevates the idea of tolerance by promoting social cohesion and infusing a sense of fraternity and comity.

153. Referring to National Education Policy, 2020, it is argued that the schools are spaces of diversity and critical thinking. It is fraternal free thinking public places as the needs and expectations are different. The policy does not mention 'uniform' or 'discipline'. The

[69] (2004) 4 SCC 684

fundamental principles which will guide the Indian Education System as well as individual institutions are as under:

"2. full equity and inclusion as the cornerstone of all educational decisions to ensure that all students are able to thrive in the education system;

Ethics and human & Constitutional values like empathy, respect for others, cleanliness, courtesy, democratic, spirit, spirit of service, respect for public property, scientific temper, liberty, responsibility, pluralism, equality, and justice;

6.12. Students will be sensitized through this new school culture, brought in by teachers, trained social workers and counsellors as well as through corresponding changes to bring in an inclusive school curriculum. The school curriculum will include, early on, material on human values such as respect for all persons, empathy, tolerance, human rights, gender, equality, non-violence, global citizenship, inclusion, and equity. It would also include more detailed knowledge of various cultures, religions, languages, gender identities, etc. to sensitize and develop respect for diversity. Any biases and stereotypes in school curriculum will be removed and more material will be included that is relevant and relatable to all communities.

3.4. Once infrastructure and participation are in place, ensuring quality will be the key in retention of students, so that they (particularly, girls and students from other socio-economically disadvantaged groups) do not lose interest in attending school. This will require a system of incentives for deploying teachers with knowledge of the local language to areas with high dropout rates, as well as overhauling the curriculum to make it more engaging and useful."

154. In ***K.S. Puttaswamy***, the distinction between private and public spaces was drawn and it was stated that both must be free to the extent that there should be freedom to think, without any direct or indirect pressures on thought and belief. Thus, the schools must give students the privacy and the freedom to think about their choices. Therefore, the Government Order creates an arbitrary barrier to education and to fraternal spaces.

155. Not disputing with the above observations, it is important to interpret the expressions 'fraternity' and 'dignity' in view of the objective behind the Government Order. The concept of fraternity and dignity do not stand alone but have to be inferred from the context, circumstances and the purpose sought to be achieved. There is no dispute, as asserted in the written submissions, that the purpose of introducing fraternity as a constitutional value is to invoke horizontal or social sensitivity towards inequalities, in addition to the vertical, or top-down political prescriptions towards inequalities. Fraternity is in fact social sensitivity. The students herein are in the age group of 15 to 18 years. The seed of education should germinate equally amongst all students. Therefore, the Preambular goal of justice, liberty, equality or fraternity would be better served by removing any religious differences, inequalities and treating students alike before they attain the age of adulthood.

156. The students have been given a uniform platform to grow and take quantum leap in their further pursuits. The homogeneity amongst the students in the matter of uniform would prepare them to grow without any distinction on the basis of religious symbols, if not worn during the classroom studies in a Pre-University College.

157. Still further, the Hindi word of fraternity is "बंधत्व " that is brotherhood. Brotherhood is amongst all the citizens of the Country and not of a particular community. Fraternity is the antithesis of a segmented society wherein all humans are treated equally and their innate genius is allowed an outlet by exposing them to equal opportunities.

158. The argument is that the appellants seek equal access to public education where they would have the opportunity to fraternize across religious, class and gender boundaries, an opportunity which would not be available to them if they were to transfer to religious schools.

Hence, the Government Order has created an arbitrary barrier to education and to fraternal spaces.

159. I do not find any merit in the argument raised. Fraternity is a noble goal but cannot be seen from the prism of one community alone. It is a goal for all citizens of the country irrespective of caste, creed, sex and religion. The abstract idea of fraternity, as discussed in the judgments referred to by learned counsel for the appellants, has to be applied to the ground realities wherein some students wearing headscarf in a secular school run by the State Government would stand out and overtly appear differently. The concept of fraternity will stand fragmented as the apparent distinction of some of the students wearing headscarf would not form a homogenous group of students in a school where education is to be imparted homogeneously and equally, irrespective of any religious identification mark. The Constitutional goal of fraternity would be defeated if the students are permitted to carry their apparent religious symbols with them to the classroom. None of the judgments referred to by the learned counsel for the appellants deal with an issue of fraternity in respect of a section of the citizens who wish to carry their religious symbols to a classroom. The Constitutional goal as emanating from the Preamble would not be achieved if fraternity is given a narrow meaning in respect of the students identifying themselves with the religious symbols in the classroom.

160. I do not find any merit in the argument raised that the use of the phrase "behave in a fraternal manner by transcending their group identity as the young students" in the impugned Order can be said to be violative of any law. Before a student goes for higher studies in colleges, she should not grow with a specific identity, but under the umbrella of equality guaranteed under Article 14 transcending the group identity. Religion, which is a private affair, has no meaning in a secular school run by the State. The students are free to profess their religion and carry out their religious activities other than when they are attending a classroom where religious identities should be left behind.

161. Accordingly, I do not find that the Government Order impinges on the Constitutional promise of fraternity and dignity. Instead, it promotes an equal environment where such fraternal values can be imbibed and nurtured without any hindrance of any kind.

162. Though, it is argued that wearing of a piece of cloth on the head does not violate or contravene the uniform prescribed. The dictionary meaning of word 'Uniform' is as under:

- **Blacks Law Dictionary** (Uniform, *Adjective*)

Conforming to one rule, mode, or unvarying standard; not different at different times or places; application to all places or divisions of a country.

- **Cambridge English Dictionary** (Uniform, *noun*) A particular set of clothes that has to be worn by the members of the same organization or group of people. A type of clothes that is connected with a particular group of people.

- **Merriam Webster Dictionary**

(Uniform, *noun*) Dress of a distinctive design or fashion worn by members of a particular group and serving as a means of identification.

(*Adjective*) Having always the same form, manner or degree: not varying or variable. Of the same form with others- conforming to one rule or more. Presenting an unvaried appearance of surface, pattern or color. (eg.- uniform procedures, uniform red brick houses)

163. The issue as to whether a person professing Islam can support a beard as a member of the Indian Air Force came up for consideration before the Single Bench of the Punjab and Haryana High Court in ***No. 786505-N Leading Aircraftsman Ansari Aaftab Ahmed*** v.

Union of India & Ors. [70]. The Single Bench referred to the principles of Islam by Maulana Wahiduddin Khan from his book "Islam the Voice of Human Nature" and the rules applicable to the airmen to hold that growing of beard violates the norms of uniform. Accordingly, the writ petitions were dismissed. An intra-court appeal was also dismissed[71]. The matter came up for hearing before this Court in a judgment reported as ***Mohammed Zubair Corporal No. 781467-G*** v. ***Union of India & Ors.***[72]. This Court dismissed the appeal finding no reason to take a view of the matter at variance with the view taken by the High Court. It was noticed that there are varying interpretations, one of which is that it is desirable to maintain a beard. Therefore, in respect of an airman employed by the Indian Air Force, beard was not found permissible in terms of the Rules framed.

164. The uniform prescribed would lose its meaning if the student is permitted to add or subtract any part of uniform. The schools are nurseries for training the citizen for future endeavours. If, the norms of the uniform in the school are permitted to be breached, then what kind of discipline is sought to imparted to the students. The freedom of expression guaranteed under Article 19(1)(a) does not extend to the wearing of headscarf. Once the uniform is prescribed, all students are bound to follow the uniform so prescribed. The uniform is to assimilate the students without any distinction of rich or poor, irrespective of caste, creed or faith and for the harmonious development of the mental and physical faculties of the students and to cultivate a secular outlook. The wearing of hijab is not permitted only during the school time, therefore, the students can wear it everywhere else except in schools. The wearing of anything other than the uniform is not expected in schools run by the State as a secular institution. In a secular school maintained at the cost of the State, the State is competent to not permit anything other than the uniform.

165. The argument that the wearing of a headscarf provides dignity to the girl students is also not tenable. The students are attending an all-girls' college. The students are at liberty to carry their religious symbols outside the schools but in pre-university college, the students should look alike, feel alike, think alike and study together in a cohesive cordial atmosphere. That is the objective behind a uniform, so as to bring about uniformity in appearances.

Question (vii)- *Whether, if the wearing of hijab is considered as an essential religious practice, the student can seek right to wear headscarf to a secular school as a matter of right?*

166. The argument is that hijab is an additional cloth worn on the head, and that it does not cause any harm to any other person. The argument is based upon Conscience & Religion (Article 25), Culture (Articles 29 and 51-A(f)), Identity (Articles 19 and 21 - Autonomy, Dignity, Choice) and Secularism (Articles 19 and 21 - Autonomy, Dignity, Choice), therefore, the students have been wrongly denied admission to an educational institution on the basis of religion. The contention of the students is that by denying the right to wear headscarf, they have also been denied to attend the classes which stand foul with the mandate of clause (2) of Article 29.

167. I do not find any merit in the said argument. The schools run by the State are open for admission irrespective of any religion, race, caste, language or any of them. Even the Act mandates that the students would be admitted without any restriction on such grounds. However, the students are required to follow the discipline of the school in the matter of

[70] L.I.C. 4004 (CWP No. 14927 of 2005 decided on 14.7.2008)
[71] LPA No. 196 of 2008 decided on 31.7.2008
[72] (2017) 2 SCC 115

uniform. They have no right to be in the school in violation of the mandate of the uniform prescribed under the Statute and the Rules.

168. In ***M. Ajmal Khan*** v. ***The Election Commission of India, rep. by its Chief Election Commissioner, New Delhi-I & Ors.***[73]**,** the challenge was to the Elector Roll with photographs particularly of Muslim Gosha Women in the eligible voters' list. The argument was that wearing of purdah by Muslim women is one of the principles laid down in Holy Quran and it has to be strictly followed by Muslim women. Therefore, any interference with such religious practice would amount to interfering with the fundamental right of the Muslim women, which is guaranteed under Article 25 of the Constitution of India. The Madras High Court dismissed such writ petition holding that such direction of the Election Commission is not violative of Article 25 of the Constitution. It was held that "the decision of the Election Commission of putting the photographs in the electoral roll was taken with a view to improving the fidelity of the electoral rolls and to check impersonation and eradicate bogus voting. Hence, the argument of the learned counsel that the decision violates the right to privacy is required to be rejected". The said judgment though is in the context of elections but the ratio thereof is applicable to the present matters, the education to a school by the State is constitutional mandate to be carried out in a nondiscriminatory manner irrespective of caste, sex and religion.

