IN THE HON’BLE SUPREME COURT OF INDIA
[S.C.R., Order XXI Rule 3(1) (a)]
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION
(Under Article 136 of the Constitution of India)

SPECIAL LEAVE PETITION (C) NO. 5236 OF 2022

(WITH PRAYER FOR INTERIM RELIEF)

[AGAINST THE IMPUGNED JUDGMENT AND FINAL ORDER DATED 15.03.2022 PASSED BY THE HON’BLE HIGH COURT OF KARNATAKA AT BENGALURU IN WP NO. 2880 OF 2022]

IN THE MATTER OF:

MISS AISHAT SHIFA … PETITIONERS

VERSUS

THE STATE OF KARNATAKA & ORS. … RESPONDENTS

WITH

I.A. NO. OF 2022:
Application seeking exemption from filing certified copy of the Impugned order dated 15.03.2022

And

I.A. NO. OF 2022:
Application for Exemption from filing Official Translation of Annexure P-1

And

I.A. NO. OF 2022:
Application for Permission to file lengthy Synopsis & List of Dates

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ADVOCATE FOR THE PETITIONER: MR. JAVEDUR RAHMAN

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2022

IN THE MATTER OF:

MISS AISHAT SHIFA … PETITIONER

VERSUS

THE STATE OF KARNATAKA & ORS. … RESPONDENTS

OFFICE REPORT ON LIMITATION

1. The petition is within time.
2. The petition is barred by time and there is delay of ______ days in filing the same against the Impugned judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in WP No. 2880 of 2022 and petition for condonation of _____ days delay has been filed.
3. There is delay of ___days in refilling the petition and appeal for condonation of ____ days delay in refilling has been filed.

Place: New Delhi
Date: **16.03.2022** BRANCH OFFICER

SECTION: IVA

PROFORMA FOR FIRST LISTING

	Central Act: (Title)	**Constitution of India**
	Section:	**14, 19, 21, 25 & 29**
	Central Rule: (Title)	**NA**
	Rule No(s):	**NA**
	State Act(Title)	**Karnataka Education Act, 1983**
	Section:	**Section 143**
	State Rule: (Title)	**Karnataka Education Rules, 1995**
	Rule No(s):	**Rule 11**
	Impugned Interim Order: (date)	**NA**
	Impugned Final Order/Decree(Date)	**15.03.2022**
	High Court: (Name)	**HON'BLE THE HIGH COURT OF KARNATAKA AT BENGALURU**
	Names of Judges:	**HON'BLE MR. JUSTICE MR. RITU RAJ AWASTHI, CHIEF JUSTICE, HON'BLE MR. JUSTICE KRISHNA S DIXIT AND HON'BLE MS. JUSTICE J. M. KHAZI, JJJ**
	Tribunal/Authority: (Name)	**NA**
1.	Nature of matter	**CIVIL**
2. (a)	Petitioner/appellant No.1:	**MISS AISHAT SHIFA**
(b)	e-mail ID:	**NA**
(c)	Mobile phone number	**NA**
3. (a)	Respondent No. 1:	**THE STATE OF KARNATAKA & ORS.**
(b)	e-mail ID	**NA**
(c)	Mobile phone number	**NA**
4. (a)	Main category classification	**18**
(b)	Sub classification	**1807 OTHER**
5.	Not to be listed before	**NA**
6. (a)	Similar disposed of matter with citation, if any, & case details	**NO SIMILER DISPOSED OF MATTER**
(b)	Similar pending matter with case	**NO SIMILER PENDING**

	details:	**MATTER**
7.	**Criminal Matters**	
(a)	Whether accused/convict has surrendered	**NA**
(b)	FIR No. and date:	**NA**
(c)	Police Station	**NA**
(d)	Sentence Awarded	**NA**
(e)	Sentence Undergone	**NA**
8.	**Land Acquisition Matters:**	**NA**
(a)	Date of Section 4 notification	**NA**
(b)	Date of Section 6 Notification	**NA**
(c)	Date of Section 17 notification	**NA**
9.	**Tax Matters :** State the tax effect:	**NA**
10.	**Special Category** (first petitioner/appellant only):	**NA**
	☐ Senior citizen>65 years ☐ SC/ST ☐ Women/Child ☐ Disabled ☐ Legal Aid case ☐ In custody	**NA** **NA** **NA** **NA** **NA** **NA** **NA** **NA**
11.	Vehicle Number (in case of Motor Accident Claim matters):	**NA**

MR. JAVEDUR RAHMAN
ADVOCATE FOR THE PETITIONERS
AOR CODE : 2949
CONTACT NO. 9810644479

New Delhi
Date : **16. 03.2022**

SYNOPSIS

Aishat Shifa, a 1st year student of the Government PU College, Kundapura, Udupi District, Karnataka, is constrained to move this Hon'ble Court seeking its urgent intervention for protection and enforcement of her fundamental rights under Article 14, 15, 19, 21, 25 and 29 of the Constitution of India. The Hon'ble High Court *vide* the impugned final judgement and order has dismissed the petition ***Aisha Shifat & Anr. v. State of Karnataka,*** **W.P. NO. 2880/2022** filed by the Petitioner and has upheld the G.O. dated 05.02.2022 issued by the State Government, which had been challenged by the Petitioner herein.

The Hon'ble High Court **at page 39** of the impugned judgment formulated the following four questions for determination.

> "1. Whether wearing *hijab*/head-scarf is a part of *'essential religious practice'* in Islamic Faith protected under Article 25 of the Constitution?
>
> 2. Whether prescription of school uniform is not legally permissible, as being violative of petitioners Fundamental Rights *inter alia* guaranteed under Articles, 19(1)(a), (i.e., *freedom of expression*) and 21,(i.e., *privacy*) of the Constitution?
>
> 3. 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 Articles 14 & 15 of the Constitution?
>
> 4. Whether any case is made out in W.P.No.2146/2022 for issuance of a direction for initiating disciplinary enquiry against respondent Nos.6 to 14 and for issuance of a Writ of *Quo Warranto*against respondent Nos.15 & 16?"

It is respectfully submitted that the Hon'ble High Court has asked itself wrong questions and has completely sidestepped the relevant questions and has consequently arrived at erroneous conclusions.

In the aforesaid background, the Petitioner is approaching this Hon'ble Court being the *sentinel on the qui vive* to restore the fundamental rights which the Hon'ble High Court has failed to protect against a majoritarian government that is trampling on them with impunity for its own vested

political considerations. The patent errors in the impugned judgment are broadly brought out in the following headings.

THE HIGH COURT RAISES AND ANSWERS A QUESTION THAT WAS NOT RAISED BY ANY OF THE PETITIONERS, VIZ., THE LEGALITY / CONSTITUTIONALITY OF PRESCRIPTION OF A UNIFORM BY THE SCHOOLS

The second question quoted hereinabove did not arise for consideration at all. It was nobody's case that the school uniform was unconstitutional or violative of Articles 19(1)(a) and 21. There was no challenge whatsoever to the constitutionality or legality of the prescription of a uniform. Nevertheless, the Hon'ble High Court from **pages 95 to 109** devotes about 15 pages to answering questions which were never raised by any of the parties before it.

It is submitted that the Petitioner has absolutely no objection in wearing the uniform prescribed by the schools. All that the Petitioner sought was to wear a headscarf / head-covering, in addition to the prescribed uniform, which could be of the same colour or matching the colour of the school uniform so as to make it compatible with her religious beliefs. This submission has not at all been dealt with by the High Court in the entire 129 pages of the impugned judgment. The High Court has not even recorded this clear, categorical and oft-repeated stand of the Petitioner and rendered a judgment as if the Petitioners before it were arguing that prescription of a school uniform violated their fundamental rights, which it is again reiterated, was not their case.

Be that as it may, Rule 11 of the *Karnataka Education Rules, 1995* merely provides for the prescription of a uniform. Rule 11 has been in place since 1995 for almost 27 years and consistent with the said Rule, the Petitioners have been donning their uniform. The college authorities have also permitted the petitioners to wear a head scarf of the same colour as the school uniform. Wearing of the additional headscarf is not a breach of Rule 11. It is submitted that wearing of a head scarf does not by any stretch of

imagination impinge on any other person's fundamental rights nor does it cause any disturbance.

Rule 11 cannot be construed in a manner that a person is prohibited from wearing something in addition to and not in derogation of the uniform. A student donning a 'namam' or wearing a 'rudraksha', consistent with his innocent practice of faith cannot be said to be in breach of Rule 11. The cause of action therefore arose with the G.O. dated 05.02.2022 whereby in the garb of prescription of a uniform, the fundamental right of the Petitioner were sought to be restricted, and did not exist before that.

The High Court at **page 105** has denounced the stand of the Petitioner on the ground that *"An extreme argument that the students should be free to choose their attire in the school individually, if countenanced, would only breed indiscipline that may eventually degenerate into chaos in the campus and later, in the society at large."*

It is respectfully submitted that the Petitioners never put forth any such contention that they should be free to choose their attire in school. All that was sought was to accommodate their head scarf / head cover / hijab in addition to the school uniform and even matching its colour. The Hon'ble Court has stretched the Petitioner's contention to an extreme extent thereby losing sight of the Petitioner's case before it.

Once again, it was never the case of the Petitioner that *"the school dress code militates against the fundamental freedoms guaranteed under Articles, 14, 15, 19, 21 & 25 of the Constitution and therefore, the same should be outlawed by the stroke of a pen"* as has erroneously been recorded by the High Court at pg. 106.

THE HIGH COURT FAILED TO APPRECIATE THAT THE G.O WAS AN FRONTAL ATTACK TO THE FUNDAMENTAL RIGHTS OF THE PETITIONER UNDER 14, 15, 19, 21, 25 AND 29

The impugned G.O. is an indefensible attempt to create a regime of "coerced uniformity" to further marginalise what has historically been an

educationally and socially disadvantaged minority community and impede their access to education. As such, there is no place for the G.O. within our constitutional scheme. It is wholly perverse and is a frontal attack on not one, but a range of fundamental rights, including Articles 14, 15, 19, 21, 25 and 29 of the Constitution. These rights are by their very nature interconnected, and do not exist in silos. See **(1978) 1 SCC 248 #14 and (2017) 10 SCC 1 # 298**

It is submitted that the Hon'ble High Court ought to have appreciated that the restrictions in the G.O. are not a *simpliciter* issue of testing the limits of the freedom of conscience and right to freely practice one's religion under Article 25 but is a wholesale attack on the conception of "choice" itself, that too in a matter as deeply personal as dressing according to the dictates of one's conscience and faith. This offends several fundamental rights, in addition to Article 25:

i. By intruding into a matter as deeply personal as an item of clothing (which is being worn in addition to and not as a substitute for the prescribed uniform), there is a definitive encroachment on an individual's "zone of solitude", and thus a violation of an individual's right to privacy, liberty, dignity and expression under Articles 14, 19 and 21;

ii. The G.O. violates Article 21 inasmuch as it denies hijab wearing Muslim girl their right to education by placing before them the Hobson's choice of choosing between their faith, identity and dignity on the one hand and their educational futures on the other.

iii. The G.O. violates Articles 14 and 15 by perpetuating discrimination in an educational institution by targeting Muslim women by hindering their ability to exercise decisional autonomy and choice in manifesting their religious beliefs;

iv. The G.O. violates Article 29(1) by placing a restriction on the right of Muslim women to preserve their distinct culture, which includes wearing the hijab. Further, Article 29(2), which stipulates that no citizen shall be denied admission into any educational institution maintained by or receiving funds from the State on grounds of *inter alia* religion, is also violated. The choice being faced by the young Muslim girls is stark – theyare**not**being allowed to enter class and participate in educational activities if they continue to assert any religious/cultural identity. This is an ex-facie violation of Article 29(2).

It is pertinent to note that these rights are being asserted in conjunction with each other, and go far beyond the fundamental right to free conscience and practice of religion guaranteed under Article 25.

It was contended before the Hon'ble Court that the G.O. creates and actively promotes an environment where students are discouraged from exercising their decisional autonomy vis-à-vis their religious observances, thereby hindering them from "charting and pursuing" the development of their personalities. This is an encroachment on the zone of personal development over which every individual has the "right to be left alone". Any interference in this zone is a negation of dignity, liberty and privacy. It is essential to note that this "zone of solitude" which allows the development of personality attaches <u>to the person</u> and not the place with which it is associated.

In effect, the G.O. forces students to abdicate any semblance of a public display of faith, in order to continue receiving education. The inference is clear- students have no autonomy to pursue and build a relationship with their faith if they are to continue to participate in public education. This forced choice between two distinct parts of an individual's identity,that of a believer and of a student, is a violation of the fundamental right of every person to exercise choice in such deeply personal matters.

The right to decisional autonomy is a critical component of the right to privacy, as observed by Chandrachud, J in ***Justice K.S. Puttaswamy&Ors. v. Union of India &Ors***., (2017) 10 SCC 1:

> "**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**..."

(emphasis supplied)

Inherent in the right to privacy is the ability to make <u>**choices**</u> about deeply personal matters such as faith, dress and food. In the specific context of faith and religion, the right to privacy operates in tandem with Article 25 but is not limited by it, permitting individuals to choose a faith and facilitating a choice on their part to manifest their beliefs. An arbitrary state action, such as the present G.O., is an unacceptable intrusion in this sanctified personal space of the body and mind. Chandrachud J. observes:

> "**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. <u>**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**</u>… <u>**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.**</u>Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.
>
> **298.** …The autonomy of the individual is the ability to make decisions on vital matters of concern to life…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… **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 to the exercise of liberty."

(emphasis supplied)

Furthermore, Chelameshwar, J. held in ***Puttaswamy*** **(supra)** that the right to dress and religious observances is a matter of conscience that emanates from the zone of purely private thought, and must be kept away from the State glare. The freedom to manifest one's religious belief in matters of dress is not exclusively confined to Article 25, but is an aspect of liberty and privacy as well, and consequently also protected under Articles 14, 19 and 21:

> "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..."

(emphasis supplied)

Instead of viewing the issue holistically, the Hon'ble High Court has focussed its attention on Article 25 seen in isolation, and in that too, has dived straight into the question of whether wearing of hijab is an essential religious practice without first conducting the enquiry that must be undertaken before the question of essentiality arises.

HIGH COURT IGNORES THE CONCESSION / ADMISSION OF THE STATE GOVERNMENT THAT THE G.O., IN SO FAR AS IT STATES THAT WEARING OF HIJAB IS NOT A PART OF

ARTICLE 25, WAS A RESULT OF *"OVER ENTHUSIASM OF THE DRAFTSMAN"*

The State had conceded in the course of its arguments that it had no intention to curtail the right of the Petitioners to wear a hijab for which protection was claimed under Article 25 of the Constitution, nor did the State seek to invoke the exceptions of public order, morality or health that Article 25 is subject to. The Ld. Advocate General had categorically conceded that the G.O., insofar as it laid down that wearing of hijab is not a part of Article 25 rights, *"was a result of over-enthusiasm of the draftsman"*. The Ld. Advocate General had argued that the G.O. should be read ignoring the recitals that dealt with wearing of hijab and without its concluding line that invoked 'public order' and should instead be read as an innocuous circular empowering certain college committees to prescribe a uniform. It is submitted that despite the State giving up the defence of the G.O., the High Court *vide* the impugned order has sought to resurrect the same and has upheld the G.O., body and soul. There is no mention whatsoever of the concession of the State despite this fact being orally argued and subsequently placed in the Written Arguments submitted by the Petitioner.

THE HIGH COURT OUGHT NOT TO HAVE SUBSTITUTED ITS OWN UNDERSTANDING AND EXPLAINED THE IMPUGNED G.O. IN EXPRESS DEROGATION SUBSTITUTION OF THE PLAIN LANGUAGE OF THE G.O. ITSELF

It is settled law that the validity of a statutory order has to be tested solely on the basis of the reasons mentioned in the order itself and that the validity cannot be sustained on fresh reasons supplemented later. Despite this, the High Court has done exactly the opposite.

Despite the fact that this was specifically argued before the High Court and the Constitution Bench decision in ***Mohinder Singh Gill* v. *Chief Election Commissioner*, (1978) 1 SCC 405** was cited in support of this contention, the High Court has ignored the binding precedent and employed a new concept called 'intrinsic material' which it coined in **page 65** (after giving

its footnote based interpretation to the Quran) and employs it at **page 116** to circumvent the decision in ***M.S. Gill*** and upheld the G.O. based on material that did not form part of the reasons given in the order.

The Petitioner had, based on the translation of the G.O. dated 05.02.2022, vehemently argued that a restriction on religious freedom sought to be imposed on the ground of 'public order' has to be justified on adequate material, which material can be looked at by the constitutional court in the exercise of the power of judicial review to satisfy itself whether the purported grounds of public order is a mere cloak or a ruse for the State to trample upon the fundamental rights enshrined under the Constitution and further that public order is not every breach of law and order but is an aggravated form of disturbance that is much higher than a law and order issue.

The same was initially sought to be downplayed by the Respondent State who argued that the Kannada term *'sarvajanika suvyavasthe'* does not mean 'public order' but when it was pointed out by the Petitioner that the official Kannada translation of the Constitution uses the term *'sarvajanika suvyavasthe'* for the term *'public order'* at every place in the Constitution, the Respondent State had no response to it and gave up the defence based on *'public order'* despite categorically pleading the same in its objections, and conceded that the invocation of the ground of 'public order' in the last line of the G.O. may be ignored as "over-enthusiasm" of the draftsman.

The Hon'ble High Court has however at **page 118** ignored the concession and proceeded to hold that the term 'public order' cannot be construed as the one employed in the Constitution or statues since *"There is a sea of difference in the textual structuring of legislation and in promulgating a statutory order as the one at hands. The draftsmen of the former are ascribed of due diligence & seriousness in the employment of terminology which the government officers at times lack whilst textually framing the statutory policies"* and further that the impugned order could have been better drafted. Further the Court goes on to observe that the Government

Order gives a lose impression that there is some nexus between wearing of hijab and the 'law and order' situation.

Even apart from the fact that the Ld. Advocate General had completely given up the defence based on 'public order' despite the same being categorically pleaded in the State's Statement of Objections, there is no other ground on which the State has justified the restriction on the fundamental right under Article 25 in its pleadings. The concession of the Ld. Advocate General was more than enough for the Hon'ble High Court to hold that there exist no restriction for the Petitioner and other Muslim girls to wear their hijab to school / college.

Secondly, the requirement under law, which was vociferously argued, was that there has to be a direct and proximate nexus between the restriction imposed and the ground on which it is justified. The High Court has while observing that the G.O. gives a *'loose impression'*, as opposed to the direct and proximate link requirement, between wearing of hijab and 'law and order' goes on to sustains the same.

Lastly, it is submitted that 'law and order' is not and cannot be a ground to impose restrictions on the freedom to practice religion, the same not being enumerated either in Article 25(1) or in Article 25(2) as one of the justifications for imposing Article 25 restrictions.

THE HIGH COURT HAS NOT SATISFIED ITSELF AS TO WHETHER THE INFERENCE IN THE IMPUGNED G.O. THAT PROHIBITION OF HEADSCARF DOES NOT VIOLATE ARTICLE 25 WAS BASED UPON ANY MATERIAL AT ALL

The Petitioner had vehemently contended before the Hon'ble High Court that none of the three decisions referred to in the G.O. i.e. (i) ***FathimaThasneem v. State of Kerala***, 2018 SCC OnLine Ker 5267;(ii)***Fathema Hussain Sayed v. Bharat Education Society*****,** AIR 2003 Bom 75;and (iii)***Sir M. VenkataSubba Rao, Matriculation Higher Secondary School Staff Assn. v. Sir M. VenkataSubba Rao, Matriculation Higher Secondary School***, (2004) 2 CTC 1, can actually be

relied upon to justify the prohibition on wearing of hijab / headscarf / head cover and reliance upon the same by the State Government in the impugned G.O. is completely misplaced.

Though theHon'ble High Court notes in paras X(ii), X(iii) and X(iv) that the judgments relied upon in the G.O. are irrelevant, it has not questioned the Respondents as to on what other basis then has the State Government in the first placecome to a conclusion in the G.O. that prohibition on hijab / headscarf / head cover will not be violative of Article 25.

It is most humbly submitted that in the absence of any material put forth by the State to justify such conclusion and upon it being demonstrated that the reasons given in the impugned G.O. were misplaced, the Hon'ble Court ought not to have supplanted its view no matter how abhorrent the practice of wearing *hijab* might seem to the learned Judges.

That apart, while none of the Ld. Senior Advocates appearing on behalf of the Respondents have adverted to or have called in question the correctness of the decisions of the Ld. Single Judge of the Hon'ble Kerala High Court in***Amnah Bint Basheer v. Central Board of Secondary Education (CBSE)***, 2016 SCC OnLine Ker 41117(paras 29 and 30)**<u>that covering of the head is an essential part of Islam</u>**, which decision has subsequently been approved by the Hon'ble Division Bench of the Kerala High Court in ***Central Board of Secondary Education v. Amnah Bint Basheer***, 2016 SCC OnLine Ker 487; nor have they dealt with the Division Bench decision of the Hon'ble Madras High Court in ***M. Ajmal Khan v. Election Commission of India***, 2006 SCC OnLine Mad 794, where in para 15 the Hon'ble Court notes the unanimity amongst Muslim scholars **<u>that covering of head is an obligatory act</u>**. Despite this, the Hon'ble High Court in the impugned order goes to on distinguish the same holding that the factual matrix therein was different.

It is submitted that change in factual matrix will not change the essentiality of a religious practice. A religious practice is to be looked at and

understood from the sources of the religion and not on myriad factual situations.

Thus, the Hon'ble Court failed to appreciate that the impugned G.O. deserved to be set aside on account of there being absolutely no material before the State Government to justify the conclusion it had reached therein. **[see *AnuradhaBhasinv.UOI*,**(2020) 3 SCC 637#78, #141]

THE HIGH COURT OUGHT TO HAVE APPRECIATED THE PETITIONER'S CONTENTION THAT THE IMPUGNED G.O. IS IN CONTRAVENTION OF SECTION 143 OF THE *KARNATAKA EDUCATION ACT, 1983*

It is most respectfully submitted that the Hon'ble High Court has not dealt with the contention of the Petitioner that the G.O. dated 05.02.2022 is in breach of Section 143 of the 1983 Act.

Section 143 of the *Karnataka Education Act, 1983,* empowers the State Government to delegate the exercise of powers under the Act or rules to an officer or authority sub-ordinate to it and such delegation would be valid only when the same is notified in the official Gazette. Section 143 reads as follows:

> "**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."

(emphasis added)

Firstly, the State Government has not bothered to demonstrate as to whether or not the G.O. delegating powers upon the College Development Committees has been notified in any official gazette.

Secondly and more importantly, such powers could not have been conferred upon the local MLA led College Development Committees since neither are they officers nor authorities subordinate to the State Government, as required in Section 143.

In so far as the position of an MLA is concerned, it is well settled that he is not a servant of the State. Reference in this regard may be made to the following observation of the Hon'ble Apex Court in ***Ashwini Kumar Upadhyay v. Union of India*, (2019) 11 SCC 683 #15**

In view thereof, it is submitted that the State Government could not have entrusted a private MLA-led committee with the power to determine the extent upto which the Petitioner's fundamental rights could be curbed. After all, it is trite that when a statute prescribes a thing to be done in a particular manner then it has to be done in such manner and such manner only. A three judge bench of this Hon'ble Court in ***State of U.P. v. Singhara Singh*, (1964) 4 SCR 485**, has declared the law as follows:

> "**8.** The rule adopted in Taylor v. Taylor [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted..."
>
> (emphasis added)

The Hon'ble High Court at **pg. 121** has cursorily dealt with the without prejudice argument of the Petitioner that the impugned G.O. is also bad in law on account of it attracting the 'doctrine of dictation' by cursorily rejecting the same holding that *"Who acted under whose dictation cannot be adjudged merely on the basis of some concessional arguments submitted on behalf of the State Government."*

The High Court ought to have appreciated that the 'doctrine of dictation' is invoked and can only be invoked in respect of a superior authority directing an inferior authority to act in a certain manner. In the present case, there is no doubt at all that the Petitioner had challenged the impugned G.O. which was issued by the State Government to the College Development Committees. As such 'who dictated to whom' is not ambiguous as the High Court seems to suggest. It is very clear that the

direction is from the higher authority i.e. the State Government to the lower authority i.e. Campus Development Committees.

The State Government *vide* the G.O. while ostensibly leaving the final decision to be taken by the College Development Committees, however has indicated its mind that wearing of Hijab is not a part of Article 25 rights. This clearly makes the purported independent exercise of any power by the CDC totally vitiated. See ***Orient Paper Mills Ltd. v. Union of India*, (1970) 3 SCC 76 #4**; ***Manohar Lal v. Ugrasen*, (2010) 11 SCC 557 #23.**

THE HIGH COURT INSTEAD OF ENQUIRING WHETHER THERE WAS ANY LEGAL RESTRICTION ON THE FUNDAMENTAL RIGHTS OF THE PETITIONER, PROCEEDS TO ASK THE PETITIONER TO SATISFY THE TEST OF *'ESSENTIAL RELIGIOUS PRACTICE'* AT THE VERY THRESHOLD, WHICH APPROACH IS TOTALLY PERVERSE IN CONSTITUTIONAL ADJUDICATION OF ANY VIOLATION OF ARTICLE 25

It is submitted that the issue of 'essential religious practice' did not at all arise as has been portrayed by the Hon'ble High Court. The Petitioner had submitted that the State could not have come to a conclusion in the G.O. that wearing of hijab is not an essential religious practice. For that purpose, the Petitioner had pleaded and demonstrated that in the Islamic faith, the wearing of hijab was an essential religious practice.

More importantly, it was categorically argued that the issue of essential religious practice arises only when there is a valid legal restriction under Article 25 on a religious practice placed by the State. Admittedly, there was no restriction under Article 25(1), as the State had given up the 'public order' defense; nor is there a 'law' under Article 25(2)(b) providing for social welfare and reform of a religious practice. In the absence of any valid legal restriction envisaged under Articles 25(1) or 25(2) on the religious practice of wearing a hijab, there was no requirement of getting the Petitioners to prove that wearing of hijab was an *essential* religious practice in Islam. The impugned judgment raises serious issues about the approach of a Court in judicial review and instead of asking the primary question of whether there was any restriction of the fundamental right

under Article 25 in the first place, the Court asks the Petitioners to prove that they have a fundamental right to wear a hijab by demonstrating that such practice is essential to Islam.

The Hon'ble High Court at **page 57** of the impugned judgement completely inverses the law and the context in which the essential religious practice doctrine was evolved and comes to a totally perverse conclusion that "*if essential religious practice as a threshold requirement is not satisfied, the case does not travel to the domain of constitutional values*". It is respectfully submitted that the Hon'ble High Court has totally turned the law on its head and has, in fact, put the cart before the horse. The far reaching consequence of such erroneous conclusion is that it has completely restricted the exercise of religious freedoms to so called 'essential practices' itself, which was never in the contemplation of the framers of the constitution nor of this Hon'ble Court when it invoked the said concept itself.

The State, admittedly, had conceded that there was no restriction placed under Article 25(1) and the ground of 'public order' stated in the G.O. was given up in the arguments. Thus, there was no restriction under Article 25(1) to the exercise of fundamental rights under Article 25. Further, the State had not placed any material to show that Rule 11 of the Karnataka Education Rules, 1995 was in fact a law of social reform intended to curb a religious practice. Article 25(2) deals with laws enacted for social reform and does not include in its scope a law that incidentally encroaches on religious freedoms that is subsequently sought to be defended on the basis that it 'reforms' a religion. In the absence of any valid restriction under Articles 25(1) and 25(2), there was no question of stating that essential practice was a threshold requirement and had to be proved by the Petitioner.

RULE 11 OF *THE KARNATAKA EDUCATION RULES, 1995*, IS NOT A RESTRICTION FOR THE PURPOSES OF ARTICE 25(2) AS THE SAID RULE HAS NO *'PROXIMATE'* OR *'DIRECT'* CONNECTION

WITH SOCIAL REFORM CONCERNING THE PRACTISE OF HIJAB.

It is respectfully submitted that the Hon'ble Court, while tracing the power of the Government to prescribe uniform to Rule 11 of the 1995 Rules, has not at all dealt with the contention of the Petitioner that any restriction on fundamental rights has to have an immediate, proximate and direct relation to the object sought to be achieved and the encroachment on the fundamental right cannot be a mere accidental or incidental consequence of the so called restriction.

Further, it has been held that thoughthe State is empowered under Article 25(2)(b) to make any law providing for social welfare and reform, the said power ought not to be exercised in a manner so as to reform a religion out of existence or identity by invading upon the basic and essential practices. Therefore, the 'essential religious practice' doctrine is a shield against the invasion of the State into the freedom guaranteed under Article 25 and is not to be used as a sword to further strike at the guaranteed freedoms.

It is submitted that in the absence of any pleadings, the oral explanations advanced by the State that the said measure of restricting the wearing of hijab / headscarf / head cover is a measure of social reform ought not to have been countenanced at all by the Hon'ble High Court, primarily since no such intent is evinced from the impugned G.O. itself nor does Rule 11 of the *Karnataka Education Rules, 1995*, on which the State places reliance, can by any stretch of imaginative and fanciful interpretation be said to be a measure of social reform of the Muslim community so as to be justified in terms of Article 25(2)(b).

In any event, the stand of the Respondent State that the restriction is only limited to the school premises and not outside by itself demonstrates the hollowness in the 'social reform' argument. If the State intended to curtail this practice there is no reason why it would ostracise it only within the school compound and compel minor girls to stop practicing hijab in school, while maintaining that they are free to do so outside the school. This only

shows that the 'social reform' argument is clearly an afterthought to somehow sustain an otherwise hasty, arbitrary and constitutionally unsound G.O., which has nothing to do with the restrictions prescribed under Article 25(2) and was driven by purely political considerations.

HIGH COURT FAILS TO APPRECIATE THAT THE 'CONSTITUTIONAL VALUES' AS HELD BY THIS HON'BLE COURT ARE 'PRO CHOICE' AND THE PETITIONER'S ASSERTIONS WERE IN TUNE WITH THE SAME

Further, the Hon'ble High Court ought to have appreciated that the constitutional values, as noted in ***Indian Young Lawyers Assn. (SabrimalaTemple-5J)*** **v.** ***State of Kerala*****, (2019) 11 SCC 1** (relied upon by the High Court at **page 56** of the impugned judgement) further pro-choice values and, as such, could not be read in a manner so as to deny the Petitioner's choice to wear a headscarf. In fact, the pro-choice judgement of this Hon'ble Court has been construed to be anti-choice**.**

IMPUGNED ORDER DEGRADES AND DENIGRATES THE SACROSANCT NATURE OF FUNDAMENTAL RIGHTS UNDER PART III BY LABELLING THEM AS *'DERIVATIVE RIGHTS'*

The Hon'ble High Court from **pages 87 – 94** emphasises on the importance of a school uniform and that the school exercises a parental power over the students. While there is no gainsaying these abstract concepts, the question which ought to have been asked by the HC was the relevancy of the same when the fundamental rights are alleged to have been breached.

The Hon'ble High Court *vide* the impugned order has dismissed core fundamental rights as 'derivative rights' (**pages 99 and 100** of the impugned judgment) and compares schools with *"courts, war-rooms and defence camps"* to hold that freedom of individuals as a 'necessity' is curtailed to maintain discipline and decorum. The High Court in its quest to uphold the purported sacrosanct nature of the uniform has completely given a death-knell to the fundamental rights of the petitioners under Articles 14, 15, 19, 21, 25 and 29 of the Constitution, which is completely impermissible in our constitutional scheme.

HIGH COURT'S CONLCUSION THAT FREEDOM OF CONSCIENCE AND FREEDOM OF RELIGION ARE MUTUALLY EXCLUSIVE IS UNTENABLE

The High Court draws a bizarre distinction between freedom of conscience and freedom of religion and observes at **page 81** that *"freedom of conscience and right to religion are mutually exclusive"*. It is submitted that the High Court has completely nullified the extent, width and content of Article 25 of the Constitution.

The Hon'ble High Court at page 81 of the impugned judgement holds that freedom of conscience and right to religion are mutually exclusive and that no material was placed as to how wearing of hijab was a part of their right to conscience. It is submitted that freedom of conscience and freedom of religion are not rights that operate in silos and have separate verticals. It is submitted that freedom of religion and freedom of conscience are inter-woven and intersect at various stages.

THE TEST OF ESSENTIAL RELIGIOUS PRACTICE HAS BEEN TURNED ON ITS HEAD BY THE HIGH COURT

It is most respectfully submitted that the impugned order deserves to be dismissed on the solitary ground that the Hon'ble High Court has turned the 'essential religious practices' inquiry on its head. Though the Petitioner vehemently contended on the basis of this Hon'ble Court's decisions in ***Ratilal Panachand Gandhi v, State of Bombay***, AIR 1954 SC 388; as well as ***Bijoe Emmanuel v. State of Kerala***, 1986 3 SCC 615, that in a matter of adjudication of Article 25 rights, Constitutional Courts ought to exercise restraint in inquiring into 'essential religious practices' at the very threshold itself, the Hon'ble High Court has failed to heed the approach adopted by this Hon'ble Court and without any hesitation has undertaken such inquiry.

It is submitted that this Hon'ble Court in Para 10 of ***Ratilal's*** case categorically observed that subject only to the restrictions imposed under

Article 25, every person has a fundamental right, not only to entertain but to also exhibit his religious belief by way of overt acts sanctioned by his religion. Para 10 reads as follows:

> "**10.** Article 25 of the Constitution guarantees to every person and not merely to the citizens of India, the freedom of conscience and the right freely to profess, practise and propagate religion. This is subject, in every case, to public order, health and morality. Further exceptions are engrafted upon this right by clause (2) of the article. Sub-clause (*a*) of clause (2) saves the power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and sub-clause (*b*) reserves the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices. Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience **but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion** and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. 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."

(emphasis added)

Thereafter in Para 13 the Constitution Bench sounded a word of caution at 'outside authorities', meaning authorities outside of the religious community, from inquiring as to whether or not the practices in question therein were 'essential parts of the religion', which caution has gone unheeded by the High Court. Para 13 reads as under:

> "**13.** 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. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. **No outside authority has any right to say that these are not essential parts of religion** and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like

> under the guise of administering the trust estate. Of course, the scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides. We may refer in this connection to the observation of Davar, J. in the case of *Jamshedji* v. *Soonabai* [33 Bom 122] and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktadbaj, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think, are quite appropriate for our present purpose. "If this is the belief of the community" thus observed the learned Judge, "and it is proved undoubtedly to be the belief of the Zoroastrian community,—a secular Judge is bound to accept that belief—it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind". These observations do, in our opinion, afford an indication of the measure of protection that is given by Article 26(*b*) of our Constitution."

(emphasis added)

The self-imposed restraint on inquiring at the very threshold as to whether or not a practice is fundamental / essential to the religion can also be seen in the approach adopted by the Hon'ble Apex Court in ***Bijoe Emmanuel*** (supra). The Hon'ble Apex Court in the said case merely inquired into whether or not the beliefs entertained by the Petitioners therein had some foundation and were not the outcome of any perversity.

The Hon'ble Apex Court upon noting in Para 8 that the beliefs were sincere, although they *"may appear strange or even bizarre to us"*, proceeded to first examine whether the ban imposed therein was consistent with Articles 19(1)(a) and 25 of the Constitution. It is evident that the Hon'ble Court did not foray into the field of 'essential religious practice' at the very outset itself.

It is further submitted that the essentiality test, which is itself under re-consideration by a 9-Judge Bench of this Hon'ble Court as stated above, is invoked where a competing right or State interest is involved and a balancing act is required by the Court. It is submitted that a Muslim girl pursuing her education wearing a hijab/headscarf offends nobody's right

nor does it militate against any State interest. Therefore, on this ground also, the essentiality test is wrongly invoked in the present facts.

IMPUGNED ORDER WRONGLY HOLDS THAT THE BINDING JUDGEMENT OF THIS HON'BLE COURT IN *BIJOE EMMANUEL'S* CASE IS NOT APPLICABLE

The High Court wrongly distinguishes the judgement of this Hon'ble Court in ***Bijoe Emmanuel* v. *State of Kerala*, (1986) 3 SCC 615**. The High Court from **pages 81 to 85** completely sidesteps the binding judgement of this Hon'ble Court by holding that *"Bijoe Emmanuel is not the best vehicle for drawing a proposition essentially founded on the freedom of conscience"*.

It is submitted that *pari materia* the present case, the Hon'ble Apex Court in ***Bijoe Emmanuel*** was dealing with a situation where children belonging to the Jehovah's witnesses faith were expelled from the school for not singing the National Anthem, which they sincerely believed was against the tenets of their faith, though they would stand up in respect when it was sung during the morning assembly. Hon'ble Justice O. Chinnappa Reddy captured the factual scenarios in para 1 as follows:

> **"O. Chinnappa Reddy, J.**— The three child-appellants, Bijoe, BinuMol and Bindu Emmanuel, are the faithful of Jehovah's Witnesses. They attend school. Daily, during the morning Assembly, when the National Anthem "Jana Gana Mana" is sung, they stand respectfully but they do not sing. They do not sing because, according to them, it is against the tenets of their religious faith — not the words or the thoughts of the anthem but the singing of it. This they and before them their elder sisters who attended the same school earlier have done all these several years. No one bothered. No one worried. No one thought it disrespectful or unpatriotic, the children were left in peace and to their beliefs. That was until July 1985, when some patriotic gentleman took notice. The gentleman thought it was unpatriotic of the children not to sing the National Anthem. He happened to be a Member of the Legislative Assembly. So, he put a question in the Assembly. A Commission was appointed to enquire and report. We do not have the report of the Commission. We are told that the Commission reported that the children are "law-abiding" and that they showed no disrespect to the National Anthem. Indeed it is nobody's case that the children are other than well-behaved or that they have ever behaved disrespectfully when the National Anthem was sung. They have always stood up in respectful silence. But these matters of conscience, which though better left alone, are sensitive and emotionally evocative. So, under the instructions of Deputy Inspector

> of Schools, the Headmistress expelled the children from the school from July 26, 1985...”

This Hon’ble Court after noting that such beliefs were genuinely held went on to state in para 9 what it was required to do in that *“...Now, we have to examine whether the ban imposed by the Kerala education authorities against silence when the National Anthem is sung on pain of expulsion from the school is consistent with the rights guaranteed by Articles 19(1)(a) and 25 of the Constitution.”*

The Hon’ble Court thereafter notes the circulars issued by the Kerala Education authorities and after examining them goes on to hold that the said circulars have no legal sanction and clearly contravene Article 19(1)(a) and Article 25(1). The relevant paras in this regard are as follows:

> “**13.** The Kerala Education Authorities rely upon two circulars of September 1961 and February 1970 issued by the Director of Public Instruction, Kerala. The first of these circulars is said to be a Code of Conduct for teachers and pupils and stresses the importance of moral and spiritual values. Several generalisations have been made and under the head patriotism it is mentioned:
>
> > “*Patriotism*
> >
> > 1. Environment should be created in the school to develop the right kind of patriotism in the children. Neither religion nor party nor anything of this kind should stand against one's love of the country.
> >
> > 2. For national integration, the basis must be the school.
> >
> > 3. National Anthem. As a rule, the whole school should participate in the singing of the National Anthem.”
>
> In the second circular also instructions of a general nature are given and para 2 of the circular, with which we are concerned, is as follows:
>
> > “It is compulsory that all schools shall have the morning assembly every day before actual instruction begins. The whole school with all the pupils and teachers shall be gathered for the assembly. After the singing of the National Anthem the whole school shall, in one voice, take the National Pledge before marching back to the classes.”
>
> **14.** Apart from the fact that the circulars have no legal sanction behind them in the sense that they are not issued under the authority of any statute, we also notice that the circulars do not oblige each and every pupil to join in the singing even if he has any conscientious objection based on his religious faith, nor is any penalty attached to not joining the singing. On the other hand, one of the circulars (the first one) very lightly

emphasise the importance of religious tolerance. It is said there, "All religions should be equally respected."

15. If the two circulars are to be so interpreted as to compel each and every pupil to join in the singing of the National Anthem despite his genuine, conscientious religious objection, then such compulsion would clearly contravene the rights guaranteed by Article 19(1)(*a*) and Article 25(1)."

In Para 19 thereafter, this Hon'ble Court has categorically laid down that the primary inquiry to be made by the courts when an allegation of breach of Article 25 is complained of is to actually examine whether the act complained of is in furtherance of any of the restrictions under Article 25 or not. Para 19 reads as follows:

"19. We see that the right to freedom of conscience and freely to profess, practise and propagate religion guaranteed by Article 25 is subject to (1) public order, morality and health; (2) other provisions of Part III of the Constitution; (3) any law (*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; or (*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. Thus while on the one hand Article 25(1) itself expressly subjects the light guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practise and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by Article 25(1). Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practise 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 authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practise or to provide for social welfare and reform. It is the duty and function of the court so to do. Here again as mentioned in connection with Article 19(2) to (6), it must be a law having the force of a statute and not a mere executive or a departmental instruction. We may refer here to the observations of Latham, C.J. in *Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth* [67 CLR 116] a decision of the Australian High Court quoted by Mukherjea, J. in the *Shirur Mutt case* [*Commr, HRE* v. *Sri LakshmindraThirthaSwamiar of Sri Shirur Mutt*, AIR 1954 SC 282 : 1954 SCR 1005] . Latham, C.J. had said :

"The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community

so organized. This view makes it possible to reconcile religious freedom with ordered government. It does not mean that the mere fact that the Commonwealth Parliament passes a law in the belief that it will promote the peace, order and good government of Australia precludes any consideration by a court of the question whether or not such a law infringes religious freedom. The final determination of that question by Parliament would remove all reality from the constitutional guarantee. That guarantee is intended to limit the sphere of action of the legislature. The interpretation and application of the guarantee cannot, under our Constitution, be left to Parliament. If the guarantee is to have any real significance it must be left to the courts of justice to determine its meaning and to give effect to it by declaring the invalidity of laws which infringes it and by declining to enforce them. The courts will therefore have the responsibility of determining whether a particular law can fairly be regarded, as a law to protect the existence of the community, or whether, on the other hand, it is a law 'for prohibiting the free exercise of any religion'. The word 'for' shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character."

What Latham, C.J. has said about the responsibility of the court accords with what we have said about the function of the court when a claim to the Fundamental Right guaranteed by Article 25 is put forward."

(emphasis added)

It is pertinent to also note that ***Bijoe Emmanuel's*** case has been consistently followed by this Hon'ble Court, including most recently in ***Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala*****, (2019) 11 SCC 1** wherein para 451.6 it was held as follows:

"**451.6.** In *Bijoe Emmanuel* v. *State of Kerala* [*Bijoe Emmanuel* v. *State of Kerala*, (1986) 3 SCC 615], three children belonging to a sect of Christianity called Jehovah's witnesses had approached the Kerala High Court by way of writ petitions to challenge the action of the Headmistress of their school, who had expelled them for not singing the National Anthem during the morning assembly. The children challenged the action of the authorities as being violative of their rights under Articles 19(1)(*a*) and 25. This Court held that the refusal to sing the National Anthem emanated from the genuine and conscientious religious belief of the children, which was protected under Article 25(1). In a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain PILs challenging religious practices followed by any group, sect or denomination, could cause serious damage to the constitutional and secular fabric of this country."

[also see *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*, (2019) 1 SCC 1 #109.2 @pg. 274 (footnote no. 79)]

HIGH COURT HAS RECORDED A FACTUALLY ERRONEOUS FINDING THAT THE PETITIONER HAS NOT PLEADED DETAILS ABOUT HER WEARING THE HEADSCARF

The Hon'ble High Court in the impugned judgment in para XII(i) has erroneously held that the Writ Petition lacked essential factual averments in that, the Petitioners have not pleaded that they were wearing *hijab* before joining the institution and that no explanation has been offered in respect of the undertaking given at the time of admission that they will abide by school discipline. It further erroneously goes on to hold that the Petitioners have not placed any material to show that they were wearing *hijab* from the 'beginning', without specifying what 'beginning' meant – since birth / infancy / toddler / pre-school / school.

It is submitted that the finding is factually erroneous and contrary to records in as much as the Petitioner has specifically and categorically pleaded in the writ petition that she has been wearing her headscarf without any obstruction since taking admission in the college, which fact has not been disputed by any of the Respondents in their counter affidavit or their arguments. It is also the Petitioner's categorical case that the Respondent College only stopped the Petitioner and similarly situated Muslim girl students from wearing their headscarves / head covering / hijab post the G.O dated 05.02.2022.

Be that as it may, it is submitted with utmost deference that the said observation is completely erroneous and hinges on absurdity in that there cannot be any estoppel in the practice of religion and an erstwhile non practicing person cannot be prevented from doing so on the ground that he didn't practice earlier. For example, merely because a Muslim person did not offer Namaz in the past does not create any hurdle for him to do so in the future if he wishes to be observant and practicing for myriad reasons.

Therefore assuming, without conceding, that any of the petitioners before the High Court did not observe the head covering in the past is of no consequence at all, more so, when the petitioner before the High Court

were minors studying in pre-university college / senior secondary school and the religious obligation to wear the head cover / head scarf / hijab arises upon a girl attaining puberty. Thus, the finding in the impugned order that the Petitioner ought to have pleaded and demonstrated that she was wearing hijab *"from the beginning"* is totally fallacious and inconsequential, in light of the categorical undisputed averments made in the writ petition.

HIGH COURT'S RELIANCE UPON THE HOUSE OF LORDS JUDGMENT AT PAGE 101 IS TOTALLY MISCONCEIVED

The Hon'ble High Courtat **pg. 101** places reliance upon ***Regina vs. Governors Of Denbigh High School*, [2006] 2 WLR 719,**to hold that in a school atmosphere religious identity should not be disclosed. First of all, the Hon'ble failed to appreciate the caveat with which the said judgment begins in that the House of Lords was very clear from the beginning that they are not getting into the question of whether or not Islamic dress or any feature of Islamic dress should be permitted in the country. The same can be seen from para 2 of Lord Bingham's opinion which is as follows:

> "**2.** It is important to stress at the outset that this case concerns a particular pupil and a particular school in a particular place at a particular time. It must be resolved on facts which are now, for purposes of the appeal, agreed. The House is not, and could not be, invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country. That would be a most inappropriate question for the House in its judicial capacity, and it is not one which I shall seek to address."

(emphasis added)

The Hon'ble High Court failed to appreciate that in the facts of the said case,the concerned student was insisting to be allowed to wear long coat like garment known as '*jilbab'* over and above the shalwar kameeze and head scarf permitted by the school in accordance with Islamic requirements. The relevant portion of Lord Bingham's opinion in this regard is as foloows:

> "**33.** The respondent criticised the school for permitting the headscarf while refusing to permit the jilbab, for refusing permission to wear the jilbab when some other schools permitted it and for adhering to their own view of what Islamic dress required. None of these criticisms can in my

opinion be sustained. The headscarf was permitted in 1993, following detailed consideration of the uniform policy, in response to requests by several girls. There was no evidence that this was opposed. But there was no pressure at any time, save by the respondent, to wear the jilbab, and that has been opposed. Different schools have different uniform policies, no doubt influenced by the composition of their pupil bodies and a range of other matters. Each school has to decide what uniform, if any, will best serve its wider educational purposes. The school did not reject the respondent's request out of hand: it took advice, and was told that its existing policy conformed with the requirements of mainstream Muslim opinion.

34. On the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the rules were acceptable to mainstream Muslim opinion. It was feared that acceding to the respondent's request would or might have significant adverse repercussions. It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision. After the conclusion of argument the House was referred to the recent decision of the Supreme Court of Canada in *Multani v Commission scolaire Marguerite-Bourgeoys*[2006] SCC 6. That was a case decided, on quite different facts, under the Canadian Charter of Rights and Freedoms. It does not cause me to alter the conclusion I have expressed."

(emphasis added)

THE FINDING AT PAGE 94 THAT THE CIRCULAR DT. 30.01.2014 WAS NOT CHALLENGED IS TOTALLY MISPLACED

While it is factually correct that the Petitioner has not challenged the circular dated 31.01.2014 in respect of constitution of the college development committees headed by the respective MLAs, it is submitted that the challenge was not necessary in the facts of the present case. The Petitioner reiterates that she has no grievance with the State passing directions for formation of private college development committees *per se*. It is the delegation of statutory / constitutional functions on these private committees that is questionable, and it is this delegation of such functions

in exercise of State power under Article 25 by way of the impugned G.O. dated 05.02.2022 that the Petitioner has challenged.

The grievance of the Petitioner thus arises not on account of the circular dated 31.01.2014 but on account of the denigration of her fundamental rights when the college authorities refused her entry into the college/school premises with her head scarf / hijab, followed by the impugned circular dt. 05.02.2022 indicating and supporting the college authorities to ban the wearing of head scarfs.

THE HIGH COURT *VIDE* THE IMPUGNED ORDER HAS SOUGHT TO RESURRECT A SPECIFIC AMENDMENT THAT WAS MOVED IN THE CONSTITUTION ASSEMBLY WHICH WAS SPECIFICALLY REJECTED BY THE FRAMERS OF THE CONSTITUTION

The High Court while quoting Dr. Ambedkar's personal opinion at **pg. 123** and his personal distaste for *'purdah'* expressed in his book titled *'Pakistan or The Partition of India'* which was first published in the year **1940** has turned a Nelson's eye to what transpired in **1948** in the Constituent Assembly, which was being spearheaded by Dr. Ambedkar himself, when Article 19 of the draft constitution (present Article 25) was being debated upon.

It is submitted that one of the Ld. Members of the Constituent Assembly namely, Mr. Tajamul Husain, had proposed 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"*.

Despite the Ld. Member vehemently putting forth arguments in support of his proposal for the amendment, the founding fathers, including Dr. Ambedkar despite his personal distaste of the *purdah* system, expressly rejected the same. If only the Hon'ble High Court had examined the issue in correct perspective it would have appreciated that while Dr. Ambedkar being at the helm of affairs of drafting the constitution could have easily imposed restrictions on religious dressing, he did not do so as he had the

foresight and understanding of what constitutionally guaranteed freedoms stood for.

Be that as it may, it is pertinent to point out that just as the Hon'ble High Court did in the Impugned Judgement with giving personal opinions of the translator by way of footnotes to his translation of the Quran, the Court has also adopted a pick and chose approach in relying on Dr. Ambedkar's personal opinions in his book instead of what transpired in the Constituent Assembly, and without appreciating or even considering the distinction between *purdah* and *hijab/head cover*, has misconstrued Dr. Ambedkar'sobservation's in respect of the former to justify restrictions by the State Government on the latter. It is respectfully submitted that purdah is the practice of women remaining confined to the house and not entering the public domain whereas all that was sought by the Petitioner was to allow her to attend school/college wearing her hijab without being ostracised for the same. Ironically, this ostracization is exactly what Dr. Ambedkar felt that the *purdah* system was doing as expressed in the same chapter which the Hon'ble High Court has conveniently excluded from referring / quoting:

> "They lag behind their sisters from other communities, cannot take part in any outdoor activity and are weighed down by a slavish mentality and an inferiority complex. They have no desire for knowledge, because they are taught not to be interested in anything outside the four walls of the house. *Purdah* women in particular become helpless, timid, and unfit for any fight in life. Considering the large number of *purdah* women among Muslims in India, one can easily understand the vastness and seriousness of the problem of *purdah**"

It is submitted that the petitioner and other Muslim girls like her want to march shoulder to shoulder with their sister from other communities in their pursuit of knowledge imparted in public institutions, but not at the cost of sacrificing their religious freedoms, when inherently there is no conflict between the practice of their religion and their pursuit of a secular education. The insistence of the Respondents that the petitioner as well as other Muslim girls give up on their religious freedoms and practices if they

wish to participate in national development is unfortunate, absurd and perverse.

THE HIGH COURT HAS COMPLETELY IGNORED THE PETITIONER'S CONTENTION *VIS-À-VIS* INDIA'S OBLIGATIONS UNDER THE *UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*

The Petitioner had specifically contented that India being a signatory to the *United Nations Convention On The Rights Of The Child* which Parliament has subsequently ratified and incorporated into our Municipal Law in the form of the *Commission for the Protection of Child Rights Act, 2005* **("Child Rights Act")**, the State it is under an obligation to fulfill the same. The High Court has not addressed this argument and instead in **pg. 122** has cursorily referred to some other United Nations conventions and then intermingled them with the recent judgment of this Hon'ble Court permitting women to join the armed forces as well asDr. Ambedkar's 1940 view of the *purdah* referred to above to conclude that denial of *hijab* is a step forward in the direction of emancipation of women, particularly for access to education.

Be that as it may, it is reiterated that the rights of young students in question under Article 21 include India's international obligations to protect and promote the rights of children, specifically the rights enumerated in the *United Nations Convention on the Rights of the Child* **("UNCRC")**, acceded to by India on 11.12.1992 without any reservations, which places binding obligations on the country to give primacy to the best interests of the child in all State actions.

A conjoint reading of Article 1 of the UNCRC with the *Majority Act, 1875*, would bring the Petitioners under the ambit of the UNCRC since the Petitioners are persons below 18 years of age. In fact, all the students of the colleges covered by the impugned G.O will come under the ambit of UNCRC.

That the Preamble to the UNCRC, in recognizing the inherent dignity and inalienable rights of persons, recognizes that all persons are entitled to rights without distinction based on sex or religion, taking due account of the importance of traditions and cultural values of people for promoting the harmonious development of the child. The following, among others, Articles have been systematically violated by the State through the impugned G.O:

> "Article 2
>
> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.
>
> Article 3
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> (…)
>
> Article 4
>
> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.
>
> (…)
>
> Article 13
>
> 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
>
> 2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. 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.

(…)

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

(…)

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

[Emphasis supplied throughout]

As stated above the High Court has not even considered the import of the Parliament incorporation the UNCRC into domestic / municipal law by enacting *The Commission for the Protection of Child Rights Act, 2005* **("Child Rights Act")**. Section 2 of the Child Rights Act defines "child rights" as under:

> "(b) "child rights" includes the children's rights adopted in the United Nations convention on the Rights of the Child on the 20th November, 1989 and ratified by the Government of India on the 11th December, 1992;"

It is clear from the above that Parliament has chosen to define "child rights" expansively as including all the rights adopted in the UNCRC. As such, in terms of Article 253, once Parliament has made this determination, it is not open to the State Legislature to restrict these rights, as the power of Parliament to give effect to the provisions of an international treaty overrides the power of State legislature under the State and Concurrent List. Article 253 states as under:

> "**253.** Legislation for giving effect to international agreements- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

As such, no power can be asserted by the State Government under any legislation including *inter alia* the Karnataka Education Act that is inconsistent with or abridges the definition of "child rights" under the Child Rights Act, regardless of whether the State Legislature is competent to legislate on the same under the State or Concurrent Lists.

THE HIGH COURT OUGHT TO HAVE APPRECIATED THE POLICY PRECSCRIBED BY KENDIRYA VIDYALAYAS WAS IN LINE WITH THE CONSTITUTIONAL SCEHEME

In the course of the arguments, the Petitioner had placed before the Hon'ble High Court the prescribed dress code for girls of KendriyaVidyala Schools, which dress code reasonably provided for the wearing of head

scarves / hijab for Muslim girls. It is most unfortunate that the High Court has disregarded the same on the ground that it is *"the policy of the Central Government"* and further that *"...the Federal Units, namely the States need not toe the line of Center"*.