169. The State has not denied admission to the students from attending classes. If they choose not to attend classes due to the uniform that has been prescribed, it is a voluntary act of such students and cannot be said to be in violation of Article 29 by the State. It is not a denial of rights by the State but instead a voluntary act of the students. It would thus not amount to denial of right to education if a student, by choice, does not attend the school. A student, thus, cannot claim the right to wear a headscarf to a secular school as a matter of right.

Question (viii)- *Whether a student-citizen in the constitutional scheme is expected to* ***surrender her fundamental rights*** *under Articles 19, 21 and 25 as a pre-condition for accessing education in a State institution?*

170. Mr. Shoeb Alam argued that in the Constitutional scheme, there cannot be any barter of fundamental rights for the enjoyment of a privilege or a right. It is argued that the State cannot attach a condition of barter for the grant of access to school/education available to a student under Article 21 and, in return, ask for a girl child to cede her right to wear the hijab inside the school, which is her fundamental right to privacy, dignity and autonomy. Reliance was placed upon a judgment of this Court reported as ***Re the Kerala Education Bill, 1957 - Reference under Article 143(1) of the Constitution of India***[74] dealing with the issue of Kerala Education Bill. The provision authorized the State to take over the management of the educational institution as a pre-condition for recognition and aid to the educational institution. This Court said to the following effect:

"31. … Therefore, the conditions imposed by the said Bill on aided institutions established and administered by minority communities, like the Christians, including the Anglo-Indian community, will lead to the closing down of all these aided schools unless they are agreeable to surrender their fundamental right of management. No educational institution can in actual practice be carried on without aid from the State and if they will not get it unless they surrender their rights they will, by compulsion of financial necessities, be compelled to give up their rights under Article 30(1). The legislative powers conferred on the legislature of the States by Articles 245 and 246 are subject to the other provisions of the Constitution and certainly to the provisions of Part III which confers

[73] 2006 SCC OnLine Mad 794 : (2006) 5 CTC 121
[74] AIR 1958 SC 956 : 1959 SCR 995

fundamental rights which are, therefore, binding on the State Legislature. The State Legislature cannot, it is clear, disregard or override those provisions merely by employing indirect methods of achieving exactly the same result. Even the legislature cannot do indirectly what it certainly cannot do directly…"

171. In ***Nar Singh Pal*** v. ***Union of India & Ors.***[75], it was held that the casual labor does not mean that he had surrendered all his constitutional rights in favour of the respondents. It was thus submitted that fundamental rights under the Constitution cannot be bartered. They cannot be compromised, nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution.

172. Reliance was also placed upon nine-Judges Bench judgment in ***Ahmedabad St. Xavier's College Society*** wherein the said Act was declared as unconstitutional which warranted educational institutions to surrender their management to the State in order to get affiliation. This Court held that in this situation, the condition which involves surrender is as effective a deterrent to the exercise of the right under Article 30(1) as a direct prohibition would be. Thus considered, it is apparent that the religious minority does not voluntarily waive its right — it has been coerced because of the basic importance of the privilege involved, namely, affiliation. This Court held as under:

"161. It is doubtful whether the fundamental right under Article 30(1) can be bartered away or surrendered by any voluntary act or that it can be waived. The reason is that the fundamental right is vested in a plurality of persons as a unit or if we may say so, in a community of persons necessarily fluctuating. Can the present members of a minority community barter away or surrender the right under the article so as to bind its future members as a unit? The fundamental right is for the living generation. By a voluntary act of affiliation of an educational institution established and administered by a religious minority the past members of the community cannot surrender the right of the future members of that community. The future members of the community do not derive the right under Article 30(1) by succession or inheritance."

173. The view of Hon'ble Justice D.Y. Chandrachud in ***K.S. Puttaswamy*** was referred where 'decisional autonomy' has been discussed to comprehend intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress. It was held as under:

"248. Privacy has distinct connotations including (*i*) spatial control; (*ii*) decisional autonomy; and (*iii*) informational control. [Bhairav Acharya, "The Four Parts of Privacy in India", *Economic & Political Weekly* (2015), Vol. 50 Issue 22, at p. 32.] Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress…

xxx xxx xxx

297. …Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture."

174. Furthermore, Hon'ble Justice Chelameswar in ***K.S. Puttaswamy*** held as under:

[75] (2000) 3 SCC 588

"372. … Insofar as religious beliefs are concerned, a good deal of the misery our species suffer owes its existence to and centres around competing claims of the right to propagate religion. Constitution of India protects the liberty of all subjects guaranteeing the freedom of conscience and right to freely profess, practise and propagate religion. While the right to freely "profess, practise and propagate religion" may be a facet of free speech guaranteed under Article 19(1)(*a*), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty…

373. … The choice of appearance and apparel are also aspects of the right to privacy. The freedom of certain groups of subjects to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right to privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling under Article 25…"

175. I do not find that the Government Order takes away any right of a student available to her under Article 21 of the Constitution, or that it contemplates any barter of fundamental rights. The right to education under Article 21 continues to be available but it is the choice of the student to avail such right or not. The student is not expected to put a condition, that unless she is permitted to come to a secular school wearing a headscarf, she would not attend the school. The decision is of the student and not of school when the student opts not to adhere to the uniform rules.

Question (ix)- *Whether in the constitutional scheme, the State is obligated to ensure '**reasonable accommodation**' to its citizens?*

176. The argument is that the school should reasonably accommodate the students for wearing headscarf as it does not interfere with any of the rights of the fellow students.

177. Learned counsel for the appellants have referred to the judgments of this Court reported as ***Jeeja Ghosh & Anr.*** v. ***Union of India & Ors.***[76], ***Vikash Kumar*** v. ***Union Public Service Commission & Ors.***[77] and ***Ravinder Kumar Dhariwal & Anr.*** v. ***Union of India & Ors.*** [78]

178. This Court in ***Ravinder Kumar Dhariwal*** held that the reasonable accommodation principle is a component of the right of equality and the right against discrimination. The concept of reasonable accommodation arose in the context of accommodating a differently abled candidate, a member of the Central Railway Police Force to provide him an alternative suitable post.

179. In ***Jeeja Ghosh***, this Court was considering the rights of a differently-abled person in using the facility of a flight. This Court found that Civil Aviation Requirements issued by Directorate General of Civil Aviation that no airline shall refuse to carry persons with disability or persons with reduced mobility and their assistive aids/devices, escorts and guide dogs including their presence in the cabin should be made available to the passengers at the time of check-in. There was a violation of such directive by the airline when this Court held that equality not only implies preventing discrimination, but goes beyond in remedying discrimination in the society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation. This Court held as under:

"40. … In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation..."

180. In ***Vikash Kumar***, this Court held as under:

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[76] (2016) 7 SCC 761
[77] (2021) 5 SCC 370
[78] 2021 SCC OnLine SC 1293

"62. … if disability as a social construct has to be remedied, conditions have to be affirmatively created for facilitating the development of the disabled. Reasonable accommodation is founded in the norm of inclusion. Exclusion results in the negation of individual dignity and worth or they can choose the route of reasonable accommodation, where each individuals' dignity and worth is respected…"

181. The argument of the appellants is however that they are seeking reasonable accommodation by the school authorities to permit them to attend school wearing matching headscarf/hijab in addition to the prescribed uniform which would be in conformity with the fundamental rights guaranteed under Article 25 and 21 of the Constitution.

182. The concept of reasonable accommodation came to be introduced in respect of a special child or person. In ***Bijoe Emmanuel***, it has been held that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the Constitution. In the aforesaid case, students, believer of Jehovah, expressed their inability to sing National Anthem though they were extending all respect when the National Anthem was to be played. In the case of the appellants, democracy is not in test but the question is whether the school, having prescribed the uniform, has a right to insist that all students wear the same uniform so as not to have inequality or disparity in the matter of wearing of uniform. Rule 11 in fact shows that any change in uniform can be affected only after serving notice to the parents and once uniform is prescribed, it cannot be changed in five years, meaning thereby that there is a continuity of the uniform and the period for which uniform is prescribed is to be followed.

183. The argument that the Kendriya Vidyalaya across the country permit wearing of headscarf/hijab for Muslim girls, therefore, the same should be followed in the State as well. Kendriya Vidyalaya is an autonomous body under the Ministry of Education, Government of India. The purpose of the same is to meet the educational needs of children of transferable Central Government employees, including Defence and Para-military personnel by providing a common programme of education. The two institutions, one under the State and other under the Central Government have independent organisations and scope of work. It may be that some State may permit headscarf and others do not. It is a decision taken by the State which cannot be said to be arbitrary on that ground alone.

184. The parties have referred to some foreign judgments in support of their respective arguments including judgments on the question of reasonable accommodation. Ours is a unique country having people from different faiths and religions professing different practices. Therefore, the judgments of other countries having different social structure and polity would not provide a reasonable basis to determine the question of religious practices in such a wide and varied country like ours.

185. Thus, though the principle of reasonable accommodation has been adopted by the Courts in our country, such contention does not arise in the present case. Constitutional goals such as secularism, fraternity, dignity mean equality for all, preference to none. The accommodation sought is contrary to spirit of Article 14 as it would result in different treatment of students in secular schools who may be following varied religions beliefs.

Question (x)- *Whether the Government Order is contrary to the legitimate State interest of promoting literacy and education as mandated under Articles 21, 21A, 39(f), 41, 46 and 51A of the Constitution?*

186. It has been argued that the Government Order is contrary to the legitimate State interest of promoting literacy and education as mandated under Articles 21 and 21A as well

as the directive principles contained in Articles 39(f), 41, 46 and fundamental duties as mentioned in Article 51A. It was said to have the effect of restricting education for women.

187. It is also submitted that the Government Order is not in the 'best interest of the child', especially the child's identity, social wellbeing and physical, emotional and intellectual development in terms of Section 2(9) of the Juvenile Justice (Care and Protection of Children) Act, 2015.

188. Reference is also made to the Commission of Protection of Child Rights Act, 2005 enacted in view of the international treaty, Convention on the Rights of the Child, acceded by India on 11.12.1992. The Act was enacted to give effect to the policies adopted by the Government in this regard and the standards prescribed in the Convention. As per Article 1 of the Convention, child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. Article 14 of the Convention states that the State Parties shall respect the right of children to freedom of thought, conscience and religion and that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. It is thus contended that in terms of the Convention to which India is a signatory, the child has a freedom of thought, conscience and religion and to manifest one's religion or belief, subject only to the limitations prescribed thereunder. Therefore, the restriction to use headscarf violates not only the fundamental rights guaranteed under the Constitution but also the International Convention.

189. The Commission of Protection of Child Rights Act, 2005, enacted in pursuance of Convention on the Rights of Child, has been referred to contemplate that the right of freedom of thought, conscience and religion are to be subservient to the rights provided under the Constitution of India. However, such rights cannot be larger than the rights available to the citizens under the Constitution. Therefore, freedom of religion in the Convention or the Act are not independent rights but have to be read along with the Constitutional provisions.

190. The pre-university college is open to all students of all castes and religions. The doors of such institutions are not closed to any student of any community. The object of the State is to provide an opportunity for the students to study in the secular schools. It is for the students to avail such a facility. If a particular student feels that she cannot compromise with the wearing of headscarf or of any other student to wear any outwardly religious symbol, the school would be justified not to allow such student, in the larger interest of treating all the students alike as a part of mandate of Article 14, which is central to the theme of Part III of the Constitution. The headscarf is not permitted in the school for the students who are studying in Class 10+1 or 10+2. The students have many years ahead of them where they can carry on their religious faith but the Government Order mandating wearing of uniform cannot be faulted with since the object is in tune with the principles of the Constitution.

191. The judgment of this Court reported as ***Society for Unaided Private Schools of Rajasthan*** v. ***Union of India & Anr.***[79] held that the right of education has been read into right to life in Article 21. The argument is that a child who is denied right to access education is not only deprived of his right to live with dignity, he is also deprived of his right to freedom of speech and expression enshrined in Article 19(1)(*a*) of the Constitution. The right to education is thus a part of Article 21. The State has not put any restriction to avail such right of education. The right of education is available to every student. The State has only regulated the right in a manner that students come to the school to attend classes only in the prescribed uniform, and the same has been done to achieve the statutory and

[79] (2012) 6 SCC 1

constitutional goals. The students cannot assert that they have a right to education but they would avail such right as per their own wish and in the manner which they consider appropriate. Schools are to prepare the students for their future endeavors in life. Discipline is one of the attributes which the students learn in schools. Defiance to rules of the school would in fact be antithesis of discipline which cannot be accepted from the students who are yet to attain adulthood. Therefore, they should grow in an atmosphere of brotherhood and fraternity and not in the environment of rebel or defiance. The argument that the school is insisting on surrendering or curtailing the right to wear a headscarf as a precondition to access the education is not tenable as the right to education is available but only condition is that the students should attend the classes in prescribed uniform.

192. The Government Order cannot be said to be contrary to the legitimate State goal of promoting literacy and education. Article 21A is not applicable as all the students are over 14 years of age. The students have a right to education under Article 21, but not of insisting on wearing something additional to the uniform, in a secular school, as a part of their religion.

193. In fact, the Act itself contemplates providing of opportunities and facilities in a healthy manner and maintaining the dignity of childhood and youth so that there is no moral or material abandonment. The uniform for the students has been prescribed so that there is no distinction between the students coming from diverse background and that each student grows in an environment of equality, fairness and equal opportunities. The uniform is an equalizer of inequalities. Therefore, prescribing uniform for children at an impressionable age is not only important but has a salutary effect on the mental development of the child to grow in the environment of oneness. The said object is in tune with Article 39(f) of the Constitution of India which reads as thus:

"39(*f*) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

194. Hence, the Government Order cannot be said to be contrary to the State goal of promoting literacy and education as mandated under the Constitution. The Government Order only ensures that the uniform prescribed is adhered to by the students and it cannot be said that State is restricting the access to education to the girl students through such an Order.

Question (xi)- *Whether the Government Order neither achieves any equitable access to education, nor serves the ethic of secularism, nor is true to the objective of the Karnataka Education Act?*

195. The argument is that the State is under a positive obligation to create an environment conducive for the exercise of fundamental rights. Conversely, it means that the subjects have no responsibility to create a conducive environment in a nondiscriminatory manner. If the students of one faith insist on a particular dress, there is no stopping for the others to carry their faiths and beliefs to the schools. It would not be conducive to the pious atmosphere of the school where the students seek admission for education. In fact, uniform fosters a sense of 'equality' amongst students- instills a sense of oneness, diminishes individual differences, helps focus on learning as students would not be bothered about their social status, improves discipline, fewer conflicts in school, promotes school spirit- generates a sense of belonging, pride, loyalty towards the school, relieves economic pressure on the parents, ensures equality before the educational institution, serves the need of a diverse community and promotes a positive sense of communal identity and does not lead to the growth of disparities of wealth and style. School is the time to learn and lay foundation for

the future pursuits in life. The students are expected to maintain discipline and the school is responsible to lay a strong foundation so as to nurture the students as responsible citizens of the country.

196. In ***Indibly Creative Private Ltd. & Ors.*** v. ***Government of West Bengal & Ors.***[80], the release of a movie in the State of West Bengal was not permitted on account of threatened breach of peace. It was in these circumstances, this Court held that the State is duty-bound to ensure the prevalence of conditions in which the constitutional freedoms can be exercised. This Court held as under:

"50. The freedoms which are guaranteed by Article 19 are universal. Article 19(1) stipulates that all citizens shall have the freedoms which it recognises. Political freedoms impose a restraining influence on the State by carving out an area in which the State shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the State. But, apart from imposing "negative" restraints on the State these freedoms impose a positive mandate as well. In its capacity as a public authority enforcing the rule of law, the State must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the State cannot look askance when organised interests threaten the existence of freedom. The State is duty-bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the State must be utilised to effectuate the exercise of freedom. When organised interests threaten the properties of theatre owners or the viewing audience with reprisals, it is the plain duty of the State to ensure that speech is not silenced by the fear of the mob. Unless we were to read a positive obligation on the State to create and maintain conditions in which the freedoms guaranteed by the Constitution can be exercised, there is a real danger that art and literature would become victims of intolerance. In the present case, we are of the view that there has been an unconstitutional attempt to invade the fundamental rights of the producers, the actors and the audience. Worse still, by making an example out of them, there has been an attempt to silence criticism and critique. Others who embark upon a similar venture would be subject to the chilling effect of "similar misadventures". This cannot be countenanced in a free society. Freedom is not a supplicant to power."

197. As discussed above, secularism is applicable to all citizens, therefore, permitting one religious community to wear their religious symbols would be antithesis to secularism. Thus, the Government Order cannot be said to be against the ethic of secularism or to the objective of the Karnataka Education Act, 1983.

198. In view of the discussions above, I dismiss all appeals and the writ petitions, though on different grounds than what prevailed before the High Court. No Costs.

[80] (2020) 12 SCC 436

Sudhanshu Dhulia, J

1. In the long hearing of this case, which went on for several days, I had the privilege of listening to the erudite submissions of learned counsels from both sides. On behalf of the Petitioners we have heard, Mr. Kapil Sibal, Mr. Rajeev Dhawan, Mr. Dushyant Dave, Mr. Salman Khurshid, Mr. Colin Gonsalves, Mr. Yusuf Hatim Muchhala, Mr. Huzefa Ahmadi, Ms. Meenakshi Arora, Mr. Aditya Sondhi, Mr. Sanjay R. Hegde, Mr. Devadatt Kamat, Ms. Jayna Kothari, Mr. A.M. Dar learned Senior Advocates and Mr. Prashant Bhushan, Mr. Shoeb Alam, Mr. Nizam Pasha, Ms. Kirti Singh and Mr. Thulasi K. Raj learned Advocates. The arguments on behalf of the State were made by Mr. Tushar Mehta, Solicitor General of India, Mr. K.M. Nataraj, Additional Solicitor General of India and Mr. Prabhuling Navadgi, Advocate General for Karnataka learned Senior Advocates. Mr. R. Venkatramani, Ms. V. Mohana and Mr. Dama Seshadri Naidu, learned Senior Advocates have appeared on behalf of the teachers.

2. I had the advantage of going through the Judgement of Justice Hemant Gupta. Justice Gupta has recorded each argument which was raised at the Bar before us in the long hearing of the case and he has given his findings on each of the issues. It is a very well composed Judgement. I am, however, unable to agree with the decision of Justice Gupta. I am therefore giving a separate opinion, on this important matter.

3. While I do so, I am conscious that as far as possible,a Constitutional Court must speak in one voice. Split verdicts and discordant notes do not resolve a dispute. Finality is not reached. But then to borrow the words of Lord Atkin (which he said though in an entirely different context), "…finality is a good thing, but Justice is better."[81]

4. The Judgement impugned before this Court waspronounced by the Karnataka High Court on March 15, 2022. This was challenged before this Court in several SLP's. Apart from the SLP we also had before us two Writ Petitions filed under Article 32 of the Constitution of India. The Karnataka High Court was dealing with 7 Petitions where the lead matter was W.P. (C) No. 2347 of 2022. All the same while we deal with the facts of the present case, we would be referring to Aishat Shifa who was there in Special Leave Petition (Civil) 5236 of 2022, and was one of the two Petitioners before the Karnataka High Court, in Writ Petition (Civil) No. 2880 of 2022. We have heard this as the lead matter. On 22.09.2022 leave was granted by this Court, and Judgement was reserved.

5. In the district of Udupi in Karnataka there is a smalltown called Kundapura. Aishat Shifa and Tehrina Begum were the two second year students of Government PreUniversity College in Kundapura. They both follow Islam religion and wear hijab. According to them they have been wearing hijab, inside their classrooms, ever since they joined the college, more than a year back. They say that in the past they had never faced any objection from anyone, including the college administration and their wearing of hijab inside their classroom was never an issue.

6. On February 3, 2022, these two girl students werestopped at the gate of their college. They were told that they will have to take off their hijab before entering the college. Since they refused to take off their hijab, they were denied entry in the college, by the college administration.

[81] Ras Behari Lal and Others vs. The King-Emperor in AIR 1933 PC 208

7. The next day that is February 4, 2022, both made arepresentation before the Deputy Commissioner Udupi, praying that direction be given to the college authorities to let them enter their college and complete their studies. No effective orders were passed by the Deputy Commissioner, but instead the Government came up with an Order on February 5, 2022. This G.O has a Preamble, which refers to the Karnataka Education Act, 1983 and the Rules framed therein, from where it draws its powers and then cites three Judgments of different High Courts to conclude that prohibiting hijab does not amount to a violation of Article 25 of the Constitution. It then mandates that the Government schools must have a school uniform and the colleges which come under the jurisdiction of the Pre-University Education Department the uniform which is prescribed by the College Development Committees (in Government colleges), and Board of Management (in private schools), should be worn. There was, however, a caveat, which said that in the event the Board of Management did not mandate any uniform then students should wear clothes that are "in the interest of unity, equality and public order."

8. Since the entire G.O. has been reproduced by JusticeHemant Gupta in his Judgement I need not reproduce the entire G.O., but the relevant portion of the G.O are as under:

"In the backdrop of the issues highlighted in the proposal, using the powers granted by the Karnataka Education Act Section 133 (2), all the government schools in the state are mandated to abide by the official uniform. Private schools should mandate a uniform decided upon by their board of management.