The High Court has completely failed to assess the consequence and the impact of its observation *vis-à-vis* fundamental rights which do not depend upon the policies of the Centre or the States. Fundamental rights are rooted deep in the Constitution and irrespective of whichever party is in power or whatever is the policy of governments both at the Centre and States, they cannot be over ridden except in so far as the restrictions are prescribed in the respective provisions of Part III.

The fundamental rights of the Petitioners cannot be left to the whims and fancies of political parties that come into power. They cannot be enjoyed only when a secular or non-majoritarian party secures power and trampled upon when a majoritarian government takes over. Fundamental rights and especially those concerning religion are to be enjoyed by citizens for all times to come irrespective of electoral results.

HIGH COURT ERRED IN DISTINGUISHING THE JUDGEMENT OF SOUTH AFRICAN CONSTTUTIONAL COURT IN *KWAZULU-NATAL & ORS. VS. NAVANEETHUM PILLAY & ORS.*,

The Petitioner had placed much reliance upon a judgment dated. 05.10.2007 passed by the Constitutional Court of South Africa in ***MEC for Education: Kwazulu-Natal & Ors. vs. Navaneethum Pillay &Ors.***, pertaining to the right of a Hindu girl from South India to wear a nose ring. It was the girl's case that wearing nose ring was part of a long standing tradition in South India. However, the State therein had argued that the girl had agreed to the school code and further that she was free to wear it outside the school, and hence, removing the same for few hours during school does not impact her culture.

The High Court dismisses reliance on the said judgment at **page 108** observing that *"the said case involved a nose stud, which is ocularly insignificantly, apparently being as small as can be"* and further that it would not affect the uniformity which the dress code intends to bring in the class room, without caring to look into the legal principles enunciated therein which may well be adopted by multi-cultural countries like ours.

It is submitted that the Constitutional Court of South Africa in the said judgment rejected the similar argument of the State therein that the girl, Sunali Pillai, could wear the nose stud outside of school and therefore the infringement was valid. The following observations of that court are apposite:

> "**[85]** The School submitted that the infringement of Sunali's right, if any, is slight, because Sunali can wear the nose stud outside of school. I do not agree. The practice to which Sunali adheres is that once she inserts the nose stud, she must never remove it. Preventing her from wearing it for several hours of each school day would undermine the practice and therefore constitute a significant infringement of her religious and cultural identity. What is relevant is the symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome."

(emphasis added)

In so far as the judgment of the Malaysian Supreme Court referred to in **page 108** is concerned, first of all it was never cited by the Petitioner. The Petitioner had placed reliance upon a Division Bench judgment of the Madras High Court namely, ***M. Ajmal Khan v. Election Commission of India*, (2006) 5 CTC 121**, wherein the direction of ECI to publish photo electoral rolls was challenged on the ground that *"...wearing of purdah by Muslim women is one of the principles laid down in Holy Koran and it has to be strictly followed by Muslim women. From the time immemorial the Muslim women are adhering to these principles in their life. 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 Hon'ble High Court while referring to various sources to understand the prescription of dress code for women in Islam happens to also refer to a 1992 judgment passed by the Malaysian High Court and affirmed by the Supreme Court of Malaysia in 1994 wherein it was held as follows:

> "**15.** In 1992 Justice Eusoff of Malaysian High Court delivered a judgment ruling that the freedom of religion guaranteed under Article 11(1) of the Malaysian Constitution was not absolute as Article 11(5) did not authorise any act contrary to any general law relating to public order, public health or morality. The prohibition against wearing attire that covered the face did not affect the appellant's constitutional right to profess and practice her religion. This decision of the Malaysian High Court was confirmed by the Malaysian Supreme Court in 1994. It is, thus, seen from the reported material that there is almost unanimity amongst Muslim scholars that purdah is not essential but covering of head by scarf is obligatory."

(emphasis added)

It is pertinent to note that the underlined portion is the conclusion of the Hon'ble Madras High Court and not the Malaysian High/Supreme Court. If only the Hon'ble High Court in the present case had actually examined the decision of the Malaysian Courts, which it has cited in the footnote at **page 108**, it would have seen that the question of hijab never arose therein. The Hon'ble High Court without even looking into the facts of the said case goes on to hold that *"Malaysia being a theistic Nation has Islam as the State religion and the court in its wisdom treated wearing hijab as being part of religious practice."*

THE HON'BLE HIGH COURT HAS ERRED IN HOLDING THAT THE PRACTICE OF A MUSLIM WOMAN IN COVERING HER HEAD BY WEARING HIJAB / HEADSCARF / HEAD COVER IS NOT AN ESSENTIAL ISLAMIC PRACTICE

It is most humbly submitted that while as stated above, the Hon'ble High Court was not at all required to inquire into the essentiality of the practice of wearing hijab, it nevertheless has ventured into the same and has, against explicit directions in ***Ratilal*** and ***Bijoe Immanuel***, given its own interpretation to the Quran and rejected *hadith* to hold that it is only a 'recommendatory' practice since no penalty is provided in respect of the same, without appreciating the core Islamic belief that accountability for failure to comply with religious injunction is to Allah in the hereafter.

Further, the High Court has undertaken the completely unacceptable exercise of venturing into the territory of holding that the practice in question was relevant only to the time and geographical context and is not relevant in the present day and age. The Court completely erroneously holds that "*Thus, it can be reasonably assumed that the practice of wearing hijab had a thick nexus to the socio-cultural conditions then prevalent in the region*". It is submitted that this sets a dangerous precedent, appointing the Court as a supra religious authority empowered to re-interpret religious doctrine in light of what the judges feel are the needs of changing times.

Be that as it may, it was categorically demonstrated on behalf of the Petitioner before the Hon'ble High Court that covering of the head by a Muslim woman by wearing a hijab / headscarf / head cover is an essential obligation commanded / ordained in the Holy Qur'an and reflected in the unexceptionable practice of the womenfolk in the Prophetic era, immediately upon the revelation of the said verse, as has been recorded in the most authentic collection of *Hadith*, namely *Sahih Al-Bukhari*.

It is submitted that the command to cover the head can be traced to *Surah No.24 'An-Noor' ('The Light'): Ayat No. (Verse No.) 31*. The Arabic word in question in the said verse is *'Khumoor'*, which is the plural of the word *'Khimaar'*. *'Khimaar'* essentially means a head-covering. Even in the *Collins English Dictionary*[1] as well as the *Oxford Learner's Dictionary*[2]respectively, the word 'Khimaar' has been described as a *"headscarf worn by a Muslim woman"*; as well as *"a piece of cloth worn in public by some Muslim women that covers the head and the upper part of the body"*.

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[1] available online at https://www.collinsdictionary.com/us/dictionary/english/khimar

[2]available online at https://www.oxfordlearnersdictionaries.com/definition/english/khimar?q=khimar

In this background, reference may also be made to the various different and popular translations[3] of *Surah No.24 'An-Noor' ('The Light'): Ayat No. (Verse No.) 31*, which were produced before the Hon'ble High Court and are as follows:

I. And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; **they should let their headscarves fall to cover their necklinesand not reveal their charms except** to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as attend them who have no sexual desire, or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believers, all of you, turn to God so that you may prosper.

— Abdul Haleem[4]

II. And tell the believing women to lower their gaze and be modest, and to display of their adornment only that which is apparent, **and to draw their veils over their bosoms, and not to reveal their adornment save** to their own husbands or fathers or husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or sisters' sons, or their women, or their slaves, or male attendants who lack vigour, or children who know naught of women's nakedness. And let them not stamp their feet so as to reveal what they hide of their adornment. And turn unto Allah together, O believers, in order that ye may succeed.

— Pickthall[5]

III. And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; **that they should draw their veils over their bosoms and not display their**

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[3]The said translations have been obtained from the website https://www.quran.com/24 which is an agglomeration of widely accepted Qur'an translations by different translators.

[4]**Muhammad A. S. Abdel Haleem**born 1930, is the Professor of Islamic Studies at the School of Oriental and African Studies, University of London and editor of the *Journal of Qur'anic Studies*. He studied at Al-Azhar University and completed his PhD at the University of Cambridge. He has lectured at SOAS since 1971. In 2004, Oxford University Press published his translation of the Qur'an into English. Abdel Haleem was appointed an Officer of the Order of the British Empire (OBE) in the Queen's 2008 Birthday Honours, in recognition of his services to Arabic culture, literature and to inter-faith understanding.

[5]**Muhammad Marmaduke Pickthall** (born **Marmaduke William Pickthall**) was an English Islamic scholar noted for his 1930 English translation of the Quran, called *The Meaning of the Glorious Koran*. His translation of the Qur'an is one of the most widely known and used in the English-speaking world. A convert from Christianity to Islam, Pickthall was a novelist, esteemed by D. H. Lawrence, H. G. Wells, and E. M. Forster, as well as a journalist, headmaster, and political and religious leader.

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. And O ye Believers! turn ye all together towards Allah, that ye may attain Bliss.

— Yusuf Ali[6]

IV. Tell believing women to avert their glances and guard their private parts, and not to display their charms except what [normally] appears of them. **They should fold their headscarves over their bosoms and show their charms only** to their husbands, or their fathers or their fathers-in-law, or their own sons or stepsons, or their own brothers or nephews on either their brothers' or their sisters' side; or their own womenfolk, or anyone their right hands control, or male attendants who have no sexual desire, or children who have not yet shown any interest in women's nakedness. Let them not stomp their feet in order to let any ornaments they may have hidden be noticed. Turn to Allah (God), all you believers, so that you may prosper!

— Muhammad Hijab

V. And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment except that which [necessarily] appears thereof and **to wrap [a portion of] their headcovers over their chests and not expose their adornment [i.e., beauty] except** to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess [i.e., slaves], or those male attendants having no physical desire, or children who are not yet aware of the private aspects of women. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed.

— Saheeh International[7]

VI. And tell the believing women to lower their gaze and guard their chastity, and not to reveal their adornments except what normally appears. **Let them draw their veils over their chests, and not reveal their ˹hidden˺ adornments except** to their husbands, their fathers, their fathers-in-law, their sons, their stepsons, their brothers, their brothers' sons or sisters' sons, their fellow women, those ˹bondwomen˺ in their possession, male attendants with no desire, or children who are still unaware of women's nakedness. Let them not

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[6]**Abdullah Yusuf Ali**, (died 10 December 1953) was an Indian-British barrister and Muslim scholar who wrote a number of books about Islam including a translation of the Qur'an.

[7]**Saheeh International translation** is an English Language translation of the Quran that has been translated by three American women, Emily Assami, Mary Kennedy, and AmatullahBantley. it is one of the World's most popular Quran translations.

stomp their feet, drawing attention to their hidden adornments. Turn to Allah in repentance all together, O believers, so that you may be successful.

— Dr. Mustafa Khattab, the Clear Quran[8]

VII. And tell the believing women to lower their gaze (from looking at forbidden things), and protect their private parts (from illegal sexual acts) and not to show off their adornment except only that which is apparent (like both eyes for necessity to see the way, or outer palms of hands or one eye or dress like veil, gloves, head-cover, apron, etc.), **andto draw their veils all over Juyûbihinna (i.e. their bodies, faces, necks and bosoms) and not to reveal their adornment except** to their husbands, or their fathers, or their husband's fathers, or their sons, or their husband's sons, or their brothers or their brother's sons, or their sister's sons, or their (Muslim) women (i.e. their sisters in Islâm), or the (female) slaves whom their right hands possess, or old male servants who lack vigour, or small children who have no sense of feminine sex. And let them not stamp their feet so as to reveal what they hide of their adornment. And all of you beg Allâh to forgive you all, O believers, that you may be successful.

— Muhammad Taqi-ud-Din al-Hilali[9]& Muhammad Muhsin Khan[10]

VIII. And tell the believing women that they must lower their gazes and guard their private parts, and must not expose their adornment, except that which appears thereof, **and must wrap their bosoms with their shawls, and must not expose their adornment, except** to their husbands or their fathers or the fathers of their husbands, or to their sons or the sons of their husbands, or to their brothers or the sons of their brothers or the sons of their sisters, or to their women, or to those owned by their right hands, or male attendants having no (sexual) urge, or to the children who are not yet conscious of the shames of women. And let them not stamp their feet in a way that the adornment they conceal is known. And repent to Allah O believers, all of you, so that you may achieve success.

— Mufti TaqiUsmani[11]

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[8]**Dr. Mustafa Khattab** is a Canadian-Egyptian authority on interpreting the Quran. He received his Ph.D., M.A., and B.A. in Islamic Studies in English with Honors from Al-Azhar University's Faculty of Languages & Translation. He lectured on Islam at Clemson University (OLLI Program, 2009-2010), held the position of a lecturer at Al-Azhar University for over a decade starting in 2003, and served as the Muslim Chaplain at Brock University (2014-2016). He is a member of the Canadian Council of Imams and a Fulbright Interfaith Scholar.

[9]**Muhammad Taqi-ud-Din Hilali** is most notable for his English translations of Sahih Bukhari and along with Muhammad Muhsin Khan, the Qur'an, entitled The Noble Qur'an.

[10]**Muhammad Muhsin Khan** (died 14 July 2021) was an Islamic scholar and translator of Afghan origin, who lived in Medina and served as the Chief of Department of Chest Diseases at the King Faisal Specialist Hospital and Research Center. He translated both the Quran and Sahih Al-Bukhari into English. He was the director of the clinic of Islamic University of Madinah.

IX. And say to the female believers to cast down theirbe holdings, and preserve their private parts, and not display their adornment except such as is outward, **and let them fix (Literally: strike) closely their veils over their bosoms, and not display their adornment except** to their husbands, or their fathers, or their husbands' fathers, or their sons, or their husbands' sons, or their brothers, or their brothers's sons, or their sisters' sons, or their women, or what their right hands possess, or (male) followers, men without desire (Literally: without being endowed with "sexual" desire) or young children who have not yet attained knowledge of women's privacies, and they should not strike their legs (i.e., stamp their feet) so that whatever adornment they hide may be known. And repent to Allah altogether, (O) you believers, that possibly you would prosper.

— Dr.Ghali[12]

It can be seen from the above translations that the word 'Khumoor/khimaar' has interchangeably been translated either as headscarves or head coverings or veil or shawl, but the meaning is consistently the same across translations.

It was also contended before the Hon'ble High Court that while translations are to aid non Arabic speakers to understand the meaning of the original Arabic text, and the choice of words in the translated text is entirely upto the translator, there is no second opinion as to the original Arabic text itself and the best way to infer as to what the original text i.e. command in the Holy Qur'an actually meant is to look into how the Prophet (s.a.w.s) himself and the people around him understood / practiced / implemented the same, which is recorded in as *Hadith.*

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[11]**Muhammad Taqi Usmani** (born 5 October 1943), is a Pakistani Islamic scholar and former judge of the Shariat Appellate Bench of the Supreme Court of Pakistan from 1982 to 2002, and on the Federal Shariat Court from 1981 to 1982. He has authored 143 books in Urdu, Arabic and English, including a translation of the Qur'an in both English and Urdu as well a 6-volume commentary on the *Sahih Muslim* in Arabic, *Takmilat Fath al-Mulhim* and *Uloomu-l-Qur'an*. He has written and lectured extensively on hadith, and Islamic finance. He chairs the Shariah Board of the Bahrain-based Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). He is also a permanent member of the Jeddah-based International Islamic Fiqh Academy, an organ of the OIC.

[12]**Mohammad Mahmoud Ghali** was the Professor of Linguistics and Islamic Studies, Al-Azhar University, Cairo, Egypt. Ghali has spent 20 years interpreting the meanings of the Quran into English. He is the author of an English translation of the Quran, *Towards Understanding the Ever-Glorious Quran*. Ghali got his PhD in Phonetics from the University of Michigan. He also studied phonetics at the University of Exeter in the UK. Ghali authored 16 books in Islamic studies, in Arabic as well as in English. The English books include *Prophet Muhammad and the First Muslim State, Moral Freedom in Islam*, *Islam and Universal Peace*, *Synonyms in the Ever-Glorious Quran*.

At this juncture, it may be apt to note that in so far as *Hadith* is concerned, the Constitution Bench of the Hon'ble Apex Court in ***ShayaraBano v. UOI,* 2017 9 SCC 1,** has recognised that along with the Qur'an, *Hadith* comes in the 'first degree' category of commands which are '*Fard'* (obligatory). The opinion of Justice Nariman as expressed in para 54 may be taken note of and the same reads as follows:

> "**54.** ...Indeed, Islam divides all human action into five kinds, as has been stated by Justice Hidayatullah in his introduction to *Mulla*. There it is stated:
>
> "E. *Degrees of obedience* : Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.
>
> **(*i*) *First degree*: Fard. Whatever is commanded in the Koran, Hadis or Ijmaa must be obeyed.**
>
> Wajib. Perhaps a little less compulsory than Fard but only slightly less so.
>
> (*ii*) *Second degree* :Masnun, Mandub and Mustahab : These are recommended actions.
>
> (*iii*) *Third degree* :Jaiz or Mubah : These are permissible actions as to which religion is indifferent.
>
> (*iv*) *Fourth degree* :Makruh : That which is reprobated as unworthy.
>
> (*v*) *Fifth degree* : Haram : That which is forbidden."

(emphasis added)

With the aforesaid background in mind, it is apt to take note of the *Hadeeth* in relation to the Qur'anic command in Surah No. 24, Ayat No.31[13] which is as follows:

> **"4758.** Narrated Aishah: May Allah bestow His Mercy on the early emigrant women. When Allah revealed:
>
> *"...and to **draw their veils** all over their Juyubihinna(i.e., their bodies, faces, necks and bosoms)..."*(V.24:31)

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[13]as recorded in Vol. 6 of ***The Translation of the Meanings of Sahih Al-Bukhari, Arabic - English***, translated byDr. Muhammad MohsinKhanand published by Dar-us-Salaam Publishers & Distributors.

> they tore their *Murut*(woollen dresses or waist binding clothes or aprons etc.) and **covered their heads and faces** with those *Muruts."*
>
> (emphasis added)

The next hadith, though sourced from a different narrator, also affirms the said position. It is as follows:

> "**4759.** NarratedSafiyya bint Shaiba:
>
> > 'Aishah used to say: *"when (the Verse):'....and to **draw their veils** all over their Juhubihinna(i.e., their bodies, faces, necks and bosoms, etc.)....'*(V.24:31) was revealed,
>
> (the ladies) cut their waist-sheets from their margins and **covered their heads and faces** with those cut pieces of cloth."
>
> (emphasis added)

Thus, as can be seen from the above, the Quranic command along with the manner in which it was practiced, which practice finds mentioned in the *Hadith* quoted above, demonstrates the essentiality of the said Islamic practice of covering of their heads by Muslim women.

It is submitted that the piece of cloth may be known by different names in different languages in different parts of the world but what is established is that all of them have to confirm to the religious requirement of 'covering of the head' along with their 'bosoms'.

THE IMPUGNED G.O AND THE JUDGEMENT ALSO VIOLATE THE DOCTRINE OF PROPORTIONALITY

It is submitted that the impugned judgement has also not considered the argument of proportionality which was specifically raised by the Petitioner. It is submitted that there is no legislative mandate for denying a student entry into the school because she wears a headscarf in addition to the school uniform. Even if such restriction was to be in place such a restriction, the same cannot withstand the test of proportionality under Article 14.

Be that as it may it is submitted that the pursuant to the impugned order, the Petitioner will be barred from participating in the final exams which

are scheduled to start on 28.03.2022 only on the ground that she wears a head scarf. It is submitted that such a step totally militates against the Article 14 and 15 of the Constitution.

In these exigent circumstances, the Petitioner is imploring upon this Hon'ble Court as the *sentinnel on the quive* to protect the fundamental rights of the Petitioner and permit her to write the exams commencing from 28.03.2022 whilst wearing the headscarf of the same colour as the school uniform.

LIST OF DATES

2021-2022	The Petitioner is a 1st year student in the Government Pre-University College in Kundapura, Udupi District, Karnataka.
03.02.2022	The Petitioner was refused entry by the college administration who insisted that she remove the Hijab/Headscarf. The Petitioner and similarly situated women refused to remove their Hijab/Headscarf and as a result were restricted from entering the college premises.
04.02.2022	Being aggrieved by the actions of the College authorities, the Petitioner herein and other similarly situated women made a representation to the Deputy Commissioner, Udupi District, voicing their grievance.
05.02.2022	The State of Karnataka in purported exercise of its powers under Section 133(2) of the *Karnataka Education Act, 1983*, issued G.O.dtd. 05.02.2022, whereby the College Development Committees were directed to prescribe uniforms,indicating therein that wearing of Hijab/Headscarf is a non-essential religious practice, not being a part of the rights under Article 25.

A true and translated copy of the G.O. dtd. 05.02.2022 is annexed hereunder as **Annexure P-1 [Pgs 156 – 161]**

07.02.2022 The Petitioner herein being aggrieved by the G.O. dtd. 05.02.2022 was constrained to file Writ Petition No. 2880 of 2022 in the Hon'ble High Court of Karnataka *inter alia* seeking quashing of the G.O. dtd. 05.02.2022 on the grounds of it being violative of Articles 14, 19, 21, 25 and 29 of the Constitution as well as consequential reliefs.

A true typed copy of W.P. No. 2880 of 2022 dated 07.02.2022, without annexures, filed by the Petitioner before the Hon'ble High Court of Karnataka at Bangalore is annexed hereunder as **Annexure P-2 [Pgs 162 – 182]**

08.02.2022-09.02.2022 The Petitioner's W.P. No. 2880 of 2022 along with a batch of other Writ Petitions filed by similarly situated students were heard by a Ld. Single Judge, who subsequently referred the matter to a larger bench.

A true typed copy of the order dated 08.02.2022 passed by the Ld. Single Judge of the Hon'ble High Court of Karnataka at Bangalore in W.P. No. 2347 of 2022 is annexed hereto and marked as **ANNEXURE P-3 [Pgs. 183 – 185]**

A true typed copy of the order dated 09.02.2022 passed by the Ld. Single Judge of the Hon'ble High Court of Karnataka at Bangalore in W.P. No. 2880 of 2022 is annexed hereto and marked as **ANNEXURE P-4 [Pgs. 186 – 187]**

10.02.2022 W.P No. 2880 of 2022 was then heard by a full bench which on 10.02.2022 passed an interim order *inter alia*

directing the State Government and college authorities to reopen the educational institutions and restrained anyone, including the Petitioner herein, from wearing/displaying any religious objects in the college premises.

A true typed copy of the order dated 10.02.2022 passed by the full bench of the Hon'ble High Court of Karnataka at Bangalore in W.P. No. 2880 of 2022 is annexed hereto and marked as **ANNEXURE P-5 [Pgs. 188 – 194]**

A copy of the written submissions filed by the Petitioner on 10.02.2022 before the Hon'ble High Court of Karnataka at Bangalore in W.P. No. 2880 of 2022 is annexed hereunder as **ANNEXURE P-6 [Pgs. 195 – 223]**

19.02.2022 Objections were field by the Respondent Nos. 5 & 6 in W.P. No. 2146 of 2022, which were adopted in all writ petitions.

A true typed copy of objections filed by Respondent Nos. 5 & 6 in W.P. No. 2146 of 2022 before the Hon'ble High Court of Karnataka at Bangalore is annexed hereto and marked as **ANNEXURE P-7 [Pgs. 224 – 231]**

21.02.2022 The State filed a common Statement of Objections *inter alia* contending that:

(a) the Petitions were not maintainable

(b) the issue relating to uniform is regulated by the State.

(c) Practice of wearing Hijab is not conducive for academic growth and does not facilitate participation in extra-curricular school activities.

(d) The Petitioner has chosen to enroll in an institute imparting secular education and not to practice their religion.

(e) Courts in Turkey have banned wearing of Hijab/Headscarf in public.

(f) Article 25 is not absolute and must give way to public order and other provisions of Part III of the Constitution.

(g) The uniform worn by the students has been prescribed for a very long time.

10.02.2022-25.02.2022	W.P. (C) No. 2880 of 2022 along with a batch of similar Petitions were heard over 10 days by the full bench and judgment was reserved on 25.02.2022. The Petitioner thereafter filed its supplementary written submissions as well. A copy of the supplementary written submissions filed by the Petitioner on 10.02.2022 before the Hon'ble High Court of Karnataka at Bangalore in W.P. No. 2880 of 2022 is annexed hereunder as **ANNEXURE P-8 [Pgs. 232 – 268]**
15.03.2022	The Hon'ble High Court pronounced the impugned final judgment and order dismissing the Writ Petition.
16.03.2022	Aggrieved by the decision of the Hon'ble High Court of Karnataka, the Petitioner herein has preferred this instant appeal.

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 15TH DAY OF MARCH, 2022

PRESENT

THE HON'BLE MR. RITU RAJ AWASTHI, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE KRISHNA S. DIXIT

AND

THE HON'BLE MS. JUSTICE J. M. KHAZI

WRIT PETITION NO. 2347/2022 (GM-RES) C/w
WRIT PETITION NO. 2146/2022 (GM-RES),
WRIT PETITION NO. 2880/2022 (GM-RES),
WRIT PETITION NO. 3038/2022 (GM-RES),
WRIT PETITION NO. 3424/2022 (GM-RES-PIL),
WRIT PETITION NO. 4309/2022 (GM-RES),
WRIT PETITION NO. 4338/2022 (GM-RES-PIL)

IN W.P. NO.2347 OF 2022

BETWEEN:

1 . SMT RESHAM,
D/O K FARUK,
AGED ABOUT 17 YEARS,
THROUGH NEXT FRIEND
SRI MUBARAK,
S/O F FARUK,
AGED ABOUT 21 YEARS,
BOTH RESIDING AT NO.9-138,
PERAMPALI ROAD,
SANTHEKATTE,
SANTHOSH NAGARA, MANIPAL ROAD,
KUNJIBETTU POST,
UDUPI, KARNATAKA-576105.

... PETITIONER

(BY PROF. RAVIVARMA KUMAR, SENIOR ADVOCATE FOR SHRI ABHISHEK JANARDHAN, SHRI ARNAV. A. BAGALWADI & SHRI SHATHABISH SHIVANNA, ADVOCATES)

AND:

1 . STATE OF KARNATAKA,
REPRESENTED BY THE PRINCIPAL SECRETARY,
DEPARTMENT OF PRIMARY AND
SECONDARY EDUCATION

2 . GOVERNMENT PU COLLEGE FOR GIRLS
BEHIND SYNDICATE BANK
NEAR HARSHA STORE
UDUPI
KARNATAKA-576101
REPRESENTED BY ITS PRINCIPAL

3 . DISTRICT COMMISSIONER
UDUPI DISTRICT
MANIPAL
AGUMBE - UDUPI HIGHWAY
ESHWAR NAGAR
MANIPAL, KARNATAKA-576104.

4 . THE DIRECTOR
KARNATAKA PRE-UNIVERSITY BOARD
DEPARTMENT OF PRE-UNIVERSITY EDUCATION
KARNATAKA, 18TH CROSS ROAD,
SAMPIGE ROAD,
MALESWARAM,
BENGALURU-560012.

… RESPONDENTS

(BY SHRI PRABHULING K. NAVADGI, ADVOCATE GENERAL A/W
SHRI. ARUNA SHYAM, ADDITIONAL ADVOCATE GENERAL
SHRI VINOD KUMAR, ADDITIONAL GOVERNMENT ADVOCATE
SHRI SUSHAL TIWARI,
SHRI SURYANSHU PRIYADARSHI &
SHRI ANANYA RAI, ADVOCATES FOR
RESPONDENTS 1 TO 3
SHRI DEEPAK NARAJJI, ADVOCATE IN IA 2/2022
SHRI KALEESWARAM RAJ & RAJITHA T.O. ADVOCATES IN
IA 3/2022 & IA 7/2022
SMT. THULASI K. RAJ & RAJITHA T.O ADVOCATES IN
IA 4/2022 & IA 6/2022
SHRI SUSHAL TIWARI, ADVOCATE IN IA 5/2022
SHRI BASAVAPRASAD KUNALE &
SHRI MOHAMMED AFEEF, ADVOCATES IN IA 8/2022
SHRI AKASH V.T. ADVOCATE IN IA 9/2022
SHRI R. KIRAN, ADVOCATE, IN IA 10/2022
SHRI AMRUTHESH N.P., ADVOCATE IN IA 11/2022

SHRI MOHAMMAD SHAKEEB, ADVOCATE IN IA 12/2022
Ms. MAITREYI KRISHNAN, ADVOCATE IN IA 13/2022
SHRI ADISH C. AGGARWAL, SENIOR ADVOCATE IN IA 14/2022, IA 18/2022, IA 19/2022 & IA 21/2022
SHRI GIRISH KUMAR. R., ADVOCATE, IN IA 15/2022
Smt. SHUBHASHINI. S.P. PARTY-IN-PERSON IN IA 16/2022
SHRI ROHAN KOTHARI, ADVOCATE IN IA 17/2022
SHRI RANGANATHA P.M., PARTY-IN-PERSON IN IA 20/2022)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DIRECT THE RESPONDENT No. 2 NOT TO INTERFERE WITH THE PETITIONERS FUNDAMENTAL RIGHT TO PRACTICE THE ESSENTIAL PRACTICES OF HER RELIGION, INCLUDING WEARING OF *HIJAB* TO THE RESPONDENT No. 2 UNIVERSITY WHILE ATTENDING CLASSES AND ETC.

IN W.P. NO.2146 OF 2022

BETWEEN:

1. AYESHA HAJEERA ALMAS
AGED ABOUT 18 YEARS,
D/O MUPTHI MOHAMMED ABRURUL,
STUDENT,
REPRESENTED BY HER MOTHER KARANI,
SADIYA BANU
W/O MUPTHI MOHAMMED ABRURUL,
AGED ABOUT 40 YEARS,
R/AT NO 2-82 C KAVRADY,
OPP TO URDU SCHOOL,
KANDLUR VTC KAVRADY,
P O KAVRADI,
KUNDAPURA UDUPI 576211

2. RESHMA
AGE ABOUT 17 YEARS
D/O K FARUK
STUDENT
REPRESENTED BY HER MOTHER
RAHMATH W/O K FARUK
AGED ABOUT 45 YEARS
R/AT NO 9-138 PERAMPALLI ROAD
AMBAGILU SANTOSH NAGAR
SANTHEKATTE UDUPI 576105

3. ALIYA ASSADI
AGED ABOUT 17 YEARS,

D/O AYUB ASSADI
STUDENT
REPRESENTED BY HER FATHER
AYUB ASSADI
S/O ABDUL RAHIM
AGED ABOUT 49 YEARS,
R/AT NO 4-2-66 ABIDA MANZIL
NAYARKERE ROAD KIDIYOOR
AMBALAPADI UDUPI 576103

4 . SHAFA
AGED ABOUT 17 YEARS,
D/O MOHAMMED SHAMEEM
STUDENT
REPRESENTED BY HER MOTHER
SHAHINA
W/O MOHAMMED SHAMEEM
AGED ABOUT 42 YEARS,
R/AT NO 3-73 MALLAR
GUJJI HOUSE MALLAR VILLAGE
MAJOOR KAUP UDUPI 576106

5 . MUSKAAN ZAINAB
AGED ABOUT 17 YEARS
D/O ABDUL SHUKUR
STUDENT
REPRESENTED BY HER FATHER
ABDUL SHUKUR
S/O D ISMAIL SAHEB
AGED ABOUT 46 YEARS
R/AT NO 9-109 B,
VADABHANDESHWARA MALPE UDUPI 576108

... PETITIONERS

(BY SHRI. SANJAY HEGDE, SENIOR ADVOCATE FOR SHRI MOHAMMED TAHIR & SMT.TANVEER AHMED MIR, ADVOCATES FOR PETITIONERS 1, 3 TO 5)

(V/O DT. 15.02.2022, PETITION IN RESPECT OF PETITIONER No.2 STANDS DISMISSED AS WITHDRAWN)

AND:

1 . CHIEF SECRETARY
PRIMARY AND HIGHER EDUCATION EDUCATION DEPARTMENT
KARNATAKA GOVERNMENT MINISTRY
MS BUILDING BANGALORE 560001

2 . DIRECTOR
PU EDUCATION DEPARTMENT
MALLESHWARAM
EDUCATION DEPARTMENT
BANGALORE 560012

3 . DEPUTY DIRECTOR
PRE UNIVERSITY COLLEGE
UDUPI DIST UDUPI 576101

4 . DEPUTY COMMISSIONER
DC OFFICE UDUPI
CITY UDUPI 576101

5 . GOVT PU COLLEGE FOR GIRLS
UDUPI CITY UDUPI 576101
REP BY ITS PRINCIPAL

6 . RUDRE GOWDA
S/O NOT KNOWN
AGE ABOUT 55 YEARS,
OCCUPATION PRINCIPAL
OFFICE AT GOVT PU COLLEGE FOR GIRLS
UDUPI CITY UDUPI 576101

7 . GANGADHAR SHARMA
AGE ABOUT 51
S/O NOT KNOWN
VICE PRINCIPAL OF GOVT COLLEGE
R/AT NO 21/69 ANRGHYA
7TH CROSS MADVANAGAR
ADIUDUPI UDUPI 576102

8 . DR YADAV
AGE ABOUT 56
S/O NOT KNOWN
HISTORY LECTURER
OFFICE AT GOVT PU COLLEGE FOR GIRLS
UDUPI CITY UDUPI 576101

9 . PRAKASH SHETTY
AGE ABOUT 45
S/O NOT KNOWN
POLITICAL SCIENCE SUB LECTURER
OFFICE AT GOVT PU COLLEGE FOR GIRLS
UDUPI CITY UDUPI 576101

10 . DAYANANDA D
AGE ABOUT 50 YEARS,
S/O NOW KNOWN
SOCIOLOGY SUB LECTURER
OFFICE AT GOVT PU COLLEGE FOR GIRLS
UDUPI CITY UDUPI 576101

11 . RUDRAPPA
AGE ABOUT 51 YEARS
S/O NOT KNOWN
CHEMISTRY SUB LECTURER
OFFICE AT GOVT PU COLLEGE FOR GIRLS
UDUPI CITY UDUPI 576101

12 . SHALINI NAYAK
AGE ABOUT 48 YEARS,
W/O NOT KNOWN
BIOLOGY SUB LECTURER
OFFICE AT GOVT PU COLLEGE FOR GIRLS
UDUPI CITY UDUPI 576101

13 . CHAYA SHETTY
AGE ABOUT 40 YEARS,
W/O NOT KNOWN
PHYSICS SUB LECTURER
R/AT KUTPADY UDYAVAR UDUPI 574118

14 . DR USHA NAVEEN CHANDRA
AGE ABOUT 50 YEARS
W/O NOT KNOWN TEACHER
OFFICE AT GOVT PU COLLEGE FOR GIRLS
UDUPI CITY UDUPI 576101

15 . RAGHUPATHI BHAT
S/O LATE SRINIVAS BHARITHYA
AGE ABOUT 53 YEARS
LOCAL MLA AND
UNAUTHIRIZED CHAIRMAN OF CDMC
D NO 8-32 AT SHIVALLY VILLAGE PO
SHIVALLY UDUPI 576102

16 . YASHPAL ANAND SURANA
AGE ABOUT 50 YEARS
S/O NOT KNOWN
AUTHORIZED VICE CHAIRMAN OF CDMC
R/AT AJJARAKADU UDUPI H O UDUPI 576101

... RESPONDENTS

(BY SHRI PRABHULING K. NAVADGI, ADVOCATE GENERAL A/W
SHRI ARUNA SHYAM, ADDITIONAL ADVOCATE GENERAL
SHRI VINOD KUMAR, ADDITIONAL GOVERNMENT ADVOCATE
SHRI SUSHAL TIWARI,
SHRI SURYANSHU PRIYADARSHI &
Ms. ANANYA RAI, ADVOCATES FOR RESPONDENTS 1 TO 4.
SHRI S.S. NAGANAND, SENIOR ADVOCATE FOR
SHRI RAKESH S.N. & SHRI S. VIVEKANANDA, ADVOCATES FOR R-5 & R6.
SHRI RAGHAVENDRA SRIVATSA, ADVOCATE FOR R-7
SHRI GURU KRISHNA KUMAR, SENIOR ADVOCATE FOR
SHRI K. MOHAN KUMAR, ADVOCATE FOR R-8 & IN IA 2/2022
SHRI VENKATARAMANI, SENIOR ADVOCATE FOR
SHRI KASHYAP N. NAIK, ADVOCATE FOR R-12
SHRI VENKATARAMANI, SENIOR ADVOCATE FOR
SHRI VIKRAM PHADKE, ADVOCATE FOR R-13
SHRI NISHAN G.K. ADVOCATE FOR R-14
SHRI SAJAN POOVAYYA, SENIOR ADVOCATE FOR
SHRI MANU KULKARNI & SHRI VISHWAS N., ADVOCATES
FOR R-15
SHRI SAJAN POOVAYYA, SENIOR ADVOCATE FOR
SHRI MRINAL SHANKAR & SHRI N.S. SRIRAJ GOWDA, ADVOCATES
FOR R-16
SHRI SHIRAJ QUARAISHI & SHRI RUDRAPPA P., ADVOCATES IN IA 6/2022)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO ISSUE THE WRIT OF MANDMAUS AND ORDER TO RESPONDENT NOS. 1 AND 2 TO INITIATE ENQUIRY AGAINST THE RESPONDENT NO.5 COLLEGE AND RESPONDENT NO.6 i.e., PRINCIPLE FOR VIOLATING INSTRUCTION ENUMERATED UNDER CHAPTER 6 HEADING OF IMPORTANT INFORMATION OF GUIDELINES OF PU DEPARTMENT FOR ACADEMIC YEAR OF 2021-22 SAME AT ANNEXURE-J FOR MAINTAINING UNIFORM IN THE P U COLLEGE AND ETC.

IN W.P. NO.2880 OF 2022

BETWEEN:

1 . MISS AISHAT SHIFA
D/O ZULFIHUKAR
AGED ABOUT 17 YEARS
SANTOSH NAGAR
HEMMADY POST
KUNDAPUR TALUK

UDUPI DISTRICT-576230
REP BY HER NATURAL GUARDIAN AND
FATHER MR ZULFHUKAR

2 . MISS THAIRIN BEGAM
D/O MOHAMMAD HUSSAIN
AGED ABOUT 18 YEARS
KAMPA KAVRADY
KANDLUR POST
KUNDAPURA
UDUPI DISTRICT-576201.

... PETITIONERS

(BY SHRI DEVADUTT KAMAT, SENIOR ADVOCATE FOR
SHRI MOHAMMAD NIYAZ, ADVOCATE FOR PETITIONERS)

AND:

1 . THE STATE OF KARNATAKA
VIDHANA SOUDHA
DR AMBEDKAR ROAD
BANGALORE - 560001
REPRESENTED BY ITS PRINCIPAL SECRETARY

2 . THE UNDER SECRETARY TO GOVERNMENT
DEPARTMENT OF EDUCATION
VIKAS SOUDHA
BANGALORE-560001.

3 . THE DIRECTORATE
DEPARTMENT OF PRE UNIVERSITY EDUCATION
BANGALORE-560009.

4 . THE DEPUTY COMMISSIONER
UDUPI DISTRICT
SHIVALLI RAJATADRI
MANIPAL
UDUPI-576104.

5 . THE PRINCIPAL
GOVERNMENT PU COLLEGE
KUNDAPURA
UDUPI DISTRICT-576201.

... RESPONDENTS

(BY SHRI PRABHULING K. NAVADGI, ADVOCATE GENERAL A/W
SHRI ARUNA SHYAM, ADDITIONAL ADVOCATE GENERAL
SHRI VINOD KUMAR, ADDITIONAL GOVERNMENT ADVOCATE

SHRI SUSHAL TIWARI,
SHRI SURYANSHU PRIYADARSHI &
Ms. ANANYA RAI, ADVOCATES FOR RESPONDENTS 1 TO 5
SHRI AIYAPPA, K.G. ADVOCATE IN IA 2/2022.
SHRI S. VIVEKANANDA, ADVOCATE IN IA 3/2022
SMT. SHIVANI SHETTY, ADVOCATE IN IA 4/2022.
SHRI SHASHANK SHEKAR JHA, ADVOCATE IN IA 5/2022)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED DIRECTION DATED 05.02.2022 VIDE ORDER No.EP 14 SHH 2022 PASSED BY THE RESPONDENT NO. 2 VIDE ANNEXURE-A AND ETC.

IN W.P. NO.3038 OF 2022

BETWEEN:

1 . MISS SHAHEENA
D/O ABDUL RAHEEM
AGED ABOUT 19 YEARS
SANTOSH NAGAR
HEMMADI POST, KUNDAPUR TALUK
UDUPI DISTRICT-576230.

2 . MISS SHIFA MINAZ
D/O NAYAZ AHAMMAD
AGED ABOUT 18 YEARS
SANTOSH NAGAR
HEMMADI POST,
KUNDAPUR TALUK
UDUPI DISTRICT-576230.

... PETITIONERS

(BY SHRI YUSUF MUCHCHALA, SENIOR ADVOCATE FOR
SHRI NAVEED AHMED, ADVOCATE)

AND:

1 . THE STATE OF KARNATAKA
VIDHANA SOUDHA
DR AMBEDKAR ROAD
BANGALORE-560001
REPRESENTED BY ITS PRINCIPAL SECRETARY

2 . THE UNDER SECRETARY TO GOVERNMENT
DEPARTMENT OF EDUCATION
VIKAS SOUDHA

BANGALORE-560001.

3 . THE DIRECTORATE
DEPARTMENT OF PRE UNIVERSITY EDUCATION
BANGALORE-560009

4 . THE DEPUTY COMMISSIONER
UDUPI DISTRICT
SHIVALLI RAJATADRI MANIPAL
UDUPI-576104.

5 . THE PRINCIPAL
GOVERNMENT PU COLLEGE
KUNDAPURA
UDUPI DISTRICT-576201.

… RESPONDENTS

(BY SHRI PRABHULING K. NAVADGI, ADVOCATE GENERAL A/W
SHRI ARUNA SHYAM, ADDITIONAL ADVOCATE GENERAL
SHRI VINOD KUMAR, ADDITIONAL GOVERNMENT ADVOCATE
SHRI SUSHAL TIWARI, SHRI SURYANSHU PRIYADARSHI &
Ms. ANANYA RAI, ADVOCATES)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED DIRECTION DATED 05.02.2022 VIDE ORDER No.EP 14 SHH 2022 PASSED BY THE RESPONDENT NO. 2 VIDE ANNEXURE-A AND ETC.

IN W.P. NO.3424 OF 2022

BETWEEN:

DR VINOD G KULKARNI
M.D. (BOM) (PSYCHIATRY) D P M (BOM)
FIPS LLB (KSLU)
AGED ABOUT 70 YEARS,
OCCUPATION CONSULTING
NEUROPSYCHIATRIST ADVOCATE AND
SOCIAL ACTIVIST
R/O MANAS PRABHAT COLONY,
VIDYANAGAR, HUBBALLI -580 021
DIST DHARWAD KARNATAKA
CELL NO.9844089068

… PETITIONER

(BY DR. VINOD G. KULKARNI, PETITIONER -IN-PERSON)

AND:

1 . THE UNION OF INDIA
NEW DELHI
REPRESENTED BY
THE PRINCIPAL SECRETARY TO
MINISTRY OF HOME AFFAIRS
NORTH BLOCK NEW DELHI-110011
PH NO.01123092989
01123093031
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2 . THE UNION OF INDIA
NEW DELHI
REPRESENTED BY
THE PRINCIPAL SECRETARY TO
MINISTRY OF LAW AND JUSTICE
4TH FLOOR A-WING SHASHI BAHAR
NEW DELHI--110011
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3 . THE STATE OF KARNATAKA
BY ITS CHIEF SECRETARY
VIDHANA SOUDHA
BANGALURU-560001
Email: cs@karnataka.gov.in

… RESPONDENTS

(BY SHRI PRABHULING K. NAVADGI, ADVOCATE GENERAL A/W
SHRI. ARUNA SHYAM, ADDITIONAL ADVOCATE GENERAL
SHRI VINOD KUMAR, ADDITIONAL GOVERNMENT ADVOCATE
SHRI SUSHAL TIWARI, SHRI SURYANSHU PRIYADARSHI &
Ms. ANANYA RAI, ADVOCATES FOR RESPONDENT No.3.

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING FOR APPROPRIATE WRIT OR ORDER OR DIRECTIONS IN THE NATURE OF MANDAMUS OR ANY OTHER APPROPRIATE WRIT ORDER OR DIRECTIONS BE ISSUED TO THE RESPONDENTS TO DECLARE THAT ALL THE STUDENTS OF VARIOUS SCHOOLS AND COLLEGES IN KARNATAKA AND IN THE COUNTRY SHALL ATTEND THEIR INSTITUTIONS BY SPORTING THE STIPULATED UNIFORM AND ETC.

IN W.P. NO.4309 OF 2022

BETWEEN:

1 . MS ASLEENA HANIYA
D/O LATE MR UBEDULLAH
AGED ABOUT 18 YEARS
R/AT NO.1560 13TH MAIN ROAD HAL 3RD STAGE
KODIHALLI BANGALORE-560008
STUDYING AT NEW HORIZON COLLEGE
ADDRESS 3RD A CROSS 2ND A MAIN ROAD
NGEF LAYOUT, KASTURI NAGAR
BANGALORE-560043.

2 . MS ZUNAIRA AMBER T
AGED ABOUT 16 YEARS
MINOR REPRESENTED BY HER FATHER
MR TAJ AHMED
R/A NO.674 9TH A MAIN 1ST STAGE 1ST CROSS
CMH ROAD OPPOSITE KFC SIGNAL
INDIRANAGAR
BANGALORE-560038

STUDYING AT SRI CHAITANYA TECHNO SCHOOL
ADDRESS-PLOT NO.84/1 GARDEN HOUSE 5TH MAIN
SRR KALYAN MANTAPA
OMBR LAYOUT, BANASWADI
KASTURI NAGAR
BENGALURU-560043.

... PETITIONERS

(BY SHRI A.M. DAR, SENIOR ADVOCATE FOR
SHRI MUNEER AHMED, ADVOCATE)

AND:

1 . THE STATE OF KARNATAKA
REPRESENTED BY THE PRINCIPAL SECRETARY
DEPARTMENT OF PRIMARY AND SECONDARY DEPARTMENT
2ND GATE 6TH FLOOR M S BUILDING
DR AMBEDKAR VEEDHI
BENGALURU-560001.

2 . THE UNDER SECRETARY TO GOVERNMENT
DEPARTMENT OF EDUCATION
VIKAS SOUDHA
BANGALORE-560001.

3 . THE DIRECTOR
KARNATAKA PRE-UNIVERSITY BOARD
DEPARTMENT OF PRE-UNIVERSITY EDUCATION
KARNATAKA
NO.18TH CROSS ROAD SAMPIGE ROAD
MALESWARAM
BENGALURU-560012.

4 . THE COMMISSIONER
EDUCATION DEPARTMENT
GOVT OF KARNATAKA
N T ROAD
BANGALORE-560001.

5 . DIRECTOR GENERAL OF POLICE
STATE OF KARNATAKA
STATE POLICE HEADQUARTERS NO.2
NRUPATHUNGA ROAD
BANGALORE-560001.

6 . THE PRINCIPAL
REPRESENTED BY COLLEGE MANAGEMENT
NEW HORIZON COLLEGE
ADDRESS 3RD A CROSS 2ND A MAIN ROAD
NGEF LAYOUT, KASTURI NAGAR
BANGALORE-560043.

7 . THE PRINCIPAL
REPRESENTED BY SCHOOL MANAGEMENT
SRI CHAITANYA TECHNO SCHOOL
ADDRESS PLOT NO.84/1 GARDEN HOUSE
5TH MAIN SRR KALYAAN MANTAPA
OMBR LAYOUT, BANASWADI KASTURI NAGAR
BENGALURU-560043.

8 . THE INSPECTOR OF POLICE
RAMAMURTHYNAGAR POLICE STATION
KEMPE GOWDA UNDER PASS ROAD
NGEF LAYOUT
DOORAVANI NAGAR, BENGALURU
KARNATAKA-560016.

… RESPONDENTS

(BY SHRI PRABHULING K. NAVADGI, ADVOCATE GENERAL A/W
SHRI. ARUNA SHYAM, ADDITIONAL ADVOCATE GENERAL
SHRI VINOD KUMAR, ADDITIONAL GOVERNMENT ADVOCATE
SHRI SUSHAL TIWARI, SHRI SURYANSHU PRIYADARSHI &
Ms. ANANYA RAI, ADVOCATES FOR RESPONDENTS 1 TO 5 & 8)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED GOVERNMENT ORDER NO. EP 14 SHH 2022 DATED 05.02.2022, PRODUCED AS ANNEXURE-A AND ETC.

IN W.P. NO.4338 OF 2022

BETWEEN:

GHANSHYAM UPADHYAY
AGED 51 YEARS,
INDIAN INHABITANT,
OCCUPATION,
ADVOCATE HAVING HIS OFFICE AT 506,
ARCADIA PREMISES,
195, NCPA ROAD,
NARIMAN POINT,
MUMBAI-400021

... PETITIONER

(BY SHRI SUBHASH JHA & AMRUTHESH. N.P., ADVOCATES FOR PETITIONER)

AND:

1 . UNION OF INDIA
THROUGH THE MINISTRY OF HOME AFFAIRS,
NEW DELHI
REPRESENTED BY ITS SECRETARY

2 . STATE OF KARNATAKA
THROUGH THE HOME MINISTRY
VIDHANA SOUDHA,
BENGALURU-560001
REPRESENTED BY CHIEF SECRETARY

3 . THE PRINCIPAL SECRETARY
DEPARTMENT OF PRIMARY AND SECONDARY EDUCATION,
VIDHAN SOUDHA,
BENGALURU-560001

4 . THE DIRECTOR
CENTRAL BUREAU OF INVESTIGATION,
KARNATAKA

5 . NATIONAL INVESTIGATION AGENCY
BENGALURU,
KARNATAKA
REPRESENTED BY DIRECTOR

... RESPONDENTS

(BY SHRI PRABHULING K. NAVADGI, ADVOCATE GENERAL A/W
SHRI. ARUNA SHYAM, ADDITIONAL ADVOCATE GENERAL
SHRI VINOD KUMAR, ADDITIONAL GOVERNMENT ADVOCATE
SHRI SUSHAL TIWARI, SHRI SURYANSHU PRIYADARSHI &
Ms. ANANYA RAI, ADVOCATES FOR RESPONDENT NOS. 2 & 3.

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO DIRECT THE CBI/NIA AND/OR SUCH OTHER INVESTIGATION AGENCY AS THIS HONBLE COURT MAY DEEM FIT AND PROPER TO MAKE A THOROUGH INVESTIGATION WITH REGARD TO THE MASSIVE AGITATION TAKING PLACE ALL OVER THE COUNTRY AND SPIRALLING EFFECT AND IMPACT BEYOND THE GEOGRAPHICAL LIMITS OF INDIA IN THE AFTERMATH OF ISSUANCE OF GOVERNEMNT ORDER DTD.5.2.2022 ISSUED UNDER KARNATAKA EDUCATION ACT 1983 BY THE STATE OF KARNATAKA AND TO FIND OUT AS TO WHETHER THERE IS INVOLVEMENT OF RADICAL ISLAMIST ORGANIZATIONS SUCH AS PFI, SIO (STUDENT ISLAMIC ORGANIZATION) CFI (CAMPUS FRONT OF INDIA) JAMAAT-E-ISLAMI WHICH IS FUNDED BY SAUDI ARABIAN UNIVERSITES TO ISLAMISE INDIA AND TO ADVANCE RADICAL ISLAM IN INDIA AND SUBMIT THE REPORT OF SUCH ENQUIRY/INVESTIGATION TO THIS HON'BLE COURT WITHIN SUCH MEASURABLE PERIOD OF TIME AS THIS HONBLE COURT MAY DEEM FIT AND PROPER AND ETC.

THESE WRIT PETITIONS, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, THE **CHIEF JUSTICE** PRONOUNCED THE FOLLOWING:

ORDER

This judgment, we desire to begin with what Sara Slininger from Centralia, Illinois concluded her well

researched article "*VEILED WOMEN: HIJAB, RELIGION, AND CULTURAL PRACTICE-2013":*

> *"The hijab's history…is a complex one, influenced by the intersection of religion and culture over time. While some women no doubt veil themselves because of pressure put on them by society, others do so by choice for many reasons. The veil appears on the surface to be a simple thing. That simplicity is deceiving, as the hijab represents the beliefs and practices of those who wear it or choose not to, and the understandings and misunderstandings of those who observe it being worn. Its complexity lies behind the veil."*

Three of these cases namely W.P.No.2347/2022, W.P.No.2146/2022 & W.P.No.2880/2022, were referred by one of us (Krishna S Dixit J.) vide order dated 09.02.2022 to consider if a larger Bench could be constituted to hear them. The Reference Order *inter alia* observed:

> *"All these matters essentially relate to proscription of hijab (headscarf) while prescribing the uniform for students who profess Islamic faith…The recent Government Order dated 05.02.2022 which arguably facilitates enforcement of this rule is also put in challenge. Whether wearing of hijab is a part of essential religious practice in Islam, is the jugular vein of all these matters…The said question along with other needs to be answered in the light of constitutional guarantees availing to the religious minorities. This Court after hearing the matter for some time is of a considered opinion that regard being had to enormous public importance of the questions involved, the batch of these cases may be heard by a Larger Bench, if Hon'ble the Chief Justice so decides in discretion…In the above circumstances, the Registry is directed to place the papers immediately at the hands of Hon'ble the Chief Justice for consideration…"*

Accordingly, this Special Bench came to be constituted the very same day vide Notification dated 09.02.2022 to hear these petitions, to which other companion cases too joined.

I. PETITIONERS' GRIEVANCES & PRAYERS BRIEFLY STATED:

(i) In Writ Petition No. 2347/2022, filed by a petitioner – girl student on 31.01.2022, the 1st, 3rd & 4th respondents happen to be the State Government & its officials, and the 2nd respondent happens to be the Government Pre–University College for Girls, Udupi. The prayer is for a direction to the respondents to permit the petitioner to wear *hijab* (head – scarf) in the class room, since wearing it is a part of *'essential religious practice'* of Islam.

(ii) In Writ Petition No. 2146/2022 filed by a petitioner–girl student on 29.01.2022, the 1st, 3rd & 4th respondents happen to be the State Government & its officials and the 2nd respondent happens to be the Government Pre – University College for Girls, Udupi. The prayer column has the following script:

> *"1. Issue the **WRIT OF MANDAMUS** and order to respondent no 1 and 2 to initiate enquiry against the Respondent 5 college and Respondent no 6 i.e. Principal for violating instruction enumerated under Chapter 6 heading of "Important information" of*

*Guidelines of PU Department for academic year of 2021-22 same at **ANNEXURE J** for maintaining uniform in the PU college.,*

*2. Issue **WRIT OF MANDAMUS** to Respondent no 3 conduct enquiry against the Respondent no 6 to 14 for their Hostile approach towards the petitioners students.,*

*3. Issue **WRIT OF QUO WARRANTO** against the Respondent no 15 and 16 under which authority and law they interfering in the administration of Respondent no 5 school and promoting their political agenda. And,*

*4. **DECLARE** that the status quo referred in the letter dated 25/01/2022 at **ANNEXURE H** is with the consonance to the Department guidelines for the academic year 2021-22 same at **ANNEXURE J**…"*

(iii) In Writ Petition Nos.2880/2022, 3038/2022 & 4309/2022, petitioner – girl students seek to lay a challenge to the Government Order dated 05.02.2022. This order purportedly issued under section 133 read with sections 7(2) & (5) of the Karnataka Education Act, 1983 (hereafter '1983 Act') provides that, the students should compulsorily adhere to the dress code/uniform as follows:

a. in government schools, as prescribed by the government;

b. in private schools, as prescribed by the school management;

c. in Pre–University colleges that come within the jurisdiction of the Department of the Pre–University Education, as prescribed by the

College Development Committee or *College Supervision Committee; and*

d. wherever no dress code is prescribed, such attire that would accord with '*equality & integrity*' and would not disrupt the '*public order*'.

(iv) In Writ Petition No.3424/2022 (GM-RES-PIL), filed on 14.02.2022 (when hearing of other cases was half way through), petitioner – Dr.Vinod Kulkarni happens to be a consulting neuro – psychiatrist, advocate & social activist. The 1st and 2nd respondents happen to be the Central Government and the 3rd respondent happens to be the State Government. The first prayer is for a direction to the respondents "*to declare that all the students of various schools and colleges in Karnataka and in the country shall attend their institutions by sporting the stipulated uniform*" (*sic*). Second prayer reads "*To permit Female Muslim students to sport Hijab provided they wear the stipulated school uniform also" (sic).*

(v) In Writ Petition No.4338/2022 (GM-RES-PIL), filed on 25.02.2022 (when hearing of other cases was half way through), one Mr. Ghanasham Upadhyay is the petitioner. The 1st respondent is the Central

Government, 2nd & 3rd respondents happen to be the State Government & its Principal Secretary, Department of Primary & Secondary Education; the 4th & 5th respondents happen to be the Central Bureau of Investigation and National Investigation Agency. The gist of the lengthy and inarticulate prayers are that the Central Bureau of Investigation/National Investigation Agency or such other investigating agency should make a thorough investigation in the nationwide agitation after the issuance of the Government Order dated 05.02.2022 to ascertain the involvement of radical organizations such as Popular Front of India, Students Islamic Organization of India, Campus Front of India and *Jamaat*-e-*Islami*; to hold and declare that wearing of *hijab*, *burqa* or such "*other costumes by male or female Muslims and that sporting beard is not an integral part of essential religious practice of Islam*" and therefore, prescription of dress code is permissible. There are other incoherent and inapplicable prayers that do not merit mentioning here.

(vi) The State and its officials are represented by the learned Advocate General. The respondent–Colleges

and other respondents are represented by their respective advocates. The State has filed the Statement of Objections (this is adopted in all other matters) on 10.02.2022; other respondents have filed their Statements of Objections, as well. Some petitioners have filed their Rejoinder to the Statement of Objections. The respondents resist the Writ Petitions making submission in justification of the impugned order.

II. BROAD CONTENTIONS OF PETITIONERS:

(i) Petitioner – students profess and practice Islamic faith. Wearing of *hijab* (head – scarf) is an 'essential religious practice' in Islam, the same being a *Quranic* injunction vide *AMNAH BINT BASHEER vs. CENTRAL BOARD OF SECONDARY EDUCATION*[1] and *AJMAL KHAN vs. ELECTION COMMISSION OF INDIA*[2]. Neither the State Government nor the Schools can prescribe a dress code/uniform that does not permit the students to wear *hijab*. The action of the respondent – schools in insisting upon the removal of *hijab* in the educational institutions is impermissible, as being violative of the fundamental right guaranteed under Article 25 of the

[1] (2016) SCC OnLine Ker 41117
[2] (2006) SCC OnLine Mad 794

Constitution vide *SRI VENKATARAMANA DEVARU vs. STATE OF MYSORE*[3] and *INDIAN YOUNG LAWYERS ASSOCIATION vs. STATE OF KERALA*[4]

(ii) The impugned Government Order dated 05.02.2022 is structured with a wrong narrative that wearing of *hijab* is not a part of '*essential religious practice*' of Islam and therefore, prescribing or authorizing the prescription of dress code/uniform to the students consistent with the said narrative, is violative of their fundamental right to freedom of conscience and the right to practice their religious faith constitutionally guaranteed under Article 25 vide *BIJOE EMMANUAL vs. STATE OF KERALA*[5].

(iii) One's personal appearance or choice of dressing is a protected zone within the *'freedom of expression'* vide *NATIONAL LEGAL SERVICES AUTHORITY vs. UNION OF INDIA*[6]; What one wears and how one dresses is a matter of individual choice protected under '*privacy jurisprudence*' vide *K.S PUTTASWAMY vs. UNION OF INDIA*[7]. The Government Order and the action of the schools to the extent that they do

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[3] 1958 SCR 895
[4] (2019) 11 SCC 1
[5] (1986) 3 SCC 615
[6] (2014) 5 SCC 438
[7] (2017) 10 SCC 1

not permit the students to wear *hijab* in the institutions are repugnant to these fundamental rights constitutionally availing under Articles 19(1)(a) & 21.

(iv) The action of the State and the schools suffers from the violation of *'doctrine of proportionality'* inasmuch as in taking the extreme step of banning the *hijab* within the campus, the possible alternatives that pass the *'least restrictive test'* have not been explored vide *MODERN DENTAL COLLEGE vs. STATE OF MADHYA PRADESH*[8] and *MOHD. FARUK V. STATE OF MADHYA PRADESH*[9].

(v) The impugned Government Order suffers from *'manifest arbitrariness'* in terms of *SHAYARA BANO VS. UNION OF INDIA*[10]. The impugned Government Order suffers from a gross non-application of mind and a misdirection in law since it is founded on a wrong legal premise that the Apex Court in *AHSA RENJAN vs. STATE OF BIHAR*[11], the High Courts in Writ Petition(C) No. 35293/2018, *FATHIMA HUSSAIN vs. BHARATH EDUCATION SOCIETY*[12], *V.KAMALAMMA vs. DR. M.G.R. MEDICAL UNIVERSITY and SIR*

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[8] (2016) 7 SCC 353
[9] (1969) 1 SCC 853
[10] (2017) 9 SCC 1
[11] (2017) 4 SCC 397
[12] AIR 2003 Bom 75

M. VENKATA SUBBARAO MARTICULATION HIGHER SECONDARY SCHOOL STAFF ASSOCIATION vs. SIR M. VENKATA SUBBARAO MARTICULATION HIGHER SECONDARY SCHOOL[13] have held that the wearing of *hijab* is not a part of essential religious practice of Islam when contrary is their demonstrable ratio.

(vi) The impugned Government Order is the result of acting under dictation and therefore, is vitiated on this ground of Administrative Law, going by the admission of learned Advocate General that the draftsmen of this order has gone too far and the draftsman exceeded the brief vide *ORIENT PAPER MILLS LTD vs. UNION OF INDIA*[14] and *MANOHAR LAL vs. UGRASEN*[15]. Even otherwise, the grounds on which the said government order is structured being unsustainable, it has to go and that supportive grounds cannot be supplied *de hors* the order vide *MOHINDER SINGH GILL vs. CHIEF ELECTION COMMISSIONER.*[16]

(vii) The Government is yet to take a final decision with regard to prescription of uniform in the Pre-University

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[13] (2004) 2 MLJ 653
[14] (1970) 3 SCC 76
[15] (2010) 11 SCC 557
[16] AIR 1978 SC 851

Colleges and a High Level Committee has to be constituted for that purpose. The *Kendriya Vidyalayas* under the control of the Central Government too permit the wearing of *hijab* (head-scarf). There is no reason why similar practise should not be permitted in other institutions.

(viii) The Karnataka Education Act, 1983 or the Rules promulgated thereunder do not authorize prescription of any dress code/uniform at all. Prescribing dress code in a school is a matter of '*police power*' which does not avail either to the government or to the schools in the absence of statutory enablement. Rule 11 of Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula, etc) Rules, 1995 (hereafter '1995 Curricula Rules') to the extent it provides for prescription of uniform is incompetent and therefore, nothing can be tapped from it.

(ix) The *College Betterment (Development) Committee* constituted under Government Circular dated 31.1.2014 is only an extra-legal authority and therefore, its prescription of dress code/uniform for the students is without jurisdiction. The prospectus issued by the Education Department prohibits prescription of any uniform. The composition & complexion of

College Betterment (Development) Committee under the Government Circular dated 31.1.2014 *inter alia* compromising of local Member of Legislative Assembly as its President and his nominee as the Vice – President would unjustifiably politicize the educational environment and thereby, pollute the tender minds. The Pre-University institutions are expected to be independent and safe spaces.

(x) The *College Betterment (Development) Committee* which *inter alia* comprises of the local Member of Legislative Assembly vide the Government Circular dated 31.1.2014, apart from being unauthorized, is violative of *'doctrine of separation of powers'* which is a basic feature of our Constitution vide *KESAVANANDA BHARATI vs. STATE OF KERALA*[17] read with *RAI SAHIB RAM JAWAYA KAPUR vs. STATE OF PUNJAB*[18], and *STATE OF WEST BENGAL vs. COMMITTEE FOR PROTECTION OF DEMOCRACTIC RIGHTS*[19] also infringes upon of the principle of accountability vide *BHIM SINGH vs. UNION OF INDIA*[20]. This committee has no power to prescribe school uniforms.

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[17] AIR 1973 SC 1461
[18] AIR 1955 SC 549
[19] (2010) 3 SCC 571
[20] (2010) 5 SCC 538

(xi) The ground of '*public order*' (*sārvajanika suvyavasthe*) on which the impugned Government Order is founded is un-understandable; this expression is construed with reference to '*public disorder*' and therefore, the State action is bad vide *COMMISSIONER OF POLICE vs. C. ANITA*[21]. If wearing of *hijab* disrupts the public order, the State should take action against those responsible for such disruption and not ban the wearing of *hijab*. Such a duty is cast on the State in view of a positive duty vide *GULAM ABBAS vs. STATE OF UTTAR PRADESH*[22]*, INDIBILY CREATIVE PVT. LTD vs. STATE OF WEST BENGAL*[23]*.* In addition such a right cannot be curtailed based on the actions of the disrupters, i.e., the *'hecklers don't get the veto'* vide *TERMINIELLO vs. CHICAGO*[24]*, BROWN vs. LOUISIANA*[25]*, TINKER vs. DES MOINES*[26], which view is affirmed by the Apex Court in *UNION OF INDIA vs. K.M.SHANKARAPPA*[27]*.* This duty is made more onerous because of positive secularism contemplated by the

[21] (2004) 7 SCC 467
[22] (1982) 1 SCC 71
[23] (2020) 12 SCC 436
[24] 337 U.S. 1 (1949)
[25] 383 U.S. 131 (1966)
[26] 393 U.S. 503 (1969)
[27] (2001) 1 SCC 582

Constitution vide *STATE OF KARNATAKA vs. PRAVEEN BHAI THOGADIA (DR.)*[28], *ARUNA ROY vs. UNION OF INDIA*[29].

(xii) Proscribing *hijab* in the educational institutions apart from offending women's autonomy is violative of Article 14 inasmuch as the same amounts to *'gender–based'* discrimination which Article 15 does not permit. It also violates right to education since entry of students with *hijab* to the institution is interdicted. The government and the schools should promote plurality, not uniformity or homogeneity but heterogeneity in all aspects of lives as opposed to conformity and homogeneity consistent with the constitutional spirit of diversity and inclusiveness vide *VALSAMMA PAUL (MRS) vs. COCHIN UNIVERSITY*[30], *SOCIETY FOR UNAIDED PRIVATE SCHOOLS OF RAJASTHAN vs. UNION OF INDIA*[31] and *NAVTEJ SINGH JOHAR vs. UNION OF INDIA*[32].

(xiii) The action of the State and the school authorities is in derogation of International Conventions that provide for protective discrimination of women's rights vide *UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), CONVENTION OF*

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[28] (2004) 4 SCC 684
[29] (2002) 7 SCC 368
[30] (1996) 3 SCC 545
[31] (2012) 6 SCC 1
[32] AIR 2018 SC 4321

ELIMINATION ON ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1981), INTERNATIONAL COVENANTS ON CIVIL AND POLITICAL RIGHTS (1966), UNITED NATIONS CONVENTION ON RIGHTS OF CHILD (1989). To provide for a holistic and comparative view of the *'principle of reasonable accommodation'* as facets of *'substantive–equality'* under Article 14 & 15 vide *LT. COL. NITISHA vs. UNION OF INDIA*[33]; petitioners referred to the following decisions of foreign jurisdictions in addition to native ones: *MEC FOR EDUCATION: KWAZULU – NATAL vs. NAVANEETHUM PILLAY*[34], *CHRISTIAN EDUCATION SOUTH AFRICA vs. MINISTER OF EDUCATION*[35], *R. vs. VIDEOFLEX*[36], *BALVIR SSINGH MULTANI vs. COMMISSION SCOLAIRE MARGUERITE - BOURGEOYS*[37], *ANTONIE vs. GOVERNING BODY, SETTLERS HIGH SCHOOL*[38] and *MOHAMMAD FUGICHA vs. METHODIST CHRUCH IN KENYA*[39].

(xiv) In W.P.No.2146/2022, the school teachers have been acting in derogation of the Brochure of the Education

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33 (2021) SCC OnLine SC 261
34 [CCT51/06 [2007] ZACC 21]
35 [2000] ZACC 2
36 1948 2D 395
37 (2006) SCC OnLine Can SC 6
38 2002 (4) SA 738 (T)
39 (2016) SCC OnLine Kenya 3023

Department which prohibits prescribing any kind of uniform inasmuch as they are forcing the students to remove *hijab* and therefore, disciplinary action should be taken against them. The respondents – 15 & 16 have no legal authority to be on the College Betterment (Development) Committee and therefore, they are liable to be removed by issuing a Writ of *Quo Warranto*.

III. CONTENTIONS OF RESPONDENT – STATE & COLLEGE AUTHORITIES:

Respondents i.e., State, institutions and teachers per contra contend that:

(i) The fact matrix emerging from the petition averments lacks the material particulars as to the wearing of *hijab* being in practice at any point of time; no evidentiary material worth mentioning is loaded to the record of the case, even in respect of the scanty averments in the petition. Since how long, the students have been wearing *hijab* invariably has not been pleaded. At no point of time these students did wear any head scarf not only in the class room but also in the institution. Even otherwise, whatever rights petitioners claim under Article 25 of the Constitution, are not absolute. They are susceptible to reasonable restriction and regulation by

law. In any circumstance, the wearing *hijab* arguably as being part of *'essential religious practice'* in Islam cannot be claimed by the students as a matter of right in all-girl-institutions like the respondent PU College, Udupi.

(ii) Wearing *hijab* or head scarf is not a part of '*essential religious practice'* of Islamic faith; the Holy Quran does not contain any such injunctions; the Apex Court has laid down the principles for determining what is an '*essential religious practice'* vide *COMMISSIONER HINDU RELIGIOUS ENDOWMENTS MADRAS vs. SRI LAKSHMINDRA THIRTHA SWAMIAR OF SRI SHIRUR MUTT*[40], *DURGAH COMMITTEE, AJMER vs. SYED HUSSAIN ALI*[41], *M. ISMAIL FARUQUI vs. UNION OF INDIA*[42], *A.S. NARAYANA DEEKSHITULU vs. STATE OF ANDHRA PRADESH*[43], *JAVED vs. STATE OF HARYANA*[44], *COMMISSIONER OF POLICE vs. ACHARYA JAGADISHWARANANDA AVADHUTA*[45], *AJMAL KHAN vs. THE ELECTION COMMISSION*[46], *SHARAYA BANO, INDIAN YOUNG LAWYERS ASSOCIATION*. Wearing *hijab* at the most may be a

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[40] AIR 1954 SC 282
[41] AIR 1961 SC 1402
[42] (1994) 4 SCC 360
[43] (1996) 9 SCC 611
[44] (2003) 8 SCC 369
[45] (2004) 12 SCC 770
[46] 2006 SCC OnLine Mad 794

'cultural' practice which has nothing to do with religion. Culture and religion are different from each other.

(iii) The educational institutions of the kind being '*qualified public places*', the students have to adhere to the campus discipline and dress code as lawfully prescribed since years i.e., as early as 2004. The parents have in the admission forms of their wards (minor students) have signified their consent to such adherence. All the students had been accordingly adhering to the same all through. It is only in the recent past; quite a few students have raked up this issue after being brainwashed by some fundamentalist Muslim organizations like Popular Front of India, Campus Front of India, *Jamaat*-e-*Islami*, and Students Islamic Organization of India. An FIR is also registered. Police papers are furnished to the court in a sealed cover since investigation is half way through. Otherwise, the students and parents of the Muslim community do not have any issue at all. Therefore, they cannot now turn around and contend or act to the contrary.

(iv) The power to prescribe school uniform is inherent in the concept of school education itself. There is sufficient

indication of the same in the 1983 Act and the 1995 Curricula Rules. It is wrong to argue that prescription of uniform is a '*police power*' and that unless the Statute gives the same; there cannot be any prescription of dress code for the students. The so called '*prospectus*' allegedly issued by the Education Department prohibiting prescription of uniform/dress code in the schools does not have any authenticity nor legal efficacy.

(v) The Government Order dated 05.02.2022 is compliant with the scheme of the 1983 Act, which provides for '*cultivating a scientific and secular outlook through education'* and this G.O. has been issued under Section 133 read with Sections 7(1)(i), 7(2)(g)(v) of the Act and Rule 11 of the 1995 Curricula Rules; this order only authorizes the prescription of dress code by the institutions on their own and it as such, does not prescribe any. These Sections and the Rule intend to give effect to constitutional secularism and to the ideals that animate Articles 39(f) & 51(A). The children have to develop in a healthy manner and in conditions of *'freedom and dignity'*; the school has to promote the spirit of *harmony and common brotherhood* transcending *religious, linguistic, regional or sectional diversities*. The practices that

are derogatory to the dignity of women have to be renounced. All this would help nation building. This view is reflected in the decision of Apex Court in *MOHD. AHMED KHAN vs. SHAH BANO BEGUM*[47].

(vi) The Government Order dated 5.02.2022 came to be issued in the backdrop of social unrest and agitations within the educational institutions and without engineered by Popular Front of India, Students Islamic Organization of India, Campus Front of India & *Jamaat*-e-*Islami.* The action of the institutions in insisting adherence to uniforms is in the interest of maintaining *'peace & tranquility'*. The term '*public order*' (*sārvajanika suvyavasthe*) employed in the Government Order has contextual meaning that keeps away from the same expression employed in Article 19(2) of the Constitution.

(vii) The '*College Betterment (Development) Committees'* have been established vide Government Circular dated 31.01.2014 consistent with the object of 1983 Act and 1995 Curricula Rules. For about eight years or so, it has been in place with not even a little finger being raised by anyone nor is there any complaint against the composition or functioning of these Committees. This Circular is not put in challenge in

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[47] (1985) 2 SCC 556

any of the Writ Petitions. These autonomous Committees have been given power to prescribe uniforms/dress code vide *SIR M. VENKATA SUBBARAO & ASHA RENJAN supra, FATHIMA THASNEEM vs. STATE OF KERALA*[48] and *JANE SATHYA vs. MEENAKSHI SUNDARAM ENGINEERING COLLEGE*[49]. The Constitution does not prohibit elected representatives of the people being made a part of such committees.

(viii) The right to wear *hijab* if claimed under Article 19(1)(a), the provisions of Article 25 are not invocable inasmuch as the simultaneous claims made under these two provisions are not only mutually exclusive but denuding of each other. In addition, be it the freedom of conscience, be it the right to practise religion, be it the right to expression or be it the right to privacy, all they are not absolute rights and therefore, are susceptible to reasonable restriction or regulation by law, of course subject to the riders prescribed vide *CHINTAMAN RAO vs. STATE OF MADHYA PRADESH*[50] and *MOHD. FARUK V. STATE OF MADHYA PRADESH, supra.*

(ix) Permitting the petitioner – students to wear *hijab* (head – scarf) would offend the tenets of human dignity

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[48] 2018 SCC OnLine Ker 5267
[49] 2012 SCC OnLine Mad 2607
[50] AIR 1951 SC 118

inasmuch as, the practice robs away the individual choice of Muslim women; the so called religious practice if claimed as a matter of right, the claimant has to *prima facie* satisfy its *constitutional morality* vide *K.S PUTTAWAMY supra*, *INDIAN YOUNG LAWYERS ASSOCIATION supra*. There is a big shift in the judicial approach to the very idea of essential religious practice in Islamic faith since the decision in *SHAYARA BANO*, supra, which the case of the petitioners overlooks. To be an essential religious practice that merits protection under Article 25, it has to be shown to be essential to the religion concerned, in the sense that if the practice is renounced, the religion in question ceases to be the religion.

(x) Children studying in schools are placed under the care and supervision of the authorities and teachers of the institution; therefore, they have '*parental and quasi – parental*' authority over the school children. This apart, schools are '*qualified public places*' and therefore exclusion of religious symbols is justified in light of 1995 Curricula Regulation that are premised on the objective of secular education, uniformity and standardization vide *ADI SAIVA SIVACHARIYARGAL NALA*

SANGAM vs. STATE OF TAMIL NADU[51], *S.R. BOMMAI vs. UNION OF INDIA*[52], *S.K. MOHD. RAFIQUE vs. CONTAI RAHAMANIA HIGH MADRASAH*[53] and *CHURCH OF GOD (FULL GOSPEL) IN INDIA vs. K.K.R MAJECTIC COLONY WELFARE ASSCOIATION*[54]*.* What is prescribed in *Kendriya Vidyalayas* as school uniform is not relevant for the State to decide on the question of school uniform/dress code in other institutions. This apart there is absolutely no violation of right to education in any sense.

(xi) Petitioner-students in Writ Petition No.2146/2022 are absolutely not justified in seeking a disciplinary enquiry against some teachers of the respondent college and removal of some others from their position by issuing a Writ of *Quo Warranto*. As already mentioned above, the so called prospectus/instructions allegedly issued by the Education Department prohibiting the dress code in the colleges cannot be the basis for the issuance of coercive direction for refraining the enforcement of dress code. The authenticity and efficacy of the prospectus/instructions are not established.

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[51] (2016) 2 SCC 725
[52] (1994) 3 SCC 1
[53] (2020) 6 SCC 689
[54] (2000) 7 SCC 282

In support of their contention and to provide for a holistic and comparative view, the respondents have referred to the following decisions of foreign jurisdictions, in addition to native ones: *LEYLA SAHIN vs. TURKEY*[55], *WABE and MH MÜLLER HANDEL*[56], *REGINA vs. GOVERNORS OF DENBIGH HIGH SCHOOL*[57] and *UNITED STATES vs. O'BRIEN*[58] and *KOSE vs. TURKEY*[59].

IV. All these cases broadly involving common questions of law & facts are heard together on day to day basis with the concurrence of the Bar. There were a few Public Interest Litigations espousing or opposing the causes involved in these cases. However, we decline to grant indulgence in them by separate orders. Similarly, we decline to entertain applications for impleadment and intervention in these cases, although we have adverted to the written submissions/supplements filed by the respective applicants.

Having heard the learned counsel appearing for the parties and having perused the papers on record, we

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55 Application No. 44774/98
56 C-804/18 and C-341/19 dated 15th July 2021
57 [2006] 2 WLR 719
58 391 US 367 (1968)
59 Application No. 26625/02

have broadly framed the following questions for consideration:

SL.NO.	QUESTIONS FOR CONSIDERATION
1.	Whether wearing *hijab*/head-scarf is a part of *'essential religious practice'* in Islamic Faith protected under Article 25 of the Constitution?
2.	Whether prescription of school uniform is not legally permissible, as being violative of petitioners Fundamental Rights *inter alia* guaranteed under Articles, 19(1)(a), (i.e., *freedom of expression*) and 21, (i.e., *privacy*) of the Constitution?
3.	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 Articles 14 & 15 of the Constitution?
4.	Whether any case is made out in W.P.No.2146/2022 for issuance of a direction for initiating disciplinary enquiry against respondent Nos.6 to 14 and for issuance of a Writ of *Quo Warranto* against respondent Nos.15 & 16?

V. SECULARISM AND FREEDOM OF CONSCIENCE & RELIGION UNDER OUR CONSTITUTION:

Since both the sides in their submissions emphasized on Secularism and freedom of conscience & right to religion, we need to concisely treat them in a structured way. Such a need is amplified even for adjudging the validity of the Government Order dated 05.02.2022, which according to the State gives effect to and operationalizes constitutional Secularism.

SECULARISM AS A *BASIC FEATURE* OF OUR CONSTITUTION:

(i) '*India, that is Bharat*' (Article 1), since centuries, has been the sanctuary for several religions, faiths & cultures that have prosperously co-existed, regardless of the ebb & flow of political regimes. Chief Justice S.R. Das in *IN RE: KERALA EDUCATION BILL*[60] made the following observation lauding the greatness of our heritage:

> "*...Throughout the ages endless inundations of men of diverse creeds, cultures and races - Aryans and non-Aryans, Dravidians and Chinese, Scythians, Huns, Pathans and Mughals - have come to this ancient land from distant regions and climes. India has welcomed them all. They have met and gathered, given and taken and got mingled, merged and lost in one body. India's tradition has thus been epitomised in the following noble lines:*
>
> *"None shall be turned away From the shore of this vast sea of humanity that is India" (Poems by Rabindranath Tagore)...*"

In *S.R.BOMMAI, supra* at paragraph 25, the Hon'ble Supreme Court of India observed: "*India can rightly be described as the world's most heterogeneous society. It is a country with a rich heritage. Several races have converged in this sub-continent. They brought with them their own cultures, languages, religions and customs. These diversities threw up*

[60] (1959) 1 SCR 996

their own problems but the early leadership showed wisdom and sagacity in tackling them by preaching the philosophy of accommodation and tolerance…"

(ii) The 42nd Amendment (1976) introduced the word '*secular'* to the Preamble when our Constitution already had such an animating character *ab inceptio*. Whatever be the variants of its meaning, secularism has been a *Basic Feature* of our polity vide *KESAVANANDA*, *supra* even before this Amendment. The ethos of Indian secularism may not be approximated to the idea of *separation between Church and State* as envisaged under American Constitution post First Amendment (1791). Our Constitution does not enact Karl Marx's structural-functionalist view '*Religion is the opium of masses*' (1844). H.M.SEERVAI, an acclaimed jurist of yester decades in his *magnum opus* 'Constitutional Law of India, Fourth Edition, Tripathi at page 1259*, writes: 'India is a secular but not an anti-religious State, for our Constitution guarantees the freedom of conscience and religion. Articles 27 and 28 emphasize the secular nature of the State…'* Indian secularism oscillates between s*ārva dharma samabhāava and dharma nirapekshata.* The Apex Court in *INDIRA NEHRU*

GANDHI vs. RAJ NARAIN[61] explained the basic feature of secularism to mean that *the State shall have no religion of its own and all persons shall be equally entitled to the freedom of conscience and the right freely to profess, practice and propagate religion.* Since ages, India is a secular country. For India, there is no official religion, inasmuch as it is not a theocratic State. The State does not extend patronage to any particular religion and thus, it maintains neutrality in the sense that it does not discriminate anyone on the basis of religious identities *per se*. Ours being a 'positive secularism' vide *PRAVEEN BHAI THOGADIA supra*, is not antithesis of religious devoutness but comprises in religious tolerance. It is pertinent to mention here that Article 51A(e) of our Constitution imposes a Fundamental Duty on every citizen '*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*'. It is relevant to mention here itself that this constitutional duty to transcend the sectional diversities of religion finds its utterance in section 7(2)(v) & (vi) of the 1983 Act which empowers the State

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[61] (1975) Supp. SCC 1

Government to prescribe the curricula that would amongst other inculcate the sense of this duty.

VI. CONSTITUTIONAL RIGHT TO RELIGION AND RESTRICTIONS THEREON:

(i) Whichever be the society, '*you can never separate social life from religious life*' said Alladi Krishnaswami Aiyar during debates on Fundamental Rights in the Advisory Committee (April 1947). The judicial pronouncements in America and Australia coupled with freedom of religion guaranteed in the Constitutions of several other countries have substantially shaped the making of *inter alia* Articles 25 & 26 of our Constitution. Article 25(1) & (2) read as under:

> *"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.*
>
> *Explanation I - The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.*

> *Explanation II - In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."*

This Article guarantees that every person in India shall have the freedom of conscience and also the right to profess practise and propagate religion. It is relevant to mention that unlike Article 29, this article does not mention *'culture'* as such, which arguably may share a common border with religion. We shall be touching the cultural aspect of *hijab,* later. We do not propose to discuss about this as such. The introduction of word 'conscience' was at the instance of Dr. B.R.Ambedkar, who in his wisdom could visualize persons who do not profess any religion or faith, like Chāarvāakas, atheists & agnostics. Professor UPENDRA BAXI in *'THE FUTURE OF HUMAN RIGHTS' (Oxford), 3rd Edition, 2008, at page 149* says*:*

> *"...Under assemblage of human rights, individual human beings may choose atheism or agnosticism, or they may make choices to belong to fundamental faith communities. Conscientious practices of freedom of conscience enable exit through conversion from traditions of religion acquired initially by the accident of birth or by the revision of choice of faith, which may thus never be made irrevocably once for all..."*

BIJOE EMMANUEL, supra operationalized the freedom of conscience intricately mixed with a great measure of right to religion. An acclaimed jurist DR. DURGA DAS BASU in his '*Commentary on the Constitution of India*', 8th Edition at page 3459 writes: "*It is next to be noted that the expression 'freedom of conscience' stands in juxtaposition to the words "right freely to profess, practise and propagate religion". If these two parts of Art. 25(1) are read together, it would appear, by the expression 'freedom of conscience' reference is made to the mental process of belief or non-belief, while profession, practice and propagation refer to external action in pursuance of the mental idea or concept of the person…It is also to be noted that the freedom of conscience or belief is, by its nature, absolute, it would become subject to State regulation, in India as in the U.S.A. as soon as it is externalized i.e., when such belief is reflected into action which must necessarily affect other people…*"

(ii) There is no definition of religion or conscience in our constitution. What the American Supreme Court in *DAVIS V. BEASON*[62] observed assumes relevance: "*…the term religion has reference to one's views of his relation to his Creator and to*

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[62] (1889) 133 US 333

the obligation they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cultus of form or worship of a particular sect, but is distinguishable from the latter". **WILL DURANT**, a great American historian (1885-1981) in his Magnum Opus '*THE STORY OF CIVILIZATION'*, Volume 1 entitled '*OUR ORIENTAL HERITAGE'* at pages 68 & 69 writes:

> *'The priest did not create religion, he merely used it, as a statesman uses the impulses and customs of mankind; religion arises not out of sacerdotal invention or chicanery, but out of the persistent wonder, fear, insecurity, hopefulness and loneliness of men…" The priest did harm by tolerating superstition and monopolizing certain forms of knowledge…Religion supports morality by two means chiefly: myth and tabu. Myth creates the supernatural creed through which celestial sanctions may be given to forms of conduct socially (or sacerdotally) desirable; heavenly hopes and terrors inspire the individual to put up with restraints placed upon him by his masters and his group. Man is not naturally obedient, gentle, or chaste; and next to that ancient compulsion which finally generates conscience, nothing so quietly and continuously conduces to these uncongenial virtues as the fear of the gods…'.*

In *NARAYANAN NAMBUDRIPAD vs. MADRAS*[63], Venkatarama Aiyar J. quoted the following observations of Leathem C.J in

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[63] AIR 1954 MAD 385

ADELAIDE CO. OF JEHOVAH'S WITNESSES INC. V. COMMONWEALTH[64]:

> *"It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance..."*

In *SHIRUR MUTT* supra, 'religion' has been given the widest possible meaning. The English word 'religion' has different shades and colours. It does not fully convey the Indian concept of religion i.e., 'dharma' which has a very wide meaning, one being 'moral values or ethics' on which the life is naturally regulated. The Apex Court referring to the aforesaid foreign decision observed:

> *"...We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon article 44(2) of the Constitution of Eire and we have great doubt whether a definition of "religion" as given above could have been in the minds of our Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities*

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[64] (1943) 67 C.L.R. 116, 123

> *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 modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress…"*

(iii) It is relevant to quote what BERTRAND RUSSELL in his '*EDUCATION AND SOCIAL ORDER*' (1932) at page 69 wrote: '*Religion is a complex phenomenon, having both an individual and a social aspect …throughout history, increase of civilization has been correlated with decrease of religiosity.'* The free exercise of religion under Article 25 is subject to restrictions imposed by the State on the grounds of public order, morality and health. Further it is made subordinate to other provisions of Part III. Article 25(2)(a) reserves the power of State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice. Article 25(2)(b) empowers the State to legislate for social welfare and reform even though by so doing, it might interfere with religious practice.

H.M.SEERVAI[65] at paragraph 11.35, page 1274, states: "*It has been rightly held by Justice Venkatarama Aiyar for a very strong Constitution Bench that Article 25(2) which provides for social and economic reform is, on a plain reading, not limited to individual rights. So, by an express provision, the freedom of religion does not exclude social and economic reform although the scope of social reform, would require to be defined.*" This apart, Article 25(1) deals with rights of individuals whereas Article 25(2) is much wider in its content and has reference to communities. This Article, it is significant to note, begins with the expression '*Subject to…*'. Limitations imposed on religious practices on the ground of public order, morality and health having already been saved by the opening words of Article 25(1), the saving would cover beliefs and practices even though considered essential or vital by those professing the religion. The text & context of this Article juxtaposed with other unmistakably show that the freedom guaranteed by this provision in terms of sanctity, are placed on comparatively a lower pedestal by the Makers of our Constitution *qua* other Fundamental Rights conferred in Part III. This broad view

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[65] Constitutional Law of India: A Critical Commentary, 4th Edition

draws support from a catena of decisions of the Apex Court beginning with *VENKATARAMANA DEVARU, supra*.

(iv) RELIGIOUS FREEDOM UNDER OUR CONSTITUTION VIS-À-VIS AMERICAN CONSTITUTION:

The First Amendment to the US Constitution confers freedoms in absolute terms and the freedoms granted are the rule and restrictions on those freedoms are the exceptions evolved by their courts. However, the Makers of our Constitution in their wisdom markedly differed from this view. Article 25 of our Constitution begins with the restriction and further incorporates a specific provision i.e., clause (2) that in so many words saves the power of State to regulate or restrict these freedoms. Mr.Justice Douglas of the US Supreme Court in *KINGSLEY BOOKS INC. vs. BROWN*[66], in a sense lamented about the absence of a corresponding provision in their Constitution, saying "*If we had a provision in our Constitution for 'reasonable' regulation of the press such as India has included in hers, there would be room for argument that censorship in the interest of morality would be permissible*". In a similar context, what Chief Justice Hidayatullah, observed

[66] 354 US 436 (1957)

in *K.A.ABBAS vs. UNION OF INDIA* [67] makes it even more evoking:

> *"…The American Constitution stated the guarantee in absolute terms without any qualification. The Judges try to give full effect to the guarantee by every argument they can validly use. But the strongest proponent of the freedom (Justice Douglas) himself recognised in the Kingsley case that there must be a vital difference in approach... In spite of the absence of such a provision Judges in America have tried to read the words 'reasonable restrictions' into the First Amendment and thus to make the rights it grants subject to reasonable regulation …"*

Succinctly put, in the United States and Australia, the freedom of religion was declared in absolute terms and courts had to evolve exceptions to that freedom, whereas in India, Articles 25 & 26 of the Constitution appreciably embody the limits of that freedom.

(v) What is observed in *INDIAN YOUNG LAWYERS ASSOCIATION, supra* at paragraphs 209 & 210 about the scope and content of freedom of religion is illuminating:

> *"…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 recognized in Articles 14, 15, 19 and 21. While*

[67] 1971 SCR (2) 446

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.

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 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. However, in matters of temple entry, the Constitution recognised the disabilities which Hindu religion had imposed over the centuries which restricted the rights of access to dalits and to various groups within Hindu society. The effect of clause (2) of Article 25 is to protect the ability of the state to

enact laws, and to save existing laws on matters governed by sub-clauses (a) and (b). Clause (2) of Article 25 is clarificatory of the regulatory power of the state over matters of public order, morality and health which already stand recognised in clause (1). Clause 1 makes the right conferred subject to public order, morality and health. Clause 2 does not circumscribe the ambit of the 'subject to public order, morality or health' stipulation in clause 1. What clause 2 indicates is that the authority of the state to enact laws on the categories is not trammelled by Article 25…"

VII. AS TO PROTECTION OF ESSENTIAL RELIGIOUS PRACTICE AND THE TEST FOR ITS ASCERTAINMENT:

(i) Since the question of *hijab* being a part of essential religious practice is the bone of contention, it becomes necessary to briefly state as to what is an *essential religious practice* in Indian context and how it is to be ascertained. This doctrine can plausibly be traced to the Chief Architect of our Constitution, Dr. B.R.Ambedkar and to his famous statement in the Constituent Assembly during debates on the Codification of Hindu Law: "*the religious conception 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…" [Constituent Assembly Debates VII:*

781]. In *ACHARYA JAGADISHWARANANDA AVADHUTA, supra,* it has been observed at paragraph 9 as under:

> *"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, etc. of the given religion… 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 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."*

(ii) *INDIAN YOUNG LAWYERS ASSOCIATION* surveyed the development of law relating to essential religious practice and the extent of its constitutional patronage consistent with

the long standing view. Ordinarily, a religious practice in order to be called an '*essential religious practice*' should have the following indicia: *(i) Not every activity associated with the religion is essential to such religion. Practice should be fundamental to religion and it should be from the time immemorial. (ii) Foundation of the practice must precede the religion itself or should be co-founded at the origin of the religion. (iii) Such practice must form the cornerstone of religion itself. If that practice is not observed or followed, it would result in the change of religion itself and, (iv) Such practice must be binding nature of the religion itself and it must be compelling.* That a practice claimed to be essential to the religion has been carried on since time immemorial or is grounded in religious texts *per se* does not lend to it the constitutional protection unless it passes the test of essentiality as is adjudged by the Courts in their role as the guardians of the Constitution.

ESSENTIAL RELIGIOUS PRACTICE SHOULD ASSOCIATE WITH CONSTITUTIONAL VALUES:

(i) March of law regarding essential religious practice: Law is an organic social institution and not just a black letter section. In order to be '*living law of the people*', it marches

with the ebb and flow of the times, either through legislative action or judicial process. Constitution being the Fundamental Law of the Land has to be purposively construed to meet and cover changing conditions of social & economic life that would have been unfamiliar to its Framers. Since *SHAYARA BANO,* there has been a paradigm shift in the approach to the concept of essential religious practice, as rightly pointed by the learned Advocate General. In *INDIAN YOUNG LAWYERS ASSOCIATION*, this branch of law marched further when the Apex Court added another dimension to the concept of essential religious practice, by observing at paragraphs 289 & 291 as under:

> *"For decades, this Court has witnessed claims resting on the essentiality of a practice that militate against the constitutional protection of dignity and individual freedom under the Constitution. It is the duty of the courts to ensure that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality. While the Constitution is solicitous in its protection of religious freedom as well as denominational rights, it must be understood that dignity, liberty and equality constitute the trinity which defines the faith of the Constitution. Together, these three values combine to define a constitutional order of priorities. Practices or beliefs which detract from these foundational values cannot claim legitimacy...*
>
> *Our Constitution places the individual at the heart of the discourse on rights. In a constitutional order characterized by the Rule of Law, the constitutional*

commitment to egalitarianism and the dignity of every individual enjoins upon the Court a duty to resolve the inherent tensions between the constitutional guarantee of religious freedom afforded to religious denominations and constitutional guarantees of dignity and equality afforded to individuals. There are a multiplicity of intersecting constitutional values and interests involved in determining the essentiality of religious practices. In order to achieve a balance between competing rights and interests, the test of essentiality is infused with these necessary limitations."

Thus, a person who seeks refuge under the umbrella of Article 25 of the Constitution has to demonstrate not only *essential religious practice* but also its engagement with the constitutional values that are illustratively mentioned at paragraph 291 of the said decision. It's a matter of concurrent requirement. It hardly needs to be stated, if *essential religious practice* as a threshold requirement is not satisfied, the case does not travel to the domain of those constitutional values.

VIII. SOURCES OF ISLAMIC LAW, HOLY QURAN BEING ITS PRINCIPAL SOURCE:

1. The above having been said, now we need to concisely discuss about the authentic sources of Islamic law inasmuch as Quran and *Ahadith* are cited by both the sides in support of their argument & counter argument relating to wearing of *hijab*. At this juncture, we cannot resist our feel to reproduce *Aiyat* 242 of the Quran which says: *"**It is expected***

that you will use your commonsense". (Quoted by the Apex Court in *SHAH BANO, supra.*

(i) SIR DINSHAH FARDUNJI MULLA'S TREATISE[68], at sections 33, 34 & 35 lucidly states:

> "***33.* Sources of Mahomedan Law:** *There are four sources of Mahomedan law, namely, (1) the Koran; (2) Hadis, that is, precepts, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by authorized persons; (3) Ijmaa, that is, a concurrence of opinion of the companions of Mahomed and his disciples; and (4) Qiyas, being analogical deductions derived from a comparison of the first three sources when they did not apply to the particular case."*
>
> "***34. Interpretation of the Koran:*** *The Courts, in administering Mahomedan law, should not, as a rule, attempt to put their own construction on the Koran in opposition to the express ruling of Mahomedan commentators of great antiquity and high authority."*
>
> "***35. Precepts of the Prophet:*** *Neither the ancient texts nor the preceipts of the Prophet Mahomed should be taken literally so as to deduce from them new rules of law, especially when such proposed rules do not conduce to substantial justice…*"

(ii) FYZEE'S TREATISE: Referring to another Islamic jurist of great repute Asaf A.A. Fyzee[69], what the Apex Court at paragraphs 7 & 54 in *SHAYARA BANO*, *supra*, observed evokes interest:

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[68] Principles of Mahomedan law, 20th Edition (2013)
[69] Outlines of Muhammadan, Law 5th Edition (2008)

"7. There are four sources for Islamic law- (i) Quran (ii) Hadith (iii) Ijma (iv) Qiyas. The learned author has rightly said that the Holy Quran is the "first source of law". According to the learned author, pre-eminence is to be given to the Quran. That means, sources other than the Holy Quran are only to supplement what is given in it and to supply what is not provided for. In other words, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Quran. Islam cannot be anti-Quran…

54. …Indeed, Islam divides all human action into five kinds, as has been stated by Hidayatullah, J. in his Introduction to Mulla (supra). There it is stated:

"E. Degrees of obedience: Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.

(i) First degree: Fard. Whatever is commanded in the Koran, Hadis or ijmaa must be obeyed.Wajib. Perhaps a little less compulsory than Fard but only slightly less so.(ii) Second degree: Masnun, Mandub and Mustahab: These are recommended actions.(iii) Third degree: Jaiz or Mubah: These are permissible actions as to which religion is indifferent (iv) Fourth degree: Makruh: That which is reprobated as unworthy (v) Fifth degree: Haram: That which is forbidden."

The Apex Court at paragraph 55 of *SHAYARA BANO* has treated the structural hierarchy of binding nature of Islamic norms starting from Quran and ending with Haram, while proscribing the obnoxious practice of *triple talaq*. The argument of *hijab* being mandatory under Ahadith, if not under Quran, shall be treated hereinafter, in the light of such a structure.

2. <u>AS TO WHICH AUTHORITATIVE COMMENTARY ON HOLY QURAN, WE ARE PRINCIPALLY RELYING UPON AND REASONS FOR THAT:</u>

(i) At the outset we make it clear that, in these cases, our inquiry concerns the nature and practice of wearing of *hijab* amongst Muslim women and therefore, references to the Holy Quran and other sources of Islamic law shall be confined to the same. During the course of hearing, the versions of different authors on this scripture were cited, viz., Abdullah Yusuf Ali, Abdul Haleem, Pickthall, Muhammad *Hijab*, Dr. Mustafa Khattab, Muhammad Taqi-ud-Din al-Hilali, Muhammad Muhsin Khan, Dr. Ghali. However, this Court prefers to bank upon the *'The Holy Quran: Text, Translation and Commentary' by Abdullah Yusuf Ali, (published by Goodword Books; 2019 reprint),* there being a broad unanimity at the Bar as to its authenticity & reliability. The speculative and generalizing mind of this author views the verses of the scriptures in their proper perspective. He provides the unifying principles that underlie. His monumental work has a systematic completeness and perfection of form. It is pertinent to reproduce *Abdullah Yusuf Ali's 'Preface to First Edition'* of his book, which is as under:

"…In translating the Text I have aired no views of my own, but followed the received commentators. Where they differed among themselves, I have had to choose what appeared to me to be the most reasonable opinion from all points of view. Where it is a question merely of words, I have not considered the question important enough to discuss in the Notes, but where it is a question of substance, I hope adequate explanations will be found in the notes. Where I have departed from the literal translation in order to express the spirit of the original better in English, I have explained the literal meaning in the Notes… Let me explain the scope of the Notes. I have made them as short as possible consistently with the object I have in view, viz., to give to the English reader, scholar as well as general reader, a fairly complete but concise view of what I understand to be the meaning of the Text…"

(ii) There is yet another reason as to why we place our reliance on the commentary of Mr. Abdullah Yusuf Ali. The Apex court itself in a catena of cases has treated the same as the authoritative work. In *SHAYARA BANO,* we find the following observations *at* paragraphs 17 & 18:

"17. Muslims believe that the Quran was revealed by God to the Prophet Muhammad over a period of about 23 years, beginning from 22.12.609, when Muhammad was 40 years old. The revelation continued upto the year 632 – the year of his death. Shortly after Muhammad's death, the Quran was completed by his companions, who had either written it down, or had memorized parts of it. These compilations had differences of perception. Therefore, Caliph Usman - the third, in the line of caliphs recorded a standard version of the Quran, now known as Usman's codex. This codex is generally treated, as the original rendering of the Quran.

18. During the course of hearing, references to the Quran were made from 'The Holy Quran: Text Translation and Commentary' by Abdullah Yusuf Ali, (published by Kitab

> *Bhawan, New Delhi, 14th edition, 2016). Learned counsel representing the rival parties commended, that the text and translation in this book, being the most reliable, could safely be relied upon. The text and the inferences are therefore drawn from the above publication…The Quran is divided into 'suras' (chapters). Each 'sura' contains 'verses', which are arranged in sections.…"*

The above apart, none at the Bar has disputed the profound scholarship of this writer or the authenticity of his commentary. We too find construction of and comments on suras and verses of the scripture illuminative and immensely appealing to reason & justice.

IX. AS TO *HIJAB* BEING A QURANIC INJUNCTION:

(i) Learned advocates appearing for the petitioners vehemently argued that the Quran injuncts Muslim women to wear *hijab* whilst in public gaze. In support, they heavily banked upon certain *suras* from Abdullah Yusuf Ali's book. Before we reproduce the relevant suras and verses, we feel it appropriate to quote what Prophet had appreciably said at *sūra (ii)* verse 256 in Holy Quran: ***'Let there be no compulsion in religion...'*** What Mr. Abdullah Yusuf Ali in footnote 300 to this verse, appreciably reasons out, is again worth quoting: '*Compulsion is incompatible with religion because religion depends upon faith and will, and these would be meaningless if induced by force...'* With this at heart, we are

reproducing the following verses from the scripture, which were pressed into service at the Bar.

<u>Sūra xxiv (Nūr):</u>

The environmental and social influences which most frequently wreck our spiritual ideals have to do with sex, and especially with its misuse, whether in the form of unregulated behavior, of false charges or scandals, or breach of the refined conventions of personal or domestic privacy. Our complete conquest of all pitfalls in such matters enables us to rise to the higher regions of Light and of God-created Nature, about which a mystic doctrine is suggested. This subject is continued in the next Sūra.

Privacy should be respected, and the utmost decorum should be observed in dress and manners
(xxiv. 27 – 34, and C. 158)

Domestic manners and manners in public or collective life all contribute to the highest virtues, and are part of our spiritual duties leading upto God"
***(xxiv. 58 – 64, and C. 160)**.*

"And say to the believing women
That they should lower
Their gaze and guard[*].
Their modesty; that they
Should not display their
Beauty and ornaments except*
What (must ordinarily) appear
Thereof; that they should
Draw their veils over
Their bosoms and not display
Their beauty except
To their husband, their fathers,
Their husbands' father, their sons,
Their husbands' sons,
Their brothers or their brothers' sons,
Or their sisters' sons,

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[*] References to the footnote attached to these verses shall be made in subsequent paragraphs.

Or their women, or the slaves
Whom their right hands
Possess, or male servants
Free from physical needs,
Or small children who
Have no sense of the shame
Of sex; that they
Should strike their feet
In order to draw attention
To their hidden ornaments.
And O ye Believers!
Turn ye all together
Towards God, that ye
May attain Bliss."* **(xxiv. 31, C. – 158)**

<u>Sūra xxxiii (Ahzāb)</u>

"Prophet! Tell
Thy wives and daughters,
And the believing women,*
That they should case
*Their outer garments over**
Their persons (when abroad):
That is most convenient,
*That they should be known**
(As such) and not molested.
*And God is Oft – Forgiving, **
Most Merciful." **(xxxiii. 59, C. - 189)**

Is *hijab* Islam-specific?

(ii) *Hijab* is a veil ordinarily worn by Muslim women, is true. Its origin in the Arabic verb *hajaba*, has etymological similarities with the verb "*to hide*". *Hijab* nearly translates to partition, screen or curtain. There are numerous dimensions of understanding the usage of the *hijab*: visual, spatial, ethical

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* *Id*

and moral. This way, the *hijab* hides, marks the difference, protects, and arguably affirms the religious identity of the Muslim women. This word as such is not employed in Quran, cannot be disputed, although commentators may have employed it. Indian jurist Abdullah Yusuf Ali referring to *sūra (xxxiii), verse 59, at footnote 3765 in his book states: "Jilbāb, plural Jalābib: an outer garment; a long gown covering the whole body, or a cloak covering the neck as bosom."*. In the footnote 3760 to *Verse 53,* he states: "***...In the wording, note that for Muslim women generally, no screen or hijab (Purdah) is mentioned, but only a veil to cover the bosom, and modesty in dress. The screen was a special feature of honor for the Prophet's household, introduced about five or six years before his death...***" Added, in footnote 3767 to verse 59 of the same sura, he opines: "***This rule was not absolute: if for any reason it could not be observed, 'God is Oft. Returning, Most Merciful.'...***" Thus, there is sufficient intrinsic material within the scripture itself to support the view that wearing *hijab* has been only recommendatory, if at all it is.

(iii) The Holy Quran does not mandate wearing of *hijab* or headgear for Muslim women. Whatever is stated in the

above *sūras*, we say, is only directory, because of absence of prescription of penalty or penance for not wearing *hijab,* the linguistic structure of verses supports this view. This apparel at the most is a means to gain access to public places and not a religious end in itself. It was a measure of women enablement and not a figurative constraint. There is a laudable purpose which can be churned out from Yusuf Ali's footnotes *2984*, *2985* & *2987 to verses in Sūra xxiv* (*Nūr*) and footnotes *3764 & 3765 to verses in Sū*ra *xxxiii* (*Ahzāb*). They are reproduced below:

<u>Sūra xxiv (Nūr)</u>

"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 uncovering of the bosom."

"2985. Zinat 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 negligé 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 this item would now be blank, with the abolition of slavery; (5) old or infirm men-servants; and (6) infants or small children before they get a sense of sex.

"2987. While all these details of the purity and the 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 make 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. Mystics understand the rules of decorum themselves to typify spiritual truths. Our soul, like a modest maiden, allows not her eyes to stray from the One True God. And her beauty is not for vulgar show but for God."

Sūra xxxiii (Ahzāb)

"3764. This is for all Muslim women, those of the Prophet's household, as well as the others. The times were those of insecurity (see next verse) and they were asked to cover themselves with outer garments when walking abroad. It was never contemplated that they should be confined to their houses like prisoners."

"3765. Jilbāb, plural Jalābib: an outer garment; a long gown covering the whole body, or a cloak covering the neck as bosom."

(iv) *The essential part of a religion is primarily to be ascertained with reference to the doctrine of that religion itself*, gains support from the following observations in *INDIAN YOUNG LAWYERS ASSOCIATION*:

> *"286. In determining the essentiality of a practice, it is crucial to consider whether the practice is prescribed to be of an obligatory nature within that religion. If a practice is optional, it has been held that it cannot be said to be 'essential' to a religion. A practice claimed to be essential must be such that the nature of the religion would be altered in the absence of that practice. If there is a fundamental change in the character of the religion, only then can such a practice be claimed to be an 'essential' part of that religion."*

It is very pertinent to reproduce what the Islamic jurist Asaf A.A. Fyzee, *supra* at pages 9-11 of his book states:

> *"…We have the Qur'an which is the very word of God. Supplementary to it we have Hadith which are the Traditions of the Prophet- the records of his actions and his sayings- from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or Shariat as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law..."*

(v) Petitioners pressed into service *sūra (xxxiii)*, verse 59, in support of their contention that wearing *hijab* is an indispensable requirement of Islamic faith. This contention is bit difficult to countenance. It is relevant to refer to the historical aspects of this particular verse as vividly explained by *Abdullah Yusuf Ali* himself at footnote 3766:

> *"The object was not to restrict the liberty of women, but to protect them from harm and molestation under the conditions then existing in Medina. In the East and in 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 civilizations. Assyrian Law in its palmist 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*"*

It needs to be stated that wearing *hijab* is not religion-specific, as explained by Sara Slininger from Centralia, Illinois in her research paper *"VEILED WOMEN: HIJAB, RELIGION, AND CULTURAL PRACTICE"*. What she writes throws some light on the socio-cultural practices of wearing *hijab* in the region, during the relevant times:

> *"Islam was not the first culture to practice veiling their women. Veiling practices started long before the Islamic prophet Muhammad was born. Societies like the Byzantines, Sassanids, and other cultures in Near and Middle East practiced veiling. There is even some evidence that indicates that two clans in southwestern Arabia practiced veiling in pre-Islamic times, the Banū Ismāʿīl and Banū Qaḥṭān. Veiling was a sign of a women's social status within those societies. In Mesopotamia, the veil was a sign of a woman's high status and respectability. Women wore the veil to distinguish Slininger themselves from slaves and unchaste women. In some ancient legal traditions, such as in Assyrian law, unchaste or unclean women, such as harlots and slaves, were prohibited from veiling themselves. If they were caught illegally veiling, they were liable to severe penalties. The practice of veiling spread throughout the ancient world the same way that many other ideas traveled from place to place during this time: invasion."*

(vi) Regard being had to the kind of life conditions then obtaining in the region concerned, wearing *hijab* was recommended as a measure of social security for women and to facilitate their safe access to public domain. At the most the practice of wearing this apparel may have something to do with *culture* but certainly not with religion. This gains credence from Yusuf Ali's Note 3764 to verse 59 which runs as under:

> *"…The times were those of insecurity (see next verse) and they were asked to cover themselves with outer garments when walking abroad. It was never contemplated that they should be confined to their houses like prisoners."*

History of mankind is replete with instances of abuse and oppression of women. The region and the times from which Islam originated were not an exception. The era before the introduction of Islam is known as *Jahiliya-a* time of barbarism and ignorance. The Quran shows concern for the cases of '*molestation of innocent women*' and therefore, it recommended wearing of this and other apparel as a measure of social security. May be in the course of time, some elements of religion permeated into this practice as ordinarily happens in any religion. However, that *per se* does not render the practice predominantly religious and much less essential

to the Islamic faith. This becomes evident from Ali's footnote 3768 to verse 60 which concludes with the following profound line **"Alas! We must ask ourselves the question: *'Are these conditions present among us today?'*"** Thus, it can be reasonably assumed that the practice of wearing *hijab* had a thick nexus to the *socio-cultural* conditions then prevalent in the region. The veil was a safe means for the women to leave the confines of their homes. Ali's short but leading question is premised on this analysis. What is not religiously made obligatory therefore cannot be made a quintessential aspect of the religion through public agitations or by the passionate arguments in courts.