In colleges that come under the preuniversity education department's jurisdiction the uniforms mandated by the College Development Committee, or the board of management, should be worn. In the event that the management does [sic does not] mandate a uniform, students should wear clothes that are in the interests of unity, equality and public order.

By the Orders of the Governor of Karnataka"

9. Since hijab was not made a part of the 'uniform,' and wearing it was not 'in the interest of unity, equality and public order,' as the G.O. mandated, the Petitioners were denied entry in their school. This Court has been informed at the Bar, that similar restriction was imposed on other school going girls in different parts in Karnataka.

10. The two girls, who were the students were thenconstrained to file Writ Petitions before the Karnataka High Court. Initially the case went before a learned Single Judge of the High Court, who in turn, considering the importance of the matter, referred it to the Chief Justice for constituting a larger bench. A three-judge bench was constituted by the Chief justice, which has heard the matter at length and then passed its orders on March 15, 2022, dismissing the Writ Petitions, an order which is presently impugned before this Court.

11. Before the Karnataka High Court as well as beforethis Court the main argument of the Petitioners was that the G.O. dated February 5, 2022, and the restrictions imposed by the school authorities in not permitting the Petitioners to wear hijab inside their classrooms amounts to a violation of their Fundamental Rights given to them under Article 19(1)(a) and Article 25(1) of the Constitution of India as well as under Articles 14 and 21 of the Constitution. Some of the Petitioners also raised a claim that wearing of hijab is a part of their Essential Religious Practice. The argument of the State on the other hand would be that the G.O only directs the school authorities of respective schools to prescribe a school uniform. It is an innocuous order, which is religion neutral. As to the argument on Fundamental Rights, the reply was that Fundamental Rights are not absolute and they are

always subject to reasonable restrictions. Prohibiting hijab inside a classroom is a reasonable restriction. Wearing of hijab was also said to be not an Essential Religious Practice.

12. The Karnataka High Court had formulated fourquestions for its consideration. These questions are as follows:

a) Whether wearing hijab/headscarf is a part of Essential Religious practice in Islamic Faith protected under Article 25 of the Constitution.

b) Whether prescription of school uniform is not legally permissible, as being violative of petitioners' Fundamental Rights inter-alia guaranteed under Article 19(1)(a), (i.e., freedom of expression) and 21 (i.e., privacy) of the Constitution.

c) Whether the Government Order dated 05.02.2022 apart from being incompetent is issued without application of mind and further is manifestly arbitrary and therefore violates Article 14 and 15 of the Constitution?

d) Whether any case is made out in Writ Petition Number 2146 of 2022 for issuance of a direction for initiating disciplinary enquiry against Respondent No. 6 to 14 and for issuance of a Writ of Quo Warranto against Respondent No. 15 and 16?

13. As far as the first question is concerned the HighCourt has given a finding that wearing of hijab by Muslim women does not form a part of Essential Religious Practice in Islamic faith. On the second question it was held that prescription of school uniform places only a reasonable restriction which is Constitutionally permissible and cannot be objected by the students. As regards the third, i.e., the G.O of 5 February 2022 it was again held that the Government has powers to issue such an order and no case is made out for its invalidation. The fourth point was also given in the negative.

14. One of the grounds raised by the Petitioners intheir challenge to the validity of the G.O. dated February 5, 2022 is that it is merely an Executive Order. But it has far reaching consequences as far as curtailment of Fundamental Rights of the Petitioner are concerned given to her under Article 19(1)(a) and 25(1) of the Constitution. It was submitted that the settled position of law is that restrictions on Fundamental Rights can only be imposed by a statutory law and not by executive order. The decision of this Court in **Kharak Singh** v**. State of Uttar Pradesh**[82] was relied upon. This submission, however, is not correct and therefore declined. The reasons being, that under Section 133[83] of the Karnataka Education Act, 1983

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[82] (1964) 1 SCR 332

[83] *'133. **Powers of Government to give directions**-(1) The State Government may, subject to the other provisions of this Act, by order, direct the Commissioner of Public Instruction or the Director or any other officer not below the rank of the District Educational Officer to make an enquiry or to take appropriate proceedings under this Act in respect of any matter specified in the said order and the Director or the other officer, as the case may be, shall report to the State Government in due course the result of the enquiry made or the proceedings taken by him.*

(2) The State Government may give such directions to any educational institution or tutorial institution as in its opinion are necessary or expedient for carrying out the purposes of this Act or to give effect to any of the provisions contained therein or of any rules or orders made thereunder and the Governing Council or the owner, as the case may be, of such institution shall comply with every such direction.

(3) The State Government may also give such directions to the officers or authorities under its control as in its opinion are necessary or expedient for carrying out the purposes of this Act, and it shall be the duty of such officer or authority to comply with such direction"

the Government has powers to give directions. Section 145 of the 1983 Act gives the State Government powers to make Rules, which have been made and are called the Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula Etc.,) Rules, 1995. Rule 11(1),[84]of the above Rules' states that the recognized educational institutions can prescribe uniform. Therefore, the State Government in any case has powers to prescribe a uniform/dress code. Therefore, the submissions that the G.O is not a valid law is not correct. The G.O draws its source from the statue and the statutory rules. Therefore, it has the force of law. Nevertheless, the fact remains that it still has to pass muster the provisions of Articles 19 and 25 of the Constitution.

15. Out of the four questions formulated by theKarnataka High Court the first question is in fact the crucial one. Everything depended on the determination on this question. But then the Court had set a very tall order for the Petitioners to prove their case. The Petitioners had to prove that wearing of hijab forms a core belief in the religion of Islam. ERP also meant that such a practice should be fundamental to follow as a religious belief or practice as ERP was held to be the foundation, on which the superstructure of the religion was erected. Essential Religious Practice would mean a practice without which religion would not remain the same religion. Also, the Petitioners had to prove that the practice of wearing hijab is a practice which is being followed since the very beginning of their religion. This was the task set up for the Petitioners to prove their case. But this was not enough, this was only the threshold requirement. The Petitioners also had to prove that the ERP does not militate against any of the Constitutional values. This perhaps was right, because an ERP which is an invasion on the Fundamental Rights of others will not be given the protection. The Court held as follows[85]:

"…There is absolutely no material placed on record to prima facie show that wearing of hijab is a part of an essential religious practise in Islam and that the Petitioners have been wearing hijab from the beginning. This apart, it can hardly be argued that hijab being a matter of attire, can be justifiably treated as fundamental to Islamic faith. It is not that if the alleged practise 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. Petitioners have miserably failed to meet the threshold requirement of pleadings and proof as to wearing hijab is an inviolable religious practice in Islam and much less a part of 'essential religious practice'…"

As the Petitioners did not meet the threshold requirement, the High Court did not feel it necessary to touch on the aspect of Constitutional Values. Therefore, they stated that :-

"It hardly needs to be stated that if Essential Religious Practice as a threshold requirement is not satisfied then the case would by extension not travel to the merits surrounding the domain of those Constitutional Values."

16. The Judgement then upholds the validity of theG.O dated February 5, 2022 and holds that the authorities have power to prescribe uniform in schools.

17. In my opinion, the question of Essential ReligiousPractices, which we have also referred in this judgement as ERP, was not at all relevant in the determination of the dispute before the Court. I say this because when protection is sought under Article 25(1) of the Constitution of India, as is being done in the present case, it is not required for an individual

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[84] *'11. **Provision of Uniform, Clothing, Text Books etc.,** (1) Every recognised education institution may specify its own set of Uniform. Such uniform once specified shall not be changed within the period of next five years.*

[85] Para XII at Page 87 of the Judgement

to establish that what he or she asserts is an ERP. It may simply be any religious practice, a matter of faith or conscience! Yes, what is asserted as a Right should not go against "public order, morality and health," and of course, it is subject to other provisions of Part III of the Constitution.

18. Partly, the Petitioners had to be blamed for thecourse taken by the Court as it was indeed the Petitioners or some of the Petitioners who had claimed that wearing of hijab is an essential practice in Islam. Before us, however, when arguments were raised at the Bar, some of the Counsels did admit that ERP was not the core issue in the matter, but the Petitioners before the Karnataka High Court had no choice as they were, inter alia, attacking the Government Order dated 5 February 2022, which clearly stated that prohibiting hijab in schools will not be violative of Article 25 of the Constitution of India. Be that as it may, the fact remains that the point was raised. It was made the core issue by the Court, and it went against the Petitioners.

19. The approach of the High Court could have beendifferent. Instead of straightaway taking the ERP route, as a threshold requirement, the Court could have first examined whether the restriction imposed by the school or the G.O on wearing a hijab, were valid restrictions? Or whether these restrictions are hit by the Doctrine of Proportionality. In **Bijoe Emmanuel and Ors. vs State of Kerala and Ors**[86]**.** this is what the Court had to say:

"…Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practice and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorized by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practice or to provide for social welfare and reform. It is the duty and function of the court so to do."

20. Be that as it may, let us examine as to how andwhat the entire concept of Essential Religious Practice has been defined by this Court.

21. The test of ERP has been laid down by this Court inthe 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." What was raised was the protection of Article 25 as well as Article 26 of the Constitution of India. In other words, these were the cases where both Article 25 (1) and (2) and Article 26 were in play. Essentially, these were the cases where the rituals and practices of a denomination or a sect of a particular religion sought protection against State intervention. Even when Rights of an individual were raised, as we may say in the case of **Shayara Bano** v. **Union of India and Ors.**[87] which is the Triple Talaq case or the case of **Indian Young Lawyers Association and Ors, (Sabarimala Temple, In Re.)** v. **State of Kerala and Ors.**[88] which is commonly known as the Sabarimala case, these were cases where an individual right was asserted against a religious practice or where there was an assertion, primarily on a religious identity. In the case at hand, the question is not merely of

[86] 1986 3 SCC 615; Para 19

[87] (2017) 9 SCC 1

[88] (2019) 11 SCC 1

religious practice or identity but also of 'freedom of expression,' given to a citizen under Article 19(1)(a) of the Constitution of India, and this makes this case different.