(vii) Petitioners also relied upon verses 4758 & 4759 (Chapter 12) from Dr.Muhammad Muhsin Khan's *'The Translation of the Meanings of Sahih Al-Bukhari, Arabic-English'*, Volume 6, Darussalam publication, Riyadh, Saudi Arabia. This verse reads:

> *"4758. Narrated 'Aishah': May Allah bestow His Mercy on the early emigrant women. When Allah revealed:*
>
> *"…and to draw their veils all over their Juyubihinna (i.e., their bodies, faces, necks and bosoms)…" (V.24:31) they tore their Murut (woolen dresses or waist-binding clothes or aprons etc.) and covered their heads and faces with those torn Muruts.*

> *4759. Narrated Safiyya bint Shaiba: Aishah used to say: "When (the Verse): '… and to draw their veils all over their Juhubihinna (i.e., their bodies, faces, necks and bosoms, etc.)…' (V.24:31) was revealed, (the ladies) cult their waist-sheets from their margins and covered their heads and faces with those cut pieces of cloth."*

Firstly, no material is placed by the petitioners to show the credentials of the translator namely Dr.Muhammad Muhsin Khan. The first page of volume 6 describes him as: "F*ormerly Director, University Hospital, Islamic University, Al-Madina, Al-Munawwara (Kingdom of Saudi Arabia).* By this, credentials required for a commentator cannot be assumed. He has held a prominent position in the field of medicine, is beside the point. We found reference to this author in a decision of Jammu & Kashmir High Court in *LUBNA MEHRAJ VS. MEHRAJ-UD-DIN KANTH*[70]. Even here, no credentials are discussed nor is anything stated about the authenticity and reliability of his version of Ahadith. Secondly, the text & context of the verse do not show its obligatory nature. Our attention is not drawn to any other verses in the translation from which we can otherwise infer its mandatory nature. Whichever be the religion, whatever is stated in the scriptures, does not become *per se* mandatory in a wholesale way. That is how the concept of essential religious practice, is

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[70] 2004 (1) JKJ 418

coined. If everything were to be essential to the religion logically, this very concept would not have taken birth. It is on this premise the Apex Court in *SHAYARA BANO,* proscribed the 1400 year old pernicious practice of *triple talaq* in Islam. What is made recommendatory by the Holy Quran cannot be metamorphosed into mandatory dicta by Ahadith which is treated as supplementary to the scripture. A contra argument offends the very logic of Islamic jurisprudence and normative hierarchy of sources. This view gains support from paragraph 42 of *SHAYARA BANO* which in turn refers to Fyzee's work. Therefore, this contention too fails.

X. AS TO VIEWS OF OTHER HIGH COURTS ON *HIJAB* BEING AN ESSENTIAL RELIGIOUS PRACTICE:

Strangely, in support of their version and counter version, both the petitioners and the respondents drew our attention to two decisions of the Kerala High Court, one decision of Madras and Bombay each. Let us examine what these cases were and from which fact matrix, they emanated.

(i) *In re AMNAH BINT BASHEER, supra:* this judgment was rendered by a learned Single Judge A.Muhamed Mustaque J. of Hon'ble Kerala High Court on 26.4.2016. Petitioner, the students (minors) professing Islam had an

issue with the dress code prescribed for All India Pre-Medical Entrance Test, 2016. This prescription by the Central Board of Secondary Education was in the wake of large scale malpractices in the entrance test during the previous years. At paragraph 29, learned Judge observed:

> "*Thus, the analysis of the Quranic injunctions and the Hadiths would show that it is a farz to cover the head and wear the long sleeved dress except face part and exposing the body otherwise is forbidden (haram). When farz is violated by action opposite to farz that action becomes forbidden (haram). However, there is a possibility of having different views or opinions for the believers of the Islam based on Ijithihad (independent reasoning). This Court is not discarding such views. The possibility of having different propositions is not a ground to deny the freedom, if such propositions have some foundation in the claim…*"

Firstly, it was not a case of school uniform as part of Curricula as such. Students were taking All India Pre-Medical Entrance Test, 2016 as a onetime affair and not on daily basis, unlike in schools. No Rule or Regulation having force of law prescribing such a uniform was pressed into service. Secondly, the measure of ensuring personal examination of the candidates with the presence of one lady member prior to they entering the examination hall was a feasible alternative. This 'reasonable exception' cannot be stretched too wide to swallow the rule itself. That feasibility

evaporates when one comes to regular adherence to school uniform on daily basis. Thirdly, learned Judge himself in all grace states: "*However, there is a possibility of having different views or opinions for the believers of the Islam based on Ijithihad (independent reasoning).* In formulating our view, i.e., in variance with this learned Judge's, we have heavily drawn from the considered opinions of Abdullah Yusuf Ali's works that are recognized by the Apex Court as being authoritative vide *SHAYARA BANO* and in other several decisions. There is no reference to this learned authors' commentary in the said judgment. Learned Judge refers to other commentators whose credentials and authority are not forthcoming. The fact that the Writ Appeal against the same came to be negatived[71] by a Division Bench, does not make much difference. Therefore, from this decision, both the sides cannot derive much support for their mutually opposing versions.

(ii) *In re FATHIMA THASNEEM supra:* the girl students professing Islam had an issue with the dress code prescribed by the management of a school run by a religious minority (Christians) who had protection under Articles 29 & 30 of the

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[71] (2016) SCC Online Ker 487

Constitution. This apart, learned Judge i.e., A.Muhamed Mustaque J. was harmonizing the competing interests protected by law i.e., community rights of the minority educational institution and the individual right of a student. He held that the former overrides the latter and negatived the challenge, vide order dated 4.12.2018 with the following observation:

> "*10. In such view of the matter, I am of the considered view that the petitioners cannot seek imposition of their individual right as against the larger right of the institution. It is for the institution to decide whether the petitioners can be permitted to attend the classes with the headscarf and full sleeve shirt. It is purely within the domain of the institution to decide on the same. The Court cannot even direct the institution to consider such a request. Therefore, the writ petition must fail. Accordingly, the writ petition is dismissed. If the petitioners approach the institution for Transfer Certificate, the school authority shall issue Transfer Certificate without making any remarks. No doubt, if the petitioners are willing to abide by the school dress code, they shall be permitted to continue in the same school…*"

This decision follows up to a particular point the reasoning in the earlier decision (2016), aforementioned. Neither the petitioners nor the respondent-State can bank upon this decision, its fact matrix being miles away from that of these petitions. This apart, what we observed about the earlier decision substantially holds water for this too.

(iii) *In re FATHIMA HUSSAIN, supra:* This decision by a Division Bench of Bombay High Court discussed about Muslim girl students' right to wear *hijab* "*...in exclusive girls section cannot be said to in any manner acting inconsistent with the aforesaid verse 31 or violating any injunction provided in Holy Quran.* ***It is not an obligatory overt act enjoined by Muslim religion that a girl studying in all girl section must wear head-covering.*** *The essence of Muslim religion or Islam cannot be said to have been interfered with by directing petitioner not to wear head-scarf in the school.*" These observations should strike the death knell to Writ Petition Nos.2146, 2347, 3038/2022 wherein the respondent college happens to be all-girl-institution (not co-education). The Bench whilst rejecting the petition, at paragraph 8 observed: "*We therefore, do not find any merit in the contention of the learned counsel for the petitioner that direction given by the Principal to the petitioner on 28-11-2001 to not to wear head-scarf or cover her head while attending school is violative of Article 25 of Constitution of India.*" We are at loss to know how this decision is relevant for the adjudication of these petitions.

(iv) *In re SIR M. VENKATA SUBBARAO, supra:* The challenge in this case was to paragraph 1 of the Code of

Conduct prescribing a dress code for the teachers. The Division Bench of Madras High Court while dismissing the challenge at paragraph 16 observed as under:

> *"For the foregoing reasons and also in view of the fact that the teachers are entrusted with not only teaching subjects prescribed under the syllabus, but also entrusted with the duty of inculcating discipline amongst the students, they should set high standards of discipline and should be a role model for the students. We have elaborately referred to the role of teachers in the earlier portion of the order. Dress code, in our view, is one of the modes to enforce discipline not only amongst the students, but also amongst the teachers. Such imposition of dress code for following uniform discipline cannot be the subject matter of litigation that too, at the instance of the teachers, who are vested with the responsibility of inculcating discipline amongst the students. The Court would be very slow to interfere in the matter of discipline imposed by the management of the school only on the ground that it has no statutory background. That apart, we have held that the management of the respondent school had the power to issue circulars in terms of clause 6 of Annexure VIII of the Regulations. In that view of the matter also, we are unable to accept the contention of the learned counsel for appellant in questioning the circular imposing penalty for not adhering to the dress code."*

This case has completely a different fact matrix. Even the State could not have banked upon this in structuring the impugned Govt. Order dated 5.2.2022. The challenge to the dress code was by the teacher and not by the students. The freedom of conscience or right to religion under Article 25 was not discussed. This decision is absolutely irrelevant.

(v) *In re PRAYAG DAS vs. CIVIL JUDGE BULANDSHAHR*[72]*:* This decision is cited by the petitioner in W.P.No.4338/2022 (PIL) who supports the case of the State. This decision related to a challenge to the prescription of dress code for the lawyers. The Division Bench of Allahabad High Court whilst rejecting the challenge, observed at paragraph 20 as under:

> *"In our opinion the various rules prescribing the dress of an Advocate serve a very useful purpose. In the first place, they distinguish an Advocate from a litigant or other members of the public who may be jostling with him in a Court room. They literally reinforce the Shakespearian aphorism that the apparel oft proclaims the man. When a lawyer is in prescribed dress his identity can never be mistaken. In the second place, a uniform prescribed dress worn by the members of the Bar induces a seriousness of purpose and a sense of decorum which are highly conducive to the dispensation of justice..."*

This decision is not much relevant although it gives some idea as to the justification for prescribing uniform, be it in a profession or in an educational institution. Beyond this, it is of no utility to the adjudication of issues that are being debated in these petitions.

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[72] 1973 SCC OnLine All 333

XI. AS TO WEARING *HIJAB* BEING A MATTER OF FREEDOM OF CONSCIENCE:

(1) Some of the petitioners vehemently argued that, regardless of right to religion, the girl students have the freedom of conscience guaranteed under Article 25 itself and that they have been wearing *hijab* as a matter of conscience and therefore, interdicting this overt act is offensive to their conscience and thus, is violative of their fundamental right. In support, they heavily rely upon *BIJOE EMMANUEL supra,* wherein at paragraph 25, it is observed as under:

> *"We are satisfied, in the present case, that the expulsion of the three children from the school for the reason that because of their conscientiously held religious faith, they do not join the singing of the national anthem in the morning assembly though they do stand up respectfully when the anthem is sung, is a violation of their fundamental right to freedom of conscience and freely to profess, practice and propagate religion."* .

Conscience is by its very nature subjective. Whether the petitioners had the conscience of the kind and how they developed it are not averred in the petition with material particulars. Merely stating that wearing *hijab* is an overt act of conscience and therefore, asking them to remove *hijab* would offend conscience, would not be sufficient for treating it as a ground for granting relief. Freedom of conscience as already mentioned above, is in distinction to right to religion as was

clarified by Dr. B.R.Ambedkar in the Constituent Assembly Debates. There is scope for the argument that the freedom of conscience and the right to religion are mutually exclusive. Even by overt act, in furtherance of conscience, the matter does not fall into the domain of right to religion and thus, the distinction is maintained. No material is placed before us for evaluation and determination of pleaded conscience of the petitioners. They have not averred anything as to how they associate wearing *hijab* with their conscience, as an overt act. There is no evidence that the petitioners chose to wear their headscarf as a means of conveying any thought or belief on their part or as a means of symbolic expression. Pleadings at least for urging the ground of conscience are perfunctory, to say the least.

(2) *BIJOE EMMANUEL* CASE: ITS FACT MATRIX AND *RATIO DECIDENDI*:

(i) Since the petitioners heavily banked upon *BIJOE EMMANUEL,* in support of their contention as to freedom of conscience, we need to examine what were the material facts of the case and the propositions of law emanating therefrom. This exercise we have undertaken in the light of what Rupert Cross and J.W.Harris in their '*PRECEDENT IN ENGLISH LAW*',

4th Edition – CLARENDON, at page 39 have said: "*the ratio decidendi is best approached by a consideration of the structure of a typical judgment…A Judge generally summarizes the evidence, announcing his findings of fact and reviews the arguments that have been addressed to him by counsel for each of the parties. If a point of law has been raised, he often discusses a number of previous decisions…It is not everything said by a Judge when giving judgment that constitutes a precedent…This status is reserved for his pronouncements on the law…The dispute is solely concerned with the facts…It is not always easy to distinguish law from fact and the reasons which led a Judge to come to a factual conclusion…*" What LORD HALSBURY said more than a century ago in the celebrated case of *QUINN vs. LEATHEM*[73]' is worth noting. He had craftily articulated that a decision is an authority for the proposition that is laid down in a given fact matrix, and not for all that which logically follows from what has been so laid down.

(ii) With the above in mind, let us examine the material facts of *BIJOE EMMANUEL*: *Three 'law abiding children' being the faithful of Jehovah witnesses, did*

[73] (1901) A.C. 495

respectfully stand up but refused to sing the National Anthem in the school prayer. This refusal was founded on the dicta of their religion. They were expelled under the instructions of Deputy Inspector of School. These instructions were proven to have no force of law. They did not prevent the singing of National Anthem nor did they cause any disturbance while others were singing. Only these facts tailored the skirt, rest being the frills. The decision turned out to be more on the right to religion than freedom of conscience, although there is some reference to the conscience. The court recognized the negative of a fundamental right i.e., the freedom of speech & expression guaranteed under Article 19 as including right to remain silent. What weighed with the court was the fact '*the children were well behaved, they respectfully stood up when the National Anthem was sung and would continue to do so respectfully in the future*' (paragraph 23). Besides, Court found that their refusal to sing was not confined to Indian National Anthem but extended to the Songs of every other country.

(iii) True it is that the *BIJOE EMMANUEL* reproduces the following observation of Davar J. made in *JAMSHEDJI CURSETJEE TARACHAND vs. SOONABAI*[74]:

> *"...If this is the belief of the community--and it is proved undoubtedly to be the belief of the Zoroastrian community--a secular judge is bound to accept that belief--it is not for him to sit in judgment on that belief--he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be in advancement of his religion and for the welfare of his community or of mankind..."*

These observations essentially relate to '*the belief of the Zoroastrian community*'. It very little related to the '*freedom of conscience'* as envisaged under Article 25 of the Constitution enacted about four decades thereafter. The expression '*conscience of a donor'* is in the light of religious belief much away from *'freedom of conscience'*. After all the meaning of a word takes its colour with the companion words i.e., *noscitur a sociis.* After all, a word in a judgment cannot be construed as a word employed in a Statute. In the absence of demonstrable conformity to the essentials of a decision, the denomination emerging as a ratio would not be an operationable entity in every case comprising neighbourly fact matrix. What is noticeable is that *BIJOE EMMANUEL* did not demarcate the boundaries between 'freedom of conscience'

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[74] (1909) 33 BOM. 122

and 'right to practise religion' presumably because the overt act of the students in respectfully standing up while National Anthem was being sung transcended the realm of their conscience and took their case to the domain of religious belief. Thus, *BIJOE EMMANUEL* is not the best vehicle for drawing a proposition essentially founded on freedom of conscience.

XII. PLEADINGS AND PROOF AS TO ESSENTIAL RELIGIOUS PRACTICE:

(i) In order to establish their case, claimants have to plead and prove that wearing of *hijab* is a religious requirement and it is a part of *'essential religious practice'* in Islam in the light of a catena of decision of the Apex Court that ultimately ended with *INDIAN YOUNG LAWYERS ASSOCIATION*. The same has already been summarized by us above. All these belong to the domain of facts. In *NARAYANA DEEKSHITHULU,* it is said: "…*What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence-factual or legislative or historic-presented in that context is required to be considered and a decision reached…*" The

claimants have to plead these facts and produce requisite material to prove the same. The respondents are more than justified in contending that the Writ Petitions lack the essential averments and that the petitioners have not loaded to the record the evidentiary material to prove their case. The material before us is extremely meager and it is surprising that on a matter of this significance, petition averments should be as vague as can be. We have no affidavit before us sworn to by any *Maulana* explaining the implications of the *suras* quoted by the petitioners' side. Pleadings of the petitioners are not much different from those in *MOHD. HANIF QUARESHI*, supra which the Apex Court had critized. Since how long all the petitioners have been wearing *hijab* is not specifically pleaded. The plea with regard to wearing of *hijab* before they joined this institution is militantly absent. No explanation is offered for giving an undertaking at the time of admission to the course that they would abide by school discipline. The Apex Court in *INDIAN YOUNG LAWYERS ASSOCIATION*, supra, has stated that matters that are essential to religious faith or belief; have to be adjudged on the evidence borne out by record. There is absolutely no material placed on record to prima facie show that wearing of

hijab is a part of an essential religious practice 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 practice of wearing *hijab* is not adhered to, those not wearing *hijab* become the sinners, Islam loses its glory and it ceases to be a religion. 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'*.

In view of the above discussion, we are of the considered opinion that wearing of *hijab* by Muslim women does not form a part of *essential religious practice* in Islamic faith.

XIII. AS TO SCHOOL DISCIPLINE & UNIFORM AND POWER TO PRESCRIBE THE SAME:

(i) We are confronted with the question whether there is power to prescribe dress code in educational institutions. This is because of passionate submissions of the petitioners that there is absolutely no such power in the scheme of 1983 Act or the Rules promulgated thereunder. The idea of

schooling is incomplete without teachers, taught and the dress code. Collectively they make a singularity. No reasonable mind can imagine a school without uniform. After all, the concept of school uniform is not of a nascent origin. It is not that, Moghuls or Britishers brought it here for the first time. It has been there since the ancient *gurukul* days. Several Indian scriptures mention *samavastr/shubhravesh* in Samskrit, their English near equivalent being uniform. '*HISTORY OF DHARMASĀSTRA*' by P.V. Kane, Volume II, page 278 makes copious reference to student uniforms. (This work is treated by the Apex Court as authoritative vide *DEOKI NANDAN vs. MURLIDHAR*[75]). In England, the first recorded use of standardized uniform/dress code in institutions dates to back to 1222 i.e., *Magna Carta* days. '*LAW, RELIGIOUS FREEDOMS AND EDUCATION IN EUROPE*' is edited by Myrian Hunter-Henin; Mark Hill, a contributor to the book, at Chapter 15 titles his paper '*BRACELETS, RINGS AND VEILS: THE ACCOMMODATION OF RELIGIOUS SYMBOLS IN THE UNIFORM POLICIES OF ENGLISH SCHOOLS'*. At page 308, what he pens is pertinent:

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[75] AIR 1957 SC 133

'…The wearing of a prescribed uniform for school children of all ages is a near-universal feature of its educational system, whether in state schools or in private (fee-paying) schools. This is not a matter of primary or secondary legislation or of local governmental regulation but rather reflects a widespread and long-standing social practice. It is exceptional for a school not to have a policy on uniform for its pupils. The uniform (traditionally black or grey trousers, jumpers and jackets in the coloured livery of the school and ties for boys serves to identify individuals as members of a specific institution and to encourage and promote the corporate, collective ethos of the school. More subtly, by insisting upon identical clothing (often from a designated manufacturer) it ensures that all school children dress the same and appear equal: thus, differences of social and economic background that would be evident from the nature and extent of personal wardrobes are eliminated. It is an effective leveling feature-particularly in comprehensive secondary schools whose catchment areas may include a range of school children drawn from differing parental income brackets and social classes…'

'AMERICAN JURISPRUDENCE', 2nd Edition. (1973), Volume 68, edited by The Lawyers Cooperative Publishing Company states:

"§249. In accord with the general principle that school authorities may make reasonable rules and regulations governing the conduct of pupils under their control, it may be stated generally that school authorities may prescribe the kind of dress to be worn by students or make reasonable regulations as to their personal appearance…It has been held that so long as students are under the control of school authorities, they may be required to wear a designated uniform, or may be forbidden to use face powder or cosmetics, or to wear transparent hosiery low-necked dresses, or any style of clothing tending toward immodesty in dress…

§251. Several cases have held that school regulations proscribing certain hairstyles were valid, usually on the

> *basis that a legitimate school interest was served by such a regulation. Thus, it has been held that a public high school regulation which bars a student from attending classes because of the length or appearance of his hair is not invalid as being unreasonable, and arbitrary as having no reasonable connection with the successful operation of the school, since a student's unusual hairstyle could result in the distraction of other pupils, and could disrupt and impede the maintenance of a proper classroom atmosphere or decorum…*"

(ii) The argument of petitioners that prescribing school uniforms pertains to the domain of '*police power*' and therefore, unless the law in so many words confers such power, there cannot be any prescription, is too farfetched. In civilized societies, preachers of the education are treated next to the parents. Pupils are under the supervisory control of the teachers. The parents whilst admitting their wards to the schools, in some measure share their authority with the teachers. Thus, the authority which the teachers exercise over the students is a shared '*parental power*'. The following observations In *T.M.A.PAI FOUNDATION,* at paragraph 64, lend credence to this view:

> *"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…*"

It is relevant to state that not even a single ruling of a court nor a sporadic opinion of a jurist nor of an educationist was cited in support of petitioners argument that prescribing school uniform partakes the character of '*police power*'. Respondents are justified in tracing this power to the text & context of sections 7(2) & 133 of the 1983 Act read with Rule 11 of 1995 Curricula Rules. We do not propose to reproduce these provisions that are as clear as gangetic waters. This apart, the Preamble to the 1983 Act mentions *inter alia* of *"fostering the harmonious development of the mental and physical faculties of students and cultivating a scientific and secular outlook through education."* Section 7(2)(g)(v) provides for promoting "*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."* The Apex Court in *MODERN DENTAL COLLEGE*, supra, construed the term 'education' to include 'curricula' vide paragraph 123. The word 'curricula' employed in section 7(2) of the Act needs to be broadly construed to include the power to prescribe uniform. Under the scheme of 1983 Act coupled with international conventions to which India is a party, there is a

duty cast on the State to provide education at least up to particular level and this duty coupled with power includes the power to prescribe school uniform.

(iii) In the *LAW OF TORTS*, 26th Edition by *RATANLAL AND DHIRAJLAL* at page 98, parental and quasi parental authority is discussed: "*The old view was that the authority of a schoolmaster, while it existed, was the same as that of a parent. A parent, when he places his child with a schoolmaster, delegates to him all his own authority, so far as it is necessary for the welfare of the child. The modern view is that the schoolmaster has his own independent authority to act for the welfare of the child. This authority is not limited to offences committed by the pupil upon the premises of the school, but may extend to acts done by such pupil while on the way to and from the school…"* It is relevant to mention an old English case in *REX vs. NEWPORT (SALOP)*[76] which these authors have summarized as under:

> "*At a school for boys there was a rule prohibiting smoking by pupils whether in the school or in public. A pupil after returning home smoked a cigarette in a public street and next day the schoolmaster administered to him five strokes with a cane. It was held that the father of the boy by sending him to the school authorized the schoolmaster to administer reasonable punishment to the boy for*

[76] (1929) 2 KB 416

> *breach of a school rule, and that the punishment administered was reasonable."*

Even in the absence of enabling provisions, we are of the view that the power to prescribe uniform as of necessity inheres in every school subject to all just exceptions.

(iv) The incidental question as to who should prescribe the school uniform also figures for our consideration in the light of petitioners' contention that government has no power in the scheme of 1983 Act. In *T.M.A.PAI FOUNDATION,* the Apex Court observed at paragraph 55 as under:

> *"…There can be no doubt that in seeking affiliation or recognition, the Board or the university or the affiliating or recognizing authority can lay down conditions consistent with the requirement to ensure the excellence of education. It can, for instance, indicate the quality of the teachers by prescribing the minimum qualifications that they must possess, and the courses of study and curricula. It can, for the same reasons, also stipulate the existence of infrastructure sufficient for its growth, as a pre-requisite. But the essence of a private educational institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institutions and the government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence..."*

Section 133(2) of the 1983 Act vests power in the government to give direction to any educational institution for carrying out the purposes of the Act or to give effect to any of the provisions of the Act or the Rules, and that the institution be it governmental, State aided or privately managed, is bound to obey the same. This section coupled with section 7(2) clothes the government with power *inter alia* to prescribe or caused to be prescribed school uniform. The government vide Circular dated 31.1.2014 accordingly has issued a direction. Significantly, this is not put in challenge and we are not called upon to adjudge its validity, although some submissions were made *de hors* the pleadings that to the extent the Circular includes the local Member of the Legislative Assembly and his nominee respectively as the President and Vice President of the College Betterment (Development) Committee, it is vulnerable for challenge. In furtherance thereof, it has also issued a Government Order dated 5.2.2022. We shall be discussing more about the said Circular and the Order, a bit later. Suffice it to say now that the contention as to absence of power to prescribe dress code in schools is liable to be rejected.

XIV. AS TO PRESCRIPTION OF SCHOOL UNIFORM TO THE EXCLUSION OF *HIJAB* IF VIOLATES ARTICLES, 14, 15, 19(1)(a) & 21:

(i) There has been a overwhelming juridical opinion in all advanced countries that in accord with the general principle, the school authorities may make reasonable regulations governing the conduct of pupils under their control and that they may prescribe the kind of dress to be worn by students or make reasonable regulations as to their personal appearance, as well. In *MILLER vs. GILLS*[77]*, a rule that the students of an agricultural high school should wear a khaki uniform when in attendance at the class and whilst visiting public places within 5 miles of the school is not ultra vires, unreasonable, and void.* Similarly, in *CHRISTMAS vs. EL RENO BOARD OF EDUCATION*[78], a regulation prohibiting male students who wore hair over their eyes, ears or collars from participating in a graduation diploma ceremony, which had no effect on the student's actual graduation from high school, so that no educational rights were denied, has been held valid. It is also true that our Constitution protects the rights of school children too against unreasonable regulations. However, the prescription of dress code for the students that

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[77] (D.C. III) 315 F SUP. 94

[78] (D.C. Okla.) 313 F SUPP. 618

too within the four walls of the class room as distinguished from rest of the school premises does not offend constitutionally protected category of rights, when they are '*religion-neutral*' and '*universally applicable*' to all the students. This view gains support from Justice Scalia's decision in *EMPLOYMENT DIVISION vs. SMITH*[79]. School uniforms promote harmony & spirit of common brotherhood transcending religious or sectional diversities. This apart, it is impossible to instill the scientific temperament which our Constitution prescribes as a fundamental duty vide Article 51A(h) into the young minds so long as any propositions such as wearing of *hijab or bhagwa* are regarded as religiously sacrosanct and therefore, not open to question. They inculcate secular values amongst the students in their impressionable & formative years.

(ii) The school regulations prescribing dress code for all the students as one homogenous class, serve constitutional secularism. It is relevant to quote the observations of Chief Justice Venkatachalaiah, in *ISMAIL FARUQUI*, supra:

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[79] 494 U.S. 872 (1990)

> *"The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution… In a pluralist, secular polity law is perhaps the greatest integrating force. Secularism is more than a passive…It is a positive concept of equal treatment of all religions. What is material is that it is a constitutional goal and a Basic Feature of the Constitution."*

It is pertinent to mention that the preamble to the 1983 Act appreciably states the statutory object being "*fostering the harmonious development of the mental and physical faculties of students and cultivating a scientific and secular outlook through education."* This also accords with the Fundamental Duty constitutionally prescribed under Article 51A(e) in the same language, as already mentioned above. Petitioners' argument that '*the goal of education is to promote plurality, not promote uniformity or homogeneity, but heterogeneity*' and therefore, prescription of student uniform offends the constitutional spirit and ideal, is thoroughly misconceived.

(iii) Petitioners argued that regardless of their freedom of conscience and right to religion, wearing of *hijab* does possess cognitive elements of '*expression'* protected under Article 19(1)(a) vide *NATIONAL LEGAL SERVICES AUTHORITY, supra* and it has also the substance of privacy/autonomy that are guarded under Article 21 vide *K.S.PUTTASWAMY, supra.*

Learned advocates appearing for them vociferously submit that the Muslim students would adhere to the dress code with *hijab* of a matching colour as may be prescribed and this should be permitted by the school by virtue of '*reasonable accommodation'*. If this proposal is not conceded to, then prescription of any uniform would be violative of their rights availing under these Articles, as not passing the '*least restrictive test*' and '*proportionality test*', contended they. In support, they press into service *CHINTAMAN RAO and MD. FARUK, supra*. Let us examine this contention. The Apex Court succinctly considered these tests in *INTERNET & MOBILE ASSN. OF INDIA vs. RESERVE BANK OF INDIA*[80], with the following observations:

> "*…While testing the validity of a law imposing a restriction on the carrying on of a business or a profession, the Court must, as formulated in Md. Faruk, attempt an evaluation of (i) its direct and immediate impact upon of the fundamental rights of the citizens affected thereby (ii) the larger public interest sought to be ensured in the light of the object sought to be achieved (iii) the necessity to restrict the citizens' freedom (iv) the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public and (v) the possibility of achieving the same object by imposing a less drastic restraint... On the question of proportionality, the learned Counsel for the petitioners relies upon the four-pronged test summed up in the opinion of the majority in Modern Dental College and Research*

[80] (2020) 10 SCC 274

> *Centre v. State of Madhya Pradesh. These four tests are (i) that the measure is designated for a proper purpose (ii) that the measures are rationally connected to the fulfilment of the purpose (iii) that there are no alternative less invasive measures and (iv) that there is a proper relation between the importance of achieving the aim and the importance of limiting the right…But even by our own standards, we are obliged to see if there were less intrusive measures available and whether RBI has at least considered these alternatives..."*

(iv) All rights have to be viewed in the contextual conditions which were framed under the Constitution and the way in which they have evolved in due course. As already mentioned above, the Fundamental Rights have relative content and their efficacy levels depend upon the circumstances in which they are sought to be exercised. To evaluate the content and effect of restrictions and to adjudge their reasonableness, the aforesaid tests become handy. However, the petitions we are treating do not involve the right to freedom of speech & expression or right to privacy, to such an extent as to warrant the employment of these tests for evaluation of argued restrictions, in the form of school dress code. The complaint of the petitioners is against the violation of essentially 'derivative rights' of the kind. Their grievances do not go to the core of *substantive rights* as such but lie in the penumbra thereof. So, by a sheer constitutional logic, the

protection that otherwise avails to the *substantive rights* as such cannot be stretched too far even to cover the *derivative rights* of this nature, regardless of the '*qualified public places*' in which they are sought to be exercised. 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 repel the assertion of individual rights to the detriment of their general discipline & decorum. Even the *substantive rights* themselves metamorphise into a kind of *derivative rights* in such places. These illustrate this: the rights of an under – trial detenue qualitatively and quantitatively are inferior to those of a free citizen. Similarly, the rights of a serving convict are inferior to those of an under – trial detenue. By no stretch of imagination, it can be gainfully argued that prescription of dress code offends students' fundamental right to expression or their autonomy. In matters like this, there is absolutely no scope for complaint of manifest arbitrariness or discrimination *inter alia* under Articles 14 & 15, when the dress code is equally applicable to all the students, regardless of religion, language, gender or the like. It is nobody's case that the dress code is sectarian.

(v) 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 & ethically)'* in its deeper analysis is only a hollow rhetoric, '*unity in diversity*' being the oft quoted platitude since the days of *IN RE KERALA EDUCATION BILL, supra* , wherein paragraph 51 reads: *'...the genius of India has been able to find unity in diversity by assimilating the best of all creeds and cultures.'* The counsel appearing for Respondent Nos.15 & 16 in W.P.No.2146/2022, is justified in pressing into service a House of Lords decision in *REGINA vs. GOVERNORS OF DENBIGH HIGH SCHOOL, supra* wherein at paragraph 97, it is observed as under:

> "*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 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...*"

(vi) It hardly needs to be stated that our Constitution is founded on the principle of '*limited government*'. "*What is the most important gift to the common person given by this*

Constitution is 'fundamental rights', which may be called 'human rights' as well." It is also equally true that in this country, the freedom of citizens has been broadening precedent by precedent and the most remarkable feature of this relentless expansion is by the magical wand of judicial activism. Many new rights with which the Makers of our Constitution were not familiar, have been shaped by the constitutional courts. Though the basic human rights are universal, their regulation as of necessity is also a constitutional reality. The restriction and regulation of rights be they fundamental or otherwise are a small price which persons pay for being the members of a civilized community. There has to be a sort of balancing of competing interests i.e., the collective rights of the community at large and the individual rights of its members. True it is that the Apex Court in *NATIONAL LEGAL SERVICES AUTHORITY supra,* said that dressing too is an 'expression' protected under Article 19(1)(a) and therefore, ordinarily, no restriction can be placed on one's personal appearance or choice of apparel. However, it also specifically mentioned at paragraph 69 that this right is "*subject to the restrictions contained in Article 19(2) of the Constitution.*" The said decision was structured keeping the

'*gender identity'* at its focal point, attire being associated with such identity. Autonomy and privacy rights have also blossomed vide *K.S.PUTTASWAMY, supra.* We have no quarrel with the petitioners' essential proposition that what one desires to wear is a facet of one's autonomy and that one's attire is one's expression. But all that is subject to reasonable regulation.

(vii) Nobody disputes that persons have a host of rights that are constitutionally guaranteed in varying degrees and they are subject to reasonable restrictions. What is reasonable is dictated by a host of qualitative & quantitative factors. Ordinarily, a positive of the right includes its negative. Thus, right to speech includes right to be silent vide *BIJOE EMMANUEL.* However, the negative of a right is not invariably coextensive with its positive aspect. Precedentially speaking, the right to close down an industry is not coextensive with its positive facet i.e., the right to establish industry under Article 19(1)(g) vide *EXCEL WEAR vs. UNION OF INDIA*[81]. Similarly, the right to life does not include the right to die under Article 21 vide *COMMON CAUSE vs. UNION OF INDIA*[82], attempt to

[81] AIR 1979 SC 25

[82] (2018) 5 SCC 1

commit suicide being an offence under Section 309 of Indian Penal Code. It hardly needs to be stated the content & scope of a right, in terms of its exercise are circumstantially dependent. Ordinarily, liberties of a person stand curtailed *inter alia* by his position, placement and the like. The extent of autonomy is enormous at home, since ordinarily residence of a person is treated as his inviolable castle. However, in '*qualified public places*' like schools, courts, war rooms, defence camps, etc., the freedom of individuals as of necessity, is curtailed consistent with their discipline & decorum and function & purpose. Since wearing *hijab* as a facet of expression protected under Article 19(1)(a) is being debated, we may profitably advert to the '*free speech jurisprudence*' in other jurisdictions. The Apex Court in *INDIAN EXPRESS NEWSPAPERS vs. UNION OF INDIA*[83] observed:

> *"While examining the constitutionality of a law which is alleged to contravene Article 19(1)(a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration...".*

[83] (1985) 1 SCC 641

(viii) In US, the Fourteenth Amendment is held to protect the First Amendment rights of school children against unreasonable rules or regulations vide *BURNSIDE vs. BYARS*[84]. Therefore, a prohibition by the school officials, of a particular expression of opinion is held unsustainable where there is no showing that the exercise of the forbidden right would materially interfere with the requirements of a school' positive discipline. However, conduct by a student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-materially disrupts class work or involves substantial disorder or invasion of the rights of others, is not immunized by the constitutional guaranty of freedom of speech vide *JOHN F. TINKER vs. DES MOINES INDEPENDENT COMMUNITY SCHOOL, supra* In a country wherein right to speech & expression is held to heart, if school restrictions are sustainable on the ground of positive discipline & decorum, there is no reason as to why it should be otherwise in our land. An extreme argument that the students should be free to choose their attire in the school individually, if countenanced, would only breed indiscipline that may eventually degenerate into chaos in the campus and

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[84] 363 F 2d 744 (5th Cir. 1966)

later, in the society at large. This is not desirable to say the least. It is too farfetched to argue that the school dress code militates against the fundamental freedoms guaranteed under Articles, 14, 15, 19, 21 & 25 of the Constitution and therefore, the same should be outlawed by the stroke of a pen.

(ix) CONCEDING *HIJAB* ON THE PRINCIPLE OF REASONABLE ACCOMMODATION:

The counsel for the petitioners passionately submitted that the students should be permitted to wear *hijab* of structure & colour that suit to the prescribed dress code. In support of this, they bank upon the '*principle of reasonable accommodation*'. They drew our attention to the prevalent practice of dress codes/uniforms in *Kendriya Vidyalayas*. We are not impressed by this argument. Reasons are not far to seek: firstly, such a proposal if accepted, the school uniform ceases to be uniform. There shall be two categories of girl students viz., those who wear the uniform with *hijab* and those who do it without. That would establish a sense of *'social-separateness',* which is not desirable. It also offends the feel of uniformity which the dress-code is designed to bring about amongst all the students regardless of their religion & faiths. As already mentioned above, the statutory

scheme militates against sectarianism of every kind. Therefore, the accommodation which the petitioners seek cannot be said to be reasonable. The object of prescribing uniform will be defeated if there is non-uniformity in the matter of uniforms. Youth is an impressionable period when identity and opinion begin to crystallize. Young students are able to readily grasp from their immediate environment, differentiating lines of race, region, religion, language, caste, place of birth, etc. The aim of the regulation is to create a *'safe space'* where such divisive lines should have no place and the ideals of egalitarianism should be readily apparent to all students alike. Adherence to dress code is a mandatory for students. Recently, a Division Bench of this Court disposed off on 28.08.2019, Writ Petition No.13751 OF 2019 (EDN-RES-PIL) between *MASTER MANJUNATH vs. UNION OF INDIA* on this premise. What the *Kendriya Vidyalayas* prescribe as uniform/dress code is left to the policy of the Central Government. Ours being a kind of Federal Structure (Professor K.C. Wheare), the Federal Units, namely the States need not toe the line of Center.

(x) Petitioners' heavy reliance on the South African court decision in *MEC FOR EDUCATION: KWAZULU-NATAL,*

supra, does not much come to their aid. Constitutional schemes and socio-political ideologies vary from one country to another, regardless of textual similarities. A Constitution of a country being the Fundamental Law, is shaped by several streams of forces such as history, religion, culture, way of life, values and a host of such other factors. In a given fact matrix, how a foreign jurisdiction treats the case cannot be the sole model readily availing for adoption in our system which ordinarily treats foreign law & foreign judgments as matters of facts. Secondly, the said case involved a nose stud, which is ocularly insignificantly, apparently being as small as can be. By no stretch of imagination, that would not in any way affect the uniformity which the dress code intends to bring in the class room. That was an inarticulate factor of the said judgment. By and large, the first reason *supra* answers the Malaysian court decision too[85]. Malaysia being a theistic Nation has Islam as the State religion and the court in its wisdom treated wearing *hijab* as being a part of religious practice. We have a wealth of material with which a view in respectful variance is formed. Those foreign decisions cited by

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[85] HJH HALIMATUSSAADIAH BTE HJ KAMARUDDIN V. PUBLIC SERVICES COMMISSION, MALAYSIA (CIVIL APPEAL NO. 01-05-92) DECIDED ON 5-8-1994 [1994] 3 MLJ

the other side of spectrum in opposing *hijab* argument, for the same reasons do not come to much assistance. In several countries, wearing of burqa or *hijab* is prohibited, is of no assistance to us. Noble thoughts coming from whichever direction are most welcome. Foreign decisions also throw light on the issues debated, cannot be disputed. However, courts have to adjudge the causes brought before them essentially in accordance with native law.

In view of the above, we are of the considered opinion that the prescription of school uniform is only a reasonable restriction constitutionally permissible which the students cannot object to.

XV. AS TO VALIDITY OF GOVERNMENT CIRCULAR DATED 31.1.2014 CONCERNING THE FORMATION OF SCHOOL BETTERMENT (DEVELOPMENT) COMMITTEES:

(i) The government vide Circular dated 31.1.2014 directed constitution of School Betterment Committee *inter alia* with the object of securing State Aid & its appropriation and enhancing the basic facilities & their optimum utilization. This Committee in every Pre-University College shall be headed by the local Member of Legislative Assembly (MLA) as its President and his nominee as the Vice President. The Principal of the College shall be the Member Secretary. Its

membership comprises of student representatives, parents, one educationist, a Vice Principal/Senior Professor & a Senior Lecturer. The requirement of reservation of SC/ST/Women is horizontally prescribed. It is submitted at the Bar that these Committees have been functioning since about eight years or so with no complaints whatsoever. Petitioners argued for Committee's invalidation on the ground that the presence of local Member of Legislative Assembly and his nominee would only infuse politics in the campus and therefore, not desirable. He also submits that even otherwise, the College Development Committee being extra-legal authority has no power to prescribe uniform.

(ii) We are not much inclined to undertake a deeper discussion on the validity of constitution & functioning of School Betterment (Development) Committees since none of the Writ Petitions seeks to lay challenge to Government Circular of January 2014. Merely because these Committees are headed by the local Member of Legislative Assembly, we cannot hastily jump to the conclusion that their formation is bad. It is also relevant to mention what the Apex Court said in

STATE OF PUNJAB VS. GURDEV SINGH[86], after referring to Professor Wade's Administrative Law:

> *"…Apropos to this principle, Prof. Wade states: "the principle must be equally true even where the 'brand' of invalidity' is plainly visible; for their also the order can effectively be resisted in law only by obtaining the decision of the Court (See: Administrative Law 6th Ed. p. 352). Prof. Wade sums up these principles: The truth of the matter is that the court will invalidate an order only if 'the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plain- tiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another." (Ibid p. 352) It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires the Court cannot give the declaration sought for…"*

It is nobody's case that the Government Circular is *void ab initio* and consequently, the School Betterment (Development) Committees are *non est*. They have been functioning since last eight years and no complaint is raised about their performance, nor is any material placed on record that warrants consideration of the question of their validity despite

[86] AIR 1992 SC 111

absence of pleadings & prayers. It hardly needs to be stated that schools & hospitals amongst other, are the electoral considerations and therefore, peoples' representatives do show concern for the same, as a measure of their performances. That being the position, induction of local Members of Legislative Assembly in the Committees *per se* is not a ground for voiding the subject Circular.

(iii) We have already held that the schools & institutions have power to prescribe student uniform. There is no legal bar for the School Betterment (Development) Committees to associate with the process of such prescription. However, there may be some scope for the view that it is not desirable to have elected representatives of the people in the school committees of the kind, one of the obvious reasons being the possible infusion of '*party-politics*' into the campus. This is not to cast aspersion on anyone. We are not unaware of the advantages of the schools associating with the elected representatives. They may fetch funds and such other things helping development of institutions. This apart, no law or ruling is brought to our notice that interdicts their induction as the constituent members of such committees.

XVI. AS TO VALIDITY OF GOVERNMENT ORDER DATED 5.2.2022 PROVIDING FOR PRESCRIPTION OF DRESS CODES IN EDUCATIONAL INSTITUTIONS:

(i) The validity of Government Order dated 05.02.2022 had been hotly debated in these petitions. Petitioners argue that this order could not have been issued in purported exercise of power under sections 133 and 7(2) of the 1983 Act read with Rule 11 of the 1995 Curricula Rules. The State and other contesting respondents contend to the contrary, *inter alia* by invoking sections 142 & 143 of the 1983 Act, as well. This Order *per se* does not prescribe any dress code and it only provides for prescription of uniform in four different types of educational institutions. The near English version of the above as submitted by both the sides is already stated in the beginning part of the judgment. However, the same is reiterated for the ease of reference:

Students should compulsorily adhere to the dress code/uniform as follows:

a. in government schools, as prescribed by the government;
b. in private schools, as prescribed by the school management;
c. in Pre–University colleges that come within the jurisdiction of the Department of the Pre–University

Education, as prescribed by the College Development Committee or College Supervision Committee; and

d. wherever no dress code is prescribed, such attire that would accord with 'equality & integrity' and would not disrupt the 'public order'.

(ii) Petitioners firstly argued that this Order suffers from material irregularity apparent on its face inasmuch as the rulings cited therein do not lay down the ratio which the government wrongly states that they do. This Order refers to two decisions of the Kerala High Court and one decision of Bombay and Madras High Courts each. We have already discussed all these decisions supra at paragraph (X) and therefore, much need not be discussed here. Regardless of the ratio of these decisions, if the Government Order is otherwise sustainable in law, which we believe it does, the challenge thereto has to fail for more than one reason: The subject matter of the Government Order is the prescription of school uniform. Power to prescribe, we have already held, avails in the scheme of 1983 Act and the Rules promulgated thereunder. Section 133(2) of the Act which is broadly worded empowers the government to issue any directions to give effect to the purposes of the Act or to any provision of the Act or to any Rule made thereunder. This is a wide conferment of power which obviously includes the authority to prescribe

school dress code. It is more so because Rule 11 of 1995 Curricula Rules itself provides for the prescription of school uniform and its modalities. The Government Order can be construed as the one issued to give effect to this rule itself. Such an order needs to be construed in the light of the said rule and the 2014 Circular, since there exists a kinship *inter se*. Therefore, the question as to competence of the government to issue order of the kind is answered in the affirmative.

(iii) Petitioners' second contention relates to exercise of statutory power by the government that culminated into issuance of the impugned order. There is difference between existence of power and the exercise of power; existence of power *per se* does not justify its exercise. The public power that is coupled with duty needs to be wielded for effectuating the purpose of its conferment. Learned counsel appearing for the students argued that the Government Order has to be voided since the reasons on which it is structured are *ex facie* bad and that new grounds cannot be imported to the body of the Order for infusing validity thereto vide *COMMISSIONER OF*

POLICE vs. GORDHANDAS BHANJE[87]. This decision articulated the Administrative Law principle that the validity of a statutory order has to be adjudged only on the reasons stated in the order itself. We have no quarrel with this principle which has been reiterated in *MOHINDER SINGH GILL, supra.* However, we are not sure of its invocation in a case wherein validity of the impugned order can otherwise be sustained on the basis of other intrinsic material. As we have already mentioned, the Government Order is issued to give effect to the purposes of the 1983 Act and to Rule 11 of the 1995 Curricula Rules. That being the position the question of un-sustainability of some of the reasons on which the said Order is constructed, pales into insignificance.

(iv) Petitioners next argued that the Government Order cites '*sārvajanika suvyavasthe*' i.e., '*public order'* as one of the reasons for prescribing uniform to the exclusion of *hijab;* disruption of public order is not by those who wear this apparel but by those who oppose it; most of these opposers wear *bhagwa* or such other cloth symbolic of religious overtones. The government should take action against the hooligans disrupting peace, instead of asking the Muslim girl

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[87] AIR 1952 SC 16

students to remove their *hijab*. In support of this contention, they drew attention of the court to the concept of '*hecklers veto'* as discussed in *K.M.SHANKARAPPA, supra*. They further argued that ours being a '*positive secularism*', the State should endeavor to create congenial atmosphere for the exercise of citizens rights, by taking stern action against those who obstruct vide *PRAVEEN BHAI THOGADIA, supra.* Again we do not have any quarrel with the proposition of law. However, we are not convinced that the same is invocable for invalidating the Government Order, which *per se* does not prescribe any uniform but only provides for prescription in a structured way, which we have already upheld in the light of our specific finding that wearing *hijab* is not an *essential religious practice* and school uniform to its exclusion can be prescribed. It hardly needs to be stated that the uniform can exclude any other apparel like *bhagwa* or *blue shawl* that may have the visible religious overtones. The object of prescribing uniform cannot be better stated than by quoting from '*MANUAL ON SCHOOL UNIFORMS*' published by U.S. Department of Education:

> '*A safe and disciplined learning environment is the first requirement of a good school. Young people who are safe and secure, who learn basic American values and the*

> *essentials of good citizenship, are better students. In response to growing levels of violence in our schools, many parents, teachers, and school officials have come to see school uniforms as one positive and creative way to reduce discipline problems and increase school safety.'*

(v) We hasten to add that certain terms used in a Government Order such as '*public order',* etc., cannot be construed as the ones employed in the Constitution or Statutes. There is a sea of difference in the textual structuring of legislation and in promulgating a statutory order as the one at hands. The draftsmen of the former are ascribed of due diligence & seriousness in the employment of terminology which the government officers at times lack whilst textually framing the statutory policies. Nowadays, courts do often come across several Government Orders and Circulars which have lavish terminologies, at times lending weight to the challenge. The words used in Government Orders have to be construed in the generality of their text and with common sense and with a measure of grace to their linguistic pitfalls. The text & context of the Act under which such orders are issued also figure in the mind. The impugned order could have been well drafted, is true. '*There is scope for improvement even in heaven*' said Oscar Wilde. We cannot resist ourselves from quoting what Justice Holmes had said in *TOWNE vs.*

EISNER[88], *"a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."* Thus, there is no much scope for invoking the concept of '*law and order'* as discussed in *ANITA and GULAB ABBAS*, *supra*, although the Government Order gives a loose impression that there is some nexus between wearing of *hijab* and the '*law & order*' situation.

(vi) Petitioners had also produced some '*loose papers*' without head and tail, which purported to be of a brochure issued by the Education Department to the effect that there was no requirement of any school uniform and that the prescription of one by any institution shall be illegal. There is nothing on record for authenticating this version. Those producing the same have not stated as to who their author is and what legal authority he possessed to issue the same. Even otherwise, this purported brochure cannot stand in the face of Government Order dated 05.02.2022 whose validity we have already considered. Similarly, petitioners had banked upon the so called *research papers* allegedly published by '*Pew Research Centre*' about r*eligious clothing and personal*

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[88] 245 U.S.418 (1918)

appearance. They contend that this paper is generated from the research that studied various religious groups & communities and that a finding has been recorded: '*Most Hindu, Muslim and Sikh women cover their heads outside the home*' and therefore, the Government Order which militates against this social reality, is arbitrary. We are not inclined to subscribe to this view. No credentials of the researchers are stated nor the representative character of the statistics mentioned in the papers are demonstrated. The authenticity of the contents is apparently lacking.

(vii) Petitioners contended that the said Government Order has been hastily issued even when the contemplated High Powered Committee was yet to look into the issue as to the desirability of prescription and modules of dress codes in the educational institutions. The contents of Government Order give this impression, is true. However, that is too feeble a ground for faltering a policy decision like this. At times, regard being had to special conditions like social unrest and public agitations, governments do take certain urgent decisions which may appear to be *knee-jerk* reactions. However, these are matters of perceptions. May be, such decisions are at times in variance with their earlier stand.

Even that cannot be faltered when they are dictated by circumstances. After all, in matters of this kind, the doctrine of *'estoppel'* does not readily apply. Whether a particular decision should be taken at a particular time, is a matter left to the *executive wisdom,* and courts cannot run a race of opinions with the Executive, more particularly when policy content & considerations that shaped the decision are not judicially assessable. The doctrine of *'separation of powers'* which figures in our constitution as a '*basic feature*' expects the organs of the State to show due deference to each other's opinions. The last contention that the Government Order is a product of '*acting under dictation*' and therefore, is bad in law is bit difficult to countenance. Who acted under whose dictation cannot be adjudged merely on the basis of some concessional arguments submitted on behalf of the State Government. Such a proposition cannot be readily invoked inasmuch as invocation would affect the institutional dignity & efficacy of the government. A strong case has to be made to invoke such a ground, in terms of pleadings & proof.

In view of the above, we are of the considered opinion that the government has power to issue the impugned Order dated 05.2.2022 and that no case is made out for its invalidation.

XVII. INTERNATIONAL CONVENTIONS AND EMANCIPATION OF WOMEN:

(i) There have been several International Conventions & Conferences in which India is a participant if not a signatory. *UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), CONVENTION OF ELIMINATION ON ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1981), INTERNATIONAL COVENANTS ON CIVIL AND POLITICAL RIGHTS (1966), UNITED NATIONS CONVENTION ON RIGHTS OF CHILD (1989),* are only a few to name. Under our *Constitutional Jurisprudence,* owing to Article 51 which provides for promotion of international peace & security, the International Conventions of the kind assume a significant role in construing the welfare legislations and the statutes which have kinship to the subject matter of such Conventions. In a sense, these instruments of International Law permeate into our domestic law. Throughout, there has been both legislative & judicial process to emancipate women from pernicious discrimination in all its forms and means. Women regardless of religion being equal, if not superior to men, are also joining defence services on permanent commission basis vide Apex

Court decision in C.A.No.9367-9369/2011 between *THE SECRETARY, MINISTRY OF DEFENCE vs. BABITA PUNIYA*, decided on 17.2.2020. Be it business, industry, profession, public & private employments, sports, arts and such other walks of life, women are breaking the glass ceiling and faring better than their counterparts.

(ii) It is relevant to quote what Dr. B.R.Ambedkar in his book *'PAKISTAN OR THE PARTITION OF INDIA'* (1945) at Chapter X, Part 1 titled '*Social Stagnation'* wrote:

> *"…A woman (Muslim) is allowed to see only her son, brothers, father, uncles, and husband, or any other near relation who may be admitted to a position of trust. She cannot even go to the Mosque to pray, and must wear burka (veil) whenever she has to go out. These burka woman walking in the streets is one of the most hideous sights one can witness in India…The Muslims have all the social evils of the Hindus and something more. That something more is the compulsory system of purdah for Muslim women… Such seclusion cannot have its deteriorating effect upon the physical constitution of Muslim women… Being completely secluded from the outer world, they engage their minds in petty family quarrels with the result that they become narrow and restrictive in their outlook… They cannot take part in any outdoor activity and are weighed down by a slavish mentality and an inferiority complex…Purdah women in particular become helpless, timid…Considering the large number of purdah women amongst Muslims in India, one can easily understand the vastness and seriousness of the problem of purdah…As a consequence of the purdah system, a segregation of Muslim women is brought about …"*

What the Chief Architect of our Constitution observed more than half a century ago about the *purdah* practice equally applies to wearing of *hijab* there is a lot of scope for the argument that insistence on wearing of *purdah*, veil, or headgear in any community may hinder the process of emancipation of woman in general and Muslim woman in particular. That militates against our constitutional spirit of '*equal opportunity'* of '*public participation*' and '*positive secularism*'. Prescription of school dress code to the exclusion of *hijab, bhagwa,* or any other apparel symbolic of religion can be a step forward in the direction of emancipation and more particularly, to the access to education. It hardly needs to be stated that this does not rob off the autonomy of women or their right to education inasmuch as they can wear any apparel of their choice outside the classroom.

XVIII. AS TO PRAYER FOR A WRIT OF QUO WARRANTO IN SOME WRIT PETITIONS:

The petitioners in W.P. No.2146/2022, have sought for a Writ of Mandamus for initiating a disciplinary enquiry on the ground that the respondent Nos.6 to 14 i.e., Principal & teachers of the respondent-college are violating the departmental guidelines which prohibit prescription of any

uniform and for their hostile approach. Strangely, petitioners have also sought for a Writ of *Quo Warranto* against respondent Nos. 15 & 16 for their alleged interference in the administration of 5th respondent school and for promoting political agenda. The petition is apparently ill-drafted and pleadings lack cogency and coherence that are required for considering the serious prayers of this kind. We have already commented upon the Departmental Guidelines as having no force of law. Therefore, the question of the said respondents violating the same even remotely does not arise. We have also recorded a finding that the college can prescribe uniform to the exclusion of *hijab or bhagwa or such other religious symbols,* and therefore, the alleged act of the respondents in seeking adherence to the school discipline & dress code cannot be faltered. Absolutely no case is made out for granting the prayers or any other reliefs on the basis of these pleadings. The law of *Quo Warranto* is no longer in a fluid state in our country; the principles governing issuance of this writ having been well defined vide UNIVERSITY OF MYSORE vs. C.D. GOVINDA RAO[89] . For seeking a Writ of this nature, one has to demonstrate that the post or office which the

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[89] AIR 1965 SC 491

person concerned holds is a public post or a public office. In our considered view, the respondent Nos.15 & 16 do not hold any such position in the respondent-school. Their placement in the College Betterment (Development) Committee does not fill the public character required as a pre-condition for the issuance of Writ of *Quo Warranto*.

In view of the above, we are of the considered opinion that no case is made out in W.P. No.2146/2022 for issuance of a direction for initiating disciplinary enquiry against respondent Nos. 6 to 14. The prayer for issuance of Writ of *Quo Warranto* against respondent Nos. 15 and 16 is rejected being not maintainable.

From the submissions made on behalf of the Respondent – Pre – University College at Udupi and the material placed on record, we notice that all was well with the dress code since 2004. We are also impressed that even Muslims participate in the festivals that are celebrated in the '*ashta mutt sampradāya*', (Udupi being the place where eight *Mutts* are situated). We are dismayed as to how all of a sudden that too in the middle of the academic term the issue of *hijab* is generated and blown out of proportion by the powers that be. The way, *hijab imbroglio* unfolded gives scope for the argument that some '*unseen hands*' are at work to

engineer social unrest and disharmony. Much is not necessary to specify. We are not commenting on the ongoing police investigation *lest* it should be affected. We have perused and returned copies of the police papers that were furnished to us in a sealed cover. We expect a speedy & effective investigation into the matter and culprits being brought to book, brooking no delay.

XIX. THE PUBLIC INTEREST LITIGATIONS:

(i) One Dr. Vinod Kulkarni has filed PIL in W.P.No.3424/2022 seeking a Writ of Mandamus to the Central Government and State Government *inter alia 'to permit Female Muslim students to sport Hijab provided they wear the stipulated school uniform also*' (*sic*). The petition mentions about *BIJOE EMMANUEL, INDIAN YOUNG LAWYERS ASSOCIATION, JAGADISHWARANANDA AVADHUTA, CHANDANMAL vs. STATE OF WEST BENGAL*[90] and such other cases. Petition is unsatisfactorily structured on the basis of some print & electronic media reports that are not made part of the paper book. There is another PIL in *GHANSHYAM UPADHYAY VS. UNION OF INDIA* in W.P.No.4338/2022 (GM-

[90] AIR 1986 CAL. 104

RES-PIL) *inter alia* seeking a Writ of Mandamus for undertaking an investigation by the Central Bureau of Investigation (CBI), National Investigating Agency (NIA) as to the involvement of radical Islamic organizations such as Popular Front of India, Students Islamic Organization of India, Campus Front of India and *Jamaat*-e-*Islami* and their funding by some foreign universities to Islamize India. There are other incoherent prayers. This petitioner opposes the case of students who desire to wear *hijab*. Most of the contentions taken up in these petitions are broadly treated in the companion Writ Petitions. We are not inclined to entertain these two Writ Petitions filed in PIL jurisdiction, both on the ground of their maintainability & merits. The second petition, it needs to be stated, seeks to expand the parameters of the essential *lis* involved in all these cases much beyond the warranted frame of consideration. In W.P.No.3942/2022 (GM-RES-PIL) between *ABDUL MANSOOR MURTUZA SAYED AND STATE OF KARNATAKA* decided on 25.02.2022, we have already held that when the aggrieved parties are effectively prosecuting their personal causes, others cannot interfere by invoking PIL jurisdiction. A battery of eminent lawyers are

representing the parties on both the sides. Even otherwise, no exceptional case is made out for our indulgence.

In view of the above, we are of the considered opinion that both the above Writ Petitions filed as Public Interest Litigations are liable to be rejected, absolutely no case having been made out for indulgence.

In the above circumstances, all these petitions being devoid of merits, are liable to be and accordingly are dismissed. In view of dismissal of these Writ Petitions, all pending applications pale into insignificance and are accordingly, disposed off.

Costs made easy.

Sd/-
CHIEF JUSTICE

Sd/-
JUDGE

Sd/-
JUDGE

SJ/CBC

TRUE COPY

IN THE HON'BLE SUPREME COURT OF INDIA

[S.C.R., Order XXI Rule 3(1) (a)]

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION

(Under Article 136 of the Constitution of India)

SPECIAL LEAVE PETITION (C) NO. OF 2022

(WITH PRAYER FOR INTERIM RELIEF)

[AGAINST THE IMPUGNED JUDGMENT AND FINAL ORDER DATED 15.03.2022 PASSED BY THE HON'BLE HIGH COURT OF KARNATAKA AT BENGALURU IN W.P. NO. 2880 OF 2022]

	POSITION OF PARTIES	
BETWEEN:	**HIGH COURT**	**SUPREME COURT**
MISS AISHAT SHIFA AGED ABOUT 17 YEARS SANTOSH NAGAR HEMMADY POST KUNDAPUR TALUK UDUPI DISTRICT-576230 KARNATAKA (REP BY HER NATURAL GUARDIAN AND FATHER MR ZULFHUKAR)	PETITIONER NO. 1	PETITIONER
Versus		
1. THE STATE OF KARNATAKA VIDHANA SOUDHA DR AMBEDKAR ROAD BANGALORE – 560001 KARNATAKA REPRESENTED BY ITS PRINCIPAL SECRETARY	RESPONDENT NO. 1	CONTESTING RESPONDENT NO. 1
2. THE UNDER SECRETARY TO GOVERNMENT DEPARTMENT OF EDUCATION VIKAS SOUDHA BANGALORE-560001.	RESPONDENT NO. 2	CONTESTING RESPONDENT NO. 2

KARNATAKA

3.	THE DIRECTORATE DEPARTMENT OF PRE UNIVERSITY EDUCATION BANGALORE-560009. KARNATAKA REPRESENTED THROUGH ITS DEPUTY DIRECTOR	RESPONDENT NO. 3	CONTESTING RESPONDENT NO. 3
4.	THE DEPUTY COMMISSIONER UDUPI DISTRICT SHIVALLI RAJATADRI MANIPAL, UDUPI-576104. KARNATAKA	RESPONDENT NO. 4	CONTESTING RESPONDENT NO. 4
5.	THE PRINCIPAL GOVERNMENT PU COLLEGE KUNDAPURA UDUPI DISTRICT-576201. KARNATAKA	RESPONDENT NO. 5	CONTESTING RESPONDENT NO. 5
6.	MISS THAIRIN BEGAM D/O MOHAMMAD HUSSAIN AGED ABOUT 18 YEARS KAMPA KAVRADY KANDLUR POST KUNDAPURA UDUPI DISTRICT-576201. KARNATAKA	PETITIONER NO. 2	PROFORMA RESPONDENT NO. 6

TO,
HON'BLE THE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUSTICES OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF
THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHEWETH: -

1. The Petitioner, Aisha Shifat, a 1st year student of the Government PU College, Kundapura, Udupi District, Karnataka, has been constrained to file the present Special Leave Petition against the final judgment and order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka in ***Aisha Shifat & Anr. v. State of Karnataka,*** **W.P. NO. 2880 /2022** whereby the Hon'ble High Court

has rejected the challenge to the G.O. dated 05.02.2022 passed by the State Government as well as rejected the consequential prayer of directing the college authorities to allow muslim girls to attend classes without insisting on the removal of their head covering / head cover / hijab..

2. **QUESTIONS OF LAW**

It is submitted that the present SLP raises important questions of law of substantial public importance, inter alia, as to:

1. Whether the Hon'ble High Court was justified in inquiring whether or not the wearing of *hijab* is an 'essential religious practice' is Islam?

2. Whether the approach adopted by the Hon'ble High Court is contrary to the judgments of this Hon'ble Court in ***Ratilal Gandhi*** as well as ***Bijoe Emanuel*** cases?

3. Whether in view of the concessions made by the Ld. Advocate General, the High Court was required into even get into the question of essential practices test?

4. Whether the Hon'ble High Court is justified in ignoring Quranic text and *Ahadith* and place reliance on footnote commentaries of the opinions of one of the translators to hold that Hijab is not an essential practice in Islam?

5. Whether in view of the concessions made by the State there exists any restriction at all preventing the students from wearing the hijab?

6. Whether in view of the concessions it was obligatory upon the High Court to inquire and satisfy itself as to on what material the inference in the G.O. that wearing of hijab is not protected by Art. 25, was reached by the State?

7. Whether the Hon'ble High Court failed to appreciate that Rule 11 of the *Karnataka Education Rules, 1995*, has absolutely no proximate or direct nexus with the social reform / eradication of the practice of hijab?

8. Whether the Hon'ble High Court failed to appreciate that restrictions on religious identity amounts to wiping a religion out of existence and cannot be sustained in the name of social reform?

9. Whether the High Court failed to appreciate that the Petitioner is not opposed to the uniform and only seeks accommodation of her religious obligation which interferes with nobody else's freedom?

10. Whether the High Court ought to have appreciated that the impugned G.O. was in the teeth of Section 143 of the *Karnataka Education Act, 1983*?

3. **DECLARATION IN TERMS OF RULE 3(2)**

The Petitioner submits that no other petition seeking leave to appeal has been filed by him against the Judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in W.P. No.2880 of 2022.

4. **DECLARATION IN TERMS OF RULE 5:**

The Annexures P-1 to P-8 produced along with the Special Leave Petition are true copies of the pleading/documents which form part of the records of the case in the Courts below.

5. **GROUNDS:**

Leave to appeal is sought for on the following amongst other grounds:

A. FOR THAT the Hon'ble High Court *vide* the impugned final judgement and order has dismissed the petition ***Aisha Shifat & Anr. v. State of Karnataka,*** **W.P. NO. 2880/2022** filed by the Petitioner

and has upheld the G.O. dated 05.02.2022 issued by the State Government, which had been challenged by the Petitioner herein.

B. FOR THAT the Hon'ble High Court has asked itself wrong questions and has completely sidestepped the relevant questions and has consequently arrived at erroneous conclusions.

C. FOR THAT the Petitioner is approaching this Hon'ble Court being the *sentinel on the qui vive* to restore the fundamental rights which the Hon'ble High Court has failed to protect against a majoritarian government that is trampling on them with impunity for its own vested political considerations.

D. FOR THAT it was nobody's case that the school uniform was unconstitutional or violative of Articles 19(1)(a) and 21, nevertheless, the Hon'ble High Court from **pages 95 to 109** devotes about 15 pages to answering questions which were never raised by any of the parties before it.

E. FOR THAT the Petitioner has absolutely no objection in wearing the uniform prescribed by the schools.

F. FOR THAT the submission of the Petitioner seeking to wear a headscarf / head-covering, in addition to the prescribed uniform, which could be of the same colour or matching the colour of the school uniform so as to make it compatible with her religious beliefs has not at all been dealt with by the High Court in the entire 129 pages of the impugned judgment.

G. FOR THAT the High Court has not even recorded this clear, categorical and oft-repeated stand of the Petitioner and rendered a judgment as if the Petitioners before it were arguing that prescription of a school uniform violated their fundamental rights, which it is again reiterated, was not their case.

H. FOR THAT Rule 11 of the *Karnataka Education Rules, 1995* which merely provides for the prescription of a uniform has been in place since 1995 for almost 27 years and consistent with the said Rule the Petitioners have been donning their uniform and the college authorities never objected to the wearing of a head scarf matching the colour of the school uniform.

I. FOR THAT wearing of the additional headscarf is not a breach of Rule 11 and by no stretch of imagination impinges on anybody else's fundamental rights nor does it cause any disturbance.

J. FOR THAT Rule 11 cannot be construed in a manner that a person is prohibited from wearing something in addition to and not in derogation of the uniform for example, a student donning a 'namam' or wearing a 'rudraksha', consistent with his innocent practice of faith cannot be said to be in breach of Rule 11.

K. FOR THAT the cause of action arose with the G.O. dated 05.02.2022 whereby in the garb of prescription of a uniform, the fundamental right of the Petitioner were sought to be restricted, and did not exist before that.

L. FOR THAT the Petitioner never put forth the contention that they should be free to choose their attire in school.

M. FOR THAT the impugned G.O. is an indefensible attempt to create a regime of "coerced uniformity" to further marginalise what has historically been an educationally and socially disadvantaged minority community and impede their access to education and as such is totally perverse being a frontal attack on not one, but a range of fundamental rights, including Articles 14, 15, 19, 21, 25 and 29 of the Constitution.

N. FOR THAT the Hon'ble High Court ought to have appreciated that the restrictions in the G.O. are not a *simpliciter* issue of testing the limits of the freedom of conscience and right to freely practice one's

religion under Article 25 but is a wholesale attack on the conception of "choice" itself, that too in a matter as deeply personal as dressing according to the dictates of one's conscience and faith.

O. FOR THAT the impugned G.O. is bad being an intrusion into a matter as deeply personal as an item of clothing (which is being worn in addition to and not as a substitute for the prescribed uniform), there is a definitive encroachment on an individual's "zone of solitude", and thus a violation of an individual's right to privacy, liberty, dignity and expression under Articles 14, 19 and 21.

P. FOR THAT the impugned G.O. violates Article 21 inasmuch as it denies hijab wearing Muslim girl their right to education by placing before them the Hobson's choice of choosing between their faith, identity and dignity on the one hand and their educational futures on the other.

Q. FOR THAT the impugned G.O. violates Articles 14 and 15 by perpetuating discrimination in an educational institution by targeting Muslim women by hindering their ability to exercise decisional autonomy and choice in manifesting their religious beliefs.

R. FOR THAT the impugned G.O. violates Article 29(1) by placing a restriction on the right of Muslim women to preserve their distinct culture, which includes wearing the hijab.

S. FOR THAT Article 29(2), which stipulates that no citizen shall be denied admission into any educational institution maintained by or receiving funds from the State on grounds of *inter alia* religion, is also violated.

T. FOR THAT the choice being faced by the young Muslim girls is stark – they are **not being allowed to enter class and participate in educational activities** if they continue to assert any

religious/cultural identity. This is an ex-facie violation of Article 29(2).

U. FOR THAT the G.O. forces students to abdicate any semblance of a public display of faith, in order to continue receiving education and the inference is clear i.e. students have no autonomy to pursue and build a relationship with their faith if they are to continue to participate in public education.

V. FOR THAT this forced choice between two distinct parts of an individual's identity i.e. that of a believer and that of a student, is a violation of the fundamental right of every person to exercise choice in such deeply personal matters.

W. FOR THAT the right to decisional autonomy is a critical component of the right to privacy, as observed by Chandrachud, J in ***Justice K.S. Puttaswamy&Ors. v. Union of India &Ors***., (2017) 10 SCC 1.

X. FOR THAT in the specific context of faith and religion, the right to privacy operates in tandem with Article 25 but is not limited by it, permitting individuals to choose a faith and facilitating a choice on their part to manifest their beliefs.

Y. FOR THAT Chelameshwar, J. held in ***Puttaswamy*** **(supra)** that the right to dress and religious observances is a matter of conscience that emanates from the zone of purely private thought, and must be kept away from the State glare.

Z. FOR THAT freedom to manifest one's religious belief in matters of dress is not exclusively confined to Article 25, but is an aspect of liberty and privacy as well, and consequently also protected under Articles 14, 19 and 21.

AA. FOR THAT the Hon'ble High Court has focussed its attention on Article 25 seen in isolation, and in that too, has dived straight into the question of whether wearing of hijab is an essential religious

practice without first conducting the enquiry that must be undertaken before the question of essentiality arises.

BB. FOR THAT the High Court ignores the concession / admission of the state government that the impugned G.O., in so far as it states that wearing of hijab is not a part of Article 25, was a result of *"over enthusiasm of the draftsman"*.

CC. FOR THAT the Ld. Advocate General had argued that the G.O. should be read ignoring the recitals that dealt with wearing of hijab and without its concluding line that invoked 'public order' and should instead be read as an innocuous circular empowering certain college committees to prescribe a uniform.

DD. FOR THAT despite the State giving up the defence of the G.O., the High Court *vide* the impugned order has sought to resurrect the same and has upheld the G.O., body and soul.

EE. FOR THAT there is no mention whatsoever of the concession of the State despite this fact being orally argued and subsequently placed in the Written Arguments submitted by the Petitioner.

FF. FOR THAT the High Court ought not to have substituted its own understanding and explained the impugned G.O. in express derogation substitution of the plain language of the G.O. itself.

GG. FOR THAT despite the fact that this was specifically argued before the High Court and the Constitution Bench decision in ***Mohinder Singh Gill* v. *Chief Election Commissioner*, (1978) 1 SCC 405** was cited in support of this contention, the High Court has ignored the binding precedent and employed a new concept called 'intrinsic material' which it coined in **page 65** (after giving its footnote based interpretation to the Quran) and employs it at **page 116** to circumvent the decision in ***M.S. Gill*** and upheld the G.O. based on material that did not form part of the reasons given in the order.

HH. FOR THAT the Respondent State had initially sought to downplay that the Kannada term *'sarvajanika suvyavasthe'*, used in the G.O. does not mean 'public order' but when it was pointed out by the Petitioner that the official Kannada translation of the Constitution uses the term *'sarvajanika suvyavasthe'* for the term *'public order'* at every place in the Constitution, the Respondent State had no response to it and gave up the defence based on *'public order'* despite categorically pleading the same in its objections, and conceded that the invocation of the ground of 'public order' in the last line of the G.O. may be ignored as "over-enthusiasm" of the draftsman.

II. FOR THAT the Hon'ble High Court has however at **page 118** ignored the concession and proceeded to hold that the term 'public order' cannot be construed as the one employed in the Constitution or statues since *"There is a sea of difference in the textual structuring of legislation and in promulgating a statutory order as the one at hands. The draftsmen of the former are ascribed of due diligence & seriousness in the employment of terminology which the government officers at times lack whilst textually framing the statutory policies"* and further that the impugned order could have been better drafted.

JJ. FOR THAT the Court goes on to observe that the Government Order gives a lose impression that there is some nexus between wearing of hijab and the 'law and order' situation.

KK. FOR THAT there is no other ground on which the State has justified the restriction on the fundamental right under Article 25 in its pleadings.

LL. FOR THAT the concession of the Ld. Advocate General was more than enough for the Hon'ble High Court to hold that there exist no restriction for the Petitioner and other Muslim girls to wear their hijab to school / college.

MM. FOR THAT the requirement under law is that there has to be a direct and proximate nexus between the restriction imposed and the ground on which it is justified. However, the High Court has while observing that the G.O. gives a *'loose impression'*, as opposed to the direct and proximate link requirement, between wearing of hijab and 'law and order' goes on to sustains the same.

NN. FOR THAT 'law and order' is not and cannot be a ground to impose restrictions on the freedom to practice religion, the same not being enumerated either in Article 25(1) or in Article 25(2) as one of the justifications for imposing Article 25 restrictions.

OO. FOR THAT the High Court has not satisfied itself as to whether the inference in the impugned G.O. that prohibition of headscarf does not violate Article 25 was based upon any material at all.

PP. FOR THAT though the Hon'ble High Court notes in paras X(ii), X(iii) and X(iv) that the judgments relied upon in the G.O. i.e. (i) ***FathimaThasneem v. State of Kerala***, 2018 SCC OnLine Ker 5267;(ii)***Fathema Hussain Sayed v. Bharat Education Society***, AIR 2003 Bom 75;and (iii)***Sir M. VenkataSubba Rao, Matriculation Higher Secondary School Staff Assn. v. Sir M. VenkataSubba Rao, Matriculation Higher Secondary School***, (2004) 2 CTC 1, are irrelevant, it has not questioned the Respondents as to on what other basis then has the State Government in the first place come to a conclusion in the G.O. that prohibition on hijab / headscarf / head cover will not be violative of Article 25.

QQ. FOR THAT in the absence of any material put forth by the State to justify such conclusion and upon it being demonstrated that the reasons given in the impugned G.O. were misplaced, the Hon'ble Court ought not to have supplanted its view no matter how abhorrent the practice of wearing *hijab* might seem to the learned Judges.

RR. FOR THAT while none of the Ld. Senior Advocates appearing on behalf of the Respondents have adverted to or have called in question the correctness of the decisions of the Ld. Single Judge of the Hon'ble Kerala High Court in ***Amnah Bint Basheer v. Central Board of Secondary Education (CBSE)***, 2016 SCC OnLine Ker 41117; which decision has subsequently been approved by the Hon'ble Division Bench of the Kerala High Court in ***Central Board of Secondary Education v. Amnah Bint Basheer***, 2016 SCC OnLine Ker 487; or the decision of the Hon'ble Madras High Court in ***M. Ajmal Khan v. Election Commission of India***, 2006 SCC OnLine Mad 794, the Hon'ble High Court in the impugned order goes to on distinguish the same holding that the factual matrix therein was different.

SS. FOR THAT change in factual matrix will not change the essentiality of a religious practice. A religious practice is to be looked at and understood from the sources of the religion and not on myriad factual situations.

TT. FOR THAT the Hon'ble Court failed to appreciate that the impugned G.O. deserved to be set aside on account of there being absolutely no material before the State Government to justify the conclusion it had reached therein. **[see *Anuradha Bhasin v. UOI***, (2020) 3 SCC 637#78, #141]

UU. FOR THAT the Hon'ble High Court has not at all dealt with the contention of the Petitioner that the G.O. dated 05.02.2022 is in breach of Section 143 of the 1983 Act.

VV. FOR THAT the State Government could not have entrusted a private MLA-led committee with the power to determine the extent upto which the Petitioner's fundamental rights could be curbed.

WW. FOR THAT, the impugned order otherwise deserves to be set aside being contrary to law.

XX. FOR THAT the Hon'ble High Court at **pg. 121** has cursorily dealt with the without prejudice argument of the Petitioner that the impugned G.O. is also bad in law on account of it attracting the 'doctrine of dictation' by cursorily rejecting the same holding that *"Who acted under whose dictation cannot be adjudged merely on the basis of some concessional arguments submitted on behalf of the State Government."*

YY. FOR THAT State Government *vide* the impugned G.O. while ostensibly leaving the final decision to be taken by the College Development Committees, however has indicated its mind that wearing of Hijab is not a part of Article 25 rights. This clearly makes the purported independent exercise of any power by the CDC totally vitiated. See ***Orient Paper Mills Ltd. v. Union of India*****, (1970) 3 SCC 76 #4**; ***Manohar Lal v. Ugrasen*****, (2010) 11 SCC 557 #23.**

ZZ. FOR THAT the High Court instead of enquiring whether there was any legal restriction on the fundamental rights of the petitioner, erroneously proceeds to ask the petitioner to satisfy the test of *'essential religious practice'* at the very threshold, which approach is totally perverse in constitutional adjudication of any violation of article 25.

AAA. FOR THAT the issue of 'essential religious practice' did not at all arise as has been portrayed by the Hon'ble High Court.

BBB. FOR THAT the Petitioner had only submitted that the State could not have come to a conclusion in the G.O. that wearing of hijab is not an 'essential religious practice'. For that purpose, the Petitioner had pleaded and demonstrated that in the Islamic faith, the wearing of hijab was an essential religious practice.

CCC. FOR THAT there was no restriction under Article 25(1), as the State had given up the 'public order' defense; nor is there a 'law' under

Article 25(2)(b) providing for social welfare and reform of a religious practice.

DDD. FOR THAT in the absence of any valid legal restriction envisaged under Articles 25(1) or 25(2) on the religious practice of wearing a hijab, there was no requirement of getting the Petitioners to prove that wearing of hijab was an *essential* religious practice in Islam.

EEE. FOR THAT the Hon'ble High Court at **page 57** of the impugned judgement completely inverses the law and the context in which the 'essential religious practice' doctrine was evolved and comes to a totally perverse conclusion that "*if essential religious practice as a threshold requirement is not satisfied, the case does not travel to the domain of constitutional values*".

FFF. FOR THAT Article 25(2) deals with laws enacted for social reform and does not include in its scope a law that incidentally encroaches on religious freedoms that is subsequently sought to be defended on the basis that it 'reforms' a religion.

GGG. FOR THAT in the absence of any valid restriction under Articles 25(1) and 25(2), there was no question of stating that essential practice was a threshold requirement and had to be proved by the Petitioner.

HHH. FOR THAT the 'essential religious practice' doctrine is a shield against the invasion of the State into the freedom guaranteed under Article 25 and is not to be used as a sword to further strike at the guaranteed freedoms.

III. FOR THAT in the absence of any pleadings, the oral explanations advanced by the State that the said measure of restricting the wearing of hijab / headscarf / head cover is a measure of social reform ought not to have been countenanced at all by the Hon'ble High Court, primarily since no such intent is evinced from the impugned G.O. itself nor does Rule 11 of the *Karnataka Education*

Rules, 1995, on which the State places reliance, can by any stretch of imaginative and fanciful interpretation be said to be a measure of social reform of the Muslim community so as to be justified in terms of Article 25(2)(b).

JJJ. FOR THAT the stand of the Respondent State that the restriction is only limited to the school premises and not outside by itself demonstrates the hollowness in the 'social reform' argument. If the State intended to curtail this practice there is no reason why it would ostracise it only within the school compound and compel minor girls to stop practicing hijab in school, while maintaining that they are free to do so outside the school.

KKK. FOR THAT the 'social reform' argument is clearly an afterthought to somehow sustain an otherwise hasty, arbitrary and constitutionally unsound G.O., which has nothing to do with the restrictions prescribed under Article 25(2) and was driven by purely political considerations.

LLL. FOR THAT the Hon'ble High Court ought to have appreciated that the constitutional values, as noted in ***Indian Young Lawyers Assn. (SabrimalaTemple-5J)*** **v.** ***State of Kerala*****, (2019) 11 SCC 1** (relied upon by the High Court at **page 56** of the impugned judgement) further pro-choice values and, as such, could not be read in a manner so as to deny the Petitioner's choice to wear a headscarf. In fact, the pro-choice judgement of this Hon'ble Court has been construed to be anti-choice**.**

MMM. FOR THAT the impugned order degrades and denigrates the sacrosanct nature of fundamental rights under Part III by labelling them as *'derivative rights'*.

NNN. FOR THAT the impugned order has dismissed core fundamental rights as 'derivative rights' (**pages 99 and 100** of the impugned judgment) and compares schools with *"courts, war-rooms and*

defence camps" to hold that freedom of individuals as a 'necessity' is curtailed to maintain discipline and decorum.

OOO. FOR THAT the High Court in its quest to uphold the purported sacrosanct nature of the uniform has completely given a death-knell to the fundamental rights of the petitioners under Articles 14, 15, 19, 21, 25 and 29 of the Constitution, which is completely impermissible in our constitutional scheme.

PPP. FOR THAT the High Court by drawing a bizarre distinction between freedom of conscience and freedom of religion at **page 81** in that *"freedom of conscience and right to religion are mutually exclusive"* has completely nullified the extent, width and content of Article 25 of the Constitution.

QQQ. FOR THAT the restraint advised by the Constitution Bench in ***Ratilal Panachand Gandhi v, State of Bombay***, AIR 1954 SC 388, at 'outside authorities' i.e. authorities outside of the religious community, from inquiring as to whether or not the practices in question were 'essential parts of the religion', has gone unheeded by the High Court.

RRR. FOR THAT the self-imposed restraint on inquiring at the very threshold as to whether or not a practice is fundamental / essential to the religion can also be seen in the approach adopted by the Hon'ble Apex Court in ***Bijoe Emmanuel v. State of Kerala***, 1986 3 SCC 615.

SSS. FOR THAT the Hon'ble Apex Court in ***Bijoe Emmanuel (supra)***, upon noting in Para 8 that the beliefs were sincere, although they *"may appear strange or even bizarre to us"*, proceeded to first examine whether the ban imposed therein was consistent with Articles 19(1)(a) and 25 of the Constitution. It is evident that the Hon'ble Court did not foray into the field of 'essential religious practice' at the very outset itself.

TTT. FOR THAT the Hon'ble High Court failed to appreciate that the essentiality test, which is itself under re-consideration by a 9-Judge Bench of this Hon'ble Court, is invoked where a competing right or State interest is involved and a balancing act is required by the Court.

UUU. FOR THAT a Muslim girl, in the present facts, pursuing her education wearing a hijab / headscarf offends nobody's right nor does it militate against any State interest requiring the invocation of the essentiality test.

VVV. FOR THAT the High Court wrongly distinguishes the judgement of this Hon'ble Court in ***Bijoe Emmanuel* v. *State of Kerala*, (1986) 3 SCC 615** and from **pages 81 to 85** completely sidesteps it by holding that *"Bijoe Emmanuel is not the best vehicle for drawing a proposition essentially founded on the freedom of conscience"*.

WWW. FOR THAT this Hon'ble Court in ***Bijoe Emmanuel*** (supra) has categorically laid down that the primary inquiry to be made by the courts when an allegation of breach of Article 25 is complained of is to actually examine whether the act complained of is in furtherance of any of the restrictions under Article 25 or not

XXX. FOR THAT ***Bijoe Emmanuel's*** case has been consistently followed by this Hon'ble Court, including most recently in ***Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala*, (2019) 11 SCC 1**.

YYY. FOR THAT the High Court has recorded a factually erroneous finding that the petitioner has not pleaded details about her wearing the headscarf.

ZZZ. FOR THAT the Petitioner has specifically and categorically pleaded in the writ petition that she has been wearing her headscarf without any obstruction since taking admission in the college, which fact has

not been disputed by any of the Respondents in their counter affidavit or their arguments.

AAAA. FOR THAT the High Court's reliance upon the House of Lords judgment at **page 101** is totally misconceived since in the facts of the said case, the concerned student was insisting to be allowed to wear long coat like garment known as '*jilbab'* over and above the shalwar kameeze and head scarf permitted by the school in accordance with Islamic requirements.

BBBB. FOR THAT the finding at page 94 that the circular dt. 30.01.2014 was not challenged is totally misplaced since the grievance of the Petitioner arises not on account of the circular dated 31.01.2014 but on account of the denigration of her fundamental rights when the college authorities refused her entry into the college/school premises with her head scarf / hijab, followed by the impugned circular dt. 05.02.2022 indicating and supporting the college authorities to ban the wearing of head scarfs.

CCCC. FOR THAT the High Court *vide* the impugned order has sought to resurrect a specific amendment that was moved in the constitution assembly which was specifically rejected by the framers of the constitution.

DDDD. FOR THAT the petitioner and other Muslim girls like her want to march shoulder to shoulder with their sister from other communities in their pursuit of knowledge imparted in public institutions, but not at the cost of sacrificing their religious freedoms, when inherently there is no conflict between the practice of their religion and their pursuit of a secular education.

EEEE. FOR THAT the High Court has completely ignored the petitioner's contention *vis-à-vis* India's obligations under the *United Nations Convention On The Rights Of The Child.*

FFFF. FOR THAT the High Court has not addressed this argument and instead at **pg. 122** cursorily referred to some other United Nations conventions and then intermingled them with the recent judgment of this Hon'ble Court permitting women to join the armed forces as well as Dr. Ambedkar's 1940 view of the *purdah* referred to above to conclude that denial of *hijab* is a step forward in the direction of emancipation of women, particularly for access to education.

GGGG. FOR THAT the High Court ought to have appreciated the policy prescribed by Kendirya Vidyalayas was in line with the constitutional scheme.

HHHH. FOR THAT fundamental rights of the Petitioner cannot be left to the whims and fancies of political parties that come into power in that, they cannot be enjoyed only when a secular or non-majoritarian party secures power and trampled upon when a majoritarian government takes over. Fundamental rights and especially those concerning religion are to be enjoyed by citizens for all times to come irrespective of electoral results.

IIII. FOR THAT the High Court erred in distinguishing the judgement of the South African Constitutional Court in ***Kwazulu-Natal & Ors. Vs. Navaneethum Pillay & Ors.***, observing that *"the said case involved a nose stud, which is ocularly insignificantly, apparently being as small as can be"*.

JJJJ. FOR THAT the Hon'ble High Court has erred in holding that the practice of a Muslim woman in covering her head by wearing hijab / headscarf / head cover is not an essential Islamic practice.

KKKK. FOR THAT the Hon'ble High Court was not at all required to inquire into the essentiality of the practice of wearing hijab, it nevertheless has ventured into the same and has, against explicit directions in ***Ratilal*** and ***Bijoe Immanuel***, given its own interpretation to the Quran and rejected *hadith* to hold that it is only

a 'recommendatory' practice since no penalty is provided in respect of the same, without appreciating the core Islamic belief that accountability for failure to comply with religious injunction is to Allah in the hereafter.

LLLL. FOR THAT the High Court has undertaken the completely unacceptable exercise of venturing into the territory of holding that the practice in question was relevant only to the time and geographical context and is not relevant in the present day and age.

MMMM. FOR THAT for the Court to erroneously holds that "*Thus, it can be reasonably assumed that the practice of wearing hijab had a thick nexus to the socio-cultural conditions then prevalent in the region*", sets a dangerous precedent, appointing the Court as a supra religious authority empowered to re-interpret religious doctrine in light of what the judges feel are the needs of changing times.

NNNN. FOR THAT it was categorically demonstrated on behalf of the Petitioner before the Hon'ble High Court that covering of the head by a Muslim woman by wearing a hijab / headscarf / head cover is an essential obligation commanded / ordained in the Holy Qur'an and reflected in the unexceptionable practice of the womenfolk in the Prophetic era, immediately upon the revelation of the said verse, as has been recorded in the most authentic collection of *Hadith*, namely *Sahih Al-Bukhari*.

OOOO. FOR THAT the command to cover the head can be traced to <u>*Surah No.24 'An-Noor' ('The Light'): Ayat No. (Verse No.) 31*</u>.

PPPP. FOR THAT the Arabic word in question in the said verse is *'Khumoor'*, which is the plural of the word *'Khimaar'*. *'Khimaar'* essentially means a head-covering. Even in the *Collins English Dictionary* as well as the *Oxford Learner's Dictionary* respectively, the word 'Khimaar' has been described as a *"headscarf worn by a Muslim woman"*; as well as *"a piece of cloth worn in public by*

some Muslim women that covers the head and the upper part of the body".

QQQQ. FOR THAT the Petitioner had produced nine different and popular English translations of the said Quranic Ayaat to show that the word 'Khumoor/khimaar' has interchangeably been translated either as headscarves or head coverings or veil or shawl, but the meaning is consistently the same across all translations.

RRRR. FOR THAT it was contended before the Hon'ble High Court that while translations are to aid non Arabic speakers to understand the meaning of the original Arabic text, and the choice of words in the translated text is entirely upto the translator, <u>there is no second opinion as to the original Arabic text itself</u> and the best way to infer as to what the original text i.e. command in the Holy Qur'an actually meant is to look into how the Prophet (s.a.w.s) himself and the people around him understood / practiced / implemented the same, which is recorded in as *Hadith.*

SSSS. FOR THAT in so far as *Hadith* is concerned, the Constitution Bench of the Hon'ble Apex Court in ***Shayara Bano v. UOI,*** **2017 9 SCC 1,** has recognised that along with the Qur'an, *Hadith* comes in the 'first degree' category of commands which are '*Fard'* (obligatory).

TTTT. FOR THAT the *Hadith* in relation to the Qur'anic command in Surah No. 24, Ayat No.31 demonstrates the essentiality of the said Islamic practice of covering of their heads by Muslim women.

UUUU. FOR THAT the piece of cloth may be known by different names in different languages in different parts of the world but what is established is that all of them have to confirm to the religious requirement of 'covering of the head' along with their 'bosoms'.

VVVV. FOR THAT the impugned judgement has also not considered the argument of proportionality which was specifically raised by the Petitioner.

6. **GROUNDS FOR INTERIM PRAYER: -**

a) FOR THAT the Petitioner has demonstrated a *prima facie* case in its favour in that there is absolutely no restriction in place on account of the concessions made by the Ld. Advocate General. That apart the impugned order is contrary to the principles laid down by this Hon'ble Court in a catena of judgments as well.

b) FOR THAT the balance of convenience is heavily tilted in favour of the Petitioner in as much as she is wearing the hijab / head cover / head scarf since the time of taking admission and her wearing the hijab in no manner intereferes with the rights of anybody else.

c) FOR THAT the ban on the *hijab* is forcing not only the Petitioner but countless number of girls like her out of college and is likely to cause irremediable damage since they will not be allowed to attend exams which start on 28.03.2022 since pursuant to the impugned order, she will not be allowed to participate in the final exams only on the ground that she wears a head scarf.

d) FOR THAT such a step totally militates against the Article 14 and 15 of the Constitution.

7. **MAIN PRAYER:**

In the facts and circumstances mentioned hereinabove it is most humbly prayed that this Hon'ble Court may be pleased to:

a) grant special leave to appeal the against the Judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in W.P. No.2880 of 2022; and

b) pass any other order(s) as this Hon'ble Court may deem fit and proper in the interests of justice.

8. PRAYER FOR INTERIM RELIEF:

a) Grant ad-interim ex-parte stay of the operation of the Judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in W.P. No.2880 of 2022; and

b) Pass such other order or further orders as this Hon'ble Court may deem fit and proper, in the circumstances of the case.

AND FOR THIS ACT OF KINDNESS YOUR HUMBLE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY

SETTLED BY:

MR. DEVADATT KAMAT, SNR. ADV.

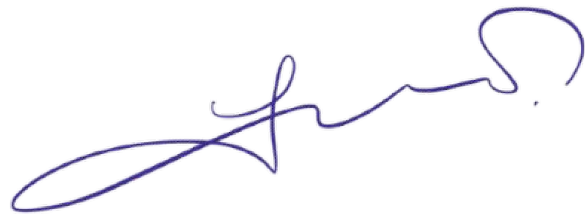
DRAWN BY:

MR. MOHD. NIZAM PASHA

MR. JAVEDUR RAHMAN

MR. RAJESH INAMDAR

FILED BY



[MR. JAVEDUR RAHMAN]

ADVOCATE FOR THE PETITIONER

PLACE: NEW DELHI

DRAWN ON: 15.03.2022

DATED: 16.03.2022

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO. OF 2022

IN THE MATTER OF:

MISS AISHAT SHIFA … PETITIONERS

VERSUS

THE STATE OF KARNATAKA & ORS. … RESPONDENTS

CERTIFICATE

Certified that the Special Leave Petition is confined only to the pleadings before the Court whose order is challenged and the other documents relied upon in those proceedings. No additional facts, documents or grounds have been taken therein or relied upon in the Special Leave Petition. It is further certified that the copies of the documents/annexures attached to the Special Leave Petition are necessary to answer the questions of law raised in the petition or to make out grounds urged in the Special Leave Petition for consideration of this Hon'ble Court. This Certificate is given on the basis of the instructions given by the Petitioner in the Special Leave Petition.

[MR. JAVEDUR RAHMAN]
ADVOCATE FOR THE PETITIONER
PLACE: NEW DELHI

DRAWN ON: 15.03.2022

DATED: 16.03.2022

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (C) NO. OF 2022

IN THE MATTER OF:

MISS AISHAT SHIFA & ANR. ...PETITIONERS

VERSUS

STATE OF KARNATAKA & ORS. ...RESPONDENTS

AFFIDAVIT

I, Mr. Zulfhukar, Son of Shri K. Zuber Sab, Aged about 48 Years, R/o Santosh Nagar, Hemmady Post, Kundapur Taluk, Udupi District 576230 Karnataka, Representing the Petitioner No. 1 here, do hereby state on solemn Affirmation as under-

1. That I am the father of the Petitioner No. 1 herein in the above Special Leave Petition and as such I am conversant with the facts and circumstances of the case and hence competent to swear this affidavit.
2. I say that I have read and understood the contents of the List of Dates at pages B to**VV** and contents of Special Leave Petition as contained in paras 1 to 8 at pages 130 to 152 and applications and state that the averments of facts made therein are true to my knowledge and information derived from the record of the case and those of submissions of law made in grounds, prayer and certificate and applications are true as per the legal advice received and believed by me.
3. That the Annexures P/1 to P/8 attached to the present special leave petition are true copies of their originals.

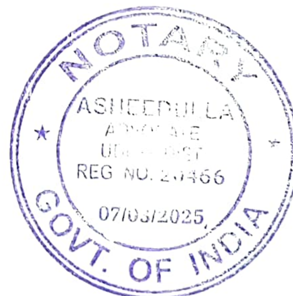
DEPONENT

VERIFICATION

I, the deponent above named do hereby verify that the contents of the above affidavit are true and correct. No part of it is false and nothing material has been concealed therefrom.

Verified at Udupi on this the 15th day of March, 2022

DEPONENT



SIGNED BEFORE ME
15/03/2022
NOTARY
UDUPI

Notarial Register
Book: 01 Page: 32
Serial No. 215 Date: 15/3/2022

NO. OF ERRORS....Nil....ONLY

APPENDIX

CONSTITUTION OF INDIA

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.

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

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

21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

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.

Explanation I.—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (*b*) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

29. Protection of interests of minorities.—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

TRUE COPY

ANNEXURE P-1

ಕರ್ನಾಟಕ ಸರ್ಕಾರದ ನಡವಳಿಗಳು

ವಿಷಯ: ರಾಜ್ಯದ ಎಲ್ಲಾ ಶಾಲಾ ಕಾಲೇಜುಗಳಲ್ಲಿ ವಿದ್ಯಾರ್ಥಿಗಳ ವಸ್ತ್ರ ಸಂಹಿತೆ ಕುರಿತು.

ಓದಲಾಗಿದೆ: 1) ಕರ್ನಾಟಕ ಶಿಕ್ಷಣ ಕಾಯ್ದೆ 1983.

2) ಸರ್ಕಾರದ ಸುತ್ತೋಲೆ ಸಂಖ್ಯೆ: 509 ಎಸ್‌ಹೆಚ್‌ಹೆಚ್ 2013, ದಿನಾಂಕ: 31-01-2014.

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ಪ್ರಸ್ತಾವನೆ:-

ಮೇಲೆ ಓದಲಾದ ಕ್ರಮ ಸಂಖ್ಯೆ:1ರಲ್ಲಿ ಕರ್ನಾಟಕ ಸರ್ಕಾರವು 1983ರಲ್ಲಿ ಜಾರಿಗೆ ತಂದಿರುವ ಶಿಕ್ಷಣ ಕಾಯ್ದೆ 1983ರಲ್ಲಿ (1-1995) ಕಲಂ 7 (2) (5)ರಲ್ಲಿ ವಿವರಿಸಿರುವಂತೆ ಕರ್ನಾಟಕ ರಾಜ್ಯದ ಎಲ್ಲಾ ಶಾಲೆಗಳ ವಿದ್ಯಾರ್ಥಿ-ವಿದ್ಯಾರ್ಥಿನಿಯರು ಒಂದೇ ಕುಟುಂಬದ ರೀತಿಯಲ್ಲಿ ನಡೆದುಕೊಳ್ಳಬೇಕೆಂದು ಮತ್ತು ಯಾವುದೇ ಒಂದು ವರ್ಗಕ್ಕೆ ಸೀಮಿತವಾಗಿರದೇ ಸಾಮಾಜಿಕ ನ್ಯಾಯದ ಪರವಾಗಿ ನಡೆದುಕೊಳ್ಳಬೇಕು. ಪ್ರಸ್ತುತ ಕಾಯ್ದೆ ಕಲಂ-133ರ ಅಡಿಯಲ್ಲಿ ಶಾಲಾ ಮತ್ತು ಕಾಲೇಜುಗಳಿಗೆ ಈ ಬಗ್ಗೆ ಸೂಕ್ತ ನಿರ್ದೇಶನಗಳನ್ನು ನೀಡುವ ಅಧಿಕಾರವು ಸರ್ಕಾರಕ್ಕೆ ಪ್ರದತ್ತವಾಗಿರುತ್ತದೆ.

ಮೇಲೆ ಓದಲಾದ ಕ್ರಮ ಸಂಖ್ಯೆ:(2)ರಲ್ಲಿನ ಸುತ್ತೋಲೆಯಲ್ಲಿ ಪದವಿ ಪೂರ್ವ ಶಿಕ್ಷಣವು ವಿದ್ಯಾರ್ಥಿಗಳ ಜೀವನದಲ್ಲಿ ಪ್ರಮುಖ ಘಟ್ಟವಾಗಿರುತ್ತದೆ. ಸರ್ಕಾರ ನೀಡುವ ಸೂಚನೆಗೆ ಅನುಗುಣವಾಗಿ ಮತ್ತು ಬಿಡುಗಡೆ ಮಾಡುವ ಅನುದಾನವನ್ನು ಸರಿಯಾಗಿ ಉಪಯೋಗಿಸಿಕೊಳ್ಳುವ ನಿಟ್ಟಿನಲ್ಲಿ ಹಾಗೂ ಮೂಲಭೂತ ಸೌಕರ್ಯಗಳನ್ನು ಅಭಿವೃದ್ಧಿಪಡಿಸುವ, ಶೈಕ್ಷಣಿಕ ಗುಣಮಟ್ಟವನ್ನು ಕಾಪಾಡುವ ದೃಷ್ಟಿಯಿಂದ ರಾಜ್ಯದ ಎಲ್ಲಾ ಶಾಲಾ ಮತ್ತು ಕಾಲೇಜುಗಳಲ್ಲಿ ಅಭಿವೃದ್ಧಿ ಸಮಿತಿಗಳನ್ನು ರಚಿಸಲಾಗಿದ್ದು, ಆಯಾ ಶಾಲಾ ಮತ್ತು ಕಾಲೇಜು ಅಭಿವೃದ್ಧಿ ಸಮಿತಿಯ ನಿರ್ಣಯಗಳ ಪ್ರಕಾರ ಕಾರ್ಯನಿರ್ವಹಿಸಲು ಸೂಚಿಸಲಾಗಿದೆ.

ಯಾವುದೇ ಶಿಕ್ಷಣ ಸಂಸ್ಥೆಯ ಮೇಲ್ವಿಚಾರಣಾ ಸಮಿತಿಯು (ಸರ್ಕಾರಿ ಶಾಲಾ ಕಾಲೇಜುಗಳಲ್ಲಿ-ಎಸ್.ಡಿ.ಎಂ.ಸಿ, ಖಾಸಗಿ ಶಾಲಾ ಕಾಲೇಜುಗಳಲ್ಲಿ-ಪೋಷಕರು ಮತ್ತು ಶಿಕ್ಷಕರ ಸಮಿತಿ ಹಾಗೂ ಆ ಸಂಸ್ಥೆಯ ಆಡಳಿತ ಮಂಡಳಿ) ಮೇಲಿನಂತೆ ಸುಗಮ ಶೈಕ್ಷಣಿಕ ವಾತಾವರಣವನ್ನು ವಿದ್ಯಾರ್ಥಿಗಳಿಗೆ ಕಲ್ಪಿಸುವ ಸದಾಶಯದಿಂದ ಸೂಕ್ತ ನೀತಿ ಸಂಹಿತೆಗಳನ್ನು ಆಯಾ ಶಾಲಾ ಕಾಲೇಜುಗಳಲ್ಲಿ ಸರ್ಕಾರದ ನೀತಿಗಳಿಗೆ ಅನುಸಾರವಾಗಿ ನಿರ್ಣಯಿಸಿ ಅಳವಡಿಸಿಕೊಳ್ಳಬಹುದಾಗಿದೆ. ಅಂತಹ ಸಮಿತಿಯ ನಿರ್ಣಯವು ಆಯಾ ಶಾಲಾ ಕಾಲೇಜುಗಳಿಗೆ ಸಂಬಂಧಿಸಿದಂತೆ ಇರುತ್ತದೆ.

ರಾಜ್ಯದ ಎಲ್ಲಾ ಶಾಲಾ ಕಾಲೇಜುಗಳಲ್ಲಿ ವಿದ್ಯಾರ್ಥಿ-ವಿದ್ಯಾರ್ಥಿನಿಯರು ಏಕರೂಪ ಕಲಿಕಾ ಕಾರ್ಯಕ್ರಮದಲ್ಲಿ ಭಾಗವಹಿಸಲು ಅನುಕೂಲವಾಗುವಂತೆ ಎಲ್ಲಾ ಶಾಲಾ ಕಾಲೇಜುಗಳಲ್ಲಿ ಕಾರ್ಯಕ್ರಮಗಳನ್ನು ಹಮ್ಮಿಕೊಳ್ಳಲಾಗಿದೆ. ಆದರೆ, ಕೆಲವು ವಿದ್ಯಾ ಸಂಸ್ಥೆಗಳಲ್ಲಿ ವಿದ್ಯಾರ್ಥಿ ವಿದ್ಯಾರ್ಥಿನಿಯರು ತಮ್ಮ ಧರ್ಮದ ಅನುಸಾರ ಆಚರಣೆಗಳನ್ನು ಪಾಲಿಸುತ್ತಿರುವುದು ಕಂಡುಬರುತ್ತಿದ್ದು ಇದರಿಂದ ಶಾಲಾ ಕಾಲೇಜುಗಳಲ್ಲಿ ಸಮಾನತೆ ಮತ್ತು ಏಕತೆಗೆ ಧಕ್ಕೆ ಬರುತ್ತಿರುವುದು ಶಿಕ್ಷಣ ಇಲಾಖೆಯ ಗಮನಕ್ಕೆ ಬಂದಿರುತ್ತದೆ.

ವೈಯಕ್ತಿಕ ವಸ್ತ್ರ ಸಂಹಿತೆಗಿಂತ ಏಕರೂಪ ವಸ್ತ್ರ ಸಂಹಿತೆಗೆ ಸಂಬಂಧಿಸಿದಂತೆ ರಾಷ್ಟ್ರದ ಮಾನ್ಯ ಸರ್ವೋಚ್ಚ ನ್ಯಾಯಾಲಯ ಮತ್ತು ವಿವಿಧ ರಾಜ್ಯಗಳ ಮಾನ್ಯ ಉಚ್ಚ ನ್ಯಾಯಾಲಯಗಳ ಮುಂದೆ ದಾಖಲಾದ ಪ್ರಕರಣಗಳಲ್ಲಿ ಈ ಕೆಳಕಂಡಂತೆ ತೀರ್ಪು ನೀಡಲಾಗಿರುತ್ತದೆ:

1) ಕೇರಳ ರಾಜ್ಯದ ಮಾನ್ಯ ಉಚ್ಚ ನ್ಯಾಯಾಲಯವು W.P(C) No. 35293/2018ರ ದಿನಾಂಕ:04-12-2018ರಂದು ನೀಡಲಾದ ಆದೇಶದ ಕಂಡಿಕೆ-9ರಲ್ಲಿ ಮಾನ್ಯ ಸರ್ವೋಚ್ಚ ನ್ಯಾಯಾಲಯವು ಹೇಳಿರುವ ತತ್ವವನ್ನು ಈ ಕೆಳಕಂಡಂತೆ ವಿವರಿಸಿರುತ್ತದೆ:

"9. The Apex court in Asha Renjan & others v/s State of Bihar & 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) ಫಾತಿಮಾ ಹುಸೇನ್ ಸೈಯದ್ ವಿರುದ್ಧ ಭಾರತ್ ಎಜುಕೇಷನ್ ಸೊಸೈಟಿ ಮತ್ತು ಇತರರು, (AIR 2003 Bom 75) ಪ್ರಕರಣದಲ್ಲಿ ಇದೇ ರೀತಿಯಲ್ಲಿ ವಸ್ತ್ರ ಸಂಹಿತೆಗೆ ಸಂಬಂಧಿಸಿದಂತೆ ಕಾರ್ತಿಕ್ ಇಂಗ್ಲೀಷ್ ಸ್ಕೂಲ್, ಮುಂಬೈನಲ್ಲಿ ಸಮಸ್ಯೆ ಉದ್ಭವಿಸಿದ್ದು, ಸದರಿ ಸಮಸ್ಯೆಯ ವಿಚಾರಣೆಯನ್ನು ಬಾಂಬೆ ಉಚ್ಚ ನ್ಯಾಯಾಲಯ, ಪರಿಶೀಲಿಸಿದ್ದು, ಈ ಶಾಲೆಯ ಪ್ರಾಂಶುಪಾಲರು ಅರ್ಜಿದಾರರಿಗೆ ಶಿರವಸ್ತ್ರ(Head scarf) ಹಾಕಿಕೊಂಡು ಅಥವಾ ತಲೆಯನ್ನು ಮುಚ್ಚಿಕೊಂಡು ಶಾಲೆಗೆ ಬರದಂತೆ ನಿರ್ದೇಶಿಸಿರುವುದು ಸಂವಿಧಾನದ ಅನುಚ್ಛೇದ 25ರ ಉಲ್ಲಂಘನೆ ಅಲ್ಲವೆಂದು ಅಂತಿಮವಾಗಿ ತೀರ್ಪು ನೀಡಿರುತ್ತದೆ.

3) ಮೇಲೆ ಹೇಳಲಾದ ಮಾನ್ಯ ಸರ್ವೋಚ್ಚ ನ್ಯಾಯಾಲಯದ ತೀರ್ಪನ್ನು ಅವಲೋಕಿಸಿ ಮಾನ್ಯ ಮದ್ರಾಸ್ ಉಚ್ಚ ನ್ಯಾಯಾಲಯವು ಸಹ ವಿ. ಕಮಲಮ್ಮ ವಿರುದ್ಧ ಡಾ.ಎಂ.ಜಿ.ಆರ್. ಮೆಡಿಕಲ್ ಯುನಿವರ್ಸಿಟಿ, ತಮಿಳುನಾಡು ಮತ್ತು ಇತರರು. ಈ ಪ್ರಕರಣದಲ್ಲಿ ಸದರಿ ವಿಶ್ವವಿದ್ಯಾಲಯವು ಮಾರ್ಪಾಡು ಮಾಡಿ ನಿಗಧಿಪಡಿಸಿದ ವಸ್ತ್ರ ಸಂಹಿತೆಯ ನಿರ್ಧಾರವನ್ನು ಎತ್ತಿ ಹಿಡಿದಿದೆ. ಇದೇ ತರಹದ ವಿಷಯವು ಮಾನ್ಯ ಮದ್ರಾಸ್ ಉಚ್ಚ ನ್ಯಾಯಾಲಯದಲ್ಲಿ ಶ್ರೀ ಎಂ.ವೆಂಕಟಸುಬ್ಬರಾವ್ ಮೆಟ್ರಿಕುಲೇಷನ್ ಹೈಯರ್ ಸೆಕೆಂಡರಿ ಸ್ಕೂಲ್ ಸ್ಟಾಫ್ ಅಸೋಸಿಯೇಷನ್ ವಿರುದ್ಧ ಶ್ರೀ ಎಂ.ವೆಂಕಟಸುಬ್ಬರಾವ್ ಮೆಟ್ರಿಕುಲೇಷನ್ ಹೈಯರ್ ಸೆಕೆಂಡರಿ ಸ್ಕೂಲ್ ಎಂಬ ಮತ್ತೊಂದು (2004) 2 MLJ 653 ಪ್ರಕರಣದಲ್ಲಿ ಸಹ ಪರಿಗಣಿತವಾಗಿದೆ.