22. The expression 'essential religious practices' it seems was taken from the Constituent Assembly Debates. In response to a query, Dr. Ambedkar categorically said that what is protected under Article 25 of the Constitution is not every religious practice but only such practices which are essentially religious. The relevant passage of the Constituent Assembly Debates VII: 781 is reproduced hereunder:

"…there is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious…"

23. The first case, all the same, in this regard whichcame up for consideration before the Supreme Court was **Commissioner, Hindu Religious Endowments, Madras** v**. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt**[89] which is famously known as the Shirur Mutt case. The facts of this case were that the Mathadhipati of Shirur Math at Udupi had preferred a challenge to the powers of the Commissioner under the Madras Hindu Religious Endowments Act (Act 2 of 1927) who was exercising control over the affairs of Shirur Math. The Writ Petition was allowed by the Madras High Court and a Writ of Prohibition was granted in favour of the Mathadhipati. This order was challenged before the Supreme Court by the Commissioner, Hindu Religious Endowments, Madras. Inter-alia, therefore before the Supreme Court was the question of whether the provisions of the Act were an invasion on the exercise of Fundamental Rights of the Mathadhipati and the Management of the Temple, given to them under Article 25 and 26 of the Constitution. This Court then proceeded to elaborate on the meaning of religion and how it has to be understood in the context of the Constitution. While delivering the concurring opinion on behalf of the Seven Judge Constitutional Bench, Justice B.K. Mukherjea held as follows:

"…Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine of belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and models of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.[90]"

24. The Court held that the guarantee under herConstitution not only protects the freedom of religious opinion but it protects also, acts done in pursuance of a religion and this is made clear using the expression 'practice of religion,' in Article 25. This Court rejected the submissions of the Ld. Attorney General of India, as he then was, that the State must be allowed to regulate the secular activities which are associated with a religion which do not constitute the essential part of it. The observations falling from the court in the **Shirur Mutt Case** (supra), in this regard were as follows:

[89] (1954) SCR 1005

[90] Para 17 of Shirur Mutt Cae *(supra)*

"19. …The learned Attorney-General lays stress upon clause 2(a) of the article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.

20. … 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**. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)[91].'

(emphasis supplied)

Thereafter though the concept like ERP had come, but what constitutes Essential Religious Practices was left to the doctrine of that religion itself.

25. The next case which came up for consideration ofthis Court was in **Ratilal Panachand Gandhi** v. **State of Bombay and Ors.**[92] wherein the Petitioners had challenged the Constitutional validity of the Act known as the Bombay Public Trusts Act, 1950 inter-alia, on grounds that the provisions in the Act were an invasion of their Fundamental Rights, given to them under Article 25 as well as Article 26 of the Constitution. Basically, it followed the same line of thought as laid down in the **Shirur Mutt** (supra) case. The observations of the court are:

"10. …The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people. What sub-clause (a) of clause 2 of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices."

26. We now come to the decision of the Supreme Court in **Durgah Committee, Ajmer, and Anr.** v. **Syed Hussain Ali and Ors.**[93] In this case the 'khadims' of the Hazrat Haji Moinuddin Chishti had challenged the Constitutional Validity of the Dargah Hazrat Khwaja Saheb Act, 1955 before the Rajasthan High Court. The 'khadims' of the Durgah of Khwaja Moin-ud-din Chishti (also known as the Durgah Khwaja Saheb, Ajmer), claimed to be the followers of a Sufi sect or Silsila called Chishti and they claimed they were doing service in the Dargah of Sufi Saint Hazrat Haji Moinuddin Chishti. Their case was that the interference of the Dargah Committee amounts to an invasion of the Fundamental Rights, inter alia, guaranteed to them under Article 25(1) of the Constitution of India. The Rajasthan High Court had substantially allowed their claim and against the said order the Dargah Committee was before the Supreme Court. The questions which fell for consideration before this Court was whether any person as a Sunni Muslim could manage the affairs of the Durgah or whether this could only be done by the followers of Chishti Silsila. There were some other questions

[91] Para 19 & 20
[92] 1954 SCR 1055; Para
[93] (1962) 1 SCR 383

as well, which would not be relevant for discussion in the context of this decision. The Supreme Court had allowed the appeal of the Durgah Committee by setting aside the order of the Rajasthan High Court, holding, inter alia that khadims could not claim the right under Article 25(1) of the Constitution of India. The Supreme Court in this case, went on to determine as to what would be an ERP and how the Court would determine the same. All the same this was done again as there was an interplay of Article 25 and Article 26 of the Constitution, and what was being asserted were the Rights of a Sect or a denomination against State intervention.

27. The Judgements of this Court in **Acharya J. Avadhuta & Ors.** v. **Commissioner of Police, Calcutta & Anr.**[94] and **Commissioner of Police & Ors.** v. **Acharya J. Avadduta**[95] both relate to the performance of tandav dance in a public place by the followers of the faith of 'Anand Margis.' The Kolkata Police had banned such performance of tandav dance in public places under Section 144 of the Code of Criminal Procedure, 1973. The matter ultimately came up before this Court in 1983 and it was held that performing tandav dance in public places is not an essential part of the 'Anand Margi' faith. The matter again reached before this Court in 2004 and a 3-Judge bench of this Court reached the same conclusion by relying upon the earlier Judgement of 1983.

28. Therefore, what can be clearly distinguished hereis that while dealing with the concept of Essential Religious Practices or whether a particular practice can be termed as an ERP, this Court was dealing with questions related to both Article 25 as well as Article 26 of the Constitution. These were the cases which were either concerned with the management of an activity related to a religious shrine or Institution or where the State had met some kind of resistance or challenge by the citizens, who claimed rights both under Article 25 and 26 of the Constitution of India. These were also the cases where a community, sect or a religious denomination of a religion was against the State action. This, however, is not presently the case before this Court. We have before us a case of assertion of individual Right as different from what would be a community Right. We are concerned only with Article 25(1) and not with Article 25(2) or Article 26 of the Constitution of India. Whereas Clause 1 of Article 25 deals with individual rights, Article 25(2) and Article 26 of the Constitution of India, deal by and large with community-based rights. In that sense what has been decided by this Court earlier as ERP would not be of much help to us. For this reason, the entire exercise done by the Karnataka High Court, in evaluating the rights of the Petitioners only on the touchstone of ERP, was incorrect.

29. In the more recent case of **Shayara Bano** (supra) the majority opinion of 3:2 held that Triple Talaq constitutes an irregular and not an essential practice amongst Sunni Muslims. It was stated as follows:

"54. …Applying the aforesaid tests, it is clear that Triple Talaq is only a form of talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi School which tolerates it. According to Javed[96], therefore, this would not form part of any essential religious practice. Applying the test stated in Acharya Jagadishwarananda it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice…"

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[94] (1983) 4 SCC 522

[95] (2004) 12 SCC 770

[96] Javed v State of Haryana, (2003) 8 SCC 369 [cited in **Shayara Bano** *(supra)*]

30. In the **Sabarimala Temple** (supra) case the question before the Constitutional Bench was whether women devotees between the ages of 10-50 years had the Right to enter the temple of Lord Ayyappa located in Sabarimala, Kerala. Subsequently, this Right was denied to them by the Temple Authorities, on the basis of customary practice and tradition. Allowing the Writ Petition by 4:1 majority, the bench held in favour of women devotees and struck down the restrictions placed upon them to be violative of their Fundamental Rights under the Constitution of India.

31. In both the cases cited above again the essentialdetermination before the Court was of religion and religious practice. Freedom of expression given to a citizen under Article 19(1)(a) was not an issue, and if at all it was it was on the periphery. In other words, not the central issue.

32. We are presently concerned with an entirelydifferent set of facts. We must deal with only Article 25(1), and not with Article 25(2), or even with Article 26 of the Constitution of India. Article 25(1) deals with the Rights of an individual, whereas Article 25 (2), and Article 26 deal with the Rights of communities or religious denominations, as referred above. Additionally, we must deal with the Fundamental Rights given to an individual under Article 19(1)(a) and its interplay with Article 25(1) of the Constitution.

33. Article 25 gives a citizen the "freedom ofconscience and free profession, practice and propagation of religion." It does not speak of Essential Religious Practice. This concept comes in only when we are dealing with Article 25(2) or Article 26, and where there is an inter-play of these two Articles.

34. We have before us two children, two girl students,asserting their identity by wearing hijab, and claim protection under Article 19 and Article 25 of the Constitution of India. Whether wearing hijab is an ERP in Islam or not is not essential for the determination of this dispute. If the belief is sincere, and it harms no one else, there can be no justifiable reasons for banning hijab in a classroom.

35. The Karnataka High Court, however, has made adetailed study as to what is ERP and whether wearing a hijab constitutes a part of ERP in Islam. Suras and verses from the Holy Quran have been referred and explained, and then taking assistance of a commentary on the Holy Book, the High Court concludes that wearing of hijab is not an essential religious practice in Islam and at best it is directory in nature, not mandatory. The decisions of the Supreme Court which we have referred above, and some other decisions as well have been considered while dealing as to what constitutes an ERP, and then a determination has been made that what is being claimed as a right is not an essential religious practice at all!

36. Apart from the fact that ERP was not essential tothe determination of the dispute, which we have already said above, there is another aspect which is even more important, which would explain as to why the Courts should be slow in the matters of determining as to what is an ERP. In my humble opinion Courts are not the forums to solve theological questions. Courts are not well equipped to do that for various reasons, but most importantly because there will always be more than one viewpoint on a particular religious matter, and therefore nothing gives the authority to the Court to pick one over the other. The Courts, however, must interfere when the boundaries set by the Constitution are broken, or where unjustified restrictions are imposed.

37. In the case of **M. Siddiq (Dead) Through LR's** v. **Mahant Suresh Das and Ors.**[97] popularly known as the Ram Janmabhoomi Case this Court had cautioned not to venture into areas of theology with which the Courts are not well equipped. There may be diversity of views within a religion and to choose one over others, may not be correct. Courts should steer clear from interpreting religious scriptures. It was observed by the Court as follows:

"90. During the course of the submissions, it has emerged that the extreme and even absolute view of Islam sought to be portrayed by Mr. P.N. Mishra does not emerge as the only available interpretation of Islamic law on a matter of theology. Hence, in the given set of facts and circumstances, it is inappropriate for this Court to enter upon an area of theology and to assume the role of an interpreter of the Hadees. The true test is whether those who believe and worship have faith in the religious efficacy of the place where they pray. The belief and faith of the worshipper in offering namaz at a place which is for the worshipper a mosque cannot be challenged. It would be preposterous for this Court to question it on the ground that a true Muslim would not offer prayer in a place which does not meet an extreme interpretation of doctrine selectively advanced by Mr. Mishra. **This Court, as a secular institution, set up under a constitutional regime must steer clear from choosing one among many possible interpretations of theological doctrine and must defer to the safer course of accepting the faith and belief of the worshipper.'**

91. Above all, the practice of religion, Islam being no exception, varies according to the culture and social context. That indeed is the strength of our plural society. Cultural assimilation is a significant factor which shapes the manner in which religion is practiced. In the plural diversity of religious beliefs as they are practiced in India, cultural assimilation cannot be construed as a feature destructive of religious doctrine. On the contrary, this process strengthens and reinforces the true character of a country which has been able to preserve its unity by accommodating, tolerating, and respecting a diversity of religious faiths and ideas. **There can be no hesitation in rejecting any attempt to lead the Court to interpret religious doctrine in an absolute and extreme form and question the faith of worshippers. Nothing would be as destructive of the values underlying Article 25 of the Constitution.** [98]**'**

(emphasis supplied)

38. In any case as to what constitutes an EssentialReligious Practice, in all its complexities, is a matter which is pending consideration before a Nine Judge Constitutional bench of this Court[99] and therefore in any case it may not be proper for me to go any further into this aspect.