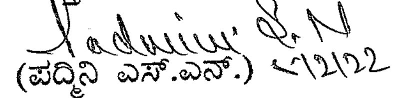
ಮೇಲೆ ಪ್ರಸ್ತಾಪಿಸಲಾದ ಮಾನ್ಯ ಸರ್ವೋಚ್ಚ ನ್ಯಾಯಾಲಯ ಹಾಗೂ ವಿವಿಧ ರಾಜ್ಯಗಳ ಮಾನ್ಯ ಉಚ್ಚ ನ್ಯಾಯಾಲಯಗಳಲ್ಲಿನ ತೀರ್ಪುಗಳನ್ವಯ ಶಿರವಸ್ತ್ರ(Head scarf) ಹಾಕಿಕೊಂಡು ಅಥವಾ ತಲೆಯನ್ನು ಮುಚ್ಚಿಕೊಂಡು ಶಾಲೆಗೆ ಬರದಂತೆ ನಿರ್ದೇಶಿಸಿರುವುದು ಸಂವಿಧಾನದ ಅನುಚ್ಛೇದ 25ರ ಉಲ್ಲಂಘನೆ ಅಲ್ಲವೆಂದಿರುವುದರಿಂದ ಹಾಗೂ ಕರ್ನಾಟಕ ಶಿಕ್ಷಣ ಕಾಯ್ದೆ 1983 ಮತ್ತು ಅದರಡಿ ರಚಿತವಾದ ನಿಯಮಗಳನ್ನು ಕೂಲಂಕಷವಾಗಿ ಪರಿಶೀಲಿಸಿ ಸರ್ಕಾರವು ಈ ಕೆಳಕಂಡಂತೆ ಆದೇಶಿಸಿದೆ.

ಸರ್ಕಾರದ ಆದೇಶ ಸಂಖ್ಯೆ:ಇಪಿ 14 ಎಸ್‌ಹೆಚ್‌ಹೆಚ್ 2022 ಬೆಂಗಳೂರು, ದಿನಾಂಕ:05.02.2022.

ಪ್ರಸ್ತಾವನೆಯಲ್ಲಿ ವಿವರಿಸಿರುವ ಅಂಶಗಳ ಹಿನ್ನೆಲೆಯಲ್ಲಿ ಕರ್ನಾಟಕ ಶಿಕ್ಷಣ ಕಾಯ್ದೆ 1983 ಕಲಂ 133 ಉಪ ಕಂಡಿಕೆ (2)ರಲ್ಲಿ ಪ್ರದತ್ತವಾಗಿರುವ ಅಧಿಕಾರವನ್ನು ಚಲಾಯಿಸಿ ರಾಜ್ಯದ ಎಲ್ಲಾ ಸರ್ಕಾರಿ ಶಾಲೆಗಳಲ್ಲಿ ಸರ್ಕಾರ ನಿಗಧಿ ಪಡಿಸಿರುವ ಸಮವಸ್ತ್ರವನ್ನು ಕಡ್ಡಾಯವಾಗಿ ಧರಿಸತಕ್ಕದ್ದು. ಖಾಸಗಿ ಶಾಲೆಗಳು ತಮ್ಮ ಆಡಳಿತ ಮಂಡಳಿಗಳು ನಿರ್ಧರಿಸಿರುವಂತಹ ಸಮವಸ್ತ್ರವನ್ನೇ ಧರಿಸತಕ್ಕದ್ದು.

ಪದವಿ ಪೂರ್ವ ಶಿಕ್ಷಣ ಇಲಾಖೆಯ ವ್ಯಾಪ್ತಿಯಲ್ಲಿನ ಕಾಲೇಜುಗಳಲ್ಲಿ ಆಯಾ ಕಾಲೇಜಿನ ಕಾಲೇಜು ಅಭಿವೃದ್ಧಿ ಸಮಿತಿ (CDC) ಅಥವಾ ಆಡಳಿತ ಮಂಡಳಿಯ ಮೇಲ್ವಿಚಾರಣಾ ಸಮಿತಿಯು ನಿರ್ಧರಿಸುವಂತಹ ಸಮವಸ್ತ್ರಗಳನ್ನು ಧರಿಸತಕ್ಕದ್ದು. ಆಡಳಿತ ಮಂಡಳಿಗಳು ಸಮವಸ್ತ್ರಗಳನ್ನು ನಿಗಧಿಪಡಿಸದೇ ಇದ್ದಲ್ಲಿ, ಸಮಾನತೆ ಮತ್ತು ಐಕ್ಯತೆಯನ್ನು ಕಾಪಾಡಿಕೊಂಡು ಹಾಗೂ ಸಾರ್ವಜನಿಕ ಸುವ್ಯವಸ್ಥೆಗೆ ಭಂಗ ಬರದಂತೆ ಇರುವ ಉಡುಪುಗಳನ್ನು ಧರಿಸಿಕೊಳ್ಳತಕ್ಕದ್ದೆಂದು ಆದೇಶಿಸಿದೆ.

ಕರ್ನಾಟಕ ರಾಜ್ಯಪಾಲರ ಆದೇಶಾನುಸಾರ
ಮತ್ತು ಅವರ ಹೆಸರಿನಲ್ಲಿ



(ಪದ್ಮಿನಿ ಎಸ್.ಎನ್.) 5/2/22
ಸರ್ಕಾರದ ಅಧೀನ ಕಾರ್ಯದರ್ಶಿ
ಶಿಕ್ಷಣ ಇಲಾಖೆ(ಪದವಿ ಪೂರ್ವ)

ಇವರಿಗೆ:

1. ಸರ್ಕಾರದ ಮುಖ್ಯ ಕಾರ್ಯದರ್ಶಿ, ಕರ್ನಾಟಕ ಸರ್ಕಾರ, ವಿಧಾನಸೌಧ, ಬೆಂಗಳೂರು.
2. ಸರ್ಕಾರದ ಅಪರ ಮುಖ್ಯ ಕಾರ್ಯದರ್ಶಿ, ಗ್ರಾಮೀಣಾಭಿವೃದ್ದಿ ಮತ್ತು ಪಂಚಾಯತ್ ರಾಜ್ ಇಲಾಖೆ. ಬೆಂಗಳೂರು.
3. ಸರ್ಕಾರದ ಪ್ರಧಾನ ಕಾರ್ಯದರ್ಶಿ, ಸಮಾಜ ಕಲ್ಯಾಣ ಇಲಾಖೆ, ಬೆಂಗಳೂರು.
4. ಸರ್ಕಾರದ ಪ್ರಧಾನ ಕಾರ್ಯದರ್ಶಿ, ಅಲ್ಪಸಂಖ್ಯಾತರ ಕಲ್ಯಾಣ ಇಲಾಖೆ, ಬೆಂಗಳೂರು.
5. ಸರ್ಕಾರದ ಪ್ರಧಾನ ಕಾರ್ಯದರ್ಶಿ, ಮಹಿಳಾ ಮತ್ತು ಮಕ್ಕಳ ಅಭಿವೃದ್ಧಿ ಇಲಾಖೆ, ಬೆಂಗಳೂರು.
6. ಮಾನ್ಯ ಮುಖ್ಯಮಂತ್ರಿಗಳ ಪ್ರಧಾನ ಕಾರ್ಯದರ್ಶಿ, ವಿಧಾನಸೌಧ, ಬೆಂಗಳೂರು.
7. ಆಯುಕ್ತರು, ಸಾರ್ವಜನಿಕ ಶಿಕ್ಷಣ ಇಲಾಖೆ, ಬೆಂಗಳೂರು.
8. ನಿರ್ದೇಶಕರು, ಪದವಿ ಪೂರ್ವ ಶಿಕ್ಷಣ ಇಲಾಖೆ, ಬೆಂಗಳೂರು.
9. ರಾಜ್ಯದ ಎಲ್ಲಾ ಜಿಲ್ಲಾಧಿಕಾರಿಗಳು ಮತ್ತು ಜಿಲ್ಲಾ ದಂಡಾಧಿಕಾರಿಗಳು.
10. ರಾಜ್ಯದ ಎಲ್ಲಾ ಜಿಲ್ಲಾ ಪಂಚಾಯತ್ ಮುಖ್ಯ ಕಾರ್ಯನಿರ್ವಹಣಾಧಿಕಾರಿಗಳು.
11. ಅಪರ ಆಯುಕ್ತರು, ಸಾರ್ವಜನಿಕ ಶಿಕ್ಷಣ ಇಲಾಖೆ, ಕಲಬುರಗಿ/ಧಾರವಾಡ.
12. ರಾಜ್ಯದ ಎಲ್ಲಾ ಜಂಟಿ/ಉಪನಿರ್ದೇಶಕರು, ಸಾರ್ವಜನಿಕ ಶಿಕ್ಷಣ ಇಲಾಖೆ.
13. ಎಲ್ಲಾ ಜಂಟಿ / ಉಪನಿರ್ದೇಶಕರು, ಪದವಿ ಪೂರ್ವ ಶಿಕ್ಷಣ ಇಲಾಖೆ.
14. ಮಾನ್ಯ ಪ್ರಾಥಮಿಕ ಮತ್ತು ಪ್ರೌಢಶಿಕ್ಷಣ ಹಾಗೂ ಸಕಾಲ ಸಚಿವರ ಆಪ್ತ ಕಾರ್ಯದರ್ಶಿ. ವಿಧಾನಸೌಧ.
15. ಸರ್ಕಾರದ ಅಪರ ಮುಖ್ಯ ಕಾರ್ಯದರ್ಶಿರವರ ಆಪ್ತ ಕಾರ್ಯದರ್ಶಿ, ಉನ್ನತ ಶಿಕ್ಷಣ ಇಲಾಖೆ,
16. ಸರ್ಕಾರದ ಪ್ರಧಾನ ಕಾರ್ಯದರ್ಶಿರವರ ಆಪ್ತ ಕಾರ್ಯದರ್ಶಿ, ಪ್ರಾಥಮಿಕ ಮತ್ತು ಪ್ರೌಢಶಿಕ್ಷಣ ಇಲಾಖೆ.
17. ಸರ್ಕಾರದ ಅಪರ/ಉಪ ಕಾರ್ಯದರ್ಶಿಗಳು-1, 2 ಆಪ್ತ ಸಹಾಯಕರು.
18. ಹೆಚ್ಚುವರಿ ಪ್ರತಿಗಳು.

TRUE COPY

Proceedings of the Government of Karnataka

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) (5) 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 committtees.

Any such supervisory committee in schools and colleges (SDMC in Government Institutions and Parents-Teachers' 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 : 04-12-2018, 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 the Shri. M

Venkatasubbarao Matriculation Higher Secondary School Staff Association v/s Shri M. Venkatasubbarao Matriculation Higher Secondary School (2004) 2 MLJ 653 case.

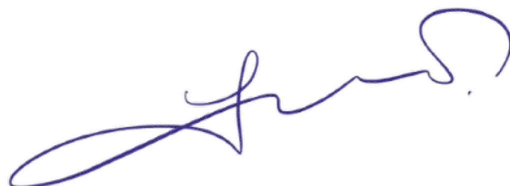
As mentioned in the abovementioned rulings of the Hon'ble Supreme Court and various High Courts, since the prohibition of a headscarf or a garment covering the head is not a violation of Article 25 of the constitution. Additionally, in terms of the Karnataka Education Act 1983 and its rules, the government 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 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 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)



TRUE TRANSLATED COPY

ANNEXURE P-2

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

W.P. No. /2022 (GM-EDU)

Between:

Miss. Aishat Shifa & Anr ...Petitioners
And

State of Karnataka & Others ...Respondents

S Y N O P S I S

Date	Events
2020	Petitioners joined the 5th respondent college and they are perusing their pre university course
Jan-2022	Respondent no.5 deprived the petitioners from attending the college by restraining them at the entry gate.
Feb-2022	Petitioners gave representation to the 4th respondent - Deputy Commissioner raising their grievance.
5-2-2022	The respondent no.2 issued the impugned order directing all schools run by the State Government shall wear the uniform provided by the concerned Government schools in the State. Private schools should wear uniforms determined by their governing bodies.
	Hence this writ petition

Brief Facts of the Case

1. Petitioners are students of 5th Respondent PU College pursuing Second Year Pre-university course. They secured admission in the said college and are regularly attending classes without any remark or blemish in their academic programme.

2. It is relevant to state that the Petitioners belongs to the Islamic faith and chose to practice their religion out of conviction including the essential religious practice of wearing *the hijab (head scarf/ veil)*.

3. On 4-2-2022 5th respondent has instructed the teaching staff of the institution not to permit the students inside the college/classes who wear headscarf, as such the petitioners and their classmates were deprived to attend the classes as long as they continue to wear head scarf. Petitioners and other classmates belonging to Islamic Faith have been forced to stay outside the entry Gate.

4. On 5-2-2022 2nd respondent issued impugned order 2nd respondent purported to be by invoking section 133 of the Karnataka Education Act, 1983 directing all schools run by the State Government shall wear the uniform provided by the concerned Government schools in the State. Private schools should wear uniforms determined by their governing bodies. Petitioner being aggrieved has filed the above noted writ petition.

Bangalore — Advocate for Petitioners

Date:07-02-2022 — (Mohammed Niyaz.S)

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

(ORIGINAL JURISDICTION)

W.P. No. 2880/2022 (GM-EDU)

Between:

1. Miss. Aishat Shifa
   D/o Zulfihukar
   Age about 17 years
   Santosh Nagar, Hemmady Post,
   Kundapur Taluk, Udupi District 576230
   Rep. by her natural guardian and father
   Mr.Zulfhukar

2. Miss. THAIRIN BEGAM
   D/o Mohammad Hussain
   Aged About 18 years
   Kampa Kavrady, Kandlur Post,
   Kundapura, Udupi District-576201

….PETITIONER

And

1. The State of Karnataka
   Vidhana Soudha
   Dr Ambedkar Road
   Bangalore- 560 001
   Represented by
   It's Principal Secretary.

2. The Under Secretary to Government
   Department of Education
   Vikas Soudha, Bangalore 560001

3. The Directorate
   Department of Pre University Education
   Bangalore -560 009.

4. The Deputy Commissioner
   Udupi District.
   Shivalli Rajatadri, Manipal,
   Udupi-576104.

5. The Principal
   Government PU College
   Kundapura, Udupi District- 576201

RESPONDENTS

MEMORANDUM OF WRIT PETITION UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA

The Petitioner is challenging the impugned direction dated 05-02-2022 vide order No. EP14 SHH 2022 Bangalore passed by the 2nd respondent purported to be by invoking section 133 of the Karantaka Education Act, 1983 directing all schools run by the State Government shall wear the uniform provided by the concerned Government schools in the State. Private schools should wear uniforms determined by their governing bodies. Copy of the order dated 5-2-2022 is enclosed as **ANNEXURE A.**

Petitioners most respectfully submits as follows:

1. Petitioners are students of 5th Respondent PU College pursuing Second Year Pre-university course. They secured admission in the said college and are regularly attending classes without any remark or blemish in their academic programme. It is relevant to state that the Petitioners belongs to the Islamic faith and and chose to practice their religion out of conviction including the essential religious practice of wearing the hijab (head scarf/ veil).

2. It is submitted that, as usual on 3-2-2022, the Petitioners went to college for attending daily classes, to their surprise they were stopped at the entry Gate of the College by the 5th Respondent and other staffs of the College. The Petitioners and other classmates were insulted, humiliated and were instructed to remove the head Scarf by the Principal and other staff members of the College. Subsequently the petitioners and other Classmates belonging to Islamic faith were denied entry into the premises by the 5th Respondent by closing the entry gate of the College. The action of the 5th respondent is inhuman, barbaric, which blatant violation of the fundamental rights of petitioners guaranteed under Article 15, 19(1)(a), 25 and 21 of the Constitution of India.

3. It is submitted that, the 5th respondent has instructed the teaching staff of the institution not to permit the students inside the college/classes who wear headscarf, as such the petitioners and their classmates were deprived to attend the classes as long as they continue to wear head scarf. Petitioners and other classmates belonging to Islamic Faith have been forced to stay outside the entry Gate. The petitioners and other classmates are in a hope of being permitted to enter their classes and continue their education. On refusal by the 5th Respondent, not permitting the petitioners and other classmates belonging to Islamic faith no to attend classes as long as they continue to wear head scarf, the petitioners along with other classmates have made representation to the 4th respondent, the Deputy Commissioner, Udupi District. Copy of the original Acknowledgment of the representation dated 04-02-2022 is produced herewith as **ANNEXURE-B.**

4. It is submitted that the Petitioners herein conscientiously chose to follow the tenets of Islam, one of which is to observe *hijab/head scarf*. Not only is it a part of their essential religious identity but denuding them from pursuing their education unless they give up on it is also an affront to their right to living with dignity protected under Article 21 of the Constitution. The unreasonable and discriminatory "punishment" imposed on the petitioners by the 5th Respondent for merely practicing their religious tenets, which in no way hinders or obstructs the imparting or acquiring of education within the institute is in blatant violation of the fundamental rights of the petitioners guaranteed under Article 15, 19(1)(a), 25 and 21 of the Constitution of India.

5. It is submitted that in a multi-religious, multi-cultural and vibrant democracy such as ours, identity forms an integral part of religious as well as other minorities. The framers of the constitution had the

foresight to apprehend the possibility of the right to practice of religion being trampled upon and therefore zealously sought to protect it by making the right to practice religion a fundamental right, correspondingly casting a duty upon the constitutional courts to enforce it.

6. It is relevant to state that before the passing the impugned order the respondent no.5 and similarly placed colleges in the district headed by the 4th respondent have stopped the students who wear head scarf which use wear regularly since their admission in to the respective colleges as it is their personal right guaranteed under the Islamic Shariat. Copies of the new articles of the published in various newspapers are enclosed herewith as ANNEXURE C series.

7. It is relevant to state that the impugned direction came to be passed to legalize the action of the colleges who adopted this illegal means so as to empower them to continue stopping the minority students who wear head scarf to enter the college and to pursue their education, it is one of the means adopted by the colleges subsequently, supported by the state government to diminish the image of students belonging to particular community. Copy of the impugned order is enclosed supra as **Annexure-A**

8. It is submitted that the Order issued by the State Government on 05.02.2022 purportedly u/s 133(2) of the Karnataka Education Act, 1983, is illegal and void, being outrageously violative and in excess of what has been prescribed by the very said provision itself. Section 133(2) reads as follows:

> **133.** Powers of Government to give directions.-
> **...**
> **(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."

9. As can be seen, directions can only be issued for carrying out the purposes of the Act or for giving effect to any of the provisions therein.

10. It is submitted that not a single provision in the entire 1983 Act talks about 'uniform' / 'dress' for students. Neither does a careful reading of the entire 1983 Act show that regulating / restricting / recommending 'uniform' / 'dress' could be even remotely regarded as one of the 'purposes' of the Act to carry out which the Government could issue directions u/s 133(2).

11. On the contrary a careful reading of the Act would reveal that the impugned direction is in the teeth of the provisions therein as well as the purpose intended by it.

12. The statement of objects and reasons puts forth the intent of the state legislature in enacting the said legislation. As per the statement of objects and reasons, the 1983 Act was considered necessary for the following purposes:

   a. planned development of educational institutions

   b. inculcation of healthy educational practice

   c. maintenance and improvement in the standards of education

   d. better organisation, discipline and control over educational institutions

   e. fostering harmonious development and cultivating a scientific and secular outlook

13. The statement of objects and reasons reads as follows:

"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;"

(emphasis added)

14. Section 3 thereafter which provides for the regulation of education by the State at all levels only talks of regulation at an administrative and institutional level. There is not even a slightest hint that regulation of education could be stretched as far as to include regulating student's appearance / dress / uniform.

15. The most relevant provision in so far as the present case is concerned is Section 7, which the State Government has turned on its head. It is submitted that Section 7 only empowers the Government to prescribe a curricula for any course of instruction, its duration, medium of instruction, etc.

16. Section 2 further requires the curricula to include schemes *inter alia* relating to national integration, harmony and the spirit of brotherhood transcending religious diversities particularly renunciation of practices derogatory to the dignity of women and to value and preserve the rich heritage of our composite culture The relevant portion of Section 7 reads as under:

"**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,- (a) the curricula, syllabi and text books for any course of instruction;\
…
(2) The curricula under sub-section (1) may also include schemes in respect of,-
…
(e) promotion of national integration;

…

(g) inculcation of the sense of the following duties of citizens, enshrined in the Constitution namely:-

…

(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;"

(emphasis added)

17. It is submitted that the State Government by way of the impugned direction is doing exactly the opposite of what Section 7 requires it to do. In this context reference may also be made to Section 40 which emphasized compliance with the provisions of the Act. The same reads as under:

> "**40. Duties of management of local authority institution.- (1)** It shall be the duty of the management of local authority institution to comply with all the provisions of this Act and the rules or orders made thereunder."

18. It is therefore submitted that the impugned directed suffers from excessive delegation, particularly when the same is in the teeth of the duty cast upon the authorities by the 1983 Act as can be seen hereinabove.

19. The action of the respondents in stopping the said students and passing of the impugned order speaks volumes about the intention behind depriving the basic right of education to certain class of citizens belonging to minority. The petitioners being aggrieved with the action of the respondent colleges and also the passing of the impugned order approach this Hon'ble court under Article 226 of the Constitution of India.

20. The petitioner has not approached this Hon'ble Court on an earlier occasion for the same cause of action or any cases pending or disposed off. It is not a public interest litigation.

21. The Petitioner has no other alternate and efficacious remedy than to approach this Hon'ble court, the petitioners have not filed any other petition before this Hon'ble court or before any other forum. Hence this Petition on the following grounds:

GROUNDS

22. It is submitted that such intorelance at the sight of muslim girls wearing hijab is unprecedentedand manifests the succumbing of the Respondentsto undue pressure from various intolerant forces. In the backdrop and context of recent events such asopen calls for social and economic boycott of Muslims, calls for excluding them from the mainstream and even 'genocide' of Muslims throughout the countryby speakers at various events self-styled as 'Dharam Sansads', incidents of circulation of mobile appsattempt at 'auctioning'Muslim, and other instances of rising bigotry, the impugned decision makes Muslim apprehensive of their personal safety and feel that their exercise of even their basic fundamental rights is under threat.

23. This Hon'ble Court is most fervently called upon to not look at this incident as a solitary instance but in the scheme of recent events and worldwide apprehensions of comings events casting their shadows beforehand that are threatening the Muslim citizens of this country.

24. It is submitted that the Petitioner's practice of wearing hijab, which according to her is an essential part of her religious practice,

in no way interferes with the imparting of education by the 4th Respondent. While it is true that the freedom to practice religion has been made subject to public order, morality and health, it is incomprehensible as to how the practice of wearing hijab, which until now never caused any public disorder is being sought to be curtailed, when in reality the public disorder is being created by intolerant groups with vested political interests.

25. It is submitted that the Qur'an is the highest in the hierarchy of sources of divine injunction for Muslims, being the direct word of God, followed by hadees (or hadith), which are Prophetic traditions, and thereafter, consensus of scholars and scholarly writings etc. interpreting the first two. The Qur'an itself in verse 24:31 prescribes injunctions for women in the manner of dress in the following words:

> "And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms except to their husbands, their fathers,…"[1]

26. It is therefore evident that the injunction to wear a headscarf or hijab is an essential feature of Islamic practice, being ordained by the Qur'an itself. While the 'essentiality test' that is commonly attributed to the Constitution Bench decision in *Sri Venkataramana Devaru* v. *State of Mysore*, 1958 SCR 895 is now itself under challenge before a 9-Judge Bench of this Hon'ble Court in *Kantaru*

[1] www.quran.com

*Rajeevaru v Indian Young Lawyers' Association*on the ground that a religious practice cannot be subjected to scrutiny to evaluate its 'essentiality', the Islamic practice of wearing the headscarf satisfies even the higher threshold of the essentiality test, being an injunction in the Qur'an itself, which is the direct word of Allah binding on all Muslims.

27. That the, impugned order passed by the 2nd respondent at Annexure A is a classic case of abuse of power and it is in violation of the right to freedom of expression, guaranteed under Article 19(1)(a) of the Constitution. Article 19(1)(a) of the Constitution specifically guarantees the right to freedom of expression, which takes within its sweep the right to freedom of appearance and apparel as well. In ***National Legal Services Authority v. Union of India*, (2014) 5 SCC 438** it was held that no restriction can be placed on one's appearance subject to restrictions made under Article 19(2) of the Constitution. It was held,

> *"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.***

70. We may, in this connection, refer to a few judgments of the US Supreme Court on the rights of TGs' freedom of expression:
70.1. The Supreme Court of the State of Illinois in City of Chicago v. Wilson [75 Ill 2d 525 : 389 NE 2d 522 (1978)] struck down the municipal law prohibiting cross-dressing, and held as follows: "the notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with values of privacy, self-identity, autonomy and personal integrity that … the Constitution was designed to protect".
70.2. In Doe v. Yunits [2000 WL 33162199 (Mass Super Ct 2000)] , the Superior Court of Massachusetts, upheld the right of a person to wear school dress that matches her gender identity as part of protected speech and expression and observed as follows: "by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important for her health and well-being. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her identity".

71. The principles referred to above clearly indicate that the freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing, etc."

28. The petitioners at this crucial juncture of their academic life at the stage of Second year pre university course. They being the followers of the Islamic faith since birth and is practicing the essential religious practise of wearing a hijab/head scarf. The petitioner is an ordinary resident of Udupi District and has safely without any let or hindrance continued to practise the wearing of hijab while participating in all aspects of daily life and the 4th and 5th respondent prevented them from attending to their classes on the ground that they are wearing hijab, which was not permissible in the college premises. It is relevant to state at this stage that previous students since several years without any hinderance have

continued to wear Hijab and have been passed out of the institution.

29. It is submitted that the Petitioners herein exercising their right to freedom of religion, faith and conscience, enshrined under Article 25 of the Constitution, by wearing a *hijab* to their educational institution. This freedom of conscience cannot be subjected to any restrictions which are not in the nature of public order, morality or health.

30. It is submitted that the right to freedom of apparel and appearances has been specifically recognised as falling under the ambit of the 'right to privacy' in *K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1 in the judgment of Justice Chelameswar. It was specifically held,

> "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.*"

31. It is submitted that the right of the Petitioner herein to attend an educational institution of her choice while professing her religion has been emphatically recognized by the Hon'ble Supreme Court in *Bijoe Emmanuel v. State of Kerala* (1986) 3 SCC 615. The Hon'ble Supreme Court specifically recognised that even though the religious beliefs of the Jehovah's Witnesses may "*appear strange or even bizarre*", they are entitled to protection under Article 25(1) and 19(1)(a) of the Constitution. The Hon'ble Supreme Court held,

> "*We see that the right to freedom of conscience and freely to profess, practise and propagate religion guaranteed by Art. 25 is subject to (1) public order, morality and health; (2) other*

provisions of Part III of the Constitution; (3) any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; or (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. Thus while on the one hand, Art. 25(1) itself expressly subjects the right guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practise and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by Art. 25(1). Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practise 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 authorised 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. Here again as mentioned in connection with Art. 19(2) to (6), it must be a law having the force of a statute and not a mere executive or a departmental instruction.

We are satisfied, in the present case, that the expulsion of the three children from the school for the reason that because of their conscientiously held religious faith, they do not join the singing of the national anthem in the morning assembly though they do stand up respectfully when the anthem is sung, is a violation of their fundamental right to freedom of conscience and freely to profess, practice and propagate religion."

32. It is submitted that the discrimination against the Petitioners herein is violative of Article 15, for restricting the entry of the Petitioners herein in a government school only on the ground of religion. Article 15 specifically envisages that the State shall not discriminate on grounds of religion. Article 15(2) further envisages that no citizen shall on grounds of religion be subject to any

restriction with regard to access of public shops. In *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179, the Hon'ble Supreme Court specifically held that educational institutions are covered under the ambit of 'shops' in Article 15(2). It was held,

> "*187. Inasmuch as education, pursuant to T.M.A. Pai [(2002) 8 SCC 481] , is an occupation under sub-clause (g) of clause (1) of Article 19, and it is a service that is offered for a fee that takes care of all the expenses of the educational institution in rendering that service, plus a reasonable surplus, and is offered to all those amongst the general public, who are otherwise qualified, then such educational institutions would also be subject to the discipline of clause (2) of Article 15. In this regard, the purport of the above exposition of clause (2) of Article 15, when read in the context of egalitarian jurisprudence inherent in Articles 14, 15, 16 and Article 38, and read with our national aspirations of establishing a society in which equality of status and opportunity, and justice, social, economic and political, would imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages.*"

It is thus submitted that the scope of the anti-discrimination principle under Article 15(2) not only applies to government schools but applies to all public areas including private schools.

33. It is submitted that the Explanation I to Article 25 of the Constitution similarly guarantees the right of Sikh persons to carry the *kirpan*. The Petitioners herein claim a similar right to wear the *hijab*, which is part of their religion and conscience. It is submitted that the Respondents herein cannot deny this right under any of the grounds of restrictions permissible under Article 25 of the Constitution.

34. It is submitted that there cannot be any prohibition under the Constitution or any laws made thereunder to curb any person from wearing any particular attire in pursuance of the right to belief, faith

and conscience, as long as it is in keeping with morality, public order and health.

35. The preamble of the Constitution of India makes a solemn assurance of *LIBERTY of thought, expression, belief, faith and worship* to the people. It contains the ideals and aspirations which the constitution makers intended to be realised by it's enacting provisions. *Article 21 and Article 25 of the Constitution* is a further protection of the right to personal liberty and the right to freedom of conscience and free profession, practice and propagation of religion as a fundamental right to not just all citizens but to all persons. The fundamental rights guaranteed under Articles 21 and 25 are no doubt subject to reasonable restriction and such reasonable restriction are as provided in these provisions. Article 25 which specifically secures to all persons the right to free profession, practice and propagation of religion makes it subject only to public order, morality and health.

36. It is submitted that the right of dignified living under Article 21 of the Constitution has been violated by the Respondents herein. The Petitioner believe that it is an essential part of their faith and conscience that they must wear a *hijab*. Their belief which, in their opinion, is an essential practice of their personal faith and conscience cannot be a ground for the State to deny education.

37. It is submitted that it is incumbent on the State to promote "*harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities;*" under Article 51-A(e) of the Constitution. This duty of both the citizens and the State is essential to the constitutional guarantee of 'Fraternity'.

38. The Hon'ble High Court of Kerala in Amnah Bint Basheer vs Central Board of Secondary Education reported in 2016 (2) KLT 601 while specifically dealing with the right to wear hijab held that the choice of dress based on religious injunctions is a Fundamental Right protected under Article 25(1) of the Constitution of India, when such prescription of dress is an essential part of the religion. The third respondent's actions impede the petitioner's right to excercise a choice based on a practise of their religious faith which is essential in nature and thereby these actions are an infringement of the Petitioners' fundamental rights guaranteed under Article 25 (1) of the Constitution of India.

39. The action of the Respondents is in violation of the Petitioners fundamental right to life and personal liberty which encompasses their right to choice of attire and appearance guaranteed under Article 21 of the Constitution of India.

40. It is also relevant to observe here that the 2021-22 guidelines for Pre-University Education issued by the Department of Pre-University Education, Government of Karnataka recognises the right of individuals to attire of their choice. This is forthcoming from the specific guidelines issued to all Principals of Government run Pre-University Colleges that Uniforms not being mandatory for students pursuing pre university courses and the imposition of uniform on students is illegal. Further it is notified that strict action will be taken against administrators and Principals of institutions found imposing uniform on students.

41. It is submitted that the verses of the Holy Quran and the narrations of the Hadiths (the Prophet's way of life) contain the essential religious practices to be followed by persons of the Islamic faith. The Holy Quran in more than one place has spoken as below about the practice of wearing hijab :

"O you Children of Adam! We have bestowed on you raiment 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." (Quran Chapter 7: verse 26)

"And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what must ordinarily appear therof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, or their brothers' sons or their sisters' sons, or their women or the servants 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. And O you Believers, turn you all together towards Allah, that you may attain Bliss." (Quran Chapter 24: verse 31)

"O Prophet, tell your wives and your daughters and the women of the believers to draw their cloaks close round them (when they go abroad). That will be better, so that they may be recognised and not annoyed. Allah is ever Forgiving, Merciful." (Quran chapter 33: verse 59)

Further the narrations from authoritative hadiths like those contained in al-Bukhaari stress upon the importance of wearing of the hijab which is to be followed as an essential religious practise.

42. By imposing a ban on the Petitioner from attending classes, the 4th Respondent has illegally taken away the Petitioners' right to education and academic progress. It cannot be said that the Petitioners have already lost valuable time and course on account of the Fourth respondent's illegal act.

GROUNDS FOR INTERIM PRAYER

43. That the Petitioners being students of PU College pursuing second year pre-university course have been prevented have been prevented from attending school since one week. They have already missed out classes. It is pertinent to note that their exams are schedule in the month of March. *Prima facie* case for grant of interim relief has been made out in as much as the Petitioners ought not to be denuded from acquiring education.

It is most respectfully submitted that while the adjudication of the validity / legality of the impugned circular may be carried on by this Hon'ble Court, it is expedient that the Petitioners in the meanwhile are allowed to attend classes since the classes before the final exams are of utmost importance as it involves the revision of the entire syllabus. Therefore the *balance of convenience* is also in favour of the Petitioners.

The Petitioners further apprehend that if the impugned direction is not stayed then they will also not be allowed to attend the exams thereby being forced to drop a year, thereby causing them *irreparable injury*.

That the impugned order is in violation of the Article 14, 15, 16, 19, 21 and 25 i.e. the basic fundamental rights guaranteed under the constitution of India. The impugned order directs all schools run by the State Government to prescribe that the students shall wear the uniform provided by the concerned Government schools in the State. Private schools should wear uniforms determined by their governing bodies. Schools coming under the Pre-University Colleges shall wear uniforms prescribed by the respective College Development Committee (CDC) or the governing-body of such colleges. If such colleges have so far not prescribed the uniforms, it shall be prescribed keeping in mind the equality and unity, which

should not violate the public order. The said impugned order is a case of abuse of power as such same is in violation of Article 14 of the Constitution of India.

PRAYER

Wherefore, it is most respectfully prayed that this Hon'ble Court be pleased to:-

a. Issue Writ in the nature of Certiorari quashing the impugned direction dated 05-02-2022 vide order No. EP14 SHH 2022 Bangalore passed by the 2nd respondent vide Annexure-A.

b. Issue Writ in the nature of Mandamus directing respondent no.5 to permit the Petitioners to attend the college without insisting for removal of their head scarf.

c. Pass any such other order as this Hon'ble Court deems fit in the facts and circumstances of the case, including the cost of this Writ Petition.

INTERIM PRAYER

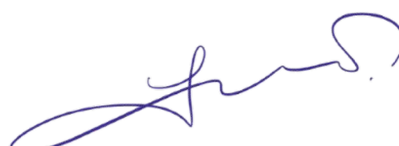
Pending disposal of the above Writ Petition, this Hon'ble Court be pleased to direct the respondent no.5 permitting the petitioners to attend the college/classes by staying the impugned order dated 05-02-2022 vide order No. EP14 SHH 2022 Bangalore passed by the 2nd respondent at Annexure-A.

Bangalore

Date: 07-02-2022

Advocate for Petitioner
(Mohammed Niyaz.S)

Address for Service:
Yennes Legal & Co.
No.215, Walnutz Tower,
3rd Floor, R.T.Nagar,
Bangalore 560032



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ANNEXURE P-3

IN THE HON'BLE HIGH COURT OF KARNATAKA AT BENGALURU

W.P. NO. 2347/2022

IN THE MATTER OF:

SMT RESHAM ...PETITIONER

AND

STATE OF KARNATAKA & ORS. ...RESPONDENTS

Name of the Hon'ble Judges	Dates	ORDERS
KRISHNA S DIXIT	08/02/2022	Heard in part. Learned Advocate General passionately submits that lot of galata is happening within the campus and without, in several institutions in the region even when the Court is busy hearing this matter of seminal importance, and that should be halted. In support of his submission he reads out 3rd un-numbered paragraph in the judgment of Apex Court in KISAN MAHAPANCHAYAT & ANR. Vs. UNION OF INDIA, W.P. (Civil) No.854/2021 which runs as under: "After hearing learned counsel for the concerned parties and the Attorney General for India, we deem it appropriate to examine the central issue as to whether the right to protest is an absolute right and, more so, the writ petition having already

		invoked the legal remedy before the Constitutional Court by filing writ petition, can be permitted to urge much less asset that they can still resort to protest in respect of the same subject matter which is already sub-judice before the Court". Learned advocates appearing for the petitioners lead by learned Sr. Adv. Mr. Devdutt Kamath are broadly in agreement with the submission of learned Advocate General. However, Mr. Kamath is not sure as to whether the Court can pass a blanket order banning agitations of the kind when the agitators are not eo nomine parties to the proceedings. Having heard the learned counsel for the parties and pending further hearing of the matter, which hopefully would be accomplished before long, this Court requests the student community in particular, and the public at large to maintain peace & tranquility, so that the case is decided swiftly undisturbed by what has been going on. This Court has full faith in the wisdom & virtue of our young students, and hopes that the ongoing agitation would stop at once. It also hastens to add that the authorities shall take all precautionary steps to ensure that no untoward incidents would take place and that no students or members of public are hurt, nor

		public/private property is damaged. Call these matters along with W.P.No.2880/2022 (GM-RES) on 09.02.2022 at 2.30 p.m. for further hearing.

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TRUE TYPED COPY **ANNEXURE P-4**

IN THE HON'BLE HIGH COURT OF KARNATAKA
AT BENGALURU

W.P. NO. 2880 /2022

IN THE MATTER OF:

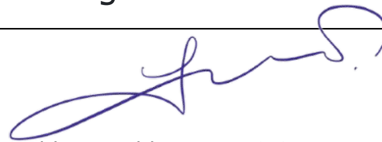
MISS AISHAT SHIFA & ANR. **...PETITIONERS**

AND

STATE OF KARNATAKA & ORS. **...RESPONDENTS**

Name of the Hon'ble Judges	Dates	ORDERS
KRISHNA S.DIXIT	09/02/2022	All these matters essentially relate to proscription of hijab (headscarf) while prescribing the uniform for students who profess Islamic faith. Rule 11 of the extant Rules promulgated under the Karnataka Education Act, 1983 authorizes the management of institutions to prescribe uniform, subject to certain conditions. The recent Government Order dated 05.02.2022 which arguably facilitates enforcement of this rule is also put in challenge. Whether wearing of hijab is a part of essential religious practice in Islam, is the jugular vein of all these matters. In support of an affirmative claim, petitioners rely upon three decisions of three neighbouring High Courts, (i.e., Bombay, Madras & Kerala) which the respondent-State also seeks to bank upon, and several decisions of the Apex Court.

		The said question along with other needs to be answered in the light of constitutional guarantees availing to the religious minorities. This Court after hearing the matter for sometime is of a considered opinion that regard being had to enormous public importance of the questions involved, the batch of these cases may be heard by a Larger Bench, if Hon'ble the Chief Justice so decides in discretion. Learned Advocates appearing for the petitioners made short submissions for the grant of interim relief at the hands of this Court. Learned Advocate General and other advocates appearing for the respondents & impleading applicants opposed the same. The contentions are not recorded nor any opinion is expressed since the papers are being placed before Hon'ble the Chief Justice. In the above circumstances, the Registry is directed to place the papers immediately at the hands of Hon'ble the Chief Justice for consideration. This Court places on record its deep appreciation for the cordiality amongst the advocates appearing for the parties and other members of the Bar who had jam packed the Court Hall during the hearing of these matters.



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TRUE TYPED COPY **ANNEXURE P-5**

IN THE HON'BLE HIGH COURT OF KARNATAKA
AT BENGALURU

W.P. NO. 2880 /2022

IN THE MATTER OF:

MISS AISHAT SHIFA & ANR. ...PETITIONERS

AND

STATE OF KARNATAKA & ORS. ...RESPONDENTS

Name of the Hon'ble Judges	Dates	ORDERS
CHIEF JUSTICE AND KRISHNA S DIXIT AND J.M.KHAZI	10/02/2022	WP NO. 2347/2022 Connected Cases: WP NO. 2146/2022, WP NO. 2880/2022, WP NO.3038/2022 AND WP NO.3044/2022 1. All these writ petitions essentially seek to lay a challenge to the insistence of certain educational institutions that no girl student shall wear the hijab (headscarf) whilst in the classrooms. Some of these petitions call in question the Government Order dated 05.02.2022 issued under sections 7 & 133 of the Karnataka Education Act, 1983. This order directs the College Development Committees all over the State to prescribe 'Student Uniform', presumably in terms of Rule 11 of Karnataka Educational Institutions (Classification, Regulation & Prescription of

		Curricula, etc.) Rules, 1995. 2. A Single Judge (Krishna S Dixit J) vide order dated 09.02.2022 i.e., yesterday, has referred these cases to Hon'ble the Chief Justice to consider if these matters can be heard by a Larger Bench 'regard being had to enormous public importance of the questions involved'. Accordingly, this Special Bench comprising of three Judges has immediately been constituted and these cases are taken up for consideration. 3. We have heard the learned Senior Advocates Mr.Sanjay Hegde & Mr. Devadatt Kamat appearing for the petitioners respectively in W.P.No.2146/2022 & W.P.No.2880/2022 for some time. Learned Advocate General appearing for the State also made some submissions. 4. Mr. Sanjay Hegde, learned Sr. Adv. argues that: The 1983 Act does not have any provision which enables the educational institutions to prescribe any uniform for the students. The 1995 Rules apart from being incompetent are not applicable to Pre-University institutions since they are promulgated basically for Primary & Secondary

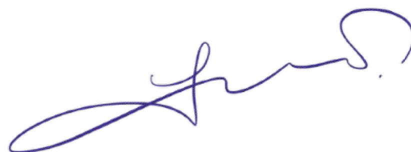
		schools. These Rules do not provide for the imposition of any penalty for violation of the dress code if prescribed by the institutions. Even otherwise the expulsion of the students for violating the dress code would be grossly disproportionate to the alleged infraction of the dress code. All stakeholders should make endeavors to create an atmosphere of peace & tranquility so that the students go back to the schools and prosecute their studies. Nobody should pollute the congenial atmosphere required for pursuing education. All stakeholders should show tolerance & catholicity so that the girl students professing & practicing Islamic faith can attend the classes with hijab and the institutions should not insist upon the removal of hijab as a condition for gaining entry to the classrooms. 5. Learned Sr. Advocate Mr. Devadatt Kamat basically assailed the subject Government Order contending that the decisions of Kerala, Madras & Bombay High Courts on which it has been structured have been wrongly construed by the Govt. as hijab being not a part of essential religious practice of Islamic faith and that there is a gross non-application of mind attributable to the Government. He also

		submits that the State Government has no authority or competence to issue the impugned order mandating the College Development Committees to prescribe student uniform. He submits that dress & attire are a part of speech & expression; right to wear hijab is a matter of privacy of the citizens and that institutions cannot compel them to remove the same. 6. In response, learned Advocate General shortly contends that no prima facie case is made out for the grant of any interim relief. The impugned order per se does not prescribe any uniform since what uniform should be prescribed by the institutions is left to them. The agitation should come to an end immediately and peace & tranquility should be restored in the society; there is no difficulty for the reopening of the institutions that are closed for a few days in view of disturbances and untoward incidents. The agitating students should go back to schools. He denies the submissions made on behalf of petitioners. Learned Advocate General also brought to the notice of the Court that there are several counter agitations involving students who want to gain entry to the institutions with

		saffron and blue shawls and other such symbolic clothes and religious flags. Consequently, the Government has clamped prohibitory orders within the radius of 200 metres of the educational institutions. 7. Mr. Devadatt Kamat, learned Sr. Adv. is continuing with his arguments. Learned advocates appearing for petitioners in other connected writ petitions, learned AG appearing for the State and Mr. Sajjan Poovayya, learned Sr. Adv. appearing for some institutions are also to be heard. This apart, there are advocates who want to argue for the impleading applicants. These matters apparently involve questions of enormous public importance and constitutional significance. We are posting all these matters on Monday (14.02.2022) at 2.30 p.m. for further consideration. 8. Firstly, we are pained by the ongoing agitations and closure of educational institutions since the past few days, especially when this Court is seized off this matter and important issues of constitutional significance and of personal law are being seriously debated. It hardly needs to be mentioned that ours is a country of plural cultures, religions &

		languages. Being a secular State, it does not identify itself with any religion as its own. Every citizen has the right to profess & practise any faith of choice, is true. However, such a right not being absolute is susceptible to reasonable restrictions as provided by the Constitution of India. Whether wearing of hijab in the classroom is a part of essential religious practice of Islam in the light of constitutional guarantees, needs a deeper examination. Several decisions of Apex Court and other High Courts are being pressed into service. 9. Ours being a civilized society, no person in the name of religion, culture or the like can be permitted to do any act that disturbs public peace & tranquility. Endless agitations and closure of educational institutions indefinitely are not happy things to happen. The hearing of these matters on urgency basis is continuing. Elongation of academic terms would be detrimental to the educational career of students especially when the timelines for admission to higher studies/courses are mandatory. The interest of students would be better served by their returning to the classes than by the

		continuation of agitations and consequent closure of institutions. The academic year is coming to an end shortly. We hope and trust that all stakeholders and the public at large shall maintain peace & tranquility. 10. In the above circumstances, we request the State Government and all other stakeholders to reopen the educational institutions and allow the students to return to the classes at the earliest. Pending consideration of all these petitions, we restrain all the students regardless of their religion or faith from wearing saffron shawls (Bhagwa), scarfs, hijab, religious flags or the like within the classroom, until further orders. 11. We make it clear that this order is confined to such of the institutions wherein the College Development Committees have prescribed the student dress code/uniform. 12. List these matters on 14.02.2022 at 2.30 p.m. for further consideration.



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ANNEXURE P-6

IN THE HON'BLE HIGH COURT OF KARNATAKA
AT BENGALURU

W.P. NO. 2880 /2022

IN THE MATTER OF:

MISS AISHAT SHIFA & ANR. ...PETITIONERS

AND

STATE OF KARNATAKA & ORS. ...RESPONDENTS

WRITTEN SUBMISSIONS OF SHRI DEVADATT KAMAT, SENIOR ADVOCATE ON BEHALF OF THE PETITIONERS

1. The gravamen of the Petitioner's submissions are broadly classified under the following broad headings for the convenience of this Hon'ble Court.

    I. **THE RIGHT OF A MUSLIM WOMAN TO WEAR A HIJAB(HEAD SCARF) IS AN INTEGRAL PART OF THE ISLAMIC FAITH AND THEREFORE PROTECTED UNDER ARTICLE 25 OF THE CONSTITUTION;(#2-16)**

    II. **THE GO DATED 05.02.2022 IS COMPLETELY ILLEGAL AND SUFFERS FROM TOTAL NON-APPLICATION OF MIND; (#17- 23)**

    III. **WEARING A HIJAB BY ITSELF CANNOT BE CONSTRUED AS AN ACT THAT THREATENS PUBLIC ORDER; (#24- 25)**

    IV. **THE STATE IS DUTY-BOUND UNDER THE CONSTITUTIONAL SCHEME TO CREATE A POSITIVE ENVIRONMENT FOR THE EXERCISE OF FUNDAMENTAL RIGHTS; (#26-34)**

    V. **SECULARISM IN THE INDIAN CONTEXT HAS BEEN INTERPRETED TO HAVE A POSITIVE ASPECT; (#35-36)**

    VI. **FREEDOM OF APPEARANCE IS ALSO PART AND PARCEL OF ARTICLE 19(1)(A); (#37)**

    VII. **FREEDOM OF APPAREL AND APPEARANCE IS ALSO A PART OF ARTICLE 21;(#38)**

    VIII. **VIOLATION OF RIGHTS OF THE PETITIONERS UNDER ARTICLE 29 ;(#39-43)**

IX. THE SEGREGATION OF STUDENTS ON RELIGIOUS LINES VIOLATES ARTICLES 14,19 AND 21 OF THE CONSTITUTION ;(#44-51)

X. THE STATE HAS NO JURISDICTION TO ISSUE THE IMPUGNED GO UNDER THE PROVISIONS OF THE KARNATAKA EDUCATION ACT, 1983; (#52-57)

I. **THE RIGHT OF A MUSLIM WOMAN TO WEAR A HIJAB(HEAD SCARF) IS AN INTEGRAL PART OF THE ISLAMIC FAITH AND THEREFORE PROTECTED UNDER ARTICLE 25 OF THE CONSTITUTION**

2. It is submitted that the Petitioners are followers of the Islamic faith and have been wearing a headscarf/Hijab since their admission to the Respondent No. 5 College. On 03.02.2022 the Petitioners were stopped from entering the college on the purported ground that they were wearing a Hijab/scarf (***see page 4 para 2 of the Writ Petition***)

The sources of Islamic law

3. It is the respectful submission of the Petitioner that under the tenets of the Islamic law wearing of Hijab (Headscarf) is an essential religious practice. Before adverting to this aspect, it may be worthwhile to note the sources of Islamic law

4. **Mulla in Principles of Muhammadan Law, 19th Edition in** ***paragraph 33*** notes the sources of Principles of Muhammadan Law states as under:

> **"33. Sources of Mahomedan Law:** There are four sources of Mahomedan law, namely. (1) the Koran; (2) Hadis, that is, precepts, action and saying of the Prophet Mahomed, not written down during his lifetime, but preserved by the tradition and handed down by authorized persons; (3) Ijmaa, that is a concurrence of opinion of the companions of Mahomed and his disciples and 4) Qiyas, being analogical deductions derived from a comparison of the first three sources when they did not apply to the particular case.
>
> Qiyas is reasoning by analogy. Abu Hanifa, the founder of the hanafi sect of sunnis, frequently preferred it to

traditions of single authority. The founders of the other sunni sects, however, seldom resorted to it."

5. In para 34 the Rules of interpretation of the Quran are noted which reads as under:

> "34 . interpretation of the Koran- the courts in administering Mahomedan law, should not, as a rule, attempt to put their own construction on the koran opposition to the express ruling of Mahomedan commentators of great antiquity and high authority.
>
> Thus where a passage of the koran (sura ii,vv 241-242) was interpreted in a particular way both in the Hedaya (a work on the Sunni law) and in the Imamia (a work on the Shia law), it was held by their Lordships of the privy council that it was not open to a Judge to construe it in a different manner"

The relevant verses of the Holy Quran

6. Keeping in mind the aforesaid basic principles of interpretation of Islamic law, the primary source namely the Holy Quran may be noted at this stage.

7. As per verse, 24:31 of the Holy Quran[1]

> "And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; <u>they should let their headscarves fall to cover their necklines and not reveal their charms except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as attend them who have no sexual desire,</u> or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms.

[1] The aforesaid quotation is obtained from the website www.quran.com which is from "The Qur'an" published by Oxford University Press in 2005 as part of the Oxford World Classics, which has been translated by M.A.S. Abdel Haleen. M.A.S. Abdel Haleem, as per the details provided in the paper publication, is a hafiz (i.e. has memorized the Qur'an by heart) who was educated at al-Azhar University, Cairo and Cambridge University.

Believers, all of you, turn to God so that you may prosper." [2]

8. Further, chapter 33 verse 59 reads as follows:

> "O Prophet, tell your wives and your daughters and the women of the believers to draw their cloaks close round them (when they go abroad). That will be better, so that they may be recognised and not annoyed. Allah is ever Forgiving, Merciful."[3]

Judicial dicta on Hijab as an essential religious practice.

9. The issue as to whether the wearing of a headscarf/Hijab is essential religious practice had fallen for consideration before the Ld. Single Judge of the Hon'ble Kerala High Court in **Amnah Bint Basheer v. Central Board of Secondary Education (CBSE), 2016 SCC OnLine Ker 41117.** ***(see pages 24-34 of the Compilation cases)*** The Ld. Single after examining the relevant authorities in Islamic law regarding the practice of Hijab in *paras 20-28* concludes in para 29 as follows:

> **"29.** Thus, **the analysis of the Quranic injunctions and the Hadiths would show that it is a farz to cover the head and wear the long sleeved dress except face part and exposing the body otherwise is forbidden (haram).** When farz is violated by any action opposite to farz that action becomes forbidden (haram).......

(see page 32 of the compilation of cases)

10. Further in para 30, the Hon'ble Court observed as under:

> **"30. The discussions as above would show that covering the head and wearing a long sleeve dress by women have been treated as an essential part of the Islamic religion. It follows a fortiori, Article 25(1) protects such prescription of the dress code."**

(see page 32 of the compilation of cases)

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[2] The relevant extracts can also be seen at page 9 #25 of the Writ Petition.

[3] see page 16 of the Writ Petition "the Holy Quran; translated by Abdulla Yusuf Ali.

11. The decision of the Ld. Single was affirmed by the Division Bench in **Central Board of Secondary Education v. Amnah Bint Basheer, 2016 SCC OnLine Ker 487**.

(***see pages 35-38 of a compilation of cases***)

12. In **M. Ajmal Khan v. Election Commission of India, 2006 SCC OnLine Mad 794** (***see pages 13-23 of the compilation of cases***) the Division Bench of the Hon'ble Madras High Court again reiterated that wearing of Headscarf is an essential religious practice. In para 15 of the judgment the Hon'ble High Court observed as under:

> "**15.** In 1992 Justice Eusoff of Malaysian High Court delivered a judgment ruling that the freedom of religion guaranteed under Article 11(1) of the Malaysian Constitution was not absolute as Article 11(5) did not authorise any act contrary to any *general* law relating to public order, public health or morality. The prohibition against wearing attire that covered the face did not affect the appellant's constitutional right to profess and practice her religion. This decision of the Malaysian High Court was confirmed by the Malaysian Supreme Court in 1994. It is, thus, seen from the reported material **that there is almost unanimity amongst Muslim scholars that purdah is not essential but covering of head by scarf is obligatory**."

(*emphasis and underlining supplied*)

(see pages 20-21 of the compilation of cases

13. It is thus submitted that there is overwhelming authority to show that wearing of a headscarf/hijab is a tenet of the Islamic faith and as such completely protected by Article 25(1)

14. In ***Bijoe Emmanuel v. State of Kerala,*** (1986) 3 SCC 615 (***see pages 75-92 of the compilation of cases)*** the Hon'ble Supreme Court while upholding the fundamental rights of children belonging to the Jehovah's witness which prohibited them from singing the National

Anthem quoted with approval the observations in Jamshed Ji v. Soonabai [(1909) 33 Bom 122 and observed as under:

> "If this is the belief of the community and it is proved undoubtedly to be the belief of the Zoroastrian community, — a secular Judge is bound to accept that belief — it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind."

> We do endorse the view suggested by Davar, J's observation **that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion**. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but subject, of course, to the inhibitions contained therein."