39. The decision which is of essential importance inthis case for our purposes is the decision given by this Court in the case of **Bijoe Emmanuel** (supra). It is necessary to refer to this case in some detail, as in my opinion this case is the guiding star which will show us the path laid down by the well established principles of our Constitutional values, the path of understanding and tolerance, which we may also call as "reasonable accommodation," as explained by some of the lawyers before this Court. Karnataka High Court, all the same, chose not to rely on this seminal Judgement for reasons that "Bijoe Emmanuel is not the best vehicle for drawing a proposition essentially founded on the freedom of conscience[100]." But this is not correct. This decision of the Supreme Court is most relevant in the present case, both on the facts as well as on law.

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[97] (2020) 1 SCC 1; Para 90 & 91

[98] Paras 90 & 91

[99] Kantaru Rajeevaru vs Indian Young Lawyers Assn. and Ors. [R.P. (C) No. 3358 of 2018 in W.P. (C) No. 373 of 2006]

[100] Para X1(iii) at Page 85 of the Impugned Judgement

40. Let us now look into the facts of that case:Three girl children in Kerala who belonged to a faith called Jehovah's Witnesses, were attending a government school. Every morning when the National Anthem was sung in the school these three students used to respectfully stand up for the National Anthem, like other children in the school; but they did not sing the National Anthem. They did so as their faith forbid them to sing for anyone else but Jehovah. Initially this was not noticed but then someone complained before the highest authority in the State, which led to the expulsion of these three children from their school, by orders passed by the Deputy Inspector of schools and then the Headmistress of the school. The children filed their Writ Petition before the Kerala High Court which was dismissed by the learned Single Judge as also their appeal by a division bench of Kerala High Court. They finally approached the Supreme Court of India and filed their Special Leave Petition before this Court. Their case was simple: they do not show disrespect to the National Flag or the National Anthem. They stand respectfully when the National Anthem is sung, they only do not participate in singing as they sincerely believe their faith forbids them to sing for anyone but Jehovah.

41. The Petition of these three girl children wasdismissed by the Kerala High Court as the Kerala High Court did not find any word or thought in the Indian National Anthem which could offend anyone's religious susceptibilities. Hence the Kerala High Court concluded that there was absolutely no reason for the children not to sing the national anthem! While examining their case Justice O. Chinnappa Reddy, who wrote this Judgement for the Court rejected the approach of the High Court and said that the High Court had actually misdirected itself in doing so and it went off at a tangent. The objection of the Petitioners was not to the language of the National Anthem, but they simply refused to sing any National Anthem, irrespective of any country as they sincerely believe that this is what their religion prescribes them to do.

42. The Supreme Court then cites two judgements ofthe United States Supreme Court, which we must refer here as well, since they relate to schools and the 'discipline' imposed by the schools. The first is the case of **Minersville School District** v. **Gobitis**[101] and the second is **West Virginia State Board of Education** v. **Barnette**[102]**.** While referring to the two judgement(s) my source shall remain the Judgement of **Bijoe Emmanuel** (supra).

43. In **Minersville** (supra) the question was whether compulsory saluting of the National Flag infringed upon the liberties guaranteed by the Fourteenth Amendment of the Constitution of the United States of America. The majority opinion delivered by Justice Frankfurter upheld the requirement on grounds that such decisions are to be left to the school boards. Justice Stone gave his dissent and said,

"History teaches us that there have been but few infringements of personal liberty by the State which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been dictated, as they are now, at politically helpless minorities[103]."

In short, the US Supreme Court did not interfere in the compulsory saluting of the National Flag in a Public School. The reference of this case, is however, important here as very soon

[101] 310 US 586 (1940)

[102] 319 US 624 (1943)

[103] Para 21 of Bijoe Emmanuel (supra)

this decision was overruled by the Supreme Court in the case of **Barnetta** (supra) which is the second case.

44. The second case is the one which only a few yearslater, overruled **Gobitis** (supra). Justice Jackson, the author of the Judgement in **Barnetta** referred to the famous dilemma of Abraham Lincoln which was "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" Justice Jackson then said:

"It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school…"

45. While going into the logic of Justice Frankfurter ofnon-interference with the School Authorities, as that would make the Court a School Board, Justice Jackson went onto say:

"There are village tyrants as well as village Hampdens, but none who acts under colour of law is beyond the reach of the Constitution….. We cannot, because of modest estimates of our competence in such specialities as public education, withhold the judgement that history authenticates as the function of this Court when liberty is infringed." Justice Jackson then concludes:[104],

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

46. Justice O. Chinnappa Reddy in his Judgement hastraced the struggles and the difficulties faced by the faithful of Jehovah in different countries where they had met similar restrictions. The Court then invokes Article 19(1)(a) and Article 25(1), in favor of the petitioners. It says:

"Article 19(1)(a) of the Constitution guarantees to all citizens freedom of speech and expression, but Article 19(2) provides that nothing in Article 19(1)(a) shall prevent a State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Article 25(1) guarantees to all persons freedom of conscience and the right freely to profess, practise and propagate religion, subject to order, morality and health and to the other provisions of Part III of the Constitution."

47. It was then held that it is not disrespectful to theNational Anthem if the girls respectfully stand when the National Anthem was sung, but may not have joined in the singing. Their expulsion from school was therefore held to be in violation of their Fundamental Right of Freedom of Speech and Expression given to them under Article 19(1)(a) of the Constitution of India. The Government Circular which directed that the entire school should sing National Anthem was not 'law' as given in Clause 2 of Article 19 of the Constitution. The law i.e., the statutory law was 'The Prevention of Insults to National Honour Act, 1971'. A person who respectfully stands when the National Anthem is sung but does not participate in the singing

[104] Para 22 of Bijoe Emmanuel *(supra)*

does not commit an offence under the Act. Offence is only committed when a person prevents another from singing National Anthem. The Court thus impliedly also meant that the freedom to sing would also mean freedom to remain silent.

48. Article 25 of the Constitution, was described as an article of faith and it was observed as follows:

"18. …Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to be borne in mind in interpreting Article 25."

49. The girls before us today face the samepredicament as the Jehovah's Witnesses in the above case. The present Petitioners too wear hijab as an article of their faith. They too believe that it is a part of their religion and social practice. In my considered opinion therefore, this case is squarely covered by the case of **Bijoe Emmanuel** (supra) and the ratio laid down therein.

50. Coming back to the order of Karnataka High Courtthere is another finding which is difficult to accept. This is where the High Court determines that the Petitioners cannot assert their Fundamental Rights inside a classroom which the Court terms as "qualified public places" and the rights inside a school are only "derivative right." The court states as under:

"It hardly needs to be stated that schools are qualified public places that are structured predominantly for imparting educational instructions to the students. Such qualified Spaces by their very nature repeal the assertion of individual rights to the detriment of the general discipline and decorum. Even the substantive rights themselves metamorphise into a kind of derivatives rights in such places."[105]

The Hight Court rejects the case of the Petitioners on 'reasonable accommodation,' and also the argument that schools are a showroom for diversity of culture, for reason that the schools being 'qualified public places' schoolgirls have to follow the dress code, which does not prescribe hijab. It says:

"It hardly needs to be stated the content and scope of a right, in terms of its exercise are circumstantially dependent. Ordinarily, liberties of persons stand curtailed inter-alia by his position, placement and the like. The extent of autonomy is enormous at home, since ordinarily resident of a person is treated as his inviolable castle. However, in qualified public places like schools, courts, war rooms, defense camp, etc., the freedom of individuals as of necessity, is curtailed consistent with the discipline and decorum and function and purpose[106]."

51. Comparison of a school with a war room ordefense camp, seems odd, to say the least. Schools are not required to have the discipline and regimentation of a military camp. Nevertheless, in my understanding, what the High Court wanted to convey was that all public places have a certain degree of discipline and limitations and the degree of enjoyment of a Right by an individual inside his house or anywhere outside a public space is different to what he or she would enjoy once they are inside a public space. As a general principle, one can have no quarrel with this proposition. But then let us come to the facts of the case. Laying down a principle is one thing, justifying that to the facts of a case is quite another. We must be a judge of fact as well as a judge of law. Do the facts of the case justify the

[105] Para XIV (iv) at Page 100 of the Impugned Judgement

[106] Para XIV (vii) at Page 104 of the Impugned Judgement

restrictions inside a classroom, which is admittedly a public place? In my opinion there is no justification for this.

52. School is a public place, yet drawing a parallelbetween a school and a jail or a military camp, is not correct. Again, if the point which was being made by the High Court was regarding discipline in a school, then that must be accepted. It is necessary to have discipline in schools. But discipline not at the cost of freedom, not at the cost of dignity. Asking a pre university schoolgirl to take off her hijab at her school gate, is an invasion on her privacy and dignity. It is clearly violative of the Fundamental Right given to her under Article 19(1)(a) and 21 of the Constitution of India. This right to her dignity[107] and her privacy[108] she carries in her person, even inside her school gate or when she is in her classroom. It is still her Fundamental Right, not a "derivative right" as has been described by the High Court.

53. In the **Puttaswamy** judgement (supra), Justice D.Y. Chandrachud in Paragraph 298 of his Judgement says as under:

'298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic

[107] Maneka Gandhi vs Union of India and Anr. [(1978) 1 SCC 248]; Para 85

[108] K.S. Puttaswamy and Anr. vs Union of India and Ors. [(2017) 10 SCC 1]

to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.'

54. The counsels representing the State before thisCourt had underlined the importance of G.O dated 05.02.2022 which was to enforce discipline in schools, including in Pre-University classes, and apply a dress code. The object of the act therefore was the betterment of education and to inculcate a sense of discipline among school going children. The learned Advocate General of Karnataka submitted that the law in the present case which is the G.O dated 5th February, 2022, is primarily for the enforcement of dress code in schools including Pre-University classes. It may only incidentally be giving an impact on the rights which the Petitioners claim under Article 19 and 25 of the Constitution of India. What has to be seen is the pith and substance of the law which is the enforcement of uniforms in schools, which in turn is to maintain discipline in schools. For this submission the learned Advocate General has relied upon **Bachan Singh** v. **State of Punjab**[109] which says:

"60. From a survey of the cases noticed above, a comprehensive test which can be formulated, may be restated as under:

"Does the impugned law, in its pith and substance, whatever may be its form and object, deal with any of the fundamental rights conferred by Article 19(1)? If it does, does it abridge or abrogate any of those rights? And even if it does not, in its pith and substance, deal with any of the fundamental rights conferred by Article 19(1), is the direct and inevitable effect of the impugned law such as to abridge or abrogate any of those rights?"

The mere fact that the impugned law incidentally, remotely or collaterally has the effect of abridging or abrogating those rights, will not satisfy the test. If the answer to the above queries be in the affirmative, the impugned law in order to be valid, must pass the test of reasonableness under Article 19. But if the impact of the law on any of the rights under clause (1) of Article 19 is merely incidental, indirect, remote or collateral and is dependent upon factors which may or may not come into play, the anvil of Article 19 will not be available for judging its validity."

All the same, I do not see the applicability of the above submission in the facts of the controversy before this Court. The G.O specifically seeks to address the question of hijab, which is evident from the preamble of the G.O. Moreover, the above submission of the learned Advocate General is not correct in view of the **Puttaswamy** judgement (supra) which says:

"24. The decisions in M.P. Sharma [M.P. Sharma v. Satish Chandra, AIR 1954 SC 300: 1954 Cri LJ 865 : 1954 SCR 1077] and Kharak Singh [Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] adopted a doctrinal position on the relationship between Articles 19 and 21, based on the view of the majority in Gopalan [A.K. Gopalan v. State of Madras, AIR 1950 SC 27 : 1950 SCR 88] . This view stands abrogated particularly by the judgment in Cooper [Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248] and the subsequent statement of doctrine in Maneka [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] . The decision in Maneka [Maneka Gandhi v. Union of India, (1978) 1 SCC 248], in fact, expressly recognised that it is the dissenting judgment of Subba Rao, J. in Kharak Singh [Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] which represents the exposition of the correct constitutional

[109] (1980) 2 SCC 684

principle. The jurisprudential foundation which held the field sixty-three years ago in M.P. Sharma [M.P. Sharma v. Satish Chandra, AIR 1954 SC 300: 1954 Cri LJ 865 : 1954 SCR 1077] and fifty-five years ago in Kharak Singh [Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332] has given way to what is now a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of State action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that State action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III."

55. We would now be examining some decisions offoreign Courts as in order to appreciate the assertion of religious and cultural rights in our school premises, it would be worthwhile to refer to some of the similar controversies which had come up before the Courts of other Countries which have a Constitutional Democracy. There are two cases which I would like to refer here. The first case is the 'nose-stud' case of the Constitutional Court of South Africa and the second one is a decision of the House of Lords in England.

56. The South African case though has to be seen inthe background of the Constitutional Law of South Africa where dignity is a right given to its citizens under its Constitution. Equality Courts have also been established in South Africa to hear the disputes relating to cases of discrimination. But nevertheless, the basic principle and the law remains the same.

57. Sunali was a student of Class 10 in Durban GirlsHigh School (DGHS). The Code of Conduct of the school prohibited wearing jewellery in school. When Sunali was in class 10, her mother gave her a nose stud to wear, which was not a fashion statement, but a part of Sunali's Hindu-Tamil culture. The school objected to the nose-stud and Sunali was asked to remove it. When Sunali refused to remove the nose stud her mother was called. Her mother reasoned with the authorities that this is a part of her Hindu-Tamil culture and it cannot be removed. Ultimately, Sunali through her mother had to file a Petition before the Equality Court, where such matters of discrimination are heard since Sunali had alleged discrimination by her school. The Equality Court held that though a prima facie case for discrimination had been made out, it could not be termed as 'unfair'[110], thus dismissing her case. Thereafter, the matter was taken in appeal before the High Court which allowed her appeal and held that asking Sunali to remove her nose stud amounts to discrimination which is wrong. Both the school and the administration went to the Constitutional Court which heard the matter and again decided in favour of Sunali.

58. As to the argument of the school that nose studwas not central to Sunali's religion or culture and it is only an optional practice, this is what was said by the Constitutional Court, the Highest Court of South Africa:

"86. The School further argued that the nose stud is not central to Sunali's religion or culture, but it is only an optional practice. I agree that the centrality of a practice or a belief must play a role in determining how far another party must go to accommodate that belief. The essence of reasonable accommodation is an exercise of proportionality. Persons who merely appear to adhere to a religious and/or cultural practice, but who are willing to forego it if necessary, can hardly demand the same adjustment from others as those whose identity will be seriously undermined if they do not follow

[110] Para 14 at Page 14 of the Judgement

their belief. The difficult question is how to determine centrality. Should we enquire into centrality of the practice or belief to the community, or to the individual?

87. While it is tempting to consider the objective importance or centrality of a belief to a particular religion or culture in determining whether the discrimination is fair, that approach raises many difficulties. In my view, courts should not involve themselves in determining the objective centrality of practices, as this would require them to substitute their judgement of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes. This is true both for religious and cultural practices. If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way."

59. What was also pleaded on behalf of the School wasthat the nose stud after all is a cultural and not a religious issue and therefore the infringement of any right, if at all, is much less. This issue was dealt with as follows:

"91. The next string of the School's centrality bow was that the infringement of Sunali's right to equality is less severe because the nose stud is cultural rather than a religious adornment. This was also the basis originally relied upon by the School for refusing the exemption and why it could recognise the stud's cultural significance without granting Sunali an exemption. To my mind the argument is flawed. As stated above, religious and cultural practices can be equally important to a persons' identity. What is relevant is not whether a practice is characterised as religious or cultural but its meaning to the person involved.

92. The School also argued that if Sunali did not like the Code, she could simply go to another school that would allow her to wear the nose stud. I cannot agree. In my view the effect of this would be to marginalise religions and cultures, something that is completely inconsistent with the values of our Constitution. As already noted, out Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation. There may, however, be occasions where the specific factual circumstances make the availability of another school a relevant consideration in searching for a reasonable accommodation. However, there are no such circumstances in this case and the availability of another school is therefore not a relevant consideration."

60. Ultimately what was held is given below as follows:"112. The discrimination has had a serious impact on Sunali and, although the evidence shows that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exemption. Allowing the stud would not have imposed an undue burden on the School A reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud. I would therefore confirm the High Court's finding of unfair discrimination."

61. The other case, which was also relied by theKarnataka High Court is **Regina (SB)** v. **Governors of Denbigh High School[111].** Primarily the controversy was that the school, allowed wearing of hijab, but what was further insisted was wearing of jilbab (which is more or less a burqa). Jilbab was denied and this led to the litigation where the restriction of the school on jilbab was upheld. In this background we must appreciate the observations of the Court, it was said:

"But schools are different. Their task is to educate the young from all the many and diverse families and communities in this country in accordance with the national curriculum. Their task is to help all of their pupils achieve their full potential. This includes growing up to play whatever part they choose in the society in which they are living. The school's task is also to promote the ability of people of

[111] [2007] 1 AC 100

diverse races, religions and cultures to live together in harmony. Fostering a sense of community and cohesion within the school is an important part of that. A uniform dress code can play its role in smoothing over ethnic, religious and social divisions. But it does more than that. Like it or not, this is a society committed, in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law. Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them. This particular school is a good school: that, it appears, is one reason why Shabina Begum wanted to stay there. It is also a mixed school. That was what led to the difficulty. It would not have arisen in a girls' school with an all female staff."

62. When a decision has to be made between schooldiscipline and cultural and religious rights of minorities a balance has to be maintained. That is what was held. Baroness Hale of Richmond while elaborating on this issue referred to "Culture, Religion and Gender" (2003) by Professor Frances Raday the exact Paragraph at 98 which reads like this:

"genuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialised according to the implications of veiling while still attending public educational institutions . . . A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families. Also for the families, such a policy may send a clear message that the benefits of state education are tied to the obligation to respect women's and girl's right to equality and freedom . . . **On the other hand, a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students. It may also result in traditionalist families not sending their children to the state educational institutions. In this educational context, implementation of the right to equality is a complex matter, and the determination of the way it should be achieved depends upon the balance between these two conflicting policy priorities in a specific social environment"**

(**emphasis supplied**)

63. The Karnataka High Court has placed reliance upontwo US Judgements passed by the District Courts there, that is **Miller** v. **Gills**[112] and **Christmas** v. **El Reno Board of Education**[113]. All the same the facts of these cases are different and in none of the two cases the action of the school authorities debarred students from attending their classes. There is another judgement relied upon by Karnataka High Court which is **Employment Division** v**. Smith**[114].This is a US Supreme Court Judgement.

64. The facts of the case were quite different. Theissue being examined was whether the State of Oregon was justified in denying unemployment benefits to persons who had been dismissed from their jobs owing to their consumption of "peyote," which had been classified as a 'controlled substance' (under the Controlled Substances Act, 1970), when it was being consumed as a part of religious beliefs. The consumption of peyote was admittedly a criminal offence. It was contended by the respondents that as it was only being consumed in pursuance of their religious belief and they would not be liable to be subjected to the applicable criminal law. This argument was rejected and it was held that if certain conduct (such as consumption of peyote), which is prohibited by law, then there would be no federal

[112] 315 F. Supp. 94 (N.D. Ill. 1969)
[113] 313 F. Supp. 618 (W.D. Okla. 1970)
[114] 494 US 872 (1990)

right to engage in such conduct. It was in this particular context of the applicability of the criminal law on an individual for a conduct already prohibited that such law was said to be 'facially neutral.' On this note, the following was stated:

"13. …We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in Minersville School Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586, 594-595, 60 S.Ct. 1010, 1012-1013, 84 L.Ed. 1375 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."

65. Another question which the School Administrationand the State must answer in the present case is as to what is more important to them: Education of a girl child or Enforcement of a Dress Code! We have been informed at the Bar by many of the Senior counsels appearing for the Petitioners, that the unfortunate fallout of the enforcement of hijab ban in schools in Karnataka has been that some of the girl students have not been able to appear in their Board examinations, and many others were forced to seek transfer to other schools, most likely madrasas, where they may not get the same standard of education. This is for a girl child, for whom it was never easy, in the first place, to reach her school gate.