(see page 88 of the compilation of cases)

15. It is submitted that what is an essential religious practice has to be ascertained not from the view of an outsider but from the perspective of the believer as long as the belief is genuinely and consciously held as part of the practice of the religion.

16. It is thus submitted that the injunction to wear a headscarf or hijab is an essential feature of Islamic practice, being ordained by the Qur'an itself. While the 'essentiality test' that is commonly attributed to the Constitution Bench decision in **Sri Venkataramana Devaru V. State of Mysore,1958 SCR 895 (see page 1-14 of Compilation of Cases Vol-II)** is now itself under challenge before a 9-Judge Bench of the Hon'ble Supreme Court in **Kantaru Rajeevaru v Lawyers' Association (2020) 9 SCC 121 (see page 15-29 of Compilation of Cases Vol-II)** on the ground that a religious practice cannot be

subjected to scrutiny to evaluate its 'essentiality', the Islamic practice Indian Young of wearing the headscarf satisfies even the higher threshold of the essentiality test, being an injunction in the Qur'an itself, which is the direct word of Allah binding on all Muslims.

II. THE GO DATED 05.02.2022 IS COMPLETELY ILLEGAL AND SUFFERS FROM TOTAL NON-APPLICATION OF MIND.

17. It is submitted that GO dated 05.02.2022 (***see pages 20-22 of the Writ Petition)*** on **page 21** relies upon three decisions namely *(i)* **Fathima Thasneem v. State of Kerala, 2018 SCC OnLine Ker 5267, (ii) Fathema Hussain Sayed v. Bharat Education Society, AIR 2003 Bom 75 and (iii) Sir M. Venkata Subba Rao, Matriculation Higher Secondary School Staff Assn. v. Sir M. Venkata Subba Rao, Matriculation Higher Secondary School, (2004) 2 CTC 1** and holds in the penultimate paragraph that the aforesaid decisions hold that wearing of headscarf/hijab is not an essential religious practice for the purposes of Article 25.

18. It is respectfully submitted that bare perusal of the aforesaid decisions would show that none of these decisions considered the issue in hand and is totally irrelevant.

19. The decision in **Fathima Thasneem v. State of Kerala**, 2018 SCC **OnLine Ker 5267** (***see pages 39-41 of the compilation of cases***) which has been pressed into service by the GO at ***Sl No. 1 on page 21*** is a decision that was rendered in the context of Christian Minority Educational Institution. The same learned judge who authored the decision in **Amnah Bint Basheer v. Central Board of Secondary Education (CBSE), AIR 2016 Ker 115 (*see page 24-34 of the Compilation of cases*)** notes the said authority in para 4 and in para 5 the right of minority institution to establish, manage and administer institutions is noted and in that context, the Court observes in para 10 that in view of the minority rights granted to the institution under Article 30, the Court or any authority cannot insist on the right of the

institution to be diluted in any manner by permitting students to attend classes by wearing a dress which is not prescribed by the minority educational institution. Para 10 of the judgment reads as follows:

> **"**10. In such view of the matter, I am of the considered view that the petitioners cannot seek imposition of their individual right as against the larger right of the institution. It is for the institution to decide whether the petitioners can be permitted to attend the classes with the headscarf and full sleeve shirt. It is purely within the domain of the institution to decide on the same. The Court cannot even direct the institution to consider such a request. Therefore, the writ petition must fail. Accordingly, the writ petition is dismissed. If the petitioners approach the institution for Transfer Certificate, the school authority shall issue Transfer Certificate without making any remarks. No doubt, if the petitioners are willing to abide by the school dress code, they shall be permitted to continue in the same school. No costs."

(see page 41 of the compilation of cases)

20. The second judgment which is cited in the GO is **Fathema Hussain Sayed v. Bharat Education Society, AIR 2003 Bom 75**, (***see pages 1-3 of the compilation of cases***) the said decision does not all aid the respondent as the said decision was given in the context of the Muslim girls studying in an exclusively girls sections. In this regard Para 7 of the judgment read as follows:

> "7. A girl student not wearing the head scarf or head covering studying in exclusive girls section cannot be said to in any manner acting inconsistent with **the** aforesaid verse 31 or violating any injunction provided in Holy Quran. It is not an obligatory overt act enjoined by Muslim religion that a girl studying in all girl section must wear head-covering. The essence of Muslim religion or Islam cannot be said to have been interfered with by directing petitioner not to wear head-scarf in the school."

(see page 2-3 of the compilation of cases)

21. Thirdly, the decision in ***Sir M. Venkata Subba Rao, Matriculation Higher Secondary School Staff Assn. v. Sir M. Venkata Subba Rao, Matriculation Higher Secondary School***, (2004) 2 CTC 1 (***see page 4-12 of the compilation of cases***) which has also been relied on in GO is totally inapplicable as it related to prescription of uniforms to the teachers and there was no discussion whatsoever on either wearing Hijab or rights under Article 25 of the Constitution.

22. Thus, it is submitted that none of the decisions relied upon in the impugned GO at all support the case of the State Respondent. It is submitted that the decisions cannot be read as *euclid's theorem* and have to be interpreted and understood in the context of which they were rendered.

23. The entire edifice of the impugned GO rests on the aforesaid judicial decisions. Once it is established that said GOs do not at all deal with the issue in hand, the GO has no legs to stand on and must fail.

III. WEARING A HIJAB BY ITSELF CANNOT BE CONSTRUED AS AN ACT WHICH THREATENS PUBLIC ORDER

24. It is submitted that a student silently wearing a hijab/headscarf and attending class cannot in any manner be said to be a practice that disturbs 'public order'. The practice of wearing a headscarf by itself cannot be termed as a practice opposed to public order. The State cannot restrict the fundamental rights under Article 19 or Article 25(1) by merely raising a facile plea of 'public order'. There has to be a proximate relation between the action complained of and the imposition of restriction on the ground of public order. This is not a case where a religious practice involves a public gathering where dangerous weapons are paraded like in **Commr. of Police v. Acharya Jagadishwarananda Avadhuta, (2004) 12 SCC 770 (see page 30-67 of Compilation of Cases Vol-II)**. It is submitted that the simple practice of wearing a dress in accordance with once religious faith can

bever be ground to invoke public order especially in the context of wearing a headscarf/hijab by women practising the Islamic faith.

25. It is submitted that public order cannot be the magic incantation that the State can mechanically repeat every time a violation of fundamental rights is alleged. The ground of public order has to be justified on adequate material which material can be looked at by the Constitutional courts in the exercise of the power of judicial review to satisfy itself whether the purported grounds of public order is a mere cloak or a ruse for the State to trample upon the fundamental rights enshrined under the Constitution. Public order is not every breach of law and order. Public order is an aggravated form of disturbance that is much higher than a law and order issue. In **Commr. of Police v. C. Anita, (2004) 7 SCC 467 (see page 68-75 of Compilation of Cases Vol-II)** the Hon'ble Supreme Court in *para 10* described in jurisprudential terms the concepts of law and order, public order and security of the state as concepts which lie in different concentric circles. Para 10 of the judgment reads as follows:

> **"10.** "Public order", "law and order" and the "security of the State" fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect the order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State. (See *Kishori Mohan Bera* v. *State of W.B.* [(1972) 3 SCC 845 : 1973 SCC (Cri) 30] , *Pushkar Mukherjee* v. *State of W.B.* [(1969) 1 SCC 10 : (1969) 2

> SCR 635] , *Arun Ghosh* v. *State of W.B.* [(1970) 1 SCC 98 : 1970 SCC (Cri) 67 : (1970) 3 SCR 288] and *Nagendra Nath Mondal* v. *State of W.B.* [(1972) 1 SCC 498 : 1972 SCC (Cri) 227])"

(see page 73-74 of Compilation of Cases Vol-II)

IV. THE STATE IS DUTY-BOUND UNDER THE CONSTITUTIONAL SCHEME TO CREATE A POSITIVE ENVIRONMENT FOR THE EXERCISE OF FUNDAMENTAL RIGHTS.

26. It is submitted that the rights enshrined under Art 25(1) of the Constitution cannot be lightly curbed by merely facile ground of '*public order*'. The State is under a positive obligation to create an environment conducive for the exercise of fundamental rights. In **Union of India v. K.M. Shankarappa, (2001) 1 SCC 582 (see page 76-80 of Compilation of Cases Vol-II)**in para 8 the Hon'ble Supreme Court observed as follows:

> "**8.** We fail to understand the apprehension expressed by the learned counsel that there may be a law and order situation. Once an expert body has considered the impact of the film on the public and has cleared the film, **<u>it is no excuse to say that there may be a law and order situation. It is for the State Government concerned to see that law and order is maintained</u>**. In any democratic society there are bound to be divergent views. Merely because a small section of the society has a different view, from that as taken by the Tribunal, and choose to express their views by unlawful means would be no ground for the executive to review or revise a decision of the Tribunal. In such a case, the clear duty of the Government is to ensure that law and order is maintained by taking appropriate actions against persons who choose to breach the law."

(emphasis and underlining supplied)

(see page 79-80 of Compilation of Cases Vol-II)

27. In **Gulam Abbas v. State of U.P.**, **(1982) 1 SCC 71 (see page 81-126 of Compilation of Cases Vol-II)** the Hon'ble Supreme Court in ***para 33*** held that the legal rights of the communities cannot be curtailed or prohibited on the facile ground of imminent danger to public peace

and tranquillity the authorities have to make a positive approach to ensure the due exercise of such rights. In para 33, the Hon'ble Supreme Court held as under:

> **"33.** The instant case, as we have held above, is one where the entitlement of the Shias to their customary rights to perform their religious ceremonies and functions on the plots and structures in question has been established and is the subject-matter *of* a judicial pronouncement and decree of civil court of competent jurisdiction as also by reason of these properties having been registered as Shia Wakfs for performance of their religious ceremonies and functions **and their complaint has been that the power under Section 144 is being exercised in utter disregard of the lawful exercise of their legal rights and every time instead of exercising the power in aid of their rights it is being exercised in suppressing their rights under the pretext of imminent danger to peace and tranquillity of the locality. Having elaborated the principles which should guide the exercise of that power we hope and trust that in future that power will be exercised by the executive magistracy in defence of such established rights of the petitioners and the Shia community and instead of prohibiting or suspending the exercise of such rights on concerned occasions on the facile ground of imminent danger to public peace and tranquillity of the locality the authorities would make a positive approach** to the situation and follow the dictum of Turner, C.J. that if they are satisfied that the exercise of the rights is likely to create a riot or breach of peace it would be their duty to take from those from whom disturbance is apprehended security to keep the peace. After all the customary rights claimed by the petitioners partake of the character of the fundamental rights guaranteed under Articles 25 and 26 of the Constitution to the religious denomination of Shia Muslims of Varanasi, a religious minority, who are desirous of freely practising their religious faith and perform their rites, practices, observances and functions without let or hindrance by members belonging to the majority sect of the community, namely, Sunni Muslims, and as such a positive approach is called for on the part of the local authorities...... ."

(see page 123-124 of Compilation of Cases Vol-II)

28. In **Indibily Creative (P) Ltd. v. State of W.B., (2020) 12 SCC 436 (see page 127-157 of Compilation of Cases Vol-II)** the Hon'ble Supreme Court beautifully elucidated this concept of 'duty' on the part of the State to ensure the prevalence of conditions in which of fundamental freedoms can be exercised. In this regard Para 50 of the judgment reads as follows:

> "**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."

(emphasis and underlining supplied)

(see page 156-157 of Compilation of Cases Vol-II)

29. In American jurisprudence, this aspect is referred to as *heckler's veto* and it occurs when the government accepts restrictions on speech because of the anticipated or actual reactions of opponents of the speech.

30. In ***Terminiello v. Chicago 337 U.S. 1 (1949)***, **(see page 403-419 of Compilation of Cases Vol-II)** a riot took place outside an auditorium before, during, and after a controversial speech by a priest. The priest was charged with violating an ordinance forbidding any "breach of peace", with the Trial Court holding that any misbehaviour which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" violates the ordinance Justice William O. Douglas, writing for a 5-4 majority, held unconstitutional the priest's conviction for causing a breach of the peace, noting famously,

> "Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra, pp. 315 U. S. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See Bridges v. California, 314 U. S. 252, 314 U. S.262; Craig v. Harney, 331 U. S. 367, 331 U. S. 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

(see page 404 of Compilation of Cases Vol-II)

31. Protection against the heckler's veto was afforded by the US Supreme Court in **Brown v. Louisiana, 383 U.S. 131 (1966) (see page 420-437 of Compilation of Cases Vol-II)**, where the right of African-Americans to peacefully protest against segregation in a library was protected. Holding that their expression did not violate Louisiana's breach of peace statute, the Court noted:

> "This is the fourth time in little more than four years that this Court has reviewed convictions by the Louisiana courts for alleged violations, in a civil rights context, of that State's breach of the peace statute. In the three preceding cases, the convictions were reversed. Garner v. Louisiana, 368 U. S. 157, decided in December, 1961, involved sit-ins by Negroes at lunch counters catering only to whites. Taylor v. Louisiana, 370 U. S. 154,decided in June, 1962, concerned a sit-in by Negroes in a waiting room at a bus depot, reserved "for whites only." Cox v. Louisiana, 379 U. S. 536, decided in January, 1965, involved the leader of some 2,000 Negroes who demonstrated in the vicinity of a courthouse and jail to protest the arrest of fellow demonstrators. **In each of these cases, the demonstration was orderly. In each, the purpose of the participants was to protest the denial to Negroes of rights guaranteed them by state and federal constitutions and to petition their governments for redress of grievances. In none was there evidence that the participants planned or intended disorder. In none were there circumstances which might have led to a breach of the peace chargeable to the protesting participants**."

(see page 420 of Compilation of Cases Vol-II)

Further clarifying the point in a footnote, the concept of heckler's veto was recognized, thus

> "**Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence**. See Cox v. Louisiana, supra, at 379 U. S. 551-552; Wright v. Georgia, 373 U. S. 284; cf.

> Terminiello v. Chicago, 337 U. S. 1. Compare Feiner v. New York, 340 U. S. 315, where one speaker was haranguing 75 or 80 "restless" listeners; Chaplinsky v. New Hampshire, 315 U. S. 568 ("fighting words"); cf. Niemotko v. Maryland, 340 U. S. 268, 340 U. S. 289 (concurring opinion of Frankfurter, J.). See **generally, on the problem of the "heckler's veto," Kalven, The Negro and the First Amendment, pp. 140-160 (1965).”**

(see page 434 of Compilation of Cases Vol-II)

32. The most apposite case in the present circumstance is ***Tinker v. Des Moines, 393 U.S. 503*** (**1969**) **(see page 438-449 of Compilation of Cases Vol-II)** where it was held that fear of a disturbance in school was not an adequate reason for school principals to forbid pupils from wearing black armbands, as a symbol of their opposition to the war in Vietnam. Pertinently,

> “**But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.**”

(see page 440 of Compilation of Cases Vol-II)

33. In general, the core concern with the heckler’s veto is that allowing the suppression of speech because of the discontent of the opponents provides the perverse incentive for opponents to threaten violence rather than to meet ideas with more speech. Thus the US Supreme Court has tended to protect the rights of speakers against such

opposition in these cases, effectively finding hecklers' vetoes inconsistent with the First Amendment.

34. It is submitted that the Hon'ble Supreme Court has in effect affirmed the heckler's veto doctrine in **K.M. Shankarappa (supra)**, **Lilawati (supra) and Indibily Creative (P) Ltd.** Also, see ***Lakshmi Ganesh Films & Ors. v. Government of AP & Ors, 2006 (4) ALD 374 (AP HC)***,

V. SECULARISM IN THE INDIAN CONTEXT HAS BEEN INTERPRETED TO HAVE A POSITIVE ASPECT.

35. It is well settled that secularism is the basic feature of the Constitution. Secularism in the Indian context has been interpreted by the Hon'ble Supreme Court positively and not in a negative sense. The Hon'ble Supreme Court has held that India's secular ethos is not based on the non-recognition of religions, but that secularism mandates the State to respect all religions as true and protect the practice of such religion as per the tenets of the Constitution.

36. The Indian interpretation of secularism stems from the Vedic percept of "*Sarva Dharma Sama Bhava*". In this regard attention of this Hon'ble Court is invited to **Aruna Roy v. Union of India, (2002) 7 SCC 368 (see page 158-204 of Compilation of Cases Vol-II**) where the Hon'ble Supreme in para 86 held as follows:

> **"86.** The word "secularism" used in the preamble of the Constitution is reflected in the provisions contained in Articles 25 to 30 and Part IV-A added to the Constitution containing Article 51-A prescribing fundamental duties of the citizens. It has to be understood on the basis of more than 50 years' experience of the working of the Constitution. The complete neutrality towards religion and apathy for all kinds of religious teachings in institutions of the State have not helped in removing mutual misunderstanding and intolerance *inter se* between sections of the people of different religions, faiths and beliefs. "Secularism", **therefore, is susceptible to a positive meaning that**

is developing understanding and respect towards different religions. The essence of secularism is non-discrimination of people by the State on the basis of religious differences. "Secularism" can be practised by adopting a complete neutral approach towards religions or by a positive approach by making one section of religious people to understand and respect the religion and faith of another section of people. Based on such mutual understanding and respect for each other's religious faith, mutual distrust and intolerance can gradually be eliminated."

(see page 196 of Compilation of Cases Vol-II)

VI. FREEDOM OF APPEARANCE IS ALSO PART AND PARCEL OF ARTICLE 19(1)(A)

37. It is respectfully submitted that the right to wear the headscarf/hijab is also protected by Article 19(1)(a) of the Constitution. the right to wear the clothes of once choice is an integral part of the freedom of Appearance which is a part and parcel of Article 19(1)(a). In this context attention of this Hon'ble Court is invited to para 69 of **National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (see page 93-164 of Compilation of Cases)** which reads under:

"Article 19(1)(a) and Transgenders

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."

(see page 144 of Compilation of Cases)

VII. Freedom of apparel and appearance is also a part of Article 21

38. It is respectfully submitted that the right to wear a headscarf/hijab also draws sustenance from the fundamental rights under Article 21. In ***K.S. Puttaswamy (Privacy-9J.) v. Union of India***, (2017) 10 SCC 1 the Hon'ble Supreme Court in para 373 observed as follows:

> ***373.*** Concerns of privacy arise when the State seeks to intrude into the body of subjects. [*Skinner* v. *Oklahoma*, 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942)"*20.* There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority defines as crimes." (SCC OnLine US SC para 20)—Jackson, J.] Corporeal punishments were not unknown to India, their abolition is of a recent vintage. Forced feeding of certain persons by the State raises concerns of privacy. An individual's rights to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of the right to privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there is a huge debate on those issues though it is still a grey area. [For the legal debate in this area in US, See Chapter 15.11 of *American Constitutional Law* by Laurence H. Tribe, 2nd Edn.] A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy. Similarly, the freedom to choose either to work or not and the freedom to choose the nature of the work are areas of private decision-making process. The right to travel freely within the country or go abroad is an area falling within the right to privacy. The text of our Constitution recognised the freedom to travel throughout the country under Article 19(1)(*d*). This Court has already recognised that such a right takes within its sweep the right to travel abroad. [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] A person's freedom to choose the place of his residence once again is a part of his right to privacy [*Williams* v. *Fears*, 1900 SCC OnLine US SC 211: 45 L Ed 186: 179 US 270 (1900)—"*8.* Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of

> personal liberty….” (SCC OnLine US SC para 8)] recognised by the Constitution of India under Article 19(1)(*e*) though the predominant purpose of enumerating the abovementioned two freedoms in Article 19(1) is to disable both the federal and State Governments from creating barriers which are incompatible with the federal nature of our country and its Constitution. 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. Informational traces are also an area which is the subject-matter of huge debate in various jurisdictions falling within the realm of the right to privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tappings and internet hacking by State, of personal data is another area which falls within the realm of privacy. The instant reference arises out of such an attempt by the Union of India to collect biometric data regarding all the residents of this country. The abovementioned are some of the areas where some interest of privacy exists. The examples given above indicate to some extent the nature and scope of the right to privacy.

VIII. VIOLATION OF RIGHTS OF THE PETITIONERS UNDER ARTICLE 29

39. Without prejudice to the contentions above, the Muslim Community, in addition to being a religious group, are also a distinct cultural minority entitled to protection under Article 29(1) of the Constitution. Under Article 29(1), any section of the citizens residing in the territory of India having a distinct language, script or culture of its own shall have the right to conserve the same. The right under Article 29(1) was explained by a bench of eleven Judges of the Hon'ble Supreme Court in ***T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481, para 89** as the right of any section of citizens having a distinct language, script or culture, whether they are part of a majority or minority religion, to conserve the same. The Court dissociated the

right under Article 29(1) from religion and held that any class of citizens who practiced a distinct culture would be entitled to the protection of their right to conserve the same. That is not to say that a religious group cannot also be a cultural class entitled to protection under Article 29. The Hon'ble Supreme Court has in several decisions extended the protection of Article 29 to religious minorities including to Christians in ***Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717 (see page 205-341 of Compilation of Cases Vol-II)** and to Arya Samaj is as a religious minority having a distinct script in ***DAV College* v. *State of Punjab*, (1971) 2 SCC 269 (see page 342-361 of Compilation of Cases Vol-II)**. Thus, even without going into the question of whether the hijab is part of 'essential religious practices' of Muslims, the right of the Petitioners as part of a section of citizens who have observed the wearing of a hijab or headscarf as a cultural practice will be protected under Article 29(1) of the Constitution.

40. Thus, the Muslim community in India, being a group having a distinct culture, has a right to preservation of their cultural practices even outside of their rights under Articles 25 and 26. It may be noted in this context that the right in Article 29 is not subject to the same restrictions as the right under Article 25.

41. Justice Bobde, as he then was, in ***Puttaswamy I*, (2017) 10 SCC 1**, held that the right to privacy also went hand in hand with the right of a group with a distinct cultural identity to preserve the same. He observed:

> "**414.** The right to privacy is also integral to the cultural and educational rights whereby a group having a distinct language, script or culture shall have the right to conserve the same. It has also always been an integral part of the right to own property and has been treated as such in civil law as well as in criminal law vide all the offences and torts of trespass known to law."

42. While examining this issue, the Court must bear in mind the words of caution expressed by Justice Stone in *Minersville School District* v. *Gobitis*, 84 Law Ed 1375: 310 US 586 (1940) where he 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 directed, as they are now, at politically helpless minorities."

43. Further, Article 29(2) provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only, inter alia, of religion. If Muslim girls who observe the wearing of the hijab as an inseparable part of their religion are denied admission into an educational institution maintained by the State on account of this practice linked to their religion, such denial will be struck by Article 29(2) and will be unconstitutional.

IX. THE SEGREGATION OF STUDENTS ON RELIGIOUS LINES VIOLATES ARTICLES 14,19 AND 21 OF THE CONSTITUTION

44. It is submitted that by way of an affidavit it has been brought to the attention of this Hon'ble Court that on 07.02.2022 the Muslim girl students wearing headscarf/hijab were permitted inside the school but were segregated and were made to sit in a separate class/hall. It is submitted that such segregation is a complete affront to the right to equality enshrined under Article 14 of the Constitution and amounts to religious apartheid.

45. It is submitted that segregation on religious line is total anthesis of rule of law under Article 14 and may be dealt with an iron hand by this Hon'ble Court.

46. The Hon'ble Supreme Court has time and again in numerous judgements invoked the principles laid down in **Oliver Brown, et al.**

v. Board of Education of Topeka, et al., 347 US 483 (see page 450-455 of Compilation of Cases Vol-II) and applied them to India.

47. The decision in *Brown* was a unanimous 9-0 verdict with the opinion of the Court authored by Chief Justice Earl Warren, concurred by all learned judges. The Court held that racial segregation of schools is ultra vires the Equal Protection Clause of the 14th Amendment to the US Constitution. The decision was supplemented in *Brown II* [349 U.S. 294] – which ordered de-segregation "*with all deliberate speed*'. The following observations of the Court are noteworthy:

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities?' We believe that it does." —Brown, at p. 493.

(see page 452 of Compilation of Cases Vol-II)

> "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone." —Brown, at p. 494.

(see page 452 of Compilation of Cases Vol-II)

> "We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."— Brown, at p. 495.

(see page 453 of Compilation of Cases Vol-II)

48. Justice Jeevan Reddy in his majority opinion in **Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217** relied on *Brown v. Board* to

uphold the concept positive racial discrimination. The following paragraphs are apposite:

> *"Decisions of US Supreme Court*
>
> **715.** At this stage, it would be interesting to notice the development of law on the subject in the USA. The problem of blacks (Negroes) — holds a parallel to the problem of Scheduled Castes, Scheduled Tribes and Backward Classes in India, with this difference that in USA the problem is just about 200 years' old and far less complex. Blacks were held not entitled to be treated as citizens. They were the lawful property of their masters (*Dred Scott* v. *Sandford* [15 L Ed 691 : 16 US (19 How) 393 (1857)]). In spite of the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment guaranteeing equality, it persisted in South and Mid-West for several decades. All challenges to slavery and apartheid failed in courts. World War II and its aftermath, however, brought about a radical change in this situation, the culmination of which was the celebrated decisions in *Brown* v. *Board of Education* [347 US 483 : 48 L Ed 2d 873 (1954)] and *Bolling* v. *Sharpe* [347 US 497 : 98 L Ed 884] , overruling the 'separate but equal' doctrine evolved in *Plessy* v. *Ferguson* [163 US 537 (1896) : 41 L Ed 256] . In quick succession followed several decisions which effectively outlawed all discrimination against blacks in all walks of life. But the ground realities remained. Socially, educationally and economically, blacks remained a backward community. Centuries of discrimination, deprivation and degradation had left their mark. They were still unable to compete with their white counterparts. Similar was the case of other minorities like Indians and Hispanics. It was not a mere case of economics. It was really a case of 'persisting effects of past discrimination'. The Congress, the State universities and other organs of the State took note of these lingering effects and the consequent disadvantage suffered by them. They set out to initiate measures to ameliorate them. That was the command of the Fourteenth Amendment. Not unnaturally, these measures were challenged in Courts with varying results. The four decisions examined hereinafter, rendered during the period 1974-1990 mirror the conflict and disclose the judicial thinking in that country."

…

> "**733.** At this stage, we wish to clarify one particular aspect. Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under clause (1) of Article 16, appointments and/or posts can be reserved in favour of a class. But an argument is now being advanced — evidently inspired by the opinion of Powell, J in *Bakke* [57 L Ed 2d 750 : 438 US 265 (1978)] that Article 16(1) permits only preferences but not reservations. The reasoning in support of the said argument is the same as was put forward by Powell, J. This argument, in our opinion, disregards the fact that that is not the unanimous view of the court in *Bakke* [57 L Ed 2d 750 : 438 US 265 (1978)] . Four Judges including Brennan, J took the view that such a reservation was not barred by the Fourteenth Amendment while the other four (including Warren Burger, CJ) took the view that the Fourteenth Amendment and Title VI of the Civil Rights Act, 1964 bars all race-conscious programmes. At the same time, there are a series of decisions relating to school desegregation — from *Brown* [347 US 483 : 48 L Ed 2d 873 (1954)] to *North Carolina Board of Education* v. *Swann* [28 L Ed 2d 586 : 402 US 43 (1970)] — where the court has been consistently taking the view that if race be the basis of discrimination, race can equally form the basis of remedial action. The shift in approach indicated by *Metro Broadcasting Inc.* [58 IW 5053 (decided on June 27, 1990)] is equally significant. The 'lingering effects' (of past discrimination) theory as well as the standard of strictest scrutiny of race-conscious programmes have both been abandoned. Suffice it to note that no single uniform pattern of thought can be discerned from these decisions. Ideas appear to be still in the process of evolution."

49. In **State of Karnataka v. Appa Balu Ingale, 1995 Supp (4) SCC 469 (see page 362-380 of Compilation of Cases Vol-II)**, which was a criminal case under the Protection of Civil Rights Act, 1955, the Hon'ble Supreme Court while reversing the acquittal of upper caste persons accused of restraining a harijan man from taking water from a new well, relied on *Brown* v. *Board* and held:

> "**29.** It is worth bearing in mind a stark lesson that the doctrine of "separate but equal" profounded in *Plassey* v. *Ferguson* [41 L Ed 356 : 163 US 537 (1896)] depleted the glorious contents of 14th Amendment to integrate the Negroes into the mainstream of American Society till it was buried fathoms deep in *Oliver Brown* v. *Board of Education of Topeka* [98 L Ed 873 : 347 US 483 (1954)]."

(see page 376-377 of Compilation of Cases Vol-II)

> "**35.** The judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. This Court as the vehicle of transforming the nation's life should respond to the nation's needs and interpret the law with pragmatism to further public welfare to make the constitutional animations a reality. Common sense has always served in the court's ceaseless striving as a voice of reason to maintain the blend of change and continuity of order which is sine qua non for stability in the process of change in a parliamentary democracy. In interpreting the Act, the judge should be cognizant to and always keep at the back of his/her mind the constitutional goals and the purpose of the Act and interpret the provisions of the Act in the light thus shed to annihilate untouchability; to accord to the Dalits and the Tribes right to equality; give social integration a fruition and make fraternity a reality."

(see page 379 of Compilation of Cases Vol-II)

50. Thereafter, in several decisions the Hon'ble Supreme Court has time and again invoked the doctrine laid down in *Brown* v. *Board*. The observations in ***Ashoka Kumar Thakur (8)* v. *Union of India*, (2007) 4 SCC 361 (see page 381-399 of Compilation of Cases Vol-II)** may be noted by way of illustration:

> "**27.** The "separate but equal doctrine" was sanctified by the decision of the US Supreme Court in *Homer Adolph Plessy* v. *John H. Ferguson* [(1896) 163 US 537 : 41 L Ed 256] . But the formal equality was established in US after the decision in *Brown* v. *Board of Education* [(1954) 347 US 483 : 48 L Ed 873] and the

Civil Rights Act, 1964. It is to be noted that in both the United States and South Africa, the past discrimination was along racial lines.

28. This Court has in several instances focused on the question as to whether Articles 15(4) and 16(4) are a facet of equality or a derogation from it.

29. Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities. Where, therefore, there is inequality in fact, legal equality always tends to accentuate it. [See *Pradeep Jain (Dr.)* v. *Union of India* [(1984) 3 SCC 654] .]"

(see page 396 of Compilation of Cases Vol-II)

51. The view of the Hon'ble Supreme Court in relation to Article 14 has consistently been that absolute equality between unequal's results in a violation of Article 14 as inequality often demands differential treatment. The observations of Justice K.K. Mathews in **Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717 (see page 205-341 of Compilation of Cases Vol-II)** sum up the position on this question without further need to multiply authorities:

"132. The problem of the minorities is not really a problem of the establishment of equality because if taken literally, such equality would mean absolute identical treatment of both the minorities and the majorities. This would result only in equality in law but inequality in fact. The distinction need not be elaborated for it is obvious that "equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations." [The Advisory opinion on Minority Schools in Albania, 6th April, 1935 publications of the Court, series A/B No. 64, p. 19]"

(see page 286-287 of Compilation of Cases Vol-II)

THE STATE HAS NO JURISDICTION TO ISSUE THE IMPUGNED GO UNDER THE PROVISIONS OF THE KARNATAKA EDUCATION ACT, 1983.

52. It is respectfully submitted that the impugned GO which has been purportedly issued under the provisions of Section 7 read with Section 133 of the Karnataka Education Act, 1983 is totally illegal in as much as the Act does not at all empower the State under the provisions of this Act to regulate the dress of the Students. The attention of this Hon'ble Court is invited to Section 7 (1) which reads as follows:

> **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,-
>
> (a) the curricula, syllabi and text books for any course of instruction;
> (b) the duration of such course;
> (c) the medium of instruction;
> (d) the scheme of examinations and evaluation;
> (e) the number of working days and working hours in an academic year;
> (f) the rates at which tuition and other fees, building fund or other amount, by whatever name called, may be charged from students or on behalf of students;
> (g) the staff pattern (teaching and non-teaching) and the educational and other qualifications for different posts;
> (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

53. It is submitted that bare reading of ***(a) to (h)*** clearly shows that the GO is not covered under any of the provisions above. It is submitted that the power to specify curricula/syllabi cannot by any stretch of imagination include the right to circumscribe the choice of dress of students belonging to a particular faith. It is further submitted that ground ***(i)*** which states that such other matters as are considered necessary has to be read *ejusdem generis* to ***(a) to (h)*** and cannot be said to independent source of power.

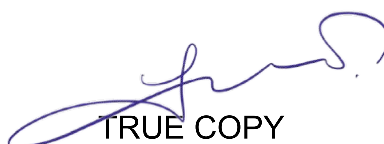
54. Further Section 133 (2) of the Act only enables the State to give directions necessary and expedient for carrying out the purposes of the Act or to give effect to any of the provisions contained in the Act.

55. It is submitted that no provision in the Act permits the State to regulate the dress of students in Government colleges and prohibits the wearing of hijab/headscarf.

56. Furthermore, it is respectfully submitted that no notice has been given under 133(2) as is said to be mandated by this Hon'ble Court in ***para 5*** of **Condominium of Residents and Employees of Academy of General Education v. State of Karnataka, *ILR 2001 Kar 5677.*** **(see page 400-402 of Compilation of Cases Vol-II)**

57. It is thus submitted that looked at from any angle the impugned GO cannot pass the constitutional muster and deserves to be struck down.

Date: 10.02.2022



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ANNEXURE P-7

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IN THE HON'BLE HIGH COURT OF KARNATAKA
AT BENGALURU

(Original Jurisdiction)

W.P. NO. 2146 /2022 (GM-EDI)

BETWEEN:

ANESHA HAJEERA ALMAS & ORS. …PETITIONERS

AND

CHIEF SECRETARY
PRIMARY AND HIGHER EDUCATION & ORS. …RESPONDENTS

STATEMENT OF OBJECTIONS FILED BY RESPONDENTS NO, 5 AND 6\

That Respondents No. 5 and 6 herein filed the following Statement of Objections to the Writ Petition as follows:

1. At the outset the allegations made against Respondents No. 5 and 6 are false and baseless.

2. It is submitted that the Petitioners are students of the Government P.U. Girls College, Udupi. The college is a Girls' college meant exclusively for girls and there are about 599 students in the college/

3. At the outset, it is submitted that the petition is not maintainable either under law or on facts and is liable to be dismissed at the threshold.

The Prayer 1 seeking for mandamus and an enquiry against the Respondents 5 and 6 for violating instruction enumerated under Chapter 6 of the Guidelines of PU Department for the academic year of 2021-22 is untenable as it is seeking enforcement of certain GUIDELINES which do not have the force of law. The authority to issue the GUIDELINES does not flow from the ACT or RULES and the same cannot be enforced in a writ petition under article 226 of the Constitution of India,

4. The Prayer 2 seeking for writ of mandamus to Respondent No. 3 to conduct enquiry against Respondents 6 to 14 for their hostile approach towards the Petitioners is misconceived as it not preceded by a demand, which is mandatory before approaching the court for mandamus. There is also no foundation for the false allegations in the petitioner against respondents 6 to 14 which calls for any enquiry.

5. The Prayer 3 seeking for a writ of quo warranto against Respondents 15 to 16 under which authority and law they are interfering in the administration of Respondent No. 5 School is untenable. The writ of QUO WARRANTO does not lie against individuals who are acting in accordance with law.

6. The Prayer No. 4 seeking for a declaration of status quo referred in the letter dated 25.01.2022 at Annexure H is with the consonance with the Department Guidelines for the Academic Year 2021-22, is misconceived as the issue relating to uniform has been regulated by the state and the guidelines have no force of law.

7. It is submitted that the girl students or the Petitioners were not in the habit of wearing hijab previously. However, occasionally some parents of the Muslim girls used to enquire whether the wearing of hijab

is permitted during the college study hours. Further, the parents of Muslim girls requesting for wearing of Hijab would request the principal and the teachers to ensure that their daughters are not involved in singing, dancing, music, and other extracurricular activities. In fact, some of the parent would say that Muslim girls are required to wear hijab of the purpose of constantly and continuously remaining them that they are not supposed to move freely with other girls and avoid the company of boys. Hijab is not just a scarf but is a garment that constantly and continuously reminds the Muslim girls of the restrictions placed on them. It would contradiction in terms to give education that preaches liberty and equality and permit the wearing of hijab which clearly communicates that the Muslim girls are not equal to the other girls or boys. This in fact would lead to an inferiority complex among the girl students who would be wearing the hijab. Further, wearing of hijab would give rise to a situation where the Muslim girls would be isolated and segregated automatically from the other students. Further, since hijab would be a constant and continuous reminder of the restrictions placed on the girl students, they would not be allowed to participate in any activities like music, singing, dancing, sports, and other extracurricular activities. This in turn would result in even the teachers not selecting candidates wearing hijab for various competitions and this would, in fact, result in the Muslim girls being ignored and not getting exposed to education for the overall development and growth of the Muslim girl child.

8. It is further submitted that Petitioners have chosen to enroll in an educational institution for secular education and not for practicing their religion. The right to practice their religion is not interfered with by framing regulations governing all students uniformly. A small section of

students, having been instigated by radical elements in the minority community are raising issue based on religion. Te practice of religion does not mean that overt expression of one's faith in educational institutions has a deleterious effect of all students. There are many students who do not want to be seen as belonging to any particular religion which is their right in a secular state. Students belonging to another religion feel uncomfortable when such external exhibition of one religion is permitted. The wearing of head covering is not universal among Muslims. Many do not consider it an essential part of Islam and do not advocate it universally. Only in totalitarian states and some Islamic states like Saudi Arabia such mandatory prescription is seen in the world. Even in some Muslim countries like Turkey, Courts have ruled that head covering is not essential in Islam and a ban on the same is lawful and does not violate the freedom of religion. Many other western countries which profess secularism like France, have also restricted head gear in schools and public places which have been held to not violate religious freedom. Such restriction has been held to not violate any international convention. Such restriction on teachers has also been upheld in many jurisdictions. The Respondents herein have always acted in the best interest of all the girls studying in the school and college without distinguishing or differentiating them on the basis of religion, caste, creed, etc., Uniforms and dress code have been felt necessary for promoting discipline among students apart from promoting feelings of equality and fraternity among all students.

9. It is submitted that in the last week of December 2021, when the Petitioners along with a few other Muslim girls approached seeking for wearing hijab during college hours, their parents were asked to meet the school authorities claiming to be the parents of the Petitioners and other

Muslim girls insisting on wearing hijab. The principal and other authorities convinced them to not insist on wearing hijab during college hours. However, on 30.12.2021, some persons from the Campus Front of India (CFI) approached the college authorities and insisted on permitting hijab in college and when refused, the students and the persons with them started to behave rashly and started protesting and then the Muslim girl students refused to attend classes without wearing hijab. After that, the CFI has been co-ordinating protests and processions. It is pertinent to note that the parental rights of supervision are delegated to the school and teachers when the child is entrusted to school. Regulation of uniform is one of the aspects which can be enforced by the school and teachers. This has nothing to do with practicing one's religion.

10. It is submitted that Article 25 of the Constitution of India is not an absolute and must give way to public order and "other provisions of part III of the constitution", the right to freedom under Art. 25 must be read in consonance with the freedom guaranteed to other citizens and children, to be educated in a free and fair environment without being subjected to overt religious symbols and practices, which make them uncomfortable and leads to a permanent distinction in their young minds about ones religious orientation. It is well established that religious symbols in schools evoke unfavourable feelings among large sections of the society and children.

11. The allegations made against the Respondents herein are false and baseless and the Petitioners are put to strict proof of the same. The allegations made in the Writ Petition at paragraph 5 stating "the Respondents No. 6, 7, and 13 insisted the Petitioner students to remove the headscarf by shaming them due to their conduct and invoking their

religious identity." Is, hereby vehemently denied as false and baseless. It is submitted that the Petitioners were previously not wearing headscarves and all of a sudden, the Petitioners started wearing the same and the action of the Petitioners is clearly an instigation by some organization outside the college.

12. It is submitted that the uniform worn by the students in the college has been prescribed since a very long time and the same has been continued from time to time by passing resolutions. Resolutions by the College Development Committee (CDC) in this regard for the continuation of the uniform was passed in 2004, 2006, and 2018. Copies of the minutes/resolutions dated 06.07.2004, 23.06.2018, 31.07.2018 and 25.01.2022 are herewith furnished as ANNEXURES R1 , R2, R3,AND R4.

13. The allegation made in paragraph 7 of the writ petition that the Respondents 6 and 7 told the Petitioners that the Petitioner's parents had signed a consent letter during the time of admission which stated that their wards shouldn't wear a headscarf is hereby denied as false and baseless.

14. The allegation made in paragraph 8 of the writ petition that Respondents 5 and 7 used to scold and threaten the Petitioners by marking them absent and not rewarding them internal marks is denied as false and baseless.

15. The allegations made in paragraph 10 stating "since September 2021, the Petitioners faced discrimination in their class and whenever Respondent Nos. 5 to 12 takes their classes, remove Petitioners from the class and mark them absent and made them stand outside the class as

punishment and it is still continuing today" is stoutly denied as false and baseless.

16. The allegation made in paragraph 11 stating that in the month of December the parents of the Petitioners went to speak to Respondent No. 6 and Respondent No. 6 sent them away telling them to discuss the issue after the exams, is denied as false and baseless.

17. The allegation made in paragraph 11 that Respondent No. 6 candidly accepted that there is no specific condition regarding headscarf and it is common form regarding maintaining school rules and discipline is denied as false and baseless.

18. The allegation made in paragraph 12 that the class teacher wouldn't allow the Petitioner students to attend the class and would instead send them to get permission from the principal i.e., Respondent No. 6 through their parents, and would compel them to wait all day without meeting, is vehemently denied as false and baseless.

19. The allegation made in paragraph 13 that Respondent No. 3 immediately called Respondent No. 6 and scolded him for not allowing Petitioners to attend the class and directed him to allow the students immediately is denied as false and baseless.

20. The allegation made in paragraph 14 that "Respondent No. 6 called a meeting of the so-called college development committee which has no legal sanctity and illegal composition of political entities to interfere in the management and functioning of the colleges and percolate their political agenda, Respondent No. 15 and 16 are the self-claimed chairman and vice-chairman in this illegal CDC. In this meeting

Respondent No. 15 declared the Petitioners will not wear a headscarf. It they continue then other students will wear muffler/saffron shawl to counter them and blend the entire issue into communal colour” is vehemently denied as false and purely baseless.

21. The allegation made in paragraph 15 that Respondent NO. 6 called the local media at the instance of Respondent No. 16 is stoutly denied as false and baseless.

22.. The allegation made in paragraph 16 which states “on 14.01.2021 Petitioners No. 4, 5, and 6 went to college and Respondent No. 6 has called them in the chamber and scolded them for conducting protest in front of the college gate and making a media issue and subsequently he called Respondent No. 7 to 11 in his chamber to write an apology letter, these Respondents threaten Petitioners No. 4 to 6 with their gestures and gave a blank paper in their hands to forcefully write an apology, when they refused they called Respondent No. 13 as well, who manhandled them physically and threaten them to spoil their education completely” is hereby vehemently denied as false and completely baseless. The Petitioners have made statements to suit their convenience for the purpose of filing the writ petition.

Wherefore, it is prayed that this Hon’ble Court may be pleased to dismiss the petition, in the interest of justice and equity.

Sd/-
Advocate for Respondents 5 and 6
Bengaluru
Dt: 19.02.2022

Sd/-
Respondent No. 6

TRUE TYPED COPY

ANNEXURE P-8

IN THE HON'BLE HIGH COURT OF KARNATAKA

AT BENGALURU

W.P. NO. 2880 /2022

IN THE MATTER OF:

MISS AISHAT SHIFA & ANR. …PETITIONERS

AND

STATE OF KARNATAKA & ORS. …RESPONDENTS

SUPPLEMENTARY WRITTEN SUBMISSIONS OF SHRI. DEVADATT KAMAT, SNR. ADV. ON BEHALF OF THE PETITIONERS

1. The present supplementary written submissions are being filed pursuant to the liberty granted by this Hon'ble Court upon the conclusion of the Petitioner's oral rejoinder submissions on 24.02.2022. For the convenience of this Hon'ble Court the written submissions are being divided under the following heads:

SL. NO.	SUB HEADING	PARA NOS.
A.	THE FACTUM OF THE PETITIONERS WEARING HEADSCARF SINCE THEIR ADMISSION IS NOT DISPUTED	2
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THE FACTUM OF THE PETITIONERS WEARING HEADSCARF SINCE THEIR ADMISSION IS NOT DISPUTED

2. At the very outset, it is submitted that the Petitioners categorical assertion that they have been wearing their headscarf without any obstruction since taking admission in the college has not been disputed by any of the Respondents. It is also the case of the Petitioners that the Respondent college had only stopped the Petitioner's from wearing their headscarf post the G.O dated 05.02.2022. Further, it is also relevant to note that the Petitioners have not sought any omnibus declaration seeking the making of wearing the hijab / headscarf / head cover mandatory for all Muslim women. The relief sought by the Petitioner is only limited to the striking down of the G.O. dtd. 05.02.2022 and a consequent direction to the Respondent College to permit them to attend classes without compelling the removal of their hijab / headscarf / head cover. **[see pg. 18 of W.P.]**

STATE HAS CONCEDED DURING ARGUMENTS THE ASSERTION IN THE G.O DATED 05.02.222 THAT WEARING OF HEADSCARF IS NOT A PART OF ARTICLE 25

3. The Petitioners challenge to the impugned G.O. was primarily based upon the fact that the G.O. curtailed their right to wear the hijab / headscarf / head cover while attending college and therefore violated their freedom to practice their religion guaranteed under Article 25. It was the stand of the Petitioners that the freedom to practice religion could only be curtailed in terms of the restrictions provided under Article 25(1) i.e. public order, morality and health. It was contended that while the impugned restriction could obviously not be in respect of morality and health, the State has failed to demonstrate as to how the practice of wearing hijab / headscarf / head cover amounted to a breach of

'public order', which is at a much higher threshold than a mere 'law and order' situation.

4. It is pertinent to note that the entire basis on which the restriction on the wearing of hijab / headscarf / head cover was imposed by the G.O. was solely on the ground of 'public order' and nothing else. The restriction of the ground of 'public order' has also been emphatically reiterated in the statement of objections filed on behalf of the State in paras 15 and 20 as well. Having taken a categorical stand that the restriction was imposed on the ground of 'public order' the Respondent State could not have vacillated from the same during the hearing. It is strange that the State itself is unsure of the reason it imposed the restriction in the first place.

5. Further, the Ld. Advocate General in the course of his arguments has conceded that the impugned G.O. did not ban or proscribe the wearing of hijab / headscarf / head cover and that the penultimate para in the G.O. is a result of 'over enthusiasm' of the government authorities and that the same 'may not have been required'.

6. Infact, insofar as the justification mentioned in the last line of the operative portion of the G.O. is concerned, that the wearing of uniform clothes is in the *"interests of unity, equality and public order"*, has also been given up by the Ld. Advocate General stating that those things were not required and in fact could have been avoided.

7. In view of the concessions given by the Ld. Advocate General, there remains absolutely no restriction prohibiting or proscribing the Petitioners from attending classes with their hijab / headscarf / head cover in place.

IMPUGNED G.O OUGHT TO BE STRUCK DOWN ON THE GROUND OF DOCTRINE OF DICTATION

8. Even otherwise, the G.O. is vitiated by the doctrine of dictation and indication. The State Government *vide* the G.O. while ostensibly leaving the final decision to be taken by the College Development Committees, however has indicated its mind that wearing of Hijab is not a part of Article 25 rights. This clearly makes

the purported exercise of any power by the CDC totally vitiated. See ***Orient Paper Mills Ltd. v. Union of India*****, (1970) 3 SCC 76 #4**; ***Manohar Lal v. Ugrasen*****, (2010) 11 SCC 557 #23.**

9. The impugned G.O. thus having attracted the 'doctrine of dictation' deserves to be quashed and set aside for being in the teeth of the principles of administrative law.

THE INFERENCE IN THE IMPUGNED G.O. THAT PROHIBITION OF HEADSCARF DOES NOT VIOLATE ARTICLE 25 IS NOT BASED UPON ANY MATERIAL AT ALL

10. The Petitioners have during the course of their submissions categorically explained to this Hon'ble Court that none of the three decisions referred to in the G.O. i.e. (i) ***Fathima Thasneem v. State of Kerala***, 2018 SCC OnLine Ker 5267; (ii) ***Fathema Hussain Sayed v. Bharat Education Society*****,** AIR 2003 Bom 75; and (iii) ***Sir M. Venkata Subba Rao, Matriculation Higher Secondary School Staff Assn. v. Sir M. Venkata Subba Rao, Matriculation Higher Secondary School***, (2004) 2 CTC 1, can actually be relied upon to justify the prohibition on wearing of hijab / headscarf / head cover and reliance upon the same by the State Government is completely misplaced.

11. Apart from the erroneous reliance placed upon the three judgments mentioned in the impugned G.O. which have not at all been explained by the Respondents, no material whatsoever has been put forth before this Hon'ble Court to show as to on what basis the State Government came to a conclusion that prohibition on hijab / headscarf / head cover will not be violative of Article 25.

12. That apart, none of the Ld. Senior Advocates appearing on behalf of the Respondents have adverted to or have called in question the correctness of the decisions of the Ld. Single Judge of the Hon'ble Kerala High Court holding in paras 29 and 30 of ***Amnah Bint Basheer v. Central Board of Secondary Education (CBSE)*****,** 2016 SCC OnLine Ker 41117 **that covering of the head is an essential part of Islam**, which decision has subsequently been approved by the Hon'ble Division Bench of the Kerala High Court in ***Central Board of Secondary Education v. Amnah Bint Basheer*****,** 2016 SCC OnLine Ker 487;

nor have they dealt with the Division Bench decision of the Hon'ble Madras High Court in ***M. Ajmal Khan v. Election Commission of India***, 2006 SCC OnLine Mad 794, where in para 15 the Hon'ble Court notes the unanimity amongst Muslim scholars **that covering of head is an obligatory act**.

13. Thus, the impugned G.O. also deserves to go on account of there being no material before the State Government to justify the conclusion it has reached therein. **[see *Anuradha Bhasin v.UOI*,** (2020) 3 SCC 637 #78, #141**]**

STATE CANNOT WISH AWAY PORTIONS OF THE G.O. BY RESORTING TO INGENIOUS SUBSEQUENT EXPLANATIONS / CLARIFCATIONS

14. It is submitted that the offending portions in the impugned G.O cannot be simple ignored or wished away by subsequent explanations given by the State that the same was a result of over enthusiasm of the draftsmen.. An arbitrary decision, which otherwise is a result of a complete non application of mind, cannot be sustained on the basis of subsequent explanations or justifications. In this regard reference may be made to ***Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405 #8.**

G.O. IS IN CONTRAVENTION OF SECTION 143 OF THE KARNATAKA EDUCATION ACT, 1983

15. It is submitted that Section 143 of the *Karnataka Education Act, 1983,* empowers the State Government to delegate the exercise of powers under the Act or rules to an officer or authority sub-ordinate to it. Such delegation would be valid only when the same is notified in the official Gazette. Section 143 reads as follows:

> "**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."

(emphasis added)

16. *Firstly*, the State Government has not demonstrated as to whether or not the impugned G.O. delegating powers upon the College Development Committees has been notified in any official gazette.

17. *Secondly* and more importantly, such powers could not have been conferred upon the MLA led College Development Committees since neither are they officers nor authorities subordinate to the State Government.

18. In so far as the position of an MLA is concerned, it is well settled that he is not a servant of the State. Reference in this regard may be made to the following observation of the Hon'ble Apex Court in ***Ashwini Kumar Upadhyay v. Union of India*, (2019) 11 SCC 683 #15**

19. In view thereof, it is submitted that the State Government could not have entrusted a non-statutory MLA led committee with the power to determine the extent upto which the Petitioner's fundamental rights could be curbed. After all it is trite that when a statute prescribes a thing to be done in a particular manner then it has to be done in such manner and such manner only. A three judge bench of this Hon'ble Court in ***State of U.P. v. Singhara Singh*, (1964) 4 SCR 485**, has declared the law as follows:

> "**8.** The rule adopted in Taylor v. Taylor [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted..."

(emphasis added)

20. In view of the aforesaid discussions, the impugned G.O. deserves to be set aside on all counts and the consequent relief sought for by the Petitioners i.e. to direct the Respondent College to permit them to attend classes without insisting on the removal of hijab / headscarf / head cover also deserves to be granted.

RE: THE STAGE OF INQUIRING INTO 'ESSENTIAL RELIGIOUS PRACTICES' DOES NOT ARISE IN THE PRESENT CASE

21. Insofar as the protection guaranteed under Article 25 to the practice of religion is concerned, the stages of inquiry that is to be adopted by a Constitutional Court has been clearly delineated by the Hon'ble Apex Court in ***Ratilal Panachand Gandhi v, State of Bombay***, AIR 1954 SC 388, as well as ***Bijoe Emmanuel v. State of Kerala***, 1986 3 SCC 615.

22. The Hon'ble Apex Court in Para 10 of ***Ratilal's*** case categorically observed that subject only to the restrictions imposed under Article 25, every person has a fundamental right, not only to entertain but to also exhibit his religious belief by way of overt acts sanctioned by his religion. Para 10 reads as follows:

> "**10.** Article 25 of the Constitution guarantees to every person and not merely to the citizens of India, the freedom of conscience and the right freely to profess, practise and propagate religion. This is subject, in every case, to public order, health and morality. Further exceptions are engrafted upon this right by clause (2) of the article. Sub-clause (*a*) of clause (2) saves the power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and sub-clause (*b*) reserves the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices. Thus, subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience **but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion** and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. 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."

(emphasis added)

23. Thereafter in Para 13 the Constitution Bench sounded a word of caution at the outside authorities from inquiring as to whether or not the practices in question therein were 'essential parts of the religion'. Para 13 reads as under:

> "**13.** 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.

> Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate. Of course, the scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides. We may refer in this connection to the observation of Davar, J. in the case of *Jamshed ji* v. *Soonabai* [33 Bom 122] and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktadbaj, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think, are quite appropriate for our present purpose. "If this is the belief of the community" thus observed the learned Judge, "and it is proved undoubtedly to be the belief of the Zoroastrian community,—a secular Judge is bound to accept that belief—it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind". These observations do, in our opinion, afford an indication of the measure of protection that is given by Article 26(*b*) of our Constitution."

(emphasis added)

24. The self imposed restraint on inquiring at the very threshold as to whether or not a practice is fundamental / essential to the religion can also be seen in the approach adopted by the Hon'ble Apex Court in ***Bijoe Emmanuel*** (supra). The Hon'ble Apex Court in the said case merely inquired into whether or not the beliefs entertained by the Petitioners therein had some foundation and were not the outcome of any perversity.

25. The Hon'ble Apex Court upon noting in Para 8 that the beliefs were sincere, although they *"may appear strange or even bizarre to us"*, proceeded to first examine whether the ban imposed therein was consistent with the rights guaranteed by Articles 19(1)(a) and 25 of the Constitution. It is evident that the Hon'ble Court did not foray into the field of 'essential religious practice' at the very outset itself.

THE *BIJOE EMMANUEL* JUDGMENT APPPLIES ON ALL FOURS TO THE FACTS OF THE PRESENT CASE AND THIS FACT HAS NOT BEEN ADVERTTED TO AT ALL BY THE RESPONDENTS

26. It is submitted that *pari materia* the present case, the Hon'ble Apex Court in *Bijoe Emmanuel* was dealing with a situation where children belonging to the Jehovah's witnesses faith were expelled from the school for not singing the National Anthem, which they sincerely believed was against the tents of their faith, though they would stand up in respect when it was sung during the morning assembly. Hon'ble Justice O. Chinnappa Reddy captured the factual scenarios in para 1 as follows:

> "**O. Chinnappa Reddy, J.**— The three child-appellants, Bijoe, Binu Mol and Bindu Emmanuel, are the faithful of Jehovah's Witnesses. They attend school. Daily, during the morning Assembly, when the National Anthem "Jana Gana Mana" is sung, they stand respectfully but they do not sing. They do not sing because, according to them, it is against the tenets of their religious faith — not the words or the thoughts of the anthem but the singing of it. This they and before them their elder sisters who attended the same school earlier have done all these several years. No one bothered. No one worried. No one thought it disrespectful or unpatriotic, the children were left in peace and to their beliefs. That was until July 1985, when some patriotic gentleman took notice. The gentleman thought it was unpatriotic of the children not to sing the National Anthem. He happened to be a Member of the Legislative Assembly. So, he put a question in the Assembly. A Commission was appointed to enquire and report. We do not have the report of the Commission. We are told that the Commission reported that the children are "law-abiding" and that they showed no disrespect to the National Anthem. Indeed it is nobody's case that the children are other than well-behaved or that they have ever behaved disrespectfully when the National Anthem was sung. They have always stood up in respectful silence. But these matters of conscience, which though better left alone, are sensitive and emotionally evocative. So, under the instructions of Deputy Inspector of Schools, the Headmistress expelled the children from the school from July 26, 1985..."

27. The Hon'ble Court after noting that such beliefs were genuine went on to state in para 9 what it was required to do in that *"...Now, we have to examine whether the ban imposed by the Kerala education authorities against silence when the National Anthem is sung on pain of expulsion from the school is consistent with the rights guaranteed by Articles 19(1)(a) and 25 of the Constitution."*

28. The Hon'ble Court thereafter notes the circulars issued by the Kerala Education authorities and after examining them goes on to hold that the said circulars hae no legal sanction and clearly contravene Article 19(1)(a) and Article 25(1). The relevant paras in this regard are as follows:

> "**13.** The Kerala Education Authorities rely upon two circulars of September 1961 and February 1970 issued by the Director of Public Instruction, Kerala. The first of these circulars is said to be a Code of Conduct for teachers and pupils and stresses the importance of moral and spiritual values. Several generalisations have been made and under the head patriotism it is mentioned:
>
> > "*Patriotism*
> >
> > 1. Environment should be created in the school to develop the right kind of patriotism in the children. Neither religion nor party nor anything of this kind should stand against one's love of the country.
> >
> > 2. For national integration, the basis must be the school.
> >
> > 3. National Anthem. As a rule, the whole school should participate in the singing of the National Anthem."
>
> In the second circular also instructions of a general nature are given and para 2 of the circular, with which we are concerned, is as follows:
>
> > "It is compulsory that all schools shall have the morning assembly every day before actual instruction begins. The whole school with all the pupils and teachers shall be gathered for the assembly. After the singing of the National Anthem the whole school shall, in one voice, take the National Pledge before marching back to the classes."
>
> **14.** Apart from the fact that the circulars have no legal sanction behind them in the sense that they are not issued under the authority of any statute, we also notice that the circulars do not oblige each and every pupil to join in the singing even if he has any conscientious objection based on his religious faith, nor is any penalty attached to not joining the singing. On the other hand, one of the circulars (the first one) very lightly emphasise the importance of religious tolerance. It is said there, "All religions should be equally respected."
>
> **15.** If the two circulars are to be so interpreted as to compel each and every pupil to join in the singing of the National Anthem despite his genuine, conscientious religious objection, then such compulsion would clearly contravene the rights guaranteed by Article 19(1)(*a*) and Article 25(1)."

29. In Para 19 thereafter, this Hon'ble Court has categorically laid down that the primary inquiry to be made by the courts when an allegation of breach of Article 25 is complained is to actually examine whether the act complained is

in furtherance of any of the restrictions under Article 25 or not. Para 19 reads as follows:

> **"19.** We see that the right to freedom of conscience and freely to profess, practise and propagate religion guaranteed by Article 25 is subject to (1) public order, morality and health; (2) other provisions of Part III of the Constitution; (3) any law (*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; or (*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. Thus while on the one hand Article 25(1) itself expressly subjects the light guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practise and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by Article 25(1). Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practise 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 authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practise or to provide for social welfare and reform. It is the duty and function of the court so to do. Here again as mentioned in connection with Article 19(2) to (6), it must be a law having the force of a statute and not a mere executive or a departmental instruction. We may refer here to the observations of Latham, C.J. in *Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth* [67 CLR 116] a decision of the Australian High Court quoted by Mukherjea, J. in the *Shirur Mutt case* [*Commr, HRE* v. *Sri LakshmindraThirthaSwamiar of Sri Shirur Mutt*, AIR 1954 SC 282 : 1954 SCR 1005] . Latham, C.J. had said :
>
> > "The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. This view makes it possible to reconcile religious freedom with ordered government. It does not mean that the mere fact that the Commonwealth Parliament passes a law in the belief that it will promote the peace, order and good government of Australia precludes any consideration by a court of the question whether or not such a law infringes religious freedom. The final determination of that question by Parliament would remove all reality from the constitutional guarantee. That guarantee is intended to limit the sphere of action of the legislature. The interpretation and application of the guarantee cannot, under our Constitution, be left to Parliament. If the guarantee is to have any real significance it must be left to the courts of justice to determine its meaning and to give effect to it by declaring the invalidity of laws which infringes it and by declining to enforce them. The courts will therefore have the responsibility of determining whether a particular law can fairly be regarded, as a law to protect the existence of the community, or whether, on the other hand, it is a law 'for prohibiting the free exercise of any religion'. The word 'for'

> shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character."
>
> What Latham, C.J. has said about the responsibility of the court accords with what we have said about the function of the court when a claim to the Fundamental Right guaranteed by Article 25 is put forward."

(emphasis added)

30. It is pertinent to also note that *Bijoe Emmanuel's* case has been consistently followed by the Hon'ble Apex Court till recently in ***Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala*, (2019) 11 SCC 1** where in para 451.6 it was held as follows:

> "**451.6.** In *Bijoe Emmanuel* v. *State of Kerala* [*Bijoe Emmanuel* v. *State of Kerala*, (1986) 3 SCC 615] , three children belonging to a sect of Christianity called Jehovah's witnesses had approached the Kerala High Court by way of writ petitions to challenge the action of the Headmistress of their school, who had expelled them for not singing the National Anthem during the morning assembly. The children challenged the action of the authorities as being violative of their rights under Articles 19(1)(*a*) and 25. This Court held that the refusal to sing the National Anthem emanated from the genuine and conscientious religious belief of the children, which was protected under Article 25(1). In a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain PILs challenging religious practices followed by any group, sect or denomination, could cause serious damage to the constitutional and secular fabric of this country."

[also see *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*, (2019) 1 SCC 1 #109.2 @pg. 274 (footnote no. 79)]

31. In the present case, the impugned G.O. itself justified the restriction on the ground of 'public order', which restriction finds mention in Article 25(1). As mentioned hereinbefore, the justification based on 'public order' also finds mention in the common objections filed by the Respondent. In the absence of any material of record to show that justification for imposing the restriction was based on anything apart from 'public order', which ground the Ld. Advocate General has conceded in the course of his arguments, the only conclusion that could be drawn is that as on date there exists no restriction having the force of law.

32. Therefore, when there are no restrictions in place, this Hon'ble Court is not at all required to make an inquiry as to whether or not wearing of hijab / headscarf / head coveris an 'essential religious practice' of the Islamic faith.

RULE 11 OF THE KARNATAKA EDUCATION RULES, 1995 IS NOT A RESTRICTION FOR THE PURPOSE OF ARTICE 25(2) AS THE SAID RULE HAS NO PROXIMATE OR DIRECT CONNECTION WITH SOCIAL REFORM/ ERADICATION OF THE PRACTISE OF HIJAB

33. It is well settled that though the State is empowered under Article 25(2)(b) to make any law providing for social welfare and reform, the said power ought not to be exercised in a manner so as to reform a religion out of existence or identity by invading upon the basic and essential practices. It is reiterated that the 'essential religious practice' doctrine is a shield against the invasion of the State into the freedom guaranteed under Article 25 and is not to be used as a sword to further strike at the guaranteed freedoms.

34. It may also not be out of place to mention that even the oral explanation being advanced now by the State that the said measure of restricting the wearing of hijab / headscarf / head cover is a measure of social reform is absolutely misplaced.

35. It is submitted that no such intent is evinced from the impugned G.O. itself nor does Rule 11 of the *Karnataka Education Rules, 1995*, on which the State places reliance can by any stretch of imaginative and fanciful interpretation be said to be a measure of social reform of the Muslim community which would be justified and protected in terms of Article 25(2)(b).

36. Rule 11 merely empowers educational institutions to specify uniforms and cannot be held to be a measure of social reform as is sought to be contended by the State, especially when it has long been established **that any restriction on fundamental rights has to have an immediate, proximate and direct relation to the object sought to be achieved and cannot be a mere accidental or incidental consequence of the so called restriction**. In this regard reference may be made to ***O.K. Ghosh and Anr. v. E.X. Joseph*** **AIR 1963 SC 812** where at Para 10, the Hon'ble Apex Court held as follows:

> **"10.** This argument raises the problem of construction of clause (4). Can it be said that the rule imposes a reasonable restriction in the interests of public order? There can be no doubt that Government servants can be subjected to rules which are intended to maintain discipline amongst their ranks and to lead to an efficient discharge of their duties. Discipline amongst Government employees and their efficiency may in a sense, be said to be related to public order. But in considering the scops of clause (4), it has to be borne in mind that the rule must be in the interests of public order and must amount to a reasonable restriction. The words "public order" occur even in clause (2), which refers, inter alia, to security of the State and public order. There can be no doubt that the said words must have the same meaning in both clauses (2) and (4). So far as clause (2) is concerned, security of the State having been expressly and specifically provided for, public order cannot include the security of State, though in its widest sense it may be capable of including the said concept. Therefore, in clause (2), public order is virtually synonymous with public peace, safety and tranquility. The denotation of the said words cannot be any wider in clause (4). That is one consideration which it is necessary to bear in mind. When clause (4) refers to the restriction imposed in the interests of public order, it is necessary to enquire as to what is the effect of the words "in the interests of". This clause again cannot be interpreted to mean that even if the connection between the restriction and the public order is remote and indirect, the restriction can be said to be in the interests of public order. <u>A restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression "in the interests of public order". This interpretation is strengthened by the other requirement of clause (4) that, by itself, the restriction ought to be reasonable. It would be difficult to hold that a restriction which does not directly relate to public order can be said to be reasonable on the ground that its connection with public order is remote or far-fetched. That is another consideration which is relevant. Therefore, reading the two requirements of clause (4), it follows that the impugned restriction can be said to satisfy the test of clause (4) only if its connection with public order is shown to be rationally proximate and direct.</u> That is the view taken by this Court in *Superintendent, Central Prison, Fatehgarh* v. *Dr Ram Manohar Lohia* [AIR 1960 SC 633] . <u>In the words of Patanjali Sastri J. in *Rex* v. *Basudev* [1949-50 FCR 657 at p 661] "the connection contemplated between the restriction and public order must be real and proximate, not far-fetched or problematical".</u> It is in the light of tins legal position that the validity of the impugned rule must be determined."
>
> (emphasis added)

37. Though the aforesaid observations are in the context of 'public order', which also finds mention in Article 25(1), the said principle also applies in the context of 'social reform', which finds mention in Article 25(2)(b).

[also see ***State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.***, (1973) 2 SCC 713 #51; ***Shreya Singhal v. Union of India***, (2015) 5 SCC 1 #22 – 28,

38, 41, 47; and Index Medical College, Hospital and Research Centre v. State of Madhya Pradesh, 2021 SCC ONLE SC 318 #21]

RULE 11 IS NOT AN OBSTACLE IN THE PETITIONERS WEARING OF A HEADSCARF

38. It is submitted that Rule 11 merely provides for the prescription of a uniform. Rule 11 has been in place since 1995 for almost 27 years and consistent with the said Rule, the Petitioners have been donning their uniform. The College authorities have also permitted the Petitioners to wear a head scarf of the same colour. Wearing of the additional headscarf is not a breach of Rule 11. It is submitted that wearing of a head scarf does not by any stretch of imagination impinge on any other personss fundamental rights or that it causes any disturbance.

39. Rule 11 cannot be construed in a manner that a person is prohibited from wearing something extra than the uniform. A student wearing a 'namam' or wearing a 'rudraksha' consistent with his innocent practice of faith cannot be said to breach Rule 11.

THE PRACTICE OF A MUSLIM WOMAN IN COVERING HER HEAD BY WEARING HIJAB / HEADSCARF / HEAD COVER IS AN ESSENTIAL ISLAMIC PRACTICE

40. Having demonstrated that the inquiry into whether or not a religious practice is essential to the faith comes in at a much later stage, it is nevertheless categorically asserted on behalf of the Petitioners that covering of the head by a Muslim woman by wearing a hijab / headscarf / head cover is an essential obligation commanded / ordained in the Holy Qur'an and reflected in the unexceptionable practice of the womenfolk in the Prophetic era, immediately upon the revelation of the said verse, as has been recorded in the most authentic collection of *Hadith*, namely *Sahih Al-Bukhari*.

41. As has already been pleaded in the Writ Petition, the command to cover the head can be traced to <u>*Surah No.24 'An-Noor' ('The Light'): Ayat No. (Verse No.) 31*</u>. The Arabic word in question in the said verse is *'Khumoor'*, which is the plural of the word *'Khimaar'*. *'Khimaar'* essentially means a headcovering.

Even the *Collins English Dictionary*[1] as well as the *Oxford Learner's Dictionary*[2] respectively, the word 'Khimaar' has been described as a *"headscarf worn by a Muslim woman"*; as well as *"a piece of clothe worn in public by some Muslim women that covers the head and the upper part of the body"*.

42. In this background, reference may also be made to the various different and popular translations[3] of *Surah No.24 'An-Noor' ('The Light'): Ayat No. (Verse No.) 31*, which are as follows:

I. And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [it is acceptable] to reveal; **they should let their headscarves fall to cover their necklinesand not reveal their charms except** to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as attend them who have no sexual desire, or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believers, all of you, turn to God so that you may prosper.

— Abdul Haleem[4]

II. And tell the believing women to lower their gaze and be modest, and to display of their adornment only that which is apparent, **and to draw their veils over their bosoms, and not to reveal their adornment save** to their own husbands or fathers or husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or sisters' sons, or their women, or their slaves, or male attendants who lack vigour, or children who know naught of women's nakedness. And let them not stamp their feet so as to reveal what they hide of their adornment. And turn unto Allah together, O believers, in order that ye may succeed.

— Pickthall[5]

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[1] available online at https://www.collinsdictionary.com/us/dictionary/english/khimar

[2] available online at https://www.oxfordlearnersdictionaries.com/definition/english/khimar?q=khimar

[3] The said translations have been obtained from the website https://www.quran.com/24 which is an agglomeration of widely accepted Qur'an translations by different translators.

[4] **Muhammad A. S. Abdel Haleem**born 1930, is the Professor of Islamic Studies at the School of Oriental and African Studies, University of London and editor of the *Journal of Qur'anic Studies*. He studied at Al-Azhar University and completed his PhD at the University of Cambridge. He has lectured at SOAS since 1971. In 2004, Oxford University Press published his translation of the Qur'an into English. Abdel Haleem was appointed an Officer of the Order of the British Empire (OBE) in the Queen's 2008 Birthday Honours, in recognition of his services to Arabic culture, literature and to inter-faith understanding.

III. And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments 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. And O ye Believers! turn ye all together towards Allah, that ye may attain Bliss.

— Yusuf Ali[6]

IV. Tell believing women to avert their glances and guard their private parts, and not to display their charms except what [normally] appears of them. **They should fold their headscarves over their bosoms and show their charms only** to their husbands, or their fathers or their fathers-in-law, or their own sons or stepsons, or their own brothers or nephews on either their brothers' or their sisters' side; or their own womenfolk, or anyone their right hands control, or male attendants who have no sexual desire, or children who have not yet shown any interest in women's nakedness. Let them not stomp their feet in order to let any ornaments they may have hidden be noticed. Turn to Allah (God), all you believers, so that you may prosper!

— Muhammad Hijab

V. And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment except that which [necessarily] appears thereof and **to wrap [a portion of] their headcovers over their chests and not expose their adornment [i.e., beauty] except** to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess [i.e., slaves], or those male attendants having no physical desire, or children who are not yet aware of the private aspects of women. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed.

— Saheeh International[7]

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[5]**Muhammad Marmaduke Pickthall** (born **Marmaduke William Pickthall**) was an English Islamic scholar noted for his 1930 English translation of the Quran, called *The Meaning of the Glorious Koran*. His translation of the Qur'an is one of the most widely known and used in the English-speaking world. A convert from Christianity to Islam, Pickthall was a novelist, esteemed by D. H. Lawrence, H. G. Wells, and E. M. Forster, as well as a journalist, headmaster, and political and religious leader.

[6]**Abdullah Yusuf Ali**, (died 10 December 1953) was an Indian-British barrister and Muslim scholar who wrote a number of books about Islam including a translation of the Qur'an.

[7]**Saheeh International translation** is an English Language translation of the Quran that has been translated by three American women, Emily Assami, Mary Kennedy, and AmatullahBantley. it is one of the World's most popular Quran translations.

VI. And tell the believing women to lower their gaze and guard their chastity, and not to reveal their adornments except what normally appears. **Let them draw their veils over their chests, and not reveal their ˹hidden˺ adornments except** to their husbands, their fathers, their fathers-in-law, their sons, their stepsons, their brothers, their brothers' sons or sisters' sons, their fellow women, those ˹bondwomen˺ in their possession, male attendants with no desire, or children who are still unaware of women's nakedness. Let them not stomp their feet, drawing attention to their hidden adornments. Turn to Allah in repentance all together, O believers, so that you may be successful.

— Dr. Mustafa Khattab, the Clear Quran[8]

VII. And tell the believing women to lower their gaze (from looking at forbidden things), and protect their private parts (from illegal sexual acts) and not to show off their adornment except only that which is apparent (like both eyes for necessity to see the way, or outer palms of hands or one eye or dress like veil, gloves, head-cover, apron, etc.), **andto draw their veils all over Juyûbihinna (i.e. their bodies, faces, necks and bosoms) and not to reveal their adornment except** to their husbands, or their fathers, or their husband's fathers, or their sons, or their husband's sons, or their brothers or their brother's sons, or their sister's sons, or their (Muslim) women (i.e. their sisters in Islâm), or the (female) slaves whom their right hands possess, or old male servants who lack vigour, or small children who have no sense of feminine sex. And let them not stamp their feet so as to reveal what they hide of their adornment. And all of you beg Allâh to forgive you all, O believers, that you may be successful.

— Muhammad Taqi-ud-Din al-Hilali[9]& Muhammad Muhsin Khan[10]

VIII. And tell the believing women that they must lower their gazes and guard their private parts, and must not expose their adornment, except that which appears thereof, **and must wrap their bosoms with their shawls, and must not expose their adornment, except** to their husbands or their fathers or the fathers of their husbands, or to their sons or the sons of their husbands, or to their brothers or the sons of their brothers or the sons of their sisters, or to their women, or to those owned by their right hands, or male attendants having no (sexual) urge, or to the children who are not yet conscious of the shames of women. And let them not stamp their feet in a way that the adornment they conceal is known. And repent to Allah O believers, all of you, so that you may achieve success.

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[8]**Dr. Mustafa Khattab** is a Canadian-Egyptian authority on interpreting the Quran. He received his Ph.D., M.A., and B.A. in Islamic Studies in English with Honors from Al-Azhar University's Faculty of Languages & Translation. He lectured on Islam at Clemson University (OLLI Program, 2009-2010), held the position of a lecturer at Al-Azhar University for over a decade starting in 2003, and served as the Muslim Chaplain at Brock University (2014-2016). He is a member of the Canadian Council of Imams and a Fulbright Interfaith Scholar.

[9]**Muhammad Taqi-ud-Din Hilali** is most notable for his English translations of Sahih Bukhari and along with Muhammad Muhsin Khan, the Qur'an, entitled The Noble Qur'an.

[10]**Muhammad Muhsin Khan** (died 14 July 2021) was an Islamic scholar and translator of Afghan origin, who lived in Medina and served as the Chief of Department of Chest Diseases at the King Faisal Specialist Hospital and Research Center. He translated both the Quran and Sahih Al-Bukhari into English. He was the director of the clinic of Islamic University of Madinah.

— Mufti TaqiUsmani[11]

IX. And say to the female believers to cast down theirbe holdings, and preserve their private parts, and not display their adornment except such as is outward, **and let them fix (Literally: strike) closely their veils over their bosoms, and not display their adornment except** to their husbands, or their fathers, or their husbands' fathers, or their sons, or their husbands' sons, or their brothers, or their brothers's sons, or their sisters' sons, or their women, or what their right hands possess, or (male) followers, men without desire (Literally: without being endowed with "sexual" desire) or young children who have not yet attained knowledge of women's privacies, and they should not strike their legs (i.e., stamp their feet) so that whatever adornment they hide may be known. And repent to Allah altogether, (O) you believers, that possibly you would prosper.

— Dr.Ghali[12]

43. It can be seen from the above translations that the word 'Khimaar' has interchangeably been translated either as headscarves or head coverings or veil or shawl.

44. This Hon'ble Court may also take note of the fact that while translations are to aid non Arabic speakers to understand the meaning of the original Arabic text, and the choice of words is entirely upto the translator, there is no second opinion as to the original Arabic text itself and the best way to infer as to what the original text i.e. command in the Holy Qur'an actually meant is to look into how the Prophet (s.a.w.s) himself and the people around him understood / practiced / implemented the same which is recorded in as *Hadeeth.*

45. At this juncture it may be apt to note that in so far as *Hadeeth* is concerned, the Constitution Bench of the Hon'ble Apex Court in ***Shayara Bano v. UOI,*** **2017**

[11]**Muhammad TaqiUsmani** (born 5 October 1943), is a Pakistani Islamic scholar and former judge of the Shariat Appellate Bench of the Supreme Court of Pakistan from 1982 to 2002, and on the Federal Shariat Court from 1981 to 1982. He has authored 143 books in Urdu, Arabic and English, including a translation of the Qur'an in both English and Urdu as well a 6-volume commentary on the *Sahih Muslim* in Arabic, *TakmilatFath al-Mulhim* and *Uloomu-l-Qur'an*. He has written and lectured extensively on hadith, and Islamic finance. He chairs the Shariah Board of the Bahrain-based Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). He is also a permanent member of the Jeddah-based International Islamic Fiqh Academy, an organ of the OIC.

[12]**Mohammad Mahmoud Ghali** was the Professor of Linguistics and Islamic Studies, Al-Azhar University, Cairo, Egypt. Ghali has spent 20 years interpreting the meanings of the Quran into English. He is the author of an English translation of the Quran, *Towards Understanding the Ever-Glorious Quran*. Ghali got his PhD in Phonetics from the University of Michigan. He also studied phonetics at the University of Exeter in the UK. Ghali authored 16 books in Islamic studies, in Arabic as well as in English. The English books include *Prophet Muhammad and the First Muslim State, Moral Freedom in Islam*, *Islam and Universal Peace*, *Synonyms in the Ever-Glorious Quran*.

9 SCC 1, has recognised that along with the Qur'an, *Hadeeth* comes in the 'first degree' category of commands which are '*Fard'* (obligatory). The opinion of Justice Nariman as expressed in para 54 may be taken note of and the same reads as follows:

> "**54.** ...Indeed, Islam divides all human action into five kinds, as has been stated by Justice Hidayatullah in his introduction to *Mulla*. There it is stated:
>
> "E. *Degrees of obedience* : Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.
>
> **(*i*) *First degree*: Fard. Whatever is commanded in the Koran, Hadis or Ijmaa must be obeyed.**
>
> Wajib. Perhaps a little less compulsory than Fard but only slightly less so.
>
> (*ii*) *Second degree* :Masnun, Mandub and Mustahab : These are recommended actions.
>
> (*iii*) *Third degree* :Jaiz or Mubah : These are permissible actions as to which religion is indifferent.
>
> (*iv*) *Fourth degree* :Makruh : That which is reprobated as unworthy.
>
> (*v*) *Fifth degree* : Haram : That which is forbidden."

(emphasis added)

46. Having clarified the position of *Hadeeth* in Islamic Jurisprudence, it is apt to take note of the *Hadeeth* in relation to the Qur'anic command in Surah No. 24, Ayat No.31[13]. The same reads as follows:

> **"4758.** Narrated Aishah: May Allah bestow His Mercy on the early emigrant women. When Allah revealed:
>
> *"...and to* ***draw their veils*** *all over their Juyubihinna(i.e., their bodies, faces, necks and bosoms)..."*(V.24:31)
>
> they tore their *Murut* (woollen dresses or waist binding clothes or aprons etc.) and **covered their heads** and faces with those *Muruts."*

(emphasis added)

47. The next hadith, though sourced from a different narrator, also affirms the said position. It is as follows:

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[13]as recorded in Vol. 6 of ***The Translation of the Meanings of Sahih Al-Bukhari, Arabic - English,*** translated byDr. Muhammad Mohsin Khanand published by Dar-us-Salaam Publishers & Distributors.

"**4759.** Narrated Safiyya bint Shaiba:

> 'Aishah used to say: *"when (the Verse):'....and to* ***draw their veils*** *all over their Juhubihinna(i.e., their bodies, faces, necks and bosoms, etc.)....'*(V.24:31) was revealed,
>
> (the ladies) cut their waist-sheets from their margins and **covered their heads** and faces with those cut pieces of cloth."

(emphasis added)

48. Thus as can be seen from the above, the Quranic command along with the manner in which it was practiced, which practice finds mentioned in the *Hadith* quoted above, demonstrates the essentiality of the said Islamic practice of covering of their heads by Muslim women. The piece of cloth may be known by different names in different languages in different parts of the world but what is established is that all of them have to confirm to the religious requirement of 'covering of the head' along with their 'bosoms'.

THE CONSTITUENT ASSEMBLY EXPRESSLY REJECTED THE PROPOSAL TO *INTER-ALIA*B AN THE WEARING OF DRESSES BY WHICH A PERSON'S RELIGION COULD BE RECOGNIZED

49. It is fascinating to note that the present factual scenario clearly resonates with what had transpired in the Constituent Assembly when Article 25 was being considered and being debated upon. One of the Ld. Members of the Constituent Assembly namely, Mr. Tajamul Husain, had proposed 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".*

50. Though the Ld. Member quite vehemently put forth his proposal for amendment, the founding fathers expressly rejected the same.

51. In view thereof, this Hon'ble Court is fervently beseeched to not permit the State Government or any of its subordinate authorities to resuscitate something which the framers of the Constitution expressly rejected.

ARGUMENT OF THE STATE THAT EVEN THOUGH A PRACTICE CAN BE FOUND IN HOLY QURAN THE SAME CAN STILL BE NON-ESSENTIAL IS COMPLETELY FLAWED

52. The State has sought to argue that the Supreme Court has held that practices of Muslims, even though found in the Qur'an, can be non-essential. This argument is completely incorrect and the cases cited in support of this argument do not support this proposition.

53. The Ld. AG sought to rely upon ***Mohd. Hanif Qureshi* v. *State of Bihar,* 1959 SCR 629** which dealt with the question of whether the practice of slaughter of cows on Eid-al-Azha was an essential part of Islam. Contrary to what was argued, no verses of the Qur'an were cited before the Court and the judgement proceeded on the basis that (a) no material had been placed before the Court in support of the practice and, (b) the practice of sacrifice of animals was an essential part of religion, but since there was a choice to sacrifice other animals such as goats and camels, it could not be said that sacrifice of cows was an essential part of religion. The following observations of the Hon'ble Court are relevant in this regard:

> "**13.** … No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow. 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 YdKirban, 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. So there may be an economic compulsion although there is no religious compulsion…."

(emphasis added)

54. The Ld. AG then relied upon ***Javed* v. *State of Haryana*, (2003) 8 SCC 369**, where the Hon'ble Supreme Court was considering the constitutionality of an

election law that disqualified persons having more than two living children after a certain date from holding certain public offices in the Panchayat. It was sought to be argued before the Court that the rule could not apply to Muslims as polygamy was permitted in Islam. Again, no verses of the Qur'an were placed before the Court and the decision of the Court turned on the fact that polygamy was a permission and not an obligation in Islam and therefore could not be held to be essential to the practice of Islam. Further, it was held that the right to contest elections was neither a constitutional nor a common law right but was a statutory right and could be restricted by the statute governing it. The following observations are relevant in this regard:

> "**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. We may have a reference to a few decided cases."
>
> ...
>
> **60.** Looked at from any angle, the challenge to the constitutional validity of Section 175(1)(*q*) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does."

55. The next decision cited in this context was ***Mohammed Zubair* v. *Union of India,* (2017) 2 SCC 115**. In this case, the Petitioner was discharged from service for growing a beard despite the applicable regulations requiring officers to be clean shaved. The petitioner challenged his discharge order claiming he was covered by the exception carved out in theregulationsfor persons whose religious precepts required them to grow a beard. Here too, no verses of the

Quran or any other Islamic source were cited and the decision proceeded on an unfortunate concession of the counsel that keeping a beard was not obligatory in Islam. The following extract may be noted in this regard:

> "**15.** During the course of the hearing, we had inquired of Shri Salman Khurshid, learned Senior Counsel appearing on behalf of the appellants whether there is a specific mandate in Islam which "prohibits the cutting of hair or shaving of facial hair". The learned Senior Counsel, in response to the query of the Court, indicated that on this aspect, there are varying interpretations, one of which is that it is desirable to maintain a beard. No material has been produced before this Court to indicate that the appellant professes a religious belief that would bring him within the ambit of Regulation 425(*b*) which applies to "*personnel whose religion prohibits the cutting off the hair or shaving off the face of its members*". The policy letters which have been issued by the Air Headquarters from time to time do not override the provisions of Regulation 425(*b*) which have a statutory character. The policy circulars are only clarificatory or supplementary in nature."

56. The Ld. AG next sought to rely on ***M. Ismail Faruqui (Dr) v. Union of India.*, (1994) 6 SCC 360,** where, in the context of acquisition of the disputed land around the Babri Masjid-Ram Janmabhoomi in Ayodhya, it was held that while offering namaaz was an essential part of Islam, offering namaaz in a mosque could not be held to be an essential feature of Islam and mosques could not be treated differently from the places of worship of all other religions and placed beyond the eminent domain of the State. The Ld. AG relied upon Surah No. 2: Verse No. 141 and other verses to show that mosques find mention in the Qur'an and therefore, the Court held mosques to be non-essential despite these verses. It is important to note that no verses of the Qur'an were cited before the Hon'ble Supreme Court in this case, and the Ld. AG has sought to rely on material that was not before the Supreme Court to draw conclusions of the Court's view of the value of that material, which is totally absurd and misconceived. The following extract is indicative of the ratio of the judgement in this regard:

> "**82.** The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession (See *Mulla's Principles of Mahomedan Law*, 19th Edn., by M. Hidayatullah — Section 217; and *ShahidGanj* v. *Shiromani Gurdwara* [AIR 1940 PC 116, 121 : 44 CWN 957 : 67 IA 251]). If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune

from acquisition by exercise of the sovereign or prerogative power of the State. 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. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practise the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right."

57. The last case relied upon by the Ld. AG for this purpose was ***Shayara Bano* v. *Union of India*, (2017) 9 SCC 1**. Rather than prove that what is stated in the Qur'an cannot necessarily be said to be an essential practice, this judgment proceeds on the premise what is stated in the Qur'an is sacrosanct and no other Islamic source can be understood to contradict what is stated therein. While Justice Kurien Joseph strikes down the practice of instantaneous triple talaaq on the ground that it is against clear instructions in the Qur'an, Justice Nariman notes that what is stated in the Qur'an, Hadith as well as Ijma (consensus) is fard or mandatory for Muslims before holding that since triple talaq is not commanded by any of these sources, it is not covered by Article 25. The opinion of Justice Nariman recognizing the primacy to be given to *Hadith* already having been extracted hereinabove, reference only be made to the opinion of Justice Kurien Joseph in this regard as well which is as follows:

7. There are four sources for Islamic Law— (*i*) Quran (*ii*) Hadith (*iii*) Ijma (*iv*) Qiyas. The learned author has rightly said that the Holy Quran is the "first source of law". According to the learned author, pre-eminence is to be given to the Quran. That means, sources other than the Holy Quran are only to supplement what is given in it and to supply what is not provided for. In other words, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Quran. Islam cannot be anti-Quran. According to BadarDurrez Ahmed, J. in *Masroor Ahmed* v. *State (NCT of Delhi)* [*Masroor Ahmed* v. *State (NCT of Delhi)*, 2007 SCC OnLine Del 1357 : ILR (2007) 2 Del 1329 : (2008) 103 DRJ 137] : (SCC OnLine Del para 14)

> "*14*. In essence, the Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These rules have been crystallised through the process of ijtihad employing the sophisticated jurisprudential techniques. *The primary source is the Quran. Yet, in matters not directly covered by the divine book, rules were developed looking to the Hadis and upon driving a consensus.* The differences arose between the schools because of reliance on different Hadis, differences in consensus and differences on qiyas or aql as the case may be."

(emphasis supplied)

58. There is thus, no authority placed by the State that supports the proposition that what is prescribed by the Qur'an is not an essential part of religion for Muslims. The Qur'an is the highest in the hierarchy of sources of divine injunction for Muslims, being the direct word of God, and for a practising Muslim, it is a sin to not follow the prescriptions contained therein.

'CONSTITUTIONAL MORALITY' IS PRO CHOICE AND NOT ANTI CHOICE

59. The argument put forth by the Ld. Advocate General that it is for the Petitioner to prove that the practice of wearing hijab / headscarf / head cover satisfies the test of 'Constitutional morality' and 'dignity' is completely flawed and in a manner so to speak, an inversion of the doctrine itself.

60. The 'constitutional morality' concept was conceived by the Hon'ble Apex Court to keep a check on State action and has always been invoked a pro choice doctrine and not ant choice. The concept of constitutional morality is invoked to maintain diversity and heterogeneity as opposed to an artificial homogeneity forced down the throats of diverse populace in the country. The said position can be gathered from a reading of the judgment of the Hon'ble Apex Court in ***Navtej Singh Johar v. UOI* (2018) 10 SCC 1**where at Para 128 the Hon'ble Court observed as follows:

> "**128.** It is the concept of constitutional morality which strives and urges the organs of the State to maintain such a heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways. It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality.

> Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time."
>
> (emphasis added)

61. It is apt to bear in mind that the concept of 'constitutional morality' has been invoked by the Hon'ble Apex Court in support of exercise of religious freedom and not to curtail the same [see ***Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala*,** (2019) 11 SCC 1 #106 – 111, 289, 290, 422.2]. As such it is a pro-choice doctrine and ought not to be invoked as a restriction on practice of religion.

FUNDAMENTAL RIGHTS DO NOT EXIST IN SILOS

62. The impugned G.O. is an indefensible attempt to create a regime of "coerced uniformity" to further marginalise what has historically been an educationally and socially disadvantaged minority community and impede their access to education. As such, there is no place for the G.O. within our constitutional scheme. It is wholly perverse and is a frontal attack on not one, but a range of fundamental rights, including Articles 14, 15, 19, 21, 25 and 29 of the Constitution. These rights are by their very nature interconnected, and do not exist in silos. See **(1978) 1 SCC 248 #14 and (2017) 10 SCC 1 # 298**

63. The restrictions in the G.O. are not a *simpliciter* issue of testing the limits of the freedom of conscience and right to freely practise one's religion under Article 25. In fact, the G.O. launches a wholesale attack on the conception of "choice", that too in a matter as deeply personal as dressing according to the dictates of one's conscience and faith. This offends several fundamental rights, in addition to Article 25:

    i. By intruding into a matter as deeply personal as an item of clothing (which is being worn in addition to and not as a substitute for the prescribed uniform), there is a definitive encroachment on an individual's "zone of solitude", and thus a violation of an individual's right to privacy, liberty, dignity and expression under Articles 14, 19 and 21;

ii. The G.O. violates Articles 14 and 15 by perpetuating discrimination in an educational institution by targeting Muslim women by hindering their ability to exercise decisional autonomy and choice in manifesting their religious beliefs;

iii. The G.O. violates Article 29(1) by placing a restriction on the right of Muslim women to preserve their distinct culture, which includes wearing the hijab. Further, Article 29(2), which stipulates that no citizen shall be denied admission into any educational institution maintained by or receiving funds from the State on grounds of *inter alia* religion, is also violated. The choice being faced by the young Muslim girls is stark – theyare **not** being allowed to enter class and participate in educational activities if they continue to assert any religious identity. This is an ex-facie violation of Article 29(2).

64. It is pertinent to note that these rights are being asserted across the board, in conjunction with each other, and go far beyond the fundamental right to free conscience and practise of religion guaranteed under Article 25.

65. The G.O. creates and actively promotes an environment where students are discouraged from exercising their decisional autonomy vis-à-vis their religious observances, thereby hindering them from "charting and pursuing" the development of their personalities. This is an encroachment on the zone of personal development over which every individual has the "right to be left alone". Any interference in this zone is a negation of dignity, liberty and privacy. It is essential to note that this "zone of solitude" which allows the development of personality attaches <u>to the person</u> and not the place with which it is associated.

66. In effect, the G.O. forces students to abdicate any semblance of a public display of faith, in order to continue receiving education. The inference is clear-students have no autonomy to pursue and build a relationship with their faith if they are to continue to participate in public education. This forced choice between two distinct parts of an individual's identity, that of a believer and of a

student, is a violation of the fundamental right of every person to exercise choice in such deeply personal matters.

67. The right to decisional autonomy is a critical component of the right to privacy, as observed by Chandrachud, J in ***Justice K.S. Puttaswamy & Ors. v. Union of India & Ors***., (2017) 10 SCC 1:

> "**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**..."

(emphasis supplied)

68. Inherent in the right to privacy is the ability to make **choices** about deeply personal matters such as faith, dress and food. In the specific context of faith and religion, the right to privacy operates in tandem with Article 25 but is not limited by it, permitting individuals to choose a faith and facilitating a choice on their part to manifest their beliefs.An arbitrary state action, such as the present G.O., is an unacceptable intrusion in this sanctified personal space of the body and mind. Chandrachud J. observes:

> "**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 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.
>
> **298.** …The autonomy of the individual is the ability to make decisions on vital matters of concern to life…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… **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 to the exercise of liberty."

(emphasis supplied)

69. Chelameshwar, J. held in ***Puttaswamy*** **(supra)** that the right to dress and religious observances is a matter of conscience that emanates from the zone of purely private thought, and must be kept away from the State glare. The freedom to manifest one's religious belief in matters of dress is not exclusively confined to Article 25, but is an aspect of liberty and privacy as well, and consequently also protected under Articles 14, 19 and 21:

> "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..."

(emphasis supplied)

RE: THE RESTRICTION SOUGHT TO BE IMPOSED IS ALSO IN CONFLICT WITH INDIA'S INTERNATIONAL OBLIGATIONS

70. Apart from what has been stated hereinabove, the rights of the young students in question under Article 21 include India's international obligations to protect and promote the rights of children, specifically the rights enumerated in the *United Nations Convention on the Rights of the Child* **("UNCRC")**, acceded to by India on 11.12.1992 without any reservations, which places binding

obligations on the country to place the best interests of the child in all state actions.

71. A conjoint reading of Article 1 of the UNCRC with the *Majority Act, 1875*,would bring the Petitioners under the ambit of the UNCRC since the Petitioners are persons below 18 years of age. In fact, all the students of the colleges covered by the impugned G.O will come under the ambit of UNCRC.

72. That the Preamble to the UNCRC, in recognizing the inherent dignity and inalienable rights of persons, recognizes that all persons are entitled to rights without distinction based on sex or religion, taking due account of the importance of traditions and cultural values of people for promoting the harmonious development of the child. The following, among others, Articles have been systematically violated by the State through the impugned G.O:

> "Article 2
>
> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.
>
> Article 3
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> (…)
>
> Article 4
>
> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.
>
> (…)

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. 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.

(…)

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

(…)

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

73. The UNCRC has also been implemented by the Parliament through the *Commission for the Protection of Child Rights Act, 2005***("Child Rights Act")**. Section 2 of the Child Rights Act defines "child rights" as under:

> "(b) "child rights" includes the children's rights adopted in the United Nations convention on the Rights of the Child on the 20th November, 1989 and ratified by the Government of India on the 11th December, 1992;"

74. It is clear from the above that Parliament has chosen to define "child rights" expansively as including all the rights adopted in the UNCRC. As such, in terms of Article 253, once Parliament has made this determination, it is not open to the State Legislature to restrict these rights, as the power of Parliament to give effect to the provisions of an international treaty overrides the power of State legislature under the State and Concurrent List. Article 253 states as under:

> "**253.** Legislation for giving effect to international agreements- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

75. As such, no power can be asserted by the State Government under any legislation including *inter alia* the Karnataka Education Act that is inconsistent with or abridges the definition of "child rights" under the Child Rights Act, regardless of whether the State Legislature is competent to legislate on the same under the State or Concurrent Lists.

RE: THE JUSTIFICATION OF THE BAN BASED ON TURKEY AND FRANCE IS COMPELETELY MISPLACED AND OUT OF CONTEXT

76. It is submitted that the Respondents in the course of their arguments have heavily relied upon a Turkish case of ***Leyla Sahin v. Turkey,*** which was a judgment rendered by the European Court of Human Rights, upholding the

judgment of the Constitutional Court of Turkey which in turn had upheld the ban in the headscarf by the Istanbul University, to contend that Turkey, being a majority Muslim State, has also imposed such a ban.

77. First of all, it is important to note that the ban on religious headscarves in Turkey has already been overturned by the Government way back in the year 2013 and thereafter the Constitutional Court of Turkey in the year 2018, in the case of ***Sarah Akgul*** has itself overruled its earlier decision in ***Leyla Sahin's*** case and held in 2018 that the Applicant was entitled to the freedom of religion and to continue her university education by wearing a headscarf.

78. Insofar as France is concerned, it is pertinent to bear in mind that it practices an extreme form of secularism, called the '*laicite',* wherein the hostility between the State and religion is quite extreme, unlike the positive secularism espoused under the Indian Constitution where different faiths are respected. It is submitted that in France, all forms of religious dressing, be it of any religion, are prohibited in public life. In fact, both Turkey and France are the only two countries to actually enter reservations in respect of Article 30 of the UNCRC, which protects the right of children from minority or indigenous groups, to enjoy their culture, practice their religion and use their language together with other members of their group.

HYPOTHETICAL SITUATIONS CANNOT BE THE BASIS CONSTITUTIONAL ADJUDICATION

79. The State despitehaving given up the ground of 'public order' in the course of arguments, still contends that permitting Muslim girls to wear hijab / headscarf / head coverwould result in a situation where others would start donning attires of their own, resulting in a 'parade of horribles'. The Petitioners in the opening arguments have sought to rebut this argument by relying upon the judgement of the *Constitutional Court of South Africa dated 05.10.2007 (Fiona Knight v Navaneethum Pillay)*. Be that as it may it submitted that the argument of the Respondents that permitting the Petitioners to wear headscarf will result in different students exhibiting their religious identities cannot be the basis for negating the rights of the Petitioner.

80. The Hon'ble Apex Court, way back in the year 1983, has sounded a word of caution to the Courts to refrain from answering such academic or hypothetical questions when serious constitutional issues are involved. In ***Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.,*** **(1983) 1 SCC 147,** the Hon'ble Apex Court held as under:

> "**11.** …We have serious reservations on the question whether it is open to a court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We (Judges) are not authorised to make disembodied pronouncements on serious and cloudy issues of constitutional policy without battle lines being properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper lis between parties properly ranged on either side and a crossing of the swords. We think it is inexpedient for the Supreme Court to delve into problems which do not arise and express opinion thereon."

(emphasis added)

RE: CONCLUSION

81. The Hon'ble Apex Court in para 32 of ***Society for Unaided Private Schools of Rajasthan v. Union of India***, **(2012) 6 SCC 1,** has held that *"...right to education has been read into right to life in Article 21. 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)."* The actions of the Respondent are in the teeth of the aforesaid observations.

82. In view of the discussions hereinbefore, it is most respectfully submitted that ultimately what is in issue today is a piece of cloth that a Muslim girl wraps around her head since she genuinely believes and conforms to the norms of modesty prescribed by her religion. By itself, the said practice does not come in the way of her acquiring education. The unfortunate reality is that the problem is being created by certain vested interests seeking to impose majoritarian dominance upon the weakest section of a weak minority, i.e. its girls. The sequence of events only show that the State Government has abdicated its duty to create a conducive environment to facilitate Muslim girls to enter the mainstream. .

83. It is therefore implored upon this Hon'ble Court to protect the fundamental rights of the Petitioner and take a an appropriate view which is in furtherance of the educational opportunities of the Petitioners. **The Petitioners have never opposed to the prescribed uniform**. **They only seek to attend their classes wearing the prescribed uniform with the addition of a head scarf which may of the same colour as the uniform. This practice is permitted in all Central Government Kendriya Vdyalayas which fact has also not been disputed by the State Government.**

Dated: 10.02.2022

TRUE COPY

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. NO. OF 2022
IN
SPECIAL LEAVE PETITION (CIVIL) NO. OF 2022

IN THE MATTER OF:

MISS AISHAT SHIFA … PETITIONER

VERSUS

THE STATE OF KARNATAKA & ORS. … RESPONDENTS

APPLICATION SEEKING EXEMPTION FROM FILING CERTIFIED COPY OF THE IMPUGNED ORDER

TO,
HON'BLE THE CHIEF JUSTICE OF INDIA & HIS COMPANION JUSTICES OF THE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF THE PETITIONERS/APPLICANTS ABOVENAMED

MOST RESPECTFULLY SHOWETH:

1. The Petitioner above named most respectfully submits this petition seeking special leave to appeal against the judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in WP No. 2880 of 2022. That all the facts are stated in the Special Leave Petition in detail and the same are not repeated herein for the sake of brevity. The Petitioner craves leave and permission of this Hon'ble Court to refer and rely upon the contents of the accompanying Special Leave Petition at the time of hearing of this Application also.

2. It is most respectfully submitted that the Petitioner is filing the accompanying SLP in extreme urgency against an order passed

only a day before i.e. 15.03.2022. Hence the Petitioner has not been able to obtain a certified copy of the impugned order. The Special Leave Petition is being preferred by filing a true copy of the Impugned Order as available on the website of the Hon'ble High Court.

3. The Petitioners undertakes to apply for the Certified Copy of the Impugned Order at the earliest and as soon as the same is made available to the Petitioners, the same shall be filed in due course.

4. Hence, this Hon'ble Court may exempt the Petitioners from filing certified copy of the impugned judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in WP No. 2880 of 2022.

5. That the present application is being filed *bona fide* and in the interests of justice.

PRAYER

In view of the facts and circumstances narrated hereinabove, it is most respectfully submitted that this Hon'ble Court may be pleased to:

a. Allow the present Application and exempt the Petitioners from filing certified copy of the impugned judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in WP No. 2880 of 2022 and;

b. Pass any other order as this Hon'ble Court may deem fit in the facts and circumstances of the present case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY

FILED BY

MR. JAVEDUR RAHMAN
ADVOCATE FOR THE PETITIONER

PLACE: NEW DELHI

DATED: 16.03.2022

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. NO. OF 2022
IN
SPECIAL LEAVE PETITION (CIVIL) NO. OF 2022

IN THE MATTER OF:

MISS AISHAT SHIFA … PETITIONER

VERSUS

THE STATE OF KARNATAKA & ORS. … RESPONDENTS

APPLICATION FOR EXEMPTION FROM FILING OFFICIAL TRANSLATION OF ANNEXURE P-1

TO,
HON'BLE THE CHIEF JUSTICE OF INDIAAND HIS COMPANION JUSTICES OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF
THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHEWETH:-

1. The Petitioner above named most respectfully submits this petition seeking special leave to appeal against the judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in WP No. 2880 of 2022. That all the facts are stated in the Special Leave Petition in detail and the same are not repeated herein for the sake of brevity. The Petitioner craves leave and permission of this Hon'ble Court to refer and rely upon the contents of the accompanying Special Leave Petition at the time of hearing of this Application also.

2. That the Annexure P-1 filed with the Special Leave Petition was in vernacular. Due to the urgency in filing the present Special Leave Petition, a competent person who is conversant

with the legal phraseology has done the said translation and the same is a correct and true English Translation of the original documents. It is in the interest of Justice that the English Translation filed by Petitioner/Applicant be taken on record and the Petitioner/Applicant be exempted from filing the Official Translation of the Annexures P-1 along with the accompanying Special Leave Petition in the interests of justice.

3. That this application is being made bonafide and in the interests of justice.

PRAYER

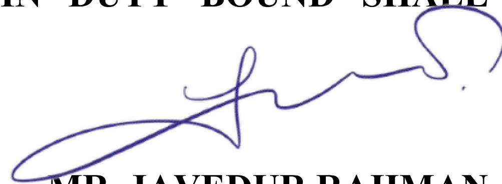
In light of the abovementioned facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to:

a. exempt the Petitioner/Applicant from filing official translation of the Annexure P-1, annexed along with the present Special Leave Petition; and

b. pass such other further orders or directions as this Hon'ble Court deems fit in the circumstances of the case and in the interest of justice.

AND FOR THIS ACT OF KINDNESS THE PETITIONER/APPLICANT AS IN DUTY BOUND SHALL EVER PRAY.

FILED BY



MR. JAVEDUR RAHMAN
ADVOCATE FOR THE PETITIONER

PLACE: NEW DELHI
DATED: 16.03.2022

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO. OF 2022

IN

SPECIAL LEAVE PETITION (CIVIL) NO. OF 2022

IN THE MATTER OF:

MISS AISHAT SHIFA … PETITIONER

VERSUS

THE STATE OF KARNATAKA & ORS. … RESPONDENTS

APPLICATION SEEKING PERMISSION TO FILE LENGTHY SYNOPSIS & LIST OF DATES

TO,

HON'BLE THE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUSTICES OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHEWETH:-

1. That the Petitioner has filed the accompanying SLP against the judgment and final order dated 15.03.2022 passed by the Hon'ble High Court of Karnataka at Bengaluru in WP No. 2880 of 2022. That all the facts are stated in the Special Leave Petition in detail and the same are not repeated herein for the sake of brevity. The Petitioner craves leave and permission of this Hon'ble Court to refer and rely upon the contents of the accompanying Special Leave Petition at the time of hearing of this Application also.

2. It is submitted that for an effective adjudication of the aforesaid Special Leave Petition, which involves crucial questions relating to

the Petitioner's fundamental rights as well as the standard of judicial review in such matters, it is imperative that the Petitioner's case be canvassed in the most detailed manner and for this purpose the Synopsis and List of dates is longer than usual. Hence, it is in the interests of justice that the Petitioners be granted permission to file lengthy synopsis and list of dates in the above Special Leave Petition.

3. The instant application is being made *bona fide* and in the interests of justice.

PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to:

a) Allow the present application and grant permission to the Petitioner to file lengthy synopsis and list of dates from pages B to VV; and

b) pass any other further orders as it may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONERS AS IN DUTY BOUND SHALL EVER PRAY.

FILED BY

JAVEDUR RAHMAN
ADVOCATE FOR THE PETITIONERS

PLACE: NEW DELHI

FILED ON: 16.03.2022

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LETTER OF URGENCY

DATE: 16.03.2022

To,

The Registrar,
Supreme Court of India,
Tilak Marg, New Delhi – 110001

Sub: Miss Aishat Shifa v. State of Karnataka & Ors.

Dear Sir,

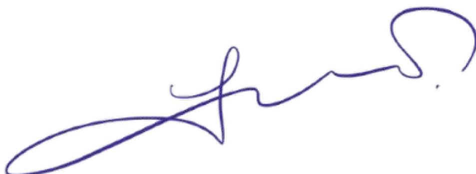
The captioned Special Leave Petition has been filed in utmost urgency against the impugned final judgment and order passed by the Hon'ble Karnataka High Court yesterday i.e. 15.03.2022, whereby the Hon'ble High Court upheld the ban on muslim girls from entering into schools/colleges wearing hijab. The impugned order has great ramifications and requires to be stayed as otherwise the Petitioner will not be allowed to sit for her 1st year PUC exams which are scheduled from 28.03.2022 to 13.04.2022.

The Petitioner had earlier also filed SLP (C) No. 2481 of 2022 challenging the interim order dated 10.02.2022 passed by the High Court wherein it had prohibited the wearing of religious symbols etc. during the pendency of the writ proceedings before it. The said SLP was mentioned before the Hon'ble CJI on 11.02.2022 for urgent listing, however, the Hon'ble CJI directed to await the outcome of the writ proceedings. In view of the writ proceedings having culminated yesterday i.e. 15.03.2022, upholding the ban, it is incumbent that the matter may be taken up for hearing at the earliest possible convenience of the Court.

In view of the grave nature of the matter and the urgency, it is requested that the matter be listed before the Hon'ble Court at the earliest.

Thanking you,

Yours Sincerely,



JAVEDUR RAHMAN
(AoR for the Petitioner)

E-mail: javedurrahman88@gmail.com
Enrollment No: O-677/2013; AoR Code: 2949

MEMO OF PARTIES

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

(ORIGINAL JURISDICTION)

W.P. No. 2880/2022 (GM-EDU)

Between:

1. Miss. Aishat Shifa
   D/o Zulfihukar
   Age about 17 years
   Santosh Nagar, Hemmady Post,
   Kundapur Taluk, Udupi District 576230
   Rep. by her natural guardian and father
   Mr.Zulfhukar

2. Miss. THAIRIN BEGAM
   D/o Mohammad Hussain
   Aged About 18 years
   Kampa Kavrady, Kandlur Post,
   Kundapura, Udupi District-576201

….PETITIONER

And

1. The State of Karnataka
   Vidhana Soudha
   Dr Ambedkar Road
   Bangalore- 560 001
   Represented by
   It's Principal Secretary.

2. The Under Secretary to Government
   Department of Education
   Vikas Soudha, Bangalore 560001

3. The Directorate
   Department of Pre University Education
   Bangalore -560 009.

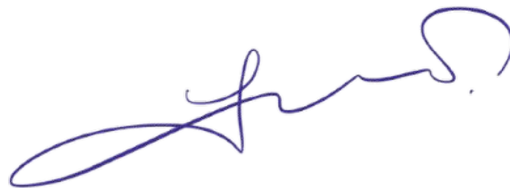
4. The Deputy Commissioner
   Udupi District.
   Shivalli Rajatadri, Manipal,

Udupi-576104.

5. The Principal
   Government PU College
   Kundapura, Udupi District- 576201

RESPONDENTS

MEMORANDUM OF WRIT PETITION UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA



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