66. One of the best sights in India today, is of a girlchild leaving for her school in the morning, with her school bag on her back. She is our hope, our future. But it is also a fact, that it is much more difficult for a girl child to get education, as compared to her brother. In villages and semi urban areas in India, it is commonplace for a girl child to help her mother in her daily chores of cleaning and washing, before she can grab her school bag. The hurdles and hardships a girl child undergoes in gaining education are many times more than a male child. This case therefore has also to be seen in the perspective of the challenges already faced by a girl child in reaching her school. The question this Court would therefore put before itself is also whether we are making the life of a girl child any better by denying her education, merely because she wears a hijab!

67. All the Petitioners want is to wear a hijab! Is it toomuch to ask in a democracy? How is it against public order, morality or health? or even decency or against any other provision of Part III of the Constitution. These questions have not been sufficiently answered in the Karnataka High Court Judgement. The State has not given any plausible reasons either in the Government Order dated 5 February 2022, or in the counter affidavit before the High Court. It does not appeal to my logic or reason as to how a girl child who is wearing a hijab in a classroom is a public order problem or even a law-and-order problem. To the contrary reasonable accommodation in this case would be a sign of a mature society which has learnt to live and adjust with its differences. In his famous dissent delivered in **United States** v**. Schwimmer**[115] Justice Oliver Wendell Holmes Jr., said as under:

"22. …if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought-not free thought for those who agree with us but freedom for the thought that we hate…"

[115] 279 US 644 (1929); Para 22

68. A girl child has the right to wear hijab in her houseor outside her house, and that right does not stop at her school gate. The child carries her dignity and her privacy even when she is inside the school gates, in her classroom. She retains her fundamental rights. To say that these rights become derivative rights inside a classroom, is wholly incorrect.

69. We live in a Democracy and under the Rule of Law,and the Laws which govern us must pass muster the Constitution of India. Amongst many facets of our Constitution, one is Trust. Our Constitution is also a document of Trust. It is the trust the minorities have reposed upon the majority. Commenting on the report of the Advisory committee on minorities, Sardar Vallabh Bhai Patel made a statement before the Constitute Assembly on 24 May 1949, which should be referred here. He said, "…. it is not our intention to commit the minorities to a particular position in a hurry. If they really have to come honestly to the conclusion that in the changed conditions of this country, it is in the interest of all to lay down real and genuine foundations of a secular State, then nothing is better for the minorities than to trust the good-sense and sense of fairness of the majority, and to place confidence in them. So also, it is for us who happened to be in a majority to think about what the minorities feel, and how we in their position would feel if we were treated in the manner in which they are treated.[116]"

70. The question of diversity, raised by the Petitionersbefore the Karnataka High Court, was not considered by the Court since it was thought to be a 'hollow rhetoric,' and the submissions made by the lawyers on 'unity and diversity,' were dismissed as an "oft quoted platitude." This is what was said, "Petitioners' contention that a class room should be a place for recognition and reflection of diversity of society, a mirror image of the society (socially and ethically) in its deeper analysis is only a hollow rhetoric, 'unity in diversity' being the oft quoted platitude.…[117]"

71. The question of diversity and our rich plural cultureis, however, important in the context of our present case. Our schools, in particular our Pre-University colleges are the perfect institutions where our children, who are now at an impressionable age, and are just waking up to the rich diversity of this nation, need to be counselled and guided, so that they imbibe our constitutional values of tolerance and accommodation, towards those who may speak a different language, eat different food, or even wear different clothes or apparels! This is the time to foster in them sensitivity, empathy and understanding towards different religions, languages and cultures. This is the time when they should learn not to be alarmed by our diversity but to rejoice and celebrate this diversity. This is the time when they must realise that in diversity is our strength.

72. The National Education Policy 2020, of theGovernment of India underlines the need for inculcating the values of tolerance and understanding in education and making the children aware of the rich diversity of this country. The Principles of the Policy state that 'It aims at producing engaged, productive, and contributing citizens for building an equitable, inclusive, and pural society as envisaged by our Constitution.'

73. In the case of **Aruna Roy** v. **Union of India**[118] this Court had elaborated on the Constitutional Values of religious tolerance and diversity of culture and its need in our

[116] 25th May, 1949: Constituent Assembly Debates, Volume VIII

[117] Para XIV(v) at Page 101 of Impugned Judgement

[118] (2002) 7 SCC 368

education system. It was observed as follows by Justice Dharmadhikari in the concurring opinion authored by him:

"25. …These need to be inculcated at appropriate stages in education right from the primary years. Students have to be given the awareness that the essence of every religion is common, only the practices differ…"

At another place in their judgement the court has said as under:

"86. …The complete neutrality towards religion and apathy for all kinds of religious teachings in institutions of the State have not helped in removing mutual misunderstandings and intolerance inter se between sections of the people of different religions, faiths and belief. 'Secularism', therefore, is susceptible to a positive meaning that is developing and understanding and respect towards different religion."

74. A Constitutional Bench of this Court in **Navtej Singh Johar and Ors.** v**. Union of India, Ministry of Law and Justice**[119] while speaking on diversity, dissent, liberty and accommodation spoke the following while delivering concurring opinions:-

"375. The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets; in the beliefs, ideas and ways of living of her citizens. Democratic as it is, out Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril[120]."

75. In the case of **St. Stephen's College** v. **University of Delhi**[121] while delivering the majority opinion on behalf of the bench, Justice K Jagannatha Shetty held as follows:

"81. Even in practice, such claims are likely to be met with considerable hostility. It may not be conducive to have a relatively homogeneous society. It may lead to religious bigotry which is the bane of mankind. In the nation building with secular character sectarian schools or colleges segregated faculties or universities for imparting general secular education are undesirable and they may undermine secular democracy. They would be inconsistent with the central concept of secularism and equality embedded in the Constitution. Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life. The students and teachers are the critical ingredients. It is there they develop respect for, and tolerance of, the cultures and beliefs of others. It is essential therefore, that there should be proper mix of students of different communities in all educational institutions[122]."

76. It is the Fundamental Duty of every citizen, underPart IV A of the Constitution of India to 'value and preserve the rich heritage of our composite culture.' [123]

77. Adverting to the Statutory Provisions applicable inthis case, namely, the Karnataka Education Act, 1983 which is the source of the G.O. dated 05.02.2022 speaks inter-alia that the curriculum in schools and colleges must promote the rich and composite culture of our country. Section 7 of the above Act prescribes that one of the curriculum in the school can

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[119] (2018) 10 SCC 1

[120] Para 375, Concurring Opinion by Dr. Justice D.Y. Chandrachud, *(supra)*

[121] (1992) 1 SCC 558

[122] Para 81 *(supra)*

[123] Article 51A(f) of the Constitution of India

be “moral and ethical education” and the it further says that the school should also “to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic, and regional or sectional diversities to renounce practices derogatory to the dignity of women”

78. The preamble to the Constitution secures to all itscitizens “LIBERTY of thought, expression, belief, faith and worship.” It is the Preamble again which seeks to promote among them all, “FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.” The Government Order dated 5 February, 2022, and the restrictions on the wearing of hijab, also goes against our constitutional value of fraternity and human dignity. Liberty, equality, fraternity, the triptych of the French Revolution is also a part of our Preamble. It is true that whereas liberty and equality are well established, properly understood, and recognized concepts in politics and law, fraternity for some reasons has largely remained incognito. The framers of our Constitution though had a different vision. Fraternity had a different, and in many ways a much larger meaning with the main architect of our Constitution, Dr Ambedkar. In his own words: “my social philosophy may be said to be enshrined in these words: liberty, equality and fraternity. Let no one, however, say that I have borrowed my philosophy from the French Revolution. I have not. My philosophy has roots in religion and not in political science. I have derived them from my Master, the Buddha[124].” Dr Ambedkar gave the highest place to fraternity as it was the only real safeguard against the denial of liberty or equality. “These principles of liberty, equality and fraternity are not to be treated as separate items in trinity. They form a union of trinity in the sense that to diverse one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce a supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity liberty and equality could not become a natural course of things.[125]”

79. Fraternity, which is our Constitutional value, wouldtherefore require us to be tolerant, and as some of the learned Counsels would argue to be, reasonably accommodating, towards the belief and religious practices of others. We should remember the appeal made by Justice O. Chinnappa Reddy in **Bijoe Emmanuel** (supra) “Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance; let us not dilute it.”

80. Under our Constitutional scheme, wearing a hijab should be simply a matter of Choice. It may or may not be a matter of essential religious practice, but it still is, a matter of conscience, belief, and expression. If she wants to wear hijab, even inside her class room, she cannot be stopped, if it is worn as a matter of her choice, as it may be the only way her conservative family will permit her to go to school, and in those cases, her hijab is her ticket to education.

81. The unfortunate fallout of the hijab restriction would be that we would have denied education to a girl child. A girl child for whom it is still not easy to reach her school gate. This case here, therefore, has also to be seen in the perspective of the challenges already faced by a girl child in reaching her school. The question this Court would put before itself is also

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[124] Ministry of Social Justice and Empowerment, Government of India, Dr. Babasaheb Ambedkar: Writings and Speeches, 2020 (Vol XVII, Part III); Preface Accessed at https://www.mea.gov.in/Images/CPV/Volume17_Part_III.pdf

[125] Speech of Dr. Ambedkar on 25th November, 1949: Constituent Assembly Debates, Volume XI

whether we are making the life of a girl child any better by denying her education merely because she wears a hijab!

82. Our Constitution has visualised a just society and it is for this reason that the first virtue that is secures for the citizens is 'Justice' which is the first of our Preambular promises. Rawls in his 'A Theory of Justice' writes: "… Justice is the first virtue of social institutions, as truth is of system of thoughts…" "…Therefore in a just society the liberties of equal citizenship are taken as settled, the rights secured by justice are not subject to political bargaining or to the calculus of social interest…" [126]

83. By asking the girls to take off their hijab before they enter the school gates, is first an invasion on their privacy, then it is an attack on their dignity, and then ultimately it is a denial to them of secular education. These are clearly violative of Article 19(1)(a), Article 21 and Article 25(1) of the Constitution of India.

84. Consequently, I allow all the appeals as well as theWrit Petitions, but only to the extent as ordered below:

a) The order of the Karnataka High Court dated March 15, 2022, is hereby set aside;

b) The G.O. dated February 5, 2022 is hereby quashed and,

c) There shall be no restriction on the wearing of hijab anywhere in schools and colleges in Karnataka.

O R D E R

In view of the divergent views expressed by the Bench, the matter be placed before Hon'ble The Chief Justice of India for constitution of an appropriate Bench.

[126] Rawls, John (1921): A Theory of Social Justice, Rev. Ed.; The Belknap Press of the Harvard University Press, Cambridge, Massachusetts